No. 09-1533

In the Supreme Court of the United States

FRANTZ DEPIERRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

EDUARDO A. MASFERRER
Masferrer & Hurowitz, P.C.
6 Beacon Street
Suite 720
Boston, MA 02108
(617) 531-0135

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

REPLY BRIEF FOR PETITIONER

The government tries mightily to portray this case as an easy exercise in statutory interpretation—"cocaine base" is a recognized scientific term; terms-of-art should be given their technical meaning; petitioner's reading of the statute is "extra-textual" (U.S. Br. 16, 22), and would cause confusion. But each step of the government's argument is wrong.

The conventional scientific term for substances with the chemical formula $C_{17}H_{21}NO_4$ is "cocaine," and Congress had already employed that term—with that meaning—in the Controlled Substances Act ("CSA") that Congress amended in 1986. The government's argument thus requires the Court to conclude that Congress intended two different terms—"cocaine" and "cocaine base"—to have an identical meaning. That of course is directly contrary to the settled principle that when Congress uses different terms it intends *different* meanings.

Moreover, it is the government's reading, not petitioner's, that would lead to bizarre results. *First*, it renders several parts of clause (ii) of § 841(b)(1)(A) entirely superfluous, because offenses involving substances specifically included in clause (ii)—such as "cocaine" and "coca leaves"—will always be subject to the higher mandatory minimum specified in clause (iii). Congress would have had no reason to list those substances in clause (ii) if it intended that in every case they would trigger clause (iii)'s penalty. *Second*, offenses involving unrefined, low potency coca leaves and paste would, under the government's interpretation, be subject to the especially severe mandatory minimum, but those involving cocaine hydrochloride

("cocaine powder"), long recognized as a dangerous drug, would not.

If Congress truly intended the government's interpretation, it could have written § 841(b)(1)(A) much more simply—with one clause imposing the severe minimum on offenses involving "cocaine," and another imposing the less severe minimum on those involving cocaine hydrochloride and cocaine isomers. The fact that Congress did not do that—but rather included *all* of these substances in clause (ii) and then made clause (iii)'s heightened penalty applicable to the subset of clause (ii) substances qualifying as "cocaine base"—makes clear that Congress did not intend to define the latter term by reference to any of the categories expressly listed in clause (ii); rather, it was using the new term "cocaine base" to delineate a new category of substances.

The statutory text, structure, and context make clear that the new category Congress intended to designate was crack cocaine. That conclusion is consistent with the use of the term "base" at the time the statute was enacted, as well as with the other terms Congress employed in the statute and with Congress's acknowledged purpose in enacting the provision. Moreover, it is an entirely workable standard that federal courts in every circuit have used—without the chaos curiously prophesized by the government—for over fifteen years in calculating Sentencing Guidelines ranges.

Finally, if the Court were to conclude that "cocaine base" is ambiguous—that neither the government's "chemical definition" approach nor petitioner's contention that "cocaine base" means crack cocaine provides a clear solution to the question—then it should apply the rule of lenity, and read the

term "cocaine base" narrowly to mean "crack cocaine."

A. The Statutory Language And Structure Establish That Congress Did Not Intend "Cocaine Base" To Be Interpreted As A Scientific Term.

The government's principal argument is that Congress employed "cocaine base" as a scientific term-of-art, whose "chemical definition" (U.S. Br. 16) encompasses all substances with the formula $C_{17}H_{21}NO_4$. See U.S. Br. 16-18, 20-21, 26. However, "context determines meaning * * * , and [this Court] 'do[es] not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense.'" *Johnson* v. *United States*, 130 S. Ct. 1265, 1270 (2010) (quoting *Gonzales* v. *Oregon*, 546 U.S. 243, 282 (2006) (Scalia, J., dissenting)).

Here, the government's "chemical definition" approach is not supported by ordinary scientific usage; and it would mean that two terms in the CSA—"cocaine" and "cocaine base"—have precisely the same meaning, a result directly contrary to the long-established canon of construction that when Congress uses different terms in a statute it intends that they have different meanings. The government's approach also would "produce nonsense": it would raise serious questions about whether substances with the formula $C_{17}H_{21}NO_4$ are regulated by the CSA at all and it would subject offenses involving coca leaves to penalties one hundred times harsher than offenses involving cocaine hydrochloride ("cocaine powder"). The "chemical definition" argument should be rejected.

