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IN THE SUPREME COURT OF THE UNITED STATES

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FRANTZ DePIERRE, :

Petitioner :

v. : No. 09-1533

UNITED STATES :

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Washington, D.C.

Monday, February 28, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of Petitioner.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 09-1533, DePierre v. United States.

Mr. Pincus.

ORAL ARGUMENT OF ANDREW J. PINCUS

ON BEHALF OF THE PETITIONER

MR. PINCUS: Thank you, Mr. Chief Justice, and may it please the Court:

The question in this case is whether the dramatically harsher mandatory minimum penalty for what the statute terms cocaine base applies to all offenses involving cocaine or only those involving substances with the characteristics of crack cocaine. In its brief in the Kimbrough case, the government described the provision at issue here as reflecting Congress's determination that, and I'm quoting, "crimes involving crack should be subject to considerably more severe penalties." We agree.

Congress's targeting of a limited subset of the substances qualifying chemically as -- as cocaine is manifest in the statutory structure, in the language, for three basic reasons. And I'm going to be looking at page 2 of our blue brief, which has the relevant

1 statutory provision.

2 First, the only way to give different
3 meaning to two distinct terms that Congress used in the
4 statute -- "cocaine" on the one hand and "cocaine base"
5 on the other -- is to make clear that cocaine base means
6 something different than all substances with the
7 chemical formula C₁₇H₂₁NO₄.

8 JUSTICE KAGAN: Mr. Pincus, if -- if I
9 understand your interpretation correctly, it would
10 exclude freebase. How is that a sensible interpretation
11 of the statute, one that would exclude freebase, a
12 commonly known substance? Congress was aware of it.
13 The Richard Pryor incident had occurred. Everybody knew
14 it was dangerous. Wasn't it at least true that Congress
15 meant to incorporate that substance as well?

16 MR. PINCUS: Let me answer -- answer your
17 question with a little bit of detail, Justice Kagan,
18 because I think our reply brief wasn't as clear as it
19 might have been, because the word "freebase" has,
20 really, three different meanings. It means a
21 manufacturing process; it means a method of use of a
22 cocaine-related substance; and it also means a
23 substance.

24 So just to be clear: Freebase, the
25 manufacturing process, occurs when cocaine

1 hydrochloride, the powder form of cocaine, is mixed with
2 ether and ammonia in a very volatile mixture and boiled.
3 Most -- many users of freebase inhale the fumes that are
4 released during that manufacturing process. That
5 process is very dangerous, as the Richard Pryor incident
6 showed, because the substance is quite volatile and will
7 explode. If that process -- if the substance is not
8 used then, but goes to the very end, when all of the
9 liquids are boiled off, then it does produce a rock-like
10 substance similar to crack cocaine.

11 Our submission is that the -- if the
12 substance is permitted to go to the end, and if, in
13 effect, ether and ammonia are used as a substitute for
14 sodium bicarbonate, then the substance does qualify
15 under the statute, because it is a rock-like substance
16 that has -- is chemically cocaine, and was produced in a
17 method similar to the reacting of sodium bicarbonate
18 with baking soda.

19 But in -- when the process is in the middle
20 of the production process, we don't think Congress meant
21 to reach that for a couple of reasons. First of all,
22 because that was -- is -- that substance is not
23 something that's easily marketable. And one of the key
24 things that Congress was concerned about was the
25 marketability of crack cocaine in its rock-like form.

1 That's what made the really big difference.

2 JUSTICE GINSBURG: Mr. Pincus, if the -- the
3 substance that is involved in this case was a rock-like
4 substance and it wasn't a powder. So why doesn't it
5 belong? It's a rock-like substance. Why should it be
6 outside the category cocaine base?

7 MR. PINCUS: Well, I think there would be a
8 factual question in this case. None of the courts
9 below, Justice Ginsburg, determined whether, in fact,
10 this -- the substance at issue in this case was crack
11 cocaine, because the district court ruled that that
12 wasn't necessary, that all chemical -- as long as the
13 substance chemically qualified as cocaine, it satisfied
14 the statutory requirement, and the First Circuit agreed.
15 So in this case, there --

16 JUSTICE GINSBURG: Correct me if am I wrong
17 about this -- I may have a misimpression -- but I
18 thought you were objecting to a charge to the jury that
19 charged cocaine base and didn't charge crack.

20 MR. PINCUS: We're -- we're objecting to
21 the -- the fact that the district judge charged the jury
22 and himself determined that in order for this very
23 severe 100-to-1 penalty to apply, it was not necessary
24 for the substance to qualify as crack cocaine. All it
25 had to do was to be a chemical form of cocaine.

1 JUSTICE ALITO: If we agree with you, how
2 should a judge instruct a jury to determine whether a
3 substance is crack? Should the judge use the definition
4 in the sentencing guidelines?

5 MR. PINCUS: A judge could use the
6 definition in the sentencing guidelines, Your Honor.
7 Let me just say, as a threshold question, in many cases
8 this won't be a jury question.

9 JUSTICE ALITO: But in those --

10 MR. PINCUS: In those cases, we think there
11 are three -- there are three elements. One is the
12 substance has to qualify chemically as cocaine. The
13 second is it was prepared by processing cocaine
14 hydrochloride with sodium bicarbonate or with a
15 different reactant that produces a similar chemical
16 effect. And third, that it's a rock-like or otherwise
17 solid, that is smokeable, that is able to produce the
18 inhalable vapors. We think those are the key --

19 JUSTICE ALITO: It has to have all three of
20 those characteristics?

21 MR. PINCUS: All three of those
22 characteristics.

23 JUSTICE ALITO: But I thought you just said
24 that freebase would qualify, and freebase would not have
25 the second of those characteristics; isn't that right?

1 It was -- it would not be prepared using a base?

2 MR. PINCUS: It would, because ammonia is
3 one of the -- is one of -- it's ammonia and ether that
4 have -- that are used to prepare freebase.

5 JUSTICE ALITO: So if it had any base?

6 MR. PINCUS: Any base. We are -- the lower
7 courts, in applying the sentencing guidelines
8 definition, have said that sodium bicarbonate is not
9 required. We think it is not required. They've
10 recognized other substances, and we think as long as the
11 process is similar, that that's what the sentencing
12 guidelines capture, that's what the statute captures.

13 JUSTICE SCALIA: I don't understand that. I
14 can understand the argument that -- that Congress was --
15 was directing its statute at crack, and crack had -- had
16 a very definite meaning, which didn't include any
17 substance that -- that is rock-hard and has been
18 produced in the manner you suggest.

19 You're coming up -- you're urging upon us a
20 definition that neither is the definition of crack nor
21 is the chemical definition of cocaine base. It's
22 neither fish nor fowl.

23 MR. PINCUS: Well, respectfully, Justice
24 Scalia, I think that Congress was focused on crack.

25 JUSTICE SCALIA: Crack.

1 MR. PINCUS: Because it -- because it was a
2 substance that had particular characteristics.

3 JUSTICE SCALIA: That's right. But you
4 don't argue that. That's not the meaning you want us to
5 give it.

6 MR. PINCUS: Well, we do -- we do want the
7 meaning to be a substance with those particular
8 characteristics. I think the only question that
9 we're -- that we're debating is whether baking -- the
10 use of baking soda is essential, because all of those
11 other -- those other three characteristics are
12 characteristics of crack.

