No. ___ – _____

# In the Supreme Court of the United States

RICHARD MARSCHALL,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

## PETITION FOR A WRIT OF CERTIORARI

GREGORY GEIST
*Counsel of Record*
*Assistant Federal Public Defender*
Federal Public Defender's Office
1601 Fifth Avenue, Suite 700
Seattle, Washington 98101
(206) 553-1100
Gregory_Geist@fd.org

*Counsel for Petitioner*

## QUESTION PRESENTED

The decision below affirmed a felony conviction for introducing misbranded drugs into interstate commerce, in violation of 21 U.S.C. §§ 331(a) and 333(a)(2), despite the fact that the offense—ordinarily prosecuted as a misdemeanor—lacks any mens rea term as to any intent to defraud or mislead. Richard Marschall's offense was elevated to a felony through the operation of a strict-liability recidivist provision, and the mislabeled "drug" was a combination of garlic and larch—foods the FDA considers safe for human consumption. The Ninth Circuit nonetheless held that the presumption of scienter was overcome by Congress's omission of any mens rea term for the recidivist felony and that the Due Process Clause did not prohibit the use of strict liability for a felony offense carrying a three-year maximum term of imprisonment.

This petition presents the following question:

1. Whether the Due Process clause of the Fifth Amendment mandates a mens rea term for the felony recidivist enhancement, 21 U.S.C. § 333(a)(2), of the misdemeanor drug mislabeling offense described by 21 U.S.C. § 331(a)?

## TABLE OF CONTENTS



## APPENDIX

## TABLE OF AUTHORITIES

### Federal Cases



### Federal Statutes

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Marschall respectfully petitions this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a) is available at 82 F.4th 774. The order denying the petition for rehearing with suggestion for rehearing en banc (Pet. App. 7a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered September 20, 2023. The order denying rehearing was entered December 29, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 331(a) provides:

> The following acts and the causing thereof are prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.

21 U.S.C. § 333(a)(2) provides:

> (a) Violation of section 331 of this title; second violation; intent to defraud or mislead
>
> > (1) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

> (2) Notwithstanding the provisions of paragraph (1) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both.

21 U.S.C. § 321(g)(1)(B) & (C) provide:

> (g)(1) The term "drug" means . . . (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; . . . .

## INTRODUCTION

In March 2020, Richard Marschall sold dietary supplements composed of garlic and larch to an undercover Food and Drug Administration (FDA) agent for $140. Marschall had a 2017 conviction for prescribing a dangerous substance, Human Chorionic Gonadotropin (HCG), under 21 U.S.C. § 331(a). ER-400. Although Marschall's prior conviction for heavily regulated drugs put him on notice that he was operating in a regulated area involving potentially dangerous substances, there was no proof alleged or required that Marschall knew the safe foods he sold were considered mislabeled "drugs" for the purpose of the instant conviction.

Garlic and larch (which Marschall labeled the Dynamic Duo) were listed in FDA databases as foods safe for consumption. Marschall's Facebook page encouraged readers to listen to conventional authorities but take additional precautions against COVID. He also stated the Duo could "crush" COVID and other viruses, bacteria, parasites, and fungus. During a phone call with the FDA agent,

he told her he was a naturopathic doctor who no longer had a license and to seek out her own advice.

The government argued, over Marschall's objection, that anything—including birthday cake, holy water, marbles—may qualify as a "drug" if it is marketed to treat disease, citing 21 U.S.C. § 32l(g). Marschall was convicted of a strict liability offense without the need to prove he intended to defraud or mislead, even though the evidence at trial went unrefuted that the garlic and larch could in fact help to combat viruses, bacteria, parasites, and fungus.

The Ninth Circuit held that sufficient reasons existed to overcome the presumption in favor of scienter and that the Due Process Clause was not offended by the creation of a strict liability felony carrying a potential three-year prison term. The latter holding directly conflicts with decisions in other circuits that hold that the Due Process Clause prohibits strict liability offenses that trigger severe penalties, including maximum sentences of two years (in the Sixth Circuit) and even less than one year (in the Fifth Circuit).

The Court should grant certiorari to answer the question whether the Due Process Clause of the Fifth Amendment is violated by the omission of a mens rea term from the felony recidivist version, 21 U.S.C. § 333(a)(2), of the misdemeanor offense described by 21 U.S.C. § 331(a).

