No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN HENSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the erroneous issuance of a deliberate ignorance or willful blindness instruction is harmless as a matter of law and beyond appellate review where minimally sufficient evidence of the defendant's "actual knowledge" was presented at trial.

2. Whether a medical practitioner charged under § 841 can be found guilty for issuing a prescription that is *either* outside the usual scope of professional practice *or* does not serve a legitimate medical purpose; or whether the government must prove that a practitioner acted *both* outside the usual course of professional practice *and* without a legitimate medical purpose in order to obtain a conviction.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner, defendant-appellant below, is Dr. Steven Henson.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

Tenth Circuit Court of Appeals:

United States v. Steven R. Henson, No. 19-3062, United States Court of Appeals for the Tenth Circuit. Judgment entered August 19, 2021. *United States v. Henson*, 9 F.4th 1258 (10th Cir. 2021).

United States District Court for the District of Kansas:

United States v. Henson, No. 6:16-cr-10018-JMT-1. Judgement and conviction entered March 12, 2019.

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United States v. Henson, 9 F.4th 1258 (10th Cir. 2021).

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2021. On November 1, 2021 this Court granted petitioner's motion for an extension of time to file the instant petition for writ of certiorari to December 19, 2021. Under Rule 30 of this Court, Dr. Henson's brief must be postmarked by December 20, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution prohibits any person from being deprived of his or her liberty without due process of law:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C.A § 841 (a)(1) states:

> "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"

21 C.F.R § 1306.04(a) provides the requirements for lawful prescription by a physician:

> "A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of

> professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances."

STATEMENT

The jury instructions issued in Petitioner's case allowed him to be convicted for issuing prescriptions *either* (1) without a legitimate medical purpose *or* (2) outside the usual course of professional practice. Cert.Appx. 107. Historically, the usual course of professional practice was dependent upon a medical practitioner's subjective purpose in issuing a prescription. When unmoored from any question of "medical purpose," the phrase, "usual course of professional practice" becomes unconstitutionally vague. This Court recently granted certiorari on the same issue in *Kahn v. United States*, 142 S. Ct. 457, (Mem)–458 (2021), No. 21–5261. Certiorari is currently pending on the same issue in *Naum* v. *United States*, No. 20-1480 (filed Apr. 20, 2021). Admittedly, the circuit split on this issue heavily sides with the government. Of the circuits to have addressed the question, only the Ninth Circuit appears to hold that a conviction for acting outside the "usual course" of professional practice is not sufficient.

Nevertheless, the issue is one of significant national importance to both medical practitioners and patients. Threatening physicians with the potential of decades long incarceration for violations of medical norms stifles the development of medicine. The indeterminacy of the standard has led to a chilling effect on the practice of medicine because practitioners are unable to predict what procedures or policies a prosecutor will deem to be outside the usual course of professional practice.

In addition, this case provides the Court with an opportunity to resolve a significant circuit split regarding whether factually unsupported deliberate ignorance instructions are per se

harmless. Dr. Henson argued that the facts did not support the issuance of a deliberate ignorance instruction in his case. Specifically, defendant argued that a failure to conduct a sufficiently thorough investigation or obliviousness to red flags was not sufficient to constitute an "act of avoidance under *Glob.-Tech Appliances, Inc. v. SEB S.A.,* 563 U.S. 754, 769-70 (2011). The district court held that ignoring red flags and failure to investigate were legally sufficient. The Tenth Circuit did not reach the issue, finding instead that any factually unsupported deliberate ignorance instruction is per se harmless, where, when taking the evidence in the light most favorable to the government, sufficient evidence on the record supports a finding of actual knowledge. Cert.Appx. 38-39.

