No. 21-183

In The

Supreme Court of the United States

GAS PIPE, INC., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government offers no substantial basis for denying certiorari.

The government does not dispute the importance of the first question presented: whether federal prosecutors are free to charge anyone under Section 371's defraud clause who conspires "for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." Nor does the government even attempt a textual defense of its position that the statute is indeed that expansive. Instead, the government argues that the Court has already conclusively determined the scope of the defraud clause. But the government is wrong. The Court has never considered whether the government can charge the defraud clause where it is clear that the conduct alleged would implicate a specific federal offense—a reading flatly inconsistent with the structure of the statute—or whether the defraud clause contains a limit similar to the one this Court adopted under the tax code in *Marinello v. United States*, 138 S. Ct. 1101 (2018). This case, moreover, presents an ideal vehicle to consider the scope of the defraud clause, because any of the alternative constructions petitioners have proffered would require vacatur.

This petition also provides an ideal vehicle to consider another issue of independent and unquestioned national importance—*viz.*, how the harmless-error rule in *Neder v. United States*, 527 U.S. 1 (1999), applies in cases where the element omitted from the jury instructions is contested. The government denies the existence of the circuit conflict

exacerbated by the decision below. But the conflict unquestionably exists. And while the government says various vehicle problems should foreclose review, none is truly problematic. In point of fact, a reasonable jury could easily have concluded that petitioners' mislabeling of their product was immaterial—a conclusion that the Fifth Circuit would have been bound to reach had it applied the harmless-error standard that governs in several other circuits. The Court should make clear that approach is correct and remand for any necessary further proceedings.

A. The Court Should Address The Proper Scope Of Section 371

The government never argues that the text of Section 371's defraud clause reaches any conspiracy "for the purpose of impairing, obstructing, or defeating the lawful function of any department of [g]overnment." BIO 7 (quoting *Haas v. Henkel*, 216 U.S. 462, 479 (1910)). The government instead offers three principal reasons for denying certiorari: (i) precedent precludes petitioners' reading of the defraud clause, BIO 9, (ii) the statute should be construed in an atextual manner, BIO 10-13, and (iii) this petition presents a poor vehicle through which to resolve the question presented, BIO 15. Each argument is unpersuasive.

1. *Stare decisis* poses no barrier to certiorari because this Court has never considered, let alone rejected, two of petitioners' constructions of Section 371. And the government's substantive objections to these readings lack merit.

a. The Court has never considered whether the defraud clause encompasses conduct that allegedly implicates Section 371's separate offense clause. Pet. 20-22. The government says that the Court rejected this argument in *Dennis v. United States*, 384 U.S. 855 (1966). BIO 10. But that is wrong. In *Dennis*, the offense clause conduct was far narrower than conspiracy to defraud. The defendants conspired to defraud the government by filing false affidavits for the purpose of invoking the services of the National Labor Relations Board—i.e., the defendants tricked the government into performing a government function it otherwise would not have performed—whereas the offense clause conduct was based on the filing of false statements alone. 384 U.S. at 857, 862-63.

On the merits, the government's argument is irreconcilable with the 1948 amendment to Section 371. Pet. 17-18. That amendment provides that in misdemeanor cases, "the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. § 371. The point of that amendment was to prevent "[t]he injustice of permitting a felony punishment on conviction for conspiracy to commit a misdemeanor." 18 U.S.C. § 371, Reviser's Note. Yet the government's unbounded reading of Section 371 allows prosecutors to circumvent this limitation by charging conspiracies to commit misdemeanors as felonies under the defraud clause. Indeed, the government does not deny this "potential for abuse," *United States v. Rosenblatt*, 554 F.2d 36, 41 n.6 (2d

Cir. 1977), or that federal prosecutors have in fact abused Section 371 in this manner, *see* Pet. 18.

