No. 23-

IN THE

Supreme Court of the United States

RAQUEL RIVERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2018, the President signed into law the Agriculture Improvement Act, colloquially called the Farm Bill. The Farm Bill amended the Controlled Substances Act to exclude hemp from the definition of marijuana. *See* Pub. L. 115-334, 132 Stat. 4490. With the passage of the Farm Bill, the Controlled Substances Act provided:

> **(16)(A)** Subject to subparagraph (B), the term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.
>
> **(B)** The term "marihuana" does not include—
>
> > **(i)** hemp, as defined in section 1639*o* of Title 7; or
> >
> > **(ii)** the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802(16). In turn, Hemp is defined as:

> the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 [THC] concentration of not more than 0.3 percent on a dry weight basis

7 U.S.C. § 1639o(1).

The question presented is:

1. Whether, in a possession of marijuana with intent to distribute prosecution, the government is required to prove as an element that the substance is marijuana and not hemp, or whether hemp constitutes an exception to marijuana offenses that the defendant is required to put forth evidence to establish.

PARTIES TO THE PROCEEDING

Raquel Rivera, petitioner on review, was the defendant-appellant below. The United States of America, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

Decision below in the U.S. Court of Appeals for the Third Circuit:

United States v. Rivera, No. 20-3312 (3rd Cir.) (October 19, 2023) (published)(panel decision holding that by excluding hemp from the definition of marijuana, the Farm Bill carved out an *exception* to marijuana offenses and the government need not disprove an exception to a criminal offense unless a defendant produces evidence to put the exception at issue)(Pet.App. 1a-1).

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PETITION FOR A WRIT OF CERTIORARI

Raquel Rivera respectfully petitions for a writ of certiorari to review the judgment of the Third Circuit in this case.

INTRODUCTION

Under the 2018 Farm Bill, in order for a substance to constitute "marijuana," it must come from the *Cannabis Sativa L* plant and it must have a THC concentration exceeding 0.3%. Components of the *Cannabis Sativa L* plant with a THC concentration of 0.3% or less are considered "hemp," which is specifically excluded from the legal definition of "marijuana."

The Third Circuit erred in concluding that the Farm Bill carved out a exception for hemp from the definition of marijuana. Instead, the Farm Bill defined marijuana as cannabis which was not hemp, because the THC content of the cannabis exceeded 0.3%. Under the Farm Bill, the government is required to prove that the THC content of cannabis exceeds 0.3%, thereby making the substance marijuana and not hemp, in order to sustain a guilty verdict for possession of marijuana with intent to distribute.

OPINIONS BELOW

The Third Circuit's opinion is published. Pet. App. 1a-14a.

JURISDICTION

The Third Circuit judgment became final upon the entry of judgment by the Court of Appeals on July 19, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 802(16) provides:

(16)(A) Subject to subparagraph (B), the term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

(B) The term "marihuana" does not include—

(i) hemp, as defined in section 1639*o* of Title 7; or

(ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

7 U.S.C. § 1639o(1) provides:

The term "hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 [THC] concentration of not more than 0.3 percent on a dry weight basis.

21 U.S.C. § 841 provides, in relevant part:

(a)UNLAWFUL ACTS

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

…

(b)PENALTIES

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

…

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions

of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

STATEMENT

Procedural Background

A grand jury charged Rivera with (1) conspiracy to possess, with intent to distribute, less than 50 kilograms of marijuana; and (2) possession, with intent to distribute, less than 50 kilograms of marijuana.

At trial, the government presented the testimony of a drug chemist, Rafael Martinez, who works in Customs and Border Protection's laboratory division. The District Court certified Martinez as an expert in forensic chemistry. Martinez testified that he performed three tests on the substance seized from Rivera, including one test that determines whether the substance contains THC. Based on the results of these tests, Martinez testified that the substance was marijuana. However, on cross-examination, Martinez stated that he did not determine the precise amount of THC in the substance—that is, whether the substance had more than 0.3% THC.

After the government presented its evidence, Rivera rested without presenting any evidence. Rivera then moved for judgment of acquittal under Federal Rule of Criminal Procedure 29. Rivera argued that the government failed to prove its case beyond a reasonable doubt because it did not present evidence that there was more than 0.3% THC in the seized substance. The District Court deferred ruling on the motion until after the jury returned a verdict.

The District Court instructed the jury on the statutory definitions of "marijuana" and "hemp." The District Court also instructed the jury that it could rely on both direct and circumstantial evidence. The jury acquitted Rivera of the conspiracy offense and convicted her of the possession offense. After the jury returned its verdict, the District Court denied Rivera's motion for judgment of acquittal.

