No. 21-____

In The

Supreme Court of the United States

GAS PIPE, INC. ET AL.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 371's defraud clause, which in relevant part prohibits conspiracies "to defraud the United States," reaches *any* conspiracy whose object is to interfere with *any* lawful government function, even if not targeted at the government's money or property or an ongoing or reasonably foreseeable governmental proceeding.

2. Whether a court of appeals reviewing a district court's failure to instruct the jury as to an element of the offense can find the constitutional error harmless based solely on the court of appeals' assessment of the strength of the government's evidence, without considering the defendant's countervailing evidence or other factors supporting acquittal.

PARTIES TO THE PROCEEDING

Petitioners Gas Pipe, Inc. and Amy Lynn, Inc. are two corporate entities owned by Petitioner Gerald Shults and operated by Petitioner Amy Herrig. Petitioners were defendants in the district court and appellants in the court of appeals.

Respondent is the United States of America. Respondent was plaintiff in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Gas Pipe, Inc. and Amy Lynn, Inc. have no parent corporations, and no publicly held companies own 10% or more of their respective stock.

RELATED PROCEEDINGS

This petition arises from the decision of the United States Court of Appeals for the Fifth Circuit in *United States of America v. Gas Pipe, Inc. et al.*, filed May 6, 2021. The decision of the Fifth Circuit is reported at 997 F.3d 231.

This petition is related to the following Fifth Circuit proceedings:

- *United States v. Real Prop. Located at 1407 N. Collins St., Arlington, Texas, et al.*, reported at 901 F.3d 268, Judgement Entered: August 16, 2018.
- *United States v. William Venable*, No. 15-10774, Judgment Entered: April 20, 2016.
- *United States v. Joaquin Ramirez*, No. 20-10860, Judgment Entered: May 25, 2021.

This petition is additionally related to the following proceedings in the United States District Court for the Northern District of Texas:

- *United States v. Lawrence Shahwan*, Docket No. 3:14-CR-00298-M-1, Judgment Entered: November 8, 2018.
- *United States v. Justin Laney*, Docket No. 3:14-CR-00298-M-2, Judgment Entered: April 27, 2015.
- *United States v. William Venable*, Docket No. 3:14-CR-00298-M-3, Judgment Entered: July 29, 2015.

- *United States v. Jason Bond*, Docket No. 3:14-CR-00298-M-4, Judgment Entered: June 19, 2015.
- *United States v. Craig Starnes*, Docket No. 3:14-CR-00298-M-5, Judgment Entered: November 8, 2018.
- *United States v. Brody Jones*, Docket No. 3:14-CR-00298-M-6, Judgment Entered: November 8, 2018.
- *United States v. Gas Pipe Inc.*, Docket No. 3:14-CR-00298-M-7, Judgment Entered: October 8, 2019.
- *United States v. Amy Lynn Inc.*, Docket No. 3-14-CR-00298-M-8, Judgment Entered: October 8, 2019.
- *United States v. Gerald Shults*, Docket No. 3-14-CR-00298-M-9, Judgment Entered: October 8, 2019.
- *United States v. Amy Herrig*, Docket No. 3-14-CR-00298-M-10, Judgment Entered: October 8, 2019.
- *United States v. Rolando Rojas*, Docket No. 3-14-CR-00298-M-11, Judgment Entered: December 20, 2019.
- *United States v. Ryan Yarbro*, Docket No. 3-14-CR-00298-M-12, Judgment Entered: January 16, 2019.
- *United States v. John Ben Lincoln*, Docket No. 3-14-CR-00298-M-13, Judgment Entered: March 26, 2019.

- *United States v. Christopher Ramirez*, Docket No. 3-14-CR-00298-M-14, Judgment Entered: February 28, 2019.
- *United States v. Daniel Caillier*, Docket No. 3-14-CR-00298-M-15, Judgment Entered: February 28, 2019.
- *United States v. Kendall Silva*, Docket No. 3-14-CR-00298-M-16, Judgment Entered: March 26, 2019.
- *United States v. Elizabeth Walker*, Docket No. 3-14-CR-00298-M-17, Judgment Entered: February 28, 2019.
- *United States v. Bridgett Payrot*, Docket No. 3-14-CR-00298-M-18, Judgment Entered: March 26, 2019.
- *United States v. Jason Lyon*, Docket No. 3-14-CR-00298-M-19, Judgment Entered: February 28, 2019.
- *United States v. Joshua Campbell*, Docket No. 3-14-CR-00298-M-20, Judgment Entered: February 28, 2019.
- *United States v. Mick Clark* Docket No. 3-14-CR-00298-M-21, Judgment Entered: February 28, 2019.
- *United States v. Brandon Schubert*, Docket No. 3-14-CR-00298-M-22, Amended Judgment Entered: February 28, 2019.
- *United States v. Jackie Randall-King*, Docket No. 3-14-CR-00298-M-23, Judgment Entered: February 28, 2019.

- *United States v. Holly Patterson*, Docket No. 3-14-CR-00298-M-24, Judgment Entered: February 28, 2019.
- *United States v. Brad Bader*, Docket No. 3-14-CR-00298-M-25, Amended Judgment Entered: February 28, 2019.
- *United States v. Travis Lovin*, Docket No. 3-14-CR-00298-M-26, Amended Judgment Entered: February 28, 2019.
- *United States v. Jennifer Dunn*, Docket No. 3-14-CR-00298-M-27, Judgment Entered: February 28, 2019.
- *United States v. Patrick Shanahan*, Docket No. 3-14-CR-00298-M-28, Amended Judgment Entered: February 28, 2019.
- *United States v. Carolyn Settlemire*, Docket No. 3-14-CR-00298-M-29, Judgment of Acquittal Entered: October 29, 2018.
- *United States v. Tom Scott*, Docket No. 3-14-CR-00298-M-30, Judgment of Acquittal Entered: October 15, 2018.
- *United States v. Rapids Camp Lodge Inc.*, Docket No. 3-14-CR-00298-M-31, Motion to Dismiss Granted: September 17, 2018.
- *United States v. Ridglea Complex Management Inc.*, Docket No. 3-14-CR-00298-M-32, Motion to Dismiss Granted: September 17, 2018.
- *United States v. Joaquin Ramirez*, Docket No. 3-14-CR-00298-M-33, Judgment Entered: April 11, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gas Pipe, Inc., Amy Lynn, Inc., Gerald Shults, and Amy Herrig respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The decision of the court of appeals is reported at 997 F.3d 231, and reprinted in the Appendix to the Petition ("App.") at 1a-21a. The decision of the district court denying petitioners' motion to strike is unreported and reprinted at 22a-30a, and its decision denying petitioners' motion for a judgment of acquittal is unreported and reprinted at 31a-39a.

