No. 15-1294

In the Supreme Court of the United States

LAVA MARIE HAUGEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, in light of the record in this 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 district court committed reversible error by instructing the jury that, if it found that petitioner knew that a substance had a physiological effect that is substantially similar to or greater than that of a controlled substance, it may, but was not required to, infer that petitioner knew the substance had a chemical structure substantially similar to a controlled substance.

TABLE OF CONTENTS

Page

Opinion below ... 1
Jurisdiction ... 1
Statement ... 1
Argument ... 10
Conclusion ... 19

TABLE OF AUTHORITIES

Cases:

County Court of Ulster Cnty. v. *Allen*, 442 U.S. 140 (1979) ... 7, 8, 14

McFadden v. *United States*, 135 S. Ct. 2298 (2015) ... 9, 11, 12, 14, 17, 18

United States v. *Makkar*, 810 F.3d 1139 (10th Cir. 2015) ... 9, 15, 16

United States v. *McFadden*, No. 13-4349, 2016 WL 2909177 (4th Cir. May 19, 2016) ... 17

United States v. *Turcotte*, 405 F.3d 515 (7th Cir. 2005), cert. denied, 546 U.S. 1084 (2006) ... 7

Statutes:

Controlled Substances Act, 21 U.S.C. 801 *et seq.* ... 2

21 U.S.C. 802(32)(A) ... 2, 5, 11

21 U.S.C. 841(a) ... 2, 5

21 U.S.C. 841(b)(1)(C) ... 2, 5

21 U.S.C. 846 ... 2, 5

Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. 813 ... 2, 5, 11

Federal Food Drug and Cosmetics Act, 21 U.S.C. 301 *et seq.* ... 1

21 U.S.C. 331(a) ... 1, 5

Statutes—Continued: Page

21 U.S.C. 331(c) 1, 5
21 U.S.C. 331(k) 1, 5
21 U.S.C. 333(a)(2) 1, 5
21 U.S.C. 352(a) 1, 5
21 U.S.C. 352(b) 1, 5
21 U.S.C. 352(f) 1, 5
18 U.S.C. 2 .... 1, 5
18 U.S.C. 371 .... 1, 5

In the Supreme Court of the United States

No. 15-1294

LAVA MARIE HAUGEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 810 F.3d 544.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 2016. A petition for rehearing was denied on March 10, 2016 (Pet. App. 30a). The petition for a writ of certiorari was filed on April 15, 2016. 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 District of Minnesota, petitioner was convicted of conspiracy to violate the Federal Food Drug and Cosmetic Act (FDCA), in violation of 18 U.S.C. 371 and 21 U.S.C. 331(a), (c), and (k), 333(a)(2), and 352(a), (b), and (f); two substantive counts of violating the FDCA, in violation of 18 U.S.C. 2 and 21

U.S.C. 331(c) and (k), 333(a)(2), and 352(a), (b), and (f); and conspiracy to violate the Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), in violation of 21 U.S.C. 802(32)(A), 813, 841(a) and (b)(1)(C), and 846. Pet. App. 5a; Pet. C.A. Addendum 1. The district court sentenced her to 60 months of imprisonment. Pet. App. 5a. The court of appeals affirmed. *Id.* at 1a-22a.

1. Petitioner's boyfriend, James Carlson, was the owner and operator of Last Place on Earth (Last Place), a store in Duluth, Minnesota, that sold synthetic drugs from 2010 to 2012. Pet. App. 2a. These drugs included synthetic cannabinoids, known as "incense," "herbal incense," "potpourri," or "Spice"; and synthetic cathinones, known as "bath salts." Gov't C.A. Br. 7-13. Petitioner, who lived with Carlson, worked as a clerk at the shop. Pet. App. 2a; Gov't C.A. Br. 3. She and another store employee prepared order forms for Carlson, who then telephoned suppliers to order the drugs. Pet. App. 3a. Petitioner sometimes placed the drug orders herself, and on at least one occasion discussed drug pricing with a supplier. Tr. 1006, 1012. She helped Carlson package the drugs at the store, and sometimes took the drugs home to package them there. Gov't C.A. Br. at 13.