A circuit split has developed as to whether even minimally legally sufficient evidence of actual knowledge precludes review of a deliberate ignorance instructions. The, First, Fourth, Sixth, Eighth, Tenth, Eleventh and arguably the Third Circuits hold that, under this Court's reasoning in *Griffin v. United States,* 502 U.S. 46, 59 (1991), the appellate courts are legally bound to assume that, where a deliberate ignorance instruction is factually unsupported, the jury properly understood and disregarded that instruction. *United States v. Garcia-Pastrana*, 584 F.3d 351, 379 (1st Cir. 2009); *United States v. Leahy*, 445 F.3d 634, 654 (3d Cir. 2006), *abrogated on other grounds by Loughrin v. United States*, 573 U.S. 351 (2014 1999); *United States v. Ebert*, 178 F.3d 1287 (4th Cir. 1999), *opinion amended on denial of reh'g,* 188 F.3d 504 (4th Cir. 1999); *United States v. Hernandez-Mendoza*, 611 F.3d 418, 419 (8th Cir. 2010) (*order denying petition for rehearing*); *United States v. Stone*, 9 F.3d 934, 937 (11th Cir. 1993). In those circuits the deliberate ignorance instruction is *per se* harmless.

The Second, Fifth, Ninth, and Seventh Circuits hold that, even where the government presents evidence of actual knowledge, a factually unsupported deliberate ignorance instruction

may still be harmful under Federal Rule of Criminal Procedure 52. *United States v. Carrillo*, 435 F.3d 767, 781 (7th Cir. 2005) ("Great caution must be exercised, ... in determining which circumstances support the inference of deliberate ignorance."); *United States v. Ferrarini*, 219 F.3d 145, 157 (2d Cir. 2000); *United States v. Mendoza-Medina*, 346 F.3d 121, 134–35 (5th Cir. 2003); *United States v. Gieniec*, 933 F.2d 1016 (9th Cir. 1991). In some cases, those circuits appear to apply a standard of harmlessness derived from this Court's holding in *Yates v. United States,* 354 U.S. 298 (1957), *overruled by Burks v. United States*, 437 U.S. 1, (1978). In other cases, the courts appear to apply the standard articulated in *Neder v. United States,* 527 U.S. 1, 18 (1999).

The circuit split is a critical one for this Court to resolve. Every circuit recognizes the danger of confusion that can be caused by issuing a deliberate ignorance instruction when one is not justified by the evidence. Circuits repeatedly caution that a deliberate ignorance instruction should be reserved for rare circumstances. Nevertheless, deliberate ignorance instructions have become commonplace. *United States v. Lee*, 966 F.3d 310, 324 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 639 (2020). The circuits that impose a *per se* harmlessness standard essentially preclude all review of a question that occurs repeatedly in the federal criminal courts and goes to the very heart of what separates innocent from blameworthy conduct. *Morissette v. United States,* 342 U.S. 246, 250 (1952).

FACTUAL BACKGROUND

At times relevant to this case Dr. Henson was a licensed physician, registered with the DEA to issue prescriptions for controlled substances. R.1 at 6. The charges in this case allege that from approximately July 1, 2014, to August 7, 2015, Dr. Henson issued prescriptions for Oxycodone, Alprazolam, and Methadone to several of his patients outside the scope of

professional practice and without a legitimate medical purpose. R.1. Following a jury trial, Dr. Henson was convicted of the majority of the charges including two counts of conspiracy and 13 counts of distribution outside the usual course of medical practice or without a legitimate medical purpose in violation of 21 U.S.C. § 841. R. 373. R.373. Dr. Henson was sentenced to life without the chance of parole. R.434.

For the most part, the defense did not challenge the government's claim that the charged patients were either abusing their medications or selling their medications to third parties. Nor did Dr. Henson deny that he issued the charged prescriptions. Instead, Dr. Henson's defense was that he was unaware of any abuse of medication, that he honestly believed that each prescription issued was serving a legitimate medical purpose, and that he believed he was acting within the usual course of professional practice. The government argued that Dr. Henson was either knew or was willfully blind to his patients abuse of medication and, in the alternative, that he knowingly operated outside of the "usual course of professional practice."

A. Patient-Witness Testimony

Henson began practicing medicine as an emergency room doctor and eventually assisted in setting up an emergency room at Galichia Heart Hospital where he was employed until 2011. 1016/18 Tr. 257; 307. In 2013, Dr. Henson opened a pain management clinic. 1016/18 Tr. 257. Dr. Henson had outside financial interests and only worked at the pain management clinic one day a week. 1016/18 Tr. 261-2; 10/17/18 Tr. 38. Originally, Petitioner opened the practice to treat less than half a dozen patients with whom he had developed a relationship over years working in emergency room. (Wichita Health & Wellness Clinic). 1016/18 Tr. 278. Eventually his practice grew through referrals to as much as 120 patients. 1016/18 Tr. 279.

