No. 14-378

In the Supreme Court of the United States

STEPHEN DOMINICK MCFADDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in a prosecution under the Controlled Substance Analogue Enforcement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-13 (21 U.S.C. 813), the government must prove that the defendant knew, had a strong suspicion, or deliberately avoided knowing that the substance that he was intentionally distributing for human consumption was substantially similar in chemical structure to a controlled substance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 753 F.3d 432. The opinion of the district court (Pet. App. 44a-68a) is reported at 15 F. Supp. 3d 668.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2014. A petition for rehearing was denied on June 17, 2014 (Pet. App. 69a). On August 21, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 14, 2014, and the petition was filed on October 2, 2014. The petition for a writ of certiorari was granted on January 16, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted on one count of conspiring to distribute a substance or mixture containing one or more controlled substance analogues, in violation of 21 U.S.C. 841(b)(1)(C), 846; and eight counts of distributing a substance or mixture containing one or more controlled substance analogues, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 28a-32a; see 21 U.S.C. 813, 802(32). He was sentenced to 33 months of imprisonment, to be followed by 30 months of supervised release. Pet. App. 33a-35a. The court of appeals affirmed. *Id.* at 1a-27a.

1. Under the Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), Pub. L. No. 99-570, 100 Stat. 3207-13, "[a] controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. 813. The Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, makes it unlawful, *inter alia*, "for any person knowingly or intentionally" to distribute a controlled substance. 21 U.S.C. 841(a)(1). Accordingly, the combination of the Analogue Act and the CSA make it unlawful for any person knowingly or intentionally to distribute a controlled substance analogue when intended for human consumption.

The term "controlled substance analogue" is generally defined to mean a substance:

> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. 802(32)(A). The majority of courts to have considered the question have held that the foregoing definition must be read in the conjunctive, *i.e.*, that a substance qualifies as a controlled substance analogue only if it satisfies Subsection (i) *and* either Subsection (ii) or Subsection (iii). See *United States* v. *Turcotte*, 405 F.3d 515, 521-523 (7th Cir. 2005) (surveying case law), cert. denied, 546 U.S. 1089 (2006). The government does not dispute in this case that that is a proper construction of the statute. The definition also expressly excludes any controlled substance, any drug approved by the Food and Drug Administration, or the investigational use of a drug. See 21 U.S.C. 802(32)(C).

2. In July 2011, law-enforcement officers began investigating the use and distribution of substances commonly known as "bath salts" in the Char-

lottesville, Virginia, area. Pet. App. 5a. Bath salts are used as recreational drugs and, when ingested, are capable of producing effects similar to those produced by controlled substances, including cocaine, methamphetamine, and methcathinone. *Ibid.*

The investigation focused on a Charlottesville video rental store, owned and operated by Lois McDaniel, that sold bath salts. Pet. App. 5a. Using confidential informants, investigators purchased bath salts from McDaniel. *Ibid.* Testing by the United States Drug Enforcement Agency (DEA) revealed that the bath salts contained substances later proved at trial to be controlled substance analogues: 3,4-methylenedioxypyrovalerone (MDPV) and 3,4-methylenedioxymethcathinone (MDMC), also known as methylone. *Ibid.* Additional bath salts later seized from McDaniel's store contained a combination of MDPV, MDMC, and methylethylcathinone (4-MEC) (also proved at trial to be a controlled substance analogue). *Id.* at 5a, 7a-9a.

McDaniel agreed to cooperate with investigators, and she informed them that petitioner had supplied the bath salts she was selling. Pet. App. 5a. Petitioner's bath salts were "white powder," "off-white powder," and "beige crystalline powder," which petitioner sold in plastic "baggies," "plastic vials," and "blue jeweler's bag[s]." J.A. 43-46, 49-54, 57-58. Petitioner sold his products to McDaniel for $15 per gram (approximately $425 per ounce), and McDaniel sold them to her customers for $30 to $70 per gram (approximately $850 to $1980 per ounce). J.A. 47. The names petitioner used for his products included "Speed," "No Speed," "No Speed Limit," "The New Up," "Alpha,"

"Sheen's Winning," and "Hardball." J.A. 46, 50-53, 62-63, 75, 82.

McDaniel agreed to make recorded telephone calls to petitioner to order more bath salts. Pet. App. 5a. During the calls, petitioner stated that one of his products was "the replacement for the MDPV"—which petitioner had previously sold but had been recently listed as a controlled substance. J.A. 62; see Pet. App. 6a n.2. He discussed which of his products was the "most powerful" and which gave the most "intense" "feeling." J.A. 62. Petitioner explained to McDaniel that one substance (a mixture of a chemical called Alpha and 4-MEC) was like cocaine, that the "No Speed Limit" was like crystal meth, and that the "new Sheens" was "more like the meth" or "synthetic meth" than like synthetic cocaine. J.A. 62-64, 68-70; see J.A. 69 (petitioner describing the "new Sheens" as giving "a harder hit to a shorter period of time"); J.A. 75 ("I added a little extra kick to it"); J.A. 77 (petitioner asking McDaniel whether her customers were using a product "for aromatherapy or are they putting it directly on a burner?"). See Pet. App. 5a-6a.

At times, petitioner sought to avoid explicit discussion about the nature of the substances he was selling. For example, when McDaniel asked petitioner which of his products was an alternative for methamphetamine, petitioner responded, "we don't talk about that, you know that." J.A. 84. Petitioner also spoke obliquely when advising McDaniel about which of his bath salts should be snorted or smoked. J.A. 77-78 ("[S]ome people like to put it directly on a burner and then it smokes. You know, you smoke," but for other substances "some people like to use it just as an aromatherapy to, you know, to smell it. * * * You

know what I mean? * * * [I]t depends on usage which chemical I would send you.").

With McDaniel's assistance, investigators purchased bath salts from petitioner on five occasions in 2011 and 2012. Pet. App. 6a; J.A. 61-93. Testing confirmed that the bath salts contained MDPV, MDMC, and 4-MEC. Pet. App. 6a.

In February 2012, officers arrested petitioner and executed a search warrant at his New York business. Gov't C.A. Br. 11. A number of bath salts were recovered, submitted for laboratory analysis, and determined to contain 4-MEC. *Ibid.* Petitioner's personal computer also was seized and subsequently searched. *Ibid.* E-mails on the computer demonstrated that petitioner had attempted to disguise the true nature of his business. J.A. 94-97. For example, in one e-mail to a customer who was searching for bath salts on petitioner's website, petitioner wrote, "look at green valley oils, it's a front for the hardball." J.A. 95-96. In another e-mail, petitioner told a customer to look for a product "under the Green Valley Oils with the Hardball Aromatherapy . . . trying to put some shade on it." J.A. 95.

3. a. On November 14, 2012, a federal grand jury sitting in the Western District of Virginia returned a superseding indictment charging petitioner with one conspiracy count and eight substantive counts related to his distribution of substances containing the controlled substance analogues MDPV, MDMC, and 4-MEC. Pet. App. 6a.

In addition to other evidence—including transcripts of the recorded telephone conversations between petitioner and McDaniel—the government presented at trial the testimony of two expert wit-

nesses: DEA chemist Dr. Thomas DiBerardino, and DEA drug science specialist Dr. Cassandra Prioleau. Pet. App. 7a.

