No. _____

IN THE
Supreme Court of the United States

DR. GAZELLE CRAIG,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JACK B. ZIMMERMANN
Counsel of Record
Zimmermann Lavine &
Zimmermann, P.C.
770 South Post Oak Lane, #620
Houston, Texas 77056
(713) 552-0300
Jack.Zimmermann@ZLZSlaw.com

TERRI R. ZIMMERMANN

Zimmermann Lavine &
Zimmermann, P.C.
770 South Post Oak Lane, #620
Houston, Texas 77056
(713) 552-0300
Terri.Zimmermann@ZLZSlaw.com

February 19, 2021

QUESTION PRESENTED

Dr. Gazelle Craig was a licensed physician working at a pain clinic with clinic manager and co-Defendant Shane Faithful. Both were convicted of conspiracy to distribute and distribution of controlled substances based on patients filling prescriptions that Dr. Craig wrote that were allegedly not medically necessary, and therefore, unlawful.

The Controlled Substance Act defines dispensing and distributing controlled substances as mutually exclusive acts, with "dispensing" involving a prescription and "distributing" involving delivery other than by dispensing.

The question presented is:

> When Dr. Craig wrote a prescription for a controlled substance that was not medically necessary, did her conduct constitute "dispensing," "distributing," or both under the Controlled Substance Act?

RELATED PROCEEDINGS

In the United States District Court for the Southern District of Texas:

United States v. Gazelle Craig, D.O.; Shane Faithful,
No. 4:17-CR-419-1
Judgment entered September 20, 2018

In the United States Court of Appeals for the Fifth Circuit:

United States v. Gazelle Craig, D.O.; Shane Faithful,
No. 18-20671, 823 F. App'x 231 (5th Cir. 2020)
Judgment entered August 4, 2020
Order Denying Rehearing En Banc entered September 22, 2020

In the United States Supreme Court:

Shane Faithful v. United States
Petition for Certiorari filed February 11, 2021

* Raising the same issue regarding the circuit split as to the interpretation of the relevant statute as in the instant Petition

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PETITION FOR WRIT OF CERTIORARI

Dr. Gazelle Craig respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The decision of the Court of Appeals for the Fifth Circuit is unpublished but available at *United States v. Gazelle Craig, D.O.; Shane Faithful*, 823 F. App'x 23 (5th Cir. 2020), at Appendix (App.) A, 1a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals entered judgment on August 4, 2020 and denied en banc rehearing on September 22, 2020. App. A, 1a, App. B, 36a. On March 19, 2020, due to the coronavirus pandemic, this Court extended all deadlines of pending cases by 150 days from the entry of the Order Denying Rehearing En Banc in the Court of Appeals. The deadline to file this Petition for Writ of Certiorari is therefore February 19, 2021.

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(a)(1) provides:

> Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense a controlled substance.

21 U.S.C. § 802(10) provides:

> The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to

> prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

21 U.S.C. § 802(11) provides:

> The term "distribute" means "to deliver (*other than by administering or dispensing*) a controlled substance or a listed chemical."(emphasis added).

Additional relevant statutory provisions are at App. C, 38a.

STATEMENT OF THE CASE

A. Material Facts.

In July of 2017, Petitioner Dr. Gazelle Craig and Mr. Shane Faithful were named as co-defendants in a four-count indictment alleging a conspiracy to violate Section 841(a)(1) by unlawfully dispensing and distributing controlled substances and three distinct substantive violations of the same section based on alleged unlawful dispensing and distributing controlled substances. The charges stemmed from a Drug Enforcement Agency investigation into Gulfton Community Health Center, a pain clinic located in Houston, Texas based on suspicion that Dr. Craig, the clinic's sole physician, aided and abetted by Mr. Faithful, the clinic's administrator, was consistently prescribing two controlled pain medications—hydrocodone (Norco) and carisoprodol (Soma)—"not with a legitimate medical purpose and outside the scope of professional practice." App. A, 2a-5a.

The Government presented evidence that "facilitators" recruited "patients" they brought to the clinic in exchange for money and other items such as food, where after a cursory examination, Dr. Craig prescribed hydrocodone and carisoprodal, controlled

substances, to the patients. The facilitators then took the patients to a pharmacy to fill the prescriptions, and the patients would give the pills to the facilitators in exchange for cash. Apparently the clinic enforced rules not normally seen in doctors' offices such as accepting cash only and restricting the use of cell phones and other electronic devices. App. A, 2a-5a.