JURISDICTIONAL STATEMENT

The decision of the court of appeals was issued on May 6, 2021. App. 1a. That court denied rehearing on June 17, 2021. App. 40a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at App. 42a-91a.

INTRODUCTION

Over the past few decades, the Court has repeatedly rejected efforts to construe imprecise text in federal statutes in ways that would produce "sweeping expansion[s] of federal criminal jurisdiction." *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (quotations omitted); *see also*, *e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648 (2021). The Court has done so even where the courts of appeals

had "uniformly and consistently" read the statute in to the contrary. *McNally v. United States*, 483 U.S. 350, 364 (1987) (Stevens, J., dissenting). This case presents the same problem in another statute.

In 1867, Congress enacted a federal conspiracy provision as part of a bill aimed at shoring up federal tax collection. Today, that provision is codified at 18 U.S.C. § 371. The statute makes it a crime to "conspire either to commit any offense against the United States, or to defraud the United States." Under modern principles of statutory construction, the meaning of Section 371 is plain: a defendant violates it either by conspiring to commit a federal crime or by conspiring to "defraud" the government—that is, to cheat it out of money or property.

But over a century ago, this Court gave Section 371 a far broader construction. Declining to give the term "defraud" its traditional, common-law meaning—i.e., to deprive of money or property through dishonest means—the Court instead stated that the statute reached "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government." *Haas v. Henkel*, 216 U.S. 462, 479 (1910).

The first question presented by this petition is whether *Haas*'s construction of Section 371 should be revisited. The answer is yes. *Haas*'s rule that a defendant can defraud the federal government by interfering with *any* lawful function finds no support in the text, history, or structure of Section 371, resulting in a vague crime entirely unmoored from any common-law limitations. And *Haas*'s rule gives rise to many of the same problems that have

prompted this Court to limit the reach of other, similar statutory provisions, including the serious risk of the arbitrary exercise of prosecutorial discretion. Indeed, the *Haas* construction of Section 371 has been criticized by courts for decades. But because those courts have read this Court's precedent to hem them in, it falls to this Court to restore appropriate limits to this currently unbounded criminal statute. This petition provides the Court a perfect vehicle to do so.

The Court should also grant certiorari to resolve a longstanding split over the harmless-error test prescribed by *Neder v. United States*, 527 U.S. 1 (1999). *Neder* held that the failure to instruct the jury on an element of the offense can be harmless in the "narrow" situation where it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id*. at 17 n.2, 18. And the *Neder* Court found the error there harmless because the defendant had notice of the omitted element and never contested it.

Since then, the lower courts have divided over how *Neder*'s test applies where the defendant actually contested the omitted (or misdescribed) element. The Fifth Circuit evaluates the strength of the government's evidence, and affirms if it finds that that evidence, in isolation, is strong enough that a rational jury would have found the element satisfied. That is what the court below did, following its long-standing approach. But most courts go beyond the government's evidence, and look to see whether, based on *all* of the evidence at trial, a reasonable jury would necessarily have convicted. This case presents

the Court with an excellent opportunity to mend this division in this crucial area of criminal law.

STATEMENT OF THE CASE

A. Statutory Background

The general federal criminal conspiracy provision, 18 U.S.C. § 371, has two distinct clauses. The "defraud" clause makes it a crime to conspire "to defraud the United States." The "offense" clause makes it a crime to conspire to "commit any offense against the United States." That statute's history and context provide crucial backdrops for assessing its proper scope.

1. In the aftermath of the Civil War, the federal government needed tax revenues. But political and economic pressures restrained Congress from enacting broad tax legislation. *See* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 417-18 (1959). "One obvious means of meeting this need and at the same time giving heed to the [anti-tax] resentment was to collect more efficiently that which was already taxable." *Id.* So Congress turned to whiskey. At the time, "excise taxes on whisk[e]y were designed to supply the greatest part of the federal revenue." *Id.* Yet those taxes were regularly being evaded. *Id.* Thus, to aid in collection efforts and deter evasion, Congress in 1867 passed *An Act to amend existing Laws relating to Internal Revenue, and for other Purposes*, 14 Stat. 471 (1867). That "thirty-four-section statute . . . plugged loop-holes in the tax laws and, in addition, created a number of new tax offenses." Goldstein, *supra*, at 418.

The provision that is now Section 371 was first enacted as Section 30 of the 1867 Act. That section made it a federal crime to "conspire either to commit any offence against the laws of the United States, or to defraud the United States in any manner whatsoever." 14 Stat. 484, § 30. The statute's defraud clause was later amended to read: "to defraud the United States in any manner or for any purpose." Goldstein, *supra*, at 418 n.36. But while the statute was broadened to capture frauds "for any purpose" (e.g., beyond tax fraud), the defraud clause text has always been limited to conspiracies "to defraud." 18 U.S.C. § 371.

