No. 09-1533

In the Supreme Court of the United States

FRANTZ DEPIERRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government acknowledges (Opp. 6, 8) the deep, persistent conflict among the courts of appeals with respect to the question presented in the petition—whether the term "cocaine base" in 21 U.S.C. § 841(b)(1) encompasses every form of alkaloid cocaine (that is every form of cocaine that is chemically basic), or instead only "crack" cocaine (one specific kind of alkaloid cocaine). Indeed, six courts of appeals have concluded that "cocaine base" includes all forms of cocaine that are chemically basic. Five courts of appeals hold that the phrase refers only to "crack cocaine" (or, in the D.C. Circuit, potentially any smokeable form of cocaine). See Pet. 13–17.

The government's opposition does not dispute the very substantial importance of the question presented. Thousands of individuals are sentenced every year to the mandatory minimum sentences prescribed by Section 841(b)(1). See Pet. 18–19. The applicability of these mandatory minimums turns principally on the proper definition of "cocaine base." In light of the conflict among the courts of appeals, whether a defendant is sentenced under Section 841(b)(1)'s substantial mandatory minimum provisions often turns exclusively upon the jurisdiction in which the defendant is tried.

The government's sole basis for opposing certiorari is its assertion that "the arguments and evidence at trial" supposedly demonstrate "that the substance in this case was, in fact, crack." Opp. 9. That contention simply is not supported by the record—indeed, it rests on a serious misreading of the proceedings below—and, in addition, provides no basis for denying review and leaving the lower courts

in a state of disarray with respect to this very important issue.

It is, of course, true that there was no finding below that the substance here was *not* crack cocaine—but that is because the government argued successfully that no finding regarding the particular type of cocaine base at issue here was required. Like the defendant who kills his parents and then begs for mercy as an orphan, the government, having prevailed on its claim that the question whether the cocaine base was specifically crack was irrelevant, cannot now contend that review by this Court is inappropriate because the substance might be crack after all.

Indeed, the nature of the cocaine involved here was a disputed issue at trial, and the court of appeals—recognizing the legitimacy of that dispute—refused to rest its judgment on the very factual argument that the government now advances before this Court. That is because the record contains substantial evidence indicating that the cocaine in fact was *not* crack. If petitioner's interpretation of the statute is correct, the lower courts will, of course, have to determine on remand whether or not the transaction in question involved specifically crack. But given the record below, there simply is no basis for presuming the outcome of that determination now, and denying petitioner—and the thousands of other similarly situated individuals—the opportunity to argue the evidence before the district court, as required by the proper interpretation of the statute. Review by this Court accordingly is warranted.[1]

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[1] The government suggests (Opp. 9 n.3) that its argument against review in this case is similar to the reasons advanced for denying prior petitions raising this issue. See Pet. 20 n.10

A. The Court Of Appeals Expressly Refused To Rest Its Decision On The Factual Argument Advanced By The Government.

The government argued in the court of appeals that there was no need for that court to address petitioner's legal argument that the mandatory minimum statute requires a finding that the substance was crack cocaine. The government asserted there, as it does here, that the court could have found that the type of cocaine involved in petitioner's transaction was, indeed, crack. See Gov't Ct. App. Br. 23.

The court of appeals refused to rest its decision on that ground. The First Circuit acknowledged that "some evidence indicates the substance here was crack and at sentencing the judge repeatedly referred to it as crack" but concluded that "to rely on that would needlessly raise an evidentiary issue that DePierre contests." Pet. App. 10a. The court of appeals also recognized that it had an obligation to eliminate any "doubts about the continued vitality of binding circuit precedent as to the meaning of the statute." *Ibid.*

Given what the First Circuit itself recognized as the contested "evidentiary issue" regarding the type of cocaine involved here, this Court should similarly reject the government's invitation to leave the law in a state of confusion. It should grant review to resolve

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(discussing cases). That simply is not true. Each of those cases featured lower court determinations that would have prevented this Court from reaching the issue of statutory construction—for example, harmless error determinations or express findings by the lower courts that the offenses involved crack cocaine. There are no such lower court determinations here—rather, the court of appeals expressly refused to make such a determination in this case, as we explain below.

the stark conflict among the courts of appeals with respect to the question presented.