The District Court sentenced Rivera to 60 months of probation. She appealed.

On appeal, the United States Court of Appeals for the Third Circuit determined that the Farm Bill established that hemp was an exception to the general rule that all cannabis was marijuana. The panel rejected the argument that an element of marijuana offenses was a THC content exceeding 0.3%. (App. 11a-12a). The panel rejected as "irrelevant here" cases employing the categorical approach's elements test and treating THC content exceeding 0.3% as an element. (App. 12a-13a). The panel further rejected citation to *United States v. Vargas-Castillo*, 329 F.3d 715, 719 (9th Cir. 2003) after concluding that the case "does not require a careful reading of the definition of marijuana, nor does it require an examination of who bears the burden of production on exceptions to marijuana cases." (App. 13a-14a).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A SPLIT AMONGST THE CIRCUITS AS TO WHETHER A THC CONTENT GREATER THAN 0.3% IS AN ELEMENT OR WHETHER A THC CONTENT LESS THAN 0.3% IS AN EXCEPTION

In *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021), the Ninth Circuit addressed whether an Arizona conviction for attempted transportation of marijuana constituted a controlled substance offense under the Sentencing Guidelines. The Court noted that it used the categorical approach, in which the elements of the federal generic offense were compared to the elements of the state offense. *Id.* at 704. The Court explained the definition of "marijuana" under federal law:

> Both marijuana and hemp are plants of the *Cannabis sativa* species, but they differ dramatically in the quantity of the psychoactive substance THC, or delta-9 tetrahydrocannabinol, that they contain. Unlike marijuana, hemp contains "only a trace amount of the THC contained in marijuana varieties grown for psychoactive use." *Hemp Indus. Ass'n v. DEA*, 357 F.3d 1012, 1013 n.2 (9th Cir. 2004).
>
> Prior to 2018, the federal CSA defined "marihuana" to include hemp. The statutory definition included "all parts of the plant Cannabis sativa L." except certain minor components such as the mature stalks of the plant and sterilized seeds incapable of germination. *See* 21 U.S.C. § 802(16) (2012). Because hemp is a *Cannabis sativa* plant, the CSA's definition of marijuana included hemp. *See, e.g.*, *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1085 n.2 (9th Cir. 2003).
>
> On December 20, 2018, the President signed into law the Agriculture Improvement Act, Pub. L. 115-334, 132 Stat. 4490. The Act removed "hemp" from the schedule of controlled substances, specifying that "[t]he term 'marihuana' does not include—(i) hemp, as defined in section 1639o of Title 7." 21 U.S.C. § 802(16); *see also* § 12619, 132 Stat. at 5018. Section 1639o defines hemp as "the plant Cannabis sativa L. and any part of that plant ... with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639o(1); *see also* § 10113, 132 Stat. at 4908.

Id. at 704-05.

The Court then made it clear that the issue was one of necessary elements:

> the district judge was required to compare **the elements** of the state crime as they existed when Bautista was convicted of that offense **to those of the crime as defined in federal law** at the time of federal sentencing—that is, after the Agriculture Improvement Act removed hemp from the federal drug schedule. Because the federal CSA excludes hemp but Section 13-3405 of the Arizona Revised Statutes did not, the latter crime's "greater breadth is evident from its text." *See Vidal*, 504 F.3d at 1082.

Id. at 705 (emphasis added). The Ninth Circuit concluded that it was error for the District Court to consider the state conviction a predicate, since it did not contain the element required by the federal generic offense—that the THC content exceed 0.3%. The Ninth Circuit further found that the District Court's error satisfied the demanding standard of plain-error analysis. *Id.* The *Bautista* decision was relied on in significant part in *United States v. Davis*, 33 F.4h 1236, 1242 (9th Cir. 2022).

In *United States v. Hope*, 28 F.4th 487, 505-06 (4th Cir. 2022), the Fourth Circuit concluded that a state marijuana conviction did not categorically match the federal conviction because the state's definition of marijuana was broader than the federal definition, and thus there was no match of elements supporting a sentencing enhancement.

In *United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021), the First Circuit concluded that a prior state conviction for a marijuana offense did not categorically match the federal offense because federal law required marijuana's THC content to exceed 0.3% while the state law did not so require.

The court reached that conclusion after applying the categorical approach by "look[ing] only to the elements" underlying the conviction and comparing them to the federal generic offense. *Id.*at 522.