Carlson actively opposed laws prohibiting synthetic drugs. Gov't C.A. Br. 14-16. In late 2010, Carlson appeared at a Duluth City Council meeting to speak against a city ordinance that would ban JWH-018, the predominant synthetic cannabinoid sold by Last Place at that time. *Id.* at 14. When the Drug Enforcement Administration (DEA) announced that it was going to add JWH-018 to Schedule I of the Controlled Substances Act, 21 U.S.C. 801 *et seq.* (CSA), Carlson and

others filed an unsuccessful lawsuit to enjoin the scheduling. *Id.* 14-15. Around the same time, Carlson gave several media interviews in which he stated that "one little molecule different can change the compound and make it legal." *Id.* at 15 (emphasis omitted). He further stated about synthetic cannabinoids: "They're all real similar. All they've got to do is change one molecule. It's a new name, it's a new chemical, and then the government's got to start all over." *Ibid.* (emphasis omitted); Tr. 971. Carlson boasted that, "[u]nless [the government] could change the laws daily, they're not going to keep up with this." Gov't C.A. Br. 15 (brackets in original). He said his store would "still have products" that would "have the same names on them, they're just—they're called DEA compliant." *Ibid.* After JWH-018 was banned, Last Place began selling drugs containing AM-2201, which differs from JWH-018 in chemical structure by only one atom. Gov't C.A. App. 16, 40; Tr. 1726, 2082-2083.

Carlson was aware of the potential illegality of his actions. He instructed his employees to refer to the synthetic cannabinoids as "incense" and not to sell them to anyone who suggested that the products were actually illegal drugs. Gov't C.A. Br. 11. In March 2011, one of Carlson's suppliers forwarded to Carlson an email that stated: "The only thing left is the issue of analogues. This can go many different ways. * * * We will be having a call . . . to discuss the analogue issue." *Id.* at 16 (emphasis omitted). The email attached a chart comparing the molecular formulas of the substances scheduled by the DEA in March 2011 to other cannabinoids, including AM-2201. *Ibid.*

After JWH-018 was added to the controlled substances schedule, Carlson polled fellow shop owners by email, asking whether they were still planning to sell "incense" and "b salts." Gov't C.A. Br. 17. In his emails, Carlson wrote, "I know it's risky but there is so much money, during these rough times whats a person to do?" *Ibid.* (emphasis omitted). One owner responded that he was not "going to go back and sell" the banned substances, but that "[t]here still could be a possibility of arrests for analogues." *Ibid.* (emphasis omitted). Carlson received and forwarded to his supplier another email that stated, "[i]n addition to the DEA's recently adopted ban, a federal law allows for prosecution of analogue drugs that mimic the effects of illegal substances." *Ibid.* (brackets in original) (emphasis omitted). Another shop owner wrote in an email to Carlson, "[i]t sounds like on a state level, analogues are hard to prove. So as long as the feds stay out on analogues, which are hard to prove, you made the right call." *Ibid.* (emphasis omitted). Petitioner had access to the email account through which Carlson received this email, and she had used that email account to order synthetic drugs from a supplier. Tr. 1006.

Carlson regularly discussed with his suppliers the chemical contents of the drugs he sold. Carlson told one supplier that he had a laboratory test the products. Gov't C.A. Br. 19-20. The girlfriend of another supplier often overheard her boyfriend talking on speakerphone with Carlson about the chemical composition of synthetic drugs. *Id.* at 19. During his telephone conversations with suppliers, Carlson sometimes wrote down the names of the chemicals he was discussing. On one occasion, he

wrote "Amphed + MD" on an order sheet for a substance containing a close amphetamine analogue. *Id.* at 19-20; Gov't C.A. App. 101. On another order sheet, he wrote "Wikipedia—JWH-018." Gov't C.A. Br. 20; Gov't C.A. App. 102.