"At common law, the words 'to defraud' meant to deprive another of property rights by dishonest means." *United States v. Coplan*, 703 F.3d 46, 59 (2d Cir. 2012) (Cabranes, J.). And this Court's early cases underscored this limitation. In *United States v. Hirsch*, 100 U.S. 33 (1879), the Court held that the federal conspiracy statute was not strictly a revenue law and thus was not subject to the statute of limitations for revenue offenses. "In so holding, the Court described the prohibited fraud as 'any fraud against the United States. It may be against the coin, or consist in cheating the government of its land or other property.'" *Coplan*, 703 F.3d at 59 (alteration omitted) (quoting *Hirsch*, 100 U.S. at 35). Indeed, the early cases, like *Hirsch*, "[a]ll involved conspiracies to make false statements to government officers, with the intention of inducing action by such officers," which, "if taken, would in every instance have deprived the federal government of its money or property." Goldstein, *supra*, at 421.

3. That changed in 1910 with the Court's decision in *Haas v. Henkel*, 216 U.S. 462 (1910). The defendants there were charged with bribing a Department of Agriculture official to falsify cotton crop reports and to convey information in those reports to them. *Id.* at 477-79. In sustaining the charges, the Court held that it was "not essential that . . . a conspiracy [to defraud the United States] shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." *Id.* at 479.

The Court restated the *Haas* conception of Section 371 in *Hammerschmidt v. United States*, 265 U.S. 182 (1924). There, the Court held that defendants did not conspire to defraud the United States by advocating disobedience of the Selective Service Act. *Id.* at 185. But *Hammerschmidt* also parroted *Haas*'s description of a conspiracy to defraud: "[i]t is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention." *Id.* at 188.

The *Hass* formulation "marked the end of any attempt to restore to the word 'defraud' its 'ordinary' meaning." Goldstein, *supra*, at 427. *Haas*'s "sweeping language" also enticed ever more sweeping theories of criminal liability. *Id.* at 428. "Whenever misconduct in some way directed at the Government fell short of a specific offense category but seemed nevertheless

deserving of punishment, or wherever problems of proof made invocation of the offense portion of the statute questionable, the resourceful prosecutor could turn to this crime of many meanings and of seemingly infinite elasticity." *Id*.

4. In 1948, Congress recodified the federal conspiracy statute as part of the general consolidation of federal criminal law into Title 18. *See Act of June 24, 1948*, 62 Stat. 683, 701 (1948). By that time, the conspiracy statute's scope had changed dramatically in light of other changes in federal criminal law. The "offense" clause had gained substantial significance because the number of federal crimes had multiplied. *See* Goldstein, *supra*, at 440. Indeed, Congress in 1948 thought it necessary to add a proviso to Section 371 to limit its reach by preventing prosecutors from bootstrapping federal misdemeanors into felonies by charging them as conspiracies: "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. § 371.

Had the conspiracy statute's defraud clause been limited to its ordinary meaning from the outset, the growing importance of the offense clause would have been matched by a defraud clause diminished in scope. Congress later enacted express fraud offenses—the general mail and wire fraud statutes, 17 Stat. 283, 323, § 301 (1872); 66 Stat. 711, 722, § 18(a) (1952)—which are limited to money and property frauds, *see McNally v. United States*, 483 U.S. 350 (1987), and which would apply to cases in

which the United States itself was a victim. So if the conspiracy statute's defraud clause had likewise been limited to its terms, it would do independent work only when the United States was the target of a money or property fraud that did not employ the mails or a wire, or otherwise implicate an already-existing federal crime.

In light of this Court's broad language in *Haas*, however, courts have not limited the defraud clause to its terms. Rather, the only discernable limit on the scope of the "defraud" clause as currently applied in the lower courts is that the conspiracy must involve some aspect of dishonesty aimed loosely at the government. Despite the ordinary understanding of "defraud," the defendant's conduct need not involve the intended or actual loss of money or property. Nor need it even be directed at an ongoing or reasonably foreseeable government proceeding.

B. Proceedings Below

This case starkly illustrates the widely accepted breadth of Section 371.

1. Petitioners owned and operated a chain of smoke shops in Texas and New Mexico. App. 2a. Among the other products sold at Gas Pipe stores were synthetic cannabinoid products, commonly known as "spice." *Id*. The spice was labeled "not for human consumption" and sold as incense or potpourri. But customers purchasing spice clearly knew it was meant for human consumption—namely,

to be smoked to get high. App. 2a-3a; *see* ROA.8716, 8938, 9128-9129.[1]

"[T]he federal government has scheduled various synthetic cannabinoids as illegal controlled substances." App. 2a-3a. Other synthetic cannabinoids are illegal by virtue of the Controlled Substance Analogue Enforcement Act, which treats chemical analogues to controlled substances as controlled substances "to the extent intended for human consumption." 21 U.S.C. § 813(a); *see id.* § 802(32). "But regardless of whether a synthetic cannabinoid has been scheduled," no drug intended for human consumption may "be sold for human consumption absent FDA approval and proper labeling." App. 3a.

"In late 2013, the DEA started an undercover investigation into [petitioners'] spice sales." App. 3a. The investigation included "'controlled buys' to determine whether [petitioners] were selling spice for human consumption." *Id.* Lab tests "revealed that the spice contained various synthetic cannabinoids." *Id.*

The government charged petitioners with a slew of federal crimes in the U.S. District Court for the Northern District of Texas. The majority of the counts in the operative indictment alleged violations of the Controlled Substances Act and Controlled Substance Analogue Enforcement Act. App. 4a n.3. But petitioners were ultimately acquitted of these offenses. App. 4a. The government also alleged a

[1] "ROA" refers to the Record on Appeal in the Fifth Circuit.

conspiracy to commit mail and wire fraud, but it dismissed that charge before trial.

