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**

## BRIEF FOR PETITIONER


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## QUESTION PRESENTED

Section 841(b)(1)(A) of Title 21 requires the imposition of a ten-year mandatory minimum sentence upon persons who engage in a drug trafficking offense involving either (a) 5 kilograms or more of "coca leaves" or "cocaine," or (b) 50 grams (.05 kilograms) or more of those substances, or of a mixture of those substances, "which contain[] cocaine base."

The question presented is whether the term "cocaine base" encompasses every form of cocaine that is classified chemically as a base—which would mean that the ten-year mandatory minimum applies to an offense involving 50 grams or more of raw coca leaves or of the paste derived from coca leaves, but that 5,000 grams of cocaine hydrochloride (commonly known as "cocaine powder") would be required to trigger the same ten-year minimum—or whether the term "cocaine base" is limited to crack cocaine.[1]

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[1] Following the grant of certiorari in this case, Congress amended the quantity of "cocaine base" required to trigger the ten- and five-year mandatory minimum sentences under 21 U.S.C. § 841(b) from 50 grams and 5 grams to 280 grams and 28 grams, respectively. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. We refer in this brief to the trigger levels set forth in the original statute. See note 2, *infra*.

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## BRIEF FOR PETITIONER

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 599 F.3d 25. The district court's oral ruling on jury instructions (Pet. App. 13a) and its imposition of sentence (Pet. App. 14a-15a) are not reported.

## JURISDICTION

The judgment of the court of appeals was entered on March 17, 2010. The petition for a writ of certiorari was filed on June 15, 2010, and was granted on October 12, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. At the time of the conduct at issue in this case, Title 21, U.S. Code § 841 provided in relevant part:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
> >
> > (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—* * *

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years * * *.

(1)(B) In the case of a violation of subsection (a) of this section involving—* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years * * *.[2]

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[2] In 2010, Congress amended the quantity of "cocaine base" required to trigger the ten- and five-year mandatory minimum sentences under 21 U.S.C. § 841(b) from 50 grams and 5 grams to 280 grams and 28 grams, respectively. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. However, at the time of petitioner's offense, conviction, and sentencing, the 50- and 5-gram triggers applied. And the trigger levels included at the time Congress adopted the "cocaine base" standard are the ones relevant in interpreting that standard. Therefore, throughout this brief, we refer to the pre-amendment version of

2. The U.S. Sentencing Guidelines Manual § 2D1.1(c) (Notes to the Drug Quantity Table) provides in relevant part:

> (D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

## STATEMENT

Nearly 25 years ago, Congress responded to the introduction of crack cocaine to the nation's illegal drug market by enacting the Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, 100 Stat. 3207, amending the federal drug laws to require significantly longer terms of imprisonment for drug related offenses. This Court has recognized that "[c]rack cocaine was a relatively new drug when the 1986 Act was signed into law, but it was already a matter of great public concern." *Kimbrough* v. *United States*, 552 U.S. 85, 95 (2007).

Congress provided that an offense had to involve 5 kilograms of unprocessed cocaine or 5 kilograms of cocaine's salts (the category that includes "powder cocaine") in order to trigger a ten-year mandatory minimum sentence, but it applied the very same ten-year mandatory sanction to offenses involving only 50 grams of "cocaine base." The question in this case is whether "cocaine base" means only crack cocaine

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the statute. The language of the two versions is identical except for the numerical changes.

or instead includes all cocaine-related substances other than powder cocaine and other cocaine salts.

The statutory language, structure, and context all lead to the same result: "cocaine base" means crack cocaine. The expansive construction of "cocaine base" urged by the government is inconsistent with the statutory language and purpose, would render significant parts of the statute superfluous, and would lead to absurd results—extending this severe mandatory minimum penalty for offenses involving a small quantity of drugs to substances posing a much lower threat of harm than crack cocaine.

## A. Statutory Background

### *1. Regulation Of Cocaine-Related Substances Before The Advent Of Crack Cocaine*

Doctors in the late 1800s employed remedies containing cocaine-related substances to treat a variety of conditions including "respiratory ailments," "alcoholism," "morphine addiction," and depression. U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 8, 112 (1995) [hereinafter *1995 U.S.S.C. Report*]; see also Joseph F. Spillane, *Cocaine: From Medical Marvel to Modern Menace in the United States, 1884-1920*, at 1 (2000) (cocaine was characterized by doctors "as one of the most important contributions of medical science to health and well-being").

By the beginning of the twentieth century, however, the perception of drugs containing cocaine-related substances had changed. Several States began to regulate such drugs, and in 1914 Congress passed the Harrison Narcotics Act, banning non-

medical use and imposing strict limits on medical uses. *1995 U.S.S.C. Report*, *supra*, at 9.

Congress overhauled federal drug control laws in 1970 through enactment of the Controlled Substances Act (CSA), which was adopted as Title 2 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, 1242 (codified as amended in U.S.C. §§ 801 *et seq*.). The CSA repealed most of the older drug laws and created a comprehensive scheme regulating the manufacture, importation, distribution, possession, and use of certain drugs. See *Gonzales* v. *Raich*, 545 U.S. 1, 10-14 (2005) (describing the passage and structure of the CSA).

The statute allocated regulated drugs among five separate schedules, "based on [each drug's] accepted medical uses, the potential for abuse, and [the drug's] psychological and physical effects on the body." *Id*. at 13; see also 21 U.S.C. § 812 (statutory schedule of controlled substances). Cocaine-related substances were classified in Schedule II, 21 U.S.C. § 812(c) (Schedule II(a)(4)), and also included within the statute's definition of a "narcotic drug." 21 U.S.C. § 802(17).

Congress in 1984 adjusted the CSA's penalty structure for drug trafficking offenses by enacting the Controlled Substances Penalties Amendments Act of 1984 (CSPAA), Pub. L. No. 98-473, 98 Stat. 2068. These amendments introduced drug quantity as a factor in determining sentences, with penalties based upon the "type and amount of drug involved in the offense." *1995 U.S.S.C. Report*, *supra*, at 116.

The CSPAA also expanded the range of cocaine-related substances that qualified as a "narcotic

drug," the definition that at the time served as a basis for imposition of the criminal penalty provision under 21 U.S.C. § 841(b). See CSPAA §§ 502 and 507(b), 98 Stat. at 2068, 2071; *United States* v. *Meyers*, 847 F.2d 1408, 1414 (9th Cir. 1988). The term "narcotic drug" was amended by the CSPAA to include the following cocaine-related substances:

> (C) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed.
>
> (D) Cocaine, its salts, optical and geometric isomers, and salts of isomers.
>
> (E) Ecgonine, its derivatives, their salts, isomers, and salts of isomers.
>
> (F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to [in the preceding subclauses].

CSPAA § 507(b) (amending 21 U.S.C. § 802(17)).[3]

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[3] The CSPAA also updated the controlled substances schedules of § 812. See CSPAA § 507(c), 98 Stat. at 2071. Technical amendments in 1986 conformed the exact wording of 21 U.S.C. § 812 to that of § 802. See ADAA § 1867, 100 Stat. at 3702-55; Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 84, 100 Stat. 3592, 3619.

An impetus for changing the language was to defeat the so-called "cocaine isomer strategy" that had been employed to challenge prosecutions involving synthetic versions of cocaine-related substances. See, *e.g.*, *United States* v. *Puglisi*, 790 F.2d 240, 242 n.1 (2d Cir. 1986) (explaining the reason for the amendment).

### *2. The Crack Cocaine Epidemic Of The 1980s*

Crack cocaine first appeared in the illegal drug marketplace in the early 1980s. Crack cocaine is an easy-to-produce, smokeable substance containing cocaine that "delivers large quantities of cocaine to the lungs, producing effects comparable to intravenous injection" without the perceived danger or stigma of needle use. U.S. Drug Enforcement Administration, U.S. DOJ, *Drugs of Abuse* 32 (2005) [hereinafter *Drugs of Abuse*].