1. "Cocaine base" is *not* the term used by scientists to refer to substances with the chemical formula $C_{17}H_{21}NO_4$. The *Merck Index*, which the government recognizes as the critical authority in this area (see U.S. Br. 5-6), identifies the substances with this chemical formula as "cocaine." See *The Merck Index: An Encyclopedia of Chemicals, Drugs, and Biologicals* #2455, at 412 (14th ed. 2006) ("*Merck Index*").

Indeed, "cocaine base" does not appear in entry #2455—or, to our knowledge, anywhere else in the *Merck Index*.[1] The *Index* furnishes seven alternate chemical names for cocaine, but "cocaine base" is not one of them.[2]

That is because "cocaine," and not "cocaine base," is the overwhelmingly predominant technical term-of-art used in dictionaries, scientific textbooks, and chemical indices to describe substances composed of the molecule $C_{17}H_{21}NO_4$. This was true at the time Congress utilized the term "cocaine base" in 1986,[3] and it has remained true ever since.[4]

---

[1] The government's brief employs a sleight-of-hand, using the term "cocaine base" while referencing and relying upon the *Merck Index* entry for "cocaine." *E.g.*, U.S. Br. 6, 20.

[2] See *The Merck Index: An Encyclopedia of Chemicals, Drugs, & Biologicals* 2411, at 348 (10th ed. 1983). This edition (current in 1986) contains separate entries with chemical formulae and data for "Cocaine" (#2411), "Cocaine Hydrochloride" (#2412), "Cocaine Nitrate" (#2413), and "Cocaine Sulfate" (#2414), but no entry for "Cocaine Base."

[3] See, *e.g.*, Stanley H. Pine et. al., *Organic Chemistry* 52 (4th ed. 1980); *Rodd's Chemistry of Carbon Compounds* 298 (1980); Daniel S. Kemp & Frank Vellaccio, *Organic Chemistry* 872, 1268 (1980); *Miall's Dictionary of Chemistry* 117 (B.W.A. Sharp ed., 5th ed. 1981); *American Drug Index* 146 (N. Billups & S. Billups eds., 26th ed. 1982); T.W. Graham Solomons, *Organic*

2. Congress used the conventional scientific term "cocaine"—not "cocaine base"—throughout the rest of the CSA to refer to the category of substances with the chemical formula $C_{17}H_{21}NO_4$. The fact that Congress used the conventional term to identify this set of substances is a very strong indication it did not intend a different term, "cocaine base," to have the very same meaning.

The version of the CSA that Congress amended in 1986 already included the term "cocaine"—in the definition of "narcotic drug" (the category of substances subject to criminal penalties), and in the

---

Chemistry 889 (3d ed. 1984); *Concise Chemical and Technical Dictionary* 322 (H. Bennett ed., 4th ed. 1986). For earlier sources, see also, *e.g.*, *Hackh's Chemical Dictionary* 210 (J. Grant ed., 3d ed. 1953); *Dictionary of Organic Compounds* 720 (4th ed. 1965); *Stedman's Medical Dictionary* 292 (23d ed. 1976). These sources make objectively clear that "cocaine" is used in its strict technical sense to mean $C_{17}H_{21}NO_4$ only. Even non-technical dictionaries took pains to use "cocaine" precisely. See, *e.g.*, *Webster's Third New International Dictionary of the English Language Unabridged* 434 (P. Gove ed., 1981) ("1: a bitter crystalline alkaloid $C_{17}H_{21}NO_4$ obtained from coca leaves * * * .").

[4] See, *e.g.*, *Grant & Hackh's Chemical Dictionary* 142 (R. Grant & C. Grant eds., 5th ed. 1987); *CRC Handbook of Chemistry and Physics* C-213 (R. Weast et al. eds., 68th ed. 1987); *Basic and Clinical Pharmacology* 354 (B. Katzung ed., 3d ed. 1987); *Chambers Science and Technology Dictionary*, 171 (1988); *Concise Encyclopedia: Biochemistry* 119 (T. Scott & M. Eagleson eds., 2d ed. 1988); *McGraw-Hill Dictionary of Scientific and Technical Terms* 374 (4th ed. 1989); *The Merck Index* #2450, at 383 (11th ed. 1989); G. Sackheim & D. Lehman, *Chemistry for the Health Sciences* 343 (6th ed. 1990); *Concise Encyclopedia: Biochemistry and Molecular Biology* 126 (3d ed. 1997); *Encyclopedia of Toxicology* 355 (1998); *American Drug Index* 201 (51st ed. 2006); *USP Dictionary of USAN and International Drug Names* 221 (2007).

