No. _____

In the Supreme Court of the United States

Brandon David McCarthy and
Rachel Christine McCarthy,

Petitioners,

v.

United States of America

Respondent.

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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRANDON DAVID McCARTHY, a/k/a "Brandon McPoppy," RACHEL CHRISTINE McCARTHY,

Defendants.

Case No. 23CR359-SEH

SUPERSEDING INDICTMENT

[COUNT ONE: 21 U.S.C. §§ 846, 841(b)(1)(C), 843(d), and 853(b) – Drug Conspiracy;
COUNTS TWO through EIGHT: 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)– Distribution of Morphine, Codeine, and Thebaine;
COUNT NINE: 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)– Distribution of Morphine, Codeine, and Thebaine Resulting in Death;
COUNT TEN: 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) – Possession of Morphine, Codeine, and Thebaine with Intent to Distribute;
COUNTS ELEVEN through SEVENTEEN: 21 U.S.C. § 843(a)(7)– Distribution of Material;
COUNT EIGHTEEN: 21 U.S.C. § 843(a)(6) – Possession of Materials with Intent to Distribute;
COUNT NINETEEN: 21 U.S.C. §§ 856(a)(1) and 856(b) – Maintaining a Drug Involved Premises;
COUNTS TWENTY: 18 U.S.C. § 1956(h) – Money Laundering Conspiracy;
COUNTS TWENTY-ONE through FORTY-ONE: 18 U.S.C. § 1957 – Engaging in Monetary Transactions of Proceeds Derived from a Specified Unlawful Activity;

Forfeiture Allegation: 18 U.S.C. § 982(a)(1) and 21 U.S.C. § 853 – Money Laundering and Drug Forfeiture]

THE GRAND JURY CHARGES:

COUNT ONE
[21 U.S.C. §§ 846, 841(b)(1)(C), 843(d), and 853(b)]

INTRODUCTION

1. Poppy seeds are a naturally derived product originating from a flowering opium poppy plant, known as *papaver somniferum*.

2. The opium poppy plant is legitimately grown by pharmaceutical and food industries.

3. The same opium poppy plant from which poppy seeds are sourced is also the source of opium latex.

4. "Opium latex" is the milky sap-like substance from which opiate alkaloids, including morphine, codeine, and thebaine, can be extracted. Opium latex is harvested from the poppy pod and dried to create opium.

5. "Unprocessed poppy seeds" are poppy seeds that have not had the opium latex removed after harvest. These poppy seeds tend to have higher opiate alkaloid content on the exterior of the poppy seed than processed or washed seeds.

6. Unprocessed poppy seeds coated in opium latex are typically marketed as "organic," "natural," or "unwashed" to indicate a higher concentration of opium latex than what is available in the retail food market.

7. Unprocessed poppy seeds are imported into the United States by importers and sold to suppliers for processing and distribution to retailers. Retailers distribute poppy seeds as a food product to individuals for consumption. Industry standard requires suppliers to process the poppy seeds to an edible food grade standard.

8. Consumers ingest unprocessed poppy seeds coated in opium latex to achieve similar effects of pharmaceutical opiates. The most common method of ingesting unprocessed poppy seeds coated in opium latex is brewing poppy seed tea.

9. Poppy seed tea is an herbal infusion where large quantities of unprocessed poppy seeds coated in opium latex are steeped in water to remove the opium latex and the water with opium latex is then consumed.

10. Poppy seed tea made with unprocessed poppy seeds coated in opium latex can cause a consumer to experience "poppy tea nod," a semi-conscious euphoric state. Other effects of ingesting unprocessed poppy seeds coated in opium latex include addiction, unconsciousness, overdose, and death.

11. "Third-Party Payment Services" are payment services operated under financial regulation. Third-Party Payment Services include "Stripe."

12. "Stripe" is an online payment system that supports online money transfers and serves as an electronic alternative to traditional paper methods, such as check and money order.

THE CONSPIRACY AND ITS OBJECTS

13. From on or about June 1, 2017, to on or about November 17, 2020, in the Northern District of Oklahoma and elsewhere, the defendants, **BRANDON DAVID McCARTHY**, a/k/a "Brandon McPoppy," and **RACHEL CHRISTINE McCARTHY**, together and with others known and unknown to the Grand Jury (collectively "the **CONSPIRATORS**"), willfully, knowingly, and intentionally combined, conspired, confederated, and agreed, together each with the other, to commit offenses against the United States as follows:

a. To distribute morphine, codeine, and thebaine, schedule II controlled substances, a violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C);

b. To possess with intent to distribute morphine, codeine, and thebaine, schedule II controlled substances, a violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C);

c. To distribute unprocessed poppy seeds coated in opium latex, a material used to manufacture a controlled substance, knowing, intending, and having reasonable cause to believe the unprocessed poppy seeds coated in opium latex would be used to manufacture a controlled substance, a violation of Title 21, United States Code, Section 843(a)(7);

d. To possess with intent to distribute unprocessed poppy seeds coated in opium latex, a material used to manufacture a controlled substance,

knowing, intending, and having reasonable cause to believe the unprocessed poppy seeds coated in opium latex would be used to manufacture a controlled substance, a violation of Title 21, United States Code, Section 843(a)(6); and

e. To use and maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, and using any controlled substance, a violation of Title 21, United States Code, Section 856(a)(1).

PURPOSE OF THE CONSPIRACY

14. The purpose of the conspiracy was to enrich the **CONSPIRATORS** illegally through the illicit sale of unprocessed poppy seeds coated in opium latex to opiate users, within the Northern District of Oklahoma and elsewhere, who had no lawful means of acquiring the controlled substances.

MEANS AND METHODS OF THE CONSPIRACY

15. The objects of the conspiracy were accomplished by the following means and methods, among others:

The Origins of Lone Goose Bakery

16. In 2017, **BRANDON McCARTHY** and **RACHEL McCARTHY**, opened Lone Goose Bakery, an online reseller of unprocessed poppy seeds coated in opium latex.

17. Lone Goose Bakery was trademarked as a brand of Brachel Marketing, LLC, owned by **BRANDON McCARTHY** and operated by the **CONSPIRATORS**.

18. The **CONSPIRATORS** operated Lone Goose Bakery from a commercial building located at 2730 South Harvard Avenue in Tulsa, Oklahoma.

19. The **CONSPIRATORS** purchased bulk quantities of unprocessed poppy seeds coated in opium latex from suppliers and received the bulk unprocessed poppy seeds at their commercial location.

20. **BRANDON McCARTHY** and **RACHEL McCARTHY** retained several employees to package the bulk unprocessed poppy seeds coated in opium latex into smaller packages for resale under the brand name "Blue Bird Poppy Seeds."

21. The **CONSPIRATORS** sold minimal amounts of food products, including chia seeds, flax seeds, and vanilla beans. The majority of Lone Goose Bakery sales were unprocessed poppy seeds coated in opium latex.

22. Lone Goose Bakery employees repackaged the unprocessed poppy seeds coated in opium latex into smaller 4-ounce, 2-pound, 5-pound, 10-pound, 15-pound, 20-pound, and 25-pound bags. The chia and flax seeds were packaged into 1-pound bags.

The Conspirators' Unprocessed Poppy Seed Tea Recipe

23. During the time of the conspiracy, the **CONSPIRATORS** created videos of **BRANDON McCARTHY** reviewing unprocessed poppy seeds, including the Blue Bird brand poppy seeds. These videos were posted to a YouTube channel – poppyseedtearecipe.com.

24. In or about June 2017, the **CONSPIRATORS** created a step-by-step video on how to make poppy seed tea for the poppyseedtearecipe.com YouTube channel. This video was also made available on Poppy Seed Tea Recipe's Facebook page. The **CONSPIRATORS'** poppy seed tea recipe requires steeping two cups of unprocessed poppy seeds in a 20-ounce bottle filled with water.

25. The opiate alkaloid quantities vary among packages and one serving of the **CONSPIRATORS'** poppy seed tea recipe could expose consumers up to approximately 1,200 milligrams of morphine.

26. In or about September 2017, the **CONSPIRATORS** published an eBook authored by **BRANDON McCARTHY** titled "How to Make Poppy Seed Tea A Detailed Recipe." This self-published book was made available on the Lone Goose Bakery website and on the Poppy Seed Tea Recipe Facebook page.

27. During the time of the conspiracy, the **CONSPIRATORS** published an eBook authored by "Brandon McPoppy" titled "Poppy Seed Tea A Complete Guide to this Powerful Tea." This self-published book was made available on the Lone Goose Bakery website, on the YouTube channel, and on **BRANDON McCARTHY's** Facebook page.

28. During the time of the conspiracy, the **CONSPIRATORS** promoted tea made with unprocessed poppy seeds to help with pain reduction, reducing anxiety, lowering blood pressure, and as an anti-diarrheal. Additionally, the

CONSPIRATORS advertised that poppy seed tea can improve sleep and has beneficial vitamins and minerals.

29. The **CONSPIRATORS** advertised that the most dangerous possible side effect of consuming tea made from unprocessed poppy seeds coated in opium latex is opiate overdose.

The Conspirators' Interstate Sale of Controlled Substances

30. The **CONSPIRATORS** advertised the sale of unprocessed poppy seeds on the Lone Goose Bakery website and other sale platforms, including Amazon.

31. The **CONSPIRATORS** shipped repackaged and unprocessed poppy seeds coated in opium latex to buyers across the country through multiple shipping companies, including UPS, FedEx, and the United States Postal Service.

32. On or about December 2, 2018, the **CONSPIRATORS** shipped a 5-pound bag of Lone Goose Bakery's Blue Bird unprocessed poppy seeds coated in opium latex to Addie Kofford in Heber City, Utah.

33. On or about December 10, 2018, the **CONSPIRATORS** shipped a 5-pound bag of Lone Goose Bakery's Blue Bird unprocessed poppy seeds coated in opium latex to Addie Kofford in Heber City, Utah.

34. On or about December 13, 2018, Addie Kofford consumed tea made from Lone Goose Bakery's Blue Bird unprocessed poppy seeds coated in opium latex, overdosed, and died.

35. Between in or about January 2019 through in or about December 2019, the **CONSPIRATORS** shipped over 27,000 orders of unprocessed poppy seeds coated in opium latex to individual buyers throughout the United States.

36. The majority of buyers of Lone Goose Bakery's unprocessed poppy seeds coated in opium latex were individuals purchasing the product for personal use and consumption, and were not bakery and retail businesses.

37. In or about April 2020, **BRANDON McCARTHY** and **RACHEL McCARTHY** purchased a commercial location in Tulsa, Oklahoma, and moved Lone Goose Bakery to 1609 South Boston Avenue.

38. After moving to the new commercial location, the **CONSPIRATORS** repackaged and stored the unprocessed poppy seeds coated in opium latex at their commercial location located at 1609 South Boston Avenue.

39. Between in or about January 2020 through in or about October 2020, the **CONSPIRATORS** shipped over 46,000 orders of unprocessed poppy seeds coated in opium latex to individual buyers throughout the United States.

40. On or about November 17, 2020, the **CONSPIRATORS** possessed approximately 35 tons of unprocessed poppy seeds coated in opium latex, packaged for resale, and amounting to approximately 70,000 individual servings of poppy seed tea.

The Conspirators' Use of Criminal Proceeds

41. The **CONSPIRATORS** received payment for the sale of unprocessed poppy seeds coated in opium latex through a third-party payment platform, Stripe.

42. From in or about June 2017 through in or about November 2020, the **CONSPIRATORS** received over $12,578,000 in payments from the sale of unprocessed poppy seeds coated in opium latex into their Stripe account. The proceeds were then transferred to Arvest Bank accounts controlled by **BRANDON McCARTHY** and **RACHEL McCARTHY**.

43. From in or about December 2017 through November 2020, **BRANDON McCARTHY** and **RACHEL McCARTHY** transferred approximately 733 payments from their Stripe account into their Arvest Bank accounts. Of the total transfers, approximately 135 transfers were in amounts greater than $30,000. Most of the transfers were made on consecutive days.

44. Throughout the conspiracy, **BRANDON McCARTHY** and **RACHEL McCARTHY** transferred the proceeds from the sale of unprocessed poppy seeds coated in opium latex into other financial accounts and spent the proceeds on personal and real property.

45. On or about February 8, 2019, **BRANDON McCARTHY** and **RACHEL McCARTHY** purchased a residence at 1002 East 20th Street, Tulsa, Oklahoma, for $530,000 with the proceeds from the sale of unprocessed poppy seeds coated in opium latex.

46. From in or about February 2019 through in or about April 2020, **BRANDON McCARTHY** and **RACHEL McCARTHY** spent approximately $750,000 of proceeds from the sale of unprocessed poppy seeds coated in opium latex from Arvest account number xxxx1228 and account number xxxxx7135 on renovations at their 20th Street residence.

47. On or about June 22, 2019, **RACHEL McCARTHY** executed a $55,875 check from the Arvest account number xxxx1228 for the purchase of a 2020 Lexus GX.

48. On or about October 7, 2019, **RACHEL McCARTHY** executed a $50,240 check from Arvest account number xxxx1228 for the purchase of a 2017 Audi A7.

49. **BRANDON McCARTHY** and **RACHEL McCARTHY** purchased over $48,000 of precious metals, including gold and silver coins and bars, with proceeds from the sale of unprocessed poppy seeds coated in opium latex.

50. In or about January 2020, the **BRANDON McCARTHY** and **RACHEL McCARTHY** opened Arvest Bank account number xxxx7135 in the name of Brachel Marketing, LLC, with a $10,000 transfer of funds from their personal Arvest Bank account number xxxx1228.

51. On or about June 5, 2020, the **BRANDON McCARTHY** and **RACHEL McCARTHY** purchased over $25,000 of art with the proceeds from the sale of unprocessed poppy seeds coated in opium latex.

