No. 20-1480

In the Supreme Court of the United States

GEORGE P. NAUM, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in declining to admit evidence or to instruct the jury in furtherance of petitioner's theory that his bad-faith prescription of opioids outside the course of professional practice is insulated from charges of the unauthorized distribution of controlled substances, in violation of 21 U.S.C. 841, so long as he could assign a general "legitimate medical purpose" to his activities.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is not published in the Federal Reporter but is reprinted at 832 Fed. Appx. 137.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 2020. A petition for rehearing en banc was denied on November 24, 2020 (Pet. App. A28). The petition for a writ of certiorari was filed on April 20, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of West Virginia, petitioner was convicted on one count of conspiring to distribute controlled substances, in violation of 21 U.S.C.

841(a)(1) and 846, and four counts of aiding and abetting the unlawful distribution of controlled substances, in violation of 18 U.S.C. 2 and 21 U.S.C. 841. Judgment 1-2. He was sentenced to six months in prison, to be followed by two years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. A1-A18.

1. Petitioner was one of two licensed physicians employed by Advance Healthcare, a West Virginia clinic purportedly engaged in the treatment of drug addiction. Pet. App. A2. Petitioner and the clinic's other doctor, Felix Brizuela, were authorized by the federal Drug Enforcement Administration (DEA) to prescribe suboxone, a Schedule III controlled substance. *Ibid.* No other clinic employee had such prescribing privileges. *Id.* at A2-A3.

Petitioner and Brizuela were scheduled to work at the clinic just one evening per week, and they frequently missed all or part of those scheduled shifts. Pet. App. A2-A3. Indeed, camera footage from outside the clinic revealed that, over a two-month period in 2016, petitioner was present at Advance Healthcare only 13.9% of the time that it was open to patients and issuing prescriptions and missed half of the shifts at which he was scheduled to be present. *Id.* at A3; see Gov't C.A. Br. 4. At all other times, Sharon Jackson, a nurse who did not have DEA prescribing privileges, handled patient prescriptions. Pet. App. A2-A3.

To keep the operation running in their absence, petitioner and Brizuela "allowed Jackson nearly unfettered use of their DEA numbers" and "delegated most of the patient care to Jackson." Pet. App. A3. For example, the doctors generally saw patients only for their initial visit or for one other visit early in their treatment, while Jackson conducted all follow-up visits. *Ibid.*

And if neither doctor was present for a new patient's initial visit, petitioner and Brizuela permitted Jackson to diagnose the patient with an opioid-use disorder, decide on a daily dose of suboxone, and call in the prescription using one of the doctors' DEA numbers. *Ibid.*

As part of an investigation into Advance Healthcare, an undercover law enforcement officer posed as a patient at the clinic. Pet. App. A5. On his initial visit to Advance Healthcare, the undercover officer saw petitioner for just over three minutes. Gov't C.A. Br. 9. When the officer returned for a follow-up visit the next week, he met with Jackson for five minutes before receiving a suboxone prescription. *Ibid.* Four of petitioner's other patients likewise testified that their examinations, if performed at all, had been equally perfunctory, and that Jackson—rather than either petitioner or Brizuela—had managed their medication regimen thereafter. *Ibid.*; see Pet. App. A5. Notwithstanding petitioner's sporadic attendance, the clinic paid petitioner over $300,000 over several years. Gov't C.A. Br. 3.

2. In 2018, a federal grand jury returned an indictment charging petitioner, Brizuela, and others with 50 counts of conspiracy, drug distribution, illegal kickbacks, and health-care fraud. Indictment 1-27. Petitioner proceeded to trial, which lasted six days. Gov't C.A. Br. 3.

Before trial, the government filed a motion in limine requesting that the district court prohibit petitioner from arguing or presenting evidence at trial that the government must satisfy "a dual standard, that is, that the government must prove both that the distributions charged in the indictment were without a legitimate medical purpose and beyond the bounds of professional

medical practice." D. Ct. Doc. 273, at 1 (Apr. 15, 2019) (emphasis omitted). The court granted the motion. D. Ct. Doc. 299, at 1 (Apr. 23, 2019).