## STATEMENT OF THE CASE

### I. Proceedings Below

#### A. Indictment

On August 5, 2020, Marschall was charged with introducing misbranded drugs into interstate commerce, in violation of 21 U.S.C. §§ 331(a) and 333(a)(2). 4-ER-833. The indictment listed the ways a drug could be misbranded: (1) the labeling was false and misleading because it suggested Marschall was a naturopathic doctor by listing him as "Rick Marschall N.D.," (2) the drugs were dispensed without a prescription, (3) the drug did not have adequate use directions, and (4) the drugs lacked FDC registration. 4-ER-834–36. A drug was defined as any article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease...." 4-ER-834; 21 U.S.C. § 321(g)(1)(B) and (C).

The government charged Marschall with a felony based on the recidivist portion of the statute due to a prior federal conviction from 2017 for prescribing HCG. Dkt. 56-1 at 4–5; 4-ER-837.

The strict liability offense described by § 333(a)(1) creates misdemeanor liability because it permits imprisonment for not more than one year. *See United States v. Watkins*, 278 F.3d 961 (9th Cir. 2002). Section 333(a)(2) creates felony liability, due to a maximum penalty of three years' imprisonment, if a "person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead...." Dkt. 16 at 33; *see United States v. Geborde*, 278 F.3d 926 (9th Cir. 2002); § 331(a)(2). Prior

to this case, the Ninth Circuit had not considered what mens rea applied to charges under the recidivist portion of § 333(a)(2).

### B. Pretrial Motions

Marschall filed a motion to dismiss on First Amendment grounds and cited studies to indicate garlic and larch cure, mitigate, and fight disease, such as bacteria, viruses, and coronaviruses. 4-ER-592, 628–832; 3-ER-516. He asserted the items were "not drugs but supplements under the Dietary Health and Education Act." 4-ER-586; 3-ER-529–84; 3-ER-496. Finally, he claimed the government failed to state an essential element because the complaint alleged he intentionally and knowingly caused the introduction of misbranded drugs into interstate commerce but the indictment did not. 3-ER-486–87. The government argued in response that a rock or holy water could be a "drug." 10-ER-2283. An article is a drug if it is "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animal." 21 U.S.C. § 321(g); 1-ER-85.

The district court denied the motions, posited the products could be "either a food or a drug depending on its intended use," and found the indictment "sufficiently alleges that Defendant violated § 331(a)...." 1-ER-82, 85–86.

### C. Two Trials, One Ending in a Hung Jury and Mistrial and the Second in Conviction.

The trial started on August 2, 2021. 10-ER-2301. FDA Special Agent Angela Zigler testified the investigation began on March 24, 2020 because of concerns about COVID-19. 6-ER-1210. She reviewed Marschall's Facebook page, which listed him as "Richard Marschall, ND retired, health coach." 6-ER-1213. Zigler was concerned

"ND retired" gave an appearance Marschall retired in good standing when his license was revoked. 6-ER-1215.

Marschall's Facebook post said to "do what conventional authorities are telling you to do to protect yourself from the corona COVID-19, but why stop with caution alone? Why not be proactive [by having a bottle of Allimed]?" 6-ER-1224–25. Zigler testified the Facebook page claimed Allimed (or Allimax) and IAG (or Arabinogalactan) could "boost the immune system" and "crush viral infections including those in the Corona family like in China," as well as bacterial, fungal, and parasitic infections. 6-ER-1146; 5-ER-1028–29. The posts stated Allimed derives from the garlic plant. 6-ER-1223. Marschall described the products as the Dynamic Duo. 6-ER-1147.

Marschall's website told visitors to consult with doctors about its recommendations. 6-ER-1230–32. The website referenced a book promoting "plant based diet and plant based medicines...," and listed Marschall as "Rick Marschall, ND, health coach." 6-ER-1233, 1235.

Zigler employed FDA SA Julie Ryer to perform an undercover investigation. 6-ER-1235. Ryer received the Dynamic Duo in California from Marschall in Washington and sent the package to Zigler back in Washington. 6-ER-1236. The government moved two unopened bottles into evidence. 6-ER-1237–38. No one opened the bottles to see what was inside because "it was the claims that mattered. It didn't really matter so much as to what came, if these were supplements or not." 6-ER-1265. Zigler had concluded the bottles contained garlic and larch. 6-ER-1268.