2. The government also charged petitioners with violating both the defraud and offense clauses of 18 U.S.C. § 371. This was the lone count on which the government obtained a conviction.

a. *Defraud clause.* The indictment first alleged that petitioners conspired to defraud the United States "for the purpose of impeding, impairing, obstructing, and defeating [FDA's] lawful governmental functions of regulating drug labeling and approving new drugs." ROA.430. Yet during the three-week trial, the government introduced no evidence that the government lost any money or property, that any FDA proceeding was stymied, or that the FDA made any decision based on the statement that spice was "not intended for human consumption" or any other statement about spice. This was so even though the government called as a witness an FDA expert who testified in general about the agency's regulatory scheme and stated that the spice was misbranded. The expert never claimed that the alleged misbranding affected the agency's (or anyone else's) decision making in any way. *See* ROA.9792-9801.

The district court's instructions, however, rendered these evidentiary absences irrelevant. Specifically, the district court instructed the jury that it could find petitioners guilty of conspiring to defraud the United States "by defeating its lawful government function of regulating drug-labeling and approving new drugs before introduction into interstate commerce." ROA.5785. Indeed, the court expressly

charged that "[t]he word 'defraud' here is not limited to its ordinary meaning of cheating the government out of money or property; it also includes impairing, obstructing, defeating, or interfering with the lawful function of the government or one of its agencies by dishonest means." ROA.5786.[2]

The "important part" of the instructions, the government emphasized, was that a defendant could defraud the government by "defeating or interfering with the lawful function of the government or one of its agents by dishonest means." ROA.10247. "Let that sink in for a second," the prosecution stressed: petitioners could be convicted simply for "[d]efeating the lawful regulation of the Government or its agencies." *Id*.

b. *Offense clause.* The government also alleged that petitioners conspired to commit felony misbranding under 21 U.S.C. §§ 331, 333(a)(2), and 352, "by introducing or delivering an adulterated or misbranded drug into interstate commerce with the intent to defraud or mislead." ROA.430. There was no evidence that the FDA was unable to regulate petitioners' sale of spice, much less that it was duped by labeling claiming that spice was not for human consumption. But the district court refused to instruct the jury that materiality was an element of the felony

[2] Petitioners specifically objected to the district court's defraud clause instruction, ROA.10028-29, proffered their own proposed instruction, ROA.4349, and moved to strike the conspiracy-to-defraud charge, ROA.3845-53.

misbranding offense. *See* ROA.5787; *see also* ROA.10028-32.[3]

c. The jury returned a special verdict finding petitioners guilty under both clauses of Section 371. App. 18a. The district court denied petitioners' post-trial motion for a judgment of acquittal. App. 31a-39a.

3. The Fifth Circuit affirmed.

a. As to the defraud clause, the court of appeals rejected, as foreclosed by *Haas*, the argument that the word "defraud" in Section 371 limits the statute to common-law fraud—i.e., "cheating the Government out of money or property." App. 5a. And on the authority of a prior circuit decision, *see United States v. Herman*, 997 F.3d 251 (5th Cir. 2021), the court of appeals rejected the argument that there must be a nexus between the defendant's conduct and an ongoing or reasonably foreseeable federal proceeding. App. 6a.

b. As to the offense clause, the Fifth Circuit held that any error in the district court's refusal to instruct the jury that the felony misbranding statute includes materiality as an element was harmless. App. 7a-12a.

"In general," the court of appeals noted, "a statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which is was addressed." App. 8a (quotations omitted). According to the Fifth

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[3] Petitioners stipulated to having committed misdemeanor misbranding under 21 U.S.C. § 333(a)(1), *see* App. 3a, but argued that they were not guilty of a felony because they did not "inten[d] to defraud or mislead," 21 U.S.C. § 333(a)(2).

Circuit, "proof of materiality would require demonstrating that [petitioners'] misbranding had a tendency to influence, or was capable of influencing, the FDA's decisionmaking." *Id.*

Applying that conception of materiality to the facts here, the court of appeals reviewed only the government's evidence. It found that the testimony of two witnesses was "sufficient to show that [petitioners] sold spice labeled 'Not for Human Consumption' to evade the FDA's regulatory scrutiny and that, if [petitioners'] products had been correctly labeled as intended for human consumption, they would have been subject to FDA regulation." App. 10a-11a.

The court did not consider whether a reasonable jury could have acquitted despite this "sufficient" evidence. For example, the court did not consider whether the evidence that the label was not germane to consumers would have allowed a reasonable juror to conclude the same about the government's decision makers. Nor did the court consider the fact that a government witness testified at length about FDA regulatory power and the like, but failed to assert that petitioners' misbranding had any effect on any government decision.

c. Finally, the court rejected petitioners' sufficiency-of-the-evidence challenge to their Section 371 convictions, but only under the defraud clause. App. 15a-18a. Having found sufficient evidence to support the conviction under the defraud clause, the court of appeals did not consider whether the evidence was sufficient to sustain the convictions under the offense clause. App. 18a.

4. On June 17, 2021, the Fifth Circuit denied a petition for rehearing. App. 40a-41a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE PROPER SCOPE OF THE FEDERAL CONSPIRACY STATUTE'S DEFRAUD CLAUSE

The Fifth Circuit held that Section 371's "defraud" clause reaches *any* conspiracy intended to impair, obstruct, or defeat any government function—regardless of any attempt to cheat the government out of money or property, or even to interfere with an actual, ongoing or reasonably foreseeable government proceeding. Like other federal courts, the court of appeals grounded this construction in this Court's decision in *Haas v. Henkel*, 216 U.S. 462 (1910). Despite severe criticism of *Haas*, lower courts have asserted that the arguments raised here "are properly directed to a higher authority." *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012); *accord United States v. Flynn*, 969 F.3d 873, 880 (8th Cir. 2020). This Court should grant review to answer that call and to preclude convictions like this one.

A. The Fifth Circuit's Holding Is Incompatible With Section 371's Text, History, And Structure

In *Haas*, this Court stated that a defendant violates the defraud clause not only by conspiring to cheat the United States out of money or property but also by conspiring "for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." 216 U.S. at 479. That

conception of the statute—which the Fifth Circuit felt bound to apply here—cannot be reconciled with its text, structure, or history.