52. On or about October 26, 2020, **BRANDON McCARTHY** caused a $40,000 check to be drawn from the Arvest account number xxxx7135 and transferred to his personal account, Arvest account number xxxx1228.

53. On or about October 26, 2020, **RACHEL McCARTHY** caused a $40,000 check to be drawn from the Arvest account number xxxx7135 and transferred to her personal account, Arvest account number xxxx1228.

54. On or about October 26, 2020, **RACHEL McCARTHY** caused a $40,000 check to be drawn from the Arvest account number xxxx7135 and transferred to a business account for Brachel Real Estate, LLC, Arvest account number xxxx8229.

55. On or about October 28, 2019, **RACHEL McCARTHY** caused a $400,000 wire to be transferred from the Arvest account number xxxx1228 to the Rachel Christine McCarthy Trust.

All in violation of Title 21, United States Code, Sections 846, 841(b)(1)(C), 843(d), and 853(b).

COUNTS TWO through EIGHT
[21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)]

56. The Grand Jury hereby incorporates and realleges paragraphs 1 through 55 of this Indictment.

57. From in or about the dates listed below, in the Northern District of Oklahoma and elsewhere, the defendants, **BRANDON DAVID McCARTHY**, a/k/a "Brandon McPoppy," and **RACHEL CHRISTINE McCARTHY**, knowingly and intentionally distributed morphine, codeine, and thebaine, Schedule II controlled substances, by shipping unprocessed poppy seeds coated in opium latex from Lone Goose Bakery in Tulsa, Oklahoma, to customers, known to the Grand Jury, in the approximate amounts and number of transactions stated below:

Count	Date	Buyer	Amount (lbs.)	Number of Transactions
2	July 20 – October 20, 2020	A.K.	85.75	13
3	July 17 – September 23, 2020	A.J.	165.5	10
4	July 22 - October 26, 2020	J.V.	116.75	30
5	July 17 - October 20, 2020	J.S.	223	57
6	July 16 – September 30, 2020	M.B.	107.25	35
7	July 20 – October 21, 2020	D.M.	525	22
8	July 18 – October 22, 2020	J.K.	375	28

All in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

COUNT NINE
[21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)]

58. The Grand Jury hereby incorporates and realleges paragraphs 1 through 55 of this Indictment.

59. From on or about December 2, 2018, to on or about December 10, 2018, in the Northern District of Oklahoma and elsewhere, the defendants, **BRANDON DAVID McCARTHY**, a/k/a "Brandon McPoppy," and **RACHEL CHRISTINE McCARTHY**, knowingly and intentionally distributed morphine, codeine, and thebaine, Schedule II controlled substances, resulting in the death of Addie Kofford.

All in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

COUNT TEN
[21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)]

60. The Grand Jury hereby incorporates and realleges paragraphs 1 through 55 of this Indictment.

61. On or about November 17, 2020, in the Northern District of Oklahoma and elsewhere, the defendants, **BRANDON DAVID McCARTHY**, a/k/a "Brandon McPoppy," and **RACHEL CHRISTINE McCARTHY**, knowingly and intentionally possessed with intent to distribute morphine, codeine, and thebaine, Schedule II controlled substances.

All in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

COUNTS ELEVEN through SEVENTEEN
[21 U.S.C. § 843(a)(7)]

62. The Grand Jury hereby incorporates and realleges paragraphs 1 through 55 of this Indictment.

63. On or about the dates below, in the Northern District of Oklahoma and elsewhere, the defendants, **BRANDON DAVID McCARTHY**, a/k/a "Brandon McPoppy," and **RACHEL CHRISTINE McCARTHY**, knowingly and intentionally distributed unprocessed poppy seeds coated in opium latex, a material used to manufacture a controlled substance, knowing, intending, and having reasonable cause to believe that material would be used to manufacture a controlled substance. The transactions described below were for shipments of unprocessed poppy seeds coated in opium latex from Lone Goose Bakery in Tulsa, Oklahoma, to customers, in the approximate amounts stated:

Count	Date	Buyer	Amount (lbs.)	Number of Transactions
11	July 20 – October 20, 2020	A.K.	85.75	13
12	July 17 – September 23, 2020	A.J.	165.5	10
13	July 22 - October 26, 2020	J.V.	116.75	30
14	July 17 - October 20, 2020	J.S.	223	57
15	July 16 – September 30, 2020	M.B.	107.25	35
16	July 20 – October 21, 2020	D.M.	525	22
17	July 18 – October 22, 2020	J.K.	375	28

All in violation of Title 21, United States Code, Section 843(a)(7).

COUNT EIGHTEEN
[21 U.S.C. § 843(a)(6)]

64. The Grand Jury hereby incorporates and realleges paragraphs 1 through 55 of this Indictment.

65. On or about November 17, 2020, in the Northern District of Oklahoma and elsewhere, the defendants, **BRANDON DAVID McCARTHY**, a/k/a "Brandon McPoppy," and **RACHEL CHRISTINE McCARTHY**, knowingly and intentionally possessed unprocessed poppy seeds coated in opium latex, a material used to manufacture a controlled substance, knowing, intending, and having reasonable cause to believe that material would be used to manufacture a controlled substance.

All in violation of Title 21, United States Code, Section 843(a)(6).

COUNT NINETEEN
[21 U.S.C. § 856(a)(1) and 856(b)]

66. The Grand Jury hereby incorporates and realleges paragraphs 1 through 65 of this Indictment.

67. On or about April 1, 2020, through on or about November 17, 2020, in the Northern District of Oklahoma and elsewhere, the defendants, **BRANDON DAVID McCARTHY**, a/k/a "Brandon McPoppy," and **RACHEL CHRISTINE McCARTHY**, unlawfully and knowingly used and maintained a place located at 1609 South Boston Avenue, Tulsa, Oklahoma, for the purpose of distributing morphine, codeine, and thebaine, Schedule II controlled substances.

All in violation of Title 21, United States Code, Sections 856(a)(1) and 856(b).

COUNT TWENTY
[18 U.S.C. § 1956(h)]

68. The Grand Jury hereby incorporates and realleges paragraphs 1 through 67 of this Indictment.

THE CONSPIRACY AND ITS OBJECTS

69. Beginning at least as early as in or about November 2017 and continuing through November 17, 2020, the exact dates being unknown to the Grand Jury, in the Northern District of Oklahoma and elsewhere, the defendants, **BRANDON DAVID McCARTHY**, a/k/a "Brandon McPoppy," and **RACHEL CHRISTINE McCARTHY**, together and with others known and unknown to the Grand Jury, (collectively "**CONSPIRATORS**") knowingly and willfully conspired to commit the following offenses against the United States: to knowingly engage and attempt to engage in monetary transactions, as described below, in criminally derived property of a value greater than $10,000 and derived from specified unlawful activities, specifically, Drug Conspiracy, Distribution of Controlled Substances, Possession of Controlled Dangerous Substances with Intent to Distribute, Distribution of Material Used to Make Controlled Substance, Possession of Materials with Intent to Distribute, Maintaining a Drug Involved Premise, as set forth more fully in Counts One through Nineteen of this Indictment, and Interstate Transportation in Aid of Racketeering, a violation of Title 18, United States Code, Section 1957.

MANNER AND MEANS OF THE CONSPIRACY

70. The **CONSPIRATORS** used the following manner and means to achieve the objects of the conspiracy:

71. Beginning at least as early as in or about November 2017 and continuing through November 2020 , and with the intent to promote the carrying on of the offenses of Conspiracy, Distribution of Controlled Substance, Possession with Intent to Distribute Controlled Dangerous Substances, Distribution of Material Used to Make Controlled Substance, Possession of Materials with Intent to Distribute, Maintaining a Drug Involved Premise, and Interstate Transportation in Aid of Racketeering, the **CONSPIRATORS** transferred or caused the transfer of approximately $12,578,000.00 in proceeds derived from the commission of the criminal offenses, from Stripe account number xxxx2PdE to Arvest Bank account number xxxx1228 and account number xxxx7135.

All in violation of Title 18, United States Code, Section 1956(h).

COUNTS TWENTY-ONE through FORTY-ONE
[18 U.S.C. § 1957(a)]

72. The Grand Jury hereby incorporates and realleges paragraphs 1 through 71 of this Indictment.

73. Beginning at least as early as in or about February 2018 and continuing through November 2020, and on or about the dates stated below, in the Northern District of Oklahoma and elsewhere, the defendants, **BRANDON DAVID McCARTHY**, a/k/a "Brandon McPoppy," and **RACHEL CHRISTINE McCARTHY**, knowingly engaged and attempted to engage in monetary transactions in criminally derived property of a value greater than $10,000 and derived from specified unlawful activities. These specified unlawful activities were Drug Conspiracy, in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(C); Distribution of Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C); Possession of Controlled Substance with Intent to Distribute, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C); Distribution of Materials Used to Make Controlled Substances, in violation of Title 21, United States Code, Section 843(a)(7); and Possession of Materials with Intent to Distribute, in violation of Title 21, United States Code, Section 843(a)(6), Maintaining a Drug Involved Premise, in violation of Title 21, United States Code, Sections 856(a)(1) and 856(b) and Interstate Transportation in Aid of Racketeering, in violation of Title 18, United States Code, Section 1952.

74. The monetary transactions described below represent criminally derived proceeds the defendants, **BRANDON DAVID McCARTHY**, a/k/a "Brandon McPoppy," and **RACHEL CHRISTINE McCARTHY**, transferred or caused to transfer from Arvest bank accounts:

Count	Date	Source Account	Check No.	Payee	Amount
21	02/08/2019	xxxx1228		First Title & Abstract Services LLC	$305,000.00
22	06/22/2019	xxxx1228	135	Eskridge Lexus	$55,875.00
23	10/07/2019	xxxx1228	160	Spencer Construction	$28,291.59
24	10/28/2019	xxxx1228		Rachel Christine McCarthy Trust	$400,000.00
25	12/23/2019	xxxx1228	317	Spencer Construction	$38,352.50
26	12/30/2019	xxxx1228	319	Spencer Construction	$25,729.24
27	02/18/2020	xxxx1228	65	Spencer Construction	$30,814.25
28	03/03/2020	xxxx1228	122	Spencer Construction	$45,765.00
29	03/16/2020	xxxx1228	124	Spencer Construction	$35,599.04
30	04/01/2020	xxxx7135		Rachel Christine McCarthy Trust	$20,000.00
31	04/13/2020	xxxx1228		Rachel Christine McCarthy Trust	$40,000.00
32	05/11/2020	xxxx1228	127	Spencer Construction	$26,370.00
33	06/05/2020	xxxx1228	120	Royce Myers Gallery	$10,526.15
34	06/05/2020	xxxx1228	121	Royce Myers Gallery	$15,246.64
35	06/08/2020	xxxx1228	118	Spencer Construction	$37,228.00
36	07/03/2020	xxxx7135	128	Spencer Construction	$39,410.00
37	10/07/2019	xxxx1228	161	Audi Tulsa	$50,240.00
38	10/26/2020	xxxx7135	92	Rachel McCarthy	$40,000.00
39	10/26/2020	xxxx7135	93	Brandon McCarthy	$40,000.00
40	10/26/2020	xxxx7135	95	Brachel Real Estate LLC	$40,000.00
41	10/26/2020	xxxx7135	41	Spencer Construction	$48,609.61

All in violation of 18 U.S.C. § 1957(a).

FORFEITURE ALLEGATION
[18 U.S.C. § 982(a)(1) and 21 U.S.C. § 853]

The allegations contained in this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 18, United States Code, Section 982(a)(1) and Title 21, United States Code, Section 853.

Upon conviction of the offenses alleged in this Indictment, as a part of their sentences, the defendants, **BRANDON DAVID McCARTHY**, a/k/a "Brandon McPoppy," and **RACHEL CHRISTINE McCARTHY**, shall forfeit to the United States any property constituting, or derived from, or traceable to, the proceeds obtained, directly or indirectly, as a result of such violations and any property, real or personal, that was used or intended to be used to commit or to facilitate the violations of federal law. The property to be forfeited includes, but is not limited to:

CURRENCY

1. $791,649.34 in United States currency;
2. $159.36 in United States currency;
3. $59,030.81 in United States currency;
4. $6,428.18 in United States currency;
5. $122,721.41 in United States currency;
6. $12,736.14 in United States currency;

BANK ACCOUNTS

7. Fidelity Investment Account Number Zxx-xx2016;

PERSONAL PROPERTY

8. All gold, silver and other collectible coins seized on November 17, 2020 from 1002 East 20th Street, Tulsa, Oklahoma;

9. All art purchased from the Royce Meyers Gallery on June 5, 2020;

CONVEYANCES

10. 2017 Audi A7, VIN WAU22AFC4HN102133;

11. 2020 Lexus GX, VIN JTJAM7BX8l5260873;

12. 2016 Hino Model 268a Box Truck, VIN 5PVNJ8JV5G4S60179; and

REAL PROPERTY

13. All that lot and parcel of land, together with all buildings, appurtenances, improvements, fixtures, attachments, and easements thereon, and all rights appertaining thereto, located at 1002 East 20th Street, Tulsa, Tulsa County, Oklahoma.

All pursuant to Title 18, United States Code, Section 982(a)(1) and Title 21, United States Code, Section 853.

CLINTON J. JOHNSON
United States Attorney

A TRUE BILL

REAGAN V. REININGER
Assistant United States Attorney

/s/ Grand Jury Foreperson
Grand Jury Foreperson

2025 WL 360952
Only the Westlaw citation is currently available.
United States District Court, N.D. Oklahoma.

UNITED STATES of America, Plaintiff,
v.
Brandon David MCCARTHY, and
Rachel Christine McCarthy, Defendants.

