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HOW MUCH DO YOU REALLY HAVE TO KNOW?: AN ANALYSIS OF THE MENS REA REQUIREMENT OF 21 U.S.C. § 841(C)(2)

KIRSTEN ENNIS[†]

INTRODUCTION

The average American is undoubtedly familiar with the decongestant Sudafed. Often employed to treat symptoms of the common cold and allergies, Sudafed is a household name. When most people purchase Sudafed at their local drug store, however, they are often unaware that their fellow customers may *not* be buying the medicine to nurse their cold symptoms. In fact, many are not aware of the black market that exists for Sudafed. The active ingredient in Sudafed, pseudoephedrine, is used in the manufacturing of methamphetamine, a highly addictive, illegal stimulant that typically causes neurological damage in its users.¹ Methamphetamine producers often purchase bulk quantities of pseudoephedrine, and the DEA is currently unaware of any other legitimate or black market use for large amounts of pseudoephedrine.² To ensure that lawful chemicals that are readily available, such as pseudoephedrine, are not diverted into illegal channels such as methamphetamine production, Congress enacted 21 U.S.C. § 841(c)(2). This statute criminalizes the possession or distribution of certain chemicals when the defendant knew, or had reasonable cause to believe, that such chemicals would be used to manufacture a controlled substance.³

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¹ See *United States v. Khattab*, 536 F.3d 765, 766 (7th Cir. 2008).

² See *id.* at 767.

³ See 21 U.S.C.A. § 841(c)(2) (West 2011); *infra* Part I.C (describing the history and purpose of 21 U.S.C. § 841(c)(2)). Black's Law Dictionary defines "controlled substance" as "[a]ny type of drug whose possession and use is regulated by law, including a narcotic, a stimulant, or a hallucinogen." BLACK'S LAW DICTIONARY 378–79 (9th ed. 2009).

A well-established maxim in criminal law is *actus non facit reum, nisi mens sit rea*, “an act does not make [its doer] guilty, unless the mind be guilty.”⁴ It is axiomatic in American criminal jurisprudence that punishment is proper only when an individual has committed the physical act *and* had the mental state required by the statute defining the crime.⁵ Certain crimes require that the defendant intended the result of his physical act, predicating conviction on the defendant’s subjective, or actual, objectives.⁶ Other crimes, however, focus on the mindset of the reasonable person in the defendant’s situation, allowing the prosecution to prove guilt based upon objective knowledge.⁷ When drafting statutes, Congress often includes more than one requisite mental state, or *mens rea*; in such a case, a defendant may be found guilty if he possessed either of the named *mentes reae*.⁸ Title 21, section 841(c)(2) is one such statute, criminalizing the possession or distribution of certain chemicals when the defendant knew, or had reasonable cause to believe, that the chemicals would be used to manufacture a controlled substance.⁹ Black market sellers of pseudoephedrine, or other chemicals used to make controlled substances, can be convicted of

⁴ BLACK’S LAW DICTIONARY 36 (6th ed. 1990); *see also, e.g.*, *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It 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.

Id.

⁵ *See id.* at 251–52 (noting that criminal convictions are predicated on a defendant’s physical actions coupled with his mental thoughts).

⁶ *See* JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 155 (5th ed. 2009) (explaining that for the crimes of battery and murder, the prosecution must prove “the conscious object of the actor”).

⁷ *See id.* at 275 (“The ‘reasonable man’ (or, sometimes, ‘ordinary man’) shows up throughout the criminal law and represents an objective standard by which the defendant’s conduct is measured.”).

⁸ *See, e.g.*, 21 U.S.C.A. § 844(a) (West 2011) (“It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . .”); 18 U.S.C. § 1111(c)(3) (2006) (“[T]he term ‘child abuse’ means intentionally or knowingly causing death or serious bodily injury to a child.”); 26 U.S.C. § 7433(a) (2006) (“[A]ny officer or employee of the Internal Revenue Service” violates the statute if he or she “recklessly or intentionally, or by reason of negligence[,] disregards any provision of this title.”).

⁹ 21 U.S.C.A. § 841(c)(2). For the definition of “controlled substance,” *see supra* note 3.

violating 21 U.S.C. § 841(c)(2) if they do so knowing or having reasonable cause to believe that their purchasers will use the chemicals to produce a controlled substance.¹⁰

To answer the question of whether a particular defendant violated 21 U.S.C. § 841(c)(2), a court must ascertain the meaning of the requisite mens rea: “knowing or having reasonable cause to believe.” Specifically, the court must determine whether this phrase implicates an entirely subjective standard or, instead, allows a defendant’s conviction to be based on either subjective *or* objective knowledge of his purchaser’s intent. This decision is often crucial in whether a defendant is found guilty, as a defendant who only possessed objective knowledge would be innocent in a jurisdiction that adopts a wholly subjective standard; the same defendant, however, would be convicted in a court that holds that guilt may be predicated on objective fault.¹¹ Currently, the circuit courts have failed to adopt a uniform understanding of 21 U.S.C. § 841(c)(2)’s mens rea.¹² A consistent interpretation is needed to ensure that a defendant’s guilt or innocence is not determined simply by the court in which he is tried.

The varying interpretations of the mens rea of 21 U.S.C. § 841(c)(2) have been at issue in the circuit courts for a number of years. While one circuit has held that the standard is wholly subjective, others have ruled that the statute’s language allows for either a subjective or objective finding of knowledge on the part of the defendant, and one circuit has failed to adopt a conclusive stance on the issue.¹³ This Note explores these conflicting interpretations of the mens rea requirement of 21 U.S.C. § 841(c)(2) and advocates for a mixed subjective/objective standard. Part I describes the history and purpose of the Comprehensive Drug Abuse Prevention and

¹⁰ See 21 U.S.C.A. § 841(c)(2).

¹¹ Compare *United States v. Truong*, 425 F.3d 1282, 1290 (10th Cir. 2005) (explaining that while a reasonable person would have been aware that the defendant’s purchasers planned to use the pseudoephedrine to produce methamphetamine, the defendant did not have actual knowledge of their plan and thus, was innocent), with *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005) (holding that a defendant’s objective knowledge is sufficient to prove his guilt).

¹² See *United States v. Khattab*, 536 F.3d 765, 768–69 (7th Cir. 2008) (noting that the circuit courts are split regarding the appropriate interpretation of “knowing or having reasonable cause to believe”).

¹³ See *infra* Part II.

Control Act and specifically, the current language of 21 U.S.C. § 841(c)(2)'s requisite mens rea. Part II discusses the competing interpretations of "knowing or having reasonable cause to believe" in the circuit courts. Finally, Part III argues that the correct view is an interpretation that is both subjective and objective. It examines various tools of statutory interpretation, including legislative history, the maxim that a statute should be interpreted to give *each* word or phrase a distinct meaning, and the "mischief approach" to statutory construction.

I. HISTORY AND PURPOSE

This Part explains how and why 21 U.S.C. § 841(c)(2) was enacted. Section A describes the Comprehensive Drug Abuse Prevention and Control Act of 1970, the first piece of legislation passed to suppress the drug problem in the United States and its relationship to 21 U.S.C. § 841(c)(2). Section B discusses the Controlled Substances Act, the Act under which 21 U.S.C. § 841(c)(2) was eventually adopted. Finally, Section C explains the Anti-Drug Abuse Act of 1988, the legislation that authorized the enactment of 21 U.S.C. § 841(c)(2).

A. *History and Purpose of the Comprehensive Drug Abuse Prevention and Control Act*

In 1969, President Richard Nixon announced that drug abuse posed a substantial threat to the safety of the United States.¹⁴ He emphasized that drug use had soared to an unprecedented high and urged that comprehensive legislation be enacted to quell the problem.¹⁵ Two years later, he declared a national "War on Drugs,"¹⁶ calling drug abuse in America "public

¹⁴ See NPR.org, *Timeline: America's War on Drugs*, NAT'L PUB. RADIO, Apr. 2, 2007 [hereinafter *Timeline*], <http://www.npr.org/templates/story/story.php?storyId=9252490> (providing a timeline of America's fight against drugs over the past four decades).

¹⁵ See *id.* (noting that between 1960 and 1967, the United States experienced a substantial rise in drug-related crimes).

¹⁶ See *Gonzalez v. Raich*, 545 U.S. 1, 10 (2005) (explaining that President Nixon declared the "War on Drugs" two years after taking office in 1969); *Timeline*, *supra* note 14. Essentially, the "War on Drugs" was an attempt by the United States government to stop drug production, distribution, and consumption in America by imposing harsh penalties for those who engaged in drug-related activities. See

enemy No. 1.”¹⁷ Citing the alarming levels of illegal drug manufacturing, use, and trafficking, President Nixon warned that drugs were ravaging the security and morale of society.¹⁸

The resulting legislation was the Comprehensive Drug Abuse Prevention and Control Act of 1970 (“CDAPCA”).¹⁹ As the Supreme Court recently noted, “Congress set out to enact legislation that would consolidate various drug laws . . . into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs.”²⁰ The Act is divided into three distinct sections, called “Titles.”²¹ Title I regulates preventive and therapeutic treatment for narcotics addicts via the Department of Health and Human Services,²² Title II criminalizes the possession and distribution of precursor chemicals to illicit drugs, as well as the manufacture of illegal substances,²³ and Title III relates to the importation and exportation of controlled substances.²⁴ Since 21 U.S.C. § 841(c)(2) was enacted under Title II, this Note will focus primarily on that Title.