1. There is no principle of statutory construction on which the Court has become more emphatic than that a statute—especially a federal criminal statute—may reach no farther than its text allows. And "'[i]t is a settled principle of interpretation that, absent other indication,'" when Congress uses common-law terms, "'Congress intends to incorporate the well-settled meaning of th[ose] terms.'" *United States v. Castleman*, 572 U.S. 157, 162 (2014) (quoting *Sekhar v. United States*, 570 U.S. 729, 732 (2013)); *see also, e.g.*, *Morissette v. United States*, 342 U.S. 246, 263 (1952).

To "'defraud' is just such a term." *Neder v. United States*, 527 U.S. 1, 22 (1991). "At common law, the words 'to defraud' meant to deprive another of property rights by dishonest means." *Coplan*, 703 F.3d at 59. And that is exactly how this Court has construed similar fraud statutes. In *McNally v. United States*, 483 U.S. 350 (1987), this Court read the mail fraud statute, 18 U.S.C. § 1341—enacted a few years after Section 371—"as limited in scope to the protection of property rights." *Id.* at 360; *see Cleveland v. United States*, 531 U.S. 12 (2000) (reaffirming *McNally*). The Court did the same in *Kelly v. United States*, 140 S. Ct. 1565 (2020), limiting "the federal statutes prohibiting wire fraud and fraud on a federally funded program or entity" to "fraudulent schemes for obtaining property." *Id.* at 1568. While the government can be the victim of fraud, both *Kelly* and *Cleveland* rejected the

argument that a scheme to defraud could encompass a scheme to alter the government's "exercise of regulatory power." *Kelly*, 140 S. Ct. at 1572 (citing *Cleveland*, 531 U.S. at 23).

Yet that is essentially the rule that *Haas* announced with respect to Section 371. Worse yet (but not surprisingly), *Hass* did so without explanation.

Nearly a century later in *McNally*, the Court observed in a footnote that the "broad construction" it gave Section 371 in *Hass* was "based on [the] consideration" that "Section 371 is a statute aimed at protecting the Federal Government alone." 483 U.S. at 358 n.8. But that post hoc justification is no less "a relic from a bygone era of statutory construction." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (quotations omitted). *McNally*'s dictum "rest[s] on a policy judgment—that, in the nature of things, government interests justify broader protection that the interests of private parties—rather than on any principle of statutory interpretation." *Coplan*, 703 F.3d at 61. The dictum has no footing in the text of Section 371.

2. The *Haas* construction also ignores a key structural feature of Section 371—*viz.*, the implications of its having both a defraud clause *and* an offense clause. When the statute was enacted, there were not many federal offenses. So the defraud clause offered the government a mechanism through which to protect the federal coffers without Congress legislating more specific crimes. *See United States v. Minarik*, 875 F.2d 1186, 1194 (6th Cir. 1989) ("purpose" of defraud clause "was to reach conduct not covered elsewhere in the criminal code"); Goldstein,

supra, at 450. But Congress could not have intended that the defraud clause would operate as to conduct about which it *had* legislated specifically. After all, Congress does not normally write statutes that include substantial superfluity, *e.g.*, *Marinello v. United States*, 138 S. Ct. 1101, 1107 (2018); *Yates v. United States*, 574 U.S. 528, 543 (2015), and it normally understands that specific statutory language (here, specific criminal offenses) will trump general provisions like the defraud clause, *e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

Yet the *Haas* construction does not limit the defraud clause in that way. And now, more than a century later, when Congress has legislated innumerable specific criminal offenses, *Haas*'s conception of Section 371 allows the government to charge a nebulous conspiracy offense *even when Congress has specifically legislated on the matter*. This is a case in point: Congress has criminalized both misdemeanor and felony misbranding. But the government charged petitioners not only with a conspiracy to commit one of those express offenses, but also with the nebulous crime of conspiring to defraud the government based on the very same conduct.

A 1948 amendment to the federal conspiracy statute underscores the point. That amendment clarified that if the object of the conspiracy is a federal misdemeanor offense, "the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. § 371. Congress enacted this limitation on the

offense clause to prevent "[t]he injustice of permitting a felony punishment on conviction for conspiracy to commit a misdemeanor." *Id.*, Reviser's Note.

Haas's construction of the defraud clause allows an end run around this limitation. Under *Haas*, a prosecutor can almost always charge a conspiracy to commit a misdemeanor under the defraud clause—for example, by charging a misdemeanor immigration offense as a felony conspiracy to defraud. *See, e.g.*, *United States v. Zhang*, 454 F. App'x 591, 593-96 (9th Cir. 2011) (Smith, J., "reluctantly" concurring) (detailing the government's "highly questionable tactics" in manipulating charges under Section 371); *see also United States v. Rosenblatt*, 554 F.2d 36, 41 n.6 (2d Cir. 1977) (noting same "potential for abuse"). As one court observed: "if conspiracy agreements the object of which fall under a specific offense defined by Congress are allowed to be prosecuted under the 'defraud' clause, the purpose of the misdemeanor provision of § 371 will be defeated." *Minarik*, 875 F.2d at 1194.

B. An Open-Ended Construction of Section 371 Invites Arbitrary Enforcement

Haas's "infirmities" are by no means limited to its infidelity to statutory text or "the history and deployment of the statute." *Coplan*, 703 F.3d at 61. *Haas* has also been "sharply criticized," Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 Am. J. Crim. L. 193, 206 (2002), by courts and commentators because the defraud-clause crime has "assumed such broad and imprecise proportions as to trench . . . on constitutional prohibitions against vagueness." Goldstein, *supra*, at 408; *see United*

States v. Barker Steel Co., 985 F.2d 1123, 1129 (1st Cir. 1993) (noting "that the defraud clause of § 371 has been criticized for its general language and potentially broad sweep").