Case No. 23-CR-00359-SEH
|
Signed January 31, 2025

Attorneys and Law Firms

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OPINION AND ORDER

Sara E. Hill, UNITED STATES DISTRICT JUDGE

***1** Defendants are charged in a 41-count superseding indictment with committing various drug crimes under the Controlled Substances Act ("CSA") related to their business of selling and distributing poppy seeds. [ECF No. 98]. However, the CSA says that poppy seeds are not a controlled substance. 21 U.S.C. § 802(19)–(20). For this and several additional reasons explained below, Defendants' joint motion to dismiss the indictment [ECF No. 79][1] is granted. The superseding indictment is hereby dismissed as to Defendants Brandon David McCarthy and Rachel Christine McCarthy.

I. Background

This is not a typical drug case. Defendants Brandon and Rachel McCarthy operated Lone Goose Bakery, an online retailer for food products like chia seeds, flax seeds, and vanilla beans. [ECF No. 98 at 6].[2] However, nearly all of Lone Goose Bakery's sales came from "unprocessed poppy seeds coated in opium latex." [*Id.* at 6]. The government alleges that "opium latex" is "the milky sap-like substance from which opiate alkaloids, including morphine, codeine, and thebaine, can be extracted," and that "unprocessed poppy seeds" are "poppy seeds that have not had the opium latex removed after harvest." [*Id.* at 2].

Unlike most alleged illegal drug distributors who try to conceal their activities, Defendants posted videos on the internet about their poppy seeds, including video reviews and a step-by-step guide on how to make poppy seed tea. [*Id.* at 6–7]. Brandon McCarthy also published a book titled "How to Make Poppy Seed Tea A Detailed Recipe." [*Id.* at 7]. The purpose of making the tea, according to the government, is to remove the opium latex from the seeds to consume it. [*Id.* at 3]. Defendants advertised the tea's supposed benefits, but they also warned customers that the tea could cause an "opiate overdose." [*Id.* at 7–8]. Indeed, the government alleges that one of Defendants' customers overdosed and died after consuming poppy seed tea. [*Id.* at 8].

By all accounts, Defendants' business selling poppy seeds was very successful. The government alleges that Defendants shipped tens of thousands of orders of poppy seeds throughout the United States, and that they took in more than $12 million between June 2017 and November 2020. [*Id.* at 9–10]. They transferred that money into various accounts and spent significant amounts on things like a home, home renovations, vehicles, precious metals, and art. [*Id.* at 10–12].

Based on these allegations, a grand jury charged Defendants in a 41-count superseding indictment with committing various drug crimes under the CSA. For purposes of Defendants' motion to dismiss, these counts fall into two categories: (1) charges involving a controlled substance; and (2) drug precursor charges.

***2** Controlled Substance Charges:

- Count 1: charges Defendants with drug conspiracy in violation of 21 U.S.C. §§ 841(b)(1)(C), 843(d), 846, 853(b). 21 U.S.C. § 846 provides: "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The government alleges that the objects of the conspiracy

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include violations of the controlled substance statutes and the drug precursor statutes. [ECF No. 98 at 4–5].

- Counts 2–8: charge Defendants with distribution of morphine, codeine, and thebaine, Schedule II controlled substances, in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(C). [ECF No. 98 at 13]. § 841(a)(1) makes it unlawful to "distribute ... a controlled substance." In addition to the prohibitions in § 841(a)(1), § 841(b)(1)(C) specifies penalties for "a controlled substance in schedule I or II."

- Count 9: charges Defendants with distribution of morphine, codeine, and thebaine, Schedule II controlled substances, resulting in death in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(C). [ECF No. 98 at 14].

- Count 10: charges Defendants with possession of morphine, codeine, and thebaine, Schedule II controlled substances, with intent to distribute in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(C). [ECF No. 98 at 15].

- Count 19: charges Defendants with maintaining a drug-involved premises for the purpose of distributing morphine, codeine, and thebaine, Schedule II controlled substances, in violation of 21 U.S.C. § 856(a)(1), 856(b). [ECF No. 98 at 18]. § 856(a)(1) makes it unlawful to "open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance."

- Count 20: charges defendants with a money laundering conspiracy in violation of 18 U.S.C. § 1956(h). [ECF No. 98 at 19–20]. § 1956(h) provides: "[a]ny person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." The superseding indictment lists the controlled substance charges *and* precursor charges as the offenses underlying this conspiracy charge. [*Id.* at 19]. However, the "offense[s] defined in [§ 1956]," all focus on controlled substances, not drug precursor charges under 21 U.S.C. § 843. *See* 18 U.S.C. §§ 1956(c), 1961(1).

- Counts 21–41: charge Defendants with engaging in monetary transactions of proceeds derived from a specified unlawful activity in violation of 18 U.S.C.§ 1957(a). [ECF No. 98 at 21–22]. § 1957(a) provides: "[w]hoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b)." § 1957(a) does not delineate between controlled substances and drug precursors. Therefore, these counts fall under both categories of offenses charged in the superseding indictment.

***3** Precursor Charges:

- Count 1: alleges that violations of the drug precursor statutes are among the objects of the conspiracy in this count [ECF No. 98 at 4], so this charge falls under the "precursor charges" category as well.

- Counts 11–17: charge Defendants with knowingly and intentionally distributing a material used to manufacture a controlled substance, knowing, intending, and having reasonable cause to believe that material would be used to manufacture a controlled substance in violation of 21 U.S.C. § 843(a)(7). [ECF No. 98 at 16]. § 843(a)(7) makes it unlawful to knowingly or intentionally "manufacture, distribute, export, or import any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II."

- Count 18: charges Defendants with possession of materials with intent to distribute in violation of 21 U.S.C. § 843(a)(6). [ECF No. 98 at 17]. Similar to § 843(a)(7), § 843(a)(6) makes it unlawful to knowingly or intentionally "possess any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II."

- Counts 21–41: for the reasons explained above, these counts fall under both categories of offenses charged in the superseding indictment.

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It is clear why the government would want to prosecute this case. The superseding indictment catalogs Defendants' efforts to advertise the health benefits of poppy seed tea and instruct customers on how to make it even though one of their customers overdosed and died. But none of this overcomes the language Congress chose to use in the CSA that excludes poppy seeds from its prohibitions. For that reason and several others explained below, the superseding indictment must be dismissed as to Defendants Brandon David McCarthy and Rachel Christine McCarthy.

II. Standard

"On a motion to dismiss an indictment, the question is not whether the government has presented sufficient evidence to support the charge, but solely whether the allegations in the indictment, if true, are sufficient to establish a violation of the charged offense." *United States v. Todd*, 446 F.3d 1062, 1068 (10th Cir. 2006). The Federal Rules of Criminal Procedure require that an indictment contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). "An indictment is sufficient if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense." *Todd*, 446 F.3d at 1067 (quotation marks and citation omitted). "[W]here the indictment quotes the language of a statute and includes the date, place, and nature of illegal activity, it need not go further and allege in detail the factual proof that will be relied upon to support the charges." *United States v. Doe*, 572 F.3d 1162, 1173–74 (10th Cir. 2009) (quotation marks and citation omitted). Courts should "avoid considering evidence outside the indictment when testing the indictment's legal sufficiency." *Todd*, 446 F.3d at 1067.

***4** Although the question on a motion to dismiss is not about the sufficiency of the government's evidence, dismissal is proper when "as a matter of law, the government is incapable of proving its case beyond a reasonable doubt." *Id.* at 1068 (quotation marks and citation omitted). Additionally, the indictment "should be read as a whole and interpreted in a common-sense manner ...." *United States v. Stoner*, 98 F.3d 527, 531 (10th Cir. 1996) (quotation marks and citation omitted).

III. Discussion

A. Statutory Interpretation

Defendants' arguments on this point are not particularly detailed, and they focus exclusively on plain language and ordinary meaning. Nevertheless, Defendants' arguments sufficiently raise the issue of statutory interpretation, so I will conduct a full analysis.

1. Legal Framework

a. General Principles

Issues of statutory interpretation are a question of law for a court to resolve. *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018). When interpreting a statute, the "primary task is to determine congressional intent, using traditional tools of statutory interpretation." *BP America Prod. Co. v. Haaland*, 87 F.4th 1226, 1234 (10th Cir. 2023) (quotation marks and citation omitted). The first step is to look at "the language of the statute itself." *Potts v. Ctr. For Excellence in Higher Educ., Inc.*, 908 F.3d 610, 613 (10th Cir. 2018). If "the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240–41 (1989).

To determine whether a statute is plain and unambiguous, courts examine "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also Wichita Ctr. for Graduate Med. Educ., Inc. v. United States*, 917 F.3d 1221, 1225 (10th Cir. 2019) ("When searching for statutory meaning we also examine the context and structure of the statutory scheme in which a word is used, looking at the statute as a whole."). Courts also "presume that Congress enacted sensible legislation that avoids unjust, impractical, or absurd outcomes." *BP America Prod. Co.*, 87 F.4th at 1234.

b. Specific Relevant Canons of Statutory Interpretation

First, words in a statute do not exist in a vacuum. "The canon of *noscitur a sociis* teaches that a word is given more precise content by the neighboring words with which it is associated" and a meaning "that avoids ascribing to one word a meaning so broad that it is inconsistent with the company it keeps." *Fischer v. United States*, 603 U.S. 480, 481, 487 (2024) (cleaned up). This canon "especially

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holds that words grouped in a list should be given related meanings." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012) (quotation marks and citation omitted). "To be sure, in construing a word based on the company it keeps, [courts] are not limited to comparing it only to its immediately surrounding words, but must compare it instead to as much of the statute as provides interpretive guidance." *In re McDaniel*, 973 F.3d 1083, 1103 (10th Cir. 2020) (cleaned up).

Second, similar to the canon of *noscitur a sociis*, the canon of *in pari materia* counsels that "statutes addressing the same subject matter generally should be read as if they were one law." *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315–16 (2006) (quotation marks and citation omitted). This canon "does not require reading a single statute in isolation, but rather [counsels consideration of] other statutes dealing with the same subject matter." *United States v. Arciga-Bustamante*, 276 F. App'x 716, 721 (10th Cir. 2006) (citation omitted); *see also Planned Parenthood of Rocky Mountains Servs., Corp. v. Owens*, 287 F.3d 910, 923 n.13 (10th Cir.2002) ("Under the doctrine of *in pari materia*, a court will interpret a statute by examining other statutes dealing with the same subject as the statute being construed.") (citing 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51.01 (6th ed.2000)). This canon "rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so." SCALIA & GARNER, *supra* at 252.

***5** Third, statutory language must be given effect. It is fundamental that a statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 213 (2018) (quotation marks and citation omitted); *see also BP Am. Prod. Co.*, 87 F.4th at 1234–35 (noting that, when possible, courts "try to give effect to each word and only reject words as surplusage if inadvertently inserted or if repugnant to the rest of the statute.") (quotation marks and citation omitted).

Fourth, when a general and specific statute conflict, the specific statute controls. *WildEarth Guardians v. National Park Service*, 703 F.3d 1178, 1189 (10th Cir. 2013). This is often referred to as the general vs. specific canon of statutory interpretation. Application of this canon depends on the scope of the conflicting provisions, not their nature. *United States v. Wesley*, 60 F.4th 1277, 1284 (10th Cir. 2023).

2. Controlled Substance Charges

a. The Parties' Arguments

Defendants argue that the plain and ordinary meaning of the CSA does not criminalize poppy seeds. [ECF No. 79 at 4–7]. Defendants primarily point to the statutory definitions of "opium poppy" and "poppy straw," each of which exclude poppy seeds from their definition.[3] [*Id.* at 6] (quoting 21 U.S.C. § 802(19)–(20)). Defendants do not explicitly differentiate between the controlled substances charges and the precursor charges in their motion. Rather, Defendants argue that the plain meaning of the cited portions of the CSA make it clear that poppy seeds are wholly exempted from criminality.

The government argues in response that the superseding indictment "clears the low hurdle of defeating a motion to dismiss" because the government's allegations focus on the distribution, possession with intent to distribute, and conspiracy to distribute morphine, codeine, and thebaine, all of which are controlled substances. [ECF No. 86 at 15]. The government explains that controlled substances include " 'a drug or other substance, or immediate precursor, included in' the federal drug schedules." [*Id.*] (quoting 21 U.S.C. § 802(6)). The government further argues that it should prevail because it can establish the knowledge requirements under 21 U.S.C. § 841(a)(1) by showing that Defendants knew that they possessed some controlled substance (even if they did not know which one), that they knew they possessed a particular controlled substance (even if they did not know it is a controlled substance), or that they were deliberately indifferent about whether the substance was a controlled substance. [ECF No. 86 at 15–16].

With respect to the Defendants' arguments about the CSA's definitions for "opium poppy" and "poppy straw," the government contends that poppy seeds nevertheless fit within the CSA's definition of "opiate" or "opioid" under 21 U.S.C. § 802(18). [*Id.* at 16].[4]

b. Discussion

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The superseding indictment must be read "as a whole and interpreted in a common-sense manner ...." *United States v. Stoner*, 98 F.3d 527, 531 (10th Cir. 1996). Even though the superseding indictment sometimes refers to just morphine, codeine, and thebaine, rather than poppy seeds, the only source of those substances alleged in the superseding indictment is the opium latex that coats poppy seeds. As alleged by the government, unprocessed poppy seeds are poppy seeds coated in opium latex that have not had the opium latex removed after harvest. [ECF No. 98 at 2]. Therefore, as alleged by the government, poppy seeds are naturally coated in opium latex as a part of the harvesting process. In other words, and based only on the language in the superseding indictment, one cannot have *just* a poppy seed without that seed *first* being coated in opium latex at some point in the process. The seed and the opium latex are one in the same until the coating is removed at some later point. For the reasons explained below, fundamental principles of statutory interpretation show that conduct involving poppy seeds—regardless of whether they are coated with opium latex—cannot support the controlled substance charges.