With respect to MDPV, Dr. DiBerardino testified that it has a chemical structure that is substantially similar to methcathinone, a Schedule I controlled substance, and that phenethylamine is the core chemical structure for both methcathinone and MDPV. Pet. App. 7a; Gov't C.A. Br. 13-14. Turning to 4-MEC (methylethylcathinone), Dr. DiBerardino explained that its chemical structure is also substantially similar to the chemical structure of methcathinone, that both substances are part of the phenethylamine core chemical family, and that their minor chemical structural difference is so slight as to make them chemically substantially similar. Pet. App. 7a; Gov't C.A. Br. 13-14. Finally, focusing on MDMC, Dr. DiBerardino testified that that substance is chemically substantially similar to MDMA, also known as ecstasy, a Schedule I controlled substance. Pet. App. 7a; Gov't C.A. Br. 14. Dr. DiBerardino explained that both MDMC and MDMA have phenethylamine as their core chemical structure, and, using chemical structure overlays for both MDMC and MDMA, he described to the jury how the minor chemical structural differences between the two substances are so slight as to make them chemically substantially similar. Gov't C.A. Br. 14.

Dr. Prioleau testified about the pharmacological similarities between the substances at issue and controlled substances. Pet. App. 7a. She testified that 4-MEC and MDPV each produces a stimulant effect on the central nervous system that is substantially similar to that produced by methcathinone, the controlled

substance to which they are chemically similar. *Id.* at 7a-8a. She also testified that MDMC produces a stimulant effect on the central nervous system that is substantially similar to that produced by MDMA (ecstasy), the controlled substance to which it is chemically similar. *Ibid.*

The government also introduced the testimony of a former methamphetamine addict, Toby Sykes, who had purchased bath salts from McDaniel. J.A. 55-56; Pet. App. 17a. He testified that he ingested the bath salts by injecting them, and that the bath salts were "ten times more potent than meth has ever been." J.A. 55-56.

b. Petitioner asked the district court to use the following jury instruction on the term "knowingly":

> You may find that the defendant knowingly participated in a conspiracy to distribute controlled substance analogues, and that he knowingly distributed controlled substance analogues, if you find beyond a reasonable doubt that he knew that the substances that he was distributing possessed the characteristics of controlled substance analogues—that is, that he knew that:
>
> 1. The chemical structure of the substance is substantially similar to the chemical structure of a controlled substance in Schedule I or II of the Controlled Substances Act;
>
> 2. The substance has an actual, intended or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central

> nervous system of a controlled substance in Schedule I or II of the Controlled Substances Act; and
>
> 3. The substance would be consumed by humans.

J.A. 29-30.

The government's proposed instruction would have informed the jury that it needed to find that petitioner "knowingly and intentionally distributed a mixture or substance," that "the mixture or substance was a controlled substance analogue," and that petitioner "distributed the controlled substance analogue with the intent that it be consumed by humans." J.A. 26-27. The government's proposed instruction further explained that:

> [T]o prove that a mixture or substance is a controlled substance analogue, the Government must prove the following beyond a reasonable doubt:
>
> One: That the chemical structure of the mixture or substance is substantially similar to the chemical structure of a controlled substance in Schedule I or II of the Controlled Substances Act; and
>
> Two: That the mixture or substance had an actual stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II of the Controlled Substances Act; or that the defendant represented or intended that the substance have [such an effect].

J.A. 27-28.[1]

The district court rejected the substance of petitioner's proposed instruction in part, declining to instruct the jury that it had to find that petitioner knew that the substances he was distributing were substantially similar in chemical structure to controlled substances. See Pet. App. 58a (district court opinion explaining that it declined to include petitioner's instruction that the jury must find "that he knew that the alleged analogues have a chemical structure that is substantially similar to the chemical structure of a controlled substance"); C.A. App. 670-671 (district court expressing its "agree[ment] basically with [petitioner's] assertion that there has to be some measure of intent proven by the government beyond a reasonable doubt on the part of [petitioner]," while acknowledging that its instruction "may not be the precise instruction that [petitioner] ha[d] proposed"). The district court also rejected the substance of the government's proposed instruction in part—in particular, the court rejected the portion of the government's proposed instruction that would not have required the jury to find that petitioner knew that the relevant substances have pharmacological effects that are substantially similar to those of controlled substances. See J.A. 40 (instruction as given).

In the end, the district court's compromise instruction explained, *inter alia*, that the government had to prove the following elements beyond a reasonable doubt:

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[1] The government's proposed conspiracy instruction was materially identical. J.A. 24-26.

> FIRST: That the defendant knowingly and intentionally distributed a mixture or substance that has an actual, intended, or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II of the Controlled Substances Act;
>
> SECOND: That the chemical structure of the mixture or substance is substantially similar to the chemical structure of a controlled substance in Schedule I or II of the Controlled Substances Act;
>
> AND
>
> THIRD: That the defendant intended for the mixture or substance to be consumed by humans.

J.A. 40.

c. The jury found petitioner guilty of each of the nine counts alleged in the indictment. Pet. App. 9a, 28a-32a. In denying petitioner's subsequent motion for a judgment of acquittal, *id.* at 44a-68a, the district court rejected petitioner's claim that the jury instructions were erroneous, *id.* at 54a-60a. The court stated that petitioner's requested scienter instruction as to similarity of chemical structure was "not required by the statute or Fourth Circuit precedent." *Id.* at 58a (citing *United States* v. *Klecker*, 348 F.3d 69, 71-72 (4th Cir. 2003), cert. denied, 541 U.S. 981 (2004)).

d. The district court sentenced petitioner to a below-Guidelines sentence of 33 months of imprisonment, to be followed by 30 months of supervised release. Pet. App. 33a, 35a; C.A. App. 889.

4. The court of appeals affirmed. Pet. App. 1a-27a. As relevant here, the court of appeals held that the district court did not abuse its discretion in declining to adopt petitioner's proposed instruction. *Id.* at 21a-22a. The court noted that petitioner could not demonstrate that his proposed instruction was correct because circuit precedent did not require the government to prove in Analogue Act cases that the defendant "knew, had a strong suspicion, or deliberately avoided knowledge that the alleged [controlled substance analogues] possessed the characteristics of controlled substance analogues." *Ibid.* The court relied on *Klecker*, in which a panel of the Fourth Circuit had explained that:

> In order to show an Analogue Act violation, the Government must prove (1) substantial *chemical* similarity between the alleged analogue and a controlled substance, *see* 21 U.S.C.A. § 802(32)(A)(i); (2) actual, intended, or claimed *physiological* similarity (in other words, that the alleged analogue has effects similar to those of a controlled substance or that the defendant intended or represented that the substance would have such effects), *see id.* § 802(32)(A)(ii), (iii); and (3) *intent* that the substance be consumed by humans, *see id.* § 813.

348 F.3d at 71. The court of appeals declined to adopt the more rigorous knowledge requirement adopted by the Seventh Circuit in *Turcotte*, *supra*.[2]

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[2] The court of appeals also rejected petitioner's arguments that the Analogue Act is unconstitutionally vague as applied to him, Pet. App. 9a-16a; that the district court committed evidentiary errors, *id.* at 16a-20a; and that the evidence was insufficient to

SUMMARY OF ARGUMENT

The government need not prove in every Analogue Act case that the defendant knew that the substance he distributed satisfied each of the definitional elements of a controlled substance analogue set forth in 21 U.S.C. 802(32)(A). The district court correctly rejected petitioner's request for a jury instruction requiring such proof and the court of appeals correctly affirmed petitioner's convictions.

A. Petitioner's argument that the Analogue Act's mental-state requirement must be governed by the CSA's mental-state requirement is correct, but the conclusion petitioner draws from it is not. Section 841(a) of the CSA makes it illegal to, *inter alia*, knowingly distribute a controlled substance. Section 841(b), in turn, specifies penalty levels based on the amount and type of controlled substance at issue. Courts of appeals have correctly concluded that the "knowingly" requirement in Section 841(a) of the CSA applies only to the elements listed in that subsection—and not to the elements (including type of controlled substance) listed in Subsection (b) of the same statutory provision. Because "a controlled substance analogue shall * * * be treated, for the purposes of any Federal law as a controlled substance in schedule I," 21 U.S.C. 813, the same approach applies for controlled substance analogues under the Analogue Act. That is, under Section 841(a), the government must prove, *inter alia*, that the defendant knowingly distributed a controlled substance analogue. But that is all that is required to satisfy the Analogue Act's mental-state requirement. Just as there is no independent

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support his convictions, *id.* at 22a-26a. Petitioner does not renew those claims in this Court.

requirement under the CSA that a defendant know any aspect of the definition of controlled substance contained in Section 841(b), there is likewise no independent requirement that a defendant under the Analogue Act "know" the definitional elements contained in Section 802(32)(A), an entirely separate provision of the Code. Knowledge that one is distributing a controlled substance analogue is enough.

