No. 21-1418

IN THE
Supreme Court of the United States

MEDARDO QUEG SANTOS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005

RACHEL L. HAMPTON
MEREDITH MCBRIDE
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603

THOMAS A. BURNS*
SHANNON C. REESE
BURNS, P.A.
301 W. Platt St., Ste. 137
Tampa, FL 33606
(813) 642-6350
tburns@burnslawpa.com

XIAO WANG
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611

Counsel for Petitioner

*Counsel of Record

September 27, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

OTHER AUTHORITIES

REPLY

In his petition, Dr. Santos pointed out that his jury had received instructions on the law—from both the trial court and the government's expert—the propriety of which would come to turn on this Court's subsequent decision in *Ruan* v. *United States*, 142 S.Ct. 2370 (2022). Pet. 16. At first, the government agreed his petition "should be held pending the decision" and "then disposed of as appropriate in light of" *Ruan*. Mem. 1.

Sure enough, *Ruan* does implicate the propriety of the jury instructions and expert testimony at Dr. Santos's trial. *Ruan* held § 841's "'knowingly or intentionally' *mens rea* applies to authorization"; thus, "once a defendant meets the burden of producing evidence" that his "conduct was 'authorized,'" the government "must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." 142 S.Ct. at 2375-76.

Yet now, after *Ruan*, the government has reversed course—even though in similar post-*Ruan* cases, it has agreed "the appropriate course is to grant the petition for a writ of certiorari, vacate the decision below, and remand the case." *Sakkal* v. *United States*, No. 22-84, Mem. 1.

The government's about-face stems from an obvious misconstruction of Dr. Santos's jury instructions. Those instructions would've allowed the jury to find guilt if it concluded that Dr. Santos's prescriptions were *objectively* beyond the usual course of professional practice *or* weren't, in his *subjective good faith belief* at the time, the legitimate practice of medicine.

But the Court's holding in *Ruan* forbids conviction unless Dr. Santos prescribed medication with

subjective knowledge or intent of wrongdoing. The Court therefore should grant the petition, vacate the decision, and remand for renewed consideration in light of *Ruan*.

Alternatively, this petition presents an ideal vehicle to clarify the post-*Ruan* limits on expert testimony. Dr. Chaitoff's pervasive testimony consisted of impermissible (and wildly wrong) legal pontifications and citations to law that improperly justified the prosecutors' now-incorrect objective knowledge theories.

That can't be what this Court meant when it held prosecutors can introduce "circumstantial evidence" of "objective criteria." 142 S.Ct. at 2382. *Ruan* forbids prosecuting physicians for mere medical malpractice through the front door (courts instructing juries), and further guidance is needed lest prosecutors keep prosecuting them for medical malpractice through the backdoor (experts masquerading as judges).

I. After *Ruan*, Dr. Santos's case warrants renewed consideration.

A. The jury instructions contradict *Ruan*.

1. The district court told Dr. Santos's jury it couldn't return a guilty verdict unless it found he (1) "distributed and dispensed" the "controlled substance(s)," and (2) "knew[,]" "at the time of the distribution and dispensing," that he "was distributing and dispensing a controlled substance not for a legitimate medical purpose *and* not in the usual course of professional practice." Doc. 337 at 20 (emphasis added).

At the prosecutors' insistence, the court also instructed that the conjunction "and" used above actually meant "or"; thus, violation of a statute that "specifies several alternative ways in which an offense may be committed"—such as prescribing without a

legitimate medical purpose or beyond the usual course of professional practice—was "sufficient for conviction so long as the jury agree[d] unanimously" to "at least one of the alternatives." Doc. 392 at 183-84.

Whether Dr. Santos acted beyond the usual course of professional practice, the court instructed, was "to be judged *objectively* by reference to standards of medical practice generally recognized and accepted in the United States," including "Florida." Doc. 337 at 20 (emphasis added). In contrast, acting without a legitimate medical purpose "depends on [his] *subjective belief*." *Id.* at 21 (emphasis added). Thus, the court summarized, to convict Dr. Santos for acting without a legitimate medical purpose, the government had to "prove beyond a reasonable doubt that [he] did not *subjectively believe* he was acting with a *good faith belief* that he was distributing the controlled substance for a legitimate medical purpose." *Id.* (emphasis added). But either alternative theory was sufficient to convict, and it's impossible to discern upon which theory the jury rested. Doc. 392 at 183-84.

2. The government now argues these instructions "were fully consistent" with *Ruan*. BIO 10. But as shown above, the instructions incorporated language flatly rejected by *Ruan*—specifically the instruction regarding an objective or subjective "good faith belief." The government ignores this, saying the "did not subjectively believe that he was acting with a good faith belief" instruction was "consistent with" *Ruan*. *Id.* at 11. Yet this Court rejected that argument in *Ruan* because the "knowingly or intentionally" standard cannot be substituted with a "good faith" standard: Section 841 "uses the familiar *mens rea* words 'knowingly or intentionally.' It nowhere uses words such as 'good faith.'" 142 S.Ct. at 2381.

