No. 24-

In The

Supreme Court of the United States

BENJAMIN GALECKI, CHARLES BURTON RITCHIE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Analogue Act prohibits the distribution of unscheduled substances that, among other things, are "substantially similar in chemical structure" to a substance listed in Schedules I or II of the Controlled Substances Act. Scientists agree that the phrase "substantially similar in chemical structure" has no scientific meaning. Courts likewise have failed to agree on a meaning for the phrase, producing disparate decisions that often conflict and provide no ascertainable standard. In this case, involving comparison of the unscheduled substance XLR-11 with the scheduled substance JWH-018, the prosecution and defense experts agreed that there was no objective scientific standard for determining substantial similarity, relied instead on their subjective assessments, and invited the jury to reach starkly different conclusions. The district court instructed the jury that "the term substantially similar has no special meaning other than how it is used in everyday language," after which the jury convicted. Petitioners were also convicted of Continuing Criminal Enterprise on the theory that a co-defendant acquitted on all charges could be included as a criminally culpable supervisee. The questions presented are:

1. Whether the Controlled Substance Analogue Enforcement Act of 1986 is void for vagueness as applied to the substance XLR-11?

2. Whether a co-defendant acquitted on all of the substantive predicate offenses and a conspiracy charge can be counted as one of the five supervisees required to sustain a Continuing Criminal Enterprise offense?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioners state that all parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Petitioners are not corporate entities.

RELATED PROCEEDINGS

United States District Court for the District of Nevada:
United States v. Benjamin Galecki and Charles Burton Ritchie, Case No. 2:15-CR-00285-APG-EJY

United States Court of Appeals for the Ninth Circuit:
United States v. Benjamin Galecki and Charles Burton Ritchie, Case Nos. 20-10288 and 20-10296

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Benjamin Galecki and Charles Burton Ritchie respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 89 F.4th 713 and reprinted in the Appendices to the Petition ("Appx.") at 1a-57a.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on December 27, 2023. Appx. A. The court denied a timely petition for rehearing en banc on March 4, 2024. Appx. J. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> *"No person shall … be deprived of life, liberty, or property, without due process of law."*

Article I, Section 1 of the United States Constitution provides:

> *All legislative Powers herein granted shall be vested in a Congress of the*

United States, which shall consist of a Senate and House of Representatives.

Section 802(32)(A) of Title 21 provides:

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

Section 848(c)(2)(A) of Title 21 provides that a person is engaged in a Continuing Criminal Enterprise if, among other elements, the person commits a felony violation of a subchapter of Title 21 that is part of a continuing series of such violations:

> which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management…

INTRODUCTION

This case presents a constitutional question Justice Gorsuch noted was open in *United States v. Makkar*, 810 F.3d 1139, 1142-43 (10th Cir. 2015): whether the phrase "substantially similar in chemical structure" admits of fair application and affords citizens fair notice of what is proscribed by the Controlled Substances Analogue Enforcement Act of 1986 (the "Analogue Act" or the "Act"). Indeed, as presaged by Justice Gorsuch, this case presents the paradigmatic example of the vagueness of the Analogue Act. It is an "as applied" challenge involving a substance—XLR-11 —that the scientific community (outside the DEA) has reached consensus does not qualify as an analogue. This results in the prosecution and imprisonment of citizens who could not learn in advance that their conduct was considered illegal even if they really wanted to and tried hard.

This Court has reiterated that criminal laws must give "ordinary people" fair notice of the conduct they prohibit, and that ordinary people may not be left to "guess" about what the law demands. But here, if an ordinary person were first to consult with a Professor of Chemistry at any major public university regarding whether the sale of XLR-11 was considered unlawful under United States law, that person would

almost certainly guess wrong. *See* Appx. C, D, F, G, H, I. And because each jury ultimately decides in each case whether XLR-11 is or is not an analogue, the defendant, the Chemist, indeed everyone, is *always* guessing what the law is until the moment the verdict is announced. *See United States v. Turcotte*, 405 F.3d 515, 526 (7th Cir. 2005) ("A substance's legal status as a controlled substance analogue is not a fact that a defendant can know conclusively *ex ante*; it is a fact that the jury must find at trial.").

Given what the jury is asked to do – decide whether two different chemical structures are or are not "substantially similar" to one another – the jury itself is guessing. That is "not much better than a Rorschach test. Depending on how you squint your eyes, you can stretch (or shrink) it's meaning to convict (or exonerate) just about anyone." *Dubin v. United States*, 599 U.S. 110, 133 (2023) (Gorsuch, J., concurring). No amount of staring at the differing molecular structures "will yield a clue. … Choice, pure and raw, is required. Will, not judgment, dictates [the jury's] result." *Sessions v. Dimaya*, 584 U.S. 148, 189 (2018) (Gorsuch, J., concurring).

At bottom, no objective metrics exist for the application of the "substantially similar" standard to differences in chemical structure. Although independent experts may agree that whatever that standard means it cannot reasonably be applied to XLR-11, that does nothing to prevent a jury from concluding otherwise (as illustrated here). And no set of jury instructions could have made things any better, because to this day no one knows what the substantially similar standard encompasses. Wading into one as applied challenge to the Analogue Act

after another may not be attractive, but the Court must start somewhere, and this case is the optimal starting point. It presents an application of the Analogue Act to a substance even the prosecution's chemists admit can reasonably be viewed as lawful, upheld by the Ninth Circuit through a striking new definition of "substantially similar" that effectively guts the Act and exponentially compounds its vagueness.