13 JUSTICE SCALIA: It's essential to crack.

14 MR. PINCUS: Well --

15 JUSTICE SCALIA: You wouldn't call it crack
16 if it weren't made that way, would you?

17 MR. PINCUS: Well, I think in 1986, the
18 definitions were not that clear. And I think the
19 sentencing commission has said, and certainly the lower
20 courts have said, both in applying the limited
21 definition of the statute for which we contend and also
22 in interpreting the sentencing guidelines, that the use
23 of a different base gets at what Congress -- is still a
24 category of substance that Congress -- Congress cared
25 about.

1 Obviously, if the Court would like to
2 construe the statute more narrowly and say baking soda
3 is required, we wouldn't object to that. But we think
4 that Congress -- one of the reasons that Congress used
5 the term "cocaine base" was that it was trying to
6 capture a category of substances that had particular
7 characteristics and wasn't focused so much on the exact
8 chemical formula that went into it, because Congress
9 knew, in the drug area, it would --

10 JUSTICE SCALIA: How does "cocaine base"
11 suggest what you want? It has to be -- it has to be
12 rock and it has to be base cocaine produced in one of
13 the fashions you suggested. I don't know how "cocaine
14 base" remotely suggests that.

15 MR. PINCUS: Well, I think in -- in three
16 ways, Your Honor. First of all, because Congress didn't
17 use the term "cocaine," which is used elsewhere in the
18 provision, it clearly meant a subset. It didn't mean
19 all of the -- all of the substances with the chemical
20 formula that satisfies the chemical term "cocaine."

21 Second of all, the statute shows just by the
22 100-to-1 ratio that Congress was focused on something
23 that was especially dangerous, much more dangerous than
24 powder.

25 Third, the legislative context was, as the

1 Court said in Kimbrough, that this was a statute that
2 was enacted in response to a particular problem, and I
3 think the question we're debating is: Would Congress
4 have said, when it defined the term -- when it defined
5 the term "cocaine base" -- and I should say, "base" was
6 one of the street terms, colloquial terms, that was used
7 at the time to -- to describe these categories of
8 substances.

9 JUSTICE SCALIA: All of them or just crack?

10 MR. PINCUS: It was -- "freebase" was a
11 word. "Base" was a word. "Crack" was a word. The --
12 the legislative debate didn't distinguish necessarily
13 the chemical -- the chemical process for creating the
14 substance. What it focused on was a substance that had
15 characteristics that had led to the epidemic that
16 Congress was concerned with, and those characteristics
17 were easy marketability, because it was a solid,
18 incredibly strong addictive potential, and inhalability.

19 CHIEF JUSTICE ROBERTS: Counsel, the
20 provision refers to "a mixture or substance which
21 contains cocaine base." You read cocaine base to be
22 crack, so you have to be talking about a mixture or
23 substance which contains crack. What contains crack?
24 Crack is the problem they're getting at; yet the
25 statute, as you read it, has to talk about a substance

1 which contains crack, not just crack.

2 MR. PINCUS: Yes, Your Honor, and we think
3 the reason that Congress used that phrase was often in
4 this reactive process at the end of the day the rock
5 will not be pure cocaine in a rock form. There may be
6 some cocaine hydrochloride that didn't react with the
7 base. There may be -- then there often is some of the
8 base reacting --

9 CHIEF JUSTICE ROBERTS: It's kind of an odd
10 way for Congress -- it's an odd way for Congress to
11 phrase the provision if what they want to get at is
12 crack, to say what we want to get at is substance which
13 contained crack. That suggests to me, when you talk
14 about substances that contain something, what they
15 contain is a base that then is used in the substance. I
16 think that's a harder, harder logic to apply when you're
17 talking about crack. They want to stop the use of
18 crack, not so much -- it wouldn't occur naturally that
19 they're talking about substances which contain crack.
20 It would occur naturally, that language formulation, if
21 you think of cocaine base as broader than just crack.

22 MR. PINCUS: Respectfully, I disagree, Mr.
23 Chief Justice. The provision just above large Roman
24 numeral IV talks about compounds and mixtures, and
25 Congress is sensitive in crafting the drug laws that

1 often, because these substances are not prepared in a
2 chemistry lab, there are many, many impurities
3 associated with them. For example, even cocaine
4 hydrochloride, cocaine powder, is not pure cocaine
5 hydrochloride. It's often diluted, it's often cut with
6 other impurities. And so in all -- throughout the drug
7 laws Congress has used that and we think that's exactly
8 why it used a similar phrase here, because the crack
9 rock does not contain 100 percent chemical cocaine in a
10 rock-like form. There will be cocaine powder often,
11 cocaine hydrochloride left. There will be baking soda
12 left or the other reactant, and so it will be a mass of
13 substances, and Congress needed that language to avoid
14 defendants saying: This substance is not 100 percent
15 cocaine in a crack form and therefore I don't qualify
16 under (iii) .

17 CHIEF JUSTICE ROBERTS: You kind of elided
18 the point there in your verbal formulation. It's easier
19 to say this is something that's not just cocaine. It's
20 harder to say this is something which is not just crack
21 because crack is a type of cocaine. You can say it
22 contains, as the government says, cocaine base.

23 MR. PINCUS: I may be missing your point,
24 Your Honor, but I think even cocaine in a crack form has
25 other -- the rock that Congress was trying to get at has

1 other things in it.

2 CHIEF JUSTICE ROBERTS: And you're saying
3 Congress is afraid that the sodium bicarbonate, we might
4 not be able to get at that if we just say crack?

5 MR. PINCUS: No, that the defendant, that
6 the defendant would say this -- if it doesn't, if it
7 didn't say a mixture which contains, if it said cocaine
8 base, then the argument might well be, you have to --
9 you have to distill the substance to find out how much
10 cocaine base is actually in it, as opposed to how much
11 of it actually is cocaine in a rock form, as opposed to
12 other things have been mixed in, instead of, as this
13 Court decided in Chapman, it's the whole package that
14 one weighs.

15 And so I think Congress was getting at the
16 idea that it didn't want people to either avoid the
17 falling within clause (iii) entirely or trying to
18 escape the 50-gram crack threshold by saying there are
19 other things in here that you have to take out before
20 you, before you can impose this penalty on me.

21 JUSTICE SOTOMAYOR: Counsel --

22 JUSTICE ALITO: Other than crack and free
23 base, are there other forms of cocaine base that are
24 actually in use in any substantial amounts in this
25 country by drug users?

1 MR. PINCUS: Well, I think we don't know,
2 Your Honor. There are -- certainly cocaine leaves can
3 be in the country, and under the government's definition
4 of the statute cocaine leaves would qualify under clause
5 (iii) . Cocoa paste -- coca paste can be imported into
6 the country. There are cases like that.

7 JUSTICE ALITO: Are there actually people in
8 the United States who are smoking coca, coca paste? I
9 thought that that was exclusive to South America.

10 MR. PINCUS: They may not be smoking it,
11 Your Honor, but they may be bringing it into the country
12 in that form and then converting it into --

13 JUSTICE ALITO: Are you aware of cases where
14 that's happened?

15 MR. PINCUS: There are -- the case that we
16 point to regarding the cocaine that was intermingled in
17 luggage and in the fiberglass of a flowerpot are both
18 cases where it was not cocaine hydrochloride, it was
19 cocaine. So it was either coca paste or some later,
20 more distilled form of chemical cocaine as opposed to
21 cocaine hydrochloride, but it was not in a rock form,
22 and I think --

23 JUSTICE ALITO: To go back to your
24 definition of crack, just so I'm clear on it, if a
25 substance -- in the second prong of your definition, if

1 a substance is tested and chemically it is pure
2 C₁₇H₂₁N₄O₄, no trace of sodium bicarbonate, no trace of
3 ammonium, is it possible for a defendant to be convicted
4 and given the crack penalty?