The government presented its case on the theory that Dr. Craig, with Mr. Faithful's help, violated the CSA each time she issued a prescription to a clinic patient because profit, not medical treatment, motivated her diagnosis.[1] In other words, the theory was that Dr. Craig wrote prescriptions that were not medically necessary.

After the government rested its case, defense counsel for Dr. Craig and Mr. Faithful jointly orally moved for judgment of acquittal under Federal Rule of Criminal Procedure 29; the district court denied the motions. App. A, 7a-8a. Dr. Craig then presented a short defense, Mr. Faithful entered one exhibit, and the evidence closed. App. A, 8a.

The Government then abandoned the "dispensing" language; the prosecutors only argued that, "Dr. Craig *distributed* controlled substances by writing prescriptions for Norco and Soma without a legitimate medical purpose and outside the scope of professional practice," and "[a]s a co-conspirator and somebody who assisted her in the operation, Shane Faithful is as guilty as if he was the one holding the pen." C.A.5

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[1] After the district court granted a mistrial based on a hung jury, the Government retried both defendants and presented its case almost exactly as it had in the first trial. This appeal follows the second trial.

Record on Appeal at 4321 (emphasis added); *see also* App. A, 25a. Further, the Government requested that the District Court only instruct the jury on the offense of "distribution," and submitted the jury verdict form that the court used that asked the jury to determine whether both defendants were guilty or not guilty only of conduct involving "Unlawful Distribution of a Controlled Substance." App. A, 12a.

The jury convicted both defendants of all charges. Dr. Craig and Mr. Faithful filed a timely joint motion styled as "Co-Defendants[‘] Rule 33 Motion for New Trial," challenging the sufficiency of the evidence. App. A, 9a. The Government did not respond, and the district court denied the motion. The district court sentenced both defendants to 420 months—or 35 years—in prison. App. A, 5a.

On appeal, Dr. Craig and Mr. Faithful challenged their convictions and sentences; specifically, they both challenged the sufficiency of the evidence. The sufficiency claim centered on whether the trial evidence proved, as the jury found, that they conspired to, and on three occasions did, *distribute* the charged substances. They contended that the answer—in their view, "no"—was controlled by the plain language of the statute and the Fifth Circuit's holding, in *United States v. Leigh*, 487 F.2d 206, 208 (5th Cir. 1973), that a physician's unauthorized prescribing of controlled substances comes within the statutory meaning of "dispense," and thus necessarily falls outside the meaning of "distribute."

A panel of the Court of Appeals for the Fifth Circuit affirmed the convictions and sentences. App. A, 35a. As to the sufficiency claim, the Court of Appeals first deemed plain error the governing standard of review, concluding that Petitioners' post-verdict

motion neither renewed nor raised a sufficiency of the evidence challenge to the satisfaction of Federal Rule of Criminal Procedure 29(c). App. A, 7a-10a. The Court noted, however, that this did not impact its disposition of the merits—the same result would obtain even on de novo review. App. A, 11a.

On the merits, the panel held that it was not bound by *Leigh*; that the interpretive issue was instead "controlled by" a later panel's decision in *United States v. Harrison*, 651 F.2d 353 (5th Cir. 1981). Further, the court held that, under *Harrison*, evidence of a physician's delivery-by-prescription may support a conviction for either unlawful dispensation or unlawful distribution, as long as the jury is required to find the separate, non-medical purpose element. App. A, 13a-15a. Thus, the panel found that sufficient evidence supported the convictions involving unlawful distribution. *Id.*

Judge Haynes concurred "in the judgment only." App. A, 35a. She did not identify the portions of the panel's reasoning that she did not join. The Court of Appeals denied a timely petition for en banc rehearing. App. A, 36a-37a.

B. The Controlled Substance Act Makes a Clear Distinction Between "Dispensing" and "Distributing" Controlled Substances.

In pertinent part, the Controlled Substances Act makes it unlawful for "any person" to knowingly "distribute" or "dispense" any controlled substance unless otherwise authorized by the Act. 21 U.S.C. § 841(a)(1). The CSA elsewhere authorizes licensed physicians and other "practitioners" to engage in each of these behaviors, subject to certain conditions and regulations such as registration. *See, e.g.,* 21 U.S.C.