James A. Inciardi, *American Drug Policy: The Continuing Debate*, in THE DRUG LEGALIZATION DEBATE 4–5 (James A. Inciardi ed., 2d ed. 1999).

¹⁷ *Timeline*, *supra* note 14.

¹⁸ See David T. Courtwright, *The Controlled Substances Act: How a “Big Tent” Reform Became a Punitive Drug Law*, 76 DRUG & ALCOHOL DEPENDENCE 9, 11 (2004).

¹⁹ Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.); see also *Raich*, 545 U.S. at 10 (referring to the CDAPCA as “the first campaign” of the “War on Drugs”); Edward J. Perez et al., *Substance Abuse in America: Then and Now*, 13 MICH. ST. U. J. MED. & L. 365, 372 (2009) (noting that in 1970, Congress repealed then-existing drug laws and substituted them with the CDAPCA).

²⁰ *Raich*, 545 U.S. at 10; see also Perez et al., *supra* note 19 (commenting that the CDAPCA was enacted to suppress the drug problem in the United States).

²¹ See 84 Stat. at 1238, 1242, 1285; see also *Raich*, 545 U.S. at 12 n.19 (noting that the Act is comprised of three separate titles).

²² See 84 Stat. at 1238.

²³ See *id.* at 1264. A “precursor chemical” is a chemical used in the production of a certain drug. Lauren Grau, *Cutting Off the Building Blocks to Methamphetamine Production: A Global Solution to Methamphetamine Abuse*, 30 HOUS. J. INT’L L. 157, 160 (2007).

²⁴ See 84 Stat. at 1285.

B. History and Purpose of the Controlled Substances Act

Title II of the CDAPCA is also known as the Controlled Substances Act (“CSA”).²⁵ The CSA was enacted to tighten the government’s regulatory authority over the nation’s drug supply, both legal and illegal,²⁶ in an attempt to suppress the drug problem in America.²⁷ The Act empowers the Attorney General and Drug Enforcement Administration to manage and oversee drug control and enforcement.²⁸

Most notably, the CSA heavily regulates precursor chemicals that, while legal, are often used to produce illegitimate controlled substances.²⁹ To halt the detrimental impact that narcotics were having on America’s well-being, Congress recognized the need to stop all transactions through which legal drugs were diverted to illegal distribution chains and used to manufacture controlled substances.³⁰ Congress further explained that this goal could only be accomplished by reducing the availability of legal, precursor chemicals and in turn, adopted a “closed” regulatory scheme.³¹ In this “closed” scheme, the government controlled the production, sale, and use of narcotics and forbade anyone from engaging in such activities unless sanctioned by the CSA.³²

Congress divided a myriad of controlled substances into five different schedules; this division has been referred to as the “centerpiece” of the CSA.³³ A substance was placed in a certain schedule after its safety and acceptability for use in medical treatment, potential for abuse, and psychological and physical

²⁵ *Id.* at 1242 (1970). A “legal drug” is one that may lawfully be possessed and sold, as long as “the appropriate license is obtained from the DEA, and applicable regulations are followed.” *United States v. Saffo*, 227 F.3d 1260, 1263 n.1 (10th Cir. 2000).

²⁶ See Joseph F. Spillane, *Debating the Controlled Substances Act*, 76 *DRUG & ALCOHOL DEPENDENCE* 17, 17 (2004) (noting that the CSA provided the federal government with the authority to regulate numerous drugs).

²⁷ See *Gonzalez v. Raich*, 545 U.S. 1, 12 (2005) (identifying one of the main objectives of the CSA as “conquer[ing] drug abuse”).

²⁸ *Id.* at 12 n.19.

²⁹ *Id.* at 12–13 (explaining that “Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels”).

³⁰ See H.R. REP. NO. 91-1444, at 71–72 (1970).

³¹ *Id.*

³² See *Raich*, 545 U.S. at 13 (citing 21 U.S.C.A. §§ 841(a)(1), 844(a) (West 2011)).

³³ *Perez et al.*, *supra* note 19. Congress defines a “controlled substance” as “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V.” 21 U.S.C. § 802(6) (2006 & Supp. II).

effects were determined.³⁴ The CSA provides that new drugs may be added or removed from a schedule and drugs may be rescheduled after the Attorney General consults with the Secretary of Health and Human Services.³⁵

C. *History and Purpose of 21 U.S.C. § 841(c)(2)*

1. The 1988 Amendment

Under the Reagan administration, Congress amended Title II of the CSA via the Anti-Drug Abuse Act of 1988, thereby enacting 21 U.S.C. § 841(c)(2). The Act was passed to further inhibit the production, distribution, and use of illicit drugs.³⁶ In his remarks on signing the bill, President Reagan explained that the Act would help the government to “close rank” on those who played a role in the manufacturing and distribution of drugs.³⁷ President Reagan further noted that the Act gave “a new sword and shield” to law enforcement officials by tightening regulations regarding drug-related offenses.³⁸ The bill, referred to as “the most comprehensive Anti-Drug Abuse Act ever considered in the U.S. Congress” by Senator Byrd,³⁹ sent a crystal clear message to

³⁴ *Raich*, 545 U.S. at 13. Schedule I drugs are characterized by having a high chance of abuse, having no recognized medical purpose, and being unsafe for use in medical treatments. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242, 1247 (1970). Methylenedioxymethamphetamine, more commonly referred to as “MDMA” or ecstasy, is a schedule I substance. OFFICE OF DIVERSION CONTROL, DRUG ENFORCEMENT ADMIN., U.S. DEP’T OF JUST., LISTS OF: SCHEDULING ACTIONS, CONTROLLED SUBSTANCES, REGULATED CHEMICALS 4 (2010), available at <http://www.deadiversion.usdoj.gov/schedules/orangebook/orangebook.pdf> (providing a list of scheduled chemicals); see also *Gall v. United States*, 552 U.S. 38, 41 n.1 (2007) (noting that methylenedioxymethamphetamine is popularly called “MDMA” or ecstasy). Schedule II drugs are likely to be abused and may cause the user to become psychologically or physically dependent on the drug but have an accepted medical purpose. 84 Stat. at 1247. Methamphetamine is currently a schedule II drug. *Id.* at 1250.

³⁵ *Raich*, 545 U.S. at 14–15; see also Perez et al., *supra* note 19, at 373 (explaining that the CSA is complete with a “review mechanism” that provides for the introduction of new drugs or the reorganization of the current schedules).

³⁶ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-609, 102 Stat. 4181 (codified as amended in scattered sections of 21 U.S.C.).

³⁷ *Remarks on Signing the Anti-Drug Abuse Act of 1988*, 24 WEEKLY COMP. PRES. DOC. 1521, 1522 (Nov. 18, 1988) (noting the necessity of the Act by explaining that “[a]rrests, convictions, and prison sentences” of those who sold and abused drugs had risen to unparalleled levels).

³⁸ *Id.* at 1523 (explaining that the ultimate goal of the Act was to make America drug-free).

³⁹ 134 CONG. REC. 32632 (1988) (statement of Sen. Byrd).

those involved in drug trafficking, warning them that the United States would no longer allow their behavior to continue.⁴⁰ The legislation strengthened America's law enforcement abilities, bolstered its interdiction capabilities, strengthened its effort to obliterate drug crops, and imposed more stringent penalties for possession and trafficking.⁴¹

Section 401(d) of the CSA, which was later codified as 21 U.S.C. § 841(c),⁴² was amended twice throughout the congressional proceedings and debates that surrounded this 1988 Act.⁴³ The first amendment read:

Section 401 of the Controlled Substances Act (21 U.S.C. § 841) is amended by striking out subsection (d) and inserting in lieu thereof the following new subsections: (d) Any person who knowingly or intentionally . . . (2) possesses or distributes a listed chemical *knowing* that the listed chemical will be used to manufacture a controlled substance . . .⁴⁴

Section 401 was again amended eight days later to read as it does today: "(d) Any person who knowingly or intentionally . . . (2) possesses or distributes a listed chemical *knowing, or having reasonable cause to believe*, that the listed chemical will be used to manufacture a controlled substance . . ."⁴⁵

⁴⁰ *Id.* (summarizing the message as follows: "Don't do drugs. This country will no longer tolerate it").

⁴¹ *Id.*

⁴² Until 2000, the present day 21 U.S.C. § 841(c)(2) was designated as 21 U.S.C. § 841(d)(2). *See infra* note 45.

⁴³ *See* 134 CONG. REC. 30,365 (1988) (proposing that the statutory language of 21 U.S.C. § 841(d)(2) include "knowingly"); 134 CONG. REC. 33,191 (1988) (proposing, eight days later, that "having reasonable cause to believe" should also be included in the language).

⁴⁴ 134 CONG. REC. 30,365 (1988) (emphasis added).