5 MR. PINCUS: Yes, it is, Your Honor. There
6 are cases applying the sentencing guideline test, which
7 is a similar test, in which the courts have said the
8 absence -- I think what you're getting at is if the
9 reactant is not present?

10 JUSTICE ALITO: That's right. And I don't
11 think -- could you just reiterate what the second prong
12 of your test is because I thought -- I was under the
13 impression it required the presence of a reactant.

14 MR. PINCUS: It is that it was prepared by
15 processing sodium hydrochloride with a base or with
16 baking soda or similar reactant.

17 JUSTICE KAGAN: That means prepared from the
18 powder, in theory --

19 MR. PINCUS: Prepared from --

20 JUSTICE KAGAN: -- is that right?

21 MR. PINCUS: -- cocaine powder, yes.

22 JUSTICE ALITO: So you need extrinsic
23 evidence about how this particular substance was
24 prepared in order to satisfy it? If you don't have the
25 trace elements of the reactant, you need evidence that

1 that's how this was made?

2 MR. PINCUS: Your Honor, the courts have not
3 required -- the courts applying the sentencing
4 guidelines have said that a chemist can testify based on
5 his knowledge, and they've found the sentencing
6 guidelines satisfied, that in his professional opinion
7 that's how this substance was prepared.

8 JUSTICE KAGAN: Would it be enough for you
9 if it had the right chemical definition and it was a
10 rock-like substance, just those two things? Would that
11 be enough? If the government could show it has the
12 right chemical definition, it's rock-like, it's solid,
13 does it have to show anything else?

14 MR. PINCUS: I think that the element of the
15 sentencing guidelines which we're picking up in our
16 second element, Your Honor, is useful in making clear
17 that this is a substance that was -- went from cocaine
18 hydrochloride back to cocaine base, because I think
19 that's one of the --

20 JUSTICE KAGAN: I'm asking the same kind of
21 question that Justice Alito is asking, whether the
22 government has to show anything particular to
23 demonstrate that it was prepared from powder cocaine.

24 MR. PINCUS: I think that the government
25 doesn't have to produce -- doesn't have to make a

1 physical showing. It can -- it is enough for the
2 government's chemist -- and there's always a chemist
3 that testifies in these cases -- to say in his opinion
4 that's true.

5 I think -- I think as a fallback we would
6 certainly be happy with the definition that just had the
7 first and the third ingredients in what I've said, but I
8 think the second is important because one of the things
9 that Congress was focused on was the potency of the
10 crack and crack-like substance.

11 JUSTICE SCALIA: Mr. Pincus, you've lost me.
12 You've responded to the Chief Justice when he raised the
13 problem that this has to be not just cocaine base, it
14 has to be a mixture containing cocaine base, you
15 responded to him by saying: Well, crack always has some
16 mixture in it; it's never -- it's never pure; and that's
17 why crack would be covered.

18 But in response to Justice Alito, who asked
19 you what if it's pure, if it's pure cocaine base,
20 without any admixtures, you said that would still be
21 covered. I mean, both answers can't be right.

22 MR. PINCUS: I may have misspoken in my
23 response to the Chief Justice, Justice Scalia. I
24 thought the Chief Justice's question was that the
25 formulation of a mixture or substance which contains --

1 JUSTICE SCALIA: Yes.

2 MR. PINCUS: -- somehow meant that Congress
3 was getting at the chemical, all chemical forms of
4 cocaine because -- because that formulation was more
5 sympathetic than thinking that it required a rock-like
6 substance. And in responding to the Chief Justice, all
7 I was trying to say was not that it was always true,
8 that there are other things present, but just that it is
9 often is true that there are other things present and
10 that Congress's use of the word "mixture or substance"
11 therefore was designed to deal with the ordinary case
12 where other things may well be present and did not want
13 to allow defendants to escape by saying this is not 100
14 percent cocaine in its chemical form and therefore I'm
15 not covered by clause (iii) .

16 JUSTICE SOTOMAYOR: Counsel --

17 MR. PINCUS: I think the question here is --
18 I'm sorry, Your Honor -- is the converse of that
19 question, which is: But if it is 100 percent cocaine in
20 its chemical form in a rock-like state, is that covered
21 too, and I'm just trying to say: Yes, that's certainly
22 covered, too, but so is the dirtier form of a rock that
23 has other things mixed in.

24 JUSTICE ALITO: What if it's pulverized? I
25 don't know whether that's possible, but could you grind

1 it up so that it's not rock-like anymore, so it's like a
2 powder --

3 MR. PINCUS: I think --

4 JUSTICE ALITO: -- and smoke it after it's
5 in that form?

6 MR. PINCUS: Your Honor, I think our view --
7 that's one of the reasons that we would say rock-like or
8 a solid that is otherwise smokeable, to deal with people
9 saying: Oh, if it doesn't have to be a rock I'll
10 pulverize it. Even if it's tiny little rocks, if it
11 still has the smokeability characteristic, which is what
12 Congress was focused on, we think that that would be --
13 that that would be sufficient.

14 JUSTICE SOTOMAYOR: Can you get cocaine into
15 a rock form without using a base? Is there some way
16 that the rock type form of cocaine could ever be
17 achieved without a use of a base?

18 MR. PINCUS: No, I don't believe so, Your
19 Honor.

20 JUSTICE SOTOMAYOR: And coca paste, what can
21 you do with coca paste? Can you make it into powder or
22 is it only useable as a -- ultimately for a rock-like
23 formation?

24 MR. PINCUS: Coca paste is -- is the
25 intermediate step for all downline products. Coca

1 leaves are mashed up in kerosene and other things and
2 they're -- through a process. They are -- the first
3 step is to convert them into coca paste, which is this
4 sort of mushy brown substance with many, many impurities
5 in it. It then typically is subject to subsequent
6 processing which turns it into cocaine hydrochloride,
7 colloquially cocaine powder. And then the way -- the
8 way that crack is produced is that cocaine powder is
9 turned back, using the process we've been talking about,
10 into chemically cocaine in this rock-like form.

11 JUSTICE KENNEDY: You mentioned leaves
12 several times, and you talked about that in your -- in
13 your brief. If this were a trial court and we had two
14 world-class chemists, strictly from a chemical
15 standpoint wouldn't they tell you that the cocaine in a
16 leaf is in a salt form, not a base form?