Crack cocaine users feel the intense effects of the drug "almost immediately," but the high is "quickly over" compared with snorting cocaine hydrochloride (commonly referred to as "powder cocaine" or "cocaine powder"). *Ibid.*; see also *Kimbrough*, 552 U.S. at 94 ("[S]moking crack cocaine allows the body to absorb the drug much faster than inhaling powder cocaine, and thus produces a shorter, more intense high."); U.S. Dep't of Health and Human Servs., Pub. Health Serv., Alcohol, Drug Abuse, and Mental Health Administrator, *Stimulants and Cocaine: Just Say No* (1984) (pamphlet on use and dangers of stimulants and cocaine) (stating that smoking crack cocaine produces a "shorter and more intense 'high' than other ways of using [cocaine-related substances] because smoking is the most direct and rapid way to get the drug to the brain").

The ease with which crack cocaine can be produced contributed to its popularity. Crack cocaine can be made "from several basic household products and cocaine [hydrochloride]." *Drugs of Abuse*, *supra*, at 33. It "is formed by dissolving powder cocaine and baking soda in boiling water. The resulting solid is

divided into single-dose 'rocks' that users smoke." *Kimbrough*, 552 U.S. at 94 (citations omitted).

Crack cocaine "was cheap [to buy], simple to produce, ready to use, and highly profitable for dealers to develop." Drug Enforcement Admin., *Drug Enforcement Administration: A Tradition of Excellence, 1973-2003*, at 59, *available at* http://www.justice.gov/dea/pubs/history/1985-1990.pdf [hereinafter *DEA 1973-2003*]. "Once introduced in the mid-1980's, crack abuse spread rapidly and made the cocaine experience available to anyone with $10 and access to a dealer." *Drugs of Abuse*, *supra*, at 32. As the Director of the National Institute on Drug Abuse put it when he testified before Congress, "[t]he recent manufacturing and distribution of crack cocaine, which has emerged in 1985 is * * * of great concern because it is conveniently packaged, easily and rapidly ingested by smoking, and initially affordable." *"Crack" Cocaine, Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 99th Cong. 13 (1986) [hereinafter *1986 S. Crack Cocaine Hearing*] (statement of Charles R. Schuster, Ph.D, Director, National Institute on Drug Abuse).

According to the Drug Enforcement Administration, "in 1985, the crack epidemic hit the United States full force, resulting in escalating violence among rival groups and crack users in many * * * cities." *DEA 1973-2003*, *supra*, at 59. "By early 1986, crack had a stranglehold on the ghettos of New York City and was dominated by traffickers and dealers from the Dominican Republic. Crack distribution and abuse exploded in 1986, and by year-end was available in 28 States and the District of Columbia." *Id*. at 60. As crack cocaine spread through American cities,

it "dramatically increased the numbers of Americans addicted to cocaine." *Ibid.*

Heroin had been considered to be the most dangerous unlawful drug—before the arrival of crack cocaine. But experts noted that crack cocaine was more addictive and more dangerous than heroin, as well as cheaper to produce and buy on the street. *The Crack Cocaine Crisis*, *Joint Hearing Before the Select Comm. on Narcotics Abuse and Control, H.R., and the Select Comm. on Children, Youth, and Families, H.R.*, 99th Cong. 60 (1986) [hereinafter *1986 H.R. Crack Cocaine Hearing*] (testimony of Isaac Fullwood, Assistant Chief of Police, Washington, D.C.); see also U.S. Customs Serv. Drug Awareness Program, *Crack—The New Menace: You Can Help!* (1986) (noting that "[t]he significant differences between [crack cocaine] and ordinary cocaine have caused its abuse to explode across our country, coast to coast").

The extensive media coverage of crack cocaine during this period was summarized by the U.S. Sentencing Commission in its 1995 report to Congress:

> Crack cocaine was first mentioned in the media by the Los Angeles Times on November 25, 1984, referring to a cocaine "rock" that was appearing in the barrios and ghettos of Los Angeles. The New York Times first mentioned crack in a story on November 17, 1985. The coverage increased and intensified over time. In the months leading up to the 1986 elections, more than 1,000 stories appeared on crack in the national press, including five cover stories each in Time and Newsweek. NBC news ran 400 separate reports on crack (15 hours of airtime). Time

> called crack the "Issue of the Year" (September 22, 1986). Newsweek called crack the biggest news story since Vietnam and Watergate (June 16, 1986). CBS News aired a documentary entitled "48 Hours on Crack Street."

*1995 U.S.S.C. Report*, *supra*, at 122.

### *3. Congress Responds To The Crack Cocaine Epidemic*

This Court has recognized that by 1986 crack cocaine "was already a matter of great public concern" and, in the minds of members of Congress, "a problem of overwhelming dimensions." *Kimbrough*, 552 U.S. at 95 (quoting *1995 U.S.S.C. Report*, *supra*, at 121). Congressional committees held hearings in 1986 to gather information regarding crack cocaine.[4]

These deliberations culminated in enactment of the Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, 100 Stat. 3207. The ADAA imposed mandatory minimum penalties for offenses involving controlled substances, including cocaine-related sub-

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[4] See, *e.g.*, *1986 H.R. Crack Cocaine Hearing*, *supra*, at 2 (statement of Rep. Gilman, member, H. Select Comm. on Narcotics Abuse and Control) ("[A]n even deadlier drug is now available for consumption. That drug is crack, and it's sweeping across our country like a tidal wave. It's inexpensive and highly depressive, our young people are using it in all of our metropolitan areas * * * ."); *1986 S. Crack Cocaine Hearing*, *supra*, at 1-2 (statement of Chairman Roth) (identifying "a frightening and dangerous new twist in the drug abuse problem—the growing availability and use of a cheap, highly addictive, and deadly form of cocaine known on the streets as 'crack,'" and observing that "crack is endangering the lives and futures of many people who previously would not have had access to cocaine").

stances. It imposed a mandatory ten-year minimum sentence for cocaine-related offenses, depending on both the quantity and type of cocaine-related substance involved. The ten-year minimum applied to offenses involving:

> (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—
>
> > (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
> >
> > (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
> >
> > (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
> >
> > (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III); [or]
>
> (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base.

*Id*. § 1002, 100 Stat. at 3207-2 (codified as amended at 21 U.S.C. § 841(b)(1)(A)(ii), (iii)). Offenses involving 500 grams or more of mixtures containing coca leaves or cocaine, and those involving 5 grams or more of such mixtures "which contain[] cocaine base," carried a five-year mandatory minimum. 100

Stat. at 3207-3 (codified as amended at 21 U.S.C. § 841(b)(1)(B)(ii), (iii)).[5]

The four categories of cocaine-related substances set forth in clause (ii) above repeat verbatim the then-existing cocaine-related provisions of the "narcotic drug" definition in 21 U.S.C. § 802(17). Clause (iii), however, creates a new category: "a mixture or substance described in clause (ii)" that "contains cocaine base." The statute thus punishes the possession of just 50 grams of such a mixture containing "cocaine base" as severely as 5,000 grams (5 kilograms) of any cocaine-related mixture that does not.[6]

While the ADAA "moved quickly through Congress and the legislative history is sparse," that history, "as evidenced mainly by the statements of individual legislators, suggests that Congress perceived crack cocaine to be at the forefront of a national drug-abuse epidemic." U.S. DOJ, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 10 n.71 (2002); see also, *e.g.*, 132 Cong. Rec. 22,948-22,949 (1986) (statement of Rep. Young) (noting that "[c]rack is extremely dangerous because it is immediately addictive," "relatively inexpensive," and "can cause death" and that the legislation took a "wide-ranging approach to combat drug abuse"); *id.* at

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[5] Congress imposed the same mandatory minimums with respect to smuggling these substances. CSA § 1301, 100 Stat. at 3207-15 to 3207-18 (codified as amended at 21 U.S.C. § 960(b)).

