No. 15-1136

In the Supreme Court of the United States

JAMES ROBERT CARLSON, 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

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QUESTION PRESENTED

Whether, in light of the record in this prosecution under the Controlled Substances Enforcement Analogue 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.

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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. The petition for a writ of certiorari was filed on March 9, 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 on multiple counts of violating or conspiring to violate the Federal Food Drug and Cosmetics 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); one count of violating the Controlled Substances Act (CSA), in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a) and (b)(1)(C); one count of conspiring to violate the

Controlled Substances 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; multiple counts of violating the Analogue Act, in violation of 18 U.S.C. 2 and 21 U.S.C. 802(32)(A), 813, 841(a) and (b)(1)(C); and multiple counts of money laundering, in violation of 18 U.S.C. 1957. Pet. App. 5a; Indictment 2-22. The district court sentenced him to 210 months of imprisonment. Pet. App. 5a. The court of appeals affirmed. *Id.* at 1a-22a.

1. Petitioner was the owner and operator of "Last Place on Earth" (Last Place), a shop 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's girlfriend, Lava Haugen, and his son, Joseph Gellerman, both worked as clerks at the shop. Pet. App. 2a. Haugen and another store employee prepared order forms for petitioner, who then telephoned suppliers to order the drugs. *Id.* at 3a.

Petitioner actively opposed laws prohibiting synthetic drugs. Gov't C.A. Br. 14-16. In late 2010, petitioner 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 CSA, petitioner and others filed an unsuccessful lawsuit to enjoin the scheduling. *Id.* 14-15. Around the same time, petitioner 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. Petitioner 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. 40; Tr. 1726, 2082-2083.

Petitioner 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 petitioner's suppliers forwarded to petitioner 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, petitioner 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, petitioner 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). Petitioner 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 petitioner, "[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.* (brackets in original) (emphasis omitted).

Petitioner regularly discussed with his suppliers the chemical contents of the drugs he sold. Petitioner 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 petitioner about the chemical composition of synthetic drugs. *Id.* at 19. During his telephone conversations with suppliers, petitioner 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 also knew that his products got people high. When he obtained a product called "Ocean

Breeze," he openly referred to it as a marijuana substitute and invited his employees into his office to smoke the substance to confirm that it caused a high. Gov't C.A. Br. 11. He told an employee of a neighboring business that one of his products would "get you higher than cocaine or heroin." *Id.* at 20.

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); nine counts of causing misbranded drugs to be introduced into interstate commerce, in violation of 21 U.S.C. 331(a), 333(a)(2), and 352(a), (b), and (f) (Counts 2-10); six counts of delivering misbranded drugs received in interstate commerce, in violation of 21 U.S.C. 331(c), 333(a)(2), and 352(a), (b), and (f) (Counts 11-16); one count of doing acts resulting in drugs being misbranded while held for sale, in violation of 21 U.S.C. 331(k), 333(a)(2), and 352(a), (b), and (f) (Count 17); two counts of distributing a controlled substance, in violation of 21 U.S.C. 841(a) and (b)(1)(C) (Counts 18-19); one count of possessing a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a) and (b)(1)(C) (Count 20); one count of conspiring to distribute controlled substance analogues (in-

cluding AM-2201), in violation of 21 U.S.C. 802(32)(A), 813, 841(a), 841(b)(1)(C), and 846 (Count 21); nine counts of distributing of controlled substance analogues, in violation of 21 U.S.C. 802(32)(A), 813, 841(a), and 841(b)(1)(C) (Counts 22-30); and 25 counts of money laundering, in violation of 18 U.S.C. 1957 (Counts 31-55). Superseding Indictment.

Petitioner was tried with Haugen and Gellerman. 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 violating the Analogue Act. First, the court explained, the jury must find that the substances identified in the relevant counts of the indictment are in fact controlled substance analogues. *Id.* at 47a-49a. 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 48a. 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 48a-49a.

In addition, the district court instructed the jury that it must find that petitioner "knew certain things" in order to find him guilty of the Analogue Act offenses. Pet. App. 48a. In particular, the court stated that

the government had to prove that petitioner "knew that the substance was a controlled substance analogue" by proving that petitioner knew (1) "that the substance at issue was intended for human consumption" and (2) "the facts that would satisfy both parts of the test described above." *Id.* at 49a. 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. 1084 (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 on two grounds. First, he argued that the district court should not instruct the jury that the substance at issue could be similar in structure to one controlled substance and similar in effect to another controlled substance. Second, he argued that the jury should not be permitted to infer petitioner's knowledge of a substance's chemical structure from his knowledge of the substance's effect. Tr. 2317-2319, 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 51 of the 55 counts against him. Pet. C.A. Addendum 1-2. The district court sentenced petitioner to 210 months of imprisonment, to be followed by three years of supervised

release, and ordered petitioner to pay a fine of $25,000. *Id.* at 3-4, 6.

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 [he] 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 "[t]he evidence in the record showed that [petitioner] knew that the chemical structures of the analogues he sold were substantially similar to those of scheduled controlled substances." *Id.* at 9a. In reaching that conclusion, the court relied on

evidence that "[o]ne of [petitioner's] suppliers sent him a chart by email demonstrating that the molecular formula of AM-2201 and JWH-018 differed by only one atom." *Ibid.* The court noted that, "[a]lthough direct evidence" of petitioner's knowledge of the chemical structures of the "other analogues that [petitioner] distributed was not presented, circumstantial evidence was offered," including petitioner's own statements to the media that "the substances he sold were 'one little molecule' different from banned controlled substances." *Id.* at 10a.