"In addition to 'the danger of injustice inherent in a criminal conspiracy charge,' the defraud clause of section 371 has a special capacity for abuse because of the vagueness of the concept of interfering with a proper government function." *United States v. Goldberg*, 105 F.3d 770, 775 (1st Cir. 1997) (alteration and internal citation omitted) (quoting *Dennis v. United States*, 384 U.S. 855, 860 (1966)). Indeed, under *Haas*, virtually any agreement to circumvent government regulation—regardless of whether Congress saw fit to attach criminal penalties or what penalties Congress saw fit to attach—could be a federal conspiracy, punishable by up to five years in prison, so long as the conduct involves some aspect of dishonesty.

Haas's formulation is also "so standardless that it invites arbitrary enforcement," *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see, e.g.*, *Rosenblatt*, 554 F.2d at 41 n.6 ("The potential for abuse in allowing the government to manipulate a prosecution by easy access to the conspiracy-to-defraud clause is clear."). Arbitrary enforcement is always a problem with vague criminal laws. But it is especially so with Section 371 because prosecutors can often control the severity of the punishment by choosing to prosecute the same conduct under either the offense or defraud clause. *Supra* at 17-18.

Over the past decade, this Court has repeatedly granted certiorari to ensure that federal criminal

statutes are not read so broadly that they allow prosecutors all-but-unfettered discretion to deem any conduct a crime. *See Van Buren v. United States*, 141 S. Ct. 1648, 1661-62 (2021); *Kelly*, 140 S. Ct. at 1574; *Marinello*, 138 S. Ct. at 1108; *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016); *Yates*, 574 U.S. at 548; *Bond v. United States*, 572 U.S. 844, 862 (2014). It should do the same here.

C. This Case Is An Ideal Vehicle To Revisit Section 371

Petitioners would prevail under any fair reading of Section 371's defraud clause.

1. The best reading of the defraud clause is as limited to the common-law meaning of the word "defraud," i.e., "to deprive another of property rights by dishonest means." *Coplan*, 703 F.3d at 59 & n.17; *supra* Part I.A. Petitioners did not do so. Accordingly, under what even the district court called the "ordinary" meaning of defraud, petitioners' conviction cannot stand.

2. Even if the Court did not limit the defraud clause according to the common-law meaning of "defraud," it would still be necessary to construe Section 371 in a manner that requires reversal. In fact, the history and structure of the statute, as well as this Court's precedents, demand at least two limiting constructions, neither of which this Court has considered previously.

a. Section 371's defraud clause should be construed as nothing more than a stopgap that captures criminal conduct that Congress has not specifically legislated. On this reading, a court should

require that charges "be brought under the offense clause"—not under the defraud clause—"if it is clear that Congress has specifically considered a given pattern of wrongful conduct and enacted a specific statute with a specific range of penalties to cover it." *Minarik*, 875 F.2d at 1193; *see also* Goldstein, *supra*, at 448-55.

That reading is consistent with Congress's apparent intent, reflected in the statute's structure, that the defraud clause be used "to reach conduct not covered elsewhere in the criminal code, a code which, unlike the present criminal code, had not elaborated specific fraud offenses." *Minarik*, 875 F.2d at 1194; *see also* Goldstein, *supra*, at 450 (defraud clause an "interim measure protecting the Government until such time as Congress has been able to deal more specifically with a given problem"); *supra* at 16-17. It is also the only rule that makes sense. If the defraud clause reached more broadly, then the government could charge conduct that does not satisfy all the elements of various crime Congress proscribed—for example, honest-services fraud without the bribe or kickback, *but see Skilling v. United States*, 561 U.S. 358 (2010), or attempted interference with the due administration of the tax laws without an ongoing or reasonably foreseeable proceeding, *but see Marinello*, 138 S. Ct. at 1109-10.

This reading would likewise be consistent with the 1948 amendment to the offense clause. That amendment prohibits the government from charging misdemeanor offenses as felonies. And the amendment can be given effect only if the government

is precluded from end-running it by bringing charges under the defraud clause instead. *See supra* at 17-18.

This case demonstrates the dangers of *Haas*'s contrary approach. Congress has legislated specific crimes related to the conduct charged here—namely, misdemeanor and felony misbranding. Petitioners maintain that the facts satisfy the elements of the former but not of the latter. But under the *Haas* formulation, that does not matter. The government perversely gets to charge a felony even for conduct that Congress thinks is only a misdemeanor. That result cannot be reconciled with Section 371's structure generally, or the 1948 amendment in particular.

b. Alternatively, Section 371 should be limited like the statute in *Marinello*. That statute made it a crime to "obstruct[] or impede[] the due administration" of the tax code. 26 U.S.C. § 7212(a). The Court acknowledged that the statute could "be read literally to refer to every" aspect of tax administration. 138 S. Ct. at 1106. But the better reading was that the statute required a nexus between the defendant's conduct and a pending or reasonably foreseeable proceeding. *Id*. at 1109-10; *see also United States v. Aguilar*, 515 U.S. 593, 600 (1995) (adopting similar construction of 18 U.S.C. § 1503(a)); *cf. Yates*, 574 U.S. at 548. This was so in part because the government's construction would "transform" many misdemeanors into felonies (as is true under *Haas*), would create substantial overlap with other federal criminal provisions (also true under *Haas*), and would "risk the lack of fair warning and related kinds of unfairness" that typically calls for "interpretive

restraint" (again true under *Haas*). *See Marinello*, 138 S. Ct. at 1107-08 (quotations omitted).

While the text of the statute in *Marinello* does not match Section 371's defraud clause, it is almost an exact match with *Haas*'s *formulation* of the defraud clause. Again, the statute in *Marinello* punishes "obstruct[ing] or imped[ing] . . . the due administration" of the tax code, while the defraud clause under *Haas* punishes any conspiracy whose object is "to interfere with or obstruct [a] lawful governmental function[.]" *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). If the defraud clause is not to be construed according to its text, then *Haas* should at least be construed in line with this Court's precedent to apply only to conspiracies that seek to interfere with "a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action" that "was pending at the time the defendant engaged in the [conspiracy] or, at the least, was then reasonably foreseeable by the defendant." *Marinello*, 138 S. Ct. at 1109-10.