[6] The Fair Sentencing Act of 2010 increased the quantity of a mixture or substance containing "cocaine base" necessary to trigger the five-year and ten-year mandatory minimum sentences from 5 grams and 50 grams to 28 grams and 280 grams, respectively, and also eliminated the mandatory minimum sentence for simple possession of "cocaine base." See note 1, *supra*.

22,977 (statement of Rep. McCollum) ("[C]rack * * * has become one of the most tremendous problems that we have."); *id*. at 22,991 (statement of Rep. Dorgan) ("[D]rug use * * * in America has reached epidemic proportions. * * * Perhaps even more alarming [than widespread use of cocaine-related substances] is the growing popularity of crack or cheap cocaine.").[7]

As this Court has explained, Congress's intent in enacting this new penalty provision was to single out offenses involving crack cocaine for enhanced punishment. "Congress apparently believed that crack was significantly more dangerous than powder cocaine" in several ways, including that:

> (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers' drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack's potency and low cost were making it increasingly popular.

*Kimbrough*, 552 U.S. at 95-96 (citing U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* iv (2002)). The Solicitor General urged this position on the Court in *Kimbrough*. See U.S. Br. at 31-32, *Kimbrough*, 552 U.S. 85 (No. 06-6330) ("Congress clearly intended to impose signifi-

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[7] Indeed, weeks before it adopted drug law changes, Congress sent a joint resolution to the President, declaring October 1986 "Crack/Cocaine Awareness Month." H.J. Res. 678, 99th Cong. (1986).

cantly greater penalties on distributors of crack cocaine than similarly situated distributors of powder cocaine.").

### B. Scientific Background

#### *1. Chemical Description*

Cocaine is a naturally occurring chemical compound found in the leaves of the coca plant indigenous to South America. *1995 U.S.S.C. Report*, *supra*, at 9; see also *United States* v. *Gonzalez*, 608 F.3d 1001, 1002 (7th Cir. 2010) (Posner, J.). Cocaine has the molecular formula $C_{17}H_{21}NO_4$, meaning that in each molecule of cocaine there are 17 carbon atoms, 21 hydrogen atoms, 1 nitrogen atom, and 4 oxygen atoms. See *United States* v. *Edwards*, 397 F.3d 570, 574 (7th Cir. 2005); *United States* v. *Barbosa*, 271 F.3d 438, 462 (3d Cir. 2001).[8]

Chemical compounds are often grouped together based upon common characteristics. One common classification scheme describes compounds as either acids or bases because "many of the reactions that occur in organic chemistry are either acid-base reactions themselves or * * * involve an acid-base reaction." T.W. Graham Solomons & Craig B. Fryhle, *Organic Chemistry* 97 (8th ed. 2004). There are a vari-

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[8] Simply specifying a given number of various different types of atoms does not uniquely define a chemical compound because the given atoms can be bonded together in different arrangements. Thus, while cocaine has the molecular formula $C_{17}H_{21}NO_4$, not all compounds with the molecular formula $C_{17}H_{21}NO_4$ are cocaine. These other compounds are isomers of cocaine. Legally, the difference between cocaine and its isomers may be negligible because 21 U.S.C. § 841 lumps together "cocaine * * * [and its] optical and geometric isomers." 21 U.S.C. § 841(b)(1)(A).

ety of technical definitions for the terms "acid" and "base" suited to various types of chemical reactions. One of the most general definitions states that an acid "is a [compound] that accepts an electron pair to form a new bond in a chemical reaction" and a base is "the [compound] that donates the electron pair." G. Marc Loudon, *Organic Chemistry* 83 (Oxford Univ. Press, 4th ed. 2002).

Cocaine is a base. It belongs to a group of compounds known as alkaloids, which are "nitrogen-containing *bases* that occur naturally in plants." *Id.* at 1108 (emphasis added); see also *United States* v. *Brisbane*, 367 F.3d 910, 911 (D.C. Cir. 2004) ("Cocaine is a naturally occurring alkaloid—that is, a base.").[9]

Cocaine's basicity is a result of its structure; accordingly, that basicity persists as long as the cocaine molecule persists. If cocaine is mixed with other substances with which it does not react chemically, the cocaine molecule will persist in the mixture and retain its intrinsic basicity.

But if cocaine's molecular structure is changed through a chemical reaction, then the result is a new and different molecule, one that may or may not be basic depending on its structure. For example, react-

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[9] Alkaloids (including cocaine) are classified as a subset of a larger group of nitrogen-containing organic compounds called amines. Loudon 1108. Amines are "the most common organic *bases*." *Ibid.* (emphasis added); see also *id.* at 1110 ("Basicity is one of the most important chemical properties of amines."). The structure and consequent basicity of cocaine have been understood for over a century. See, *e.g.*, A. Pictet, *The Vegetable Alkaloids* 233 (H.C. Biddle trans. 1904) ("Cocaine is a tertiary base.").

ing cocaine (a base) with hydrochloric acid under the right conditions produces a new and different chemical compound called cocaine hydrochloride (the salt that is commonly known as "powder cocaine"). See *Gonzalez*, 608 F.3d at 1002; *Brisbane*, 367 F.3d at 911; *Barbosa*, 271 F.3d at 462.

Molecules of cocaine hydrochloride can be processed by chemical reaction back into molecules of cocaine. *Gonzalez*, 608 F.3d at 1003. Molecules of cocaine in a coca leaf, on one hand, and molecules of cocaine produced via chemical reaction from cocaine hydrochloride, on the other, are "chemically indistinguishable" and, as with all molecules of cocaine, are inherently basic. *Barbosa*, 271 F.3d at 462.

### *2. Production Techniques*

Prior to its importation into the United States, cocaine is ordinarily extracted from coca leaves by means of "mixing the leaves with an alkaline material (*e.g.*, sodium bicarbonate), an organic solvent (*e.g.*, kerosene), and water." *1995 U.S.S.C. Report*, *supra*, at 11.[10] The resulting solid substance is known as coca paste, and because it contains molecules of cocaine, it is a chemically basic substance. *Ibid.*

The substance known as "powder cocaine"—chemically, cocaine hydrochloride—is made by processing coca paste with the use of, among other substances, hydrochloric acid, potassium salt, and water. *Id.* at 12. Cocaine hydrochloride has the molecular formula $C_{17}H_{22}ClNO_4$ and is classified chemically

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[10] "Due to differing environmental factors, the cocaine content of the coca leaf ranges between 0.1 percent and 0.8 percent." *Ibid.*

as a salt, rather than a base. *Ibid*. Because they are entirely different molecules, cocaine hydrochloride is chemically a different substance than cocaine. "Cocaine hydrochloride is a powder usually consumed either by being sniffed or by being dissolved in water and then injected. (It cannot be smoked because heating causes it to burn rather than vaporize.)" *Gonzalez*, 608 F.3d at 1002-1003.

Crack cocaine, on the other hand, is a smokeable substance ordinarily produced by reacting cocaine hydrochloride with water and sodium bicarbonate (*i.e.*, baking soda), a process that converts the cocaine hydrochloride molecules into the chemically distinct cocaine molecules found in crack cocaine. See *1995 U.S.S.C. Report*, *supra*, at 14; see also *Gonzalez*, 608 F.3d at 1004 (noting that the "usual method" of making crack cocaine is by using baking soda but also noting alternatives of using other "weak bases" to achieve the same result).

Thus, crack cocaine—like coca leaves and coca paste—has molecules of cocaine and is chemically basic. See *1995 U.S.S.C. Report*, *supra*, at 12-13; see also *Barbosa*, 271 F.3d at 462 ("The chemical compound $C_{17}H_{21}NO_4$, either in nature or upon conversion from cocaine hydrochloride, is a base, and its distinct physical forms, such as coca paste and crack, are chemically indistinguishable.").