⁴⁵ 134 CONG. REC. 33,191 (1988) (emphasis added); *see also* 21 U.S.C.A. § 841(c)(2) (West 2011). Listed chemicals include precursor chemicals to controlled substances, such as methamphetamine and ecstasy. Such precursor chemicals include pseudoephedrine, red phosphorous, iodine, ethyl ether, acetic anhydride, and 3,4-methylenedioxyphenyl-2-propanone. 21 C.F.R. § 1310.02 (2010); *see also* Oregon.gov, Clandestine Drug Lab Program, Chemicals Used in Methamphetamine Manufacture, <http://www.oregon.gov/DHS/ph/druglab/chemicals.shtml> (last visited Nov. 12, 2010) (noting that pseudoephedrine, red phosphorous, iodine, ethyl ether, and acetic anhydride are precursors to methamphetamine); AbsoluteAstronomy, MDP2P, <http://www.absoluteastronomy.com/topics/MDP2P> (last visited Nov. 12, 2010) (stating that 3,4-methylenedioxyphenyl-2-propanone is a precursor to ecstasy). In 2000, Congress amended section 401 of the Controlled Substances Act, 21 U.S.C. § 841, "by redesignating subsections (d), (e), (f), and (g) as subsections (c), (d), (e), and (f), respectively," without altering the statutory

II. THE COMPETING INTERPRETATIONS OF 21 U.S.C. § 841(C)(2)

Whenever the government seeks to prosecute a defendant for an alleged crime, the government has the burden of proving beyond a reasonable doubt that the defendant possessed the requisite mens rea.⁴⁶ For one to be found guilty of violating 21 U.S.C. § 841(c)(2), the government must prove beyond a reasonable doubt that defendant knew or had reasonable cause to believe that the chemical he distributed would be used to make a controlled substance.⁴⁷ Currently, the circuits are split regarding the meaning of the mens rea.⁴⁸ While the Tenth Circuit has held that the statute requires the defendant to have subjective knowledge that the chemical would be used to manufacture a prohibited narcotic,⁴⁹ the Eighth, Ninth, and Eleventh Circuits have held that evidence of either actual knowledge *or* that a reasonable person in the defendant's place would have known that the chemical would be used to produce a controlled substance is sufficient.⁵⁰ The Seventh Circuit has failed to establish a conclusive standard.⁵¹

language. Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, H.R. 2130, 106th Cong. § 9 (2000) (noting that the amendment was "technical").

⁴⁶ See *Clark v. Arizona*, 548 U.S. 735, 738 (2006) (explaining that a criminal defendant is presumed innocent until the prosecution proves each element of the offense beyond a reasonable doubt, including that the defendant satisfied the statute's mens rea requirement).

⁴⁷ 21 U.S.C.A. § 841(c)(2).

⁴⁸ *United States v. Khattab*, 536 F.3d 765, 768–69 (7th Cir. 2008) (noting that there is a split amongst the circuits regarding the interpretation of "knowing or having reasonable cause to believe").

⁴⁹ See *United States v. Truong*, 425 F.3d 1282, 1289 (10th Cir. 2005) (holding that the mens rea requirement of 21 U.S.C. § 841(c)(2) is wholly subjective); *United States v. Saffo*, 227 F.3d 1260, 1268–69 (10th Cir. 2000) (explaining that determining whether one has "reasonable cause to believe" is contingent upon the defendant's actual knowledge).

⁵⁰ See *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005) (holding that "reasonable cause to believe" may be satisfied by either the defendant's subjective or objective knowledge); *United States v. Kaur*, 382 F.3d 1155, 1157 (9th Cir. 2004) (noting that "reasonable cause to believe" does not require actual knowledge but, instead, an inquiry into the mind of the reasonable person in the defendant's situation); *United States v. Prather*, 205 F.3d 1265, 1270–71 (11th Cir. 2000) (holding that the mens rea requirement of 21 U.S.C. § 841(c)(2) allows the government to prove that the defendant had either subjective or objective knowledge).

⁵¹ See *Khattab*, 536 F.3d at 769 (explaining that the Seventh Circuit did not adopt either interpretation of 21 U.S.C. § 841(c)(2)'s mens rea requirement because the defendant's actual knowledge made him guilty under either interpretation).

This Part explores the varying interpretations of 21 U.S.C. § 841(c)(2)'s requisite mens rea. Section A discusses the Tenth Circuit's interpretation. Section B explores how the Eighth, Ninth, and Eleventh Circuits have interpreted the mens rea requirement. Finally, Section C discusses the Seventh Circuit's decision to not adopt a stance on the issue.

A. *A Court That Applies a Wholly Subjective Standard*

In *United States v. Saffo*,⁵² the Tenth Circuit ruled that the mens rea of 21 U.S.C. § 841(c)(2) was entirely subjective, requiring the prosecution to prove that the defendant possessed actual knowledge. In *Saffo*, the defendant routinely sold pseudoephedrine to various wholesale distributors in several states;⁵³ she was charged with, and convicted of, seven counts of pseudoephedrine distribution in violation of 21 U.S.C. § 841(d)(2).⁵⁴ While Saffo admitted to selling large quantities of pseudoephedrine, she denied knowing that her purchasers planned on using the chemicals to manufacture methamphetamine.⁵⁵ The court held that "having reasonable cause to believe" requires the government to prove something "akin to actual knowledge," noting that a conviction should be based on the defendant's guilty mind and not on the guilt of a hypothetical reasonable man.⁵⁶ The court further explained that because "guilt is personal," allowing a conviction based on the knowledge of the theoretical reasonable man would essentially be holding the defendant guilty under a negligence standard.⁵⁷ Saffo, however, was found to have actual knowledge because she had received a DEA "Red Notice" form that explained that pseudoephedrine is typically used in methamphetamine production and because drivers stopped with large quantities of pseudoephedrine were carrying her name and telephone number.⁵⁸ Thus, the Tenth Circuit affirmed the defendant's

⁵² 227 F.3d 1260 (10th Cir. 2000).

⁵³ *See id.* at 1263–66.

⁵⁴ *Id.* at 1267. Saffo was charged and convicted under 21 U.S.C. § 841(d)(2), which was re-designated 21 U.S.C. § 841(c)(2) when Congress enacted the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000. *See supra* note 45.

⁵⁵ *See Saffo*, 227 F.3d at 1272.

⁵⁶ *Id.* at 1269.

⁵⁷ *See id.*

⁵⁸ *See id.* at 1270.

conviction,⁵⁹ holding that “knowing or having reasonable cause to believe” is based solely on defendant’s subjective knowledge.⁶⁰

Five years later, in *United States v. Truong*,⁶¹ the Tenth Circuit, following *Saffo*, rejected the contention that the mens rea requirement of 21 U.S.C. § 841(c)(2) allowed proof of either the defendant’s subjective or objective knowledge regarding his purchaser’s intent to manufacture a controlled substance.⁶² In *Truong*, the defendant, an employee at a Texaco gas station, repeatedly sold large quantities of pseudoephedrine⁶³ but explained to the police that he did not know what would be done with the pills once he sold them.⁶⁴ The court noted that the sales occurred “under unusual circumstances”—the defendant only accepted cash for the transactions, ensured that sales only occurred once the gas station was closed, placed the pseudoephedrine in a closed Styrofoam cup, and did not ring the sales into the cash register.⁶⁵ The jury found the defendant guilty, and he appealed his conviction.⁶⁶ On appeal, the Tenth Circuit held that “knowing or reasonable cause to believe” is a wholly subjective standard, requiring the government to prove that the defendant actually knew the chemicals he distributed would be used to manufacture a controlled substance—in this case, methamphetamine.⁶⁷ Relying on *Saffo*, the court reversed the defendant’s conviction.⁶⁸ The court found that the government presented enough evidence to prove that the defendant knew his customers “were up to no good” but failed to

⁵⁹ *Id.* at 1274.

⁶⁰ *Id.* at 1268.

⁶¹ 425 F.3d 1282 (10th Cir. 2005).

⁶² *See id.* at 1289; *see also* *United States v. Buonocore*, 416 F.3d 1124, 1133 (2005) (holding that the mens rea requirement of 21 U.S.C. § 841(c)(2) requires a wholly subjective inquiry and a conviction cannot be predicated upon the knowledge of a reasonable man in the defendant’s situation).

⁶³ *Truong*, 425 F.3d at 1284–85.

⁶⁴ *Id.* at 1285.

⁶⁵ *Id.* at 1286.

⁶⁶ *Id.* at 1288.

⁶⁷ *Id.* at 1289. The Court noted that the actual knowledge threshold may also be satisfied if the prosecution proves that the defendant had “something close” to subjective knowledge. *Id.*

⁶⁸ *Id.* at 1291.

prove that he had actual knowledge of their specific intention to manufacture methamphetamine; therefore, the defendant did not satisfy the mens rea requirement.⁶⁹

B. Courts That Apply a Mixed Subjective/Objective Standard

1. The Eighth Circuit

The Eighth Circuit disagreed with the Tenth Circuit, ruling that the mens rea requirement of 21 U.S.C. § 841(c)(2) permitted evidence of either the defendant's actual knowledge or the knowledge of a reasonable person in the defendant's situation.⁷⁰ In *United States v. Galvan*,⁷¹ officers monitoring the activity inside a Wal-Mart store observed the defendant purchasing three boxes of pseudoephedrine pills—the maximum amount one is allowed to purchase.⁷² The officers then followed the defendant to six other stores and watched as he left each store with a bag in hand.⁷³ The defendant was arrested.⁷⁴ Inside the defendant's vehicle, the officers found two additional boxes of pseudoephedrine pills, as well as a number of pills hidden in a bag underneath the floorboard.⁷⁵ In the district court, the defendant was convicted of one count of violating 21 U.S.C. § 841(c)(2).⁷⁶ Galvan did not deny his possession of pseudoephedrine but contended that the jury should be instructed that the statute requires actual knowledge.⁷⁷ On appeal, the Eighth Circuit held that the district court did not err

⁶⁹ *Id.* at 1290–91. Other cases illustrate situations in which the defendant was deemed to have had actual knowledge. *See, e.g.*, *United States v. Buonocore*, 416 F.3d 1124, 1126 (10th Cir. 2005) (holding that defendant had actual knowledge because a recording disclosed the purchaser saying to the defendant, “the meth cooks must be cookin like crazy . . . I must have had a run, there's a bunch of meth cooks in town, that's what their [sic] using them for.”); *United States v. Nguyen*, 413 F.3d 1170, 1175 (10th Cir. 2005) (holding that defendant had actual knowledge because he received a DEA “Red Notice,” warning him that pseudoephedrine is often used in methamphetamine manufacturing, and a DEA agent expressly told defendant that “persons seeking to purchase large quantities of pseudoephedrine should be a ‘red flag’ for criminal activity”).