The case also presents a circuit split on the question of whether a completely acquitted co-defendant can be counted as one of the five requisite supervisees to sustain a conviction for engaging in a Continuing Criminal Enterprise ("CCE") under 21 U.S.C. § 848. The Sixth Circuit has held that acquitted co-defendants may not be so considered. *United States v. Ward*, 37 F.3d 243, 249 (6th Cir. 1994). The Panel sustained Petitioners' CCE convictions only by parting ways with the Sixth Circuit and counting a co-defendant acquitted of all charges as one of the five culpable participants in the enterprise. That ruling is not only wrong on the merits, but it deepens an already existing circuit split.

STATEMENT OF THE CASE

I. STATEMENT OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Petitioners were charged with an array of offenses, including conducting a Continuing Criminal Enterprise, 21 U.S.C. § 848, and violations of the Analogue Act, 21 U.S.C. § 813, arising from their sale

of products containing XLR-11. 3-ER-714-47.[1] Petitioners were convicted after a jury trial, and the district court sentenced Petitioners to the mandatory minimum term of 20 years applicable to the CCE Count, followed by three-year terms of supervised release. D.C. Dkt No. 591, 593. The Ninth Circuit affirmed the convictions. Appx. A. The Petitioners moved for rehearing en banc. That motion was denied on March 4, 2024. Appx. J.

Mr. Galecki has been released pursuant to 18 U.S.C. § 3582(c)(1)(A). Mr. Ritchie, after serving over seven years of his sentence, was released pending appeal on November 30, 2023; he remains on release as the Ninth Circuit has stayed the issuance of its Mandate during the pendency of these Certiorari proceedings. Appx. K.

II. THE ANALOGUE ACT

The Controlled Substances Act ("CSA") prohibits the knowing possession and distribution of certain listed substances. 21 U.S.C. § 841(a)(1). The Analogue Act, 21 U.S.C. § 813 (the "Act"), "picks up where the CSA leaves off, forbidding the possession and distribution of substances analogous to those listed in the CSA." *Makkar*, 810 F. 3d at 1142. A substance is unlawful as an analogue if the jury in that prosecution determines it is "substantially similar" to a listed substance in (1) "chemical structure" ("Prong 1"); and (2) represented or intended pharmacological effects ("Prong 2"). *Id.* at

[1] Citations to "_-ER-__" refer to continuously paginated Sixteen Volumes of Record Excerpts to the Initial Brief of Benjamin Galecki filed in the United States Court of Appeals for the Ninth Circuit on April 14, 2021, D.C. Dkt. No. 22.

1142-43. In *McFadden v. United States*, the Court held that the mens rea under the Act requires proof that the defendant knew that the substance he possessed either (1) had both of these features, or (2) was controlled by the CSA or the Act. *Makkar*, 810 F.3d at 1143. Unlike the substances listed in the CSA, the government does not make public the substances it has decided to ask juries to find unlawful as analogues. 8-ER-1786; *see also United States v. Reulet*, 2016 WL 7386443, at *4 (D. Kan. Dec. 21, 2016).

III. STATEMENT OF THE FACTS

A. The SSC Industry

Petitioners owned and operated Zencense, a business that engaged in the manufacture and distribution of smokable synthetic cannabinoid ("SSC") products. These products, commonly referred to by the nickname "spice", 8-ER-1735, 8-ER-1742, look like the cooking spice oregano, and were first marketed and gained popularity in Europe in 2004. 8-ER-1742. The products came to the United States in 2007/2008, and grew in their availability from 2008 to 2010. 8-ER-1742-43. As explained by the government's expert witness on the SSC industry, "when spice products first came on the scene, you could find them everywhere, local brick and mortar-type shops, gas stations on the street corner." 8-ER-1756. From 2007 to 2010, SSC products typically contained the synthetic cannabinoid JWH-018, which was not a controlled substance until March 1, 2011. 8-ER-1743, 8-ER-1744.

SSC products were not illegal under federal controlled substance laws prior to the scheduling of JWH-018. 8-ER-1755. The public received advance notice of this scheduling, and before March 1, 2011, the SSC industry replaced JWH-018 with a new ingredient that was not listed, AM-2201. 8-ER-1744-45. As the government's expert explained, "the spice industry or the synthetic cannabinoid industry adjusts as the law changes." 8-ER-1745. In July 2012, Congress added AM-2201 to the list of controlled substances. 8-ER-1745-46. The substance at issue here, XLR-11, became one of the two prevalent cannabinoids on the SSC market in anticipation of the listing of AM-2201.[2] 8-ER-1747. This prosecution involves the sale of XLR-11 prior to July 2012, when XLR-11 was not a listed controlled substance. The prosecution rests solely on the theory that XLR-11 was unlawful as an analogue of the original SSC ingredient, JWH-018.