"Freebase" is another substance that contains molecules of cocaine and is consequently chemically basic. In contrast to crack cocaine, "freebase" cocaine results from mixing cocaine hydrochloride with a strong alkali solution (such as ammonia) and an organic solvent (such as ether). *1995 U.S.S.C. Report*, *supra*, at 13. The popularity of "freebase" declined in the 1980s following a notorious accident that befell

celebrity comedian Richard Pryor when, because of his "freebasing" with the extremely flammable ether solvent, he sustained serious burns to his body. *Ibid.* Although "there are still freebasers" in the United States today, "crack is generally believed to be the only form of cocaine base that is widely consumed," *Gonzalez*, 608 F.3d at 1003, because it is far less dangerous to produce and delivers the same high as "freebase."

### C. The Sentencing Commission Guidelines

The U.S. Sentencing Commission in 1987 calibrated sentences for offenses involving "cocaine base" in light of the mandatory minimum sentences prescribed by Congress under the ADAA. That is, the Commission designed the Guidelines' drug quantity table—which provides base offense levels corresponding to possession of various quantities of drugs—so that these base offense levels would translate into sentences consistent with the mandatory minimum sentences those same quantities of controlled substances would trigger under the ADAA. See U.S.S.G. § 2D1.1(a) (1987) (instructing judges to "[a]pply * * * the offense level specified in the Drug Quantity Table set forth in subsection (c)"); *id.* § 2D1.1(c) (providing base offense levels for possession of different quantities of various controlled substances, including for "cocaine base"); see also *id.* § 2D1.1 cmt. n.10 (stating that the Commission had "used the sentences provided in, and equivalences derived from, the ADAA, as the primary basis for the guideline sentences"); *Kimbrough*, 552 U.S. at 109 (noting that "[i]n formulating Guidelines ranges for crack cocaine offenses, * * * the Commission looked to the mandatory minimum sentences set in the 1986 Act").

The federal courts of appeals quickly divided with respect to the meaning of the term "cocaine base" in the Guidelines. Some circuits held that "cocaine base" had a strictly scientific meaning and encompassed any form of cocaine—including but not limited to crack cocaine—that qualified chemically as a base. See, *e.g.*, *United States* v. *Rodriguez*, 980 F.2d 1375, 1378 (11th Cir. 1992) (per curiam) ("[T]he term 'cocaine base' has a specific scientific meaning."); *United States* v. *Jackson*, 968 F.2d 158, 161-163 (2d Cir. 1992) ("'[C]ocaine base' has a precise definition in the scientific community.").

By contrast, the Ninth Circuit concluded, based on a lengthy review of the background of the enactment of the ADAA, that Congress did not intend a scientific meaning for the term "cocaine base." *United States* v. *Shaw*, 936 F.2d 412, 415-416 (9th Cir. 1991) (noting multiple legislative statements about crack cocaine and the lack of "any statements indicating that 'cocaine base' refers to cocaine that is a 'base' for chemistry purposes"). It held that "Congress and the Commission must have intended the term 'cocaine base' to include 'crack,' or 'rock cocaine,' which we understand to mean cocaine that can be smoked, unlike cocaine hydrochloride [powder]." *Id.* at 416.

In 1993, the Commission submitted to Congress an amendment to the Guidelines resolving this disagreement by explicitly defining "cocaine base" as crack cocaine:

> "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride

> and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

U.S.S.G. § 2D1.1(c) (Notes to the Drug Quantity Table), amend. 487 (proposed).

The Sentencing Commission explained that "[u]nder this amendment, forms of cocaine base other than crack (*e.g.*, coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride, scientifically is a base form of cocaine, but it is not crack) will be treated as cocaine." *Ibid.* The amendment took effect several months later. See 28 U.S.C. § 994(p); U.S.S.G. § 2D1.1(c) (Notes to the Drug Quantity Table), amend. 487 (eff. Nov. 1, 1993).

### D. Proceedings Below

#### *1. The Indictment And Trial*

Petitioner was charged with distributing 50 grams or more of a substance containing "cocaine base," in violation of 21 U.S.C. § 841(a)(1), and the government sought a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(iii).

The government argued to the district court that the jury was required to find only that petitioner distributed "cocaine base, not that it was the particular form of cocaine base known as crack cocaine." Tr. 443.[11] Petitioner requested that the jury be instructed that it was obligated to find that petitioner's offense involved "not just cocaine base, but the form known as crack cocaine." Tr. 512. The district court ruled that "the question is cocaine base; that is, the nonhydrochloride form of cocaine, which may or may

[11] "Tr." refers to the trial transcript.

not manifest itself in something that's been identified as crack cocaine." Pet. App. 13a.

The court's instructions directed the jury to determine whether the controlled substance was "cocaine base," pointing out that there had been testimony about "crack cocaine" but that "the statute that's relevant asks about cocaine base. Crack cocaine is a form of cocaine base, so you'll tell us whether or not what was involved is cocaine base." Tr. 585; see also Tr. 595 (reemphasizing the government's burden to prove "that what was involved was cocaine base").[12] The verdict form likewise required the jury to find only that petitioner possessed "cocaine base." Pet. App. 17a.[13]

Following petitioner's conviction, the district court sentenced him to ten years in prison—the minimum sentence required given the court's determination that "cocaine base" under 21 U.S.C. § 841(b)(1)(A)(iii) means all chemically basic forms of cocaine. The district judge stated:

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[12] Although the jury was asked to determine the nature of the drug at issue, the court of appeals acknowledged that this jury finding was not required under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Pet. App. 9a.

[13] Moreover, the evidence would not have supported a finding that petitioner's offense involved crack cocaine. The government's expert witness was "not able to identify baking soda in th[e] sample" (Tr. 499) and did not otherwise testify that the substance was crack cocaine. The court of appeals erred in suggesting that "some evidence indicates the substance here was crack." Pet. App. 10a. The district court did "repeatedly refer[] to [the substance] as crack" at sentencing (see *ibid.*), but that was because after the district court's jury instruction the parties used the term "cocaine base" and "crack cocaine" interchangeably. Pet. 11 n.5.

> I also say, as I must in these circumstances, I think this is far too harsh a sentence for you and if I had my choices, my choices would have been closer to the recommendation [of 41-51 months] that [petitioner's counsel] made than it is to that which the government made, but I don't have the choices here. So, under these circumstances, I've given you the lowest sentence in terms of incarceration that I can * * * .

Pet. App. 15a.[14]

### *2. The Court Of Appeals's Decision*

The court of appeals affirmed, rejecting petitioner's contention that the term "cocaine base" in § 841(b)(1)(A)(iii)—the provision requiring the ten-year mandatory minimum sentence—should be construed to encompass only crack cocaine and not other cocaine-containing substances that can be categorized chemically as a base. The court stated that while crack cocaine was "admittedly" the main focus of Congress's concern in passing the ADAA, prior First Circuit precedent held that "cocaine base" in § 841(b)(1)(A)(iii) "refers to 'all forms of cocaine base, including but not limited to crack cocaine.'" Pet. App. 10a-11a (quoting *United States* v. *Anderson*, 452 F.3d 66, 86-87 (1st Cir. 2006)). The court below observed

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[14] Petitioner also was convicted of distributing powder, in violation of 21 U.S.C. § 841(a)(1); and he pleaded guilty to possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k). Judgment in a Criminal Case at 1, *United States* v. *DePierre*, 1:06-CR-10058-DPW (D. Mass. Aug. 8, 2008) (Dkt. #59). Neither of those convictions carried a mandatory minimum sentence. See 21 U.S.C. § 841(b); 18 U.S.C. § 924(a)(1)(B).

that other courts of appeals had adopted conflicting interpretations of the statute, and stated that "[b]ecause of the circuit split this issue does need resolution by the Supreme Court." Pet. App. 11a-12a.

## SUMMARY OF ARGUMENT

The ten-year mandatory minimum sentence for drug offenses involving small quantities of "cocaine base" is a particularly severe punishment. Offenses involving cocaine hydrochloride (commonly known as "powder cocaine"), by contrast, must involve a quantity one hundred times as great to trigger the same ten-year penalty.

Congress limited the application of this severe penalty to offenses involving a particularly dangerous and especially addictive form of cocaine—crack cocaine. All of the relevant principles of statutory interpretation compel that result.