That construction would bring the statute at least closer to its original design. It would also remedy "the lack of fair warning and related kinds of unfairness," *id.* at 1108, inherent in the *Haas* interpretation. And it would stop short of covering petitioners' conduct here. Petitioners did not conspire to interfere with an ongoing or reasonably foreseeable proceeding.

3. Reversing petitioners' defraud-clause conviction would also require vacating the decision below. Petitioners were separately convicted under the offense clause. But petitioners raised a sufficiency-of-

the-evidence challenge to their offense-clause convictions, and the court of appeals did not reach that challenge. Instead, it deemed the challenge irrelevant on the ground that sufficient evidence supported the conviction under the defraud clause. App. 18a. If the conviction under the defraud clause is no longer valid, then a remand would be necessary—at the very least—to require the court of appeals to resolve petitioners' sufficiency challenge to the offense-clause convictions.

Furthermore, the offense-clause conviction likewise raises a certworthy question respecting the Fifth Circuit's rejection, on harmless error grounds, of petitioners' request for a jury instruction on materiality. (Part II below addresses that issue.) If the Court grants certiorari and reverses on that argument, then the validity of the defraud-clause conviction would be all the more critical.

II. THE COURT SHOULD RESOLVE THE CONFLICT OVER APPLICATION OF *NEDER*'S HARMLESS-ERROR TEST TO INSTRUCTIONAL ERROR

This case also presents an opportunity to resolve an independent issue of substantial national importance that has divided the lower courts—*viz.*, the question how harmless-error analysis works in cases of instructional error where the defendant contested the omitted (or misdescribed) element.

A. The Decision Below Perpetuates A Circuit Conflict

1. Since "very early times," the right to a jury verdict on every element of the charged offense has

been understood as "the great bulwark of . . . civil and political liberties." *Neder v. United States*, 527 U.S. 1, 19 (1999) (quoting *United States v. Gaudin*, 515 U.S. 506, 511 (1995)). But *Neder* held that the failure to instruct the jury on an element of the offense is subject to harmless-error review. *Id*. at 8-15.

In holding that such errors could be harmless, *Neder* sought to strike "an appropriate balance between society's interest in punishing the guilty and the method by which decisions of guilt are to be made." *Id*. at 18 (quotations and alteration omitted). *Neder* explained that an error may be deemed harmless in the "narrow class of case[]" where no rational juror could have acquitted—where it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id*. at 18, 17 n.2. If "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element," the error cannot be considered harmless. *Id*. at 19. In fact, holding the error harmless in that circumstance would deny the defendant his right "to a jury determination that he is guilty of every element of the crime with which he is charged." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quotation omitted); *see also In re Winship*, 397 U.S. 358, 362 (1970) ("proof of a criminal charge beyond a reasonable doubt is constitutionally required").

The *Neder* Court then applied this harmless-error framework to the facts before it. "The omitted element was materiality." *Neder*, 527 U.S. at 15. Yet the government introduced powerful evidence indicating materiality and Neder "did not contest the element of

materiality at trial." *Id.* Nor did he "suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed." *Id.* Accordingly, the omitted-element error was harmless beyond a reasonable doubt. *See id.* at 16-20.

2. Given the facts of *Neder*, the Court had no need to consider how to determine whether instructional errors are harmless in a case where defendants contest the element at issue. Lower courts have applied divergent tests in this situation. Most courts consider all of the evidence at trial, reversing where a reasonable jury could have acquitted. But the Fifth Circuit regularly considers only the strength of the government's evidence and never asks whether, in light of the record as a whole, a reasonable jury could have voted to acquit on the element in question.

a. Most courts conducting harmless-error review in the situation here survey the entire record and refuse to find an error harmless if there was evidence sufficient for a reasonable jury to acquit. In *United States v. Prigmore*, 243 F.3d 1 (1st Cir. 2001), for example, the First Circuit found an instructional error required reversal even though "the evidence of guilt [was] quite substantial" and the government's case "strong." *Id.* at 22. What mattered, the court recognized, was that "the [defendant's] competing evidence was not inherently incredible." *Id.* The error could not be harmless where the evidence was "sufficient to render rational a finding in favor" of the defendant. *Id.*

The Sixth Circuit in this situation also considers whether "[a] jury could reasonably side with the defendants" when the element is contested. *United*

States v. Miller, 767 F.3d 585, 598 (6th Cir. 2014). Even when there is "[n]o doubt" that "evidence exists . . . to support the government's theory of the case," an instructional error is not harmless where "[e]vidence back[s] up" the defendant's "position." *Id.* at 595, 601. In conducting harmless-error review, "[o]ne must consider the evidence in support of the government *and* the evidence in support of the defendants." *Id.* at 601.

Some state courts of last resort apply similar tests. *See, e.g.*, *State v. Draper*, 261 P.3d 853, 869 (Idaho 2011) (refusing to find error harmless where the "case [did] not satisfy the requirement pronounced in *Neder*—that 'the omitted element was uncontested'"); *Wegner v. State*, 14 P.3d 25, 30 (Nev. 2000) ("Where a defendant has contested the omitted element and there is sufficient evidence to support a contrary finding, the error is not harmless."), *overruled on other grounds by Rosas v. State*, 147 P.3d 1101 (Nev. 2006). The New Mexico Supreme Court, for example, has explained in a similar context that "if we were to focus our harmless error analysis exclusively on whether the trial record consisted of overwhelming evidence of the defendant's guilt, we risk inadvertently concluding that [the] constitutional error was harmless simply because there was substantial evidence to support the conviction." *State v. Alvarez-Lopez*, 98 P.3d 699, 709 (N.M. 2004).[4]

b. The Fifth Circuit, by contrast, regularly looks only at the government's evidence and finds an

[4] The Fourth Circuit has held that an instructional error is not harmless "if the defendant had genuinely contested the omitted

instructional error harmless so long as that evidence is sufficiently strong. In this case, for example, the Fifth Circuit affirmed simply because the government's evidence, standing alone, was sufficient to sustain a finding of guilt. *See supra* at 13. The court never considered whether a jury viewing the record *as a whole* might have acquitted. *See infra* at 30-31.