Petitioner knew about the physical effects of the synthetic drugs sold at Last Place. She smoked "incense" regularly and told another Last Place employee that she needed to get off the incense because it was addictive. Tr. 725. She told a customer that one "7x" synthetic cannabinoid was "a better time" than the "5x" version of the same substance. Tr. 441-442. Petitioner also tried unsuccessfully to convince Carlson to stop selling bath salts. Tr. 524-526, 1016.

Law enforcement officers used search warrants and controlled purchases to obtain 75 different synthetic drug products from Last Place. Pet. App. 3a. Between March 2011 and September 2012, Last Place's sales of synthetic cannabinoids and "bath salts" produced more than $6.5 million in revenue. Gov't C.A. App. 86.

2. A grand jury in the District of Minnesota charged petitioner in a superseding indictment with one count of conspiring to cause misbranded drugs to be introduced into interstate commerce, in violation of 18 U.S.C. 371 and 21 U.S.C. 331(a), (c), and (k), 333(a)(2), and 352(a), (b), and (f) (Count 1); one count of delivering misbranded drugs received in interstate commerce, in violation of 21 U.S. 331(c), 333(a)(2), and 352(a), (b), and (f) (Count 15); one count of misbranding drugs being held for sale, in violation of 21 U.S.C. 331(k), 333(a)(2), and 352(a), (b), and (f) (Count 17); and one count of conspiring to distribute controlled substance analogues, in violation of 21 U.S.C.

802(32)(A), 813, 841(a), and (b)(1)(C), and 846 (Count 21). See Superseding Indictment.

Petitioner was tried with Carlson and another co-defendant. Pet. App. 2a. At the close of evidence, the court instructed the jury on, *inter alia*, the various findings it must make in order to convict petitioner of conspiring to violate the Analogue Act. First, the court explained, the jury must find that the substances identified in the relevant count of the indictment are in fact controlled substance analogues. *Id.* at 48a-50a. In particular, the jury was instructed that it must find that each substance (1) "has a chemical structure that is substantially similar to the chemical structure of a controlled substance in Schedule I or Schedule II of the Controlled Substances Act" and (2) "either actually had, or the defendant represented or intended it to have, an effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect * * * of a controlled substance in Schedule I or II." *Id.* at 49a. The jury was further instructed that the controlled substance with a similar effect "in Part 2 of the test need not be the same Controlled Substance [with a similar chemical structure] referenced in Part 1 of the test." *Id.* at 49a-50a.

In addition, the district court instructed the jury that it must find that petitioner "knew certain things" in order to find her guilty of conspiring to violate the Analogue Act. Pet. App. 49a. In particular, the court stated that the government had to prove that petitioner "knew that the substance at issue was a controlled substance analogue" by proving that petitioner knew (1) "that the substance at issue was intended for human consumption" and (2) "facts that would satisfy

both parts of the test described above." *Id.* at 50a. The court also delivered the following instruction, derived from the Seventh Circuit's decision in *United States* v. *Turcotte*, 405 F.3d 515, 527 (2005), cert. denied, 546 U.S. 1089 (2006):

> [I]f you find the government has proved beyond a reasonable doubt that the defendant knew facts that satisfy part 2 of the test above, that is evidence from which you may, but are not required to, find or infer that the defendant knew facts that satisfy part 1 of the test above.

Pet. App. 5a, 8a, 50a. Petitioner objected to this permissive-inference instruction. Tr. 2319-2321, 2324, 2327-2331. Petitioner had proposed an alternative instruction that would have required the government to prove that petitioner "actually knew" about the similarity of chemical structure. D. Ct. Doc. 261, at 22 (Sept. 9, 2013).

The jury convicted petitioner on all four counts, and the district court sentenced her to 60 months of imprisonment, to be followed by three years of supervised release. Pet. C.A. Addendum at 1-3.