17 MR. PINCUS: I -- I don't think they would,
18 Your Honor. We -- we talk in our -- in our brief, we
19 cite a number of studies that have found that cocaine is
20 present in the leaf in both the salt and the chemically
21 basic form, and I -- I think that the study -- we
22 explain in detail why the government study, which is a
23 little -- the principal study they rely on is about 125
24 years old -- doesn't capture the new learning --

25 JUSTICE KENNEDY: Does that depend on the

1 age of the leaf or if it's been in the sun or is --

2 MR. PINCUS: No, I think it's just -- you
3 know, different leaves have different characteristics.
4 The mix will be different. But -- but as a -- a matter
5 of the chemical composition, there will be some cocaine
6 in its chemical form and there will be some cocaine salt
7 in the leaves, and I -- I think even more important,
8 Congress believed that. So --

9 JUSTICE KENNEDY: No, no, no, no.

10 MR. PINCUS: Yes.

11 JUSTICE KENNEDY: I thought that the
12 chemists said that it's always a salt. And you --

13 MR. PINCUS: No, Your Honor.

14 JUSTICE KENNEDY: -- I thought that was the
15 government's position, that it's a salt.

16 MR. PINCUS: That is the government's
17 position, Your Honor. But -- but on page --

18 JUSTICE KENNEDY: But you ended by saying
19 oh, sometimes it's a salt.

20 MR. PINCUS: Our position is that within the
21 leaf, there is both -- there -- both forms coexist in --
22 in the natural state; that there is both the salt form
23 and the form that is chemically cocaine, and the studies
24 that we cite on pages 9 and 10 and in the footnotes on
25 that page I think were very clear. Early on the

1 processes for extracting from the leaf made it difficult
2 to tell whether the extraction process had made it into
3 a salt or whether there was actual chemical cocaine in
4 the leaf. More modern processes make clear that there
5 are both forms in the leaf. And --

6 JUSTICE SCALIA: As a practical matter what
7 difference does it make? Is the government going to be
8 prosecuting anybody for possessing coca leaves?

9 MR. PINCUS: They say they're not, Your
10 Honor. I think the reason it makes a difference is for
11 the interpretation of what Congress meant, because --

12 JUSTICE SCALIA: I don't think Congress knew
13 what this chemical debate was all about. I -- I think
14 it's very unlikely.

15 MR. PINCUS: Well, Your Honor --

16 JUSTICE SCALIA: Let's assume that the
17 government's right and -- or that you're right. And
18 that it's -- no, let's assume the government's right,
19 and it is -- no, you say it's base.

20 MR. PINCUS: We say it's both.

21 JUSTICE SCALIA: You say it's both, but it
22 includes base.

23 MR. PINCUS: Yes. Both base --

24 JUSTICE SCALIA: And let's assume you're
25 right. So what?

1 MR. PINCUS: I think then that would mean
2 that the -- the -- under the government's interpretation
3 of the statute, offenses involving leaves, as long as
4 there were more than 50 grams of them, would fall within
5 clause III, and that doesn't make any sense.

6 JUSTICE GINSBURG: But you just said it's an
7 academic issue because there's not a market for leaves
8 or for paste. What Congress was getting at was crack.
9 The judge used the term cocaine base. Assume you are
10 right. What should happen? Could you go back to the
11 judge and he would then say, well, this is -- the
12 chemists testified this is crack?

13 MR. PINCUS: Well, Your Honor, we would like
14 to go back to the judge, because in this case in fact
15 the chemist didn't testify. The chemist did testify
16 that it was chemically -- it was cocaine in its chemical
17 form, but the chemist did not testify: In my experience
18 this is crack, based on looking at lots of samples.

19 JUSTICE GINSBURG: It was -- it was -- the
20 testimony was it was a rock-like substance. What wasn't
21 said was -- what is it? Bicarbonate, sodium
22 bicarbonate, was not mentioned.

23 MR. PINCUS: The testimony was there was no
24 -- there was no baking soda found, and that there was a
25 -- that it was chemically basic. The testimony about

1 whether it was crack or not principally came from the
2 informant in the case and a little bit from an agent who
3 also said that he believed that cocaine powder was
4 chunky.

5 And so we believe we have a fair argument on
6 remand, when the district judge looks at the facts, that
7 he will say the government did not meet its burden, even
8 though it's only a preponderance.

9 JUSTICE GINSBURG: The -- the district judge
10 would be the finder, right?

11 MR. PINCUS: The district judge would be the
12 finder. Yes, Your Honor.

13 JUSTICE GINSBURG: Because you have no
14 Apprendi problem?

15 MR. PINCUS: Yes.

16 I would like to reserve the balance of my
17 time.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr.
19 Pincus.

20 Ms. Saharsky.

21 ORAL ARGUMENT OF NICOLE A. SAHARSKY

22 ON BEHALF OF THE RESPONDENT

23 MS. SAHARSKY: Mr. Chief Justice, and may it
24 please the Court:

25 Whether you call it freebase, coca paste or

1 crack, it's the same thing chemically. It is cocaine
2 base, it is smokeable, it has the same effects on the
3 user; and Congress did not limit the statute to one form
4 of cocaine base. This Court shouldn't do it, either.

5 Just to pick up on some of the --

6 JUSTICE SOTOMAYOR: I'm sorry, cocaine paste
7 -- coca paste is smokeable in its paste form?

8 MS. SAHARSKY: Yes, it is smokeable in its
9 paste form, and that evidence was before Congress. It's
10 cited in our brief.

11 JUSTICE SOTOMAYOR: All right. Assuming we
12 accept the -- the brief of the physicians and
13 scientists, they say clearly that coca leaves can be
14 chewed, but they are bulky and contain a lot of organic
15 matter in addition to cocaine. I understood their
16 scientific explanation to say that coca leaves contain
17 coca -- cocaine.

18 I think you've taken the contrary position,
19 but let's assume we accept the sciences answer. What
20 does that do to your argument?

21 MS. SAHARSKY: Well, of course we don't
22 think that that's right as a scientific matter. But
23 probably more importantly, that's not something that we
24 can prove. We have the world's experts working for the
25 DEA on cocaine-related substances. We don't have one of

1 them who would get up in court and say that coca leaves
2 contain cocaine in its base form. We --

3 JUSTICE SOTOMAYOR: So you're representing
4 that you will never prosecute someone who possesses coca
5 leaves under subdivision (iii)?

6 MS. SAHARSKY: The Romanette provision,
7 Romanette (iii), which would be the sentencing
8 enhancement, we have never applied in any case to coca
9 leaves. We have never even had a case where it's been
10 an issue. We've never considered it --

11 JUSTICE SOTOMAYOR: And you're representing
12 to the Court that you won't?

13 MS. SAHARSKY: We don't have a chemist who
14 would testify that. We would not be able to make that
15 showing in court.

16 But perhaps a more important question is
17 whether there was evidence before Congress that the
18 provision in Romanette (iii) would apply to coca leaves,
19 and there wasn't. There was evidence before Congress
20 about different base forms of cocaine, that
21 distinguished between the salt form and the base form,
22 and it mentioned substances like coca paste, it
23 mentioned substances like freebase, and it mentioned
24 crack.

25 And the important thing in -- in looking at

1 the term that -- that Congress eventually used, cocaine
2 base, is that that came from science. Petitioner says,
3 well, you know, "base" was a colloquial term. The
4 reason that "base" was used is because cocaine is in its
5 base form. That is what makes it smokeable.

6 JUSTICE KAGAN: It's a bizarre term, Ms.
7 Saharsky. It's -- I mean, cocaine base means the same
8 exact same thing as cocaine, because cocaine is a base.
9 It's like referring to an apple by saying "apple fruit"
10 or referring to a poodle by saying "poodle dog." I
11 mean, it's a strange way to speak about it.

12 MS. SAHARSKY: It is an extra clear, extra
13 precise way to think -- to speak about it, and we think
14 that there's a good reason that Congress did that. In
15 the preceding provision in Romanette (ii), Congress was
16 defining the whole world of cocaine-related substances.
17 So when it used "cocaine" there -- and it does mean
18 cocaine base there -- but cocaine, its salt, its optical
19 and geometric isomers, it's talking about everything.
20 It didn't need to distinguish between the different
21 forms. And that formulation had already existed like
22 that in the Controlled Substances Act.