That brings us to the heart of this case: How does the government prove the relevant knowledge? Under the CSA, the courts of appeals agree that the government may satisfy the mental-state requirement in alternative ways. The government may prove that a defendant knew the identity of the controlled substance (*e.g.*, heroin) he distributed. Or the government may prove that a defendant knew that he distributed a regulated or illegal substance even if he did not know which substance it was or why the substance was illegal. In arguing that the government must always prove that an Analogue Act defendant had knowledge of the chemical structure of the substance he distributed, petitioner conflates those alternative methods of proof.

In a traditional CSA prosecution under 21 U.S.C. 841(a), the government may prove that a defendant knowingly distributed a controlled substance by proving that he knew the identity (*i.e.*, name) of the substance he distributed. In the Analogue Act context, the government cannot satisfy the knowledge-of-identity method by proving that a defendant knew the name of the substance he distributed because controlled substance analogues, unlike controlled substances, are not identified by name in statute or regulation. They are instead identified by the characteris-

tics listed in the definition of "controlled substance analogue" in 21 U.S.C. 802(32)(A). Thus, in order to prove an Analogue Act case under a knowledge-of-identity theory, the government must prove that a defendant knew of the characteristics of the substance that make it illegal, including its chemical structure.

Petitioner spends much of his brief explicating and defending the knowledge-of-identity theory. As every court of appeals has recognized (and as petitioner seems to acknowledge), however, the government may also rely on the alternative knowledge-of-regulated-status theory to satisfy the CSA's mental-state requirement. Under that theory, the government need not prove a defendant knew the identity of the drug at issue, but merely that he knew that he distributed a regulated or illegal substance. The same theory is available in an Analogue Act case. To show that the defendant knowingly distributed a controlled substance analogue under a knowledge-of-regulated-status theory, the government need not prove that the defendant knew the chemical structure of the drug at issue. The government need only prove that the defendant knew he was dealing with an illegal or regulated substance.

Methods of proof, not just theories of proof, map from the CSA to the Analogue Act. Petitioner concedes that the government may prove knowledge of regulated status under the CSA with circumstantial evidence of, *e.g.*, a defendant's efforts to conceal his actions and his knowledge of the effects of the substance he distributed. The same is true under the Analogue Act. A jury is entitled to infer knowledge of illegality or regulated status from evidence of a defendant's furtive actions or his knowledge or repre-

sentation about a substance's pharmacological effects. Such an approach is consistent with the Analogue Act's purpose, which was to prevent both the manufacture and the distribution of dangerous drugs not yet included on published schedules.

B. Petitioner argues at length that the Analogue Act is unconstitutionally vague: in all prosecutions under the Analogue Act, he argues, the government must prove that the chemical structure of the substance distributed by the defendant is "substantially similar" to the chemical structure of a controlled substance, and petitioner contends that the term "substantially similar" has no settled scientific meaning. Petitioner did not include a vagueness challenge in his petition for a writ of certiorari, although the court of appeals had considered and rejected such an argument. Nor is vagueness fairly encompassed in the question presented, which focuses exclusively on the mental-state requirement under the Analogue Act. The Court should therefore decline to consider petitioner's vagueness arguments. In any event, those arguments are unpersuasive and have been rejected by every court of appeals to consider them.

The Court should also reject petitioner's attempt to smuggle his vagueness argument into the case in the guise of a constitutional-avoidance argument. Even if the Court were to take petitioner's erroneous vagueness arguments as valid, they would not counsel in favor of requiring proof of a defendant's knowledge that the substance he distributed was substantially similar in chemical structure to a controlled substance. Although a scienter requirement can alleviate a statute's vagueness when the statutory standard is difficult to apply, the same is not true when the statu-

tory standard is entirely indeterminate. If, as petitioner contends, the concept of substantial similarity in chemical structure is meaningless in all of its applications, requiring a defendant to *know* something meaningless would do nothing to mitigate any vagueness. Constitutional avoidance thus provides no basis for choosing petitioner's approach over the government's.

C. Although the district court did not explicitly instruct the jury that it could convict petitioner if it found that he knew the substances he distributed were regulated or illegal, the court of appeals correctly affirmed petitioner's convictions both because the district court's instructions materially encompassed the correct theory of proof and because the evidence before the jury overwhelmingly established that petitioner knew he was dealing in illegal or regulated substances. That evidence included his own representations about the effects of the drugs he sold, the manner in which he sold them, the price he demanded for them, and his attempts to conceal his activities.

Finally, we acknowledge that the reasons offered by the court of appeals for affirming the district court's rejection of petitioner's proposed instruction requiring proof of knowledge of chemical structure were erroneous. The court of appeals, relying on circuit precedent, reasoned that the only mental-state requirement for an Analogue Act violation is a defendant's intent that the substance be for human consumption. Because that standard eliminates the mental-state requirement under Section 841(a)—that is, it eliminates the requirement that the defendant knowingly distributed a controlled substance analogue—it is incorrect. But this Court reviews

judgments, not opinions. And affirmance is appropriate here because the court of appeals correctly affirmed both petitioner's Analogue Act (and conspiracy) convictions and the district court's refusal to use petitioner's instruction on knowledge of chemical structure.

ARGUMENT

THE DISTRICT COURT CORRECTLY DECLINED TO INSTRUCT THE JURY THAT THE GOVERNMENT HAD TO PROVE THAT PETITIONER KNEW THE SUBSTANCES AT ISSUE WERE SUBSTANTIALLY SIMILAR IN CHEMICAL STRUCTURE TO CONTROLLED SUBSTANCES

Petitioner argues that, in every Analogue Act prosecution, the government must prove that the defendant knew that the substance he was distributing satisfied each element of the statutory definition of "controlled substance analogue," including the fact that the substance's chemical structure is substantially similar to that of a controlled substance. That is incorrect. The mental-state requirement in the CSA, 21 U.S.C. 841(a)—which the government and petitioner agree must govern Analogue Act cases—does not carry over to the definitional elements listed in 21 U.S.C. 802(32)(A). The district court therefore correctly rejected petitioner's requested instruction to that effect, as the court of appeals held. [3]

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[3] Although the court of appeals correctly affirmed petitioner's convictions, as explained at pp. 45-46, *infra*, it erred in its explanation for why the district court's instructions correctly captured the Analogue Act's mental-state requirement. Because that error did not affect the outcome of the case, the court of appeals' judgment should be affirmed.