3. The court of appeals affirmed. Pet. App. 1a-22a. As relevant here, the court rejected petitioner's argument that giving the permissive-inference jury instruction was error on the "full record here." *Id.* at 8a-12a. Relying on this Court's decision in *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 163 (1979) (*Ulster County*), the court of appeals "analyze[d] whether a permissive inference is valid 'as applied to the record before'" the court. Pet. App. 9a (quoting *Ulster County*, 442 U.S. at 163). The court explained that the district court's instruction describing a permissive inference "did not violate due process

if, in light of the record as a whole, there is a 'rational connection' between the existence of one or more 'evidentiary' or 'basic facts' that the prosecution proved, and the 'ultimate fact' or the element of the crime the prosecution must prove." *Ibid.* (quoting *Ulster County*, 442 U.S. at 156, 165). The court of appeals summarized by stating: "As applied to this case, we must determine whether all of the evidence in the record is sufficient to prove the ultimate fact at issue—[petitioner's] knowledge of the chemical structure of the substances [she and Carlson] sold—beyond a reasonable doubt." *Ibid.* (citing *Ulster County*, 442 U.S. at 167).

After examining the evidence in the record, the court of appeals concluded that the evidence supported the permissive-inference instruction. Pet. App. 9a-12a. The court held that "the record evidence was sufficient to prove beyond a reasonable doubt that [petitioner] knew that the analogues she distributed were substantially similar in chemical structure to scheduled controlled substances." *Id.* at 10a. The court explained that, because petitioner "had used Carlson's email account to communicate with synthetic drug suppliers, she had opportunity to see the chart comparing the molecular formula of AM-2201 and JWH-018." *Id.* at 10a-11a. The court further explained that petitioner prepared order forms for Carlson and that Carlson had "describe[d] the composition of the chemicals ordered" by writing "Amphed + MD" on one of those order forms. *Id.* at 11a. The court ultimately determined both that the jury was entitled to "infer that [petitioner] was familiar with the chemical structures of the products she sold" and that she "knew their structural similarities because she could

have either heard or been willfully blind to Carlson's public statements about the substantial structural similarities between the drugs sold at his store and scheduled controlled substances." *Ibid.*

The court of appeals acknowledged that the Tenth Circuit had rejected a similar permissive-inference instruction in *United States* v. *Makkar*, 810 F.3d 1139 (2015), but explained that that decision did not conflict with the court's decision in this case because the "record" in *Makkar* was "different than the one in [this] case." Pet. App. 11a. In particular, in *Makkar* "the government [had] introduced no evidence suggesting that the defendants knew anything about the chemical structure of the incense they sold." *Ibid.* (quoting *Makkar*, 810 F.3d at 1143). The court further noted that "a district court may deliberately avoid using the [permissive-inference] instruction, even where the instruction is permissible," in light of the risk that the instruction might "mislead" the jury into thinking that knowledge of a "similar pharmacological effect * * * would alone be sufficient to prove knowledge that the substance had a similar *chemical* structure to a controlled substance." *Id.* at 12a. The court of appeals recognized that giving a jury that misimpression would improperly "collaps[e] the two knowledge elements of the Analogue Act into one." *Ibid.*

The court of appeals bolstered that analysis by considering this Court's decision in *McFadden* v. *United States*, 135 S. Ct. 2298 (2015), which was issued while petitioner's appeal was pending. Pet. App. 12a. The Court in *McFadden* observed that evidence of a defendant's knowledge of a substance's effect—such as knowledge that it "produces a 'high'"—could be circumstantial evidence of knowledge that the sub-

stance fell under the Analogue Act. 135 S. Ct. at 2304 n.1. The court of appeals thus observed that, to instruct a jury "properly and consistently with the footnotes in *McFadden*, the trial court may instruct that knowledge of a similar pharmacological effect may be considered as circumstantial evidence, along with the other evidence, in deciding whether the evidence as a whole proved knowledge of a similar chemical structure." Pet. App. 12a.