***6** The CSA defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802(6). The drug schedules were originally published at 21 U.S.C. § 812, but they now reside in the Code of Federal Regulations at 21 C.F.R. § 1308.11 *et seq.* In relevant part, Schedule II lists the following:

- 21 C.F.R. § 1308.12(b)(1) (emphasis added): "(b) Substances, vegetable origin or chemical synthesis. *Unless specifically excepted* or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate excluding apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, naldemedine, nalmefene, naloxegol, naloxone, 6β-naltrexol, naltrexone, and samidorphan, and their respective salts, but including the following: (i) Codeine ... (ix) Morphine ... (xviii) Thebaine ...."

- 21 C.F.R. § 1308.12(b)(3): "Opium poppy and poppy straw."

- 21 C.F.R. § 1308.12(b)(5): "Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrene alkaloids of the opium poppy)."

Taking these statutory and regulatory terms together, the relevant following terms fall under the umbrella of "controlled substance[s]" that are criminalized under the CSA: "immediate precursor;" "opium" or "opiate;" "opium poppy;" and "poppy straw." The CSA defines most of these terms:

- Immediate precursor: "means a substance--
  - (A) which the Attorney General has found to be and by regulation designated as being the principal compound used, or produced primarily for use, in the manufacture of a controlled substance;
  - (B) which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance; and
  - (C) the control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance." 21 U.S.C. § 802(23).

- Opium: [5] "Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation. Such term does not include the isoquinoline alkaloids of opium." *Id.* § 802(17)(A).

- Opiate: "The term 'opiate' or 'opioid' means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability." *Id.* § 802(18).

- Opium Poppy: "The term 'opium poppy' means the plant of the species Papaver somniferum L., *except the seed thereof*." *Id.* § 802(19) (emphasis added).

- Poppy Straw: "The term 'poppy straw' means all parts, *except the seeds*, of the opium poppy, after mowing." *Id.* § 802(20) (emphasis added).

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It is plain and unambiguous that the terms "opium poppy" and "poppy straw" specifically exclude poppy seeds under the CSA. That leaves the question: Do the terms "seed" and "seeds," as those terms are used in § 802(19)–(20), include seeds that are coated in opium latex? Based on fundamental canons of statutory interpretation, the answer to that question is yes.

***7** The CSA does not distinguish between seeds that have different levels of processing or seeds that have or have not had opium latex removed from them. I can only look to the facts as they are alleged in the superseding indictment. *See United States v. Todd*, 446 F.3d 1062, 1067 (10th Cir. 2006). Based on the facts alleged in the superseding indictment, and as noted above, poppy seeds and opium latex are one in the same as a part of the harvesting process until some later process is undertaken to remove the opium latex. Therefore, the reference to "seed" and "seeds" in § 802(19)–(20) includes the opium latex that naturally coats poppy seeds as a part of the harvesting process.

The rest of the CSA's definition section provides supporting context for this conclusion. For example, 21 U.S.C. § 802(17)(C) includes coca leaves in the definition of "narcotic drug." That section states that "narcotic drug[s]" include coca leaves, "except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed." *Id.* The CSA also defines marijuana 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." *Id.* § 802(16)(A) (emphasis added). The language in 21 U.S.C. § 802 about other plant materials demonstrates that Congress knows how and when to differentiate between component parts and chemicals from plants that *are* controlled substances, and those that *are not* controlled substances. Congress did not make any such distinction with poppy seeds, so § 802(19)–(20) excludes all poppy seeds, regardless of whether they are coated in opium latex.

Because poppy seeds are excluded from the definition of "opium poppy" and "poppy straw," the question is whether poppy seeds could be considered a controlled substance under some other definition within the CSA. According to the government, the answer to that question is yes because poppy seeds fall under the definition of "opiate" or "opioid" in 21 U.S.C. § 802(18) *See* [ECF No. 86 at 16]. If poppy seeds do not qualify as a controlled substance as "opium poppy" or "poppy straw," but they do qualify as an "opiate," that begs the question: Why would Congress bother to include the language in § 802(19)–(20) specifically excluding seeds? Fundamental principles of statutory interpretation answer that question.

As noted above, a statute is "construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 213 (2018) (quotation marks and citation omitted). If one accepts the government's position that poppy seeds are "opium" or an "opiate," or even if one argues that they an "immediate precursor,"[6] that outcome must be squared with the fact that poppy seeds are also excluded from the definition of "opium poppy" or "poppy straw" as those terms are defined in the CSA. The entire point of defining terms in § 802 that appear in the drug schedules is to define the scope of what *is* a controlled substance, and what *is not* a controlled substance. If one subsection includes poppy seeds within the scope of controlled substances, but another subsection explicitly says they are not and a court only gives effect to the broader subsection that includes poppy seeds, then the language excluding seeds is meaningless. I will not apply the CSA in a way that renders any portion of § 802(19)–(20) meaningless.

***8** The same goes for the government's argument that it does not matter whether poppy seeds are themselves controlled substances because they can prove that Defendants knew or were deliberately indifferent about the fact that the seeds were being purchased as a source of morphine, codeine, and thebaine. If poppy seeds were considered a controlled substance because of the morphine, codeine, and thebaine they are naturally coated in as a part of the harvesting process, that would similarly render the exclusionary language in § 802(19)–(20) meaningless. That is because: (1) poppy seeds are naturally coated in a substance that contains morphine, codeine, and thebaine; and (2) Congress did not distinguish between washed, unwashed, processed, or unprocessed seeds in the same way that it distinguished between plants like coca leaves and marijuana and the naturally occurring component parts of those plants. The government's arguments are rejected on this point.

In addition to the problem with rendering the exclusionary language meaningless, the general vs. specific canon of statutory interpretation provides guidance. This canon focuses on the scope of the statutes, not their nature, and courts "interpret the more specific statute as an exception to

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the more general statute." *WildEarth Guardians v. National Park Service*, 703 F.3d 1178, 1189 (10th Cir. 2013). 21 U.S.C. § 802(18) broadly defines all opiates, which are schedule II controlled substances. 21 U.S.C. § 802(19)–(20) defines a narrower scope of opiates, "opium poppy" and "poppy straw." Even if poppy seeds could be included in the broader definition of "opiate," that conflicts with the exclusionary language in § 802(19)–(20). Because these statutes conflict, and because § 802(19)–(20) is the more specific statute, the exclusionary language in § 802(19)–(20) controls. Under the general vs. specific canon, poppy seeds are not a controlled substance.

Because poppy seeds are not a controlled substance, the controlled substance charges, counts 1–10 & 19–41 of the superseding indictment, must be dismissed.

3. Precursor Charges

a. The Parties' Arguments

Defendants do not differentiate their statutory interpretation arguments between the controlled substance charges and the precursor charges. Therefore, Defendants' arguments on this point are presumed to be the same as those made for the controlled substance charges.

In response to Defendant's arguments, the government argues that the statutes supporting the precursor charges are not limited to "prosecutions for methamphetamine precursors." [ECF No. 86 at 17]. The government further argues that it is not a defense that poppy seeds are sold at grocery stores since the charging language sufficiently alleges that Defendants had the requisite knowledge under 21 U.S.C. § 843(a)(6)–(7). [*Id.* at 17–18].

b. Discussion

Like with any statutory interpretation issue, the analysis begins with the text. The precursor statute makes the following unlawful:

> (6) to possess any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II;
>
> (7) to manufacture, distribute, export, or import any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II or, in the case of an exportation, in violation of this subchapter or subchapter II or of the laws of the country to which it is exported;

***9** 21 U.S.C. § 843(a)(6)–(7).

Assuming Defendants knew, intended, or had reasonable cause to believe their poppy seeds would be used to manufacture a controlled substance or listed chemical, the remaining question is whether poppy seeds are a "three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material." The only two terms that poppy seeds could possibly fall under are "product" and "material." Using the *noscitur a sociis* and *in pari materia* canons of statutory interpretation, poppy seeds are neither a "product" nor "material" as those terms are used in 21 U.S.C. § 843(a)(6)–(7).

Noscitur a sociis

Other than the terms "product" and "material," the things listed in 21 U.S.C. § 843(a)(6)–(7) are all mechanical, industrial, or otherwise manmade items that may be used to manufacture a controlled substance. Given the context of the other words in this list, plant material like poppy seeds does not fall within the scope of § 843(a)(6)–(7). Certainly, poppy seeds could qualify as a "product" or "material" in some contexts. For example, poppy seeds were Defendants' "product" that they sold to customers, and it would be fair to say that poppy seeds were the "material" in Defendants' shipments. But here, terms like "machine," "chemical," and "equipment" narrow and contextualize the scope of the terms "product" and "material" such that a proper reading of § 843(a)(6)–(7) excludes poppy seeds.

In pari materia

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Setting aside the problem with reading the terms "product" and "material" as including poppy seeds under the *noscitur a sociis* canon, assume for the sake of argument that poppy seeds are included under a broad interpretation of those terms. If you zoom out to see the entire structure and scheme of the CSA, including poppy seeds in the scope of § 843(a)(6)–(7) is still improper because it leads to results that do not make any sense.

At its core, the CSA outlines which drugs and substances are unlawful to possess, manufacture, and distribute. That is done by listing various substances in the drug schedules and defining those terms in 21 U.S.C. § 802. 21 U.S.C. § 841(a)(1) makes it unlawful to possess, manufacture, and distribute those listed controlled substances. Two defined controlled substances refer to poppy seeds, and the explicit statutory language in those definitions excludes them from the definition of controlled substances while including component parts of other plants. Section III(A)(2)(b), *supra.* In other words, Congress has put the public on notice that that poppy seeds are legal under § 841(a)(1). In turn, § 843(a)(6)–(7) lists things that are not themselves controlled substances, but could be used to manufacture controlled substances. It does not make any sense for Congress to carve poppy seeds out of § 802 to allow prosecution under § 843(a)(6)–(7) when it could have just defined poppy seeds as a controlled substance.

What would be the purpose of permitting prosecution under § 843(a)(6)–(7) and not under § 841(a)(1)? Perhaps Congress chose to exclude poppy seeds from the definition of opium poppy and poppy straw because it wanted to subject poppy seeds to less punishment than schedule II controlled substances. A violation of § 841(a)(1) could result in imprisonment up to life, but a violation of § 843(a)(6)–(7) generally carries a lower penalty. *Compare* 21 U.S.C. § 841(b)(1)(C) *with* 21 U.S.C. § 843(d).

***10** If that were the motive, though, Congress could have just moved poppy seeds to a lower drug schedule with lower penalties. *See* 21 U.S.C. § 841(b)(2)–(3) (setting lower penalties for schedule IV and V controlled substances). Doing that would also have the benefit of avoiding the *noscitur a sociis* interpretation issues. Under the canons of *noscitur a sociis* and *in pari materia*, poppy seeds are not a "product" or "material" under 21 U.S.C. § 843(a)(6)–(7). Therefore, the precursor charges, counts 1, 11–18, & 21–41 of the superseding indictment, must be dismissed.

B. Due Process

Even assuming that the superseding indictment could survive the above statutory interpretation analysis, Defendants prevail on due process grounds.

1. Legal Framework

The due process issues raised here are questions of law for the court to resolve. *See United States v. Walker*, 74 F.4th 1163, 1184 (10th Cir. 2023) (noting that "appellate courts are not bound by the government's concessions or stipulations on questions of law" in the context of a fair notice and due process analysis).

The Fifth Amendment provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law ...." U.S. CONST. amend V. "Vague laws contravene the first essential of due process of law that statutes must give people of common intelligence fair notice of what the law demands of them." *United States v. Davis*, 588 U.S. 445, 451(2019) (quotation marks and citation omitted). Stated otherwise, the government may not impose "sanctions under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Welch v. United States*, 578 U.S. 120, 124 (2016) (quotation marks and citation omitted); *see also United States. v. Morales-Lopez*, 92 F.4th 936, 941 (10th Cir. 2024). "Vague laws also undermine the Constitution's separation of powers [because they] threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Davis*, 588 U.S. at 451.

Statutes are unconstitutionally vague either on their face or as applied. *United States v. Lesh*, 107 F.4th 1239, 1246 (10th Cir. 2024), *petition for cert. filed*, No. 24-654. A statute is vague on its face "and thus void, where 'no set of circumstances exists under which the [regulation] would be valid.' " *Id.* (citation omitted). An as-applied vagueness challenge to a statute "tests the application of that restriction to the facts of a plaintiff's concrete case." *Id.* (internal quotation marks and citation omitted). The distinction between facial and as-applied challenges to a law's constitutionality "goes to the breadth of the remedy employed by the Court." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). "[I]t does not speak at all to the substantive rule of law

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necessary to establish a constitutional violation[;]" therefore, the same substantive constitutional analysis applies. *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019).

2. The Parties Arguments

The Parties' arguments in their briefing on the vagueness/notice issue are combined as to the controlled substance and precursor charges, so they will be addressed together.

Defendants argue that the statutes they are charged under are unconstitutionally vague and fail to provide fair notice as applied to them. They say this is because poppy seeds are excluded from the CSA, their poppy seeds "were legally imported, were deemed safe, were distributed to the Defendants, and the Defendants were granted a trademark for selling unprocessed poppy seeds which could only be done if the sale of unprocessed poppy seeds were legal." [ECF no. 79 at 11].

***11** The government responds by analogizing Defendants' position to the fact that marijuana is still unlawful if it is in a gummy, and LSD is still unlawful if it is on blotting paper. [ECF No. 86 at 20]. The government says that this is because "as alleged in the [superseding] indictment, [Defendants] knew that they were selling opiates, [so] their void for vagueness challenge fails." [*Id.*]. This, according to the government, differentiates Defendants' conduct from other poppy seed sales, and makes them guilty of the precursor charges as well. [*Id.* at 20–21].