At the close of trial, the district court instructed the jury that, to obtain a conviction under 21 U.S.C. 841, the government must prove beyond a reasonable doubt that petitioner "caused the distribution of suboxone as alleged in the Indictment," that he "did so knowingly or intentionally," and that "[h]is actions were outside the bounds of professional medical practice." D. Ct. Doc. 319, at 28-29 (Apr. 29, 2019). The court elaborated that, with respect to the last element, "physicians have discretion to choose among a wide range of options." *Id.* at 31. It therefore cautioned that, to determine whether petitioner had "caused the distribution of suboxone 'outside the bounds of professional medical practice' in this case," the jury "should examine all of his actions and the facts and circumstances in the case." *Ibid.* (emphasis omitted). In addition, the court noted that petitioner had "assert[ed] that he treated his patients in 'good faith'" and instructed:

> A physician cannot be convicted of conspiring to unlawfully distribute suboxone or aiding and abetting the unlawful distribution of suboxone if he acted in good faith in issuing the prescription. Good faith in this context is not merely a physician's sincere intention towards the patients who come to see him. Rather, it involves his sincerity in attempting to conduct himself in accordance with a standard of professional medical practice generally recognized and accepted in the country. Thus, it indicates an observance of conduct in accordance with what the physician reasonably believed to be proper medical practice.

> The defendant does not have to prove that he acted in good faith. The burden of proof remains on the Government at all times to prove to you beyond a reasonable doubt that the defendant conspired to distribute suboxone outside the bounds of professional medical practice, * * * and aided and abetted the distribution of suboxone outside the bounds of professional medical practice. * * *
>
> In considering whether the defendant acted in good faith, you should consider the defendant's actions and all the facts and circumstances in the case. If you find that the defendant acted in good faith, then you must find him not guilty.

Id. at 34-35.

The jury found petitioner guilty of one count of conspiring to distribute controlled substances, in violation of 21 U.S.C. 841 and 846, and four counts of aiding and abetting the distribution of controlled substances, in violation of 18 U.S.C. 2 and 21 U.S.C. 841. Judgment 1-2. The district court sentenced petitioner to six months of imprisonment, to be followed by two years of supervised release. Judgment 3-4.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A18.

As relevant here, the court of appeals rejected petitioner's contention that the district court had abused its discretion by declining to allow evidence or argument "that his treatment of patients" was for a medical purpose and "not for some other purpose, such as drug diversion." Pet. App. A9; see *id.* at A9-A10. The court of appeals observed that this Court's decision in *United States* v. *Moore*, 423 U.S. 122 (1975), had held that "registered physicians can be prosecuted under § 841 when

their activities fall outside the usual course of professional practice." Pet. App. A9 (quoting *Moore*, 423 U.S. at 124). And the court explained that, under circuit precedent applying *Moore*, "[t]he Government may meet its burden by establishing that the physician's actions were not for legitimate medical purposes in the usual course of professional medical practice *or* were beyond the bounds of professional medical practice." *Ibid.* The court further explained that, because "[t]he Government is not required to prove both prongs (i.e. no legitimate purpose *and* beyond professional bounds)," the district court did not abuse its discretion "in permitting the Government to proceed only on the theory that [petitioner]'s actions were beyond the bounds of professional medical practice." *Ibid.*

The court of appeals also rejected petitioner's argument that the jury instructions and admitted evidence had "permitted [him] to be found guilty upon only a showing of malpractice." Pet. App. A12; see *id.* at A12-A13. The court reviewed that argument for plain error and concluded that, taken as a whole, the instructions did not equate guilt with malpractice but rather appropriately informed the jury that it "must consider the totality of the circumstances in making its determination that [petitioner] acted outside the scope of professional medical practice." *Id.* at A13.