The court of appeals also rejected petitioner's challenge to the district court's instruction that a substance may be an analogue if it is similar in chemical structure to one controlled substance and similar in effect to another controlled substance. Pet. App. 13a. The court of appeals found that instruction "consistent with the [statutory] text," noting that "[e]ach subparagraph in 21 U.S.C. § 802(32)(A) refers only to 'a' controlled substance in Schedule I or II." *Ibid.* The court also relied on the "practical realities of illicit drug dealing," noting that, "[w]hile a dealer may claim that a substance will give a user a cocaine like high, the substance may be structurally similar to a less well known controlled substance." *Ibid.*

ARGUMENT

Petitioners renews (Pet. 8-14) her challenge to the district court's use of a permissive-inference instruction on the Analogue Act. Review by this Court is not warranted because the court of appeals' decision affirming petitioner's conviction for conspiring to violate the Analogue Act is correct, does not conflict with any decision of this Court, and does not directly conflict with a decision of any other court of appeals. Further review is particularly unwarranted, moreover, because

any instructional error was harmless beyond a reasonable doubt.

1. The Analogue Act defines a "controlled substance analogue" as a substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II" of the CSA and that either "has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than" the effect of a controlled substance in schedule I or II or that is represented or intended to have that effect with respect to a particular person. 21 U.S.C. 802(32)(A). Under the Analogue Act, "[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.*

In *McFadden* v. *United States*, 135 S. Ct. 2298 (2015), this Court addressed "the knowledge necessary for conviction under [the CSA] when the controlled substance at issue is in fact an analogue." *Id.* at 2302. The Court held that the government must prove beyond a reasonable doubt "that a defendant knew that the substance with which he was dealing was 'a controlled substance,' even in prosecutions involving an analogue." *Id.* at 2305. The Court held:

> That knowledge requirement can be established in two ways. First, it can be established by evidence that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the

* The same claim is raised in the petition for a writ of certiorari in *Carlson* v. *United States*, No. 15-1136 (filed March 9, 2016).

> federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance. Second, it can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.

Ibid. Because analogues are statutorily defined by their characteristics, rather than identified by name, the Court further explained, the government may satisfy the second method of proof with evidence that a defendant "possesses a substance with knowledge of those features." *Ibid.* In order to establish the requisite mental state, moreover, the Court noted that "the Government need not introduce direct evidence of such knowledge," but may "offer circumstantial evidence of that knowledge," *id.* at 2306 n.3, including evidence that a defendant knew "that a particular substance produces a 'high' similar to that produced by controlled substances," *id.* at 2304 n.1. The court of appeals' decision is consistent with this Court's decision in *McFadden*.

Petitioner argues (Pet. 11) that the district court's permissive-inference jury instruction "essentially eliminate[d] one element [the government was] required to prove." The court of appeals correctly rejected that argument, concluding that the government presented sufficient evidence to allow a reasonable jury to conclude beyond a reasonable doubt that petitioner had the relevant knowledge about the chemical structure of the substances she sold. Pet. App. 9a-10a.

As the court of appeals explained, because petitioner "used Carlson's email account to communicate with synthetic drug suppliers, she had opportunity to see

the chart comparing the molecular formula of AM-2201 and JWH-018." Pet. App. 10-11a. Trial testimony also established that petitioner "prepared order forms for Carlson and sometimes stood next to him while he called his suppliers to order additional products." *Id.* at 11a. The court of appeals concluded that the jury could "infer that [petitioner] was familiar with the chemical structures of the products she sold" from that and other evidence, including evidence that "[o]n one of the forms prepared by [petitioner], Carlson had written 'Amphed + MD' to describe the composition of the chemicals ordered." *Ibid.* The court further explained that "the jury could also find that [petitioner] knew their structural similarities because she could have either heard or been willfully blind to Carlson's public statements about the substantial structural similarities between the drugs sold at his store and scheduled controlled substances." *Ibid.* Reliance on such circumstantial evidence to prove petitioner's knowledge of the chemical make-up of the substances she sold is consistent with this Court's approval in *McFadden* of the use of other types of circumstantial evidence to prove a defendant's mental state. Indeed, petitioner does not challenge the sufficiency of the evidence in her petition for a writ of certiorari.