Pamphlets in the package stated Allimed could "reduce or eliminate most viruses, bacteria, parasites, MRSA and yeast...," and the Dynamic Duo supported general prevention and "can crush...viral infections..., fungal infections, and...parasitic infections." 6-ER-1248–50. Zigler did not locate anyone who had been harmed by the Dynamic Duo. 6-ER-1251–52.

Zigler testified it would be illegal to ship garlic or chicken soup if the shipper represented the products could cure a cold because that would make the article a drug. 6-ER-1257–60. She testified a "drug...can really represent any article." 6-ER-1281.

William Kellington, a supervising attorney at DOH, testified that Marschall's license was revoked in 2018 and not reinstated. 7-ER-1343. He testified Marschall was prohibited from representing himself as a naturopath or anything similar, but did not prohibit Marschall from saying he had a doctorate degree in naturopathic medicine if he also said he was "not licensed in this state." 7-ER-1366.

Dr. Arthur Simone, a senior medical advisor in the Office of Unapproved Drugs and Labeling Compliance, testified about COVID-19, MRSA, and parasites. 7-ER-1392–1400. He said he did not find "adequate and well controlled studies of the Dynamic Duo product...in any of his searches." 7-ER-1417–18.

The defense called Dr. Eric Yarnell, clinical professor at Bastyr University. 7-ER-1438. He testified about how garlic and larch interact with the immune system and viruses. 7-ER-1432, 1444. He said allicin and arabinogalactans "have the potential to prevent COVID infection" by regulating the immune system. 7-ER-

1456–58. He testified about the benefits of larch or allicin for MRSA and parasitic and fungal infections. 7-ER-1459–60. Yarnell's website listed garlic as a potential treatment for COVID-19. 7-ER-1469.

Elliot Cohen testified that he purchased the Dynamic Duo from Marschall. He did not believe the products cured COVID. 7-ER-1493. And David Boone testified Marschall told him his ND license was revoked. 7-ER-1505-1506. He purchased Allimed or IAG from Marschall and did not believe the products cured COVID. 7-ER-1505–06.

After the first jury deadlocked, the court declared a mistrial. 8-ER-1565. The retrial started on October 18, 2021. 10-ER-2307.

Zigler's testimony remained similar. 9-ER-1897–98, 1928–31. Several people bought products from Marschall, and they did not cause harm. 9-ER-1958. The Dynamic Duo producers were registered as food companies. 9-ER-1976–77.

Zigler sent the bottles "out to get tested" in August 2021. 9-ER-1931. She testified it did not matter what was inside the bottles and agreed the bottles "could have been empty" or "there could have been marbles in [them]" because it did not matter for a prosecution based on Marschall's claims. 9-ER-1977–79. Foods like oatmeal, rice, or fruit could be foods or drugs "depending on the intended use." 9-ER-1980–82.

Ryer's testimony remained similar. 9-ER-1986; 8-ER-1631. An email from Marschall referred her to doctors in her area to discuss plant-based diets. 9-ER-2003, 2018. Her role was to buy a product from Marschall. 9-ER-2010.

Dr. Enrique Yanes Santos, a chemist for the FDA, testified one product contained a garlic-related item, but he could not determine the contents of the IAG bottle. 9-ER-2019, 2036–37. Caroline Kelley, an FDA chemist, could not identify any chemicals. 10-ER-2056, 2061.

The testimony from Kellington, Loebach, and Simone was similar. 10-ER-2063, 2094–96, 2129. However, Simone agreed that "if [birthday cake] was intended to be consumed and marketed to treat cancer, it would be a drug," and the same would apply for chicken soup. 10-ER-2235.

Cohen and Boone provided similar testimony. 10-ER-2141, 2145–46. New witness Marianne Leone testified she purchased the Dynamic Duo from Marschall and did not believe she had a COVID cure. 10-ER-2151–52. Another new witness, Kenneth Morris, testified he knew Marschall lost his license, purchased the Dynamic Duo anyway, and did not believe he had a COVID cure. 10-ER-2174–75. Morris said it was "common knowledge [ ] that garlic can help as an antiviral and help boost your immune system." 10-ER-2179.