⁷⁰ *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005).

⁷¹ 407 F.3d 954.

⁷² *Id.* at 955.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 957.

in rejecting defendant's proposed jury instructions.⁷⁸ The defendant's proffered jury instructions stated that having "reasonable cause to believe" requires the prosecution to prove the defendant's subjective knowledge.⁷⁹ The court rejected this instruction as erroneous, explaining that this interpretation of the statute's mens rea requirement would render the "reasonable cause to believe" clause superfluous.⁸⁰ The Eighth Circuit ruled that the district court was correct in interpreting the statute to avoid such redundancy and affirmed the defendant's conviction.⁸¹

2. The Ninth Circuit

The Ninth Circuit agreed with the Eighth Circuit, holding that a defendant must only have knowledge that would cause a reasonable person in his situation to conclude that the chemicals he sold would be used to manufacture a controlled substance.⁸² In *United States v. Kaur*,⁸³ an undercover DEA agent purchased a large amount of pseudoephedrine from defendant's convenience store and, as a result, the defendant was charged with violating 21 U.S.C. § 841(c)(2).⁸⁴ The defendant was convicted after the district court instructed the jury that "reasonable cause to believe" does not equate to actual knowledge but rather allows the government to prove that a reasonable person in the defendant's position would have been aware that the pseudoephedrine would be used to manufacture a controlled substance.⁸⁵ The Ninth Circuit upheld these jury instructions, stating that if "reasonable cause to believe" required the government to prove actual knowledge, having both "knowing" and "having reasonable cause to believe" clauses in the statute would be redundant.⁸⁶ The court further explained that interpretations that cause statutory language to be excessive should be avoided.⁸⁷ The Ninth Circuit adhered to this rule,

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*; see also *infra* Part III.B.2.

⁸¹ *Galvan*, 407 F.3d at 957.

⁸² See *United States v. Kaur*, 382 F.3d 1155, 1157–58 (9th Cir. 2004).

⁸³ 382 F.3d 1155.

⁸⁴ *Id.* at 1156.

⁸⁵ *Id.* at 1157.

⁸⁶ *Id.*; see also *infra* Part III.B.2.

⁸⁷ *Kaur*, 382 F.3d at 1157 (“[C]ourts should disfavor interpretations of statutes that render language superfluous.” (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992))).

holding that the mens rea requirement of 21 U.S.C. § 841(c)(2) involves both a subjective and objective inquiry, and “having reasonable cause to believe” is a distinct mens rea that differs from actual knowledge.⁸⁸

3. The Eleventh Circuit

The Eleventh Circuit concurred with the Eighth and Ninth Circuits.⁸⁹ In *United States v. Prather*,⁹⁰ the defendant sold large quantities of pseudoephedrine through the mail; typically, he sold cases of seventy-five 1,000-tablet bottles at a time to individuals and stores providing drug paraphernalia.⁹¹ In 1995, the defendant received a letter from a law firm explaining that his high-risk activities may result in a criminal prosecution, yet he failed to close down his mail-order business.⁹² The defendant was convicted of ten counts of violating 21 U.S.C. § 841(d)(2).⁹³ On appeal, the defendant's district court conviction was upheld, even though the government did not prove that the defendant had actual knowledge that the pseudoephedrine he sold would be used to manufacture methamphetamine.⁹⁴ The district court judge explained to the jury, “the focus is not on what it is proven that [the defendant] actually knew. Here the standard is[,] based on what he did know, would a reasonable person . . . have cause to believe that the pseudoephedrine in the count would be diverted.”⁹⁵ The Eleventh Circuit affirmed the conviction and held that the jury instructions were not erroneous, indicating that the mens rea requirement of 21 U.S.C. § 841(c)(2) does not compel the government to prove actual knowledge.⁹⁶

C. An Undecided Court

In *United States v. Khattab*,⁹⁷ the Seventh Circuit noted the split amongst its sister courts regarding the “knowing or having

⁸⁸ *Id.*

⁸⁹ See *United States v. Prather*, 205 F.3d 1265, 1271 (11th Cir. 2000).

⁹⁰ 205 F.3d 1265.

⁹¹ *Id.* at 1268.

⁹² *Id.*

⁹³ *Id.* Prather was charged and convicted under 21 U.S.C. § 841(d)(2). See *supra* note 45.

⁹⁴ See *Prather*, 205 F.3d at 1271.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 536 F.3d 765 (7th Cir. 2008).

reasonable cause to believe” mens rea of 21 U.S.C. § 841(c)(2).⁹⁸ In *Khattab*, the defendant unknowingly engaged in a series of negotiations with undercover DEA agents to purchase 100 boxes of pseudoephedrine from them.⁹⁹ Each conversation was recorded, and in one instance, the agent mentioned using the pseudoephedrine to make a different substance; the defendant explained that those who use the “narcotic substance” created from the pseudoephedrine “sniff it” or “mix it with the baking soda.”¹⁰⁰ When the defendant met the undercover agents to purchase the pseudoephedrine, the DEA agents identified themselves, and the defendant was arrested.¹⁰¹ The defendant was tried and convicted of one count of violating 21 U.S.C. § 841(c)(2), and the district court held that the prosecution’s evidence was “just barely” satisfactory to prove that the defendant knew his purchasers would use the pseudoephedrine to manufacture methamphetamine.¹⁰² On appeal, the defendant argued the evidence presented against him was not sufficient to prove actual knowledge.¹⁰³ The Seventh Circuit, albeit mentioning the existence of the circuit split discussed above, failed to adopt an interpretation of the statute’s mens rea requirement. Rather, the court held that the defendant had genuine knowledge that the pseudoephedrine he sold would be used to produce methamphetamine. The court commented that because the defendant’s actual knowledge would have made him guilty under either of the conflicting constructions, the case at bar was “not the proper vehicle for [it] to weigh in on the circuit split regarding the proper *mens rea* standard for 21 U.S.C. § 841(c)(2).”¹⁰⁴

III. 21 U.S.C. § 841(C)(2) SHOULD BE INTERPRETED AS A MIXED SUBJECTIVE/OBJECTIVE STANDARD

This Part maintains that various canons of statutory interpretation confirm the view that the mens rea requirement of 21 U.S.C. § 841(c)(2) should be construed as a mixed

⁹⁸ *Id.* at 768–69.

⁹⁹ *Id.* at 766.

¹⁰⁰ *Id.* at 767.

¹⁰¹ *Id.* at 766.

¹⁰² *Id.* at 768.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 769.

subjective/objective standard. Section A provides a brief description of the function of mens rea in criminal law and outlines the differences between a subjective and objective standard of guilt. Section B explores different canons of statutory construction and explains why each supports a mixed standard. Finally, Section C outlines and counters the argument made by proponents of a wholly subjective standard.

A. *Mens Rea*

In American criminal jurisprudence, a crime consists of two distinct elements: the actus reus, a physical act or omission, and the mens rea, the defendant's mental state.¹⁰⁵ Determining the defendant's mental state is essential for conviction; the American legal system holds steadfast to the belief that one must not be convicted for purely accidental acts.¹⁰⁶ While certain crimes require that the government prove guilt by inquiring into the defendant's psyche and determining that his illegal act was accompanied by an evil mind,¹⁰⁷ other crimes allow conviction based on a showing of objective fault.¹⁰⁸ Objective fault requires that the prosecution prove what a reasonably prudent person in the defendant's situation would have known or how he would have acted,¹⁰⁹ while a requirement of subjective fault necessitates that the prosecution prove what the defendant himself actually knew or did.¹¹⁰ No matter the mens rea standard, the

¹⁰⁵ DRESSLER, *supra* note 6, at 127.

¹⁰⁶ See *United States v. Morissette*, 342 U.S. 246, 250–51 (1952) (explaining that an injury can only be a crime if the actor had a culpable mindset when committing the act); see also OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 2 (2009) (1881) (noting that “even a dog distinguishes between being stumbled over and being kicked,” to explain that one should not be prosecuted for a mere accident).

¹⁰⁷ See Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 436 (1982) (using murder as an example of a crime that requires the government to prove that the defendant's guilty hand was accompanied by a guilty mind).

¹⁰⁸ DRESSLER, *supra* note 6, at 275–76 (discussing that, occasionally, a defendant's conduct is viewed from an objective point of view).

¹⁰⁹ See *id.* at 275 (explaining that the “reasonable man” governs objectivity in the criminal law).