23 But then in 1986 Congress was hearing
24 testimony about a specific form, the base form of
25 cocaine. Did you, at that point -- would one want

1 Congress to have just said "cocaine" in Romanette (iii)?
2 No, Congress said "cocaine base" because it wanted to be
3 extra clear.

4 There's another reason -- another --

5 JUSTICE KAGAN: It's a strange way to be
6 extra clear, to -- to use a different phrase that's
7 meant to mean the same thing as another phrase. To use
8 two different phrases that are meant to mean the same
9 thing is not a very good way of being clear.

10 MS. SAHARSKY: Well, it's really just adding
11 the extra word "base." It's not like they're two
12 completely different words. It's just the addition of
13 "base" to be extra clear.

14 Another way to think about it is this: In
15 1986, prior to 1986, this Court had decided cases in
16 which it had said, somewhat imprecisely, that cocaine
17 hydrochloride was cocaine. It called it "cocaine"
18 throughout its opinion. It didn't make a scientific
19 finding, but that's how the Court referred to cocaine
20 hydrochloride, "cocaine." This was in its 1970 decision
21 in Turner. It was in its 1985 decision in Montoya de
22 Hernandez.

23 Congress is presumed to know about this
24 Court's decisions. It knew perhaps that courts had used
25 the term "cocaine" imprecisely, despite the fact that it

1 has a specific scientific meaning. Congress was going
2 to be extra clear and use the term cocaine base.
3 Another --

4 JUSTICE SOTOMAYOR: So why did it draft it
5 to say "cocaine salts, et cetera," as opposed to
6 "cocaine, comma, its salts, et cetera"? If it intended
7 to differentiate between true cocaine and its byproducts
8 like salts, et cetera, why didn't it just simplify the
9 language in Roman numeral number (ii)?

10 MS. SAHARSKY: Yes, I think that it does
11 that, Your Honor. I'm looking at page 19 of the
12 government's brief. This is -- you know, throughout the
13 briefs, you have Romanette (ii) and Romanette (iii). If
14 you look at Romanette (ii) -- again, I'm on page 19 of
15 the gray brief, but it's in other briefs, too --
16 Romanette (ii), Roman (II): "Cocaine, its salts,
17 optical and geometric isomers." In Roman (II),
18 "cocaine" does refer to the base form; "its salts"
19 refers to cocaine hydrochloride.

20 JUSTICE SOTOMAYOR: But why would it do
21 that? If it's going to treat cocaine base, which is the
22 same thing as cocaine, differently from cocaine salts,
23 why doesn't it just say cocaine salts?

24 MS. SAHARSKY: Well, it --

25 JUSTICE SOTOMAYOR: Couldn't --

1 MS. SAHARSKY: I'm sorry, Your Honor.

2 JUSTICE SOTOMAYOR: -- it say "cocaine and
3 its isomers" or something? "Its isomers." Why is it
4 using "cocaine" in an identical scientific way in Roman
5 numeral number (ii) and in -- in (iv)?

6 MS. SAHARSKY: The base form has to be
7 somewhere in Romanette (ii), because the way that
8 Congress drafted these two provisions together is that a
9 large amount of substances are listed in Romanette (ii)
10 and then a subset is pulled out in Romanette (iii). And
11 Romanette (iii) says, you know, 50 grams or more of a
12 mixture of substance described in clause (II) which
13 contains cocaine base. So you need to have something
14 that's described in clause (II) and that would contain
15 cocaine base, and that would be the word "cocaine" in
16 Roman (II). So you couldn't just say "cocaine salts,"
17 meaning the hydrochloride form, optical and geometric
18 isomers. You need something to get the base form
19 into -- into Roman (II).

20 JUSTICE ALITO: No, but you could have -- in
21 Romanette (iii), they could have said 50 grams or more
22 of a mixture or substance which contains cocaine base,
23 period. There was no need to have it described in
24 clause 2 if there's nothing implied in Romanette (ii)
25 that is not also in Romanette (iii) with respect to

1 cocaine.

2 On your submission, it's just bad
3 draftsmanship?

4 MS. SAHARSKY: I think that there is a
5 redundancy, but I think it is understandable in light of
6 the fact the courts had used the word "cocaine" somewhat
7 imprecisely. I think it's also understandable in light
8 of the fact that Congress was putting an enhanced
9 penalty in play, and that if Congress had not been extra
10 clear there would be criminal defendants, perhaps like
11 Petitioner, coming to court and saying, if Congress had
12 just said "cocaine," that that wasn't clear enough.

13 It's true that -- you're right, Justice
14 Alito, that Congress could have said: Here's some
15 things in (ii); here's some things in (iii); they don't
16 overlap. Congress didn't do that.

17 JUSTICE GINSBURG: What is in (ii) now, on
18 your reading, your expansive definition of "cocaine
19 base"? What is in Romanette (ii) other than powder?

20 MS. SAHARSKY: Well, there is, in Roman (I),
21 coca leaves, except those from which all of the active
22 substances have been taken out. In Roman (II), the
23 salts of cocaine, their optical and geometric isomers
24 and salts of isomers. You have (III), which is
25 ecgonine, which is a smaller molecule that is part of

1 the cocaine molecule. It was made -- it was used in
2 pharmaceuticals a while back. It's not something that's
3 really seen in the production process now. And you
4 would have compounds, mixtures, or preparations that
5 don't contain cocaine base.

6 JUSTICE ALITO: What about optical and
7 geometric isomers of cocaine? Those -- those fall under
8 Romanette (ii), Roman (II), but not under (iii). Are
9 there such things?

10 MS. SAHARSKY: Yes. There are optical --
11 optical isomers are -- isomers are generally substances
12 that have the same chemical definition, the same -- but
13 different spatial arrangements of atoms. Optical
14 isomers are nonsuperimposable mirror images, like right-
15 and left-handed versions of the same molecule. Those
16 are -- those are both cocaine base. There is a
17 right-handed cocaine base and a left-handed cocaine
18 base. They're both cocaine base. We think that those
19 would be counted within Romanette (iii).

20 Geometric isomers, which are never seen, are
21 slightly different. They are based on spatial
22 arrangements where a certain part of the molecule is --
23 it is pushed out or pushed up axially or equatorially.
24 They're -- you know, geometric isomers are not seen.

25 JUSTICE GINSBURG: They're all very exotic,

1 but practically, what does the government prosecute
2 under Romanette (ii)? What substances other than --

3 MS. SAHARSKY: I would say cocaine
4 hydrochloride would be the primary one, which would be
5 powder cocaine.

6 JUSTICE GINSBURG: Yes. That's -- so there
7 seem to have been a lot of words here, but in practice,
8 (ii) is powder and everything else is under (iii)?

9 MS. SAHARSKY: Well, the things that would
10 be under (iii) would be any form of cocaine base: That
11 would be coca paste, freebase, crack, whatever you want
12 to call it.

13 Just to explain, Justice Ginsburg, why there
14 are so many words here: You know, this definition is
15 taken from -- is the same -- the stuff in Romanette
16 (ii), this long definition -- from other places in the
17 Controlled Substances Act. It's taken from Schedule II,
18 where Congress is defining the whole world of
19 cocaine-related substances that are subject to Federal
20 law, so that's -- that's where all of this comes from.
21 This was something that existed --

22 JUSTICE BREYER: It's my understanding here
23 that -- that the problem in this case -- tell me if I'm
24 wrong -- is because cocaine can become -- can be a salt.
25 People sniff it often, I guess, if it's a salt. And

1 that's bad. And then there's a kind that's worse,
2 that's freebase or crack, and that isn't a salt and it
3 isn't a poodle and it isn't an acid. It takes a base
4 form, right?