The government instead offers two related arguments in response. First, it says "substantial overlap" between the defraud clause and the offense clause is acceptable because overlap is "not uncommon in criminal statutes." BIO 10 (quotations omitted). But here, Congress specifically amended Section 371 to eliminate this overlap and the inherent unfairness that flows from allowing prosecutors to transform misdemeanors into felonies. *Supra* at 3. Second, the government notes that "Congress may punish a conspiracy to commit an offense more severely than the underlying offense." BIO 11. That may be true as a general matter, but not here. If Congress wanted to allow prosecutors to charge conspiracies to commit misdemeanors as felonies, then it would not have amended Section 371 to foreclose that result.

b. Nor has the Court ever considered whether the defraud clause should be limited consistent with the statute in *Marinello v. United States*, 138 S. Ct. 1101 (2018). Pet. 22-23. That statute criminalizes "obstruct[ing] or imped[ing] . . . the due administration" of the tax code. 26 U.S.C. § 7212(a). *Marinello* held that this language "is best viewed" as referring "to specific, targeted acts of administration." 138 S. Ct. at 1106. The government contends that the key phrase in *Marinello* "has no analogue in Section 371's prohibition on defrauding federal agencies." BIO 14. Of course it does. Under *Haas*, the statute reaches any conspiracy whose object is "to *interfere with or obstruct* [a] lawful governmental function[,]"

Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) (emphasis added), and "interfering with or obstructing" is no different than "obstruct[ing] or imped[ing]," which is what the statute in *Marinello* prohibited, 26 U.S.C. § 7212(a). If obstructing or impeding administration of the tax code requires targeting a particular administrative tax proceeding, then interfering with or obstructing a lawful government function likewise requires targeting a particular federal proceeding—the only difference is that Section 371 is not limited to tax matters.

The government continues that the "statutory context" in *Marinello* was different because Section 7212(a) "serves as a 'catchall.'" BIO 14. So does the defraud clause. Pet. 16-17. And as with the catchall in *Marinello*, reading the defraud clause to apply to all government administration would "transform" many misdemeanors into felonies and "would create overlap and redundancy" within the statutory scheme—here, within Section 371 itself. 138 S. Ct. at 1107. In both cases, a broad construction of the catchall would swallow up more specific statutory enactments. That sort of reading is not just disfavored generally, but contradicts subsequent enactments to Section 371 demonstrating that Congress did *not* intend Section 371's defraud clause to have such breadth. *Supra* at 3.

c. Petitioners would be entitled to vacatur of the decision below if the Court adopted either one of these constructions, each of which would bring Section 371 much closer to its plain meaning. Pet. 20-24. The Court thus need not consider the one point that *Haas* did decide—namely, that the "defraud" clause is not

limited to schemes to deprive the government of money or property. Pet. 14-18.

That said, *Haas* is obviously incorrect on this point. This Court has been emphatic that federal criminal statutes must be limited to their text, yet *Haas* did not evaluate the text of Section 371 at all. Not can *Haas*'s description of Section 371's scope be squared with the statute's text, Pet. 15-16—which is why the government does not mount any such argument. Rather, the government's main defense of *Haas* is that Congress ratified the decision when it reenacted Section 371 as part of the general consolidation of federal criminal law. BIO 9-10. But one of the core "requirements for congressional ratification is [not] met here: Congress did not simply reenact [Section 371] without change." *Jama v. Immigr. & Customs Enforcement*, 543 U.S. 335, 349 (2005). As noted above, Congress specifically amended Section 371 to provide that if the object of the conspiracy is a misdemeanor offense, "the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. § 371. *Haas* contained no such limitation, and it is implausible to suppose that Congress reenacted *Haas* in all its particulars even when it substantively amended the statute.

Among federal fraud statutes, moreover, Section 371 sticks out like a sore thumb. Since *Haas*, this Court has construed such statutes "as limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360 (1987); *see* Pet. 15-16. But unless this Court intervenes, "the key word 'defraud'" will have "a fundamentally different

meaning in a conspiracy case than it does in a mail fraud prosecution." *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989).