ARGUMENT

Petitioner renews his contention (Pet. 11-35) that his convictions required proof not only that he acted outside the usual course of medical practice, but also that he lacked a general "legitimate medical purpose." The court of appeals correctly rejected that contention, and its unpublished opinion neither contravenes any precedent of this Court nor meaningfully conflicts with any

decision of another court of appeals. This Court has denied review in other cases presenting similar issues. See, *e.g.*, *Sun* v. *United States*, 138 S. Ct. 156 (2017) (No. 16-9560); *Armstrong* v. *United States*, 558 U.S. 829 (2009) (No. 08-9339).[*] It should follow the same course here.

1. Federal law prohibits the distribution of controlled substances "[e]xcept as authorized by" the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, 21 U.S.C. 841(a). The CSA authorizes physicians who register with the DEA to dispense controlled substances, but only "to the extent authorized by their registration and in conformity with [the CSA]." 21 U.S.C. 822(b); see 21 U.S.C. 823(f).

In *United States* v. *Moore*, 423 U.S. 122 (1975), this Court held that physicians registered under the CSA may be subject to criminal liability under Section 841 "when their activities fall outside the usual course of professional practice." *Id.* at 124. The Court reasoned that, under the Act's statutory predecessor, physicians "who departed from the usual course of medical practice" had been subject to the same penalties as "street pushers," and "the scheme of the [CSA] * * * reveals an intent to limit a registered physician's dispensing authority to the course of his 'professional practice.'" *Id.* at 139-140.

Applying that standard, the Court in *Moore* upheld the prescribing physician's conviction because "[t]he evidence presented at trial" in that case "was sufficient for

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[*] The pending petitions for writs of certiorari in *Ruan* v. *United States*, No. 20-1410 (filed Apr. 5, 2021), and *Couch* v. *United States*, No. 20-7934 (filed Apr. 5, 2021), present similar questions about the appropriate formulation of the mens rea requirement for prescribing physicians charged under Section 841.

the jury to find that [his] conduct exceeded the bounds of 'professional practice.'" 423 U.S. at 142. Although the Court did not specifically decide what jury instructions were required, it implicitly deemed sufficient the jury instructions given. Those instructions stated that the physician could be found guilty of violating Section 841 if he dispensed controlled substances "other than in good faith * * * in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States." *Id.* at 139 (citation omitted). They also stated that the defendant could not be found guilty if he "made 'an honest effort' to prescribe * * * in compliance with an accepted standard of medical practice." *Id.* at 142 n.20 (citation omitted).

As the court of appeals correctly recognized, under *Moore*, a physician who acts for what he believes to be a medical purpose may still be liable under Section 841 if he ventures "beyond the bounds of medical practice" in bad faith. Pet. App. A9. The touchstone for liability under *Moore* is whether a defendant acted—or, at a minimum, "made 'an honest effort'" to act—consistently with an objectively "accepted standard of medical practice." 423 U.S. at 142 n.20 (citation omitted). As the court of appeals observed, a defendant like petitioner is not immune from a drug prosecution simply because he participates in distributing drugs to people who "suffer[] from addiction and require[] treatment." Pet. App. A10. The court thus correctly determined that the district court did not abuse its discretion in preventing petitioner from presenting a theory under which he might assign a general "legitimate medical purpose" to activi-

ties outside the scope of reasonable professional boundaries that no authority had given him permission to perform. *Id.* at A9.

The district court, in turn, correctly required the jury to find that petitioner knowingly or intentionally facilitated the distribution of controlled substances outside the usual course of professional practice. The court instructed the jury that it was required to find that petitioner "caused the distribution of suboxone as alleged in the Indictment," that he "did so knowingly or intentionally," and that "[h]is actions were outside the bounds of professional medical practice." D. Ct. Doc. 319, at 28-29. It also explained that a physician "cannot be convicted of conspiring to unlawfully distribute suboxone or aiding and abetting the unlawful distribution of suboxone if he acted in good faith in issuing the prescription." *Id.* at 34. And the court elaborated on the concept of good faith, defining it as a physician's "sincerity in attempting to conduct himself in accordance with a standard of professional medical practice generally recognized and accepted in the country" and "an observance of conduct in accordance with what the physician reasonably believed to be proper medical practice." *Ibid.* Those instructions, which repeatedly referred to petitioner's state of mind, made clear that the jury could not find petitioner guilty if he lacked criminal intent or if he made a good-faith attempt to comply with the usual course of professional medical practice.