5 MS. SAHARSKY: Yes.

6 JUSTICE BREYER: And so that's why they have
7 a higher punishment. Then the odd problem is that maybe
8 a cocaine leaf, but certainly cocaine paste, which are
9 more primitive forms, also have a chemical-based
10 solution, they too. So they've written this statute
11 that sounds like -- that sounds like "Who's your
12 father's son who's not your brother?" It takes a long
13 time to figure it out.

14 All right. So would you have an
15 objection -- and I wonder if the other side would have
16 an objection -- if what we said this word "cocaine base"
17 in (iii) means is that it is cocaine in the chemical
18 form of a base after it has been processed beyond the
19 stage of coca paste? And that's how we read it. That
20 would seem to exempt the things they're most worried
21 about, the paste and the leaves.

22 And I'm not going to repeat the same stupid
23 joke, poodles and fruits, but you see the point. Is
24 there any objection from the point of the government to
25 define it in that way, or the other side? And why?

1 MS. SAHARSKY: Yes. There's an objection on
2 behalf of the government, and there are several reasons
3 why that's true. The first is there often won't be
4 evidence of how the substance was made. Second --

5 JUSTICE BREYER: No, I don't care how it was
6 made. All we do is test it. Now, all we have to do is
7 test it, and then we look to see if it's a leaf. That
8 isn't tough, I don't think. And then we have to look
9 and see if it's this yellow stuff that looks like paste,
10 and I guess that isn't too tough, either.

11 So those are the only things you have to do.
12 You have to test it, look and see if it's a leaf, look
13 and see if it's a paste. Now, even the -- I mean, I say
14 "even." I mean, certainly the DEA could do that.

15 MS. SAHARSKY: With -- with all respect,
16 Your Honor, I --

17 JUSTICE BREYER: Certainly they could,
18 right?

19 MS. SAHARSKY: I just -- I don't think it's
20 that easy.

21 JUSTICE BREYER: No, that's what I want to
22 know.

23 MS. SAHARSKY: Okay. First of all, if you
24 talk about the chemical testing that can occur, DEA
25 chemists can tell you if it contains cocaine base or if

1 it contains cocaine hydrochloride.

2 JUSTICE BREYER: We got that part. Right.

3 MS. SAHARSKY: They're not going to start
4 making guesses about how it was processed. They're just
5 going to tell you what they can --

6 JUSTICE BREYER: That's fine.

7 JUSTICE KAGAN: But they don't need to do
8 that, Ms. Saharsky. Suppose we just said it needs the
9 right chemical definition, and it's rock-like,
10 rock-like, crystalline, whatever you want to call it.
11 So it's rock-like. It's not a paste; it's not a leaf;
12 it's a rock.

13 MS. SAHARSKY: Fine. As soon as the Court
14 starts saying not a paste or rock-like or something like
15 that, you have some problems.

16 The first is, you're basically giving a
17 national uniform roadmap of -- to evasion on behalf of
18 drug traffickers. It doesn't -- crack, for example, or
19 the rock form, doesn't have to be rock-like. You can
20 grind it up in a coffee grinder and make it into a
21 powder. It is still smokeable. It is chemically the
22 exact same thing.

23 JUSTICE BREYER: Can you make it in --

24 JUSTICE SCALIA: I would assume that your
25 major objection would not be that. Your major objection

1 would be: We're not supposed to be writing a statute,
2 we're supposed to be interpreting one. And there is no
3 way to -- to get that out of these words, no way,
4 absolutely no way. Is there?

5 MS. SAHARSKY: That is exactly how I should
6 have started, Your Honor.

7 (Laughter.)

8 JUSTICE KAGAN: But this is -- but this is,
9 Ms. Saharsky, just a strange statute, where you are --
10 your definition creates all kinds of issues about why it
11 is that Congress used two different phrases to mean the
12 same thing, and then how it is that if they did use two
13 different phrases to mean the same thing, you're
14 effectively reading cocaine out of the statute in
15 Romanette (ii), right?

16 MS. SAHARSKY: No. I think that that's
17 based on a misunderstanding of how the statute works.
18 You need to have "cocaine" in Romanette (ii) so that
19 when Romanette (iii) says something contained in (ii)
20 that contains cocaine base, it is pulling out a
21 substance that is in (ii). But it's -- it's not a
22 redundancy.

23 JUSTICE KAGAN: Well, but no, cocaine is the
24 same as cocaine base. So it's like saying -- it's like
25 saying apples, oranges, and bananas cost one dollar;

1 aforesaid apples cost three dollars. That's a strange
2 way to write a statute.

3 MS. SAHARSKY: That is how Congress wrote
4 the statute, though. It defined a large amount of
5 substances and then it pulled out one substance.

6 JUSTICE KAGAN: But why would it say apples
7 cost one dollar in Romanette (ii) if it was going to say
8 apples cost three dollars in Romanette (iii)?

9 MS. SAHARSKY: Because these definitions in
10 Romanette (ii) preexisted in other parts of the
11 Controlled Substances Act, in the definitions section in
12 802, in the definitions of controlled substances in
13 Section 812. This subseries of definitions, which are
14 the whole world of cocaine-related substances, are used
15 several places. So Congress pulled them over and it
16 used them here too, to define the whole world of
17 everything --

18 JUSTICE SCALIA: Is it --

19 MS. SAHARSKY: And then it pulled out one
20 thing for special treatment.

21 JUSTICE SCALIA: Is it not relatively common
22 statutory drafting to include something in an earlier
23 section which is also included in a later section that
24 imposes a higher penalty? For example, as I recall from
25 my criminal -- criminal law courses, States have

1 statutes that provide that the taking of a human life,
2 homicide, is -- is punishable by so much; and then it
3 says the taking of a human life with malice aforethought
4 is punishable by more.

5 Now, does -- does the second include the
6 first? Of course it does. It includes the first and
7 then something. And it seems to me that's the same
8 thing here. It includes the first, the cocaine, but it
9 has to be within a compound mixture of preparation.

10 MS. SAHARSKY: Yes, you are 100 percent
11 correct, and I think that the statutory language makes
12 that clear because it says it has to be a mixture of
13 substances described in clause (ii).

14 JUSTICE GINSBURG: Then, Ms. Saharsky, you
15 do get the problem that Justice Breyer was trying to
16 avoid. That is, on your definition this paste, which is
17 supposed to be less addictive, less addictive than
18 powder, gets bracketed with crack, which is more
19 addictive.

20 MS. SAHARSKY: I don't think that there is
21 evidence that paste is less addictive than powder. They
22 contain the exact same chemical, which is cocaine in its
23 base form. And the question -- they both can be smoked.
24 Now, the question is does one have a higher percentage
25 purity of the chemical than the other? Maybe, but that

1 just depends on how it was prepared. And there are
2 cases in the courts of appeals, several in the cases
3 that gave rise to the circuit split in this case, where
4 the courts appear to be grappling with whether something
5 that was a little bit wet but still rock-like should be
6 called paste. So --

7 JUSTICE BREYER: But you define it in your
8 brief, and this is very interesting to me -- you talk
9 about it being a yellow substance that came directly
10 from grinding up leaves, something like that. You have
11 the definition there. It's written.

12 Take that definition that you wrote, and
13 what you've said that's very interesting to me that I
14 would like to know, is that, that substance, in some
15 significant amount of time is actually more addictive,
16 more dangerous than the salt, which is ordinarily
17 sniffed? Now, is that what you're saying, because I
18 received from this material the contrary impression. I
19 had the impression that the yellow paste that comes from
20 the leaf directly is, if anything, less addictive and
21 less harmful, if anything, than the salt which you
22 sniff. Now, which is it?