¹¹⁰ See *Bond v. United States*, 529 U.S. 334, 340 (2000) (categorizing “actual” and “subjective” as one in the same).

prosecution in a criminal trial always has the burden of proving beyond a reasonable doubt that the defendant possessed the requisite mental state.¹¹¹

Statutory crimes typically employ certain words to articulate the mens rea requirement. Common terms include intentionally, knowingly, willfully, recklessly, and negligently;¹¹² each requires that the prosecution prove something different to achieve a conviction. Although these words and their accompanying definitions are not uniform throughout American jurisdictions,¹¹³ the Model Penal Code provides definitions that are widely accepted.¹¹⁴ Under the Model Penal Code, “knowingly” requires the prosecution to prove the defendant’s subjective fault—that he was nearly certain that a particular result would occur.¹¹⁵ In contrast, the phrase “having reasonable cause to believe” is not defined in the Model Penal Code.¹¹⁶ The circuit split highlights the fact that perhaps this mens rea is not as clear as “knowingly.”¹¹⁷

B. *Statutory Interpretation*

1. The Plain Meaning Rule

When Congress does not explicitly define the words or phrases it uses in a statute, one must look to established canons of statutory interpretation. To determine the plain meaning of a

¹¹¹ *Clark v. Arizona*, 548 U.S. 735, 738 (2006) (explaining that in a criminal trial, the prosecution has the burden of proving beyond a reasonable doubt that the defendant satisfied the statute’s mens rea requirement).

¹¹² See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 129–44 (5th ed. 2006) (listing and explaining oft-used mens rea words).

¹¹³ See DRESSLER, *supra* note 6, at 160 (noting that there are “countless” mens rea expressions used across different jurisdictions).

¹¹⁴ MODEL PENAL CODE § 2.02 (2001) (defining the requirements for culpability under “purposely,” “knowingly,” “recklessly,” and “negligently” mens reas).

¹¹⁵ *Id.* § 2.02(2)(b).

A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Id.

¹¹⁶ See *id.* § 2.02.

¹¹⁷ See *supra* notes 49–51 and accompanying text (discussing the debate amongst the circuits regarding whether the mens rea “having reasonable cause to believe” requires subjective or objective knowledge).

statute, the first step is to examine the language of the statute itself.¹¹⁸ If the statutory language plainly and unequivocally establishes its meaning, looking beyond this language is unnecessary.¹¹⁹ However, if the language of the statute is unclear or ambiguous and thus, fails to plainly establish its meaning, one must turn to the legislative history of the statute.¹²⁰ The Supreme Court has frequently followed this plain language rule, explaining that if the wording of a statute has a clear and unambiguous definition, courts need not look further than the statute's language to discern its meaning.¹²¹ Dictionaries are a key tool in discerning the plain meaning of words or phrases used in a statute.¹²² The dictionary definitions of the word "or" provide keen insight regarding the correct interpretation of "knowing or having reasonable cause to believe." Black's Law Dictionary defines "or" as "a disjunctive particle used to express an alternative or to give a choice of one among two or more things [A]n alternative between different or unlike things."¹²³ Similarly, Merriam-Webster's Collegiate Dictionary describes "or" as "used as a function word to indicate an alternative."¹²⁴ The plain meaning of the word "or"

¹¹⁸ See *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009) (discussing that statutory interpretation always begins with the ordinary meaning of the language); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'").

¹¹⁹ See *Germain*, 503 U.S. at 253–54; see also *United States v. One "Piper" Aztec "F" De Luxe Model 250 PA 23 Aircraft Bearing Serial No. 27-7654057*, 321 F.3d 355, 359 (3d Cir. 2003) (determining that when Congress's purpose is expressed in unambiguous terms, that language is conclusive).

¹²⁰ See *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) (noting that the Supreme Court does "not resort to legislative history to cloud a statutory text that is clear").

¹²¹ See, e.g., *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063–64 (2009) ("[W]e must first determine whether the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms." (internal citations omitted)); *Gitlitz v. Comm'r*, 531 U.S. 206, 220 (2001) (noting that when the statute's language is plain, resort to policy analysis is unnecessary); *Comm'r v. Soliman*, 506 U.S. 168, 174 (1993) (explaining that the first step in statutory interpretation is to look to the ordinary meaning of the language); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [a statute] begins where all such inquires must begin: with the language of the statute itself.").

¹²² *Carey v. Saffold*, 536 U.S. 214, 216–17, 219 (2002) (using a dictionary to determine the plain meaning of "pending" when attempting to interpret 28 U.S.C. § 2244(d)(2) (2006)).

¹²³ BLACK'S LAW DICTIONARY 1095 (6th ed. 1990).

¹²⁴ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 872 (11th ed. 2007).

unambiguously demonstrates that when it is placed between two words or phrases, it is used to indicate different, independent concepts.¹²⁵

These definitions of the word “or” support the position that “having reasonable cause to believe” should not be interpreted similarly to “knowingly.” Instead, it should be interpreted as an unlike, different standard—the objective standard. The disjunctive term is a signal that implies that only one of the enumerated requirements must be fulfilled and additionally, that the listed terms have distinct meanings.¹²⁶

Under 21 U.S.C. § 841(c)(2), if “having reasonable cause to believe” is the same as “knowing,” then no diversity exists between the terms before and after “or,” since both “knowing” and “having reasonable cause to believe” will require the government to prove the defendant’s subjective knowledge. This interpretation runs counter to the ordinary dictionary meanings of “or.” If Congress intended the statute to have only one, subjective mens rea requirement, “or” would not have been the appropriate word choice; instead, “and” would have been used to signify that both *mentes reae* necessitate subjective fault. “And” is typically understood as indicating that the listed requirements are of the same type.¹²⁷ To ensure that the plain meaning of the statutory language is effectuated, “knowing or having reasonable cause to believe” must be interpreted as allowing a conviction based on subjective awareness or, in the alternative, a defendant’s objective knowledge.

a. Legislative Intent

The legislative intent of 21 U.S.C. § 841(c)(2) also demonstrates that Congress purposely armed the statute with two distinct *mentes reae*. When interpreting the language of a statute, a court may attempt to decipher what the legislature

¹²⁵ See *FCC v. Pacifica Found.*, 438 U.S. 726, 739–40 (1978) (explaining that when a list of words are written in the disjunctive, it is implied that each has a different meaning); YULE KIM, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 8 (2008), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf> (discussing that “or” is used to demonstrate the existence of an alternative).

¹²⁶ KIM, *supra* note 125.

¹²⁷ See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 124, at 46 (defining “and” as “used as a function word to indicate connection or addition . . . of items within the same class or type”).

planned to accomplish when it decided to enact the statute.¹²⁸ The congressional proceedings and debates surrounding the Anti-Drug Abuse Act of 1988, and specifically 21 U.S.C. § 841(c)(2), shed light on Congress's goals. During the proceedings, Representative Kolbe explained that due to the stark increase in drug use in America, more rigorous law enforcement measures were needed to control drug production and manufacturing throughout the country.¹²⁹ The Act was drafted to serve that purpose by substantially enhancing the government's ability to control the transportation of precursor chemicals that are used to manufacture illicit drugs, such as methamphetamine.¹³⁰ Similarly, Senator Dole noted that one-hundred percent of illegally-used methamphetamine is manufactured in the United States, and the Act would provide the government with the tools necessary to combat and eradicate methamphetamine production and use.¹³¹ Moreover, Representative Manton explained that the legislation increased the amount of resources available to prosecute and convict people for drug-related offenses and allowed the government to strictly scrutinize the distribution of legal chemicals that are used to manufacture illicit narcotics.¹³² Senator Rudman echoed this statement, describing the Act as a

¹²⁸ See *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 512, 515 (1990) (referring to the Senate report to determine the "primary objective" of various amendments to the Medicaid law); *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968) (noting that interpreting a statute in light of its legislative history and general objectives facilitates a proper construction).

¹²⁹ See 134 CONG. REC. 22,637 (1988) (statement of Rep. Kolbe).

¹³⁰ See *id.* at 22,618 (statement of Rep. English) (noting that the bill would provide the government with more tools to stop the diversion of chemicals from legitimate enterprises into illegal channels); *id.* at 22,650 (statement of Rep. Bates) (noting that the bill would enhance the government's control over precursor chemicals to methamphetamine).

¹³¹ See 134 CONG. REC. 32,634 (1988) (statement of Sen. Dole).

¹³² See *id.* at 22,646 (statement of Rep. Manton). Rep. Manton stated:

[T]his legislation will supplement our previous anti-drug efforts by strengthening existing law and providing new resources in our fight against drugs [W]e will finally place controls on many of those chemicals commonly available which are used in the manufacturing and processing of illegal narcotics . . . [,] increase our assistance to State and local drug enforcement by increasing their overall authorization . . . [, and] broaden the jurisdiction of several branches of the Federal Government to play a wider role in drug enforcement.

Id.

“major new effort” that would prevent legal precursor chemicals from being diverted to channels of illicit drug production.¹³³

The congressional records clearly suggest that a major facet of the bill was to stop legal chemicals from being used for illicit purposes—namely, narcotic production—in an attempt to ensure the safety of the United States.¹³⁴ Members of Congress often discussed increasing the number of resources available to the government to combat drug manufacturing and use. By providing two different mens rea requirements to satisfy a conviction, the Act does just that. Allowing the prosecution to prove guilt on one of two bases widens the scope of criminal liability by criminalizing not only subjective knowledge but also objective awareness that the chemicals one distributes will be used to manufacture a controlled substance. Additionally, the legislation was aimed at eradicating drug manufacturing, distribution, and use in America, as affirmed by President Reagan in his remarks on signing the Act.¹³⁵ The President discussed “clos[ing] rank on those who continue to provide drugs” by strengthening the government’s power and ability “to eliminate from America’s streets and towns the scourge of illicit drugs.”¹³⁶ If 21 U.S.C. § 841(c)(2) is interpreted as requiring subjective knowledge, the government is unable to “close rank” on those who fail to take notice of the obviousness of their actions, when the reasonably prudent person would have known the chemicals would be used to produce a controlled substance. Construing the statute to contain two distinct mens rea requirements effectuates the goal of the Anti-Drug Abuse Act of 1988—eliminating illegal drugs in the United States.