The Fifth Circuit applied a similar approach in *United States v. Skilling*, 638 F.3d 480 (5th Cir. 2011). In *Skilling*, the jury charge included a conspiracy count with three different objects, one of which was legally improper. But even though the jury returned a general verdict that did not specify which object it accepted and the defendant put on competent evidence challenging the government's case on the remaining objects, the court found the error harmless based on the strength of the government's case alone. *Id*. at 484-88.

In recent years, this Court has repeatedly granted certiorari to consider the validity of an idiosyncratic criminal rule adopted by the Fifth Circuit. *See Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020); *Rosales-Mireles v. United States*, 138 S. Ct.

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element with evidence that could have caused disagreement among the jurors about the contested element." *United States v. McFadden*, 823 F.3d 217, 225 (4th Cir. 2016) (quotations omitted). But it has not articulated this test consistently. *See, e.g.*, *United States v. White*, 810 F.3d 212, 221 (4th Cir. 2016).

1897 (2018); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). The Court should do so once again.

B. This Case Is An Excellent Vehicle To Resolve This Important And Recurring Issue Of Criminal Law

There is no question that the harmless-error doctrine is exceptionally important. It is "probably the most cited rule in modern criminal appeals." William M. Landes & Richard Posner, *Harmless Error*, 30 J. Leg. Studies 161, 161 (2001). And as the foregoing discussion makes clear, the proper approach to harmless-error analysis in instructional error cases is a recurring problem. This is presumably why Judge Lipez has urged the Court to grant review and "clarify the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element." *United States v. Pizarro*, 772 F.3d 284, 303 (1st Cir. 2014) (Lipez, J., concurring) (noting a "significant inconsistency in the way courts have reviewed for harmlessness the failure to instruct on an element of a crime").

This case is an ideal vehicle to resolve the conflict. The government alleged that petitioners conspired to commit felony misbranding under 21 U.S.C. § 333(a)(2). The Fifth Circuit assumed (as, accordingly, should this Court, for purposes of approaching the question presented) that materiality is an element of felony misbranding. *See* App. 9a n.5; *United States v. Watkins*, 278 F.3d 961, 965-66 (9th Cir. 2002); *cf. Neder*, 527 U.S. at 20-25. "Under any understanding of the concept, materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Universal Health*

Servs., Inc. v. U.S. ex rel. Escobar, 136 S. Ct. 1989, 2002 (2016) (quotations and alteration omitted). A statement to the government is material if the government attaches importance to it in making a decision. *Id*. at 2003; *accord* App. 10a (false statement is material when it has "'a natural tendency to influence, or [was] capable of influencing' the FDA's decisionmaking"). The Fifth Circuit held that the lack of any materiality instruction here was harmless because its "review of the record show[ed], beyond a reasonable doubt, that the jury would have" found petitioners' misbranding of spice as "Not for Human Consumption" material. App. 10a-12a.

But the court of appeals rested its harmlessness holding on the strength of the government's evidence alone. The court never considered whether a reasonable jury considering *all* of the evidence that could have been marshalled could have voted to acquit. It did not consider, for example, that there was substantial evidence that spice's labeling did not affect consumer decision making. *Supra* at 8-9, 13. From this evidence, a jury could have concluded that the same was true of the government. After all, the expert regulatory agency responsible for drugs is surely more discerning than ordinary consumers.[5] Nor did the court of appeals consider that the government's FDA expert witness never suggested

[5] Indeed, the government had originally charged petitioners with mail and wire fraud, but withdrew the charges. *See supra* at 9-10. The government did not say why it did so, but it could not have escaped the government that it would have been required to prove that petitioners' misbranding was material to consumers, which it clearly was not.

that the government was actually misled in any respect or that the government would have done anything differently in the real world had spice been labeled differently. Unlike the defendant in *Neder*, petitioners contested materiality by pointing out these holes in the government's case on appeal. *See e.g.*, C.A. Br. for Shults and Herrig 79. But the court of appeals simply stopped after determining that the government's case of materiality was strong (really, just "sufficient," App. 11a).

Thus, if the Court rejects the Fifth Circuit's harmless-error approach and considers whether the omitted element was genuinely contested, the decision below would have to be reversed.

C. The Decision Below Is Wrong

The Court should also grant review because the decision below is wrong.

Under *Neder*, an error can be deemed harmless only in a "narrow class of cases" where no reasonable jury could have voted to acquit. 527 U.S. at 17 n.2. In those circumstances—and those circumstances only—the defendant's fundamental right to a jury determination of guilt beyond a reasonable doubt is not meaningfully infringed because there is no possible outcome other than a conviction. And the omission of an element is not tantamount to an impermissible directed verdict on that element of the offense because the element was not genuinely contested. But when, unlike in *Neder*, an element *is* contested—and where a reasonable jury *could* vote to acquit based either on evidence introduced at trial or that could be introduced at a new trial when the

erroneously omitted element is in play—a finding of harmlessness necessarily deprives a defendant of his right to jury verdict beyond a reasonable doubt and is no different from a directed verdict.

That is what happened here. Instead of asking whether materiality was contested and whether a reasonable jury could have voted to acquit, the court of appeals simply stopped after determining that the government's case of materiality was strong. That approach contravened *Neder*'s core teaching that an error is not harmless if a reasonable jury could have voted to acquit, and in the process effectively granted the government a directed verdict on the element of materiality.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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