Petitioner nonetheless contends (Pet. 23-31) that requiring the jury to find that he acted "outside the bounds of professional medical practice," without a further explicit instruction also to find that he prescribed medication "without a legitimate medical purpose," au-

thorized the jury to impose criminal liability for "professional disagreements," Pet. 20, 23 (emphasis omitted), or otherwise diluted the standard of proof. That contention is incorrect. Courts have repeatedly recognized that no meaningful distinction exists between a finding that a physician acted "without a legitimate medical purpose" and a finding that he or she acted "outside the usual course of his or her professional practice." See *United States* v. *Armstrong*, 550 F.3d 382, 397-398 (5th Cir. 2008) (explaining that "knowingly distributing prescriptions outside the course of professional practice is a sufficient condition to convict a defendant" and that the phrases "outside the scope of professional practice" and "without a legitimate medical purpose" may be "considered interchangeable"), cert. denied 558 U.S. 829 (2009), overruled on other grounds by *United States* v. *Guillermo Balleza*, 613 F.3d 432 (5th Cir.) (per curiam), cert. denied 562 U.S. 1076 (2010); *United States* v. *Nelson*, 383 F.3d 1227, 1231 (10th Cir. 2004) (noting that "[i]t is difficult to imagine circumstances in which a practitioner could have prescribed controlled substances within the usual course of medical practice but without a legitimate medical purpose" and "[s]imilarly, it is difficult to imagine circumstances in which a practitioner could have prescribed controlled substances with a legitimate medical purpose and yet be outside the usual course of medical practice"); *United States* v. *Rosenberg*, 515 F.2d 190, 197 (9th Cir.) (finding "it difficult to understand how [a physician] can argue that he was not acting for legitimate medical reasons yet was acting in the course of his professional practice" and explaining that a determination that a physician acted outside "the course of professional practice" means that he took "action that he d[id]

not in good faith believe [was] for legitimate medical purposes"), cert. denied, 423 U.S. 1031 (1975); see also *United States* v. *Rottschaefer*, 178 Fed. Appx. 145, 147-148 (3d Cir.) (noting that several courts have held that "there is no difference in the meanings" of the two phrases) (citation omitted), cert. denied, 549 U.S. 887 (2006); *United States* v. *Daniel*, 3 F.3d 775, 778 (4th Cir. 1993) (equating the two phrases), cert. denied, 510 U.S. 1130 (1994); *United States* v. *Kirk*, 584 F.2d 773, 784 (6th Cir.) (same), cert. denied, 439 U.S. 1048 (1978); *United States* v. *Plesons*, 560 F.2d 890, 897 n.6 (8th Cir.) (same), cert. denied, 434 U.S. 966 (1977).

Courts of appeals have also rejected defendants' claims that they were convicted under a civil-malpractice standard when the jury instructions were worded in the disjunctive or did not require any specific finding of lack of a "legitimate medical purpose." See *United States* v. *Bek*, 493 F.3d 790, 798-799 (7th Cir.) (rejecting the defendant's assertion that the government had "proved malpractice, not criminal conduct" and stating that a disjunctive instruction was "proper"), cert. denied, 552 U.S. 1010 (2007); *United States* v. *Williams*, 445 F.3d 1302, 1307-1309 (11th Cir. 2006) (upholding conviction where the instruction used only the "usual course of professional practice" standard), abrogated on other grounds by *United States* v. *Lewis*, 492 F.3d 1219 (11th Cir. 2007); see also Pet. App. A12 (concluding that the jury instructions, construed "'in light of the whole record'" did not permit petitioner "to be found guilty upon only a showing of malpractice"). Indeed, in *Moore* itself, the jury instructions, as described by the Court, did not require a finding that the defendant lacked a "legitimate medical purpose," see 423 U.S. at 138-139, and