Yarnell testified about published studies on garlic and said "there's evidence of garlic blocking viruses from getting into our cells." 10-ER-2188–89. He detailed evidence that garlic kills bacteria, fungi, and parasites by "direct contact." 10-ER-2188–89. He described garlic's response to the immune system as "antiviral." 10-ER-2190. He testified that a clinical trial for allicin showed "a reduced severity of COVID-19 infection compared to placebo." 10-ER-2196.

Yarnell said larch is recognized as safe. 10-ER-2205. He testified that allicin and arabinogalactans have potential benefits in the event of a COVID-19 infection and help regulate the immune system. 10-ER-2206–08. He said "constituents in garlic can kill MRSA bacteria" and there are benefits of taking allicin or larch for parasitic and fungal infections. 10-ER-2214.

The second jury found Marschall guilty. 2-ER-95; 1-ER-9. The court sentenced Marschall to eight months' imprisonment. 1-ER-2.

### D. The Ninth Circuit Affirms.

Mr. Marschall timely appealed. 10-ER-2288. He argued, *inter alia*, that "a scienter requirement must be read into the recidivist provision of § 333(a)(2) in order to avoid a serious concern that the statute would violate the constitutional guarantee of due process." Pet. App. 23a. On September 20, 2023, a three-judge panel of the Ninth Circuit issued a published opinion rejecting Marschall's claims. The panel held the "text of the various provisions of the FDCA at issue here does not contain any language that imposes a scienter requirement...." Pet. App. 15a.

The Ninth Circuit panel found there were sufficient reasons to overcome the presumption against strict liability for the recidivist felony. Pet. App. 15a. The panel observed that Section 333(a)(1) is a strict liability offense and § 333(a)(2) adds the additional element of a prior conviction under § 333. Pet. App. 16a. It further noted the misdemeanor violation is a strict liability offense because it regulates potentially harmful or injurious items and carries a minor penalty. Pet. App. 17a–18a.

The panel concluded that nothing suggests Congress intended to add a scienter requirement to elevate the misdemeanor offense to a felony when a § 333(a)(1) offense "occurred after a final conviction for a previous violation of § 333." Pet. App. 18a. The panel agreed with Marschall that "the severity of the penalty applicable under § 333(a)(2)...is a consideration that...weighs in favor of imposing a scienter requirement" but "is not controlling in the unique circumstances presented by the recidivist offense in § 333(a)(2)." Pet. App. 19a–20a. The panel concluded Marschall's prior conviction placed him "on notice that he is operating in a heavily regulated area that involves potentially dangerous substances and...he must proactively exercise care." Pet. App. 22a.

The panel explicitly rejected Marschall's argument that a scienter requirement be read into the recidivist provision to avoid a concern that the statute would violate the constitutional guarantee of due process. Pet. App. 23a. It concluded "due process concerns are inapplicable where...a defendant has personally received ample notice of 'his potentially dangerous conduct.'" Pet. App. 24a. It rejected "Marschall's argument that the requisite notice has been afforded only if the *same* drugs are at issue in each successive prosecution under § 333." Pet. App. 24a n.4.

### E. The Ninth Circuit Denies Rehearing En Banc.

On December 29, 2023, the Ninth Circuit denied a petition for rehearing en banc without comment.

## REASONS FOR GRANTING THE PETITION

### I. The Decision Below Conflicts with Multiple Circuits.

The panel's opinion enters into a longstanding circuit split over whether the Fifth Amendment's Due Process Clause mandates that offenses may dispense with mens rea only where they are public welfare statutes with relatively minor penalties smaller than the three-year maximum prison sentence available under the recidivist provision here. In *United States v. Wulff*, the Sixth Circuit struck down the felony portion of a public welfare statute that provided for a maximum two-year term of imprisonment as a violation of the Fifth Amendment's Due Process Clause, holding the punishment did not meet the "small penalty" criteria for "public welfare" offenses. 758 F.2d 1121, 1125 (6th Cir. 1985). *Wulff* stands for the proposition that due process requires any statute that creates a severe penalty for a felony conviction to have a scienter requirement, regardless of what Congress may have intended. *Id.* at 1125. The Fifth Circuit, interpreting a statute in which one provision contained a mens rea element and another dispensed with it, similarly held that "a serious due process problem would be raised by application of this statute, which carries fairly substantial penalties [a fine of up to $10,000 and a prison sentence of up to one year], to someone who did not know and had no reason to know that he was carrying a weapon." *United States v. Garrett*, 984 F.2d 1402, 1411 (5th Cir. 1993).