The public does not receive notice of or have the ability to learn in advance of prosecution which substances the United States government believes are unlawful under the Act. 8-ER-1786-88. There is no evidence that the United States had ever prosecuted anyone for XLR-11 under the Act or any other federal law prior to this prosecution, which was initiated through the execution of a search warrant at the Nevada warehouse of Zencense on July 25, 2012.

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[2]The other compound used with frequency by the industry beginning in Spring, 2012, was UR-144, a compound that differs from XLR-11 only by a single Fluorine atom substitution on the periphery of the molecule. 13-ER-2884.

B. Zencense

The prosecution presented voluminous evidence regarding the operations of Zencense and its participation in the SSC industry. The company was run from an office in Pensacola, Florida, and manufactured SSC products at a warehouse in Nevada. Zencense conducted its business in the same way as the rest of the industry. It labeled packages "not for human consumption" and sold them to retailers with documentation demonstrating they did not contain listed controlled substances. 11-ER-2417. The government's expert had seen "hundreds and hundreds of different types" of product packages, and those sold by Zencense were "very similar to many" he had seen. 8-ER-1754. Zencense sales personnel testified they believed that the product was legal. 8-ER-1725; 8-ER-1824. The prosecution also called a representative of a retailer who purchased SSC products from Zencense and sold them to the public, who agreed the practices of Zencense were the standard in the industry. 11-ER-2417.[3]

There was no direct evidence that Petitioners believed – or were even aware that the DEA considered – XLR-11 to be an unlawful analogue before federal agents arrived with a search warrant at the Nevada warehouse. When Mr. Ritchie learned

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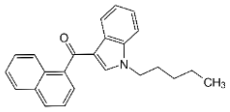
[3]The retailor and its owners were prosecuted under the Act for the sale of Zencense products containing XLR-11 to the public. *United States v. The Gas Pipe, et al.*, Case No. 3:14-cr-00298 (N.D. Tx.). The jury acquitted on all of the Analogue Act offenses. The Appendix includes opinions of several experts from the Gas Pipe prosecution explaining their views that XLR-11 is not substantially similar in chemical structure to JWH-018. Appx. B-I.

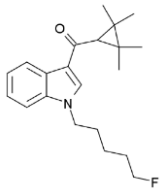
of the search, he invited a DEA Agent to come to the Pensacola office the following day. 12-ER-2646.[4] The Agent did so, Mr. Ritchie gave him a tour, explained the SSC manufacturing process, told him the active ingredient was XLR-11, and gave him samples of the finished product containing XLR-11. 12-ER-2647-49, 12-ER-2674. Mr. Ritchie also showed the Agent lab reports related to the XLR-11 and banking records of wire transfers to China for the purchase of the cannabinoids. 12-ER-2649-50, 12-ER-2673. The Agent did not know what XLR-11 was, 12-ER-2680, and it was the first time anyone had ever given him samples and lab reports related to their products. 12-ER-2681. The Agent told Mr. Ritchie that it appeared that "he was taking the steps necessary to – to stay within the law at the time." 12-ER-2664. Notwithstanding Mr. Ritchie's cooperation, he and Mr. Galecki were indicted and prosecuted for the sale of XLR-11 under the Act prior to the execution of the Nevada search warrant.

C. The Chemistry of XLR-11

These are two-dimensional representations[5] of the substances in issue:



JWH-018



XLR-11

[4]"Burton Ritchie called the cops on himself." Jordan S. Rubin, *BIZARRO*, University of California Press (2023), p.1.

[5]Three-dimensional representations of the two substances are in the Appendix. Appx. D at 85a; Appx. F at 109a; Appx. G at 122a; Appx. H at 134a.

The two compounds differ (1) in the replacement of the naphthalene ring in JWH-018 with a cyclopropane ring in XLR-11; (2) in the electronic structure of the ketone as differentially influenced by the naphthalene vs. the cyclopropane; and (3) by the replacement of a Hydrogen atom in JWH-018 with a Flourine atom in XLR-11.[6] 12-ER-2720-30; 13-ER-2880-83; Appx. D at 80a-85a; Appx. F at 100a-102a, 106a-108a; Appx. G at 119a-124a; Appx. H at 128a-135a; Appx. I at 138a, 142a-145a. The portion of the molecules that is the same is called an "indole," which is a "ubiquitous structural feature[] in medicinal chemistry and in nature." 12-ER-2714. *See also* 11-ER-2570; Appx. B at 59a-60a; Appx. C at 73a-74a; Appx. H at 130a-131a.

The prosecution called Dr. Greg Endres in its case in chief, who offered his view that XLR-11 was substantially similar in its chemical structure to JWH-018 in accordance with his "own criteria" for applying that standard. 10-ER-2181. Dr. Endres agreed that there exists no scientific or standard definition of "substantially similar," 10-ER-2183, and that the evaluation of similarity is a subjective matter. 10-ER-2218, 10-ER-2235. Dr. Endres agreed that reasonable chemists will differ in their opinions of similarity, *id.*, and that he considers "physicochemical properties" in his Prong 1 structural similarity determinations while admitting the DEA does not. 10-ER-2236-37, 10-ER-2248. Finally, Dr. Endres acknowledged his awareness that many chemists disagree with his opinion regarding the