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 pharmalogical 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 decided 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 substance 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 pharmalogical effect may be considered as circumstantial evidence, along with 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

Petitioner renews (Pet. 18-29) his challenges to the district court's jury instructions on the Analogue Act.

Review by this Court is not warranted because the court of appeals' decision affirming petitioner's convictions under the Controlled Substances Enforcement Analogue Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-13 (21 U.S.C. 813), 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 Controlled Substances Act 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, 2302 (2015), this Court addressed "the knowledge necessary for conviction under [the CSA] when the controlled substance at issue is in fact an analogue." 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 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*.

On appeal, petitioner argued that the district court's jury instructions did not require the jury to find beyond a reasonable doubt that he knew that the chemical structure of the substances he sold were substantially similar to the chemical structures of controlled substances, Pet. C.A. Br. 44—an argument he repeats in his petition for a writ of certiorari, Pet.

18. 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 he sold. Pet. App. 9a-10a.

As the court of appeals explained, with respect to one of the analogues petitioner was convicted of selling, the government presented direct evidence that petitioner "knew that the chemical structures of the analogues he sold were substantially similar to those of scheduled controlled substances" when it presented evidence that one of petitioner's "suppliers sent him a chart by email demonstrating that the molecular formula of AM-2201 and JWH-018 differed by only one atom." Pet. App. 9a; see Gov't C.A. App. 91-100 (Gov't Exh. 92) (chart compares chemical formulas of a substance petitioner sold and substances petitioner knew to be controlled). Proof as to that Analogue Act count of conviction is therefore valid under this Court's decision in *McFadden*.

With respect to the other Analogue Act counts of conviction, the court of appeals correctly held that the government presented sufficient circumstantial evidence to permit a rational jury to conclude that petitioner knew about the chemical structure of the other substances he sold. Pet. App. 10a. That evidence consisted of petitioner's own statements acknowledging that "the substances he sold were 'one little molecule' different from banned controlled substances." *Ibid.* Reliance on such circumstantial evidence to prove defendant's knowledge of the chemical make-up of the substances he 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.

Petitioner takes issue (Pet. 26-28) with the sufficiency of the evidence identified by the court of appeals. But the court of appeals applied the correct legal rule when it found petitioner's convictions to be valid under the Analogue Act based on proof that petitioner knew about the chemical structures of the substances he sold (along with the other elements that were not disputed on appeal). Petitioner's case-specific evidentiary objections do not warrant review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). And they lack merit in light of the specific evidence that petitioner was aware that the substances he sold had molecular structures nearly identical to the structures of substances petitioner knew to be controlled.

2. Petitioner contends (Pet. 18-22) that the Analogue Act verdicts are invalid because the jury was instructed that it was permitted, but not required, to infer from evidence that petitioner knew that a substance he sold was similar in physiological effect to a controlled substance that petitioner also knew that the substance he 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 him." *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 pharmacalogical 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 pharmacalogical 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.

"[T]he full record" before the jury, Pet. App. 10a, included extensive evidence that petitioner knew the chemical structure of the substances he distributed. Petitioner 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 had some of his products tested by a laboratory, regularly talked about their chemical composition with his suppliers, and sometimes wrote down chemical descriptions on order sheets. Tr. 1416-1417; 1259, 1265-1276; Gov't C.A. App. 101-102. He even received a chart from one of his suppliers that compared the molecular formulas of scheduled substances to AM-2201, one of the analogues that petitioner was selling and that formed the basis for his conviction. Gov't C.A. App. 91-100 (Gov't Exh. 92).

Petitioner further errs in challenging (Pet. 21) the court of appeals' holding that the district court correctly instructed the jury that it could find that petitioner violated the Analogue Act if it found that petitioner knew that a substance he sold was chemically similar to one controlled substance and had physiological effects similar to a different controlled substance. See Pet. App. 13a. As the court of appeals correctly explained, that approach is consistent with the statute: "[e]ach subparagraph in 21 U.S.C. 802(32)(A) refers only to 'a' controlled substance in Schedule I or II," meaning that "an analogue substance" may have a chemical structure that is similar to one controlled substance and "physiological effects" that are "similar to a different controlled substance." Pet. App. 13a. Petitioner does not refute that correct interpretation of the statutory text.

3. Petitioner also contends (Pet. 19-22, 26) 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 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 direct and circumstantial evidence that petitioner knew that the substances he sold had chemical structures similar to controlled substances. Pet. App. 9a-10a. 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 substance. *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 14, 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 the substance with which 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 engaged in a scheme to stay one step ahead of the federal schedules by distributing products that had "[o]ne little molecule different" from the scheduled substances. Tr. 967. He was also aware of the "issue of analogues" and that continuing to sell his products was "risky." Tr. 985, 992. 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. Tr. 998. This established that evidence petitioner "knew the substance" he was distributing "was controlled under the CSA or the Analogue Act," *McFadden*, 135 S. Ct. at 2302, 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 he distributed had similar chemical structures and similar physiological effects as controlled substances. Evidence showed, for example, that petitioner had some of his products tested by a laboratory, that he regularly talked about their chemical composition, and that he sometimes wrote down chemical descriptions on order sheets. Tr. 1416-1417; 1259, 1265-1276; Gov't C.A. App. 101-102. The evidence also showed that petitioner knew his products caused a high, and he even bragged to a customer that his products would get the customer "higher than cocaine." Tr. 282. Because the evidence against petitioner was overwhelming, a rational jury would have convicted him even in the absence of the permissive-inference instruction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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