Act's list of controlled substances in Schedule II. See Pet. Br. 6-7 (citing 21 U.S.C. §§ 802(17), 812(c)). As the government recognizes (U.S. Br. 24-27), the terms used in that definition and in the Act's schedules are scientific terms that have been given their scientific meanings. Thus, "cocaine" in the CSA means the category of substances with the chemical formula $C_{17}H_{21}NO_4$. See Pet. Br. 6.

Confronted with the reality that its interpretation of "cocaine base" is synonymous with the well settled scientific definition of "cocaine," the government remarks that these two terms are "somewhat redundant." U.S. Br. 21. Not so. Under the government's approach, these two terms are *entirely* redundant. Nothing that is "cocaine base" is not "cocaine." Nothing that is "cocaine" is not "cocaine base."

The government's argument thus ignores the cardinal rule of statutory interpretation that "the use of different words is purposeful and evinces an intention to convey a different meaning." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 2003 (2010).

The government imagines that "Congress reasonably decided to add the word 'base' to clarify that it was referring to the chemically basic form of cocaine, as opposed to the salt form of the drug that might colloquially be referred to as 'cocaine.'" U.S. Br. 21. But there is no support in the statutory language or structure for this speculation—especially in light of the clear meaning of "cocaine" in the pre-1986 CSA, and the text of the pre-1986 Act and of clause (ii) itself, both of which explicitly distinguish between "cocaine" and "its salts." The government simply cannot avoid the fact that its approach conflicts with the fundamental principle that when Congress uses two different terms in a statute, those

terms must be accorded different meanings. For that reason alone, its "scientific" approach must be rejected.

3. The government similarly is unable to provide a credible response to the fact that its "chemical definition" approach would swallow and render superfluous the term "cocaine" as used in clause (ii)(II), which subjects to a lower mandatory minimum penalty the possession of "cocaine, its salts, optical and geometric isomers, and salts of isomers." See Pet. Br. 39-40.

Here, the government pleads for a grammatical indulgence, contending that the term "cocaine" in clause (ii)(II) functions only as a makeweight "antecedent" for the terms "its salts" and "optical and geometric isomers." U.S. Br. 46. But Congress did not write "cocaine salts, optical and geometric isomers of cocaine, and salts of isomers." The government's argument asks the Court to ignore the plain words Congress used.

To be sure, when Congress added the new penalty provision for "cocaine base" in clause (iii), it could have changed the wording "cocaine, its salts" in clause (ii)(II) to the term "cocaine salts." The fact that it did not do so is not evidence of an oversight, as the government would have it, but rather evidence that "cocaine base" has a meaning different from—and more limited than—"cocaine."

Indeed, the government's willingness to deprive the term "cocaine" in clause (ii)(II) of an independent meaning, if endorsed by this Court, could have significant unintended effects on the regulation of cocaine as a controlled substance. The phrase used in clause (ii)(II)—"cocaine, its salts, optical and geomet-

ric isomers, and salts of isomers"—also appears in the provisions classifying cocaine as a narcotic drug and as a substance that qualifies for listing on the controlled substance schedules. See 21 U.S.C. §§ 802(17)(D), 812(c)(II)(a)(4). If the government is correct that "cocaine, its salts" means only "cocaine salts" in clause (ii)(II), then how could the same phrase have a different meaning in these other parts of the statute? But extending the government's novel interpretation of clause (ii)(II) to the very same phrase in these provisions would create substantial doubt about the status of "cocaine" as a category of substances regulated under the CSA, because failing to accord independent meaning to the word "cocaine" (as the government claims is appropriate) would restrict the scope of the statute to "cocaine salts, optical and geometric isomers of cocaine, and salts of isomers."

