

Nos. 20-1410, 21-5261

In the Supreme Court of the United States

DR. XIULU RUAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

DR. SHAKEEL KAHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writs Of Certiorari
To The United States Courts Of Appeals
For The Tenth and Eleventh Circuits**

**JOINT MOTION OF PETITIONERS RUAN AND KAHN
FOR DIVIDED ARGUMENT**

INTRODUCTION

Pursuant to this Court's Rules 21 and 28.4, Petitioner in No. 20-1410, Dr. Xiulu Ruan, and Petitioner in No. 21-5261, Dr. Shakeel Kahn, jointly move to divide oral argument time between the two Petitioners. The division of argument time will ensure that counsel for each Petitioner can adequately present each Petitioner's distinct positions. This Court's consideration of the case will also benefit from divided argument. Respondent does not oppose granting divided argument to Petitioners.

STATEMENT

Petitioners were separately indicted and prosecuted in unrelated proceedings under the Controlled Substances Act for allegedly issuing prescriptions outside "the usual course of professional practice" under 21 U.S.C. § 841(a)(1). Petitioner Ruan was tried in the United States District Court for the Southern District of Alabama; Petitioner Kahn was tried in the United States District Court for the District of Wyoming.

At their respective trials, each Petitioner requested that the district court judge issue a good faith defense instruction. The district court in Petitioner Ruan's case told the jury that it could convict Dr. Ruan even if all it found was that his prescriptions "were outside the usual course of professional medical practice." On this instruction, Petitioner Ruan was convicted on all but two counts and sentenced to 21 years of imprisonment.

By contrast, the district court in Petitioner Kahn's case instructed the jury that 'good faith' requires a physician to act "in accordance with what a reasonable

physician should believe to be proper medical practice.” Kahn J.A. 537-38. On this instruction, Petitioner Kahn was convicted on all counts and sentenced to 25 years of imprisonment.

Petitioner Ruan appealed to the 11th Circuit, which affirmed the district court’s (illusory) good faith instruction because, in its view, a physician may assert a good faith defense only “as long as [his] conduct also was in accordance with the standards of practice generally recognized and accepted in the United States.” Ruan Pet. App. 106a-107a. Petitioner Kahn appealed to the 10th Circuit, which affirmed the district court’s good faith instruction because “the usual course of professional practice” required that the government prove only that a prescription was “objectively not in the usual course of professional practice,” and “[t]hus, the only relevant inquiry under that second prong is whether a defendant-practitioner objectively acted within that scope, regardless of whether he believed he was doing so.” Kahn J.A. 542.

This Court granted certiorari in both cases on November 5, 2021, and consolidated the cases. The Court allotted one hour of time for oral argument. Argument has been set for March 1, 2022.

ARGUMENT

This case presents the question whether, and to what extent, a physician may assert a good faith defense to charges under the Controlled Substances Act (CSA). Although Petitioners share the view that a physician may not be convicted under the CSA if he acted for a lawful medical purpose, their arguments before this Court materially differ (and would materially differ at oral argument), given the very

different instructions Petitioners received at trial.

Petitioner Ruan received *no* meaningful good faith defense instruction. Although his principal submission is that a lawful medical purpose precludes conviction, he has also contended, as a fallback, that his convictions should be reversed even under an “honest effort” or “reasonable belief” standard.

Petitioner Kahn, on the other hand, received an instruction that allowed the jury to consider what the defendant “reasonably should have believed.” This language, while meaningfully distinct from the standard the government advances in its response brief, is also meaningfully distinct from the good faith instruction issued in Dr. Ruan’s case. *See* Kahn J.A. 486. Accordingly, Petitioner Kahn does not join Dr. Ruan’s fallback argument. At the district court level, Petitioner Ruan requested a jury instruction that included similar language to that which was given in the Kahn case. This fact, by itself, makes joint argument inappropriate, as the interests of the two petitioners plainly diverge regarding the acceptability of the language used in the jury instructions given in the Kahn case.

What is more, Dr. Kahn’s petition presented a question that Dr. Ruan did not present: whether 21 C.F.R. § 1306.04(a)’s two prongs should “be read in the conjunctive or the disjunctive.” And while both Petitioners address that question on the merits, their answers are different. Dr. Ruan argues that the statute and regulation set forth but a single standard, Ruan Br. 25 n.12, while Dr. Kahn argues that the regulation’s two prongs must be read in the conjunctive, Kahn Br. 33-34.

Not surprisingly, the government notes several times in its merits brief that

the two Petitioners have advanced distinctly different legal arguments. So, for example, the government responds only to Dr. Ruan in addressing the text of the CSA implementing regulation, Gov't Br. 36 (citing Ruan Br. 34-35), and responds only to Dr. Kahn in defending the regulation against a vagueness challenge, *id.* at 39 (citing Kahn Br. 42-52).

The trial record in the two cases is also materially different, and counsel for each Petitioner would be quite hard-pressed to familiarize himself with the complex details of the other Petitioner's case. To the extent this Court finds it helpful at oral argument to pose questions about the factual record, its consideration of the case will be advanced by permitting both lawyers to appear. The government's decision to advance a harmless error argument in its brief—ill-founded though that may be—heightens the likelihood that oral argument will entail fact-bound responses.

Finally, Petitioners' cases may come out differently, depending on how this Court ultimately construes the good faith defense under the CSA. If, for example, the Court adopts the "objective" good faith test embraced by several circuits, it may still reverse Dr. Ruan's convictions. By contrast, Dr. Kahn's convictions might be affirmed. Because Petitioners have different legal theories and materially different factual records, requiring one attorney to represent *both* Petitioners at oral argument would prejudice Petitioners and deprive this Court of a more thorough airing of the pertinent legal issues.

In recent Terms, this Court has granted motions for divided argument when parties with different interests in support of the same basic legal proposition appear

on the same side of a case. *E.g.*, *Rucho v. Common Cause*, 139 S. Ct. 1316 (2019) (mem.); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 951 (2019) (mem.); *LULAC v. Perry*, 126 S. Ct. 1186 (2006) (mem.). Divided argument is similarly appropriate here. See Stephen M. Shapiro et al., *Supreme Court Practice* § 14.15 at 14-16 (11th ed. 2019) (“Having more than one lawyer argue on a side is justifiable . . . when they represent different parties with different interests or positions.”).

This Court frequently grants divided argument in consolidated cases where unique facts pertain to parties on the same side of the case. *E.g.*, *Rosen v. Dai*, 141 S. Ct. 1234 (2021) (mem.); *Abbott v. Perez*, 138 S. Ct. 1544 (2018) (mem.); *Ziglar v. Abbasi*, 137 S. Ct. 615 (2017) (mem.); *Kansas v. Gleason*, 135 S. Ct. 2917 (2015) (mem.). Divided argument is similarly appropriate here.

Petitioners respectfully request that the time for argument allotted to Petitioners be divided between the two Petitioners as counsel for Petitioners see fit.

Respectfully submitted.

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