§ 821, 822, 823. The statute makes clear that practitioners are authorized to prescribe controlled substances and that such prescriptions may be written or oral, depending on the circumstances. 21 U.S.C. § 829. However, to be lawful, prescriptions for a controlled substance "must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a); *see United States v. Moore*, 423 U.S. 122, 142 (1975) (holding that when doctors distribute or dispense drugs in ways that "exceed the bounds" of authorized professional practice, they are not exempt from criminal exposure).

Importantly, the CSA explicitly defines the two different methods of delivery that constitute a violation of the law when done without a proper medical purpose, dispensing and distributing:

> The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the *prescribing* and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery.

21 U.S.C. § 802(10) (emphasis added).

The term "distribute," on the other hand, "means to deliver (*other than by administering or dispensing)* a controlled substance or a listed chemical." 21 U.S.C. § 802(11) (emphasis added).

Either form of delivery may entail the "actual, constructive, or attempted transfer" of the relevant substance. 21 U.S.C. § 802(8). Almost a half-century ago, in *Leigh*, 487 F.2d at 208, the Fifth Circuit interpreted these provisions to "clearly mean[]

that a doctor who administers or prescribes a controlled substance is, for purposes of the statute, dispensing" that substance rather than distributing it. As more fully discussed, *infra*, various Courts of Appeals have interpreted the same statutory language – the meaning of "dispense" and "distribute" when a doctor delivers a controlled substance via prescription – in at least three different ways.

C. Basis for Federal Jurisdiction in the Court of First Instance.

The District Court for the Southern District of Texas had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Entered a Decision in Conflict with the Decisions of Other United States Courts of Appeals on the Same Important Matter – this Court Should Resolve the Circuit Split on the Crucial Question of Statutory Interpretation.

The Court of Appeals entered a decision in conflict with other Courts of Appeals. S.Ct.R. 10(a). In fact, the Courts of Appeals that have considered the meaning of the important terms – "dispense" and "distribute" – in the CSA have decided the question of a doctor's liability under the circumstances of this case (constructively delivering controlled substances only via writing a prescription) in three different ways:

1. The doctor is guilty only of *dispensing*.

2. The doctor is guilty only of *distributing*.

3. The doctor is guilty of *both* dispensing and distributing.

This question of statutory interpretation is important. Because of what has been termed the current "opioid crisis," the United States has prosecuted literally hundreds,

if not thousands, of doctors, pharmacists, and other defendants involved in the unlawful delivery of controlled substances. Despite identical underlying factual situations, the charging language, proof, and ultimate success of prosecutions involving similar facts depends entirely on where the lawsuit is tried. This Court should grant certiorari and settle the issue to ensure uniformity within federal courts addressing this issue across the country.

A. Jurisdictions Finding Prescribing is Dispensing Only (Group 1).

1. The Eleventh Circuit.

Interestingly, in this circuit a defendant made the exact opposite argument that Dr. Craig advanced below: Dr. Azmat argued that although he was a doctor who had prescribed controlled substances for illegal purposes, he could not be guilty of dispensing, as he was charged – but instead, that he distributed the drugs because he could not "deliver" a controlled substance via a prescription. *United States v. Azmat*, 805 F.3d 1018, 1033 (11th Cir. 2015). The court analyzed the statutory language and precedent from its own and other courts, and found that Dr. Azmat's argument "twists the statute's plain language." *Id.* at 1034. Specifically, the court held:

> Dr. Azmat's arguments wholly fail in light of our prior decisions. In *United States v. Leigh*, the former Fifth Circuit held for the first time that "a doctor who administers *or* prescribes a controlled substance is, for the purposes of the statute, dispensing it...." [*Leigh*,] 487 F.2d 206, 208 (5th Cir.1973) (emphasis added). Our subsequent decisions have followed this precedent, and this Court has consistently affirmed defendants' convictions for unlawfully "dispensing" controlled substances—by virtue of writing prescriptions—on the ground that "prescribing" constitutes "dispensing."

Id. at 1033.[2] The court explicitly referred to *Leigh* as "binding precedent." *Id.* at 1033 n.3. Holding that, "Having reaffirmed that prescribing a controlled substance is 'dispensing,'" based on the theory that writing a prescription constitutes constructive delivery, the court affirmed the dispensing conviction. *Id.* at 1034, 1049.

2. The Seventh Circuit

This court of appeals held, "As a matter both of ordinary and statutory language, what Nechy, a pharmacist, did in selling drugs other than under valid prescription is indeed 'dispensing,' not 'distributing.'" *United States v. Nechy*, 827 F.2d 1161, 1168-69 (7th Cir. 1987); *see also*, *United States v. Roya*, 574 F.2d 386, 393 (7th Cir. 1978).