[6]The compound UR-144 does not contain the third distinction from JWH-018 – it does not have the Flourine atom that XLR-11 has. 13-ER-2884. UR-144 is thus more similar in its chemical structure to JWH-018 than is XLR-11.

substantial similarity of XLR-11 and JHW-018, and he agreed that such chemists' views are reasonable. 10-ER-2218. Among the chemists known to disagree with Dr. Endres are University of Florida Professor Paul Doering (Appx. C), University of California, Los Angeles Professor Neil Garg (Appx. D), University of Virginia Professor Michael Hilinski (Appx. F), University of California, San Francisco Professor Adam Renslo (Appx. G), University of California, Berkeley Professor Richmond Sarpong (Appx. H), and University of Notre Dame Professor Richard Taylor (Appx. I). *See also Smoke Shop, LLC v. United States*, 949 F. Supp. 2d 877, 879 (E.D. Wisc. 2013) ("As the record in this case demonstrates, the overwhelming weight of opinion in the scientific community is that the chemical structures of UR-144 and XLR-11 are not substantially similar to the chemical structure of JWH-018").

The nature and significance of the differences between the chemical structures of JHW-018 and XLR-11 were explained in the defense case by Professor Gregory Dudley, Chair of the Department of Chemistry at West Virginia University. 12-ER-2688, 12-ER-2720-30. Dr. Dudley described the substitution of the cyclopropane ring in XLR-11 in place of the naphthalene ring in JWH-018 as a "significant" change in structure, and one described in chemistry literature as "ground breaking." 12-ER-2725, 12-ER-2727. Dr. Dudley confirmed that the question of substantial similarity is subjective rather than objective, 12-ER-2709, and that there is no consensus within the chemistry community on the proper methodology for determining substantial structural similarity. 12-ER-2735. Nevertheless, Dr. Dudley testified that whatever is meant by the term

"substantially similar," there exists a consensus in the scientific community that XLR-11 is not substantially similar in chemical structure to JWH-018. 12-ER-2734-35, 12-ER-2759.

The chemists within the DEA did not agree on whether XLR-11 was substantially similar in its chemical structure to JWH-018. The defense presented the testimony of Dr. Arthur Berrier, formerly a senior research chemist at the DEA's Special Testing and Research Laboratory. 11-ER-2540. Dr. Berrier's job included participating in the DEA's process of deciding whether the DEA thought the chemical structure of a new compound was "substantially similar" to that of a listed controlled substance for purposes of Prong 1 of the Analogue Act. 11-ER-2546-49; 13-ER-2869. He agreed with the "consensus" view described by Dr. Dudley – the substitution of the cyclopropane ring in XLR-11 in place of the naphthalene ring in JWH-018 rendered the two substantially different in their chemical structure – and he told the DEA that while working there. 11-ER-2557-58.

The prosecution called Dr. Daniel Willenbring from the DEA in its rebuttal case, who concluded that XLR-11 was an unlawful analogue by first determining "what the structure is," followed by consultation with his colleagues within the DEA. 13-ER-2874, 13-ER-2891. Dr. Willenbring agreed that he and other chemists at the DEA differed from Dr. Endres in the properties considered relevant to the substantial similarity evaluation. 13-ER-2885, 13-ER-2887. Dr. Willenbring was not asked to comment on Dr. Dudley's contrary opinion or any other aspect of his testimony, leaving undisputed Dr. Dudley's

testimony regarding the consensus view of the scientific community that XLR-11 does not qualify as an analogue.

The prosecution then told the jury in closing argument to ignore the chemists: "Everything that was presented to you in terms of chemistry is for you to decide. It's not for the chemists to tell you whether it is [similar] or it is not.… It's for the jury to decide … It's actually for you to compare yourself." 14-ER-3071. The Court's guidance to the jury regarding its "duty" to "determine whether substances are controlled substance analogues" consisted of the instruction that "the term substantially similar has no special meaning other than how it is used in everyday language." 13-ER-2948-49.

D. The CCE Evidence and the Verdicts

To sustain Petitioners' CCE convictions, the prosecution had to prove they had supervised at least five criminally culpable others in the commission of a series of at least three qualifying predicate federal offenses. Among the five supervisees necessary to sustain the argument was co-defendant Ryan Eaton, who had manufactured the SSC products at the Nevada warehouse. Three of the five predicate offenses that the government charged were substantive – Count 23 (manufacturing), Count 25 (maintaining premises), and Count 26 (possession with intent to manufacture) – and for conduct attributable only to Petitioners and Mr. Eaton. 3-ER-731-34.

The jury acquitted Mr. Eaton of all charges, including the three substantive predicate offenses

and Count 22, a charge that he conspired with Petitioners as to XLR-11. 2-ER-423. The jury, nevertheless, convicted Petitioners on the Analogue Act and related CCE Counts as to XLR-11. 2-ER-424-36. The District Court imposed the mandatory minimum term of 20 years for the CCE Count only after expressing its "serious concerns about some of the statutes underlying these convictions" because a "seller of an analogue may not know he or she is breaking the law until the jury decides it is, in fact, an analogue." 1-ER-197-98.