To begin with, there is no doubt that "cocaine base" defines a targeted subset of all cocaine-related substances. Clause (ii) of 21 U.S.C. § 841(b)(1)(A) imposes the ten-year mandatory minimum for offenses involving 5 kilograms of specified cocaine-related substances, such as "coca leaves" and "cocaine, its salts, optical and geometric isomers, and salts of isomers," that—taken together—comprise the entire universe of cocaine-related substances subject to criminal sanctions. Clause (iii) then imposes the same ten-year mandatory minimum for offenses involving only 50 grams of substances "described in clause (ii)" that "contain[] cocaine base."

"Cocaine base" is not separately listed in the statute as a controlled substance, and clause (iii)'s use of that phrase as a limitation on the substances de-

described in clause (ii) makes clear that "cocaine base" defines a subcategory of cocaine-related substances. And the significantly reduced quantity trigger specified in clause (iii) means that the substances encompassed within that provision must be an especially dangerous subset of cocaine-related substances.

The lower courts have identified two alternative definitions for the subset of cocaine-related substances encompassed within clause (iii): crack cocaine, or every cocaine-related substance that is chemically basic—effectively every cocaine-related substance other than powder. The only logical conclusion is that the provision reaches only crack cocaine.

This Court has observed that "[c]rack cocaine was a relatively new drug when the 1986 Act was signed into law, but it was already a matter of great public concern." *Kimbrough*, 552 U.S. at 95. The particular characteristics of crack—its highly addictive nature, the ease with which it could be produced, its low cost, and the violence accompanying the new drug's onslaught—made it "significantly more dangerous than powder cocaine." *Ibid*.

Because Congress was legislating in the context of the drug trade, attempting to define a particular type of substance new to the United States, it looked to terms used in the drug trade in crafting the statutory language. Cf. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 202 (1974) (defining the term "working conditions" by reference to its "specific meaning in the language of industrial relations").

A variety of colloquial terms were used to refer to this new, much more potent form of cocaine—for ex-

ample, "base," "freebase," "rock," and "crack." Congress selected one of these terms, "cocaine base," to make clear that the significantly lower quantity triggers provided for in clause (iii) applied to this new, especially dangerous form of cocaine.

Certainly it is indisputable that Congress's purpose was to target crack cocaine. The statutory context makes Congress's focus clear, and this Court in *Kimbrough* recognized that crack cocaine had become "a problem of overwhelming dimensions" in the minds of members of Congress. 552 U.S. at 95. Interpreting "cocaine base" to encompass only crack cocaine is the result consistent with this congressional purpose.

The 1993 amendments by the Sentencing Commission to the Guidelines further support this conclusion. The Commission determined that construing "cocaine base" to mean crack cocaine was consistent with Congress's intent in 1986. And Congress's decision to allow the Guidelines amendment to take effect buttresses that determination.

Adopting the alternative interpretation of "cocaine base"—construing the term to mean any cocaine-related substance that is chemically basic—would render significant parts of § 841(b)(1)(A) superfluous, thus violating the Court's obligation to interpret statutes so as to give effect to each word enacted by Congress. Because all substances classified chemically as cocaine are basic, this approach would mean that the 5-kilogram trigger for violations involving "cocaine" in clause (ii) would *never* apply because in every case the ten-year sentence would have been triggered by the lower requirement of 50 grams in clause (iii).

For the same reason, this approach would render superfluous the provision of clause (ii) stating that a defendant convicted of distributing coca leaves would have to distribute 5 kilograms of the leaves to trigger the ten-year mandatory minimum sentence. Because coca leaves contain the (chemically basic) cocaine molecule, applying the chemical interpretation of "cocaine base" to the statute would mean that clause (iii) would impose the mandatory ten-year sentence for an offense involving only 50 grams of leaves—the 5 kilogram trigger for "coca leaves" would never apply because 1/100th of that amount of leaves would have already triggered the ten-year minimum sentence.

The results of construing "cocaine base" as a chemical term would be absurd. An offense involving 50 grams of coca leaves would be punished more severely than one involving 4,995 grams of cocaine hydrochloride powder—a much more dangerous substance. As Judge Posner observed in rejecting this 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." *Gonzalez*, 608 F.3d at 1003.

Finally, the rule of lenity mandates adoption of the more restrictive reading of the provision. The rule that criminal statutes should be construed narrowly, which applies to sentencing provisions as well, "embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). Clause (iii) certainly cannot be said to clearly extend the significantly smaller quantity triggers to all forms of cocaine, including coca leaves

and other unprocessed forms—imposing much harsher sentences than those that apply to the same or greater quantities of cocaine hydrochloride powder notwithstanding the greater danger posed by the latter substance. The rule of lenity therefore requires that the provision be interpreted to encompass only crack cocaine.

## ARGUMENT

### "COCAINE BASE" IN SECTION 841(b) MEANS CRACK COCAINE.

The text of § 841(b)(1)(A)(iii) targets offenses involving a specified subset of cocaine-related substances for an especially severe mandatory minimum sentence. The phrase defining that subset—"cocaine base"—can only mean crack cocaine. That interpretation is supported by the phrase's text as well as by the legislative context. The alternative urged by the government, construing "cocaine base" to mean any cocaine-related substance classified chemically as a base, is inconsistent with the statutory language and context, would render other parts of the statute superfluous, and would lead to absurd results. Even if the statute were ambiguous, which it is not, the rule of lenity would mandate rejecting the government's broad rule, and interpreting the statute to impose its severely smaller quantity triggers only on offenses involving crack cocaine.

#### A. Section 841(b)(1)(A)(iii) Describes A Targeted Subset Of Cocaine-Related Mixtures And Substances.

The structure and language of the statute make clear that clause (iii) singles out a limited subset of cocaine-related substances, mandating an especially

harsh punishment for offenses involving that specially defined class of substances.

*First*, this targeting is evident from the plain language of the provision. Clause (iii) applies to violations involving a "mixture or substance *described in clause (ii)* which contains cocaine base." 21 U.S.C. § 841(b)(1)(A)(iii) (emphasis added). The text thus makes clear that the dramatically heightened penalties apply to a subset of the mixtures and substances described earlier in clause (ii)—those that "contain[] cocaine base."

*Second*, the source of the language used by Congress confirms this conclusion. Clause (ii)'s description of cocaine-related substances is identical to the statutory definition of cocaine-related substances that Congress had adopted in 1984. See pages 6-7 & note 3, *supra*.

Clause (iii)'s critical term—"cocaine base"—by contrast, does not appear in the statutory provisions defining the universe of cocaine-related substances subject to criminal penalties. The only possible conclusion is that the term "cocaine base" in clause (iii) defines a subset of mixtures or substances already included in the universe of cocaine-related controlled substances. Indeed "cocaine base" *must* be a subset of one of the enumerated controlled substances; it is not itself listed on the controlled substances schedules, see 21 U.S.C. § 812(c), and so may be subject to criminal sanctions only because it is encompassed within a term already on those schedules.

*Third*, Congress's intent to target specially a subset of cocaine-related substances is confirmed by the significant disparity in the quantities required by clauses (ii) and (iii) to trigger the ten-year mandatory

minimum. For purposes of determining the applicable mandatory minimum sentence, Congress characterized one gram of a substance containing "cocaine base" as the equivalent of 100 grams of other cocaine-related substances. It thus treated substances containing "cocaine base" as one hundred times more dangerous than other cocaine-related substances. That demonstrates Congress's intent to target an especially dangerous subset of the universe of cocaine-related substances.[15]

### B. The Statutory Language And Context Demonstrate That Congress Targeted Only Crack Cocaine.

The lower courts have identified two alternative definitions for the subset of cocaine-related substances encompassed within clause (iii): either crack cocaine, or every cocaine-related substance that is chemically basic—that is, effectively every cocaine-related substance other than powder.

The only logical conclusion is that clause (iii)'s requirement—that the mixture or substance "contain[] cocaine base"—requires that the mixture or substance contain crack cocaine. This interpretation is the only one consistent with the statutory language and structure of the ADAA, as well as with its legislative context.