the Court used only the "professional practice" standard in describing when physicians who dispense controlled substances are criminally liable under Section 841, *id.* at 124, 140, 142. The phrase "legitimate medical purpose" appears only in a quotation, in a footnote, of a regulation enacted pursuant to 21 U.S.C. 829, which itself ties the concepts together by restricting an "effective" controlled-substance prescription to one "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." *Moore*, 423 U.S. at 136 n.12.

Petitioner further contends (Pet. 20) that the district court erroneously prevented him from "introducing evidence that patients were seeking treatment for legitimate purposes," namely, "treatment for their addiction." But as the court of appeals recognized (Pet. App. A9), the mere fact that a patient may have a legitimate medical need for some type of treatment does not give a health-care professional free rein to "act[] as a drug 'pusher,'" in a manner that he knows is not in accord with the generally recognized standard of medical practice. *Moore*, 423 U.S. at 139. The relevant question is whether the treatment that petitioner offered was legitimate—*i.e.*, at a minimum, an "honest effort" to act within the bounds of professional medical practice. *Id.* at 142 n.20. The parties accordingly did not dispute that the patients needed actual treatment; they disputed only whether that is in fact what petitioner was providing. See Gov't C.A. Br. 34-35. Additional evidence on the patients' actual medical needs was unnecessary, and would have served only to confuse the jury on the critical issue of whether petitioner was engaged in good-faith medical practice.

2. Petitioner contends (Pet. 25-28) that the decision below conflicts with decisions of other courts of appeals. Even if that were correct, the court of appeals' unpublished decision could not create a circuit conflict warranting this Court's review because it does not establish binding precedent. That is particularly relevant here because petitioner takes the view that the unpublished decision departs from earlier, precedential decisions in the same circuit that did correctly state the law. See Pet. 25 (asserting that the decision below deviated from "the Fourth Circuit's prior interpretation of the phrase 'beyond the bounds of medical practice,'" which had "included an analysis of the medical purpose of the drug") (citing *United States* v. *Alerre*, 430 F.3d 681 (4th Cir. 2005), cert. denied, 547 U.S. 1113 (2006), and *United States* v. *Tran Trong Cuong*, 18 F.3d 1132, 1133 (4th Cir. 1994)); see also Pet. 18 (asserting that "the Fourth Circuit, for the first time and in an unpublished opinion," allowed "the Government to proceed only on the theory that [petitioner's] actions were beyond the bounds of professional medical practice").

In any event, the decision below does not in fact conflict with the decisions on which petitioner relies. Every published decision to have expressly addressed the issue has determined that a Section 841 offense can be described disjunctively—*i.e.*, as involving the dispensing of a controlled substance *either* "outside the usual course of medical practice" *or* "without a legitimate medical purpose." See, *e.g.*, *United States* v. *Khan*, 989 F.3d 806, 822 (10th Cir. 2021) ("[A] licensed physician may be convicted under 21 U.S.C. § 841 for either prescribing 'outside the scope of professional practice' *or* 'for no legitimate medical purpose.'"); *Armstrong*, 550

F.3d at 399-400 (cataloguing appellate decisions upholding disjunctive jury instructions); *United States* v. *Limberopoulos*, 26 F.3d 245, 249-250 (1st Cir. 1994) ("[W]ell-established case law mak[es] clear that [Section 841] applies to a pharmacist's (or physician's) drug-dispensing activities so long as they fall outside the usual course of professional practice.").