The government further argues that Defendants' knowledge can be inferred by their conduct. [*Id.* at 21]. For example, their knowledge about controlled substances can be inferred from the large quantity of seeds they sold, the fact that they sold to individuals rather than businesses, and the high prices they charged. [*Id.* at 21–23]. Lastly, the government alleges that Defendants received several warnings about the nature of their poppy seeds. [*Id.* at 23–24].

Similar to their arguments on statutory interpretation, Defendants' arguments about due process, notice, and vagueness are not particularly detailed or in depth. However, Defendants' arguments sufficiently raise the issue such that I may conduct a full analysis.

3. Discussion

Just as this is not the typical drug case, this is not the typical vagueness, notice, or fair warning case. Nobody disputes that morphine, codeine, and thebaine are all controlled substances. Nor does anyone dispute that those substances are in the opium latex that coats poppy seeds as a natural part of the harvesting process. The hangup is that despite all of this, the CSA nevertheless carves poppy seeds out of the definition used to describe the plant the seeds come from, regardless of whether the seeds are coated with opium latex.

a. The Khat Cases and Due Process Principles

This case is similar to the notice issues in cases involving the khat plant. Khat is commonly used by people in East African and Arabian Peninsular countries. The leaves of the plant may be chewed or brewed into a tea. *United States v. Caseer*, 399 F.3d 828, 830 (6th Cir. 2005). The plant has stimulant properties, and it contains cathinone and cathine, both of which are controlled substances. *Id.* (citing 21 C.F.R. §§ 1308.11(f),1308.14(e)).

Although khat is not listed as a controlled substance, the defendant and the others involved in the case were charged with controlled substance charges based on the cathinone in the khat plant. *Id.* at 832. The defendant moved for a judgment of acquittal under Fed. R. Crim. P. 29, arguing: "(1) that his constitutional right to due process had been violated because he had not been fairly warned of the criminality of his actions; (2) that khat qualified as a food item not subject to regulation by the Controlled Substances Act; and (3) that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that [defendant] intended to import cathinone." *Id.* The Sixth Circuit reversed the conviction because of the insufficiency of the evidence, not because of the notice/fair warning issues. *Id.* at 844. I do, however, agree with the opinion of Judge Holschuh concurring in part and dissenting in part in which he explained why the CSA does not provide adequate notice that the khat plant is illegal.

***12** The drug schedules and the CSA's definition section identify several plants in addition to their psychoactive substances and other component parts of those plants. In the case of the khat plant, Judge Holschuh explained why this structure presents a fatal due process issue:

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> The regulations, therefore, list a number of specific plants as being themselves controlled substances, giving clear warning that possession of these plants is illegal, regardless of whether the person is aware that the plant contains a particular chemical substance that has a psychoactive effect. Remarkably—and in my opinion, fatally—absent from the regulations is the khat plant. Any person who wants to know whether it is illegal to make a cup of tea from the khat plant would find that, in contrast to other plants such as the marihuana plant, the peyote cactus plant, the poppy plant, and the coca plant, there is no reference of any kind to the khat plant any place in the law of the United States, *i.e.*, either in statutes or in regulations. I totally agree with the majority's statement that "the term 'cathinone' is sufficiently obscure that persons of ordinary intelligence reading the controlled substances schedules probably would not discern that possession of khat constitutes possession of a controlled substance." I would go further, however, because it is my opinion that persons of ordinary intelligence reading the controlled substances schedules could reasonably conclude that possession of the khat plant is clearly *not illegal* because, unlike other plants containing naturally-produced psychoactive substances, the khat plant is not listed.

Id. at 849–50 (Holschuh, J., concurring in part and dissenting in part).

The notice issues are not exactly the same for poppy seeds as they are for the khat plant. With the khat plant, the problem is that it is not listed at all while other plants are. *Id.* at 852. ("I don't think it is 'a stretch' to believe that persons of ordinary intelligence, seeing other plants specifically listed as being illegal but not the khat plant, could reasonably conclude that they can lawfully possess the khat plant."). Judge Holschuh also agreed with the majority that the controlled substance khat contains, cathinone, was "sufficiently obscure that persons of ordinary intelligence reading the controlled substances schedules probably would not discern that possession of khat constitutes possession of a controlled substance." *Id.* at 853.

In some ways, the exclusionary language in 21 U.S.C. § 802(19)–(20) presents an even bigger notice problem. Morphine is a more commonly known controlled substance than cathinone. But not only are poppy seeds not listed as one of the many plants that are defined in 21 U.S.C. § 802, they are *specifically excluded* from the definition of "opium poppy" and "poppy straw," the parts of the poppy plant that *are* a controlled substance. A person of ordinary intelligence reading the drug schedules and the definitions in § 802 would come to the commonsense conclusion that poppy seeds are not a controlled substance, and that because Congress excluded poppy seeds from the definition of the controlled substance, those seeds are legal to possess, use, and distribute.

As for the precursor charges, 21 U.S.C. § 843(6)–(7) does not provide adequate notice that poppy seeds are prohibited. In *Caseer*, the applicable regulation prohibited "any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers ... Cathinone." *Caseer*, 399 F.3d at 833 (quoting 21 C.F.R. § 1308.11(f)(4)). Judge Holschuh explained that it is not " 'perfectly clear' that the word 'material' includes plant life," let alone khat. *Id.* at 850–51. He further explained that the word "material" "should not be plucked from the language of 21 C.F.R. § 1308.11(f) and considered in a vacuum," and that fundamental canons of statutory interpretation such as reading words in their context should be followed. *Id.* at 851.

In the context of the regulation covering cathinone, reading the term "material" as including plant life would render the listing of other controlled substance plants such as marijuana and peyote meaningless, "and the use of the same words 'compound,' 'mixture,' or 'preparation' in the description of those plants, clearly would be superfluous." *Id.*[7] The same is true for the charges brought against the defendants under 21 U.S.C. § 843(a)(6)–(7). As noted above in Section III(A)(3), *supra*, the principles of statutory interpretation counsel against reading § 843(a)(6)–(7) as prohibiting any kind of poppy seeds. But this is also a due process issue. A person of common intelligence would read those provisions as prohibiting laboratory equipment, chemicals, machines, and substances that are used to aid in the manufacturing of a controlled substance, not plant materials specifically excluded from the CSA.

***13** One of the government's overarching theories in this case is that regardless of whether poppy seeds are a controlled substance in and of themselves, Defendants' knowledge about the properties of their seeds (i.e. their knowledge about the morphine, codeine, and thebaine they contain) permits prosecution. I agree with Judge Holschuh's reasoning on this point as well. In the khat/cathinone context, he explained:

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> The due process problem with this regulation is not a vagueness problem, but the manner in which the DEA has chosen to list controlled substances in the schedules. While it has chosen to list some specific plants by their commonly known names as well as their psychoactive substances, it has chosen to list only the psychoactive substances found in the khat plant—substances that are not found in any mainstream dictionaries—and failed to include or mention in any way the khat plant. A person of ordinary intelligence desiring to know whether it is illegal to chew khat during Ramadan or to join friends for a cup of khat tea would not find khat mentioned any place in the laws of the United States.

Caseer, 399 F.3d 828, 856. Similarly, for a person of ordinary intelligence wanting to know if it is illegal to deal with unprocessed or unwashed poppy seeds, the clearest statutory statement on the issue is that poppy seeds are *excluded* from the relevant controlled substance definitions. Further, because Congress differentiated between naturally occurring materials and the substances they contain, *see* Section III(A)(2)(b), *supra* (discussing the definitions of marijuana and coca leaves), a person of ordinary intelligence would reasonably look no further than the exclusionary language of 21 U.S.C. § 802(19)–(20) and conclude that poppy seeds, regardless of whether they are coated in opium latex, are legal.

To be sure, "for over a century federal courts have adjudicated challenges to the constitutionality of penal statutes by relying on the general rule that a defendant to whose conduct a statute clearly applies may not pose a facial challenge to the statute." *United States v. Morales-Lopez*, 92 F.4th 936, 941 (10th Cir. 2024) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)). But for the reasons explained above in Section III(A), *supra*, it is not clear that Defendants' alleged conduct violates the CSA.

Because the CSA, as applied to these defendants, did not provide adequate notice that their conduct related to poppy seeds was unlawful—regardless of whether the seeds were coated in opium latex—all of the counts brought against Defendants Brandon David McCarthy and Rachel Christine McCarthy in the superseding indictment must be dismissed.

b. Other Notice Issues

The government's arguments about marijuana in gummies or LSD on blotting paper are unpersuasive. The government does not allege that marijuana naturally occurs in gummy form, nor does it allege that LSD naturally occurs on blotting paper. Further, neither gummies nor blotting paper are mentioned in 21 U.S.C. §§ 802, 843(a), or the drug schedules. In the government's examples, a defendant puts a known controlled substance into or onto some other vehicle that the controlled substance does not naturally occur in or on. But in this case, the very thing that the government focuses its allegations on, the poppy seed, is naturally coated in a substance that contains otherwise prohibited controlled substances. Nevertheless, Congress excluded poppy seeds from the definition of a controlled substance regardless of whether they are coated in opium latex. The explicit exclusionary language in § 802(19)–(20) must control.

***14** Another fundamental due process and notice issue is that the government cannot draw any reasonably identifiable line for how much opium latex is acceptable to have on poppy seeds under the CSA. The government says it intends to introduce "expert testimony showing that, while washed poppy seeds contain only traces of opiates (much in the same way some U.S. currency in circulation contains traces of cocaine), the unwashed poppy seeds sold by the McCarthys contained fatal or near-fatal doses of morphine."[8] [ECF No. 86 at 9–10].

While this statement is not the government's main argument about due process and notice, it is a tacit admission that some "trace" amounts of opium latex on poppy seeds are acceptable. To the extent the government is arguing that the amount of opium latex on a poppy seed is what makes it unlawful, that presents at least two fundamental problems: (1) the government does not point to any such threshold in the CSA or any applicable regulations;[9] and (2) this approach would impermissibly leave the question of legality up to prosecutorial discretion.

The government seems to indicate that "trace" amounts of opiates on seeds are acceptable in the same way as "trace"

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amounts of cocaine on U.S. currency are acceptable, but "fatal" or "near-fatal" amounts are not. The CSA at least sets some guidance on the penalties associated with specified amounts of cocaine. *See generally* 21 U.S.C. § 841(b)(1)(A)(ii). But the government has not pointed to any similar statutory, regulatory, or other published guidance on an acceptable amount of opium latex covering poppy seeds. Bolstered against the exclusionary language in 21 U.S.C. § 802(19)– (20), the Due Process Clause does not allow a system where prosecutors alone decide what is lawful. *See Snyder v. United States*, 603 U.S. 1 at 15–16 (2024).

Because the CSA, as applied to these defendants, did not provide adequate notice that their conduct related to poppy seeds was unlawful—regardless of whether the seeds were coated in opium latex—all of the counts brought against Defendants Brandon David McCarthy and Rachel Christine McCarthy in the superseding indictment must be dismissed.

C. Remaining Issues

1. Congressional Delegation and the Stephen Hacala Poppy Seed Safety Act

a. The Parties' Arguments

Defendants argue that Congress could have criminalized poppy seeds with a specified level of opium latex on them, but it did not, and that "regulation of poppy seeds and any contamination around them has been delegated to the Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act." [ECF No. 79 at 7]. As a part of this delegation, Defendants argue that "the FDA, to the exclusion of the Controlled Substances Act, maintains the power to act when poppy seeds are adulterated or unsafe" and the "delegation of poppy seed safety to the Food and Drug Administration rather than a possibility of criminal prosecution is clear." *Id.*

***15** Defendants also cite to a Congressional report acknowledging potential consequences from using "contaminated imported poppy seeds" and a failed legislative effort to criminalize poppy seeds as evidence that poppy seeds are not currently criminalized. [*Id.* at 8] (citing H.R. REP. NO. 117-82, at 102 (2021); H.R. 2078, 116th Cong. (2019); S. 1016, 116th Cong. (2019)). [10] Because H.R. 2078, the "Stephen Hacala Poppy Seed Safety Act," provided a maximum penalty of one year imprisonment and/or a $1,000 fine under the Food, Drug, and Cosmetic Act, but not under the CSA, Defendants argue that "Congress understood that poppy seeds, including contaminated and unsafe seeds, are regulated by the Federal Food, Drug, and Cosmetic Act rather than the Drug Abuse Prevention and Control Act." [ECF No. 79 at 8–9].

The government argues in response that if H.R. 2078 had passed, "that would simply have allowed the misdemeanor prosecution of a class of persons not currently eligible for prosecution: those who aren't specifically aware of the opiate content of unwashed poppy seeds but who know only that the seeds are unwashed." [ECF No. 86 at 25]. H.R. 2078 also makes no difference, according to the government, because the Defendants' conduct in this case still qualifies as knowingly distributing opiates and precursors. [*Id.*]. The government further argues that the FDA's regulation of poppy seeds has no bearing on the criminality of Defendants' conduct because other areas of criminal law have coexisting regulatory schemes. [*Id.* at 25–26]. The government also points out that Defendants do not cite any authority for the proposition that a coexisting food safety regulatory scheme exempts them from prosecution under the CSA. [*Id.* at 26].

b. Discussion

Defendants do not cite any specific authority that says the existence of a food safety regulatory scheme involving poppy seeds means that poppy seeds are wholly exempted from the CSA's prohibitions. Nor do they fully explain why the structure or text of the Food, Drug, and Cosmetic Act or any of the relevant regulations lead to that conclusion. Defendants do, however, cite to the regulation that generally recognizes poppy seeds as safe. [ECF No. 79 at 7] (citing 21 C.F.R. § 182.10). Defendants do not explicitly discuss this point in the context of statutory interpretation analysis. I do not need to reach the statutory interpretation question because the analysis in Section III(A), *supra*, is sufficient.