A. The CSA's Mental-State Requirements Must Be Adapted To Govern Violations Of The Analogue Act

Petitioner argues (Br. 21-25) that violations of the Analogue Act must be governed by the mental-state requirement that courts have universally found in the CSA, 21 U.S.C. 841(a)—namely, that a defendant must have known[4] that the substance he possessed or distributed was controlled or regulated, "that is, that the substance 'was some kind of prohibited drug.'" Pet. Br. 21-22 (quoting *United States* v. *Turcotte*, 405 F.3d 515, 525 (7th Cir. 2005), cert. denied, 546 U.S. 1089 (2006)). That is correct. Petitioner goes on, however, to argue that knowledge of illegality or regulated status is insufficient for an Analogue Act violation, which instead (in petitioner's view) always requires proof of knowledge of the chemical structure of the substance at issue. That is incorrect. Petitioner's argument conflates two different theories of proof under the CSA. It likewise fails to take account of the differences, including differences in structure, between the CSA and the statutes that define an Analogue Act violation. Petitioner's contention that the government must always prove knowledge of a substance's chemical structure in order to prove that a

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[4] As petitioner has conceded (Br. 33; J.A. 30), knowledge may be established with proof of willful blindness or recklessness, including proof of a defendant's strong suspicion of illegality. See, *e.g.*, *United States* v. *Orta-Rosario*, 469 Fed. Appx. 140, 146-147 (4th Cir.), cert. denied, 133 S. Ct. 311 (2012); *United States* v. *Bansal*, 663 F.3d 634, 669 (3d Cir. 2011), cert. denied, 132 S. Ct. 2700 and 133 S. Ct. 225 (2012); *United States* v. *Heredia*, 483 F.3d 913, 922-923 & n.13 (9th Cir.), cert. denied, 552 U.S. 1077 (2007); see also *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2068-2069 (2011).

defendant knew he was distributing a regulated drug in an Analogue Act case should therefore be rejected.

1. The government may establish a violation of the Analogue Act by proving that a defendant knew he was dealing with a regulated or illegal drug

a. The CSA makes it unlawful, *inter alia*, for "any person knowingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. 841(a)(1). Penalties for a violation of the CSA are calibrated to the amount and type of the controlled substance at issue, 21 U.S.C. 841(b). As this Court has explained, the CSA "establishes five categories or 'schedules' of controlled substances" with "[v]iolations involving schedule I substances carry[ing] the most severe penalties, as these substances are believed to pose the most serious threat to public safety." *Touby* v. *United States*, 500 U.S. 160, 162 (1991).

Over the last 30 years, Congress has utilized different statutory means to combat drug traffickers who "take advantage" of the CSA's requirement that a controlled substance be included on a published schedule "by designing drugs that were similar in pharmacological effect to scheduled substances but differed slightly in chemical composition, so that existing schedules did not apply to them." *Touby*, 500 U.S. at 163. In 1984, for example, Congress authorized the Attorney General to temporarily schedule a substance when "necessary to avoid an imminent hazard to the public safety." *Ibid.* (quoting 21 U.S.C. 811(h)). In 1986, after learning that drug traffickers continued to stay one step ahead of the controlled-substance schedules, Congress enacted the Analogue Act. See

H.R. Rep. No. 848, 99th Cong., 2d Sess. 5 (1986) (House Report); see also S. Rep. No. 196, 99th Cong., 1st Sess. 1-3 (1985) (Senate Report). Congress concluded that the pre-existing statutory scheme was insufficient "to regulate the flow of illicit drugs" and that, in particular, "[t]he emergency scheduling procedure * * * is entirely reactive and can only operate after a controlled substance analog has already been shown to pose a severe risk to the public health." Senate Report 1-2.

The Analogue Act specifies that "[a] controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. 813. As noted, the CSA makes it illegal to knowingly or intentionally possess or distribute a controlled substance. 21 U.S.C. 841(a)(1). Read together, the Analogue Act and the CSA make it illegal to knowingly or intentionally possess or distribute a controlled substance analogue when intended for human consumption. On that, petitioner and the government agree. Petitioner and the government also agree with the unanimous view of the courts of appeals that the government may prove a violation of the CSA by proving that a defendant knew he possessed (or distributed, etc.) an illegal drug (*i.e.*, a controlled or regulated substance not used in a permissible manner), even if he did not know what the substance was and even if he was mistaken about which controlled substance it was. See Pet. Br. 21-22 & n.11 (collecting cases from every circuit).

The question in this case is how the CSA's mental-state requirement should apply in Analogue Act cases. Petitioner seems to agree (Br. 23) that the require-

ment under the CSA that the government prove that a defendant knew he possessed a controlled substance cannot be the standard for Analogue Act cases—because the Analogue Act specifically defines "controlled substance analogue" to *exclude* controlled substances. 21 U.S.C. 802(32)(C)(i); see *Turcotte*, 405 F.3d at 526 ("[A]pplying the standard requirement that a defendant must know the substance in question is a 'controlled substance' is nonsensical since controlled substance analogues are, by definition, not 'controlled substances.'"). The CSA's mental state requirement must therefore be adapted to suit the somewhat different statutory structure of the Analogue Act.

b. Although petitioner endorses (Br. 21-22 & n.11) the widely accepted view that the government may establish a violation of the CSA by proving that a defendant knew that he possessed a regulated drug, he errs in adapting that rule to the Analogue Act context. Courts of appeals have relied on the statutory structure of the CSA to hold that the government need not prove that a defendant knew which controlled substance he possessed as long as it proves that he knew he was dealing with some sort of regulated, controlled, or illegal drug. The First Circuit has explained:

> Subsection (a) [of 21 U.S.C. 841] identifies a crime that stands on its own: knowing possession of a controlled substance with intent to distribute. Subsection (b) then lays out a series of progressive penalties, the severity of which depend, among other things, on drug type. From this binary structure, courts reasonably have inferred that Congress intended the scienter requirement in section

> 841(a) to apply to the blanket category 'controlled substances' and not to the identity of the specific drug involved in the offense.

United States v. *Hussein*, 351 F.3d 9, 19 (2003) (citing cases).

In other words, the "knowingly" requirement in 21 U.S.C. 841(a) applies *only* to the aspects of the CSA violation included in Section 841(a) and not to other aspects of the CSA violation contained in Section 841(b), such as the identity or quantity of the controlled substance. The mental state set forth in Section 841(a) does not "carry over" to Section 841(b). Instead, any additional mental-state requirement as to the identity of the particular substance at issue must come from Section 841(b) itself—and that provision contains no reference to a defendant's state of mind.

Although the "knowingly" requirement in 21 U.S.C. 841(a) applies only to the elements in that subsection (and not to the elements in, *e.g.*, Subsection (b)), petitioner contends (Br. 35-40) that, when applied to the Analogue Act, Section 841(a)'s "knowingly" requirement must carry over to elements identified in entirely separate statutory provisions. In particular, petitioner argues (Br. 35-40) that Section 841(a)'s "knowingly" standard applies to every aspect of the definition of a controlled substance analogue in 21 U.S.C. 802(32)(A). Nothing in the text or structure of the provisions at issue supports such an expansion of the CSA's scienter requirement when applied to Analogue Act cases.

Petitioner relies primarily on this Court's decision in *Flores-Figueroa* v. *United States*, 556 U.S. 646 (2009), in which the Court held that, when a statutory provision identifies a series of statutory elements *in*

one sentence and introduces that sentence with a mental-state requirement like "knowingly," the requisite mental state applies to each element in the list. *Id.* at 650. But that principle has no application here. As discussed, the courts of appeals have uniformly held that the "knowingly" requirement in Section 841(a) applies only to the elements listed in that subsection, but not to elements identified elsewhere in the statutory scheme. Petitioner strongly endorses that interpretation of the CSA (as does the government), and it is consistent with the holding of *Flores-Figueroa*, where every element in the statute at issue was found in the same sentence of the same statutory provision. In the Analogue Act context, there is even less reason to extend the mental-state requirement of Section 841(a) to the definitional elements in Section 802(32)(A) because those elements appear in an entirely different section of the Code. If petitioner agrees that the "knowingly" requirement of Section 841(a) does not apply to Section 841(b), no reason would support extending it to Section 802(32)(A).