In contrast, none of the decisions on which petitioner relies (Pet. 27-28) for his claim of a conflict held that such a disjunctive instruction is erroneous. In *United States* v. *Feingold*, 454 F.3d 1001 (9th Cir.), cert. denied, 549 U.S. 1067 (2006), the court of appeals correctly found that the jury instructions, which included the "legitimate medical purpose" and "course of professional practice" standards in the conjunctive, as well as a good-faith instruction similar to the one given below, correctly "require[d] the jury to find that [the defendant] intentionally acted outside the usual course of professional practice." *Id.* at 1008. The court emphasized the need to distinguish a conviction under Section 841 from "a finding that [a physician] has committed malpractice." *Id.* at 1010. And the court found that the instructions given had sufficiently done so, in part because of their good-faith component. See *id.* at 1012. The affirmance of the conviction in that case, in which the court did not directly consider a disjunctive instruction, would not dictate reversal in the circumstances here.

Likewise, in *United States* v. *Smith*, 573 F.3d 639 (8th Cir. 2009), the court of appeals rejected the defendant's claim that "the definition of 'usual course of professional practice' in [the jury instructions] improperly conflated the standard for criminal liability with the

standard for medical malpractice." *Id.* at 649. Reviewing the particular instructions delivered in that case, the court noted that "the jury was unable to convict Smith unless it found a failure to adhere to prevailing medical standards *and* a lack of legitimate medical purpose." *Ibid.* But "[t]his dual showing * * * exceed[ing] that required to establish medical malpractice" was just one of several aspects of the instructions that assured the reviewing court that "the jury instructions, taken as a whole, precluded a conviction based on the civil standard of liability." *Id.* at 649-650; see *id.* at 649 ("Additional indicators that the instructions did not conflate civil and criminal standards include the fact that the court explicitly instructed that the standard of proof applicable in this case was 'beyond a reasonable doubt.'"); *id.* at 649-650 ("The court also allowed Smith the possibility of a good-faith defense, which is unavailable in malpractice cases."). The court never held that a disjunctive instruction would have been categorically erroneous, or a conjunctive instruction categorically necessary, to appropriately define the Section 841 offense.

Finally, petitioner cites (Pet. 27) *United States* v. *Volkman*, 736 F.3d 1013 (6th Cir. 2013), cert. granted, judgment vacated, 574 U.S. 95 (2014), op. resubmitted in relevant part, 797 F.3d 377 (6th Cir. 2015), and *United States* v. *Chube II*, 538 F.3d 693 (7th Cir. 2008). In both cases, the court of appeals acknowledged a distinction between the negligent conduct sufficient for civil malpractice and the intentional or knowing violation required for a criminal conviction, see *Volkman*, 736 F.3d at 1022; *Chube II*, 538 F.3d at 697-699, but did not prescribe any particular formulation of the government's burden.

Nor, contrary to petitioner's contention (Pet. 25-26), has any court of appeals diverged in the opposite direction and imposed criminal liability based on nothing more than "a simple departure from the standard of care." Rather, each of the circuits that petitioner identifies (Pet. 25-27) as having adopted that position—the Second, Fifth, and Eleventh—has expressly disapproved such an approach in a published decision. See *United States* v. *Wexler*, 522 F.3d 194, 204 (2d Cir. 2008) ("[A] violation of the standard of care alone is *insufficient* to support the criminal conviction of a licensed practitioner under § 841(a)."); *Armstrong*, 550 F.3d at 401 (5th Cir.) ("[T]he jury ha[s] to make a finding with respect to [the defendant's] state of mind," which "distinguish[es] a § 841 prosecution from a mere civil malpractice suit where a plaintiff may prevail regardless of a defendant doctor's good faith intent to act within the scope of medical practice."); *United States* v. *Ruan*, 966 F.3d 1101, 1169 (11th Cir. 2020) (acknowledging that a proposed instruction that "'a Defendant's negligence, failure to meet a standard of care, or medical malpractice, on its own is not enough to convict him,' is an accurate statement of the law," though concluding that the district court did not abuse its discretion in declining to give such an instruction in the context of that case), petitions for cert. pending, Nos. 20-1410 and 20-7934 (filed Apr. 5, 2020). Petitioner has thus failed to establish any meaningful conflict among the courts of appeals that would warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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