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[15] While Congress modified this multiple in the Fair Sentencing Act of 2010, see note 6, *supra*, the 100 to 1 ratio contained in the legislation enacting clause (iii) is the relevant legislative context for determining the meaning of the term "cocaine base."

### *1. "Cocaine Base" Was Understood To Mean Crack Cocaine.*

In construing a statutory term, this Court often looks to the use of the word or phrase in the field in which Congress was legislating, recognizing that Congress may have adopted its meaning from that context. In *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), for example, the Court defined the term "working conditions" by reference to its "specific meaning in the language of industrial relations." *Id.* at 202; see also *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 343-346 (1991) (defining "seaman" by reference to the general understanding in the maritime industry); *Louisiana Pub. Servs. Comm'n* v. *FCC*, 476 U.S. 355, 371-372 (1986) (defining "charges," "classifications," and "practices" for regulatory purposes "by reference to the trade or industry to which they apply").

Here, Congress was legislating in the context of the drug trade—in particular seeking to define an especially dangerous category of substance new to the United States. And it is clear that the terms used in the drug trade influenced the language Congress chose.

A variety of popular terms were used to refer to the new, much more potent form of cocaine, such as "base," "freebase," "rock," and "crack." The terms "crack" and "freebase" appeared most frequently, the latter because of the well-publicized incident involving comedian Richard Pryor. See page 19, *supra*; see also, *e.g.*, 132 Cong. Rec. 17,342 (1986) (statement of Sen. Hawkins) ("The base substance, crack or rock as it is sometimes called, can result in paranoia * * * ."); *1986 H.R. Crack Cocaine Hearing*, *supra*, at 26 (statement of Jerome H. Jaffe, M.D., Director, Addic-

tion Research Ctr., National Institute on Drug Abuse) (in the mid-1980s, "a new way to prepare and market freebase cocaine appeared on the illegal drug scene. This involved preparing freebase with sodium bicarbonate and eliminating the use of organic solvents. This produced a hard, white material, which [became] known as 'crack' * * * ."); H.R. 5484, 99th Cong. (1986) (calling for the development of alcohol and drug abuse prevention literature, "including literature on the adverse effects of cocaine free base (known as 'crack')"); Dave Von Drehle, *S. Florida's Drug Dens: Crack Lairs Breed Fear, Frustration*, Miami Herald, Oct. 5, 1986, at A1 (noting that at one address "[a]t least five vacant apartments have been converted into cocaine 'base houses'").

Congress needed to select a term to enact into law that would target this particularly dangerous category of cocaine-related substances. One legislative proposal was entitled "A Bill To Provide an Emergency Federal Response to the Crack Cocaine Epidemic Through Law Enforcement, Education and Public Awareness, and Prevention." See S. 2715, 99th Cong (Aug. 5, 1986) ("The Emergency Crack Control Act of 1986"). Initial proposals for the penalty enhancements in both the House and the Senate provided for increased mandatory minimums for offenses involving "cocaine freebase" as compared to those involving "cocaine." See, *e.g.*, *id.* § 101 (adding "cocaine freebase" to the list of Schedule I controlled substances and providing penalty enhancements for "5 grams or more of cocaine freebase"); H.R. 5484 § 608, 99th Cong. (Sep. 8, 1986) (adding enhanced penalties for specified amounts of "cocaine freebase" and differentiating between "cocaine freebase" and "cocaine").

The final bill's substitution of "cocaine base" for "cocaine freebase" could reflect a discomfort with the term "freebase" as too colloquial to appear in a statute—especially given its association with the Richard Pryor incident. It may also have stemmed from the fear that "freebase" could be interpreted to refer only to a particular manufacturing process. See pages 18-19, *supra*. But the replacement of one term derived from the drug trade with another term derived from the drug trade certainly provides no basis for concluding that Congress intended to switch from an industry specific term to one grounded in chemistry that would reach a dramatically broader set of substances.

Statements by members of Congress reflected the popular understanding that "cocaine base" was a synonym for crack cocaine. Cf. *Amoco Prod. Co.* v. *Village of Gambell, AK*, 480 U.S. 531, 554 (1987) (citing "[n]umerous statements by * * * legislators reveal[ing] a common understanding consistent with the [statute's] plain meaning"). For example, Senator Chiles, who previously introduced his own bill addressing the crisis, The Emergency Crack Control Act of 1986, S. 2715, 99th Cong. (1986), noted that the ADAA created enhanced penalties for crack cocaine offenses:

> [T]itle I [of the ADAA] addresses the widespread emergence of crack cocaine in this country * * * . I am very pleased that the Senate bill recognizes crack as a distinct and separate drug from cocaine hydrochloride with specified amounts of 5 grams and 50 grams for enhanced penalties. The bill also recognizes crack's insidious impacts on neighborhoods by outlawing crack houses

> and doubling penalties for those who manufacture drugs within 1,000 feet of our schools.

132 Cong. Rec. 27,180 (1986) (statement of Sen. Chiles). See also pages 13-14, *supra* (collecting statements by members of Congress).

Indeed, the government itself has in the past understood clause (iii) as reflecting Congress's determination that "crimes involving crack should be subject to considerably more severe penalties." U.S. Br. at 4, *Kimbrough*, 552 U.S. 85. (No. 06-6330). This Court and lower courts, as well, have typically referred to "cocaine base" with a parenthetical reference to crack as a pseudonym.[16]

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[16] See, *e.g.*, *Edwards* v. *United States*, 523 U.S. 511, 512-513 (1998) (Breyer, J.) ("The Government charged petitioners with * * * conspiring 'to possess with intent to distribute * * * cocaine base' (*i.e.*, 'crack')."); *United States* v. *Armstrong*, 517 U.S. 456, 458 (1996) (Rehnquist, C.J.) ("respondents were indicted * * * on charges of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack)"); *United States* v. *Haile*, 865 F.2d 1269, at *1 (6th Cir. 1989) (unpublished disposition) ("Haile has appealed the introduction into evidence of 410 grams of cocaine base (crack)"); *United States* v. *Taylor*, 862 F.2d 871, 871 (4th Cir. 1988) (unpublished disposition) ("Roberto Charles Taylor appeals an order of the district court which denied his motion to suppress cocaine base ('crack') found on his person."); *United States* v. *McDonald*, 877 F.2d 91, 92 (D.C. Cir. 1989) (noting that the defendants were charged with possession with intent to distribute "cocaine base ('crack')"); *United States* v. *Horton*, 873 F.2d 180, 180 (8th Cir. 1989) (same); *United States* v. *Paulino*, 873 F.2d 23, 24 (2d Cir. 1989) (same).

### *2. Congress's Clear Purpose Was To Impose Higher Penalties On Offenses Involving Crack Cocaine.*

This Court recognized in its opinion in *Kimbrough* that crack cocaine was Congress's focus in enacting this provision:

> Crack cocaine was a relatively new drug when the 1986 Act was signed into law, but it was already a matter of great public concern: "Drug abuse in general, and crack cocaine in particular, had become in public opinion and in members' minds a problem of overwhelming dimensions."

*Kimbrough*, 552 U.S. at 95 (quoting *1995 U.S.S.C. Report*, *supra*, at 121). The government has agreed that "the legislative history of the [ADAA] indicates that Congress believed that crack cocaine was at the forefront of the national drug epidemic." U.S. Br. at 4-5, *Kimbrough*, 552 U.S. 85 (No. 06-6330).

The legislative history strongly supports this conclusion; statements by numerous members of Congress show that the enhanced penalties were targeted at crack cocaine. Legislators registered their concern that "addiction to crack * * * [was] sweeping the country," *1986 H.R. Crack Cocaine Hearing*, *supra*, at 5 (statement of Rep. Hamilton Fish), and that "[t]he recent introduction of 'crack' cocaine * * * has allowed [the] percentage [of drug users] to spiral upward." 132 Cong. Rec. 27,185 (1986) (statement of Sen. Bumpers). "To the extent that Congress saw the drug problem as a national 'epidemic' in 1986, it viewed crack cocaine as at the very forefront." *1995 U.S.S.C. Report*, *supra*, at 117. See also pages 31-34, *supra*.