23 MS. SAHARSKY: It --

24 JUSTICE BREYER: Or if --

25 MS. SAHARSKY: I'm sorry.

1 JUSTICE BREYER: Go ahead.

2 MS. SAHARSKY: It is the case that the
3 paste, just like the freebase and the crack, can be
4 smoked, and for that reason is seen as more addictive
5 than the powder.

6 JUSTICE BREYER: So now if I want to find a
7 citation for the authority that paste, yellow, made out
8 of leaves is in fact more dangerous and Congress could
9 have thought that than -- more dangerous than ordinary
10 salt sniffed, I will read what? Because that -- that --
11 I did have that wrong impression.

12 MS. SAHARSKY: You would read our brief
13 pages 30 to 33 --

14 JUSTICE BREYER: Well, what you've referred
15 to, in other words. I -- I mean, I trust your brief
16 implicitly, but I don't know on the scientific matter or
17 the congressional. I would like to know what to read on
18 that.

19 MS. SAHARSKY: Right. And in -- on these
20 pages of our brief we're citing evidence that was before
21 Congress in the hearings in this case. There were
22 statements by two different authorities who are
23 scientists --

24 JUSTICE BREYER: What page is that of the
25 brief? You don't have to read it. I'll read it.

1 MS. SAHARSKY: No, that's okay. It's right
2 here. It's like 29, 30, 31. There's a Dr. Beck who --
3 from Yale, who testified specifically about the dangers
4 of smoking coca paste.

5 JUSTICE BREYER: Okay, I'll read that.
6 Thank you.

7 MS. SAHARSKY: And one I -- the point I
8 really wanted to make is that, you know, once the court
9 says it has to be pasty, or it has to be yellow, you
10 know, any of those things can be changed. The one thing
11 that can't be changed is the chemical composition. It's
12 still in the base form; it's still deadly; it still can
13 be smoked.

14 The paste doesn't have to be yellow, just
15 like crack doesn't have to be white or off-white. There
16 was evidence that a few years ago there were folks in
17 Ohio that were coloring crack green for St. Patrick's
18 Day. Any of these things can be changed. It doesn't
19 have to be rock-like. It can be ground up to a powder
20 and it can be smoked that way.

21 But the important think is that it's the
22 same thing chemically. And I think if you look at the
23 Controlled Substances Act, not just in this provision,
24 but holistically, what Congress was concerned about was
25 dangerous chemicals.

1 This gets back to the point that the Chief
2 Justice made, which is the reference in the provision at
3 issue here to a "mixture or substance" containing
4 cocaine base. The thing that Congress looked at was:
5 Do you have a substance which may not be 100 percent
6 pure; it's sold on the street; but does it contain the
7 dangerous chemical?

8 Congress defines throughout the Controlled
9 Substances Act the things that it was concerned about in
10 chemical terms. And that's just not because it was an
11 easy way to define things. It does give greater
12 accuracy and certainty. But it's because the harms that
13 are visited on people, the reason that they are
14 controlled substances, that they don't have approved
15 medical uses, and that they are extremely addictive, is
16 because the chemical is inside of them and the chemical
17 is dangerous.

18 So whether you get the chemical out of
19 paste, whether you get it out of rocks, whether you
20 grind the rocks and make it into a powder, whether you
21 freebase it, it is the same thing.

22 And just to -- to make sure the Court has
23 you know, some example or some thoughts as to the issues
24 that would be caused if the Court started making up
25 definitions of crack, you know, a word that doesn't

1 appear in the statute and does not have any clear
2 meaning -- you know, Petitioner says it wasn't clear in
3 1986, the definition of crack -- I just want to give the
4 Court an example of some of the problems that the -- the
5 issues the courts of appeals have confronted.

6 In several courts of appeals there have been
7 substances which I think perhaps under Justice Breyer's
8 definition would qualify as paste. The courts didn't
9 call them paste, but in the Bryant case in the Fifth
10 Circuit they said there was a brown, soft, mushy wet
11 substance that contained cocaine base was being brought
12 in the United States. The Easter case in the Tenth
13 Circuit: a wet gooey, cream-colored substance.

14 Those courts are ones that use the chemical
15 definition of cocaine base, and they said, look, they
16 contain cocaine base, they have the deadly chemicals,
17 they count.

18 JUSTICE ALITO: Well, my understanding of
19 how coke -- how the paste is produced is the following:
20 You start with the leaves; then people vigorously
21 macerate the leaves by stomping on them for an hour or
22 more; and then this mixture is -- this -- what's left is
23 mixed with an alkaline material such as sodium
24 bicarbonate, an organic solvent, such as kerosene, and
25 water; and what you end up with is a gummy, yellowish

1 solid called coca paste; is that -- that's correct?

2 MS. SAHARSKY: Yes, that's true. But it
3 also can be dried. It can -- can be dried and smoked;
4 it has been dried in South America, so it's not always
5 wet, it's just a question of, you know, whether it has
6 had time to dry or not.

7 JUSTICE ALITO: Yes. Now, if a chemist
8 analyzed that or then analyzed crack or freebase,
9 wouldn't there be present in the coca paste lots of
10 other substances that would not be present, in
11 quantities? Other substances would be present in
12 quantities in the coca paste that would not be present
13 in the crack or the freebase?

14 MS. SAHARSKY: Well, they all -- any of
15 those would have impurities that are not cocaine base.
16 All three of them would be identically -- chemically
17 identical if that they would all contain cocaine base;
18 but you're right; the impurities would be different
19 because the method of preparation would be different.

20 JUSTICE ALITO: So a DEA chemist could test
21 -- could test a substance and say this is coca paste of
22 the type that is smoked in South America by some people.
23 This is crack or freebase that has been mixed with water
24 into a pasty substance -- a chemist could make that --
25 that differentiation, couldn't they?

1 MS. SAHARSKY: I think it really depends,
2 Your Honor. I think if it's just a -- a regular DEA
3 chemist, they would be able to tell you what chemicals
4 they can find through standard techniques like infrared
5 spectroscopy, like gas chromatography, and they can say
6 we've identified these chemicals in this substance.
7 Unless it is a chemist -- and we do have some that have
8 additional knowledge of methods of preparation, DEA
9 agents who have that kind of experience, have seen it
10 prepared -- those chemists -- regular chemists would not
11 be testifying about how it was prepared.

12 For example in this case the chemist
13 testified that the -- the sample had cocaine base, it
14 did not have detectable amounts of sodium bicarbonate,
15 and then defense counsel said well is -- is this -- do
16 you think that it's -- or I'm sorry, the chemist, the
17 defense counsel said -- wanted to -- tried to
18 distinguish it from freebase, and said it's freebase
19 crack; and the chemist said you know, I can't answer
20 those questions. I can tell you scientifically what it
21 includes.

22 And that -- that's really the -- the issue
23 of proof, is that you can tell chemically that it has
24 the substance that Congress was trying to get at, the
25 cocaine base. I suppose you can tell what other

1 impurities are there, but you know, Congress doesn't
2 care about the impurities, it cares about the cocaine
3 base; and that's why you know, it says mixture of
4 substance containing cocaine base.