3. The Third Circuit

A doctor who delivered a controlled substance via prescription was charged with both distributing and dispensing under the CSA. At the close of the evidence, the district judge instructed the jury that he was eliminating "distribution" from the case due to "insufficient evidence to support conviction on that offense." On appeal, the court affirmed the conviction for unlawfully dispensing a controlled substance. *United States v. Tighe*, 551 F.2d 18, 19 (3d Cir. 1977).

4. The Second Circuit

While not specifically adjudicating the issue whether a doctor's unlawful prescription constitutes "dispensing" or "distributing" under Section 841 of the CSA,

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[2] Significantly, the Eleventh Circuit noted that other courts of appeals had come to the opposite conclusion. *Id.* n.4 (citing *United States v. Black*, 512 F.2d 864, 866 (9th Cir.1975); *United States v. Badia*, 490 F.2d 296, 297-99 (1st Cir.1973)).

this circuit found based on the plain language of the statute's definitions that the terms are distinct from each other, rejecting the argument that they "have basically the same meaning thereby making any difference a mere technicality." *United States v. Ekinci*, 101 F.3d 838, 841 (2d Cir. 1996).

B. Jurisdictions Finding Prescribing is Distributing Only (Group 2).

1. *The First Circuit*

Interpreting the relevant statutory provisions, this circuit held, "The combined effect of these statutory definitions in the present context is to limit the meaning of 'dispense' to delivery of controlled substances by a physician who is acting in the course of professional practice or research. . . .Delivery of controlled substances outside the course of professional practice or research would constitute 'distributing.'" *Badia*, 490 F.2d at 298.

2. The Ninth Circuit

This circuit similarly held that, "By definition 'dispense' expressly contemplates a 'lawful order'; if the order is not such, the prescription is not lawful under 21 U.S.C. s 829.1 If the prescription is not lawful, the 'practitioner' does not dispense; rather, under s 802(11), he 'distributes'–that is, he effects delivery 'other than by dispensing.' In short, a 'practitioner' who dispenses does not violate the Act." *Black*, 512 F.2d at 866.

C. Jurisdictions Finding Prescribing is *Both* Dispensing and Distributing (Group 3).

1. The Fifth Circuit

In 1980, a panel of the court initially followed *Leigh*, and dismissed the indictment for distribution against a doctor who had delivered a controlled substance by prescription. *United States v. Harrison*, 628 F.2d 929, 930 (5th Cir. 1980). However, after granting the Government's motion for rehearing, the court changed course, and found that since the indictment alleged that the distribution was unlawful, the distribution allegation was valid. *Harrison*, 651 F.2d at 354. The court in Harrison specifically found that, "a doctor acting unlawfully and for other than a legitimate medical purpose and not in the usual course of medical practice" may be indicted for either dispensing or distributing. *Id.* at 354 n.1.

The court below in the instant case relied on this second *Harrison* opinion for its conclusion that as long as the Government proves that the "prescriptions were issued outside the usual course of professional practice and not for a legitimate medical purpose," the conduct may constitute distribution. App. A, 15a.

2. The Sixth Circuit

This circuit explicitly acknowledged *Leigh* and "decline[d] to follow" it in a case involving a doctor whose prescriptions for controlled substances were not in accordance with "generally accepted medical practices," instead holding that "this contention [that the conduct was dispensing rather than distributing] is merely a play on words." *United States v. Ellzey*, 527 F.2d 1306, 1308 (6th Cir. 1976). The court found that "the

evidence was to the effect that the doctor did distribute within the meaning of" the CSA and affirmed the conviction for distribution. *Id.* Even when an appellant later relied on *Leigh*, the court expressly declined to overrule *Ellzey*. *United States v. Millen*, 594 F.2d 1085, 1087 (6th Cir. 1979); *see also, United States v. Price*, 919 F.2d 739 (6th Cir. 1990) ("It is well settled that a doctor may be charged with distributing a controlled substance when he illegally prescribes medications.").