The First Circuit's approach in this case also undercuts the government's suggestion (Opp. 11) that as a practical matter, cocaine base sold in this country is virtually always crack cocaine. If that were true, the lower courts would have no occasion to address the legal issue presented here—the government would simply demonstrate that the substance *was* crack cocaine, and obviate the need to address the issue, or courts would adopt the course suggested by the government here and decline to reach the legal issue because the record made clear that the substance involved was crack. The fact that the legal issue has been addressed by the lower courts with such frequency (Pet. 14–17), and that numerous commentators (*id.* at 19–20) have urged resolution of the conflict by this Court, thus casts substantial doubt on the government's claim that crack cocaine is virtually always present.

B. Substantial Record Evidence Indicates That The Substance Here Was Not Crack Cocaine.

The government's argument also falls short on its own terms, because the evidence in the record provides substantial reason to doubt that the substance petitioner distributed was crack. Given the lack of clarity in the record, there is no justification for declining to review the question presented.[2]

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[2] The government states that "[e]ven now" petitioner "never suggests that the substance he sold to the" confidential informant was a form of cocaine base other than crack. Opp. 11. As we discuss below, however, petitioner made that precise argument at trial—in questioning witnesses and in closing argu-

1. Petitioner was convicted for distributing cocaine on two separate occasions. Pet. App. 2a. In February 2005, petitioner distributed 61.7 grams of powder cocaine. Tr. 482–483 (identifying substance as "cocaine hydrochloride," *i.e.*, cocaine powder (see Pet. 6)). During a second transaction in March 2005, the petitioner distributed 55.1 grams of a substance containing cocaine. Tr. 490. The latter transaction formed the basis for petitioner's ten-year mandatory minimum.

At trial, Betty Bleivik, a senior forensic chemist for the Drug Enforcement Administration, testified that the substance from the March 2005 transaction ("Government Exhibit 6") contained "cocaine and some cocaine artifacts." Tr. 491. She likewise testified that the substance contained "cocaine base." *Id.* at 491; see also *id.* at 492. Significantly, *Bleivik, the government's own witness, never testified that the substance was crack.*

During cross-examination, counsel for petitioner pressed exactly that point. He asked Bleivik: "what does one have to do" in order "to get from [cocaine hydrochloride] to what is commonly referred to as crack?" Tr. 497. She answered that "[o]ne has to remove that hydrochloride salt from the cocaine molecule" and observed that sodium bicarbonate (*i.e.*, "baking soda") is "very commonly used" to produce "crack." *Ibid.*[3] Yet Bleivik confirmed that she "was

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ment. Those facts, reflected in the trial court record, are dispositive of the government's argument. Extra-record assertions in briefs are not relevant, much less required.

[3] Bleivik's testimony on this point was consistent with the Sentencing Guidelines, which note that "crack" cocaine is "usually prepared by processing cocaine hydrochloride and sodium bicarbonate." U.S.S.G. § 2D1.1(c), Note (D).

not able to identify any sodium bicarbonate in government Exhibit 6." Tr. 499; see also *ibid.* ("Government Exhibit is cocaine base, and I was not able to identify any baking soda in that sample.").

Far from "overwhelmingly confirming" that the substance was crack (Opp. 9), the trial evidence thus demonstrated only that the petitioner sold a form of cocaine that was chemically basic (*i.e.*, $C_{17}H_{21}NO_4$); the expert witness never testified that the substance was crack, rather than some other form of chemically basic cocaine, such as coca paste, non-powder cocaine, or freebase cocaine. See Pet. 6–7. If anything, the lack of sodium bicarbonate suggested that the substance was *not* crack at all.

2. The government bases its contrary assertion on scattered snippets from the trial record. Even taken on their own—and certainly when viewed in light of the government's failure to elicit key evidence from its own expert—these factors provide no basis for concluding that the cocaine here definitely was crack.

First, the government is just plain wrong in suggesting (Opp. 11) that the district court found the substance involved in the March 2005 transaction to be crack. During the jury charge, the district court made clear that, in the First Circuit, there is no relevant distinction between "crack" and "cocaine base," using both terms interchangeably. See Tr. 585–586 ("We've heard talk about it in terms of crack cocaine, and you can understand here that the statute that's relevant asks about cocaine base. Crack cocaine is a form of cocaine base, so you'll tell us whether or not what was involved is cocaine base * * *."). That instruction, as the First Circuit concluded below, "accord[ed]" with established circuit precedent "h[old-

ing] that 'cocaine base' refers to 'all forms of cocaine base, including *but not limited to* crack cocaine.'" Pet. App. 10a–11a (emphasis added) (quoting *United States* v. *Anderson*, 452 F.3d 66, 86–87 (1st Cir. 2006)).