The larger issue for Defendants on the congressional delegation point is that they do not cite any authority that says the existence of food safety statutes and regulations that deal with poppy seeds somehow exempts them from criminal liability under the CSA. To be sure, Defendants cite to *U.S. v. Two Bags, Each Containing 100 Pounds, Poppy Seeds*, 147 F.2d 123 (6th Cir. 1945), as supporting their position. But that case is not on point. *Two Bags* dealt with whether poppy seeds colored with charcoal pigment were "adulterated" in a way that violated the Food and Drug Act. As a part of

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its reasoning, the court did note the purpose the Food and Drug Act was to "prevent the misuse of the facilities of interstate commerce in either conveying to or placing before the consumer misbranded or adulterated articles of medicine or food ...." *Id.* at 127. But nothing in that case stands for the proposition that food safety rules dealing with poppy seeds prohibit application of criminal laws, let alone the CSA. For this reason, the Defendants' general arguments on Congressional delegation are rejected.

As for the Parties' arguments regarding H.R. 2078 and H.R. REP. NO. 117-82, I do not reach that issue. Courts turn to legislative history like this only after "exhaust[ing] the traditional tools of statutory interpretation." *Kansas Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020). As explained in Section III(A), *supra*, the applicable canons of statutory interpretation are sufficient to answer the question of whether poppy seeds are unlawful under the CSA. Therefore, I need not address whether H.R. 2078 or H.R. REP. NO. 117-82 inform the analysis.

2. Governmental Reliance

a. The Parties' Arguments

***16** Defendants argue that the federal government does not seize imported unprocessed poppy seeds, and that they used poppy seed suppliers that went through the FDA-created Foreign Supplier Verification Program ("FSVP") protocol for importers and vendors. [ECF No. 79 at 10]. Defendants also say that they received a trademark for their business name related to the sale of unprocessed poppy seeds, and that trademarks cannot be granted "for use in commerce that is unlawful." [*Id.* at 10–11]. According to Defendants, these facts exempt them from criminal liability.

In response, the government argues that not all unlawful purposes are necessarily disclosed to the United States Patent and Trademark Office, and that even if poppy seeds can have legal uses, that "does not mean poppy seeds coated with opium latex are always legal." [ECF No. 86 at 27–28]. The government also points out that the Lone Goose Bakery trademark approved class 031 poppy seeds, which are categorized as a natural agricultural product, not class 029 or 030 poppy seeds, which are processed poppy seeds that are used for human consumption. [*Id.* at 28]. The government further argues that Defendant's governmental reliance argument is misplaced because that defense requires a defendant to show engagement "by a government official to participate in a covert activity" and that the governmental agent "affirmatively misled [the defendant] as to the state of the law and [the defendant] proceeds to act on the misrepresentation," all in violation of due process protections. [*Id.* at 29] (quotation marks and citations omitted). It alleges that Defendants were not engaged or misled by a government agent and that Defendant's trademark cannot "clear[ ] them of wrongdoing in this case." [*Id.* at 30].

b. Discussion

It is not entirely clear what defense Defendants raise in terms of "governmental reliance." Defendants state that "[w]hen governmental agencies directly state or imply a strict interpretation of a statute and individuals rely on those interpretations, a strict reading of that statute is warranted." [ECF No. 79 at 10]. It is not obvious that Defendants' arguments raise a traditional entrapment defense. But assuming Defendants are asserting an entrapment defense, that argument is rejected because Defendants do not allege that a government agent induced or misled them. *See United States v. Stein*, 985 F.3d 1254, 1264 (10th Cir. 2021) (citing "government inducement" as an element of an entrapment defense); *see also United States v. Kays*, No. CR-22-40-D, 2022 WL 16541216, at *2 (W.D. Okla. Oct. 28, 2022) (listing active misleading by a government agent as an element of an entrapment defense) (quoting *United States v. Hardridge*, 379 F.3d 1188, 1192 (10th Cir. 2004)).

Defendants do note that the federal government does not seize imported unprocessed poppy seeds and that their poppy seed supplier goes through the FSVP for the purpose of ensuring that products are not adulterated and are safe. [ECF No. 79 at 10] (citing 21 U.S.C. § 384a). But that is different than being induced by or relying on a misrepresentation from a governmental agent, so Defendants' arguments on this point are rejected.

Turning to Defendants' argument about the trademark for Lone Goose Bakery, I reject this argument as well. In Defendants' view, the fact that a trademark was issued to Lone Goose Bakery for unprocessed poppy seeds absolves them of all criminal liability. It is generally true that "shipping goods in violation of federal law cannot qualify as the 'use in commerce' necessary to establish trademark rights." *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1225 (10th Cir. 2000); *Skratch Labs LLC v.*

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Delivery Native, Inc., No. 20-cv-1565-WJM-STV, 2021 WL 1406021, at *5 (D. Colo. Apr. 14, 2021) ("To maintain a trademark, a party's use of the trademark in commerce must be lawful."). But it is not that simple when it comes to controlled substances. Sometimes conduct related to controlled substances is lawful, but other times it is not. The CSA penalizes possession, distribution, and other conduct related to controlled substances. *E.g.*, 21 U.S.C. §§ 841(a), 843(a). Of course, though, the CSA makes exceptions for things like prescriptions and people who go through the proper registration process to manufacture, distribute, and dispense controlled substances. 21 U.S.C. §§ 822(b)–(c), 822(g), 829.

***17** To be clear, I find that poppy seeds are not controlled substances or precursors for the reasons explained above. This point just illustrates that regardless of whether poppy seeds are a controlled substance, the mere issuance of a trademark does not in and of itself answer the question of whether Defendants' conduct was lawful. That question is answered by conducting a statutory interpretation and due process analysis.

3. The Rule of Lenity

Defendants' argument is straightforward on this point—if there is any ambiguity about whether poppy seeds are prohibited by the CSA, the rule of lenity requires the ambiguity to be resolved in Defendants' favor. [ECF No. 79 at 9–10]. The government's argument is similarly straightforward—it contends the rule of lenity does not apply here because "the plain language of the CSA criminalizes [Defendants'] actions." [ECF No. 86 at 24–25].

The rule of lenity requires courts to interpret ambiguous statutes in favor of criminal defendants. *United States v. Tony*, 121 F.4th 56, 69 (10th Cir. 2024) (quoting *United States v. Gay*, 240 F.3d 1222, 1232 (10th Cir. 2001)). However, the rule "applies only if a statute remains grievously ambiguous after we have consulted everything from which aid can be derived." *Brown v. United States*, 602 U.S. 101, 122 (2024) (internal quotation marks and citations omitted).

For the reasons set forth in Sections III(A)–(B), *supra*, I find that poppy seeds are not criminally prohibited as a controlled substance or precursor, and that the traditional canons of statutory interpretation and fundamental principles of due process, as applied to these defendants, require this result without any remaining ambiguity. The rule of lenity therefore need not be invoked, and Defendants' arguments on this point are rejected.

Although I do not reach the lenity question (such as it is) because of the Supreme Court's instruction in *Brown*, Justice Gorsuch's concurring opinion in *Snyder v. United States*, 603 U.S. 1, 20–21 (2024) (Gorsuch, J., concurring) raises an important point. In that opinion, Justice Gorsuch aptly notes that when courts speak of things like "fair notice," "fair warning," and prohibiting reliance on prosecutorial discretion to narrow the scope of broad criminal laws, these are all really just different masks or labels that courts have given the rule of lenity. *Id.* ("But make no mistake: Whatever the label, lenity is what's at work behind today's decision, just as it is in so many others."). So, while I have fully analyzed the due process issues above ("vagueness," "notice," "fair warning," etc.) as the cases discuss them and as I am directed to do, Justice Gorsuch is likely correct that the rule of lenity is the principle that underlies these issues.

IV. Conclusion

As alleged by the government, the poppy seeds that the Defendants' sold caused the death of one of their customers. Defendants appear to have known about the potentially deadly consequences from misusing their product, and they gathered a small fortune by running their business. However, Congress chose to use language in the CSA that does not prohibit poppy seeds, and I am bound by those words.

Just as I am bound by the words Congress chooses, I must also enforce every defendant's rights. Our system of laws requires more than allegations of contemptuous conduct. Criminal statutes must be strictly read according to their text, context, the rules of statutory interpretation, and in harmony with due process principles. In this case, the plain text and context of the statutes that Defendants are charged under do not make it clear that possession, distribution, or other conduct related to poppy seeds is unlawful. On the contrary, the canons of statutory interpretation and fundamental principles of due process make it clear that poppy seeds are lawful. For the reasons stated herein, all of the counts alleged against Defendants in the superseding indictment [ECF No. 98] are hereby DISMISSED.

***18** As referenced above, the principles that underpin the rule of lenity echo the importance of the conclusion in this case:

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> Doubtless, lenity carries its costs. If judges cannot enlarge ambiguous penal laws to cover problems Congress failed to anticipate in clear terms, some cases will fall through the gaps and the legislature's cumbersome processes will have to be reengaged. But, as the framers appreciated, any other course risks rendering a self-governing people "slaves to their magistrates," with their liberties dependent on "the private opinions of the judge." ... From the start, lenity has played an important role in realizing a distinctly American version of the rule of law—one that seeks to ensure people are never punished for violating just-so rules concocted after the fact, or rules with no more claim to democratic provenance than a judge's surmise about legislative intentions.

Wooden v. United States, 595 U.S. 360, 391–92 (2022) (Gorsuch, J., concurring) (citation omitted).

IT IS THEREFORE ORDERED that the Defendants' joint motion to dismiss [ECF No. 79] is GRANTED. The superseding indictment [ECF No. 98] is DISMISSED.

All Citations

Not Reported in Fed. Supp., 2025 WL 360952

Footnotes

1 The motion to dismiss was filed before the superseding indictment, and it was directed at the initial indictment. The superseding indictment only makes typographical and similar corrections, and the charges remain the same. Because the same arguments raised by Defendants as to the indictment apply equally to the superseding indictment, I will address the merits of Defendants' motion as applied to the superseding indictment. *See* *United States v. Lewis*, No. 24-CR-00288-SEH, 2024 WL 4604388, at *1 (N.D. Okla. Oct. 29, 2024).

2 References to page numbers refer to the ECF header.

3 Every reference to poppy straw, seeds, or other parts of the poppy plant herein is a reference to Papaver somniferum L., a plant commonly known as the opium poppy.

4 During the hearing on Defendants' motion to dismiss, the government appeared to abandon this argument. Because this argument was briefed, however, I will address it.

5 The CSA does not individually define "opium," but that term appears in the definition of "narcotic drug."

6 Notably, although the definition of "immediate precursor" is "a substance ... which the Attorney General has found to be and by regulation designated as being the principal compound used, or produced primarily for use, in the manufacture of a controlled substance." 21 U.S.C. § 802(23)(A). However, the government has not identified any such regulation that specifically identifies poppy seeds coated with opium latex.

7 I acknowledge that Judge Holschuh says this reasoning is not the basis of his dissent, and that the larger constitutional notice issue with specifically omitting the khat plant from the drug schedules was his focus. Nevertheless, I find the reasoning on this point persuasive.

8 It is unclear why the government focuses here on the amount of opium latex on seeds. Elsewhere, the government argues that it is the defendants' knowledge that makes the case, not the amount of latex. [ECF No. 86 at 16] ("Since the McCarthys unquestionably knew they were distributing opiates ... the government is not 'incapable' of proving the violations stemming from § 841(a)(1) 'as a matter of law.' "). To the extent that the government is *also* arguing that the amount of opium latex coating poppy seeds is relevant to whether

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they are a controlled substance or are otherwise prohibited by the CSA, I will address the due process issues with the government's position.

9 Notably, the government alleges in the superseding indictment that "*Industry standard* requires suppliers to process the poppy seeds to an edible food grade standard." [ECF No. 98 at 3] (emphasis added). The government does not say what that industry standard is, nor does it point to any statutory or regulatory standards.

10 Because H.R. 2078, 116th Cong. (2019) and S. 1016, 116th Cong. (2019) are identical, I will refer to them collectively as "HR 2078."

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174 F.4th 1254
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellant,
v.
Brandon David MCCARTHY; Rachel Christine McCarthy, Defendants - Appellees.

No. 25-5026
|
FILED May 6, 2026

Synopsis

Background: Defendants who were charged with multiple counts including distributing and possessing unprocessed poppy seeds as materials used to manufacture controlled substances moved to dismiss all charges. The United States District Court for the Northern District of Oklahoma, Sara E. Hill, J., 2025 WL 360952, granted motion. Government appealed.

Holdings: The Court of Appeals, Hartz, Circuit Judge, held that:

process of making poppy-seed tea could be described as "extraction" from substances of natural origin under the Controlled Substances Act (CSA), and thus a reasonable jury could infer that such process constituted "manufacturing" of a controlled substance, and

poppy seeds constituted "material" under CSA, as required to support charges of knowingly and intentionally distributing a material used to manufacture a controlled substance, knowing, intending, and having reasonable cause to believe that material would be used to manufacture a controlled substance.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 4:23-CR-00359-SEH)

Attorneys and Law Firms

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Before HARTZ, TYMKOVICH, and EID, Circuit Judges.

Opinion

HARTZ, Circuit Judge.

***1257** The government appeals the dismissal of several charges in an indictment against Defendants Brandon and Rachel McCarthy. The issue before us is whether Defendants can be prosecuted for selling unprocessed poppy seeds, even if they are not controlled substances, if Defendants knew that the poppy seeds would be used as a precursor to manufacture a controlled substance—namely, poppy-seed tea, which contains opioids. Exercising jurisdiction under 18 U.S.C. § 3731, we reverse the dismissal of the disputed charges.