As is not uncommon in these cases, the patient witnesses testified that they lied to Dr. Henson in order to obtain the charged perscriptions.[1] 10/04/18 Tr. 231-2. 10/05/18 Tr. 142 (active steps to hide abuse) 10/05/18 Tr. 132.133; 10/05/18 Tr. 173-4; 10/11/18 Tr. 9; 10/10/18 Tr. 15-16. Each of the patients had legitimate pain or potentially painful medical conditions. 10/04/18 Tr. 89-92 ; 10/05/18 Tr. 132-133; 10/05/18 Tr. 173-4; 10/11/18 Tr. 4; 10/11/18 Tr. 62. Patient-witnesses testified that they had no agreement with Dr. Henson to distribute narcotics and believed that they would be fired as patients if Dr. Henson discovered they were abusing or selling narcotics. 10/04/18 Tr. 235 ("And the reason for that is because you knew very well that if you were selling your pills and he found out, he would cut you off from that clinic altogether, right? A. That's correct, he told me that once…. Okay. So he made it clear selling pills was not acceptable, right? A. Correct.); 10/05/18 Tr. 175-6; 10/11/18 Tr. 203; 10/11/18 Tr. 269; 10/11/18 Tr. 268; 10/11/18 Tr. 22-23; 10/11/18 Tr. 76; 10/12/18 Tr. 119; 10/10/18 Tr. 15-16; 0/09/18 Tr. 141-2. Several of the patient witnesses were prescribed the same or similar narcotics by other doctors. 10/04/18 Tr. 109; 10/10/18 Tr. 159; 10/11/18 Tr. 41; 10/09/18 Tr. 115-220. At least one patient-witness testified that she was at the time of trial taking pain medication and that the

[1] An undercover agent posing as a patient testified that she believed her role as an undercover officer was to fool Dr. Henson into believing that she suffered from legitimate pain. 10/09/18 Tr. 47 ("Okay. So he was trying to check you out and you actively misled him so he would think that you were legitimate, correct? A. Yes."); 10/09/18Tr. 69 ("But, and when you were in there with Dr. Henson, every question that you answered was answered to indicate to him that did you have a need for the medicine, right? A. Yes, that's the point of the undercover."); ("Isn't the point of the undercover to find corrupt doctors who aren't looking for the answers and are only trying to get money? A. No."; 10/09/18 Tr. 70 ("But you agree with me that every question he asked and every answer you gave was aimed at convincing him you had a real need and a real pain, and a history with pain medicine, right? A. Yes. And you'd agree with me that he seemed to trust your answers and accept your input about what worked for you, right? A. Yes."). When Dr. Henson asked where she was previously treated, she provided the name of a real doctor whose offices had been shut down. 10/09/18 Tr. 42, 46. She provided him with a background regarding her previous injuries and treatment that was intentionally designed so that it couldn't be verified or unverified on the in the Kansas Prescription monitoring system. 10/09/18 Tr. 47.

medications Dr. Henson prescribed were helping her to maintain functionality. 10/09/18 Tr. 173-5. Furthermore, the evidence presented at trial shows that Dr. Henson did engage in some investigation in the face of suspicious circumstances. *See, e.g.,* 10/05/18 Tr. 166 (obtaining police report when patient reported that medication was stolen); 10/09/18 Tr. 23 (questioning undercover agent posing as patient as to why previously issued prescription did not appear on Kansas prescription monitoring system); 10/12/18 Tr. 79. (Firing patient whom he learned to be diverting medication).

B. Expert Testimony And Testimony Of Dr. Henson regarding appropriate pain treatment procedures.

The government's pain management expert testified that Dr. Henson's practice was "outside the course of legitimate practice." Trial.Tr. at 2346. Dr. Henson did not use pain contracts, or engage in sufficient monitoring, or conduct sufficient physical examinations. Trial.Tr. at 2231, 2235, 2309, 2310. Dr. Morgan testified that Dr. Henson's medical records were not sufficiently thorough to justify "the use of high dose opioid therapy." Trial.Tr. at 2287-88.