The only plausible conclusion is that the government is wrong; the word "cocaine" in clause (ii)(II) must have independent content. And that means that, under the government's interpretation, all substances qualifying chemically as "cocaine base" are encompassed within clause (iii) as well as within clause (ii) and, accordingly, "[clause] (iii) swallows [clause] (ii)." *United States* v. *Hollis*, 490 F.3d 1149, 1156 (9th Cir. 2007). That bizarre outcome provides yet another reason why the government's "chemical definition" should be rejected.

4. Neither does the government have any persuasive response to our argument, Pet. Br. 40-41, that its broad construction of "cocaine base" would mean that an offense involving only coca leaves would trigger the extremely severe mandatory minimum penalties for "cocaine base" offenses.

The government says that coca leaves do not contain "cocaine," and that its strictly scientific interpretation of the term "cocaine base" therefore could not possibly encompass coca leaves. That claim would have come as quite a surprise to Congress. When subjecting coca leaves to a mandatory minimum penalty in clause (ii)(I), Congress specified that the penalty would not apply to "coca leaves and extracts of coca leaves *from which cocaine*, ecognine, and derivatives of ecgonine *or their salts have been removed*." 21 U.S.C. § 841(b)(1)(A)(ii)(I) (emphasis added). Congress thus plainly understood coca leaves to contain at least some cocaine (in addition to any salts of cocaine also in coca leaves). Only by once again excising or eviscerating the term "cocaine" can the government's interpretation succeed.

The government's argument is not just bad statutory interpretation—it is bad science as well.

To begin with, the government overlooks the fact that one of its own sources reports an extraction from coca leaves of cocaine (in base form, not as a salt).[5]

---

[5] Jorge F.S. Ferreira et al., *Histochemical and Immunocytochemical Localization of Tropane Alkaloids in* Erythroxylum Coca, 159 Int'l J. Plant Sci. 492 (1998). The study reported that dipping fresh young leaves in chloroform for 80 seconds "resulted in up to 75.5% of their cocaine extracted." *Id.* at 498. Ignoring this part of the article, the government cites another portion for the strained proposition that cocaine in coca leaves exists in "complex" with phenols—and that this means that all cocaine produced in the leaf has undergone a chemical reaction with phenol to form a salt. See U.S. Br. 43. But a closer reading makes clear that at best *some* cocaine in coca leaves is in "complex" with phenols. See *id.* at 501 ("[D]ata indicate that the alkaloids [like cocaine] *might* be naturally complexed with the phenols" and that additional reactions "result[] in *further* com-

More advanced methods of detection that do not rely on extraction-by-solvent have reached the same conclusions.[6]

As a general matter, scientific literature refers to cocaine as an alkaloid, which is defined as a "nitrogen-containing *base[]* that *occur[s] naturally in plants*." G. Marc Loudon, *Organic Chemistry* 1108 (4th ed. 2002) (emphasis added); see also U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 7 (1995) ("Cocaine is a naturally occurring substance derived from the leaves of erythroxylon plants indigenous to South America."); Physicians & Scientists Amicus Br. 2, 5.

Finally, the Court can draw scarce comfort from the government's reliance on a 125-year-old scientific report. U.S. Br. 43.[7] Observing that coca users chew

plexing.") (emphasis added). Cocaine as a base, of course, could not be "further[ed]" in any direction if it does not initially exist.

The other article cited by the government describes the results from using chloroform as a solvent to extract the chemical from coca leaves, stating that "the total cocaine extracted is not present as the free base * * * ." U.S. Br. 43. While the article cited concludes that the leaf content as a *whole* is not basic, that hardly means *none* of the leaf content is basic. See Laurent Rivier, *Analysis of Alkaloids in Leaves of Cultivated* Erythroxylum *and Characterization of Alkaline Substances Used During Coca Chewing*, 3 J. Ethnopharmacology 313, 322-323 (1981) (using chloroform and hexane to extract cocaine).

[6] See R.G. Cooks et al., *Mass-Analyzed Ion Kinetic Energy (MIKE) Spectrometry and the Direct Analysis of Coca*, 3 J. Ethnopharmacology 299, 303 (1981) (using a new technique with "the ability to identify individual components of very complex mixtures at very high sensitivities and without any prior chemical pretreatment [or] extraction" and finding that "cocaine * * * was readily identified" in a sample of ground coca leaves).