I. BACKGROUND [1]

Under the Controlled Substances Act (the CSA or the Act), 21 U.S.C. § 801 et seq., poppy seeds are explicitly excluded from the definitions of two substances listed as Schedule II controlled substances: *opium poppy* and *poppy straw*. *See* 21 U.S.C. § 802(19)–(20) (definitions); 21 C.F.R. § 1308.12 (Schedule II). The inside of an opium poppy pod, however, is coated with opium latex, a milky, sap-like substance, which contains opiate alkaloids, including morphine, codeine, and thebaine, which *are* controlled substances. After harvesting, unprocessed poppy seeds—typically marketed as "unwashed," "organic," or "natural"—have some opium latex coating. Aplt. App. 139. The industry standard requires that for poppy seeds to be food-grade, they must be processed to remove the coating.

Defendants Brandon and Rachel McCarthy operated Lone Goose Bakery as an online store primarily selling unprocessed poppy seeds coated in opium latex. Defendants would buy the seeds in bulk and repackage them in smaller

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bags for their customers. Most customers were individuals who purchased the seeds for personal consumption, not bakeries or retail businesses.

Defendants published eBooks and videos about poppy-seed tea. Poppy-seed tea is brewed by steeping large quantities of unprocessed poppy seeds in water to separate out the opium latex. Consuming poppy-seed tea causes effects similar to consuming pharmaceutical opiates and can lead to addiction, unconsciousness, overdose, and death. Defendants' books and videos, which discussed unprocessed poppy seeds sold by Lone Goose Bakery, provided guidance and recipes for making poppy-seed tea. One serving of Defendants' recipes for poppy-seed tea could expose consumers to about one gram of morphine.

Defendants' publications acknowledged that consuming tea from its poppy seeds could cause an opiate overdose. And that happened at least once. In December 2018 a customer purchased two five-pound shipments of unprocessed poppy seeds from Defendants, drank poppy-seed tea, and died from an overdose.

***1258** In January 2025 a grand jury of the United States District Court for the Northern District of Oklahoma returned a 41-count superseding indictment against Defendants. All the counts arose out of Defendants' poppy-seed business. Some relied on the contention that the poppy seeds were controlled substances; others relied on the contention that the seeds were precursors for controlled substances. Defendants moved to dismiss all charges on the grounds (1) that the CSA excludes prosecution of the sale and possession of poppy seeds, (2) that if the Act is ambiguous in that regard, the rule of lenity requires dismissal, and (3) the Act is unconstitutionally vague if it is construed to prohibit Defendants' sale and possession of poppy seeds. The district court granted the motion. [2]

The government appeals. It does not challenge the dismissal of "charges predicated upon allegations that [Defendants] distributed and possessed with intent to distribute controlled substances morphine, codeine, and thebaine"; it challenges only "the dismissal of charges predicated upon allegations that [Defendants] distributed and possessed drug precursors." Aplt. Br. at 14. We agree with the government and reverse the dismissal of the challenged counts.

II. DISCUSSION

A. Statutory Interpretation

The CSA "mak[es] it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Gonzales v. Raich*, 545 U.S. 1, 13, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (citing 21 U.S.C. §§ 841(a)(1), 844(a)). To further this mission, the CSA also forbids the possession or distribution of things that are to be used to manufacture controlled substances. *See* 21 U.S.C. § 843(a)(6) and (7). Counts 11 through 17 of the indictment against Defendants charged that they "knowingly and intentionally distributed unprocessed poppy seeds coated in opium latex, a *material* used to *manufacture* a controlled substance, knowing, intending, and having reasonable cause to believe that *material* would be used to *manufacture* a controlled substance," in violation of § 843(a)(7); and Count 18 charged that they "knowingly and intentionally possessed unprocessed poppy seeds coated in opium latex, a *material* used to *manufacture* a controlled substance, knowing, intending, and having reasonable cause to believe that *material* would be used to *manufacture* a controlled substance," in violation of § 843(a)(6). [3] ***1259** Aplt. App. at 153–54 (emphasis added). [4]

The statutory terms at issue on appeal are *material* and *manufacture*. Defendants argue that the poppy seeds they distributed and processed are not *material* within the meaning of the statute [5] and that the production of poppy-seed tea containing controlled substances is not the *manufacture* of a controlled substance within the meaning of the statute. We disagree.

1. *Plain Meaning*

Because the issue before us is one of statutory construction, our review is de novo. *See United States v. Wood*, 6 F.3d 692, 694 (10th Cir. 1993). "When interpreting the language of a statute, the starting point is always the language of the statute itself." *United States v. Quarrell*, 310 F.3d 664, 669 (10th Cir. 2002).

We first address the meaning of *manufacture*. *See* 21 U.S.C. § 843(a)(6)–(7). Defendants contend that *manufacturing* plainly " 'connote[s] ... the creation of a final product from component ingredients.' " Aplees. Br. at 30 (quoting *United States v. Fields*, 53 F.4th 1027, 1049 (6th Cir.

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2022)). Accordingly, they argue that because the controlled substances already exist on the poppy seed, merely removing the controlled substances into the tea cannot be manufacturing; for example, they say, applying the "common usage" of the term, fruit juices are not *manufactured* from a fruit. *Id.*

This argument ignores the statutory language. The CSA defines *manufacture* to include:

> the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by *extraction from substances of natural origin*.

21 U.S.C. § 802(15) (emphasis added). "When a statute includes an explicit definition, we must follow that definition, even if it varies from a term's ordinary meaning." *Digital Realty Tr., Inc. v. Somers*, 583 U.S. 149, 160, 138 S.Ct. 767, 200 L.Ed.2d 15 (2018) (internal quotation marks omitted). We need not determine the full scope of this definition, because the only language of interest here is "extraction from substances of natural origin." 21 U.S.C. § 802(15).

The CSA does not define *extraction*. When a statute does not define a term, "we give the term its ordinary meaning." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 85, 138 S.Ct. 1134, 200 L.Ed.2d 433 (2018) (internal quotation marks omitted). The *Oxford English Dictionary* ***1260** defines *extraction* as including "[t]he action or process of obtaining (the constituent elements, juices, etc.) from any substance by heat, pressure, etc." *Extraction*, *Oxford English Dictionary*, Oxford Univ. Press (online ed. 2026), https://doi.org/10.1093/OED/5161799191 [https://perma.cc/Y48X-N3WB]. Of particular relevance, it defines *water extract* as "[a]n extract of a substance made by dissolving or steeping it in water." *Water Extract*, *Oxford English Dictionary*, Oxford Univ. Press (online ed. 2026), https://doi.org/10.1093/OED/4520155170 [https://perma.cc/JS5P-LM47]. And this notion of *extract* is confirmed by a definition of *infusion* as "[a] dilute liquid *extract* obtained from a substance by soaking it with, or steeping it in, water." *Infusion*, *Oxford English Dictionary*, Oxford Univ. Press (online ed. 2026), https://doi.org/10.1093/OED/8680568360 [https://perma.cc/AUE3-GNPR] (emphasis added).

The indictment alleges that "[p]oppy seed tea is an herbal infusion" created when "large quantities of unprocessed poppy seeds coated in opium latex are steeped in water to remove the opium latex," and the resulting liquid contains several controlled substances (morphine, codeine, and thebaine). Aplt. App. at 139–40. Applying the above definitions, the process of making poppy-seed tea can be described as extracting controlled substances from unprocessed poppy seeds. And under the CSA, "extraction from substances of natural origin" is manufacturing. 21 U.S.C. § 802(15). We therefore must conclude that producing poppy-seed tea is manufacturing.

Our caselaw confirms this usage. In *United States v. Beaulieu*, 900 F.2d 1531, 1534 (10th Cir. 1990), we considered whether there was sufficient evidence that the defendant manufactured amphetamine. Officers searched the defendant's home "and found a single burner heating device, two bottles of brown liquid and glassware." *Id.* at 1532–33. A chemist testified that one bottle contained "a solution of amphetamine dissolved in ether and that sufficient amphetamine existed to extract it from the ether." *Id.* at 1533. And a DEA agent testified that the burner, liquid, and glassware could be used "to manufacture amphetamine by the 'powdering out' process." *Id.* Powdering out was described as a process in which a person "place[s] a clear dish on the heating device along with a small amount of the amphetamine-ether solution. After the heating device evaporated the ether, the resulting white powdery substance would be unlawful amphetamine sulfate." *Id.* We concluded that "a reasonable jury could infer that the defendant *manufactured* amphetamine by using the 'powdering out' process to *extract* amphetamine from ether to produce unlawful white powder amphetamine." *Id.* at 1534 (emphasis added). The same description would apply to extracting opiates from unprocessed poppy seeds as described in the indictment.

The word *material* also is not defined in the CSA. So, again, we begin by looking at its ordinary meaning. The *Oxford English Dictionary* defines *material* as "[m]atter (not precisely characterized); that which constitutes the substance of a thing(physical or non-physical); a physical substance; a material thing" or "[t]he matter or substance from which a thing is or may be made." *Material, Oxford English Dictionary*, Oxford Univ. Press (online ed. 2026), https://doi.org/10.1093/OED/1020560189 [https://perma.cc/G65U-ELNB]; *see also Material*, *Black's Law Dictionary* (12th ed. 2024) ("[t]he things that are used for making or doing

something" or "[a] solid substance such as wood, plastic, metal, or paper"). These are very broad definitions, which would certainly appear to encompass poppy seeds. ***1261** And when we look to the use of the term in the CSA, we are confirmed in that application. *See United States v. Theis*, 853 F.3d 1178, 1181 (10th Cir. 2017) (in determining the meaning of a word in a statute, "we must ... consider both the specific context in which the word is used and the broader context of the statute as a whole"). The word appears in the phrase "any ... *material* which may be used to manufacture a controlled substance or listed chemical." 21 U.S.C. § 843(a)(6)–(7) (emphasis added). We can see no reason to exclude poppy seeds from the natural meaning of the word *material*.

Defendants do not seriously take issue with this plain meaning. But they invoke canons of interpretation to suggest a more limited meaning of the statutory term. We are not persuaded.

2. In Pari Materia

In pari materia is Latin for "in the same matter." Antonin Scalia & Brian A. Garner, *Reading Law* 430 (2012). "It is a canon of construction that statutes *in pari materia* should be construed together, so that ambiguities in one statute may be resolved by looking at another statute on the same subject." *Id.*

Defendants argue that § 843(a)(6) and (7) should be interpreted in light of § 802(19) and (20), which define *opium poppy* as "the plant of the species Papaver somniferum L., except the seed thereof" and *poppy straw* as "all parts, except the seeds, of the opium poppy, after mowing." "Opium poppy" and "poppy straw" are listed as Schedule II substances in 21 C.F.R. § 1308.12(b)(3), so the statutory exception for poppy seeds precludes prosecution for the possession or distribution of poppy seeds as Schedule II substances. Defendants' argument appears to be that given the exclusion of poppy seeds from the controlled-substance schedule, it would be contradictory, or at least irregular, to allow poppy seeds to be prosecuted as a precursor to a controlled substance.

But a great variety of substances that do not appear in the controlled-substance schedules can be prosecuted when they perform a role in manufacturing controlled substances. *See, e.g.*, *United States v. Walls*, 293 F.3d 959, 968 (6th Cir. 2002) (chemicals and equipment used to manufacture methamphetamine included Red Devil lye, propane torch, and coffee filter); *United States v. Venters*, 539 F.3d 801, 803 (7th Cir. 2008) (materials and equipment used to manufacture methamphetamine included lithium batteries, coffee filters, blender, and drain cleaner). Indeed, there would be little point in the CSA provisions prohibiting possessing and distributing precursors used to manufacture controlled substances if every precursor was already a controlled substance whose possession and distribution is prohibited.

To be sure, it *is* unusual for a potential precursor to be explicitly excluded from a controlled-substance schedule. But there is no mystery why the same substance would not appear on a schedule yet still be subject to prosecution as a precursor that can be used to manufacture a controlled substance. Recall that possession or distribution of a precursor is prohibited only if the possessor or distributor "know[s], intend[s], or [has] reasonable cause to believe[ ] that it will be used to manufacture a controlled substance." 21 U.S.C. § 843(a)(6)–(7). If a substance is not dangerous in general, there may be good reason not to prohibit its possession or distribution as a controlled substance while prohibiting its possession or distribution when the intent is to use it to manufacture a dangerous substance. We said as much in *United States v. Truong*, which explained the CSA treatment of pseudoephedrine:

> ***1262** Presumably because of the large-scale legitimate use of pseudoephedrine as a cold remedy, and a concern about not imposing unreasonable duties or risk of criminal liability on the pharmacies and convenience stores that sell this common product, Congress limited the reach of 21 U.S.C. §§ 841 and 843 to sellers with the actual knowledge or intent ... that it would be used to manufacture methamphetamine.

425 F.3d 1282, 1291 (10th Cir. 2005).

The indictment here alleges similar circumstances for poppy seeds. It states that poppy seeds can be possessed and distributed in a useful, nondangerous manner. For example, suppliers can "process [imported unprocessed] poppy seeds to an edible food grade standard" and distribute them to retailers

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for resale "as a food product to individuals for consumption." Aplt. App. at 140. In contrast, Defendants allegedly possessed and distributed unprocessed poppy seeds for individuals to make poppy-seed tea and extract opiates, not, say, for bakeries to use for food products. And the government can secure a conviction only if it proves, beyond a reasonable doubt, that Defendants in fact knew or intended that the poppy seeds would be used to manufacture opioids. *See* 21 U.S.C. § 843(a)(6)–(7).