2. Petitioner contends (Pet. 9-11) that the Analogue Act verdict is invalid because the jury was instructed that it was permitted, but not required, to infer from evidence that petitioner knew that a substance she and Carlson sold was similar in physiological effect to a controlled substance, that she also knew that the substance she sold was similar in chemical

structure to a controlled substance. The court of appeals correctly rejected that argument.

The court of appeals analyzed petitioner's challenge to the district court's permissive-inference instruction under the framework this Court set out in *County Court of Ulster County* v. *Allen*, 442 U.S. 140 (1979). This Court explained that, when reviewing the inclusion of a permissive-inference jury instruction, "the Court has required the party challenging it to demonstrate its invalidity as applied to [her]." *Id.* at 157. The Court explained that, when a "permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Ibid.*

Applying that guidance, the court of appeals concluded that, "[i]n light of the full record," the district court, in instructing the jury, "did not err by using the permissive inference." Pet. App. 10a. The court explained that proof of knowledge of similar pharmacological effect is not "alone * * * sufficient to prove knowledge that the substance had a similar chemical structure to a controlled substance," but correctly concluded that knowledge of similar pharmacological effect is circumstantial evidence that a jury may consider "along with the other evidence." *Id.* at 12a. That conclusion is consistent with this Court's statements in *McFadden* that evidence of a defendant's "knowledge that a particular substance produces a 'high' similar to that produced by controlled substances" is "circumstantial evidence" of the ultimate mens rea element under the Analogue Act—*i.e.*, that the

defendant knew he was distributing a controlled substance. 135 S. Ct. at 2304 n.1; see *id.* at 2306 n.3.

As set forth above, "the full record" before the jury, Pet. App. 10a, included extensive evidence that petitioner knew the chemical structure of the substances she distributed. Petitioner lived and worked closely with Carlson, who publicly stated that changing "one molecule" could make a substance a "new chemical" and that his store would sell new substances under the "same names" as those containing recently-scheduled substances. Tr. 971, 973. Petitioner also used and had access to Carlson's email account, which gave her access to direct proof of chemical similarity in the form of a chart from one of Carlson's suppliers that compared the molecular formulas of scheduled substances to AM-2201, one of the analogues that petitioner was selling. Gov't C.A. App. 91-100 (Gov't Ex. 92).

3. Petitioner also contends (Pet. 11-14) that the court of appeals' decision conflicts with the Tenth Circuit's decision in *United States* v. *Makkar*, 810 F.3d 1139 (2015). That claim lacks merit.

The Tenth Circuit in *Makkar* held that a district court erred by including a permissive-inference jury instruction similar to the instruction petitioner challenges. 810 F.3d at 1143-1144. The court of appeals here, however, distinguished *Makkar* by considering the specific record in this case. Pet. App. 11a. As the court explained, a court must determine whether a permissive-inference instruction was valid as applied to a particular defendant. See *Ulster County*, 442 U.S. at 157; Pet. App. 9a. The record in this case, the court noted, contained ample evidence that petitioner knew that the substances she sold had chemical struc-

tures similar to controlled substances. Pet. App. 10a-11a. In contrast, the record in *Makkar* contained "no evidence suggesting that the defendants knew anything about the chemical structure of the incense they sold." 810 F.3d at 1143. The court of appeals in this case relied on that evidentiary disparity to distinguish the result in *Makkar*. Pet. App. 11a.

Any tension between *Makkar* and this case on the use of a permissive-inference instruction does not warrant review for an additional reason: the court of appeals explained that the permissive-inference instruction used in this case might not be a valid instruction in other cases. See Pet. App. 12a. The court also agreed with the Tenth Circuit, see *Makkar*, 810 F.3d at 1144, that a permissive-inference instruction may not be used when it would "collaps[e] the two knowledge elements of the Analogue Act." Pet. App. 12a. Accordingly, the court of appeals suggested that a district court might choose to avoid giving a pure permissive-inference instruction to avoid misleading the jury and might instead instruct a jury that "knowledge of similar pharmacological effect may be considered as circumstantial evidence, along with other evidence, in deciding whether the evidence *as a whole* proved knowledge of similar chemical structure beyond a reasonable doubt." *Ibid.* (emphasis added).