E. Ninth Circuit Proceedings

The Court of Appeals affirmed. Appx. A. Petitioners argued that the Analogue Act was unconstitutionally vague as applied to XLR-11. The court rejected the argument after crafting its own new standard for "substantial similarity" that effectively writes Prong 1 out of the Act and dramatically illustrates and expands the ongoing vagueness of the law. Under the Ninth Circuit's new test, any substance that shares a "significant core of common chemical structural features with a listed substance" – here the "indole," a ubiquitous structural feature in medicinal chemistry and in nature – meets Prong 1 of the Act so long as it meets Prong 2. *Id.* at 32a.

The Ninth Circuit also affirmed Petitioners' CCE convictions notwithstanding Mr. Eaton's acquittal. *Id.* at 40a-44a. Although the Sixth Circuit had held in *Ward*, *supra*, that an acquitted co-defendant cannot be counted as a CCE supervisee, the Panel did not cite or discuss *Ward,* or acknowledge the circuit split it was creating on this issue.

REASONS FOR GRANTING THE WRIT

This case has all of the hallmarks for certiorari. Vague laws are no laws at all, and the Legislature's delegation to the jury in each case of the hard work of deciding which chemical substances are to be unlawful in this Country cannot be permitted to continue. The Analogue Act is hopelessly vague, and the Ninth Circuit's decision upholding the Act as applied to a substance the scientific community believes is not an analogue squarely and cleanly presents a compelling circumstance warranting this Court's intervention. The Court should also resolve the split in the Circuits regarding the use of acquitted co-defendants as CCE supervisees.

I. The Analogue Act is Unconstitutionally Vague as Applied to XLR-11.

A. The Vagueness Doctrine.

The void-for-vagueness doctrine is well established: The government violates the Fifth Amendment Due Process Clause "by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)); *see also United States v. Aguilar*, 515 U.S. 593, 600 (1995) ("Fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.").

"Vague laws offend several important values," including the principle that citizens must be provided fair warning of what the law prohibits and the requirement that there be boundaries on the discretion of law enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The understanding that an act is criminal only if undertaken knowingly "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morisette v. United States*, 342 U.S. 246, 250 (1952). As described by Justice Gorsuch, "perhaps the most basic of due process's customary protections is the demand of fair notice." *Sessions*, 584 U.S. at 176 (Gorsuch J., concurring).

The vagueness doctrine is also fueled by the need to limit discretion in the enforcement of law – "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09.

Vagueness concerns are equally derived from the principle of separation of powers. Under Article I, Section 1, only Congress makes "the rules that will

govern … future conduct." Vague laws risk the assumption of legislative power by judges through interpretation, and also the transfer of legislative power to police and prosecutors through their enforcement decisions. *Sessions*, 584 U.S. at 182 (Gorsuch J., concurring). This must be avoided, lest the hard job of the Legislature, performed in public, be made easy and secret by transfer to others.

B. The Analogue Act is Unconstitutionally Vague as Applied to XLR-11.

The Analogue Act presents a perfect storm of vagueness. It combines a lack of fair notice of what conduct is proscribed with a complete abdication by Congress of its legislative function in favor of juries, who are presented for consideration only those cases selected by police and prosecutors based on their own secret list of crimes.

The Act fails to afford ordinary people fair notice of the conduct it punishes. It requires ordinary citizens to conform their conduct to what they imagine a jury might later conclude is unlawful based on a subjective "substantially similar in chemical structure" standard that chemists themselves agree has no scientific definition or objective metrics. Asking a chemist whether two chemical structures are "substantially similar" to one another is the scientific equivalent of asking a mathematician whether 3 is substantially similar to 4.

Neither of the two words in the phrase "substantially similar" has any quantifiable meaning and, thus, no objective criteria for its measurement exist. Indeed, scientists themselves, as well as the

courts, do not agree on what should be compared, nor the weight each comparison should be given. Appx. E at 89a ("in the forensic chemistry community, no general consensus exists as to what defines an analogue, let alone how to determine if two compounds are properly considered analogues or substantially similar"); Appx. F at 100a (the phrase "substantially similar" is "essentially meaningless" because it "is not a term used in chemical parlance"). And even if agreement could be reached on what should be compared, the Act fails to provide a defined threshold where ordinary similarity ends and substantial similarity begins. Although a group of independent scientists attempted to establish a methodology for the evaluation of controlled substance analogues, it disbanded after being unable to agree on criteria that make one compound substantially similar to another. Appx. E at 90a-91a.

Juries are thus given no meaningful instruction to guide their lawmaking tasks because none is possible. Indeed, the jury here was urged by the prosecution to ignore what they had been told by the chemists in their efforts. 14-ER-3071. District Courts can hardly be faulted if they tell juries that "the term substantially similar has no special meaning other than how it is used in everyday language." 14-ER-2948-49. "No set of instructions could have made things any better." *Percoco v. United States*, 598 U.S. 319, 333 (2023) (Gorsuch J., concurring). No "amount of staring" at the Act's "text, structure, or history will yield a clue" regarding the meaning of the phrase "substantially similar." *Sessions*, 584 U.S. at 189 (Gorsuch J., concurring).

Juries, so instructed, then confront a dead end – no amount of staring at the two-dimensional diagrams of XLR-11 and JWH-018 will answer the substantial similarity question. Depending on how the jurors squint their eyes, they can stretch (or shrink) the phrase "substantially similar" to convict (or exonerate) just about anyone. The ordinary person's notice of the requirements of law under the Act depends on their ability to predict the "choice" and "will" of a jury rather than its "judgment."