[7] See M. Bignon, *Note on the Properties of Coca and Cocaine*, 16 Pharm. J. & Transactions 265 (1885).

the leaves mixed with bases, this source suggests that they do so to convert to cocaine any salts of cocaine that are within the leaf. From this the government erroneously infers that coca leaves must contain *only* salts of cocaine. It fails to recognize that the same behavior could be equally explained by the fact that a leaf could contain *both* cocaine and its salts, such that chewing the leaf with lime or another base compound would enhance its narcotic effect. See, *e.g.*, Rivier, *supra*, at 328, 333.

In short, there is no merit to the government's claim that coca leaves do not contain "cocaine" (and hence would not meet the government's definition of containing "cocaine base"). The government's argument neither squares with Congress's understanding nor with the scientific consensus confirming the presence of cocaine—not just its salts—in coca leaves.

Coca leaves, of course, contain cocaine in its least potent form. See Sidney Cohen, 2 *The Substance Abuse Problems: New Issues for the 1980s* xiii (1985) ("The alkaloid, cocaine, is more than a hundred times more powerful than the coca leaves from which it comes."). Applying clause (iii)'s mandatory minimum to offenses involving coca leaves would have the irrational result of subjecting offenses involving leaves to harsher penalties than offenses involving cocaine hydrochloride ("cocaine powder"), one of the most dangerous drugs.

The government asserts that it has never sought a sentence enhancement for coca leaves under clause (iii). U.S. Br. 44. But the question is what Congress intended, and the government's reading of "cocaine base" requires the conclusion that Congress intended for clause (iii) to reach offenses involving coca leaves.

That contention simply is not credible. Here, as in *Johnson*, the government is attempting to force a technical definition where it "plainly do[es] not fit and produce[s] nonsense." 130 S. Ct. at 1270. Cf. *United States* v. *Stevens*, 130 S. Ct. 1577, 1591 (2010) (rejecting the government's "promise[] to use [a statute] responsibly").

5. The government's "chemical definition" approach is also sharply inconsistent with the statutory structure. It would create two distinct, non-overlapping categories: mixtures or substances containing cocaine, all of which would be subject to clause (iii)'s heightened mandatory minimum; and mixtures or substances containing "cocaine salts, optical and geometric isomers of cocaine, and salts of isomers"—such as cocaine powder—which would be subject to clause (ii)'s less severe mandatory minimum. If Congress had intended such a result, however, it could have achieved it far more simply: clause (ii) could have set out lower penalties for any "detectable amount" of "cocaine salts" (or isomers), while clause (iii) could have set higher penalties for any "detectable amount" of "cocaine."

But that is not what Congress did. The statute expressly creates overlapping categories: clause (ii) imposes a less severe minimum on a broad set of substances, while clause (iii) sets out a heightened penalty for a subset of the substances described in clause (ii) that qualify as "cocaine base." Congress's choice of this structure provides additional evidence that it did not intend to adopt the "chemical definition" urged by the government.

Moreover, the government's reading lumps crack cocaine together with a wide range of substances that do not conceivably present the same degree of

menace to society—coca leaves, cocaine-laced flowerpots, and cocaine-packed fiberglass. See Pet. Br. 43 (citing examples). Most of these substances cannot even be used by a drug consumer without much further processing. *Ibid.* At the same time, the government's construction exempts from the heightened mandatory minimum offenses using cocaine hydrochloride ("powder"), which has long been recognized as a dangerous drug.

These distinctions simply make no sense. Leaves and other non-usable forms of cocaine are not, as the government asserts, "reasonably comparable evils" within the unstated-but-presumed intent of Congress. U.S. Br. 28. And, as Judge Posner observed in rejecting the government's approach, "no reason has ever been suggested why Congress would have wanted crimes involving unprocessed cocaine to be punished more heavily than crimes involving cocaine hydrochloride." *United States* v. *Gonzalez*, 608 F.3d 1001, 1003 (7th Cir. 2010).

B. The Text, Structure, And Context Of The Provision Demonstrate That "Cocaine Base" Means Crack Cocaine.

We explained in our opening brief (at 28-30) that the text and structure of § 841(b)(1)(A)—in particular, the 100-to-1 disparity between the mandatory minimum trigger amounts in clause (ii) and clause (iii)—show that Congress intended the term "cocaine base" to focus on an especially dangerous subset of the range of substances described in clause (ii).