In light of that cautionary analysis, any prospective use of the permissive-inference instruction given in this case is unclear at best. And *McFadden* itself reduces the need for any such permissive-inference instruction. The instruction here permitted an inference of knowledge of chemical similarity from a defendant's knowledge that a particular substance produces a "high" similar to that of a controlled sub-

stance. *McFadden* identified, however, an alternative means of satisfying the mens rea requirement in an Analogue Act prosecution, *i.e.*, that the defendant "knew the identity of the substance he possessed." 135 S. Ct. at 2304. *McFadden* further indicated that a defendant's knowledge of "the controlled status of a substance" can be proved by "circumstantial evidence," including "knowledge that a particular substance produces a 'high' similar to that produced by a controlled substance." *Id.* at 2304 n.1. Thus, in post-*McFadden* prosecutions, a defendant's knowledge of the effect of a substance can be used, along with additional circumstantial evidence, to draw a different inference than was permitted here: that the defendant knew that the substance was controlled. That possibility reduces any need for the permissive-inference instruction given in this case. Accordingly, even if a direct conflict existed on the question presented by petitioner—which it does not—review of that narrow instructional issue so soon after *McFadden* would be unwarranted.

4. In any event, this case would be a poor vehicle for addressing the appropriateness of permissive-inference instructions in Analogue Act prosecutions because any instructional error was harmless. See *McFadden*, 135 S. Ct. at 2307 (recognizing that an instructional error in the Analogue Act context may be harmless); *United States* v. *McFadden*, No. 13-4349, 2016 WL 2909177 (4th Cir. May 19, 2016) (finding instructional error in *McFadden* harmless as to some counts, on remand from this Court's decision). The overwhelming evidence demonstrated that petitioner both "knew that the substance with which [s]he was dealing [wa]s some controlled substance" and

possessed the substance "with knowledge of th[e] features" that made it an analogue under the Act. *McFadden*, 135 S. Ct. at 2305.

As to the first method of proof, petitioner knowingly participated in a scheme to distribute products that her employer and live-in boyfriend publicly touted as being one step ahead of the federal schedules because they had "[o]ne little molecule different" from the scheduled substances. Tr. 967. She also had access to Carlson's email account, which he used to engage in an email discussion with other head-shop owners about whether they were planning to continue selling the same products in spite of the "risk[]" of "arrests for analogues." Gov't C.A. Br. 17. In that email exchange, one drug shop owner even told petitioner that "as long as the feds stay out on analogues," petitioner "made the right call" by continuing to distribute the analogues. *Ibid.* This established that evidence petitioner "knew that the substance" she was distributing "was controlled under the CSA or the Analogue Act," *McFadden*, 135 S. Ct. at 2302—or that she was at least deliberately indifferent to that fact—rendering it unnecessary for a rational jury to rely on a permissive inference about knowledge of the features of the substances he was distributing.

As to the second method of proof, the evidence established beyond doubt that petitioner knew that the substances she distributed had similar chemical structures and similar physiological effects as controlled substances. Evidence showed, for example, that petitioner stood next to Carlson when he spoke on the phone with suppliers about the products they sold, and that during those conversations Carlson sometimes wrote the names of chemicals he was discussing

on the order sheets that petitioner prepared. Gov't C.A. Br. 19. The evidence also showed that petitioner knew the products they sold caused a high—both because she regularly smoked "incense" and because she told a customer that one "7x" synthetic cannabinoid was "a better time" than the "5x" version of the same substance. *Id.* at Tr. 725, 441-442. Because the evidence against petitioner was overwhelming, a rational jury would have convicted her even in the absence of the permissive-inference instruction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
WILLIAM A. GLASER
Attorney

JUNE 2016