As applied to XLR-11, the ordinary citizen has notice of the law only if they assume the jury will disagree, for example, with professors of chemistry from the University of California's campuses at Berkeley, Los Angeles, *and* San Francisco. Appx. H, D, G. Laws requiring guesswork are void for vagueness; as applied to XLR-11 the Act is vagueness at its worst – it rewards only poor and uneducated guesswork. Those who try to learn the law from experts will guess wrong.

The Act also presents a particularly pernicious example of the separation of powers concerns underlying the vagueness doctrine. The Constitution gave the Legislature the hard job of identifying which substances are or are not lawful for human consumption. But through the Act, Congress pitched their work not only to judges, police, and prosecutors, but also to juries operating in secret, applying standards and criteria that will never be known. The Act "leaves the people to guess about what the law demands" and leaves juries to "make it up." *Sessions*, 584 U.S. at 189 (Gorsuch J., concurring). Just as "Congress cannot give the Judiciary uncut marble with instructions to chip away all that does not

resemble David," *Percoco*, 598 U.S. at 337 (Gorsuch J., concurring), juries may not constitutionally be given diagrams of tinker toys and asked to put them through a Rorschach test to determine the fates of criminal defendants.

Congress may well have had "high and worthy intentions" to combat novel mind-altering substances through the Act. *Id.* But it "must do more than invoke an aspirational phrase" like "substantially similar" in chemical structure and then leave it to prosecutors, judges, and juries to "make things up as they go along." *Id.* This is especially so where, as here, the jury is asked to debut such a novel analogue finding that it flies in the face of the consensus view of the relevant scientific community.

The Act, as applied to XLR-11, badly fails both the notice and separation of powers tests for vagueness.

C. The Lower Courts Have Failed to Cure the Analogue Act's Vagueness as Applied to XLR-11

The Court observed in *Johnson* that the failure of persistent efforts by the lower courts to establish a standard for interpreting a statute can provide evidence of its vagueness. *Johnson*, 576 U.S. at 598. The lower courts' consideration of the Analogue Act's requirement of substantial similarity in chemical structure reflects pervasive disagreement about both the nature of the inquiry to be conducted and the kinds of factors to be considered in making the inquiry. The disagreements among the lower courts also illustrate the need for certiorari here.

One of the earliest courts to consider the Act found it void for vagueness as applied to the substance at issue in the face of competing expert chemistry testimony. Observing that because "reputable scientists in this field disagree even on the methodology applicable to determine structural similarity," the District of Colorado held that "a defendant cannot determine in advance of his contemplated conduct" whether it is unlawful. *United States v. Forbes*, 806 F. Supp. 232, 234, 237 (D. Colo. 1992).

Other early cases sustained the application of the Act to substances specifically mentioned by Congress in the legislative history of the Act, or that metabolized into a controlled substance upon human ingestion. *United States v. DeSurra*, 865 F.2d 651,653 (5th Cir. 1989); *United States v. Hofstatter*, 8 F.3d 316, 321-22 (6th Cir. 1993); *United States v. Fisher*, 289 F.3d 1329, 1338 (11th Cir. 2002); *United States v. Washam*, 312 F.3d 926, 930-33 (8th Cir. 2002); *United States v. Orchard*, 332 F.3d 1133, 1138 (8th Cir. 2003); *United States v. Ansaldi*, 372 F.3d 118, 123-24 (2d Cir. 2004); *United States v. Turcotte*, 405 F.3d 515, 531-33 (7th Cir. 2005); *United States v. Brown*, 415 F.3d 1257, 1271 (11th Cir. 2005); *United States v. Bamberg*, 478 F.3d 934, 937-38 (8th Cir. 2007). These cases did not discuss or appear to consider the chemical structures of either the asserted analogue or the applicable listed controlled substance. Nor did they explain why the structures of these substances are or are not substantially similar to one another.

Some lower courts consider similarities of the two substances under Prong 2 of the Act—substantial similarity in pharmacological effect—to support a finding of similarity in structure under Prong 1. *Washam*, 312 F.3d at 932-33; *Turcotte*, 405 F.3d at 527. *See also United States v. Carlson*, 810 F.3d 544, 552-53 (8th Cir. 2016). But the Tenth Circuit held such an instruction to the jury to be reversible error because, as observed by Justice Gorsuch, it is "a matter of common experience and logic" that "the fact that one drug produces a similar effect to a second drug just doesn't give rise to a rational inference – let alone rationally suggest beyond a reasonable doubt – that the first drug shares a similar chemical structure with the second drug." *Makkar*, 810 F.3d at 1144.[7]

A handful of courts have ventured to discuss the chemical structures of the substances at issue, but most have simply declared two-dimensional diagrams of them sufficiently similar to put a reasonable person on notice of their substantial similarity without explanation of why that is so. *See*, *e.g.*, *United States v. McKinney*, 79 F.3d 105, 108 (8th Cir. 1996); *United States v. Klecker*, 348 F.3d 69, 72 (4th Cir. 2003). And as for just how similar the two-dimensional renderings of the two substances must look to be "substantially" similar, lower courts have permitted application of the Act so long as it is "plausible" that a reasonable person could find the similarity

[7]The conflict between the Circuits regarding the use of Prong 2 considerations under Prong 1 is mirrored in the record by the conflict between the prosecution's expert in its case in chief, who followed the approach of the Seventh and Eighth Circuits, 10-ER-2236-37, 10-ER-2248, and the prosecution's rebuttal expert from the DEA, who disagreed and followed the Tenth Circuit's approach. 13-ER-2885, 13-ER-2887.

substantial. *United States v. Fedida*, 942 F. Supp. 2d 1270, 1279 (M.D. Fla. 2013); *United States v. Cooper*, 2015 WL 13850123 *5 (M.D. Fla. Jan. 14, 2015).