Defendants suggest that it makes no sense to permit prosecution of possession or distribution of poppy seeds when intended for use in poppy-seed tea, because the prohibited chemicals in the tea are on the poppy seeds to begin with. It argues that "if Congress thought that poppy seeds were dangerous enough in and of themselves to be regulated in some fashion, but did not want to impose Schedule II penalties, then it could have listed them under a lower schedule," or "it could have narrowed its regulation in some other way, such as by including poppy seeds within the definition of the opium poppy plant unless the seeds have been washed." Aplees. Br. at 21–22. But then every importer of unprocessed poppy seeds who serves the bakery industry would be subject to regulation under the CSA. It seems to us eminently reasonable to limit regulation and prosecution to those who possess or distribute the unprocessed poppy seeds for their opioid qualities as opposed to their qualities for baking.

In short, there is good reason to treat poppy seeds as not being controlled substances while including them as prohibited precursors in the right circumstances. The statutory context (the exclusion of poppy seeds from controlled-substance schedules) does not imply otherwise. That is, the exclusion of poppy seeds from Schedule II of the CSA does not imply that poppy seeds are not a *material* for purposes of 21 U.S.C. § 843(a)(6)–(7).

3. Noscitur a Sociis *and* Ejusdem Generis

The *noscitur a sociis* canon "instructs that when a statute contains a list, each word in that list presumptively has a 'similar' meaning." *Yates v. United States*, 574 U.S. 528, 549, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (Alito, J., concurring). And under the *ejusdem generis* canon, "a general or collective term at the end of a list of specific items is typically controlled and defined by reference to the specific classes that precede it." *Fischer v. United States*, 603 U.S. 480, 487, 144 S.Ct. 2176, 219 L.Ed.2d 911 (2024) (ellipsis and internal quotation marks omitted). For example, "if a statute is said to apply to 'tacks, staples, nails, brads, screws, and fasteners,' it is clear from the words with which they are associated that the word *nails* does not denote fingernails and that *staples* does not mean reliable and customary food items." Scalia & Garner, *supra*, at 196. Defendants invoke these canons in ***1263** support of their preferred interpretation of the CSA. We are not persuaded.

Section 843(a)(6)–(7) criminalizes the possession or distribution of "any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance." Defendants contend that the interpretation of a "material which may be used to manufacture a controlled substance" should be constrained by the references to "three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule" and "equipment, chemical, product."

These related-meaning canons, however, apply only when terms are "conjoined in such a way as to indicate that they have some quality in common." Scalia & Garner, *supra*, at 196 (*noscitur a sociis* canon); *see id.* at 199 (a rationale for the *ejusdem generis* canon is that "[w]hen the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage"); *id.* at 209 (the *ejusdem generis* canon does not apply if "the specifics do not fit into any kind of definable category—the enumeration of the specific items is so heterogeneous as to disclose no common genus" (internal quotation marks omitted)).

Before applying the canons to the contested statutory language, we note some statutory history that clarifies our task. The original version of 21 U.S.C. § 843(a)(6) and (7) prohibited the possession and distribution of only "any three-neck round-bottom flask, tableting machine, encapsulating machine, gelatin capsule, or equipment specially designed or modified to manufacture a controlled substance, knowing that it will be used to manufacture a controlled substance." Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, tit. VI, sec. 6057, 102 Stat. 4181, 4319. But when the statute was amended in 1993, Congress removed the requirement that items be "specially designed or modified to manufacture a controlled substance" and

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replaced "gelatin capsule, or equipment" by "or gelatin capsule, or any equipment, chemical, product, or material." Domestic Chemical Diversion Control Act of 1993, Pub. L. No. 103-200, sec. 3(g)(1), 107 Stat. 2333, 2337–38. This revision shows that Congress had two groupings in mind: (1) the original specific items: "three-neck round-bottom flask, tableting machine, encapsulating machine, [and] gelatin capsule," followed by (2) four new broad catch-all terms: "equipment, chemical, product, or material."

The canons apply only if the specific items have a feature in common that should restrict our interpretation of the catch-all terms. For example, the term *chemical* would encompass only those chemicals that fit within a genus implied by the specific items listed. Defendants contend that "the list invokes items and substances used in deliberate production processes, not naturally occurring raw substances that already are controlled or that contain controlled substances in their native state." Aplees. Br. at 25. We think that a bit of a stretch. None of the specific listed items are chemicals, nor could they be reliably interpreted to limit the term *chemical* in any definite way. To use the specific items listed as a means to define a genus that limits the types of chemicals encompassed by the statute (such as excluding "naturally occurring" chemicals) requires far too much imagination to be a reliable guide for interpreting the provision. And Defendants ignore the definition of *manufacture*, which includes "extraction ***1264** from *substances of natural origin*," 21 U.S.C. § 802(15) (emphasis added), a not-so-subtle clue in the statute that a prosecutable precursor could be a naturally occurring substance.

Likewise, one could ask how the meaning of the final word *material* is limited by a common feature of the three preceding general words: *equipment*, *chemical*, and *product*. Again, picking a common feature applicable to the issue before us requires a creativity that goes beyond our comfort zone in construing statutes. Also, we should be particularly cautious in concocting a common feature since all four words are preceded by the modifier *any*, which is generally interpreted to apply broad meaning to subsequent nouns. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218–19, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) ("We have previously noted that read naturally, the word *any* has an expansive meaning, that is, one or some indiscriminately of whatever kind" (brackets and internal quotation marks omitted) (italics added)). We conclude that the two related-meaning canons do not restrict the CSA meaning of *material* to exclude poppy seeds.

4. *Surplusage*

Defendants next contend that a broad reading of the phrase "any ... material which may be used to manufacture a controlled substance" makes the other terms ("any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product") mere surplusage. Yes, we "presum[e] that statutory language is not superfluous." *McDonnell v. United States*, 579 U.S. 550, 569, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016) (internal quotation marks omitted). But this is a presumption, not a rigid command. *See Stanley v. City of Sanford*, 606 U.S. 46, 56, 145 S.Ct. 2058, 222 L.Ed.2d 331 (2025) ("[T]he canon against surplusage is not an absolute rule[,] [a]nd it certainly does not require us to favor an unusual meaning that will avoid surplusage over a more natural one" (brackets, citation, and internal quotation marks omitted)).

"Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." Scalia & Garner, *supra*, at 176**.** And we should not be too judgmental. What may seem ill-conceived to a gifted writer may be politically necessary for a legislator. Congress may, for example, "use[ ] broad, overlapping terms" to ensure that a subject is covered. *U.S. Postal Serv. v. Konan*, —— U.S. ——, 146 S. Ct. 736, 746, —— L.Ed.2d —— (2026) (interpreting *miscarriage* and *loss* in postal-immunity provision in a potentially redundant manner, but explaining that Congress may have deployed the "overlapping terms to better keep complaints about mail delivery out of court"). It also "may on occasion repeat language in order to emphasize it." *Marx v. Gen. Revenue Corp.*, 668 F.3d 1174, 1183 (10th Cir. 2011) ("[I]f canons of construction are to be invoked, the appropriate one is that of *ex abundanti cautela* (abundance of caution)"), *aff'd on other grounds*, 568 U.S. 371, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013). Indeed, in a survey of congressional committee counsel with drafting responsibility, almost 20% said that Congress may purposefully include surplusage "to ensure that the statute covers the intended terrain" or to satisfy "political interests" of representatives, constituents, and lobbyists who demand that certain words or phrases be included. Abbe R. Gluck & Lisa Schultz Bressman, ***1265** *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 934 (2013). The CSA itself illustrates the point. It defines *controlled substance* as "a drug or other

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substance," 21 U.S.C. § 802(6), although every drug is a substance.

In short, we see no reason to depart from the common meaning of the term *material*, or the terms *chemical* and *product*. The natural, and best, reading of the statute is that Congress amended the provision in 1993 to make it comprehensive, using several broad overlapping terms to cover any escape hatches for those engaged in producing controlled substances.

5. *Lenity, Vagueness, and Constitutional Avoidance*

Finally, having concluded that the natural reading of § 843(a)(6) and (7) encompasses the conduct with which Defendants are charged, we can summarily dispose of their remaining arguments. Defendants invoke the rule of lenity and contend that their construction of the law must be adopted for it to be constitutional because otherwise it would be unconstitutionally vague. *See United States v. Davis*, 588 U.S. 445, 464, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019) (the rule of lenity "teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor"); *id.* at 463 n.6, 139 S.Ct. 2319 (canon of constitutional avoidance requires courts, if possible, to "interpret ambiguous statutes to avoid rendering them unconstitutional"). As acknowledged by Defendants, however, these arguments fail if the statute is not ambiguous. We reject these arguments because we see no ambiguity in the statute as applied in this case.

Similarly, Defendants argue that the statute is unconstitutionally vague. *See United States v. Lesh*, 107 F.4th 1239, 1247 (10th Cir. 2024) (stating that a law may be unconstitutionally vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement" (internal quotation marks omitted)). In particular, (1) they claim that under the government's broad interpretation of the CSA, the statute could "extend to anything at all (*e.g.*, a syringe or a spoon) that could be used, in even a minor way, to make it easier for a drug user to consume a controlled substance," Aplees. Br. at 38; (2) they say that the statute provides no textual ground to distinguish between processed and unprocessed poppy seeds, "nor any reasonably identifiable line for how much opium latex is acceptable to have on poppy seeds under the CSA," *id.* (internal quotation marks omitted); and (3) they claim that the statute as interpreted by the government would be "affirmatively misleading" because of the specific exemption of poppy seeds from Schedule II, *id.* at 37.

But we are not concerned with whether the law may be vague as "applie[d] to *other* defendants in *other* cases"; a defendant "may complain *only* about the vagueness of the law as it applies *in his own case*." *United States v. Baldwin*, 745 F.3d 1027, 1031 (10th Cir. 2014) (Gorsuch, J.). Defendants' indictment was not based on a notion of manufacturing that included use of a spoon or syringe, and we established above that the manufacturing alleged in this case clearly satisfied the statutory definition. Nor is there any need to worry about where to draw the line on how much opium latex was on the seeds that Defendants possessed and distributed; the indictment alleges that there was enough latex to produce controlled substances. And we are not inclined to recognize a doctrine excusing criminal conduct by supposing that a perpetrator was misled by reading only a "helpful" (although cabined) portion of a statute (the CSA provision ***1266** excluding poppy seeds from Schedule II), while ignoring the portion (§ 843(a)(6) and (7)) that the perpetrator violated.

B. Count 20

Count 20 of the indictment charges a money-laundering conspiracy under 18 U.S.C. § 1956(h). The parties disagree about whether that count should be reinstated if we reinstate the precursor counts. The district court should resolve this issue on remand.

III. CONCLUSION

We **REVERSE** in part the district court's dismissal of the superseding indictment and **REMAND** to the district court for further proceedings consistent with this opinion.

All Citations

174 F.4th 1254

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Footnotes

1 On review of the dismissal of an indictment, we assume the allegations in the indictment to be true. *See United States v. Todd*, 446 F.3d 1062, 1067 (10th Cir. 2006).

2 Defendants also moved to dismiss on the grounds that poppy-seed regulation was delegated exclusively to the Food and Drug Administration and that they relied on the government's approval of their business since they obtained the poppy seeds in compliance with the Foreign Supplier Verification Program and received a trademark for Lone Goose Bakery. The district court rejected those grounds. Because Defendants do not raise those issues on appeal, we do not consider them.

3 Under § 843(a)(6) and (7) it is "unlawful for any person knowingly or intentionally":

> (6) to possess any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or *material* which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to *manufacture* a controlled substance or listed chemical in violation of this subchapter or subchapter II; [or] (7) to manufacture, distribute, export, or import any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or *material* which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to *manufacture* a controlled substance or listed chemical in violation of this subchapter or subchapter II or, in the case of an exportation, in violation of this subchapter or subchapter II or of the laws of the country to which it is exported[.]

21 U.S.C. § 843(a) (emphasis added).

4 Although the phrase *having reasonable cause to believe* could be read to say "that the *mens rea* element of [precursor] offenses could be either subjective or objective," this court has interpreted the statute to require the government to show "actual knowledge, or something close to it." *United States v. Truong*, 425 F.3d 1282, 1289 (10th Cir. 2005).

5 The government asserts on appeal that unprocessed poppy seeds could constitute a "*chemical, product, or* material which may be used to manufacture a controlled substance." Aplt. Br. at 20 (emphasis added) (internal quotation marks omitted). But the superseding indictment charged only the possession and distribution of "a material." Aplt. App. 153–54. When an indictment charges that a crime was committed in a particular fashion, those particulars "become[ ] an essential and delimiting part of the charge itself." *United States v. Farr*, 536 F.3d 1174, 1181 (10th Cir. 2008) (Gorsuch, J.). We therefore consider only whether unprocessed poppy seeds may constitute a *material* within the meaning of the statute.

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FILED
United States Court of Appeals
Tenth Circuit

July 17, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

BRANDON DAVID MCCARTHY;
RACHEL CHRISTINE MCCARTHY,

Defendants - Appellees.

No. 25-5026
(D.C. No. 4:23-CR-00359-SEH-1)
(N.D. Okla.)

ORDER

Before **HARTZ**, **TYMKOVICH**, and **EID**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appellee's *Motion for Leave To File Reply* to Appellant's response to the petition for rehearing (Dkt. No. 62) is granted and the reply is filed as submitted (Dkt. No. 63).

Entered for the Court

Per Curiam

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Office of the Clerk
Washington, DC 20543-0001

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October 13, 2026

Clerk
United States Court of Appeals for the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

Re: Brandon David McCarthy and Rachel Christine McCarthy
v. United States
Application No. 26A475
(Your No. 25-5026)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Gorsuch, who on October 13, 2026, extended the time to and including November 16, 2026.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by H. C.
Howard Cook
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

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