The government concedes that "the Congress that enacted the 1986 Act was prompted to act by a concern about 'crack'." U.S. Br. 28. Indeed, this Court has recognized that "[d]rug abuse in general, and

crack cocaine in particular, had become in public opinion and in members' minds a problem of overwhelming dimensions." *Kimbrough* v. *United States*, 552 U.S. 87, 95 (2007) (quoting U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 121 (1997)); Pet. Br. 8-9.

In 1986, when this problem came to Congress's attention, there was no generally recognized formal term describing the substance Congress wished to target (crack, which has the same chemical composition as other forms of cocaine). Congress therefore selected one of the less colloquial sounding terms then in public use—"cocaine base"—for inclusion within the statute. See Pet. Br. 31-34.

The government attacks this conclusion on a variety of grounds; none is persuasive.

1. The government protests that "[i]f Congress had wanted to limit the sentencing provision to 'crack,' it easily could have said so." U.S. Br. 15-16. But two sentences later it explains why Congress did not use the word "crack" in the CSA: "The CSA * * * does not use street names." *Id.* at 16. Congress decided to target a particularly virulent type of cocaine, then commonly referred to by a number of "street" terms, including "crack," for drastically heightened penalties. Congress reasonably chose not to use the quite informal term "crack" in the statute, but instead to use a more formal-sounding term—"cocaine base."

2. The government warns that construing "cocaine base" to include only crack cocaine will encourage "enterprising" and "clever" drug traffickers who will fashion crack-like substances. U.S. Br. 40, 41. But these concerns overlook the settled crack cocaine

definition already applied by the courts to thwart such efforts (see pp. 18-20, *infra*) and the fact that such drug traffickers will still remain subject in any event to criminal penalties for dealing other non-crack forms of cocaine.

In addition, the government's proposed definition is subject to the same criticism. Crack-like substances made from optical and geometric isomers of cocaine would not qualify as "cocaine base" under the government's "chemical definition" approach. See Pet. Br. 6-7 & n.3.

The government similarly relies on the Analogue Act—a law adapting the CSA's regulatory scheme to newly created alternative substances—to suggest that Congress intended its definition of "cocaine base" to sweep broadly. Br. 33-34. This is groundless misdirection. The purpose of the Analogue Act was to allow prosecution of crimes involving substances that do *not* appear on the drug schedules but that have substantial similarities to controlled substances. See, e.g., *United States* v. *Hodge*, 321 F.3d 429, 437 (3d Cir. 2003). The Act does not bear on the question of which *already illegal* cocaine-related substances should be subject to the harshest of penalties reserved for crack cocaine.

3. The government also complains that interpreting "cocaine base" to mean only crack cocaine would exclude other smokeable forms of cocaine such as freebase and coca paste. U.S. Br. 31-33.

At the time Congress acted, however, it understood that—in contrast to the huge threat posed by crack cocaine—concerns regarding coca paste and freebase were virtually nonexistent. In the handful of times the words "coca paste" appeared in the 1986

hearings, it was used to refer to the "intermediate product in producing the hydrochloride salt," not to a drug distributed in American cities. *"Crack" Cocaine, Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 99th Cong. 87 (1986) (statement of Dr. Robert Byck, M.D.). And Congress understood freebase largely to be a drug created by individual users for private consumption after purchasing *cocaine hydrochloride* from a dealer, not a substance that was itself widely distributed on the streets. The danger, complexity, and expense of manufacturing freebase render it not amenable to large-scale production and distribution. See, *e.g.*, *id.* at 2, 71.

Congress opted not to impose the harshest of penalties on forms of cocaine that were far less commonly marketed and prevalent in the United States (both coca paste and freebase), far more subject to self-regulation by virtue of the notorious dangers of their manufacture (freebase), and far less potent when smoked (coca paste).

Congress's decision not to include some non-crack forms of smokeable cocaine is no different that its determination not to impose the harsher mandatory minimum on offenses involving other forms of cocaine-related substances that are indisputably *not* "cocaine base." Congress, for example, did not single out crimes involving injectable forms of cocaine salts for a harsher penalty. As the government concedes, *both* injected cocaine hydrochloride and crack "reach[] the brain most quickly," with "short lasting effects" leading to more dosages and that create the greatest danger of addiction. U.S. Br. 10. A statutory scheme that aimed broadly at all sub-

stances similar to crack would surely provide for increased penalties for injectable cocaine as well.