In contrast, the Second Circuit considered, but declined to adopt, the approach of comparing the visual similarity of two-dimensional diagrams, even as applied to substances that differed from one another by only two atoms. *United States v. Roberts*, 363 F.3d 118, 124 (2d Cir. 2004). In a passage wrenched from its context by the Panel Opinion here, the Second Circuit's reason for rejecting the "visual similarity" test was that "[i]n another case, it might well be that a one- or two- atom difference in a molecule made such a radical difference in the substance's relevant characteristics that any similarity in two-dimensional charts would not be 'substantial' enough to satisfy the definition of 'controlled substance analogue.'" *Id.* The Second Circuit likewise considered, but rejected, the suggestion that post-ingestion metabolization of the proposed analogue into a listed controlled substance suffices, without more, to establish substantial chemical similarity. *Id.* at 124-25. The Second Circuit upheld the Act as applied to the substance at issue only because the analogue was *both* visually similar *and* metabolized into the listed substance upon ingestion. *Id.*

Left to their own devices, the Circuits are all over the map in their approach to substantial similarity in chemical structure. Once the Circuits ventured beyond the handful of substances either specifically mentioned by Congress in the legislative history to the Act or that metabolized into controlled substances upon ingestion, all agreement came to an

end. The Seventh and Eighth Circuits consider Prong 2 when considering Prong 1. The Tenth Circuit (in line with the DEA's own chemists) considers this error. The Second Circuit has so far ducked the question, while in the District Courts constitutional notice is provided so long as it is "plausible" a person could have predicted what the jury decided the law proscribes.

D. The Court of Appeals' Decision Creates a Further Split in the Circuits and Compounds the Vagueness of the Analogue Act

Purporting to rely on the Second Circuit's precedent rejecting the "visual similarly" approach, the Panel Opinion minted a new test for substantial similarity that takes the Seventh and Eighth Circuits' approach further by simply collapsing Prong 1 into Prong 2. According to the Panel, if the two substances at issue "share a common core," a jury may find them substantially similar in structure so long as "any residual differences in the analogue's chemical structure as compared to that of a listed substance, do not result in a material 'difference in the substance's relevant characteristics.'" Appx. A at 32a. As applied to XLR-11, it is an analogue of JWH-018 according to the Panel because they share an "indole" core and their differences in chemical structure "did not impede XLR-11 from having a substantially similar pharmacological effect as JWH-018." *Id.* at 35a.

The "indole" core shared by XLR-11 and JWH-018 is a "common building block" and "extremely common in chemical and pharmaceutical research." 12-ER-2714. *See also* 11-ER-2570; Appx. B at 59a-

60a; Appx. C at 73a-74a; Appx. H at 130a-131a. Under the Panel's approach, all such substances are henceforth unlawful under the Act so long as they meet Prong 2.

The Panel's reliance on Prong 2 in considering Prong 1 defies the statute's text, which makes clear that Prong 1 and Prong 2 are independent elements. *See McFadden v. United States*, 576 U.S. 186, 194 n.2 (2015). And contrary to the Ninth Circuit's conclusion, evidence of substantial similarity in pharmacological effect cannot as a matter of logic or chemistry support an inference of substantial similarity in chemical structure. *Makkar*, 810 F.3d at 1144; Appx. C at 73a ("there are many compounds that share similar chemical structures that are vastly different in their pharmacological and toxic effects"); Appx. G at 125a ("the presence of a shared *N*-alkyl-3-acyl-indole structure in JWH-018 and XLR-11 is by itself insufficient structural information to infer a particular pharmacological effect"). The Panel's ruling will make it virtually impossible to derive notice of which substances might be considered substantially similar in their chemical structure to a listed controlled substance, and it writes a "blank check" to juries to condemn or exonerate as their will dictates, free of any meaningful input from Congress.