It is particularly inappropriate to import Section 841(a)'s scienter requirement into other provisions that define an Analogue Act violation because those provisions contain their own distinct mental-state requirements. Section 813, for example, specifies that a controlled substance analogue shall be treated as a controlled substance only "to the extent intended for human consumption." 21 U.S.C. 813. The definition in Section 802(32)(A), in turn, includes a mental-state requirement only for cases in which the defendant "represents or intends" that the substance "have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar"

to that of a Schedule I or II controlled substance. 21 U.S.C. 802(32)(A)(iii). In contrast, the other prongs of the definition—the chemical-structure prong in paragraph (i) and the pharmacological-effect prong in paragraph (ii)—do not refer to the defendant's mental state. The juxtaposition of express mental-state elements in some of the provisions that define an Analogue Act violation suggests that the omission of a mental-state requirement in the other provisions was intentional. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). Thus, nothing in the text of Sections 802(32)(A) or 813 suggests that the mental-state requirement of Section 841(a) carries through to every element of an Analogue Act violation.

In sum, petitioner is correct that the government can prove a violation of the Analogue Act by proving that a defendant knew that he possessed an illegal or regulated drug.[5] As discussed more fully in Section A.2, *infra*, however, petitioner errs in insisting that such knowledge can be established only with proof that the defendant knew the chemical structure of the controlled substance analogue.

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[5] A conviction for an Analogue Act violation also requires proof of other elements, including, *e.g.*, that the substance involved was in fact a controlled substance analogue. Because the dispute in this case now concerns only what mental state the government must prove to establish an Analogue Act violation, this brief does not discuss the other elements required for a conviction.

2. The government need not prove that a defendant charged with violating the Analogue Act knew the substance he possessed was substantially similar in chemical structure to a controlled substance

Because both parties agree that the government can prove a defendant committed an Analogue Act violation by proving that he knew he was dealing with an illegal or regulated drug, the question then posed is *how* the government can prove that. Petitioner insists that the only way to make such a showing is to prove that a defendant knew of each of the drug's characteristics that made his possession or distribution of it illegal. But that is not the rule under the CSA, and nothing in the Analogue Act would justify imposing such a heightened standard of proof.

a. Under the CSA, the government has two ways to prove that a defendant knowingly distributed a controlled substance. First, under a "knowledge of identity" approach, if the government has proof that a defendant knew the identity (*i.e.*, name) of the substance he distributed (and the substance is in fact listed on a schedule), that is sufficient to prove that he knowingly distributed a controlled substance. *E.g.*, *Hussein*, 351 F.3d at 19 ("In most cases," the government may satisfy Section 841(a)'s mental-state requirement "by proving that the defendant knew the specific identity of the controlled substance that he possessed."). If the defendant knows he distributed heroin, that suffices even if he has no idea that heroin is listed as a Schedule I substance.

Second, under the "knowledge of regulated status" approach, a defendant can be found guilty of distributing, *e.g.*, "magic mushrooms" if he knows that they are illegal or regulated; and that is so even if he does

not know that the reason magic mushrooms are regulated is that they contain psilocybin and psilocin, two substances included on Schedule I. 21 C.F.R. 1308.11(d)(29) and (30); see *United States* v. *Hassan*, 578 F.3d 108, 121 n.5 (2d Cir. 2008); see also, *e.g.*, *United States* v. *Ali*, 735 F.3d 176, 188-190 (4th Cir. 2013), cert. denied, 134 S. Ct. 135 (2014); *United States* v. *Ramirez-Ramirez*, 875 F.2d 772, 774 (9th Cir. 1989); *United States* v. *Gonzalez*, 700 F.2d 196, 200-201 (5th Cir. 1983); *United States* v. *Lewis*, 676 F.2d 508, 512 (11th Cir.), cert. denied, 459 U.S. 979 (1982); *United States* v. *Morales*, 577 F.2d 769, 776 (2d Cir. 1978).

b. i. Petitioner does not contest that the CSA permits these two methods of proving the requisite knowledge. However, invoking a line of cases holding generally that a statute criminalizing knowing conduct requires proof that a defendant had knowledge of the facts, though not necessarily the law, that made his conduct illegal, petitioner contends (Br. 27) that a conviction for distributing a controlled substance analogue requires knowledge of the alleged analogue's chemical structure. That argument conflates the two different theories of proof under the CSA. As applied to the Analogue Act, knowledge of chemical structure is required only when the government proceeds under the knowledge-of-identity approach, but not when it pursues the knowledge-of-regulated-status approach.

Petitioner is correct that knowledge of the chemical structure of the controlled substance analogue is required when the government proceeds under a knowledge-of-identity theory. In the CSA context, that method of proof applies when the evidence shows that a defendant knew the identity of the controlled

substance he possessed. Because controlled substances are identified by name on published schedules, a defendant who knows the name of the controlled substance in his possession has knowledge of the facts that make his conduct illegal even if he does not know that the substance is included on a schedule and even if he does not know that it is illegal.[6]

In the Analogue Act context, the government cannot prove knowledge of identity by proving that a defendant knew the name of the substance he distributed—controlled substance analogues are identified by their features, as set forth in the statutory definition in 21 U.S.C. 802(32)(A), rather than by name in published schedules. In that way, the proof requirements under the Analogue Act necessarily differ from those under the CSA. But the government can rely on an adapted version of the CSA's knowledge-of-identity proof standard by proving a defendant's knowledge of the characteristics in the statutory definition of a controlled substance analogue. That definition includes the requirement that the chemical structure of the controlled substance analogue be "substantially similar to the chemical structure of a controlled substance in schedule I or II." 21 U.S.C. 802(32)(A)(i). And the defendant must know of the substantial similarity to be convicted under this approach.

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[6] In some cases, a substance qualifies as a controlled substance because one or more of its chemical components is included on a schedule. In those cases, a defendant who knows both the identity of the chemical component and that the component is present in the substance he possesses would have knowledge of the facts that make his conduct illegal.

ii. But that is not the only permissible approach. Petitioner agrees that the mens rea requirement for the Analogue Act comes from Section 841(a). And it is clear that under the knowledge-of-regulated-status approach a defendant may be properly convicted of a CSA offense upon proof that he knew that the substance he distributed was regulated or illegal, whether or not he knew exactly what the substance was. The same is true under the Analogue Act: a defendant can be convicted for distributing MDPV, MDMC, or 4-MEC based on proof that he knew those substances are illegal or regulated; and that is so even if he did not know exactly *why* (*i.e.*, under what statutory or regulatory scheme) that is so. In other words, if the government proves that an Analogue Act defendant knows he is distributing a regulated or illegal substance, it need not also prove that the defendant knows the drug is substantially similar in chemical structure and pharmacological effect to a controlled substance. It is enough that the defendant knew he possessed a controlled substance even if he did not know the fact that made the substance controlled (*i.e.*, its identity). The same is true of an Analogue Act offender: if he knew he possessed an illegal or regulated substance, he is guilty even if he did not know the facts that made his possession of the substance illegal. See *Hussein*, 351 F.3d at 19-20 (describing both methods of proof under the CSA).

iii. Petitioner concedes (Br. 33) that knowledge of illegality or regulated status may be proved for purposes of the CSA with circumstantial evidence, including, *e.g.*, evidence of a defendant's furtive conduct. The same is true under the Analogue Act. See *United States* v. *Santos*, 553 U.S. 507, 521 (2008) (opinion of

Scalia, J.) (noting that knowledge "must almost always be proved" with "circumstantial evidence"). The government can satisfy Section 841(a)'s knowledge-of-regulated-status standard in the Analogue Act context by relying on circumstantial evidence that the defendant knew he was dealing with a regulated or illegal substance. Such evidence might include evidence that a defendant concealed his drug-related activities. See, *e.g.*, *United States* v. *Abdulle*, 564 F.3d 119, 127 (2d Cir. 2009) (Sotomayor, J.). Or it might include evidence of a defendant's "familiarity with [the drug's] effects on the central nervous system, the efforts [he] employed to avoid detection, and the method and amount of remuneration that he will receive for his role." *Hussein*, 351 F.3d at 20; see *Ali*, 735 F.3d at 189 (noting that juries may rely on evidence of a defendant's evasive behavior and knowledge that a substance "produces a high much like other controlled substances" to infer knowledge of regulated status). But the government need not always produce evidence that a defendant knew the substance's chemical structure was substantially similar to that of a controlled substance.

c. Extending the CSA's knowledge-of-regulated-status standard to Analogue Act offenses without requiring proof of chemical-structure knowledge furthers the purposes of the Analogue Act. Congress sought to stop the scourge of so-called "designer drugs," *i.e.*, drugs made from altering illegal drugs "in order to create new drugs that are similar to their precursors in effect but are not subject to the restrictions imposed on controlled substances." *United States* v. *Klecker*, 348 F.3d 69, 70 (4th Cir. 2003), cert. denied, 541 U.S 981 (2004); see *United States* v.