On the same side of this split, the Eight Circuit has held a statute imposing strict liability does *not* violate due process if the "penalty is relative[ly] small" and "where the conviction does not gravely besmirch." *Holdridge v. United States*, 282

F.2d 302, 310 (8th Cir. 1960); *see also United States v. Enochs*, 857 F.2d 491, 494 n.2 (8th Cir. 1988) ("[T]he imposition of severe penalties, especially a felony conviction, for the commission of a morally innocent act may violate the due process clause of the fifth amendment...."); *Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991); *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 699 n.4 (10th Cir. 2010) (citing *Wulff*, 758 F.2d at 1123, 1125) ("[D]ue process suggests some constitutional limits on the penalties contained in strict liability crimes. Severe fines and jail time would warrant a state of mind requirement."); *see also United States v. Freed*, 401 U.S. 601, 613 n.4 (1971) (Brennan, J., concurring) (citing *Holdridge* test as the proper standard for determining "[t]he situations in which strict liability may be imposed").

Although this Court has often characterized mens rea arguments as interpretations of Congressional intent, *see, e.g.*, *Staples v. United States*, 511 U.S. 600, 604–05 (1994), the Court has also suggested that there may be an outer bound for the characterization of a statute as a public welfare offense for which strict liability is appropriate. *See id.* at 618 ("Close adherence to the early cases described above might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense.... We need not adopt such a definitive rule of construction to decide this case, however."); *see also id.* at 637 n.24 (Stevens, J., dissenting) (noting the question of a Due Process Clause violation was reserved because the petitioner in *Staples* did not raise it). And in *Lambert v. California*, 355 U.S. 225 (1957), this Court struck down an ordinance that required any convicted

felon to register his or her presence in the city of Los Angeles within five days because "[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." *Id.* at 229–30.

In contrast, the Third Circuit, in line with the Ninth Circuit opinion below, explicitly rejects the Sixth Circuit's reasoning in *Wulff*:

> We are persuaded that the Sixth Circuit in *Wulff*, the district court here, and the government have ignored a formidable line of cases imposing strict liability in felony cases without proof of scienter. It is well established that a criminal statute is not necessarily rendered unconstitutional because its definition of a felony lacks the element of scienter.

*United States v. Engler*, 806 F.2d 425, 433 (3rd Cir. 1986). The *Engler* court reasoned that the difference between a felony conviction punishable by two years' imprisonment and a misdemeanor conviction was "de minimis," *id.* at 434, and that distinguishing between the two involved "a very slippery slope with too much in the eye of the beholder." *Id.* at 435 (internal quotation marks omitted). The Third Circuit, however, did acknowledge that "The Supreme Court has indicated that the due process clause may set some limits on the imposition of strict criminal liability, but it has not set forth definite guidelines as to what those limits might be." *Id.* at 433 (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971); *Lambert*, 355 U.S. at 228).

This Court should grant certiorari to consider whether the Due Process Clause of the Fifth Amendment is violated by the relatively severe three-year maximum felony sentence available for this strict liability offense.

## II. This Case Presents an Ideal Vehicle for Addressing the Circuit Split.

Although the Ninth Circuit panel was satisfied that the notice concerns central to the Due Process Clause were not present here because the case concerned a recidivist provision, in fact Marschall's prior conviction was for a wholly distinct violation involving a potentially dangerous hormone regulated as a drug by the FDA: Human Chorionic Gonadotropin (HCG). ER-400. This prior conviction did not put him and could not be reasonably expected to put him on notice that foods approved by the FDA as safe for human consumption would be similarly regulated if he made evidence-backed claims about them.

Proof of mens rea will be a simple matter where the second conviction is for the same conduct as the first conviction, and this was likely the logic behind Congress's omission of a mens rea element for the felony recidivist provision. But in the unique circumstances of this case, where the characterization of safe foods as mislabeled "drugs" not only introduced novel notice concerns but may have led Marschall's first jury to become deadlocked, the exact requirements of the Due Process Clause become critically important. This case presents the ideal vehicle for addressing this issue.

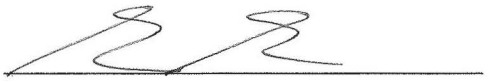
//

//

## CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted this 28th day of March 2024.



Gregory Geist
*Counsel of Record*
Assistant Federal Public Defender

*Counsel for Petitioner*