Congress's concern about crack cocaine stemmed from a characteristic that rendered it much more dangerous than other cocaine-related substances: its smokeability, which makes crack intensely addictive. See pages 8-10, *supra*; see also, *e.g.*, 132 Cong. Rec. 21,229 (1986) (statement of Rep. Garcia) ("It is the use of 'smokeable cocaine,' known as crack, that has intensified the [drug] epidemic and forced everyone to take notice. Crack probably poses the greatest drug threat to users and society to date, because it is extremely addictive, with addiction taking hold even after a single use."). In addition, Congress was particularly concerned with crack cocaine because it was cheaper and simpler to make. "The recent manufacturing and distribution of crack cocaine, which has emerged in 1985 [is] * * * of great concern because it is conveniently packaged, easily and rapidly ingested by smoking, and initially affordable." *1986 S. Crack Cocaine Hearing*, *supra*, at 13 (statement of Charles R. Schuster, Ph.D, Director, National Institute on Drug Abuse). See also *Brisbane*, 367 F.3d at 912 (noting that crack cocaine is "a highly addictive form of smokable cocaine that was far cheaper than either powder or freebase had ever been").

Interpreting "cocaine base" to mean crack cocaine is the only way to give effect to Congress's clear intent that "the enhanced penalties * * * apply to crack cocaine and the lesser penalties * * * apply to all other forms of cocaine." *Gonzalez*, 608 F.3d at 1003 (quoting *Edwards*, 397 F.3d at 574).

Indeed, even the courts of appeals that have defined "cocaine base" by its broad chemical terms concede that the overall if not sole purpose of the enhanced penalty was to target crack cocaine. See *Jackson*, 968 F.2d at 162 ("It is apparent that Con-

gress in imposing the enhanced penalties was concerned with the scourge of 'crack.'"); *United States* v. *Lopez-Gil*, 965 F.2d 1124, 1134 (1st Cir. 1992) (opinion after rehearing) (conceding that "Congress indeed was concerned primarily with the crack epidemic in enacting the legislation").[17]

### *3. Congress's Focus On Crack Cocaine Is Confirmed By The 1993 Sentencing Guideline Amendment.*

The U.S. Sentencing Commission's decision to define "cocaine base" as "crack" for purposes of applying the Sentencing Guidelines, see page 26, *supra,* supports adopting the same construction of clause (iii).

To be sure, this Court's holding in *Neal* v. *United States*, 516 U.S. 284 (1996), makes clear that a revision of the Guidelines by the Sentencing Commission cannot *overturn* this Court's prior interpretation of a statute. See *id.* at 295. But the Court in *Neal* also took pains to "acknowledg[e] that the Commission's expertise and the design of the Guidelines may be of potential weight and relevance in other contexts" where there has been no prior interpretation of the statute at issue. *Id.* at 290.[18]

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[17] See also *Barbosa*, 271 F.3d at 466 (noting that the 1993 Sentencing Guidelines amendment "conforms to Congress' intent to punish offenders who traffic in crack more severely"); *United States* v. *Easter*, 981 F.2d 1549, 1558 n.7 (10th Cir. 1992) ("[T]he legislative history of 21 U.S.C. § 841(b)(1) indicates that Congress amended the statute due to its concern over the increasing abuse of crack cocaine * * * .").

[18] In *Neal*, the Court found it unnecessary to determine whether any particular level of agency deference should be given to determinations by the Sentencing Commission because

This case presents just such a context. The Sentencing Commission based its 1993 amendment defining "cocaine base" as crack cocaine on a close analysis of the structure and language of the ADAA and on Congress's intent in enacting the statute. Cf. *1995 U.S.S.C. Report*, *supra*, at 116-118 (describing the statutory framework and history of the ADAA).

"Ordinarily, [this Court] resist[s] reading congressional intent into congressional inaction. But in this case, Congress failed to act on a proposed amendment to the Guidelines in a high-profile area in which it had previously exercised its disapproval authority * * * ." *Kimbrough*, 552 U.S. at 106 (citations omitted). "By allowing the [1993 Sentencing Commission] amendment to take effect, Congress has given its imprimatur to the new definition of 'cocaine base'; Congress indicated that it intends the term 'cocaine base' to include only crack cocaine." *United States* v. *Munoz-Realpe*, 21 F.3d 375, 377 (11th Cir. 1994). ) (citations omitted).

### C. Interpreting The Provision To Encompass All Cocaine-Related Substances That Are Chemically Basic Is Inconsistent With The Statutory Language And Structure And Would Lead To Absurd Results.

The alternative interpretation of clause (iii)—construing "cocaine base" as a technical scientific term, which would effectively encompass offenses involving every cocaine-related substance except powder and its chemical relatives—is not only inconsis-

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its holding in *Chapman* v. *United States*, 500 U.S. 453 (1991), had already interpreted the provision at issue. *Neal*, 516 U.S. at 295.

tent with the language, structure, and context of the ADAA. It also violates the fundamental canon of statutory construction that a provision may not be interpreted in a manner that makes some of the statutory language meaningless. And it leads to truly absurd results.

*First*, as a technical scientific term, "cocaine base" is redundant. All cocaine is chemically basic. See page 16, *supra*. Thus, if the words are construed as chemical terms of art, "base" would be superfluous—any substance qualifying as "cocaine" would necessarily be a base. Because it is this Court's "duty 'to give effect, if possible, to every clause and word of a statute,'" *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955), this fact weighs heavily against a chemical-term-of-art approach to interpreting "cocaine base."

*Second*, interpreting "cocaine base" as a purely chemical term renders much of clause (ii) superfluous. Because *all* cocaine is basic, any mixture or substance containing cocaine molecules would qualify as "cocaine" under clause (ii)(II) *and* as "cocaine base" under clause (iii). But the trigger weight in clause (iii) is lower, and therefore clause (iii) would apply in every case, while clause (ii)(II) would never apply. That would render the term "cocaine" in clause (ii)(II) superfluous, making the clause meaningful only with respect to "[cocaine] salts * * * and salts of isomers [*e.g.*, cocaine hydrochloride powder]." 21 U.S.C. § 841(b)(1)(A)(ii)(II).

In other words, if all that must be shown to trigger clause (iii) is that the cocaine-related substance is chemically basic, then the 5-kilogram trigger for violations involving "cocaine" in clause (ii) would *never* apply because in every case the ten-year sen-

tence would have been triggered by the lower requirement of 50 grams. See *Edwards*, 397 F.3d at 575 ("If any form of cocaine base * * * qualifies for the enhanced penalties in the statute, then ([clause] iii) swallows ([clause] ii), because "cocaine base" ([clause] iii) is chemically the same as "cocaine" ([clause] ii)."); *United States* v. *Hollis* 490 F.3d 1149, 1156 (9th Cir. 2007) ("[C]ocaine and cocaine base are chemically identical. If any form of cocaine base qualifies for the enhanced penalties under the statute, then [clause] (iii) swallows [clause] (ii)."); see also *United States* v. *Higgins*, 557 F.3d 381, 394 (6th Cir. 2009) (quoting *Hollis*, 490 F.3d at 1156).

A strictly technical definition of the term "cocaine base" in clause (iii) would render superfluous much of clause (ii) and its use of the term "cocaine."