Hodge, 321 F.3d 429, 437 (3d Cir. 2003) ("The Analogue Act's purpose is to make illegal the production of designer drugs and other chemical variants of listed controlled substances that otherwise would escape the reach of the drug laws."); *Turcotte*, 405 F.3d at 523 (similar). The legislative history repeatedly references the creators and distributors of designer drugs who are at the heart of the problem. See, *e.g.*, Senate Report 1, 3, 6; House Report 2, 5. The legislative history also emphasizes the need for "swift investigation and prosecution" of such distributors of designer drugs. House Report 2; see Senate Report 3 ("Strong measures are needed to attack this problem.").

Petitioner offers two arguments in response. First, he contends (Br. 29-30) that, in enacting the Analogue Act, Congress sought to target only the chemists who create the designer drugs covered by the Analogue Act. To be sure, Congress sought in part to rein in the "underground chemists" responsible for the new and ever-changing chemical combinations. *Klecker*, 348 F.3d at 70. But the congressional reports accompanying the bills that produced the Analogue Act leave little doubt that Congress's legislative purpose was broader than simply targeting chemists. Congress also sought to more effectively "regulate the flow of illicit drugs" generally and to avoid "severe risk[s] to the public health," including by targeting "drug dealers" and "drug traffickers." Senate Report 1-2, 6; see *id.* at 3 (noting that analogues "could present a 'public health disaster'" and do "present a clear and present danger to our society"). That purpose is reflected in the plain text of the statutory scheme, which prohibits all "knowing[]" distribution (or possession with intent to distribute) of controlled substance analogues. 21

U.S.C. 813, 841(a)(1). Petitioner's counter-textual "chemists only" limitation makes little sense in light of Congress's purpose of staying ahead of (or at least trying to keep up with) innovation in the illegal drug world. Limiting the reach of the Analogue Act in the manner petitioner urges would frustrate efforts to prevent the distribution of these dangerous drugs to the public by immunizing street-level dealers and thereby complicating the identification and prosecution of upstream drug chemists and wholesalers who insulate themselves through multiple organizational levels.

Second, petitioner contends (Br. 40-42) that Congress could not have wanted to target the range of "innocent conduct" that petitioner believes a broad reading of the Analogue Act would encompass. Under the government's interpretation of the statutes defining an Analogue Act violation (as set forth in this brief), however, the Analogue Act does not punish innocent conduct. The proprietor of a vitamin store, for example, would not violate the Analogue Act by selling supplements that contain a controlled substance analogue unless he either knew that the product contained a substance satisfying the definitional elements in Section 802(32)(A) or knew that the product contained a regulated or illegal substance (a fact that could be established with circumstantial evidence, including evidence that he told customers that the supplement would make them feel as if they had ingested cocaine). Nor would the innocent Girl Scout petitioner posits (Br. 40) be at risk, because she would not be aware that her cookies had been adulterated or were illegal in any way. Of course, if the evidence showed that a different Girl Scout sold brownies pack-

aged in little baggies in a dark alley for $50 each while using a code name and informing her customers that the brownies would get them high, a jury could convict her under the Analogue Act if the brownies contained a controlled substance analogue, and that would be true even if the Girl Scout lacked knowledge of the chemical structure of the ingredients that the brownies contained.

B. Petitioner's Assertions Of Vagueness Do Not Support His Insistence On Proof Of A Defendant's Knowledge Of Chemical Structure

In his petition for a writ of certiorari, petitioner did not ask this Court to review his argument (which was rejected by the court of appeals) that the Analogue Act is unconstitutionally vague. See Pet. i. Nor is that argument fairly encompassed in the question presented. Nevertheless, petitioner devotes 13 pages of his brief (Br. 43-55) to arguing that the Analogue Act is unconstitutionally vague, tacking on a little more than one page at the end (Br. 56-57) in an effort to cloak his vagueness argument in the garb of constitutional avoidance. Petitioner's efforts are unavailing.

1. Petitioner argues (Br. 43-55) that the requirement that an analogue have a chemical structure that is "substantially similar" to that of a controlled substance is unconstitutionally vague because most people—and in particular, most dealers and distributors of controlled substance analogues—will not know whether the drugs they are distributing have chemical structures that are substantially similar to those of controlled substances. That is so, he argues (Br. 43-52), both because non-scientists such as street dealers and intermediate distributers like petitioner generally do not have access to the scientific equipment needed

to assess chemical structure and because the phrase "substantially similar" has no settled meaning in the scientific community. As discussed below, petitioner's arguments are incorrect and should be rejected in any future case that actually presents the vagueness question. More to the point for this case: petitioner's vagueness arguments have no bearing on the Analogue Act's mental-state requirement.

This Court has recognized that "scienter requirements alleviate vagueness concerns." *Gonzales* v. *Carhart*, 550 U.S. 124, 149 (2007). But that principle can operate only if a statute has a discernable standard, even if that standard may be difficult to apply to particular cases. See *United States* v. *Williams*, 553 U.S. 285, 306 (2008) ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."). Here, petitioner contends not merely that the "substantially similar" test is difficult to apply; he argues that it is entirely indeterminate—that it is vague to the core. If it is true, as petitioner and his amici argue (Br. 43-52; Expert Forensic Scientists Amicus Br. 11-14; NACDL Amicus Br. 7-8), that an individual who is distributing a controlled substance knock-off can never know whether that substance satisfies the statutory definition in the Analogue Act, then that problem will persist regardless of what mental-state requirement this Court finds in the statutes that define an Analogue Act violation. If petitioner were to prevail on his argument that the government must prove that a defendant knew that he was distributing a substance substantially similar in

chemical structure to a controlled substance, such a rule would do nothing to mitigate the vagueness problem of which petitioner complains. If petitioner is correct that a defendant can never know whether two substances are chemically similar, then requiring him to know that two substances are chemically substantially similar is a meaningless limit on the statute's reach. Because adopting petitioner's preferred mental-state requirement would not alleviate the constitutional problem that petitioner posits, his attempt to cast his vagueness argument as one of constitutional avoidance is misplaced.

2. On the merits, petitioner's vagueness argument would fail even if properly presented. The courts of appeals "considering this issue have unanimously held that the CSA's Analogue Provision is not unconstitutionally vague." *Turcotte*, 405 F.3d at 531; see *United States* v. *Bamberg*, 478 F.3d 934, 937-938 (8th Cir. 2007), cert. denied, 552 U.S. 1261 (2008); *United States* v. *Roberts*, 363 F.3d 118, 122-126 (2d Cir. 2004); *Klecker*, 348 F.3d at 71-72; *United States* v. *Desurra*, 865 F.2d 651, 653 (5th Cir. 1989). Notably, the Seventh Circuit held that, "even leaving aside the implications of our scienter ruling, the Analogue Provision seems to us sufficiently clear by its own terms." *Turcotte*, 405 F.3d at 531.