Indeed, if *Haas* dictates that Section 371 really is as broad as the government says, then the statute raises serious vagueness concerns that provide an additional basis for certiorari. *See United States v. Davis*, 139 S. Ct. 2319, 2327-38 (2019) (holding statute void for vagueness that the Court construed over the years to be irredeemably open-ended). The government asserts that this Court has been able to apply *Haas*'s test in a few cases. BIO 12. But that ignores the problem, which is that *Haas*'s judge-made rule applies so broadly that it invests prosecutors with near-limitless discretion, which necessarily invites abuse. Pet. 19; *see also City of Chicago v. Morales*, 527 U.S. 41, 56, 60-64 (1999) (law is unconstitutionally vague where its "broad sweep" "may authorize and even encourage arbitrary and discriminatory enforcement"). It is that exceptionally broad sweep that renders the first question presented so important, and so worthy of this Court's review.

2. This petition presents an ideal vehicle to resolve this important question because petitioners' defraud clause convictions would have to be reversed if any of petitioners' readings of Section 371 were adopted. Pet. 20-23. The government observes that because petitioners were also convicted under the offense clause, they ultimately may not "obtain any potential relief on remand." BIO 15. That is irrelevant. Sometimes petitioners obtain relief on remand; sometimes they don't. *See, e.g.*, *United States v. Skilling*, 638 F.3d 480 (5th Cir. 2011), *on remand*

from 561 U.S. 358 (2010); *United States v. Neder*, 197 F.3d 1122 (11th Cir. 1999), *on remand from* 527 U.S. 1 (1999). What matters is whether a decision reversing petitioners' defraud clause convictions would require vacating the Fifth Circuit's judgement. It would, because the court below never considered whether the evidence was sufficient to sustain petitioners' offense clause convictions. Pet. 23-24. Petitioners have a strong argument in this regard and would renew it on remand.[1]

As explained next, moreover, petitioners' offense clause convictions present a pure legal question independently worthy of this Court's review.

B. The Court Should Resolve How *Neder*'s Harmless-Error Test Works

Neder v. United States, 527 U.S. 1 (1999), concluded that the failure to instruct the jury on an element of the offense was subject to harmless-error analysis, and that the error in that case was harmless because the defendant did not contest the omitted element. Lower courts have since divided about how to apply *Neder* in cases such as this, where the omitted element *is* contested. Most view the case from the perspective of the defendant and ask whether a jury could have acquitted. Pet. 26-27. But the Fifth Circuit does things differently: it focuses on the

[1] That distinguishes this case from *Coplan v. United States*, No. 12-1299, where (among other things) the petitioner would have lost even under his own standard. And in *Flynn v. United States*, No. 20-1129, the petitioner raised a *Marinello* argument that was reviewable only for plain error.

government's case and asks about its strength. *Id*. at 28-29.[2]

1. The government says the Fifth Circuit actually considered the whole record and ruled out the possibility of acquittal. BIO 18. This is wishful thinking. The court of appeals failed to mention *Neder*'s rule that an error is not harmless "where the defendant contested the omitted element and raised sufficient evidence to support [acquittal]." 527 U.S. at 19. Nor is there anything in the decision below to suggest that the court considered the evidence on which petitioners relied or whether that evidence was sufficient to acquit. The Fifth Circuit cited only the testimony of two government witnesses, and stated that the harmless-error standard was satisfied because that testimony was "sufficient" *to convict*. Pet. App. 11. That approach is contrary to that of other circuits, under which an omitted-element error is not harmless so long as the evidence was sufficient for a jury *to acquit*.