*Third*, giving "cocaine base" a scientific meaning renders § 841(b)(1)(A)(ii)(I), which addresses "coca leaves," entirely superfluous as well. That provision states that a defendant convicted of distributing coca leaves would have to distribute 5 kilograms of the leaves to trigger the ten-year mandatory minimum sentence, because the statute states that the ten-year minimum applies to "a violation * * * involving 5 kilograms or more of * * * coca leaves." 21 U.S.C. § 841(b)(1)(A)(ii)(I). But coca leaves will *always* contain chemically basic cocaine because they contain cocaine molecules in their naturally occurring, basic form. Thus, if "cocaine base" is interpreted in a strictly scientific sense, coca leaves, like cocaine, would be a "mixture or substance * * * which contains cocaine base." 21 U.S.C. § 841(b)(1)(A)(iii). A defendant convicted for distribution of coca leaves would therefore have to distribute only 50 grams of leaves to trigger the ten-year minimum sentence by

operation of § 841(b)(1)(A)(iii). Such a reading renders wholly superfluous the specific provision requiring 5 kilograms of "coca leaves" to trigger the ten-year minimum: the 5 kilogram trigger for "coca leaves" would *never* apply because 1/100th of that amount of leaves would have already triggered the ten-year minimum sentence.

Similarly, under the parallel provisions of § 841(b)(1)(B) that prescribe a lesser five-year mandatory minimum sentence for lesser weights of the same controlled substances, a conviction for distribution of only 5 grams of coca leaves (as a mixture or substance "which contains cocaine base") would trigger a minimum five-year sentence. 21 U.S.C. § 841(b)(1)(B)(iii). To conceptualize what 5 grams of leaves would look like, a single nickel from the U.S. mint weighs exactly 5 grams. U.S. Mint, Coins and Medals: Nickel, http://usmint.gov/mint-prgrans /circulatingcoins/index.cfnd?action=circnickel.

This interpretation does not simply render parts of the statute superfluous; it also leads to absurd results. For example, a defendant convicted of distributing 499 grams of pure cocaine hydrochloride, ready to snort or inject, would *not* be subject to a five-year minimum (under § 841(b)(1)(B)(ii)), but a defendant convicted of distributing only a nickel's-weight handful of coca leaves, a not terribly "useful" form of the drug, *would* be subject to a five-year minimum sentence (under § 841(b)(1)(B)(iii)).

This outcome is even more bizarre when one compares the potential of these two substances to be converted into smokeable forms of cocaine. The 499 grams of pure cocaine hydrochloride (which is *not* subject to the five-year mandatory minimum) can be readily converted into *several hundred grams* of pure

smokeable cocaine with a little baking soda and water. In contrast, the nickel's-weight pinch of coca leaves (which under a technical reading of "cocaine base" *would be* subject to a five-year mandatory minimum) would require multiple solvents and other reagents to be converted into *just 0.05 grams* of pure smokeable cocaine.[19]

This Court consistently refuses to construe statutes in a manner that renders words superfluous. See *Menasche*, 348 U.S. at 538-539; *Duncan* v. *Walker*, 533 U.S. 167, 167 (2001) ("This Court's duty to give effect, where possible, to every word of a statute * * * makes the Court reluctant to treat statutory terms as surplusage."). Here, if the broader definition of "cocaine base" applies, an entire clause is effectively written out of the statute, and the results are patently absurd.

Construing "cocaine base" to mean only crack cocaine, on the other hand, provides a role for every word and clause of the statute. It is entirely consistent with—and gives effect to—the statute's separate identification and delineation of penalties for "coca leaves" and for "cocaine, its salts, optical and geometric isomers, and salts of isomers." 21 U.S.C. § 841(b)(1)(A)(ii)(I), (II).

*Fourth*, as Judge Posner has observed, "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." *Gonzalez*, 608 F.3d at 1003. But the unavoidable result of interpreting "cocaine

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[19] This estimate conservatively assumes that coca leaves contain 1% cocaine by weight. See page 17, note 10, *supra*.

base" as a strictly chemical term is that the amount of cocaine hydrochloride powder involved in an offense would have to be 100 times greater than the amount of its precursor unprocessed cocaine in order to trigger the same mandatory minimum penalty.

"Congress could hardly have intended to apply the enhanced penalties [of § 841(b)] to forms of cocaine base that are not smokeable or even consumable without further processing, while imposing the lesser penalties on defendants dealing in similar amounts of ready-to-snort cocaine hydrochloride." *Brisbane*, 367 F.3d at 913. But a strictly chemical definition would require application of the higher minimum sentences even when "cocaine base" is dissolved in a liquid, *e.g.*, *Munoz-Realpe*, 21 F.3d 375,[20] is packed into fiberglass, *e.g.*, *Lopez-Gil*, 965 F.2d 1124, or is melted into a flowerpot, *e.g.*, *United States* v. *Palacio*, 4 F.3d 150 (2d Cir. 1993).

In addition, applying the "cocaine base" scientific definition to forms of cocaine occurring *before* the substance is processed into powder would mean that those substances would trigger the same high, mandatory penalty as crack cocaine, and would lead to much more severe punishments than the more dangerous substance—cocaine hydrochloride powder—into which they are almost always ultimately converted. There simply is no basis for interpreting the statute to lead to such absurd results.

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[20] *Munoz-Realpe* is the case in which the Eleventh Circuit switched from its broader definition of "cocaine base" as including all chemical bases to the more restrictive definition of crack cocaine. Cf. *United States* v. *Rodriguez*, 980 F.2d 1375 (11th Cir. 1992) (holding that the term "cocaine base" includes all chemical bases).

### D. Defining "Cocaine Base" As Crack Cocaine Is Required By The Rule Of Lenity.

Construing "cocaine base" to refer to crack cocaine rather than to all cocaine-containing mixtures and substances that are chemically basic is mandated by the rule of lenity. Because the very most that can be said for the government's position is that clause (iii) might be ambiguous—the provision certainly does not unambiguously apply to every cocaine-related substance except powder and other cocaine salts—the rule of lenity requires adoption of the less severe construction of the statute. When a court is confronted with ambiguity in a statute meting out steep penalties to criminal defendants, "the tie must go to the defendant." *United States* v. *Santos*, 553 U.S. 507, 514 (2008). "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). "This policy embodies the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348. See also *Bifulco* v. *United States*, 447 U. S. 381, 387 (1980) ("[T]he touchstone of the rule of lenity is statutory ambiguity.").

"[T]he rule has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing." *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992); see also *Bifulco*, 447 U.S. at 387 ("[T]he

Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.") (citing *United States* v. *Batchelder*, 442 U.S. 114, 121 (1979) and *Simpson* v. *United States*, 435 U.S. 6, 14-15 (1978)).

While it is not completely clear whether the rule of lenity applies as a general canon of construction or only as a last resort,[21] it is clear that lenity must break the tie if, after construing § 841(b)'s text, structure, and history, this Court cannot say with certainty that "cocaine base" refers to any and every chemically basic cocaine-related substance. See *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.").

As we have discussed, there are strong arguments arising from the statutory structure, language, and context for interpreting "cocaine base" to mean crack cocaine, and the term cannot mean "all cocaine-related substances that are chemically basic" without rendering other portions of the statute incoherent or inoperative, and without ignoring the statute's structure and clear purpose. Even if the Court is not convinced that the term "cocaine base" unam-

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[21] Compare, *e.g.*, *Bass*, 404 U.S. at 347 ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (internal citation omitted), with *Chapman*, 500 U.S. at 463 ["T]he rule of lenity * * * is not applicable unless there is a 'grievous ambiguity or uncertainty' * * * , such that even after a court has 'seized every thing from which aid can be derived,' it is still 'left with an ambiguous statute.'") (internal citations omitted).

biguously means crack cocaine, it cannot reasonably conclude that "cocaine base" must therefore encompass the broad range of substances urged by the government. The rule of lenity requires that the provision be interpreted to impose its dramatically heightened penalties only on offenses involving crack cocaine.[22]

## CONCLUSION

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

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[22] There can be no argument that this construction of clause (iii) will leave courts without sufficient guidance. To the contrary, for the past 17 years, in cases where courts' sentencing results were not controlled by a statutory mandatory minimum for "cocaine base," courts have successfully interpreted the term "crack" and applied it for purposes of calculating sentences under the Sentencing Guidelines. See, *e.g.*, *United States* v. *Bryant*, 557 F.3d 489, 499-500 (7th Cir. 2009) (reviewing different courts' application of the Guidelines definition of "crack").

Respectfully submitted.

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