Petitioner principally argues (Br. 43-52) that the Analogue Act does not give potential defendants fair notice of what is prohibited because it uses the phrase "substantially similar." Congress frequently defines the scope of criminal activity with reference to objects or substances that are "similar" to other objects or substances. See, *e.g.*, 18 U.S.C. 232(5) (defining "explosive or incendiary device" to include "any explosive

bomb, grenade, missile, or similar device"); 18 U.S.C. 1507 (prohibiting the disruption of court proceedings by using a "sound-truck or similar device"); 18 U.S.C. 2241(b)(2) (defining aggravated sexual abuse to include crimes in which the victim's faculties were compromised by administration of "a drug, intoxicant, or other similar substance"). The concept of similarity is not unique to the Analogue Act and is easily understood by lay jurors and defendants alike. Although petitioner cites some authority for the proposition that scientists are unfamiliar with the concept of "substantial similarity," the American Chemical Society informed the Congress that enacted the Analogue Act that "the term 'substantially similar' chemical structure is meaningful to scientists and capable of reasoned interpretation by the trier of fact." Senate Report 5. Nothing in the real-world application of the Act has proven that statement wrong. In particular, petitioner seems to suggest (Br. 19, 45-49) that the possibility that expert witnesses may disagree about the application of a legal concept to the facts of a particular case is a reason to hold that the legal concept is unconstitutionally vague. But criminal juries are frequently called upon to determine factual issues related to, *e.g.*, identity by weighing competing expert testimony about DNA, handwriting, and fingerprint evidence. Cf. *Holmes* v. *South Carolina*, 547 U.S. 319, 322-323 (2006) (describing criminal trial in which competing experts testified about DNA and fingerprint evidence). Defendants are protected in close cases by the requirement of proof beyond a reasonable doubt. *Williams*, 553 U.S. at 305-306.[7]

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[7] Petitioner complains that the Analogue Act is unfair to potential defendants because it provides them with insufficient notice of

In any case, to the extent any potential vagueness problem with the Analogue Act could, as petitioner argues, be ameliorated by adopting a particular mental-state requirement, that would be accomplished by adapting the CSA's knowledge-of-regulated-status standard to the Analogue Act context. As petitioner notes (Br. 56), this Court has repeatedly stated that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice." *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 526 (1994) (quoting *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)).

Petitioner further errs in arguing (Br. 53-55) that the Analogue Act risks arbitrary enforcement and violates principles of separation of powers. Petitioner's only arbitrary-enforcement argument (see Br. 53) is that sometimes the government will succeed in convincing a jury that a particular substance qualifies as a controlled substance analogue and sometimes it will not. That unremarkable observation applies to a broad swath of determinations that are entrusted to

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what the Act requires. In the context of drug offenses (and other statutory public-welfare offenses), however, this Court has long held that Congress need not include *any* mental-state requirement at all. See, *e.g.*, *Staples* v. *United States*, 511 U.S. 600, 607 (1994); *United States* v. *Freed*, 401 U.S. 601, 607-610 (1971); *United States* v. *Behrman*, 258 U.S. 280, 288 (1922); *United States* v. *Balint*, 258 U.S. 250, 252-253 (1922); see *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952) ("Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."). Here, where Congress *has* included a "knowingly" requirement in the statutory scheme, petitioner's fairness complaint is particularly misguided.

juries in criminal cases. For example, one jury called upon to decide whether a defendant's behavior was reckless may disagree with another jury asked to decide the same question on materially identical facts. The potential for such disparate results is inherent in the jury system; it is not a sign of vagueness or the potential for arbitrary enforcement. The problem with vague statutory prohibitions, this Court has observed, is that "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104 108-109 (1972). The Analogue Act does not ask law-enforcement officers, judges, or juries to make basic policy decisions. The Act instead asks juries to make basic factual determinations, some of which may require assessing competing testimony from expert witnesses. Again, that is the hallmark of our jury system, not the sign of a vague statute. For the same reason, petitioner's argument (Br. 54-55) that the Analogue Act raises separation of powers concerns must fail—because asking juries to make factual determinations in criminal cases is not the same as delegating legislative functions to juries.

C. The Court of Appeals Correctly Affirmed Petitioner's Convictions

Although the district court did not specifically instruct the jury that it could convict petitioner if it found that he knew he was distributing regulated or illegal substances, any error in that respect was harmless in light of the overwhelming evidence of petitioner's knowledge that his conduct was illegal.

1. As explained above, the district court did not abuse its discretion when it rejected petitioner's request that the jury be instructed that it could not convict petitioner without finding that he knew that the substances he was distributing were substantially similar in chemical structure to controlled substances. To the extent petitioner's challenge to his convictions rests on that ruling, his challenge should be rejected.

We acknowledge that the district court did not explicitly instruct the jury that it could convict petitioner of the Analogue Act violations if it found that he knew the substances he was distributing were regulated or illegal. Any instructional error does not warrant reversal of petitioner's convictions, however, because no rational jury could have concluded that petitioner did *not* know that the substances he was distributing were illegal or regulated drugs (even if he did not know which law made his distribution of them illegal). Thus, any instructional error was harmless beyond a reasonable doubt, and petitioner's convictions should be affirmed. See *Neder* v. *United States*, 527 U.S. 1, 8-10 (1999) (omission of an element from a jury instruction is subject to harmless-error analysis); see also, *e.g.*, *United States* v. *Mack*, 729 F.3d 594, 608 (6th Cir. 2013) (jury-instruction error is harmless when it is clear beyond a reasonable doubt that the outcome would not change had the jury been properly instructed), cert. denied, 134 S. Ct. 1338 (2014); *Turcotte*, 405 F.3d at 529 (affirming Analogue Act conviction on harmless-error grounds).

When petitioner knowingly sold "bath salts" containing MDPV, MDMC, and 4-MEC, he knew—in fact represented to his customers—that the substances, when ingested, would produce a pharmacological ef-

fect similar to that of controlled substances and he intended that the substances be used as substitutes for controlled substances. Pet. App. 5a-6a.[8] Petitioner's bath salts were "white powder," "off-white powder," and "beige crystalline powder," which petitioner sold in plastic "baggies," "plastic vials," and "blue jeweler's bag[s]." J.A. 43-46, 49-54, 57-58. The prices petitioner set for his products (and the prices users paid) further suggest his knowledge that he was distributing regulated substances: he sold them to McDaniel for $15 per gram (approximately $425 per ounce), and she sold them to her customers for $30 to $70 per gram (approximately $850 to $1980 per ounce). J.A. 47. The names petitioner gave to his products further indicate that he knew both that they produced drug effects and that they were either controlled substances or closely related to controlled substances: Speed, No Speed, The New Up, Alpha, Sheen's Winning, and Hardball. J.A. 46, 50-53, 62-63, 75, 82.

On recorded telephone calls with McDaniel, petitioner stated that one of his products was "the replacement for the MDPV," which petitioner had previously sold but had been recently listed as a controlled substance. J.A. 62. He discussed which of his products was the "most powerful" and gave the most "intense" "feeling." *Ibid.* Petitioner confirmed for McDaniel that one substance (a mixture of Alpha and 4-MEC) was "like cocaine"; that "No Speed Limit" was like crystal meth; and that the "new Sheens" was

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[8] During the course of the government's investigation, the DEA classified MDPV and MDMC as controlled substances. See Pet. App. 6a n.2. The government did not charge petitioner with distributing either product after this classification. *Ibid.*

"more like the meth" or "synthetic meth" than like synthetic cocaine. J.A. 62-64, 68-70; see J.A. 69 (petitioner describing the "new Sheens" as giving "a harder hit to a shorter period of time"). A former methamphetamine addict who had purchased bath salts from McDaniel testified that they produced an effect on his body "ten times more potent than meth." J.A. 55.