3. *The Tenth Circuit*

Finding it proper to charge a prescribing doctor with distributing rather than dispensing, this circuit rejected *Leigh* and held, "In our view, appellant seeks to create a hyper-technical distinction between the terms dispense and distribute which have no functional difference in the context of this case." *United States v. Fellman*, 549 F.2d 181, 182 (1977).[3]

D. The Conflict is Significant and Warrants this Court's Review.

As demonstrated above, the various courts of appeals disagree widely on whether a doctor who writes an unlawful prescription violates the CSA by dispensing, distributing, or both. It is troubling that several courts of appeals have acknowledged but refused to follow the seminal case on the issue, *Leigh*, without any coherent rationale for doing so. Further, the Court should be particularly troubled by the fact

[3] This court also recognized the fact that even as early as the 1980s, "There [was] disagreement among the circuits concerning whether the Act creates two distinct offenses, 'distribution' and 'dispensation,' or only one, 'distribution'," and noted that, "the Controlled Substances Act 'is not a model of clarity in this respect.'" *United States v. Genser*, 710 F.2d 1426, 1430 (10th Cir. 1983).

that the Eleventh Circuit, as recently as 2015, held that *Leigh* is valid, binding precedent in that circuit, but the Fifth Circuit, which originally decided *Leigh*, has abandoned it and held that it is not controlling.

Dr. Craig and Mr. Faithful highlighted the circuit split in their Petition for En Banc Rehearing presented to the court below, but the Fifth Circuit denied the Petition. This issue is ripe for the Court's review.

E. Under the Plain Language of the Statute and the Reasoning of the Group 1 Decisions, Prescribing is Dispensing Only; the Court Below Erred.

It is clear under the CSA that the terms "dispense" and "distribute" are distinct and not interchangeable. The first rule of statutory construction is that the plain language of the statute controls – when Congress writes a statute, it means what it says. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) *("*In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop.") (citations omitted); *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) ("Statutory interpretation, as we always say, begins with the text."). This is so, even when there are policy reasons – such as, for example, the opioid crisis and the desire to hold prescribing doctors accountable for unlawful prescriptions – that may cause one to desire a broader reading of the text. The text controls. "This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . .

Congress 'must have intended' something broader." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014).

Group 1 jurisdictions hold that the applicable language means one thing; Group 2 jurisdictions hold that the same language has the exact opposite meaning; and Group 3 jurisdictions hold that the terms are basically interchangeable. This cannot be so.

Congress specifically defined the terms and the courts are bound to apply those definitions. In this case, only the Group 1 jurisdictions have correctly decided cases based on the plain and clear meaning of the statutory definitions – when a practitioner (in this case, a doctor) unlawfully delivers a controlled substance by prescribing it, that offense is "dispensing." 21 U.S.C. § 802(10). It cannot be "distributing" because that definition specifically excludes dispensing. 21 U.S.C. § 802(11).

It has long been the law of the land that, "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883). This is particularly important in the realm of criminal law, when a statutory definition is crucial to whether the Government proved its case at trial beyond a reasonable doubt. *Fowler v. United States*, 563 U.S. 668, 677 (2011) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (there is a "particular reluctance to treat statutory terms as surplusage when the words describe an element of a criminal offense") (internal quotes omitted)). Under any reading other than that prescribing doctors dispense versus distribute via prescription, the words "other than by

dispensing" in the definition of "distribute" become superfluous and meaningless. The jurisdictions in Group 1 correctly analyzed the statutory language and the others did not. This Court should grant this petition and resolve the issue to ensure uniformity throughout the federal court system.

II. The Fifth Circuit Decided an Important Question of Federal Law That Has Not Been, but Should Be, Settled by this Court.

As detailed above, the Courts of Appeals are deeply divided on how to interpret the same relevant provisions of the CSA. This Court has not directly addressed the question presented but should, because it is obvious that clarity is lacking in this highly significant area of the law. S.Ct.R. 10(c).

The ambiguity that exists negatively affects not only defendants who must mount challenges to their prosecutions in different ways depending on the jurisdiction, but also prosecutors who must make charging decisions and judges who must instruct juries – all in different ways based on geography. Especially in light of the ever-increasing existence of the opioid crisis and the Government's attempts to combat it, providing the definitive interpretation of the CSA is a prime issue for the Court's resolution – the Court should establish *one* rule for the entire country.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JACK B. ZIMMERMANN
Counsel of Record
Zimmermann Lavine &
Zimmermann, P.C.
770 South Post Oak Lane, #620
Houston, Texas 77056
(713) 552-0300
Jack.Zimmermann@ZLZSlaw.com

TERRI R. ZIMMERMANN

Zimmermann Lavine &
Zimmermann, P.C.
770 South Post Oak Lane, #620
Houston, Texas 77056
(713) 552-0300
Terri.Zimmermann@ZLZSlaw.com

Counsel for Petitioner

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