For his own part, Dr. Henson testified that he based his theory of pain management largely, though not exclusively, on a conference he attended that was led by a Dr. Forest Tennant. 10/16/18 Tr. 270. As Dr. Henson understood it, Dr. Tennant advocated prescribing medication to whatever degree is necessary to establish a patient's functionality. 10/16/18 Tr. 274. Dr. Henson talked about the importance of having a trusting relationship with patients. 10/16/18 Tr. 287. Dr. Henson testified as to why he believed urine drug screens and pill counts to be infective in detecting diversion or abuse, and were, in his opinion, unnecessary and expensive barriers to pain treatment, which work to undermine the quality of care. 10/16/18 Tr. 294-96.

C. Jury Instructions

The government requested, and the defense objected to the issuance of the deliberate ignorance instruction. 10/01/18 Tr. 36-37. In granting the government's request for a deliberate ignorance instruction, the district court summarized the government's theory of deliberate ignorance:

> The strongest act of avoidance in the case is separate from all of the underlying evidence of knowledge that Dr. Henson's otherwise relying on in his defense and that is this uniform rote colloquy with patients in which he asked them if they had pain, they said yes, and then he gave them prescriptions.
>
> The fact that he asked these very limited questions knowing that the patient would respond, Sure, I have pain, but never asking any additional questions that would get to the cause of the pain or anything else that might be somewhat probative, not performing any testing is just the kind of thing that I believe could constitute deliberate ignorance.

10/15/18 Tr. 304-06. The deliberate ignorance instruction issued by the district court read:

> The term "knowingly" means that defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake, or accident.
>
> When the word "knowingly" is used in these instructions, it means that the act was done voluntarily and intentionally, and not because of mistake or accident. Although knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself or herself to the existence of a fact. Knowledge can be inferred if the defendant was aware of a high probability of the existence of the fact in question, unless the defendant did not actually believe the fact in question.

Cert.Appx. 107

While acknowledging the Tenth Circuit's binding precedent to the contrary, Petitioner objected to the elements instruction, asking that the two elements--"usual course of professional practice" and "legitimate medical purpose"-- be read in the conjunctive. 10/01/18 Tr. 13-14. The district court overruled the defendant's objection

and issued an instruction allowing the government to prove the defendant's guilt by establishing either (1) that the defendant acted outside the usual course of professional practice *or* (2) without a legitimate medical purpose.

> "Under this regulation, a registered medical practitioner may prescribe a controlled substance if she acts both for a legitimate medical purpose and while acting in the usual course of her profession. Without both, a practitioner is subject to prosecution. In other words, if the Government proves beyond a reasonable doubt that a prescription was knowingly written (1) not for a legitimate medical purpose, *or* (2) outside the usual course of professional practice, then the exception to the Controlled Substances Act does not apply."

Cert.Appx. 137.

D. Court Of Appeals Decision

Petitioner appealed to the Tenth Circuit Court of Appeals. Petitioner argued that the deliberate ignorance instruction was erroneously issued because, in part, the government did not present evidence of an affirmative act taken by the defendant to avoid confirming an actual suspicion that he was acting outside the usual course of professional practice or without a legitimate medical purpose. Cert.Appx. 38. The Tenth Circuit declined to reach the issue because Petitioner did not challenge the sufficiency of the evidence necessary to establish actual knowledge. *Id*. 1279. The Tenth circuit found that, under *Griffin* and its previous precedent, "when there is sufficient evidence to support a conviction on one theory of guilt on which the jury was properly instructed, we will not reverse the conviction on the ground that there was insufficient evidence to convict on an alternative ground on which the jury was instructed." Cert.Appx. 39. (*quoting United States v. Ayon Corrales*, 608 F.3d 654, 656 (10th Cir. 2010)). The Tenth Circuit held that factually unsupported deliberate indifference is per se harmless absent a successful challenge to the mere sufficiency of proof of actual knowledge.