In *United States v. Batiz-Torres*, 562 F.Supp.3d 28, 31 (D. Ariz. 2021), the District Court extended the *Bautista* decision and concluded that the defendant's prior federal convictions for conspiracy to possess with intent to distribute marijuana and possession with intent to distribute marijuana did not qualify as controlled substance offenses for purposes of the career offender guideline enhancement. That Court reasoned that since the prior convictions pre-dated 2018, those convictions could have been based on hemp and not marijuana, and controlled substance offenses must involve a controlled substance, which hemp is not.

In *United States v. Williams,* 850 Fed.Appx. 393 (6th Cir. 2021), the Sixth Circuit addressed whether a Tennessee possession of marijuana for resale conviction constituted a controlled substance offense under the Sentencing Guidelines. The Sixth Circuit noted that it utilized the categorical approach, in which the **elements** of the federal generic offense are compared to the elements of the state offense. *Id.* at 398-99. The Court concluded that the elements of the federal generic offense did not include hemp (which had a THC content of 0.3% or less) while the state offense included hemp. *Id.* at 401. Based on that overbreadth, the state conviction "doesn't count" and the District Court committed error in considering it a qualifying predicate. *Id.*

In *United States v. Jamison*, 502 F.Supp.3d 923, (M.D. Pa. 2020), the District Court held that the defendant was not a career offender because his prior state convictions for possession of marijuana did not qualify as predicate controlled substance offenses. The Court did so after concluding that pursuant to the categorial approach, the state offense was overbroad when compared with the federal generic offense. The state offense was overbroad because one of the elements of the federal generic offense was that the substance claimed to be marijuana must have a THC content exceeding 0.3%. The Court's rationale included an explicit definition of "marijuana" under federal law:

> "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." 21 U.S.C. § 802(16)(A). However, Subsection 16(B) expressly excludes "hemp" and cross references Section 1639*o*(1) of Title 7 for hemp's definition. Id. § 802(16)(B). In that section, hemp is defined as the "plant Cannabis sativa L. and any part of that plant" with a THC "concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639*o*(1). Thus, the federal schedules create a carve-out for the Cannabis sativa L. plant, and all of its parts, that have a THC concentration of less than 0.3 percent.

Id. at 930.

In *United States v. Miller*, 480 F.Supp.3d 614 (M.D.Pa. 2020), the District Court held that the defendant was not a career offender because his prior state convictions for possession of marijuana did not qualify as predicate controlled substance offenses. The Court did so after concluding that pursuant to the categorial approach, the state offense was overbroad when compared with the federal generic offense. The state offense was overbroad because one of the elements of the federal generic

offense was that the substance claimed to be marijuana must have a THC content exceeding 0.3%. The Court's rationale included an explicit definition of "marijuana" under federal law:

> Following passage of the 2018 Farm Bill, the federal Schedule I controlled substance of "marihuana" is defined similarly to Pennsylvania's law but explicitly excludes hemp. Section 802(16)(A) of Title 21 defines "marihuana" as "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." 21 U.S.C. § 802(16)(A). Subsection 16(B) then expressly excludes "hemp" and cross-references Section 1639*o*(1) of Title 7 for hemp's definition. Id. § 802(16)(B). Hemp, in turn, is defined as the "plant Cannabis sativa L. and any part of that plant" with a THC "concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639*o*(1).

Id. at 621.

These cases concluded that the Farm Bill altered the elements of the offense of possession of marijuana with the intent to distribute. These cases interpreted the Farm Bill as defining "marijuana" under federal law as the product of Cannabis sativa L. plants with THC content exceeding 0.3%.

The Third Circuit, on the other hand, reached the opposite conclusion—holding that hemp is an exception which the government was not required to disprove unless the defendant first brought forth evidence tending to show that the substance was hemp. The *Rivera* panel swept aside the existence of that conflict by claiming that the categorical decisions cited did not cite to 21 U.S.C. §885(a)(1). But this Court should not cast aside the conflict as lightly as the Third Circuit did. The categorical approach cases cited herein establish that the **elements** of the offense of possession of marijuana with intent to distribute **include** a THC concentration greater than 0.3%. Those cases cover the Ninth,

First, Fourth and Sixth Circuits. The Third Circuit has now weighed in and concluded that the **elements** of the offense **do not include** a THC concentration greater than 0.3%.

This circuit split over whether a THC content of 0.3% is an element or an exception is significant and requires intervention from this Court if it is to be resolved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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