Because circuit precedent rendered irrelevant any distinction between crack cocaine specifically and alkaloid cocaine generally, the district court and the parties used the terms "crack" cocaine and "cocaine base" interchangeably at the sentencing hearing. That usage—adopted after the district court's ruling on the meaning of "cocaine base"—does not represent a holding by the district court (especially in light of the court's conclusion that such a determination was unnecessary) and certainly provides no basis for a determination that crack cocaine specifically was involved.

Second, the government's reliance (Opp. 9, 11) on a few out-of-context statements by petitioner's counsel is nothing short of bizarre. Petitioner contended at trial that the substance was *not* crack, and vigorously sought a jury instruction allowing the jury to make a determination to that effect. Tr. 512. And trial counsel's cross-examination of Bleivik was designed specifically to demonstrate that the substance was *not* crack. See Tr. 497–499.

Nor did petitioner in the course of his sentencing memorandum concede that the substance he distributed was, as a matter of fact, crack. After the district court rejected petitioner's argument concerning the interpretation of Section 841(b)(1), petitioner's counsel simply followed the court, the government, and the common vernacular in loosely referring to all alternatives to "powder cocaine" as "crack cocaine." See Sentencing Memo. at 6 (observing that the

"mandatory minimum sentence" applies to "crack cocaine" as distinguished from "powder cocaine"). Indeed, in the sentencing memorandum, petitioner's counsel defined the term "crack cocaine" as interchangeable with "cocaine base." *Id.* at 1.

Certainly, nothing trial counsel said there or at any other time amounted to the kind of "formal stipulation[]" that "ha[s] the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2983 (2010). That is how the First Circuit saw it as well, observing that petitioner's "contention, *which was preserved in the district court*, is that the statute should be read to apply only to that form of cocaine base called crack" and thus requires a finding to that effect. Pet. App. 9a (emphasis added).[4]

Third, although the confidential informant, acting at the direction of the government, requested that petitioner sell him crack cocaine (Opp. 9–10), what the informant *asked for* and *believed* he was receiving obviously has no bearing on the chemical composition of what petitioner *actually* provided. And while the government asserts that the substance

[4] The government also faults petitioner for failing to dispute the presentence report's characterization of the substance as crack cocaine. See Opp. 10. But petitioner's trial counsel plainly made a judgment to focus his argument at sentencing on the claim that the government engaged in sentencing factor manipulation (see Pet. App. 3a, 6a–8a) because, if successful, that would have produced the largest sentence reduction. That strategic choice—particularly in light of binding First Circuit precedent making any disputation concerning the type of cocaine base largely pointless—provides no support whatsoever for a concession that the substance in fact was "crack."

was "chunky" and thus potentially "crack" cocaine (*id.* at 10), the substance introduced at trial was not in a "chunky" form. Tr. 493. Moreover, the substance petitioner distributed in February 2005, which the government concedes was cocaine hydrochloride (that is, "powder" rather than "crack" cocaine), was *also* described by the informant at trial as "chunky." Tr. 234. Thus the isolated fact that the informant observed that the substance was "chunky" surely does not demonstrate that it was crack.

There is accordingly no basis for denying review on the ground that the record in this case conclusively demonstrates that the cocaine involved here was crack. Should petitioner prevail in this appeal, that factual question would be an issue for resolution on remand.[5]

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[5] The government also argues (Opp. 6–8) that the court of appeals correctly interpreted the relevant statutory provision. That contention of course provides no basis for denying review. And the government's position is unpersuasive in any event. For reasons we have explained (see Pet. 22–25), the government's reading would, for example, render substantial portions of Section 841(b)(1) meaningless. According to the government, Section 841(b)(1)(A)(iii) would impose a ten-year mandatory minimum for distribution of just 50 grams of coca leaves, despite that in Section 841(b)(1)(A)(ii) Congress specifically determined that coca leaves should carry a ten-year minimum sentence only when an individual distributes 5,000 grams of that substance. The government makes no attempt to harmonize these provisions. The legislative history also unambiguously indicates that Congress used the term "cocaine base" to mean exclusively "crack" cocaine (see Pet. 26–27), a conclusion independently necessitated by the rule of lenity (see *id.* at 27–28).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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