Ruan also cautioned against turning "criminal liability on the mental state of a hypothetical 'reasonable' doctor, not on the mental state of the defendant himself." *Id.* But "[h]aving liability turn on" what a "reasonable person" thinks "regardless of what the defendant thinks" would "reduce[] culpability" to mere "negligence"—or in this case, to medical malpractice. *Id.* Nevertheless, Dr. Santos's jury instructions provided: Whether "Defendant acted outside the usual course of professional practice is to be judged objectively by reference to standards of medical practice generally recognized and accepted in the United States," including "Florida." Doc. 337 at 20. That's the "hypothetical reasonable doctor" that *Ruan* rejected.

These twin maladies—*i.e.*, the instructions about "good faith" and hypothetical reasonable doctors—also plagued the jury instructions in *Ruan*. In *Ruan*, the district court instructed that a doctor acts lawfully when he prescribes "*in good faith* as part of his medical treatment of a patient *in accordance with the standard of medical practice generally recognized and accepted in the United States*." 142 S.Ct. at 2375 (emphasis added). In *Kahn*, the jury received instruction to acquit "if it found that Kahn acted in '*good faith*,' defined as 'an attempt to act in accordance with what a reasonable physician should believe to be proper medical practice.'" *Id.* at 2376 (emphasis added). The district court defined "good faith" as "an honest effort to prescribe for patients' medical conditions *in accordance with generally recognized and accepted standards of practice*." *Id.* (emphasis added).

Nonetheless, this Court declined to decide whether the jury instructions in *Ruan* "complied with the standard we have set forth today." *Id.* at 2382. Although the government argued the jury instructions had "conveyed the requisite *mens rea*," this Court

instead left that question to be "address[ed] on remand." *Id.*

3. What's more, the government claims that "[b]ecause the instructions here, *inter alia*, directed the jury to determine whether petitioner 'subjectively believe[d]'" he prescribed "for a legitimate medical purpose," the jury "*necessarily* found that he 'knowingly or intentionally acted in an unauthorized manner,' when it convicted him" under § 841(a). BIO 11 (emphasis added). But the government ignores that the jury instructions here were made disjunctive—at the prosecutor's insistence—and allowed conviction under *either* an objective or subjective theory.

There's no way to know on which theory the general verdict rested. *Yates* v. *United States*, 354 U.S. 298, 312 (1957) (verdict must be vacated when it's "supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"); *Mills* v. *Maryland*, 486 U.S. 367, 376 (1988) (same). And having induced the court to give disjunctive instructions, see Appellee Br. 25 ("rule is disjunctive, and a doctor violates the law if he falls short of either requirement") (citation omitted); Doc. 385 at 108-09 (prosecutor explaining under circuit precedent "it's a disjunctive standard"), the government is judicially estopped from now claiming they were actually conjunctive, see *New Hampshire* v. *Maine*, 532 U.S. 742, 749-56 (2001).

4. Finally, since *Ruan*, the government has agreed it was appropriate to grant, vacate, and remand ("GVR") cases that challenge jury instructions as contrary to *Ruan*. See, *e.g.*, *Sakkal*¸ Mem. at 1. Indeed, both Dr. Sakkal's and Dr. Santos's instructions included the rejected "good faith" language and language implicating hypothetical reasonable doctors. *Id.*, Pet. 11-13, 19a; see also App. A-D.

Dr. Santos should, at minimum, be treated like the physicians in *Ruan*, as well as the cases the government has agreed to GVR.[1] If this Court provides no other relief, it should GVR and leave the issue "for the [Eleventh Circuit] to address on remand." *Ruan*, 142 S.Ct. at 2382.

B. Dr. Chaitoff's incorrect legal pontifications also contradict *Ruan*.

1. Nor were the jury instructions the only source of mistaken law. Indeed, Dr. Chaitoff repeatedly and flagrantly backdoored the government's *objective* legal theories. That violated *Ruan*'s holding that Section 841 prosecutions require "proving that a defendant knew or intended"—*subjectively* and at the time—that his "conduct was unauthorized." *Ruan*, 142 S.Ct. at 2382.

The petition details this testimony at length. See Pet. 5-13. But at least one example bears reiterating, when Dr. Chaitoff offered his legal interpretation of § 841's "outside the scope of professional practice" language. When asked for the "standards" he considered for "purposes of defining that term," he testified: "Well, it's *defined* under the Controlled Substance Act," the "DEA manual 2006," "Florida Rule 458.331 which discusses the disciplinary action to be taken if one should prescribe controlled substance out of professional practice for no legitimate medical purpose," and "[i]t's also . . . *inherent to the rules*" regarding "prescribing of controlled substances, 464.44," and "Rule 64B8-9.013." Doc. 388 at 21-22 (emphases added).