5 You know, one -- one other thing that I just
6 want to make sure is clear to the Court, is that there
7 was ample testimony before Congress at the time that it
8 enacted this provision about the chemistry of this all,
9 that when Congress spoke about cocaine base, it was
10 understanding that base meant chemically the base form,
11 and that again is near the pages I cited to Justice
12 Breyer in our brief. But two different scientists, one
13 was the head of the National Institute for Drug Abuse;
14 the other was the -- was a professor at Yale. Both with
15 experience, and they said things like the form of the
16 drug is the freebase, the usual kind of cocaine is a
17 salt. It is cocaine with hydrochloride, it is a salt
18 like sodium chloride. But this has no chloride attached
19 to it, it is freebase, which is just plain cocaine.

20 So Congress knew the base form of cocaine is
21 what would normally be called cocaine. It learned about
22 the science and it used the term cocaine base.

23 And I take your point, Justice Kagan, some
24 of the other Justices: There is perhaps redundancy in
25 saying cocaine base instead of just saying cocaine, but

1 when Congress in 1986 was faced with a situation where
2 courts, including this Court, had used the term cocaine
3 to refer imprecisely to the cocaine hydrochloride form
4 and Congress was going to put a mandatory minimum
5 penalty in place, Congress had every incentive to be
6 extra clear, and that's exactly what we think that
7 Congress was doing here.

8 JUSTICE SCALIA: Ms. Saharsky, coming back
9 to Romanette (iii), you have 50 grams or more of a
10 mixture or substance described in clause 2. Doesn't --
11 it really doesn't have to be a mixture. It could be
12 pure, couldn't it? It says "mixture or substance," not
13 mixture.

14 MS. SAHARSKY: Yes, it could be pure. I
15 don't know that we've seen any cases like that, but it
16 is almost always cut with something else.

17 So just to wrap up and be as clear as
18 possible, what Congress had intended to do in the
19 Controlled Substances Act really was to pull out
20 chemicals that -- that have certain pharmacological
21 effects on people that are dangerous. Congress did that
22 by using the term "cocaine base." That is a term that
23 is expansive and includes all these kind of forms that
24 we've been talking about today.

25 The lower courts have struggled in trying to

1 figure out whether a substance that's wet, off-white,
2 rock-like, paste-like counts as cocaine base. Certainly
3 the Seventh Circuit has had several cases like that. It
4 struggled. If this Court picks just one definition to
5 limit the term "cocaine base," it's really setting up a
6 road to evasion for drug traffickers to change to a
7 different form. We hope that this Court won't do that.
8 We just don't think the text supports it. It says
9 "cocaine base" without any limitation. And this -- we
10 just don't think that this -- this Court should be
11 adding a limitation based on what it thinks Congress
12 must have intended but didn't say in the text.

13 If the Court has no further questions, the
14 judgment below should be affirmed.

15 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

16 Mr. Pincus, you have four minutes remaining.

17 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

18 ON BEHALF OF THE PETITIONER

19 MR. PINCUS: Thank you, Mr. Chief Justice.

20 Just a couple of points.

21 First of all, in response to Justice
22 Breyer's question, the 2002 sentencing report where --
23 sentencing commission report on this issue, on page 110,
24 recommends to Congress that substances other than crack
25 should be excluded from Clause 3, and I'm quoting,

1 "because they do not present the heightened concerns
2 associated with crack cocaine."

3 JUSTICE BREYER: Yes, but she says there's
4 no way -- and she does cite this professor from Yale and
5 so forth, who says if the stuff has the base in it, it
6 can be abused in ways that if it has the salt in it, it
7 can't be abused. That's all we can look at.

8 MR. PINCUS: But Your Honor, I --

9 JUSTICE BREYER: That's her point. That's
10 her point. You can respond to that if you want.

11 MR. PINCUS: I think that is her point. But
12 I think the question here -- all of these substances are
13 criminalized, and they're all going to be penalized.
14 The question is: What deserves the 100-to-1 sanction?
15 That, to us, means something that Congress was
16 especially concerned about, and certainly, because the
17 government agrees that cocaine hydrochloride is only in
18 2, something that's worse than cocaine hydrochloride,
19 which is a pretty bad thing. As Judge Posner said,
20 there's no reason to imagine that Congress meant to
21 punish paste more than cocaine hydrochloride.

22 JUSTICE BREYER: She says there is a reason.
23 It's because it contains base, and for many years, it
24 was smoked in Latin America and can be smoked here.
25 That's her reason. Now, your response is, it's a bad

1 reason?

2 MR. PINCUS: Our response is that it is --
3 it does not have the potency that crack had. It was
4 smoked here and didn't give rise to the epidemic that
5 occurred once crack was created, because that was more
6 potent, more marketable, and led to all the evils that
7 Congress was trying to get at.

8 Second point: We would be very happy to
9 accept your definition.

10 Third point, about the statutory language:
11 I think the critical question here, as several members
12 of the Court have noted, is that "cocaine" -- not just
13 in Romanette (ii), but throughout the statute -- means
14 all chemical forms of cocaine. If that's what Congress
15 meant in (iii), there was no reason to just -- not to
16 just say it. The words "cocaine base" could have a
17 chemical meaning, but the word "base" was also in this
18 debate as a word that was being used to describe the
19 specific evil that Congress was aimed at. And so we
20 think, at the worst, there's ambiguity here.

21 We think it's quite clear that by using
22 those different terms, Congress meant something
23 different, but at worst, there's ambiguity here. And an
24 ambiguity, under the rule of lenity, means that the
25 clause should be construed narrowly.

1 And, Justice Scalia, going to your point in
2 your analogy to State law, the problem here is that
3 everything that is in clause 2 is in clause 3 under the
4 government's interpretation, because clause 2, Roman
5 (II), has the word "cocaine," and clause 2, Roman (IV),
6 says any compound mixture or whatever containing
7 cocaine. Under the government's theory, that provision
8 will never, ever be invoked, because every offense that
9 uses cocaine is sanctionable under 3. And so it's not
10 the situation with --

11 JUSTICE SCALIA: It's the same with homicide
12 and murder. Every murder, every murder, is a homicide.

13 MR. PINCUS: Yes, but the question here is
14 whether every homicide -- whether every lesser form of
15 homicide is also capital murder. And what the
16 government's position means: Every lesser form of
17 homicide, everything that's in (II) that sets up a
18 punishment, is also in (III), and we think that's the
19 problem with their interpretation.

20 And it's why, if it's unclear, as you said
21 maybe it was, then the rule of lenity should apply, and
22 Congress can fix it. If Congress meant to include all
23 of these other substances, Congress can easily fix the
24 statute. But we think, given the way the statute looks
25 right now, that's not possible.

1 Two more --

2 JUSTICE SOTOMAYOR: Let's assume for the
3 sake of a hypothetical that the statute was the same but
4 that things were reversed; that the smaller universe of
5 items was the salt rather than the crack, and so they
6 put an enhancement in Roman numeral number (III) for
7 salt rather than crack.

8 Is your argument that it's redundant based
9 on the fact that a larger grouping of the chemicals
10 listed in Roman numeral number (II) is excluded by Roman
11 numeral number (III), so that -- is that the basis of
12 your argument?

13 MR. PINCUS: That particular argument would
14 still apply. Our principal argument, if I may answer
15 the question, is that in this -- in the government's
16 interpretation, the word "cocaine" and the word "cocaine
17 base" -- the phrase "cocaine base" have the same
18 meaning. That evil wouldn't be present, and therefore,
19 our argument would be harder, but it is present here.

20 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
21 The case is submitted.

22 (Whereupon, at 11:05 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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