The government also appears to argue that petitioners did not "contest" materiality because they did not affirmatively put on witnesses "to rebut" the government's showing. BIO 18. That argument is doubly wrong. For one thing, a defendant need not put on any evidence at all, since it is the *government* that "must prove guilt beyond a reasonable doubt." *Patterson v. New York*, 432 U.S. 197, 211 (1977); *see Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975); *In re*

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[2] *Pon v. United States*, No. 20-1709, presents a similar question regarding the operation of the harmless-error rule. If this Court grants certiorari in that case, it should at least hold this one.

Winship, 397 U.S. 358, 364 (1970). It thus suffices that the defendant contested the government's failure to carry its burden, which petitioners plainly did here. Pet. 30-31. For another thing, it makes no sense to ask whether petitioners "contested" the missing element *at trial*. The whole problem is that the district court held that materiality was not an element of the mislabeling offense, thus dissuading petitioners from making their case to the jury. What matters under *Neder* is whether petitioners showed on appeal that they *could have* contested materiality had the jury been properly charged by (for example) explaining on appeal the record evidence on which they would have relied. *See* 527 U.S. at 15, 19. Petitioners indisputably satisfied that burden. Pet. 30-31.

2. Indeed, the supposed vehicle problems the government identifies are not vehicle problems at all; they are factual arguments that illustrate that the materiality element here was disputed, and that the omission of that element was thus not harmless.

a. The government contends that its "evidence overwhelmingly showed that petitioners' mislabeling of their spice had a natural tendency to influence the FDA and government investigators." BIO 19. Yet the government introduced no evidence that FDA would have done anything differently had petitioners labeled their spice "for human consumption." Pet. 30-31. After all, the problem from FDA's perspective was that petitioners were *selling* spice "for human consumption" without FDA approval. *See* Pet. App.3a (Spice "may not be sold for human consumption absent FDA approval and proper labeling"); *see also* BIO 20; ROA.9794-10001. Whether the labeling said

"not for human consumption" or "synthetic cannabinoid free" was immaterial to the FDA regulatory violation—or at least a properly instructed jury could have so concluded.

The government must recognize this problem, because it now contends that petitioners' labeling was material to other "government investigators," BIO 19, that is, the DEA. *But see* Pet. App. 8a-12a (focusing on "FDA's decisionmaking"). But the government never made this DEA-related argument to the Fifth Circuit, nor did that court consider it. And for good reason: the whole genesis of this prosecution was DEA's investigatory conclusion that petitioners "were selling spice for human consumption," notwithstanding any statements to the contrary. Pet. App. 3a. A jury could have concluded from DEA's own beliefs and actions that petitioners' labeling had no tendency to influence its decisionmaking. DEA's conclusion, "despite its actual knowledge" of petitioners' contrary labeling, "is very strong evidence that those [statements were] not material." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016).

b. The government separately contends that petitioners' labeling could have been material to their *customers*. BIO 21. Again, the court below considered only materiality *to FDA*. And again, the government's position suffers in any event from a lack of proof. The government argues that statements like "100 percent synthetic cannabinoid free" and "50 state legal premium potpourri" were material to consumers "by making them believe they were buying products with different ingredients or products that were legal."

BIO 21. But the government cites *no* evidence that consumers, who bought spice to get high (Pet. 8-9), cared about its legality or thought it was actually incense. That is presumably why the government dropped its mail and wire fraud charges against petitioners, which would have required the government to prove that petitioners' statements were material to consumers. Pet. 9-10.

c. Finally, the government argues that "review of the court of appeals' harmless-error determination might not affect the ultimate outcome in this case" because the Fifth Circuit might decide "on remand" that materiality is not an element of felony misbranding. BIO 22. Any such statutory holding would be wrong, *see United States v. Watkins*, 278 F.3d 961 (9th Cir. 2002), and the government does not endorse any such position. At any rate, the government's argument about relief on remand is irrelevant. *Supra* at 7-8. Because the Fifth Circuit assumed that materiality is an element (Pet. App. 9a), this case is an ideal vehicle to consider how *Neder*'s harmless-error rule applies when the omitted element is contested.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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