The record evidence also showed that petitioner attempted to conceal his activities, further suggesting that he was conscious of his own wrongdoing. For example, when asked which of his products was an alternative for methamphetamine, petitioner responded, "we don't talk about that, you know that." J.A. 84.[9] Petitioner also attempted to disguise the true nature of his business, telling a buyer searching for bath salts on his website to "look at green valley oils" and describing it as "a front for the hardball." J.A. 95-96; see J.A. 95 (telling a customer to look for a product "under the Green Valley Oils with the Hardball Aromatherapy . . . trying to put some shade on it."). And petitioner spoke in a sort of code when advising McDaniel about which of his bath salts should be snorted or smoked. J.A. 77-78 ("[S]ome people like to put it directly on a burner and then it smokes. You know, you smoke," but for other substances "some people like to use it just as an aromatherapy to, you know, to smell it. * * * You know what I mean? * * * [I]t depends on usage which chemical I would send you.").

Petitioner emphasizes (Br. 9-10; see Pet. 7) that he checked the DEA's website to see whether any of the

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[9] Petitioner went on, however, to state that "the closest thing you have to that as an alternative is Hardball." J.A. 84.

substances he sold were listed as controlled substances and that he did not sell any substance after it was listed. That evidence tends to show that petitioner believed that his actions did not violate the CSA specifically, but it does not rebut the vast evidence demonstrating that he knew his actions were illegal more generally. A defendant who knows his actions are illegal need not know which statute or regulation he is violating to have the requisite evil mind to support a conviction under a "knowingly" standard. See *Liparota* v. *United States*, 471 U.S. 419, 434 (1985) (government can prove that a defendant knowingly used food stamps in a manner not authorized by law with proof that he knew his actions were illegal even if he did not know which statute or regulation made his actions illegal); cf. *Bryan* v. *United States*, 524 U.S. 184, 192-193 (1998) (government may prove that a defendant willfully dealt in firearms without a federal license if the government proves the defendant's knowledge that his conduct was illegal even if defendant did not know what provision of law made his conduct illegal). Petitioner's close attention to the published schedules of controlled substances shows, moreover, that he knew the products he sold had drug effects sufficiently similar to those of controlled substances to support their eventual inclusion on the schedules. Cf. *United States* v. *Sullivan*, 714 F.3d 1104, 1107 (8th Cir. 2013) (evidence that petitioner "indicat[ed] the bath powder was illegal supports a reasonable inference he knew the powder contained a controlled substance analogue"). In addition, when one of the drugs petitioner sold (MDPV) was added to Schedule I, he did not respond by ceasing his operations and getting out of the business of selling "bath

salts" for use as recreational drugs. Instead, he began selling a "replacement for the MDPV." J.A. 62.

These facts together establish beyond a reasonable doubt that any rational jury would have found that petitioner knew he was dealing with illegal or regulated drugs. Petitioner concedes (Br. 33) that, even under the more onerous mental-state requirement he prefers, a jury may rely on circumstantial evidence—including evidence of a defendant's furtive conduct and evidence that a defendant was told that a substance is an analogue—and may draw inferences of a guilty mind from what the defendant said about the effects of the drugs he distributes. See *Turcotte*, 405 F.3d at 529 n.7 (noting that, where defendant intended or represented that a substance had similar physiological effects to a controlled substance, "as a matter of common sense, it would seem strange to allow [defendant] to claim he did not know" the substance was an analogue of the controlled substance); see also *Sullivan*, 714 F.3d at 1107 (that petitioner "indicat[ed] the bath powder was illegal supports a reasonable inference he knew the powder contained a controlled substance analogue"). This Court has repeatedly held that instructional error on an element of an offense is subject to harmless-error review and that "a conviction should be affirmed '[w]here a reviewing court can find that the record developed at trial established guilt beyond a reasonable doubt.'" *Pope* v. *Illinois*, 481 U.S. 497, 502-503 (1987) (quoting *Rose* v. *Clark*, 478 U.S. 570, 579 (1986)). As in *Neder*, this Court should apply harmless-error review to the record in this case, including the jury's apparent conclusion that petitioner knowingly distributed a substance with substantially similar pharmacological effects to that of

a controlled substance (or intended or represented that the substance have such effects), and affirm the judgment of the court of appeals.

In addition, petitioner errs in asserting that the district court "instruct[ed] the jury that the only mens rea required for a criminal conviction of the Analogue Act is an intent that the alleged analogue be consumed by humans." Pet. Br. 16; see *id.* at 35, 40. The district court also instructed the jury that it had to find that petitioner "knowingly and intentionally distributed a mixture or substance that has an actual, intended, or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II of the Controlled Substances Act." J.A. 40 (quoted at Pet. Br. 14 n.9). That instruction parrots the mental-state language of Section 841(a) and applies it to the pharmacological-effect prong of the definition in Section 802(32)(A). See D. Ct. Doc. 217, at 3 (Jan. 10, 2013) (government's closing argument) ("[A] basic summary of the law involved in this trial is that it is illegal to slightly alter the chemical structure of a Schedule I controlled substance and distribute it for human consumption, intending that it gets people just as high, if not higher, than that Schedule I controlled substance."). In light of that instruction, the jury's guilty verdicts reflect a finding that petitioner was either aware that the substances he distributed had a pharmacological effect similar to that of controlled substances or represented that they had such an

effect.[10] Either way, a jury may often infer knowledge of illegality from such a finding—and in light of the additional evidence of petitioner's guilty mind, any rational jury would have convicted petitioner of the Analogue Act offenses on this record.

2. Based on the jury instruction actually used by the district court and on the overwhelming evidence that petitioner knew he was dealing with illegal or regulated drugs, the court of appeals correctly affirmed petitioner's convictions. In so doing, the court of appeals relied on a prior Fourth Circuit case stating that the only mental state the government needs to establish to obtain an Analogue Act conviction is a defendant's intent that the substance be used for human consumption. Pet. App. 21a-22a (relying on *Klecker*, 348 F.3d at 71-72). Relying on circuit precedent, the government requested (and the district court rejected) an instruction in which the mental-state element was limited to the intent for human consumption. J.A. 27-28. And the government relied on that precedent in defending petitioner's convictions on appeal. Gov't C.A. Br. 60-63. The Fourth Circuit's approach is not, however, a correct interpretation of the statutes that define an Analogue Act violation. As discussed in this brief, the Analogue Act incorporates the CSA's mental-state requirement, which (when adapted to the Analogue Act context) requires more

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[10] Based on petitioner's reliance on the statutory holding in *Flores-Figueroa*, *supra*, that the word "knowingly" applies to each ensuing element in the same sentence, he presumably agrees that that instruction required the jury to find that petitioner knew each element in that sentence, including that the substance he distributed had a pharmacological effect substantially similar to that of a controlled substance.

than proof that a defendant intended a substance for human consumption. In the Brief in Opposition filed in this case, the government defended the court of appeals' affirmance of petitioner's convictions and explained why the district court correctly rejected petitioner's proposed instruction on chemical structure, but did not defend the court of appeals' view of the limited mental-state requirement to prove a violation of the Analogue Act. Br. in Opp. 10-17.

Although the court of appeals relied on faulty reasoning, its ultimate judgment affirming petitioner's convictions and its holding that the district court did not abuse its discretion in declining to accept petitioner's proposed chemical-structure instruction were correct and should be affirmed by this Court. This Court "reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984). In the course of deciding the question presented, the Court should make clear that the Fourth Circuit has erred in interpreting the mental-state requirement for Analogue Act violations. But because that error did not affect the outcome of the appeal in this case, the Court should affirm the judgment of the court of appeals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 21 U.S.C. 802(32) provides:

Definitions

(32)(A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance—

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue.

(C) Such term does not include—

(i) a controlled substance;

(ii) any substance for which there is an approved new drug application;

(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 355 of this title to the extent conduct with respect to such substance is pursuant to such exemption; or

(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

2. 21 U.S.C. 813 provides:

Treatment of controlled substance analogues

A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.

3. 21 U.S.C. 841(a) provides:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.