¹³³ 134 CONG. REC. 32,630–31 (1988) (statement of Sen. Rudman).

¹³⁴ See *id.* at 32,630 (statement of Sen. Rudman) (noting that the drug problem in America was “one of the most serious threats” to national security, and the Act would serve to restore safety to the United States by diminishing drug production and use); *id.* at 32,636 (statement of Sen. Chiles) (discussing the grave threat that drugs posed to the security of the United States).

¹³⁵ *Remarks on Signing the Anti-Drug Abuse Act of 1988*, *supra* note 37, at 1522–23 (describing the “ultimate destination” of the Anti-Drug Abuse Act of 1988 as making America drug free).

¹³⁶ *Id.*

The sequence of changes in the statutory language that occurred throughout congressional proceedings is also telling.¹³⁷ As a general matter, the Supreme Court attaches significance to Congress's choice to use one House's proposed version of a statute's language over another House's model.¹³⁸ For example, in *United States v. Riverside Bayview Homes*, the Court found Congress's choice of the Senate's proposed definition of "navigable waters" and rejection of the House's extremely persuasive for determining how the Clean Water Act should be interpreted.¹³⁹ Here, the statutory language of 21 U.S.C. § 841(c)(2) underwent two significant changes throughout the legislative process.¹⁴⁰ The Senate's first proposed amendment to 21 U.S.C. § 841(c)(2) included only one mens rea requirement: knowing.¹⁴¹ The House proposed to amend the Senate's language on October 21, 1988 and added "reasonable cause to believe" as a second mens rea.¹⁴² Congress chose to adopt the House's version. When 21 U.S.C. § 841(c)(2) was enacted, both terms appeared in the statute.¹⁴³ Similar to *Riverside*, here Congress had the opportunity to choose between two varying drafts of the amendment to 21 U.S.C. § 841(c)(2), and it decided to enact the House's version. This final version indicates Congress's intent to expand the reach of the statute past the scope originally proposed in the Senate's amendment.¹⁴⁴ If "knowing" and "having reasonable cause to believe" both meant

¹³⁷ See *Booth v. Churner*, 532 U.S. 731, 739–41 (2001) (examining changes to the language of a bill as a tool in statutory construction); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952) (looking to the "specific history of the legislative process" of a statute aids in arriving at an appropriate meaning).

¹³⁸ See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 136–37 (1985).

¹³⁹ See *id.* at 137.

¹⁴⁰ See *supra* notes 42–45 and accompanying text.

¹⁴¹ 134 CONG. REC. S15,785 (daily ed. Oct 13, 1988). The proposed amendment read:

Section 401 of the Controlled Substances Act (21 U.S.C. 841) is amended by striking out subsection (d) and inserting in lieu thereof the following new subsections: (d) Any person who knowingly or intentionally . . . (2) possesses or distributes a listed chemical knowing that the listed chemical will be used to manufacture a controlled substance . . .

Id.

¹⁴² 134 CONG. REC. H11108 (daily ed. Oct. 21, 1988).

¹⁴³ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6055, 102 Stat. 4181, 4318 (codified as amended in 21 U.S.C.A. § 841(c)(2) (West 2011)).

¹⁴⁴ See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258–59 (2004) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995))).

actual knowledge, the amendment would have lacked meaning, been duplicative, and served no cogent purpose. Congress, however, always intends its statutory amendments to be substantive and significant.¹⁴⁵ Congress's decision to adopt the House's proposed amendment over the Senate's, coupled with this fact about statutory amendments, support the conclusion that Congress intended "knowing" and "having reasonable cause to believe" to be independent, alternate *mentes reae*.

b. "Having Reasonable Cause To Believe" Is a Term of Art

When attempting to decipher the meaning of a particular statute, courts also consider whether Congress has explicitly defined the term or phrase.¹⁴⁶ When a word or phrase has been defined elsewhere in the United States Code, it becomes a "term of art."¹⁴⁷ Unless circumstances indicate otherwise, that definition is controlling.¹⁴⁸ The Supreme Court has noted that if applying the definition to the statute at hand would present an "obvious incongruit[y]" or depart from the statute's purpose, then the circumstances indicate that definition is not controlling.¹⁴⁹

Currently, "reasonable cause to believe" is defined in 12 U.S.C. § 4003(c)(1) as requiring "the existence of facts which would cause a well-grounded belief in the mind of a reasonable person."¹⁵⁰ Here, no perverse implications would result from defining the same phrase in 21 U.S.C. § 841(c)(2) in the same manner. Title 12, section 4003(c)(1) was codified in 1987; thus, Congress arguably knew how it had previously defined "reasonable cause to believe" when it decided to use that same language in 1988.¹⁵¹ With this knowledge, Congress decidedly employed the term when drafting and enacting 21 U.S.C. § 841(c)(2).

¹⁴⁵ *See id.*

¹⁴⁶ *See* KIM, *supra* note 125, at 5.

¹⁴⁷ *See id.* at 5–6 (noting that when Congress has previously defined a word or phrase in a section of the United States Code, that word or phrase is a "term of art").

¹⁴⁸ *See id.* (explaining that when a term is defined in the United States Code, that definition is to be applied when the word or phrase is used elsewhere in the Code, so long as the definition is applicable in the circumstances).

¹⁴⁹ *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949).

¹⁵⁰ 12 U.S.C. § 4003(c)(1) (2006); *see also* *Fort v. Smith*, 407 N.E.2d 117, 120 (Ill. App. Ct. 1980) (identifying "reasonable cause to believe" as a term of art).

¹⁵¹ *See Miles v. Apex Marine Corp.*, 496 U.S. 19, 32 (1990) (noting that it is safe to assume that Congress was cognizant of existing law when enacting legislation).

2. Statutory Language Should Not Be Construed To Render Any Part Superfluous

The maxim that courts should avoid interpretations that render any part of the statutory language superfluous has remained constant from the nineteenth century until today.¹⁵² This rule of statutory interpretation serves an even more important purpose when interpreting a criminal statute. As the Supreme Court noted in *Ratzlaf v. United States*,¹⁵³ judges should be even more reluctant to treat statutory language as mere surplusage when the words are defining an element of a criminal offense.¹⁵⁴ In *Bailey v. United States*,¹⁵⁵ the Supreme Court explained that when Congress places two terms in a statute, it assumes that Congress intended each word to have its own “nonsuperfluous” meaning.¹⁵⁶ Ensuring that a statute is construed to avoid rendering any part of the statute superfluous is well-established in the Supreme Court.¹⁵⁷

Here, if “reasonable cause to believe” requires actual knowledge, it is an entirely redundant, unnecessary phrase, as “knowingly” already requires that the defendant have a subjective awareness that the chemicals he distributes will be used to manufacture a controlled substance.¹⁵⁸ Similar to the

¹⁵² See *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2499 (2009) (noting that a statute should be construed in such a way that each provision is given a meaning and no part of the statute will be insignificant); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (“[C]ourts should disfavor interpretations of statutes that render language superfluous.”); *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (noting that courts should be extremely hesitant to interpret a statute so as to make any words or provisions unnecessary); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (stating that courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed”).

¹⁵³ 510 U.S. 135 (1994).

¹⁵⁴ See *id.* at 140–41 (explaining that judges should attempt to ensure that each word in a statute has consequence, especially when the statute at hand is criminal).

¹⁵⁵ 516 U.S. 137 (1995).

¹⁵⁶ *Id.* at 146 (noting that when Congress decided to use two different terms, it did not intend for either term to be excessive).

¹⁵⁷ See, e.g., *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (stating that “of course” the court attempts to interpret statutes so no word is rendered unnecessary).

¹⁵⁸ See *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005) (explaining that if having “reasonable cause to believe” requires subjective knowledge, the phrase is superfluous and unnecessary); *United States v. Kaur*, 382 F.3d 1155, 1157 (9th Cir. 2004) (noting that because “knowing” and “having reasonable cause to

statute referenced in *Bailey*, we may presume that not only did Congress purposely use two different phrases when drafting 21 U.S.C. § 841(c)(2) but that the legislature intended each term to have its own distinct meaning, especially since the statute defines a criminal offense.¹⁵⁹ Congress chose to adopt the latter of the two language options. By using two different phrases in the statute, Congress deliberately chose to broaden the application of the statute beyond actual knowledge and provide two different bases for conviction.¹⁶⁰ If Congress intended to provide the government with only one avenue for conviction, it would have, and could have, written the statute to ensure such a construction; instead, Congress worded the statute to plainly present “knowing” and “having reasonable cause to believe” as two individual, separate alternatives.¹⁶¹

3. Mischief Approach

Another tool often used in statutory interpretation is the “mischief” approach, also commonly known as the “purposivist” approach, which is considered the most flexible and traditional method.¹⁶² Under this doctrine, a court first determines the ill that the legislature was attempting to remedy by passing the statute. Next, the statute is interpreted in a manner that “attack[s] that mischief as manifested under current circumstances.”¹⁶³

This approach has been recognized for over four-hundred years. In 1584, the English judge presiding over *Heydon's Case*¹⁶⁴ explained that “the office of all the Judges is always to make such construction as shall suppress the mischief, and advance

believe” are obviously “two distinct alternatives,” having “reasonable cause to believe” would be redundant if it is defined as actual knowledge).