---

[1] *Naum* v. *United States*, No. 20-1480 (whether jury properly instructed that § 841 elements are disjunctive); *Henson* v. *United States*, No. 21-6736 (same); *Couch* v. *United States*, 20-7934 (whether jury properly instructed on good-faith standard); *Mencia* v. *United States*, No. 21-1008 (same).

Dr. Chaitoff's testimony conflated legal standards governing doctors with the scope of the "usual course of professional practice" defense. He testified that doctors prescribing controlled substances were liable if—in hindsight—he or a prosecutor didn't believe they complied with the relevant *legal* rules, regardless of the physician's own *mens rea*. That can't be squared with *Ruan*'s command that prosecutors "must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner," which he knew at the time. 142 S.Ct. at 2376.

2. Additionally, in framing Dr. Chaitoff's testimony to the jury, the prosecutors also repeatedly made arguments inconsistent with *Ruan*'s later holding. In opening statement, for instance, the prosecutor said Dr. Chaitoff would "assist" the jury in understanding the "legal term[s] mentioned throughout trial" (*i.e.*, "no legitimate medical purpose" and "not in the usual course of medical practice") so they could "judge" Dr. Santos's actions "objectively." Doc. 380 at 30-31 (emphasis added). During closing argument, the prosecution doubled down on Dr. Chaitoff's impermissibly objective, legalistic view of the crime, emphasizing he had "explained that prescribing within the scope of professional practice means within generally accepted standards of medical practice, such as under Florida laws or Federal Rules and regulations." Doc. 393 at 30.

Dr. Chaitoff's legalistic view of "usual course of professional practice"—and the government's repetition of that view—reduced the "except as authorized" exception to an objective standard. It committed the mortal sin, which *Ruan* corrected, of "turn[ing] a defendant's criminal liability on the mental state of a hypothetical 'reasonable' doctor," *Ruan*, 142 S.Ct. at 2381, which risks criminalizing medical malpractice. The admission of Dr. Chaitoff's testimony was error and, at

minimum, warrants further consideration on remand in light of *Ruan*.

II. The post-*Ruan* scope of expert testimony merits independent clarification.

1. *Ruan* left the door ajar as to *how* the government might prove *mens rea*, suggesting only that prosecutors may introduce "circumstantial evidence" of "objective criteria." 142 S.Ct. at 2382. *Ruan* didn't elaborate on exactly *what* "circumstantial evidence" of "objective criteria" could be permissible.

Today, however, the government offers a startling position unsupported by precedent or the Federal Rules of Evidence. It argues *Ruan* lets it backdoor its upside-down objective legal theories through experts who advise juries on the complex laws and regulations governing medical prescriptions. BIO 12. Indeed, to the government, Dr. Chaitoff's legal opinions were mere "background testimony" that cast light on the "objective bounds" of "legitimate medical purpose" and other legal terms of art. *Id.* at 5, 12, 14.

2. But this position upends centuries of precedent: for "matters in law[,] the judges ought to decide." Sir Edward Coke, Commentary on Littleton 155.b (C. Butler et al., eds. 1832). It's black-letter law that it's "'not for witnesses to instruct the jury as to applicable principles of law, but for the judge.'" *Nieves-Villanueva* v. *Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997).

The rules governing expert witnesses aim to generate testimony that "will help the trier of fact." Fed. R. Evid. 702(a). Juries aren't triers of law, so legal testimony doesn't help their task. *Nieves-Villanueva*, 133 F.3d at 100. Plus, such conclusions outstrip experts' specialized medical knowledge. *United States* v. *Lipscomb*, 14 F.3d 1236, 1241 (7th Cir. 1994). By contrast, specialized knowledge is surely helpful in elucidating

"the customs and practices of an industry," *Pelletier* v. *Main Street Textiles, LP*, 470 F.3d 48, 55 (1st Cir. 2006), but that didn't happen here, see Pet. 20.