To be sure, the government could argue that drug users are more likely to smoke crack than to inject cocaine hydrochloride—and that Congress could reasonably have decided to exclude that substance because the threat to society was not as acute as that posed by the more "user-friendly" crack cocaine. But precisely the same is true of the disincentive to risk self-immolation like Richard Pryor by home-brewing freebase cocaine. No sensible reason explains why Congress would subject freebase cocaine to a harsher penalty than injectable cocaine hydrochloride, which is precisely what the government's overbroad interpretation of "cocaine base" would require.

In addition, Congress chose a lower quantity trigger for crack cocaine because it was aware that crack dealers sold their wares in much smaller quantities than cocaine powder dealers. That is, Congress singled out crack because of the way it was sold, not only because of the way it made users feel.

Immediately prior to the Act's passage, the DEA reported that "[c]rack is sold almost exclusively by * * * retail dealers" in quantities that "infrequently exceed one ounce [28.3 grams]," whereas cocaine powder dealers make "multi-kilogram quantities of cocaine hydrochloride available." U.S. DEA, *Special Report: The Crack Situation in the United States* 2 (1986). Thus was born the 100-to-1 ratio (28.3 grams is approximately 1/100th of 3 kilograms). Congress narrowly tailored clause (iii)'s quantity trigger to reflect the quantities in which *specifically crack cocaine* was being trafficked on the streets. See *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 4-5 (1997) ("To determine the quantity of

drugs indicative of mid-level or serious traffickers, Congress consulted with drug enforcement experts to gather information about drug markets at the time [1986] and set quantity triggers based on this information."); see also H.R. Rep. No. 99-845, 11-12 (1986).

In sum, construing "cocaine base" to mean crack cocaine is the only interpretation that is consistent with the statutory text, structure, and context.

C. The Cases Interpreting The Sentencing Guidelines' Definition of Crack Cocaine Provide A Clear Standard For "Cocaine Base."

The government contends (U.S. Br. 37-38) that interpreting "cocaine base" to mean crack cocaine will create tremendous uncertainty. But the cases interpreting the relevant Sentencing Guidelines provision provide a fully fleshed-out definition—a definition that the government itself has defended as clear in other contexts.

1. The Sentencing Guidelines define crack cocaine as "a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rock like form." U.S.S.G. § 2D1.1(c) (n.D). *All* district courts nationwide have been applying the Guidelines definition of crack cocaine to calculate a defendant's applicable sentencing range once statutory minimums are met.[8]

---

[8] Sentencing judges must calculate the applicable Guidelines range before determining a precise sentence. *United States* v. *Booker*, 543 U.S. 220, 259 (2005). Because the applicable range is dependent upon whether the offense involved crack cocaine,

The government protests that crack cocaine has "no inherent plain meaning" (U.S. Br. 37) and that the Guidelines definition of crack is "hardly precise" (U.S. Br. 38). But this complaint is belied by 17 years of judicial experience. The Second Circuit, for example, concluded that "[t]he Guidelines definition is * * * lucid enough for lawyers, dealers, users and citizens." *United States* v. *Canales*, 91 F.3d 363, 368 (2d Cir. 1996).

Indeed, when fending off challenges by criminal defendants to the Guidelines definition of crack cocaine, the government has been quick to argue that the Guidelines definition is plainly understandable and perfectly workable. See, *e.g.*, Brief for the United States at 36, *United States* v. *Leonard*, 116 F.3d 492 (11th Cir. 1997) (No. 96-4017) ("[N]either law enforcement, the courts, nor drug distributors * * * have had any difficultly making the distinction between 'crack' and other forms of cocaine and cocaine base."); Brief for the United States at 32, *United States* v. *Canales*, *supra* (analogizing ability to distinguish between crack and freebase to an ordinary person's ability to distinguish between "water and ice").