¹⁵⁹ See *Bailey*, 510 U.S. at 146 (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”); see also *Ratzlaf*, 510 U.S. at 140–41.

¹⁶⁰ See *Bailey*, 510 U.S. at 146 (explaining that when Congress uses two different terms in a statute, the language should be interpreted as allowing two independent bases upon which the government may charge a defendant).

¹⁶¹ See *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

¹⁶² See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332 n.40 (1990).

¹⁶³ *Id.* (citing Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1269–72 (1947)).

¹⁶⁴ 76 Eng. Rep. 637 (Exch. 1584).

the remedy” that “Parliament hath resolved and appointed to cure the disease of the commonwealth.”¹⁶⁵ The trend was still dominant three-hundred years later.¹⁶⁶ In *United States v. Boisdoré's Heirs*,¹⁶⁷ Chief Justice Taney noted that judges must always interpret a statute according to the policy that drove its enactment.¹⁶⁸ The Supreme Court has remained loyal to this approach, noting time and time again that a statute should be interpreted in a way that will remedy the harm that the legislature sought to eradicate.¹⁶⁹ The purposivist approach instructs a court to consider how the particular mischief has evolved since the statute's enactment.¹⁷⁰

When Congress enacted the Anti-Drug Abuse Act of 1988, it consistently explained that the purpose of the legislation was to ensure that drugs no longer ravaged the safety of the United States. Senators Byrd and Rudman noted that the presence of drugs in America was “one of the most serious threats” to the country, and the Act's purpose was to restore safety to the United States by eradicating drug production, manufacturing, and use.¹⁷¹ Senator Rockefeller detailed the deleterious effect drug

¹⁶⁵ *Id.* at 639.

¹⁶⁶ *See, e.g.*, *United States v. Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850).

¹⁶⁷ 49 U.S. (8 How.) 113.

¹⁶⁸ *See id.* at 122 (“In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”).

¹⁶⁹ *See* *Negusie v. Holder*, 129 S. Ct. 1159, 1171 (2009) (explaining that “interpretation is a multifaceted enterprise” that includes construing statutory language to effectuate the legislature's policy); *McCreary Cnty. v. ACLU*, 545 U.S. 844, 845 (2005) (explaining that deciphering the “purpose” of a statute is a “staple” of statutory interpretation); *United States v. Fausto*, 484 U.S. 439, 443–48 (1988) (noting that the “answer” to correctly interpreting a statute is in the purpose of the act); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982) (citing *Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979)); *SEC v. Joiner*, 320 U.S. 344, 350–51 (1943) (noting that statutory text should be interpreted to further the generally expressed legislative policy).

¹⁷⁰ *See* *Eskridge & Frickey*, *supra* note 162.

¹⁷¹ 134 CONG. REC. S17,300-01 (daily ed. Oct. 21, 1988) (statements of Sen. Byrd and Sen. Rudman); *see also id.* (statement of Sen. McConnell) (explaining that the bill sought to notify drug traffickers that the United States government would no longer allow drugs to be the cause of innumerable deaths, and noting that the legislation aimed to crack down on those who “finance” the enemy); *id.* (statement of Sen. Chiles) (noting that drugs pose a serious threat to national security); 134 CONG. REC. H7074-02 (daily ed. Sept. 7, 1988) (statement of Rep. Hoyer) (commenting that drugs are “tearing” apart the nation).

use was having on the security of America's family units and economy, explaining that drugs cause a stark increase in criminal activities. Senator Rockefeller stated,

[w]e have seen drugs literally rip thousands of American families asunder. Nationally, substance abuse is a factor in 90 percent of all teen pregnancies, 60 percent of all teen suicides and homicides, and 90 percent of all incest cases.

.....

It is estimated that the economic costs associated with drug abuse in the United States could be as high as \$100 billion a year in lost productivity, associated health care costs, and the need for increased law enforcement.

.....

The National Institute of Justice found that of 2,000 persons arrested for serious crimes last year, 70 percent tested positive for drug use. More than half of the criminal cases pending before our courts involve drug-related crimes.¹⁷²

Today, drugs also endanger the protection of the United States via the relationship between drug trafficking and international terrorism. In 1988, Representative Smith noted that there was a "connection between narcotics traffickers and terrorists," yet the issue of narco-terrorism was not nearly as prominent and glaring as it is today.¹⁷³ Over the past two decades, the connection between drug transactions and international terrorism has significantly strengthened and poses a genuine threat to the safety of the United States.¹⁷⁴ When Congress passed the Act, the ill that it sought to remedy was the negative impact that drug trafficking had on the safety of the nation. Today, in the wake of 9/11, the Madrid subway bombing,

¹⁷² 134 CONG. REC. S17,301-01 (statement by Sen. Rockefeller).

¹⁷³ 134 CONG. REC. H7074-02 (statement by Rep. Smith); *see also* DAVEED GARTENSTEIN-ROSS & KYLE DABRUZZI, CTR. FOR POLICING TERRORISM, *THE CONVERGENCE OF CRIME AND TERROR: LAW ENFORCEMENT OPPORTUNITIES AND PERILS 2-4* (2007) (noting that "[t]errorist groups have derived a great deal of profit from the illegal drug trade" and describing the relationship between methamphetamine trafficking and the Shia terrorist group Hezbollah); David Kaplan, *Paying for Terror*, U.S. NEWS & WORLD REP. (Dec. 5, 2005), <http://www.usnews.com/usnews/news/articles/051205/5terror.htm> (describing the connection between the Madrid subway bombing and MDMA trafficking).

¹⁷⁴ *See* GARTENSTEIN-ROSS & DABRUZZI, *supra* note 173, at 3-5 (commenting on the danger to the United States caused by the link between drug traffickers and terrorists).

and the rapid growth of international terrorist organizations drugs specifically threaten the security of the United States by financing the operation of terrorist groups.¹⁷⁵

Former Attorney General John Ashcroft once stated, “[t]errorism and drugs go together like rats and the bubonic plague—they thrive in the same conditions, support each other, and feed off each other.”¹⁷⁶ A “narco-terrorist organization” is “an organized group that is complicit in the activities of drug trafficking in order to further, or fund, premeditated, politically motivated violence perpetrated against non-combatant targets with the intention to influence.”¹⁷⁷ Similarly, “narco-terrorism” is the use of drug trafficking as a way to provide financial support to terrorist organizations.¹⁷⁸ Currently, narco-terrorism is prevalent within the borders of the United States, as profits from narcotics transactions are used to finance terrorist organizations;¹⁷⁹ twelve of the thirty-six organizations on the State Department’s terrorist organizations list have been linked to the international drug trade.¹⁸⁰ Hezbollah, Al-Qaeda, and Hamas each receive financing from narcotics trafficking in the United States.¹⁸¹

Specifically, a strong connection between methamphetamine trafficking and terrorist organizations has been uncovered within the past decade.¹⁸² A study of jihadist terrorism since 9/11

¹⁷⁵ See *id.* at 3–4.

¹⁷⁶ John Ashcroft, Attorney Gen., U.S. Dep’t of Justice, DEA/Drug Enforcement Rollout (Mar. 19, 2002) (prepared remarks), available at <http://www.justice.gov/archive/ag/speeches/2002/031902newsconferencedeaenforcementrollout.htm>. President George W. Bush nearly echoed this sentiment, stating, “It’s so important for Americans to know that the traffic in drugs finances the work of terror, sustaining terrorists . . . Terrorists use drug profits to fund their cells to commit acts of murder.” RACHEL EHRENFELD, *FUNDING EVIL: HOW TERRORISM IS FINANCED AND HOW TO STOP IT* 3–4 (2005).

¹⁷⁷ GARTENSTEIN-ROSS & DABRUZZI, *supra* note 173, at 4.

¹⁷⁸ *Id.*

¹⁷⁹ Larry Cunningham, *The Border Search Exception as Applied to Exit and Export Searches: A Global Conceptualization*, 26 QUINNIPIAC L. REV. 1, 32 (2007).

¹⁸⁰ *Id.* at 32–33; see also Sara Carter, *Hezbollah Uses Mexican Drug Routes into U.S.*, WASH. TIMES, Mar. 27, 2009, at A1 (reporting that the DEA believes that sixty percent of terrorist groups are connected with illicit narcotics trafficking).

¹⁸¹ See EHRENFELD, *supra* note 176, at 12.