To be sure, in other cases, parsing the permissible (customs and practices) from the prohibited (legal opinions) can be easier said than done, and this issue is one that extends far beyond this case. See *Hanson* v. *Waller*, 888 F.2d 806, 812 (11th Cir. 1989) (Fed. R. Evid. 704 didn't "totally dispel the confusion over the admissibility of expert opinions arguably amounting to conclusions of law"); Note, *Expert Legal Testimony*, 97 Harv. L. Rev. 797, 801 (1984) (describing "a battleground in the conflict over the admissibility of expert legal testimony"). Trial courts often mistakenly admit impermissible expert legal testimony in pain clinic prosecutions. See *United States* v. *Miller*, 891 F.3d 1220, 1229 (10th Cir. 2018) ("no specific guidelines" address what's "required to support a conclusion that an accused acted outside the usual course of professional practice"); compare *United States* v. *Lopez*, No. 18-0006, 2019 WL 1570818, at *6-7 (S.D.N.Y. Apr. 11, 2019) (expert prohibited from defining "legal standards"), with *United States* v. *Kohli*, 847 F.3d 483, 492 (7th Cir. 2017) ("testimony on the standard of care is not converted into an impermissible jury instruction on the governing legal standard just because the two standards overlap"). But here, Dr. Chaitoff clearly and repeatedly crossed the line.

3. In *Ruan*'s wake, prosecutors and lower courts thus need guidance about the line between permissible industry custom and practice and prohibited legal testimony. The need for the Court to set such boundaries is heightened here, because the government *still* contends Dr. Chaitoff could permissibly offer legal opinions about the "standards outlined in a DEA manual, and state and federal regulations," BIO 12 (cleaned

up), which simply cannot be the law, see also *id.* at 5 (characterizing Dr. Chaitoff's testimony as legal analysis because he "testified that 'most of' the prescriptions that [petitioner] wrote for controlled substances 'were provided for no legitimate medical purpose'" (alterations in original)); Doc. 388 at 119-20 (Dr. Chaitoff admitting his report's undisclosed reliance on legal authorities).

And the need for such boundaries is further illustrated by the fact that Dr. Chaitoff not only provided forbidden legal opinions, but also testified impermissibly about Dr. Santos's subjective state of mind. Doc. 388 at 201 (testifying "controlled substances were prescribed [by Dr. Santos] for no legitimate purpose"); *id.* at 20 (opining that "100 percent" or "most of [Dr. Santos's] prescriptions for controlled substances were provided for no legitimate medical purpose"); Pet. 17. Rule 704(b), however, commits such subtle state-of-mind judgments to jurors, not witnesses-for-hire, because doctors "are experts in medicine" and "not the law." Wright & Miller, 29 Fed. Prac. & Proc. Evid. § 6282 (2d. ed.). The government apparently reads *Ruan* as upending that longstanding policy judgment.

4. Moreover, the admission of Dr. Chaitoff's testimony was plain error and affected Dr. Santos's substantial rights.[2] He repeatedly offered his outlandish legal opinions, including that poor handwriting and abbreviations were federal crimes. See Pet. 11. And despite acknowledging "a substantial likelihood that a

---

[2] The expert testimony's pervasiveness arguably implicates structural error. It usurped the jury's role, "affect[ed] the 'entire conduct of the [proceeding] from beginning to end,'" *Greer* v. *United States*, 141 S.Ct. 2090, 2100 (2021) (quotation omitted), and precipitated "consequences that are necessarily unquantifiable and indeterminate," *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-82 (1993).

motion for new trial or an acquittal will be granted" in "light of the circumstances of this case" and the verdict's "oddity," the district court still denied judgment of acquittal on counts seven through nine based solely on his testimony. Doc. 394 at 12, 16. By contrast, in this battle of the experts, the defense's expert played by the rules, testifying that Dr. Santos's actions were consistent with the pain-management industry's custom and practice. Doc. 391 at 31-39. This establishes a reasonable probability that Dr. Santos would've been acquitted but-for Dr. Chaitoff's testimony.

5. Without further clarity, the consequences of the government's position will metastasize far beyond this case, resulting in further backdoor expert testimony that evades lower courts' gatekeeping, mystifies jurors, and terrifies physicians into exercising excessive caution lest they "risk felony liability whenever they choose unpopular treatments." *Ruan*, No. 20-1410, Pet. Merits Br. 44. That outcome "would disserve both the development of medicine generally and the individual needs of patients" for whom "novel treatments may present the only possibility of recovery." *Id.*; see also *id.*, Br. of *Amici Curiae* Professors of Health L. & Pol'y at 16-19 (describing medical ramifications of § 841 prosecutions).

This Court should give guidance to the gatekeepers by affirming the longstanding principle that expert witnesses can't serve up half-baked legal pontifications, especially after *Ruan*, and especially when they portend convictions for mere medical malpractice.

CONCLUSION

The petition should be granted.

Respectfully submitted,

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005

RACHEL L. HAMPTON
MEREDITH MCBRIDE
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603

THOMAS A. BURNS*
SHANNON C. REESE
BURNS, P.A.
301 W. Platt St., Ste. 137
Tampa, FL 33606
(813) 642-6350
tburns@burnslawpa.com

XIAO WANG
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611

Counsel for Petitioner

*Counsel of Record

September 27, 2022