What is more, the government has argued that "[b]y restricting the definition of 'cocaine base' to crack, the Guidelines * * * have made it easier for ordinary citizens and police officers to understand

---

courts must determine whether the substance was crack for Guidelines calculation purposes. Thus, even courts in circuits that have adopted the government's construction of "cocaine base" must determine whether a substance is crack. See, *e.g.*, *United States* v. *Waters*, 313 F.3d 151 (3d Cir. 2002); *United States* v. *Diaz*, 176 F.3d 52, 119 (2d Cir. 1999); *United States* v. *Brooks*, 161 F.3d 1240, 1248 (10th Cir. 1998).

what conduct the statute addresses," and therefore that "the Guidelines have added clarity, not ambiguity, to prosecutions involving crack." Brief for the United States at 28, *United States* v. *Miller*, 89 F.3d 853 (11th Cir. 1996) (No. 94-5013).[9] The government's new-found arguments to the contrary ring hollow in light of these prior statements.

2. The government's concerns that prosecutors will have to take elaborate measures to show a substance is crack or that defendants will escape higher sentences through loopholes have failed to materialize in the lower courts' application of the Guidelines definition. Courts have been flexible in construing crack to include substances prepared with agents other than sodium bicarbonate (baking soda); "enterprising" drug dealers have not escaped heightened crack penalties simply by using other reactants.[10]

The government's reference to a case in which "DEA chemists were required to assemble a device similar to a 'crack pipe' that * * * could 'smoke' a drug sample in a laboratory setting" (U.S. Br. 39) is wholly inapposite. The issue there did *not* concern whether or not the substance involved was crack cocaine. Rather, the defendant contended that his sentence should be modified in light of an applicable Guidelines amendment pertaining to how substances are weighed. *United States* v. *Byfield*, No. 89-0322

---

[9] See also Brief for the United States at 35, *United States* v. *Leonard*, *supra* (arguing that the Guidelines definition "adds clarity, not the relative obfuscation that limiting the definition to a chemical one * * * would entail").

[10] See, *e.g.*, *United States* v. *Eli*, 379 F.3d 1016 (D.C. Cir. 2004); *Waters*, *supra*, at 155; *Diaz*, *supra*, at 119; *Brooks*, *supra*, at 1248.

(TFH), 2006 WL 2228936, at *1 (D.D.C. Aug. 3, 2006). The DEA's "crack pipe" experiment—which was in no sense "required"—served to bolster the prosecution's claim that the substance was "usable" in the form in which it was found and that its entire weight should therefore be counted.

The government omits from its discussion any mention of a case decided by the D.C. Circuit stating precisely that the prosecution does *not* have to stage any sort of "smoking" display to demonstrate that the defendant is subject to clause (iii)'s higher mandatory minimum for offenses involving "cocaine base." *Eli*, *supra*, at 1022 ("Although [the defendant] rejects [the Government's] testimony on the ground that the chemist did not attempt to smoke the substance himself, we can hardly insist that a government chemist smoke a drug sample in order to certify its identity.").

In sum, the well-established jurisprudence developed under the Guidelines defining the term "crack cocaine" precludes any possibility that interpreting clause (iii) to encompass crack cocaine will create uncertainty in the lower courts.

D. The Court Should Apply The Rule of Lenity.

If the Court finds that the statute is ambiguous—that the government's reading of "cocaine base" is inconsistent with science and logic, but that petitioner's reading is not sufficiently persuasive—then the Court should apply the rule of lenity to limit "cocaine base" to mean only crack cocaine.

"[B]ecause of the seriousness of criminal penalties * * * legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U.S.

336, 348 (1971). The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion of Scalia, J.) (citing *Bass*). "This venerable rule * * * places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Ibid.* If Congress intended "cocaine base" to have the broad meaning advocated by the government, then "Congress can make that meaning clear." *Holloway* v. *United States*, 526 U.S. 1, 20 (1999) (Scalia, J., dissenting) (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)).

"It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Holloway*, 526 U.S. at 21 (quoting *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). In keeping with this presupposition, this Court should adopt petitioner's reading of 21 U.S.C. § 841(b)(1)(A), and leave "Congress * * * to enact the words that will produce the result the Government seeks." *Bifulco* v. *United States*, 447 U.S. 381, 401 (1980).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

EDUARDO A. MASFERRER
Masferrer & Hurowitz, P.C.
6 Beacon Street
Suite 720
Boston, MA 02108
(617) 531-0135

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

FEBRUARY 2011