¹⁸² Methamphetamine is a schedule II controlled substance. U.S. Drug Enforcement Admin., *Methamphetamine*, <http://usdoj.gov/dea/concern/meth.html> (last visited Nov. 12, 2010). Methamphetamine is an addictive illegal stimulant that may be snorted, smoked, or injected intravenously by users. See *id.* Common street names for methamphetamine include, but are not limited to, “speed,” “meth,” “poor

revealed that terrorist groups find financial support through methamphetamine sales in the United States.¹⁸³ In January 2002, Operation Mountain Express III, a federal investigation, resulted in charges against 136 people, and the seizure of 179 pounds of methamphetamine and thirty-six tons of pseudoephedrine, a listed precursor chemical to methamphetamine.¹⁸⁴ A large portion of the profits from the drug ring was sent to the Middle East to support terrorist organizations.¹⁸⁵ In thwarting yet another Hezbollah drug ring, the DEA arrested 300 people for methamphetamine sales and seized 181 pounds of methamphetamine, thirty tons of pseudoephedrine, and nine methamphetamine laboratories.¹⁸⁶ The DEA concluded that profits from this drug ring were being used in support of the Hezbollah, Al-Qaeda, and Hamas terrorist operations.¹⁸⁷ Similarly, Operation Green Quest, a “task force on terrorist financing” designed to destroy the financial sources of terrorism, uncovered instances of proceeds from methamphetamine trafficking being sent to support Hezbollah.¹⁸⁸

Furthermore, ecstasy trafficking is another source of funding for terrorist groups.¹⁸⁹ The Madrid Cell, the terrorist group that

man’s cocaine,” “crystal,” and “shabu.” *Id.* Methamphetamine highs may last for as long as half a day and have toxic repercussions on the brain; high doses can cause the body’s temperature to spike to lethal levels and may cause convulsions. *See id.* Long-term use often causes addiction, violent behavior, anxiety, insomnia, hallucinations, paranoia, suicidal tendencies, and depression. *See id.* Methamphetamine recipes are readily available on the Internet, thereby allowing anyone with Internet access the opportunity to learn how to manufacture the drug. Simple Ways To Make Methamphetamine, <http://www.simple-ways-to-make-methamphetamine.com/crank-meth-recipe-red-white-blue-process.html> (last visited Nov. 12, 2010).

¹⁸³ EHRENFELD, *supra* note 176.

¹⁸⁴ GARTENSTEIN-ROSS & DABRUZZI, *supra* note 173, at 3.

¹⁸⁵ *Id.*

¹⁸⁶ *See* EHRENFELD, *supra* note 176, at 11–12; *see also* U.S. Drug Enforcement Admin., Maps of Methamphetamine Lab Incidents, http://www.usdoj.gov/dea/concern/map_lab_seizures.html (last visited Nov. 12, 2010) (observing that since January 1999, 123,400 methamphetamine labs have been seized).

¹⁸⁷ EHRENFELD, *supra* note 176, at 12.

¹⁸⁸ GARTENSTEIN-ROSS & DABRUZZI, *supra* note 173, at 3.

¹⁸⁹ *See* Kaplan, *supra* note 173. Ecstasy, or MDMA, a schedule I controlled substance, is an illegal drug that functions as a stimulant and a psychedelic. U.S. Drug Enforcement Admin., MDMA (Ecstasy), <http://www.usdoj.gov/dea/concern/mdma.html> (last visited Nov. 12, 2010). Users experience euphoria, and reduced inhibitions, heightened energy and sexuality, and distortions in time and perception. *See id.* Street names include, but are not limited to, “XTC,” “E,” “X,” “hug drug,” and “disco biscuit.” *See id.* Ecstasy use may cause liver, kidney, cardiovascular system

arranged the 2004 subway bombing in Madrid, received much of its financing from the proceeds of ecstasy sales.¹⁹⁰ The Cell's leaders called drug sales "a weapon of jihad."¹⁹¹ The terrorist gang financed the subway bombing with money earned from trafficking in ecstasy. When police raided the home of a Madrid Cell member, 125,800 ecstasy pills were seized.¹⁹²

Currently, narcotics trafficking poses a substantial threat to the safety of the United States, as terrorist organizations use the profits of methamphetamine and ecstasy sales to finance terrorist operations.¹⁹³ Since the statute's enactment in 1988, the damage caused by controlled substances has evolved into endangering the safety of the United States by way of narco-terrorist organizations.¹⁹⁴ Pursuant to the mischief approach to statutory construction, the "knowing or having reasonable cause to believe" requisite mens rea of 21 U.S.C. § 841(c)(2) must be interpreted with this threat in mind; specifically, it must be construed in light of the recently-formed connection between narcotics trafficking and international terrorism.¹⁹⁵ Since Congress passed 21 U.S.C. § 841(c)(2) to diminish the threat that controlled substances posed to the United States, its language should be interpreted to further that objective.

To effectuate Congress's intent to protect the country from the danger of narcotics, the statute must be interpreted broadly. If the statute is construed narrowly as a wholly subjective standard, the government will be unable to safeguard the United States from those who fail to take notice of the fact that the chemicals they sell will be used to manufacture a controlled substance, when the reasonable person in the defendant's position would have been aware of his purchaser's intent. Construing the statute to limit the government's reach directly interferes with the legislature's intent—that is, to protect the United States from terrorism by eliminating terrorist drug money ties—by making an entire class of people often involved in

failure, muscle tension, nausea, blurred vision, faintness, depression, and trouble concentrating. *See id.*

¹⁹⁰ *See* Kaplan, *supra* note 173 (describing the connection between ecstasy sales and the subway bombing).

¹⁹¹ GARTENSTEIN-ROSS & DABRUZZI, *supra* note 173, at 5.

¹⁹² Kaplan, *supra* note 173.

¹⁹³ *See supra* notes 176–81 and accompanying text.

¹⁹⁴ *See supra* notes 176–81 and accompanying text.

¹⁹⁵ *See supra* notes 162–63 and accompanying text.

drug trafficking immune from conviction. Alternatively, interpreting the statute as a mixed subjective/objective standard provides the government with two bases upon which it may convict a defendant for drug trafficking. As a result, this will enhance the government's ability effectively thwart terrorist activities by allowing the prosecution to convict a larger number of dangerous criminals. This interpretation is consistent with Congress's attempt to safeguard the country from terrorism, a substantial danger caused by narcotics.

C. The Tenth Circuit's Erroneous Counterargument

Proponents of an entirely subjective standard, namely the Tenth Circuit, argue that one's guilt cannot be predicated on the beliefs of a hypothetical, reasonable man but instead must take into account the precise knowledge of the defendant himself.¹⁹⁶ The Tenth Circuit noted that "[g]uilt is personal," and a defendant cannot fairly be forced to accept liability simply because a hypothetical person would have had knowledge of certain facts.¹⁹⁷ This view, however, is based on a flawed perception of the criminal law. In fact, there are statutes that criminalize actions without ever inquiring into the defendant's state of mind¹⁹⁸ or by determining what a reasonable person in the defendant's situation would have known.¹⁹⁹ A prime example is statutory rape; the criminal law punishes a defendant for engaging in intercourse with a child under a certain age, regardless of whether the defendant thought or a reasonable person would have thought the child was older than the requisite age.²⁰⁰ The defendant's mens rea is irrelevant to conviction, proving that guilt certainly does not always require an examination of the defendant's actual, subjective knowledge. Similarly, the negligence mens rea is widely used throughout the criminal law. When employed, the negligence standard requires only that a reasonable person in the defendant's situation would have known certain facts or acted in a certain way.²⁰¹ Criminally

¹⁹⁶ See *United States v. Saffo*, 227 F.3d 1260, 1268–69 (10th Cir. 2000).

¹⁹⁷ *Id.* at 1269.

¹⁹⁸ See *DRESSLER*, *supra* note 112, at 156 (explaining that "strict liability" crimes impose liability without a mens rea requirement).

¹⁹⁹ See *id.* at 131 (noting that a negligence mens rea punishes a defendant "for his failure to live up to the standards of the fictional 'reasonable person'").

²⁰⁰ See *id.* at 157–58.

²⁰¹ See MODEL PENAL CODE § 2.02(2)(d).

negligent homicide is one such example: To be convicted of this crime, the Model Penal Code explains that the prosecution need only prove that the defendant acted in contrast to how a reasonable person would have acted in his situation.²⁰² Thus, the Tenth Circuit deviates from the well-established tenet in criminal law jurisprudence that guilt does not always have to be based upon the defendant's subjective knowledge but in fact can be based on the knowledge of the reasonably prudent man.

CONCLUSION

The mens rea requirement of 21 U.S.C. § 841(c)(2)—“knowing or having reasonable cause to believe”—must be interpreted to allow either subjective or objective proof as to the mens rea of the defendant and calls upon the Supreme Court to reverse the Tenth Circuit's contrary opinion. The prosecution may prove the defendant's guilt either by demonstrating that he had actual knowledge that the listed chemicals he distributed would be used to manufacture a controlled substance *or* that a reasonably prudent person in the defendant's situation would have had such an understanding. Congress enacted the Anti-Drug Abuse Act of 1988, which authorized the current language of 21 U.S.C. § 841(c)(2), to eradicate drug manufacturing and use in America and focused on providing the government with the necessary resources to stop legal drugs from being used to manufacture illicit substances. Congress intended to ensure the safety of the United States by waging an aggressive attack on those who supply and use drugs. The proposed interpretation, already adopted by the Eighth, Ninth, and Eleventh Circuits, is overwhelmingly supported by the legislative history of the statute, the canon of statutory interpretation that holds that no language in a statute should be rendered superfluous, and the “mischief approach” to statutory construction. Each of these fundamental tools, used regularly by the Supreme Court,

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a *gross deviation from the standard of care that a reasonable person would observe in the actor's situation*.

Id. (emphasis added).

²⁰² See *id.* § 210.4.

2010] *HOW MUCH DO YOU REALLY HAVE TO KNOW?* 1131

convincingly confirm that “knowing or having reasonable cause to believe” must be understood as allowing a conviction based on the defendant’s subjective *or* objective knowledge. The Supreme Court should resolve the circuit split and adopt the correct interpretation of the mens rea requirement of 21 U.S.C. § 841(c)(2): a mixed subjective/objective standard.