This Court should not defer certiorari in the hope that a consensus or improved approach will emerge from the lower courts' consideration of continued constitutional challenges to the Act. This issue has been deliberated long enough, and—as shown—no clear reasoning has been or can be developed. Indeed, many courts tend to avoid this pressing constitutional issue based on an incorrect

reading of this Court's decision in *McFadden*. Those courts contend that *McFadden* already addressed and foreclosed argument regarding the Act's vagueness. *See e.g. United States v. DeMott*, 906 F.3d 231, 237 (2d Cir. 2018) ("In *McFadden v. United States*, the Supreme Court rejected a vagueness challenge to the Analogue Act, characterizing the statute as 'unambiguous.'") (quoting *McFadden,* 576 U.S. at 197); *Carlson*, 810 F.3d at 550–51 ("The Supreme Court recently determined in *McFadden v. United States* that the Analogue Act is not unconstitutionally vague because the statute's 'knowingly or intentionally' scienter requirement alleviates vagueness concerns by 'narrow[ing] the scope of its prohibition, and limit[ing] prosecutorial discretion.'"); *United States v. Novak*, 841 F.3d 721, 727 (7th Cir. 2016); *United States v. Palmer*, 917 F.3d 1035, 1038 (8th Cir. 2019); *United States v. Way*, 804 F. App'x. 504, 512 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 371. That is a misreading of *McFadden*.

The issue before the Court in *McFadden* was the appropriate mens rea standard. The Court noted that the scienter it found necessary alleviated some vagueness concerns, but it did not state that such concerns were resolved. Noting the vagueness concerns raised by the defendant, it explained that the mens rea standard it adopted did not, by itself, render the statute vague. The Court rejected McFadden's proposed mens rea standard in part because "the substantial similarity test for defining analogues is itself indeterminate, his proposed alternative scienter requirement would do nothing to cure" the statute's vagueness. 576 U.S. 197.

While it may be initially comforting that after *McFadden* defendants cannot be convicted of an Analogue Act offense unless they "know" the substance at issue qualifies as an analogue, that comfort fades swiftly upon recognition that the supposed object of "knowledge" is the purely subjective question of "substantial similarity" in chemical structure. Because all that may be had regarding these assessments is opinion rather than knowledge, Appx. E at 94a, any finding that a defendant "knew" the substance qualified as an analogue is inherently fictional. Allowing juries to nevertheless speculate and decide that defendants had such "knowledge" – especially as to a substance the scientific community believes does not qualify as an analogue – is a game of roulette that cannot be permitted under the due process clause of the Fifth Amendment.

The *McFadden* Court specifically recognized that vagueness concerns might exist with regard to the Analogue Act, but it did not announce them "cured." Nor did it pass on the issue because it was not presented. Whether the Analogue Act is void for vagueness remains, even after *McFadden*, an "open question." *Makkar*, 810 F. 3d at 1143. This case—wrongly decided below—presents this Court with the perfect opportunity to begin providing a much-needed answer to a very important constitutional question.

II. Certiorari Should Be Granted to Resolve the Circuit Split Regarding the Use of Acquitted Co-defendants as CCE Supervisees

To sustain Petitioners' CCE convictions, the Panel had to include Mr. Eaton among the five culpable participants supervised by the Petitioners in their series of crimes even though the jury had acquitted Mr. Eaton on all counts. The Sixth Circuit has held that there is no "agreement between the controlling party and the controlled person" that satisfies the "in concert with" element of a CCE charge when the jury has acquitted the supervisee of conspiracy. *Ward*, 37 F.3d at 249. The Fourth Circuit has held to the contrary. *United States v. Heater*, 63 F.3d 311, 317 (4th Cir. 1995).

The Panel defied the ruling in *Ward* without even discussing it or citing *Heater* as supportive authority. Instead, the Panel summarily applied circuit precedent, *United States v. Ching Tang Lo*, 447 F.3d 1212, 1226 (9th Cir. 2006), which held that "a person may be convicted of conspiring with a codefendant even when the jury acquits that co-defendant of conspiracy." Appx. A at 40a. But *Ching Tang Lo* addressed a defendant's challenge to a simple drug conspiracy conviction. The Panel's application of that decision to the more complex CCE charge – especially given Mr. Eaton's acquittal on the conspiracy offense *and* the substantive predicate offenses – was error. It also deepened a split in the Circuits on an important issue.

The Court's intervention is badly needed to resolve an open question about federal criminal law. Counting an acquitted co-defendant such as Mr.

Eaton as a supervisee flies in the face of the statute's text and Congress's intent. *See Ward,* 37 F.3d at 248 ("[I]nnocent participants in a criminal activity cannot be counted as part of a continuing criminal enterprise." (citing *United States v. Smith*, 24 F.3d 1230, 1234 (10th Cir.1994))); *United States v. Fuchs*, 467 F.3d 889, 903 (5th Cir. 2006) ("[A]n innocent participant acting without criminal intent cannot be counted as one of the five individuals in the CCE.").

This case presents the quintessential record for consideration of the issue in light of the charges and verdicts. The CCE statute's significant mandatory minimum is the only reason Mr. Ritchie would return to prison if this petition for certiorari is denied. That would not be the result had Mr. Ritchie been charged in the Sixth Circuit. And more generally, that mandatory minimum is no small matter. In the mine-run of drug prosecutions, a CCE charge is known to "virtually compel plea bargaining, force cooperation, and in essence determine the length of sentences" under the statute. Robert G. Morvillo & Bary A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 Am. Crim. L. Rev. 137, 137 (1995).

The Court should grant certiorari to decide this important issue, which will ultimately resolve an existing circuit split and clarify the application of the CCE statute.

CONCLUSION

For the reasons set forth above, Petitioners Benjamin Galecki and Charles Burton Ritchie's petition for a writ of certiorari should be granted.

Respectfully submitted,

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