Petitioner also challenged the issuance of instructions allowing the government to prove *either* that a defendant acted outside the usual scope of professional practice *or* that the defendant acted without a legitimate medical purpose. The Tenth Circuit declined to revisit its prior precedent and upheld the instructions. Cert.Appx. 84.

REASONS FOR GRANTING REVIEW

I. Review is Necessary To Resolve A Deep Circuit Split As To Whether A Deliberate Ignorance Instruction Is *Per-Se* Harmless In The Face Of Minimally Sufficient Evidence Of Actual Knowledge.

Deliberate ignorance instructions allows a jury to find knowledge where, "(1) The defendant [subjectively believes] that there is a high probability that a fact exists and (2) the defendant [takes] deliberate actions to avoid learning of that fact" such that a defendant "can almost be said to have actually known the critical facts" *Glob.-Tech Appliances, Inc.* 563 U.S. at 769-70 (*citing,* G. Williams, Criminal Law § 57, p. 159 (2d ed. 1961)).[2] Where knowledge is an element of the offense, neither recklessness nor negligence is sufficient to establish deliberate ignorance. *Id.* 769–70. "Indifference" to a "known risk" is not sufficient. *Id.* 770.

The deliberate ignorance instruction should be given "rarely" because if unsupported by the evidence it runs the risk of confusing the jury into convicting on the basis of what a defendant "should have known" and "thereby relieving the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt." *United States v. Mari,* 47 F.3d 782, 785 (6th Cir. 1995) *(quotations omitted)*; *United States v. Lee*, 966 F.3d at 324 ("We are not alone in our concern with their overuse. Similar to our admonitions, other

[2] Although *Glob-Tech* is a civil case, it has been applied to criminal cases. *United States v. Macias*, 786 F.3d 1060, 1063 (7th Cir. 2015); *United States v. Brooks,* 681 F.3d 678, 702 n. 19 (5th Cir.2012); *United States v. Ferguson,* 676 F.3d 260, 278 n. 16 (2d Cir.2011); *United States v. Butler,* 646 F.3d 1038, 1041 (8th Cir.2011).

courts use the words "rarely," "sparingly," and "caution" when discussing the instruction.") (collecting cases).[3]

Despite repeated, often toothless, admonitions from the Circuits, issuance of deliberate ignorance instructions has become routine in criminal cases, perhaps especially where doctors are accused of acting outside the usual course of professional practice. *Lee*, 966 F.3d 310, 323 (5th Cir.) ("but what seems rare is a health care prosecution without the instruction.")[4]. Case law

[3] Nearly every court of appeals recognizes this possibility and has cautioned that deliberate ignorance instructions should be the exception rather that the rule. *United States v. Brandon*, 17 F.3d 409, 453–54 (1st Cir. 1994) ("The danger of an improper willful blindness instruction is " 'the possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known [an illegal act] was taking place.' "); *United States v. Lighty*, 616 F.3d 321, 378 (4th Cir. 2010) (indicating that willful blindness instruction should be issued "only in rare circumstances"… "because the instruction presents the danger of allowing the jury to convict based on an *ex post facto* theory (he should have been more careful) or to convict on a negligence theory (the defendant should have known his conduct was illegal") (quotations omitted); *United States v. Skilling*, 554 F.3d 529, 548–49 (5th Cir. 2009), *aff'd in part, vacated in part, remanded*, 561 U.S. 358 (2010) ("The source of this risk is the potential for confusion about the degree of 'deliberateness' required to convert ordinary, innocent ignorance into guilty knowledge. The concern is that once a jury learns that it can convict a defendant despite evidence of a lack of knowledge, it will be misled into thinking that it can convict based on negligent or reckless ignorance rather than intentional ignorance. In other words, the jury may erroneously apply a lesser *mens rea* requirement: a 'should have known' standard of knowledge."); *United States v. Geisen,* 612 F.3d 471, 486 (6th Cir. 2010) ("However, we have cautioned that this instruction should be used sparingly because of the heightened risk of a conviction based on mere negligence, carelessness, or ignorance."); *United States v. Ciesiolka*, 614 F.3d 347, 352 (7th Cir. 2010) (recognizing "the danger that such instructions could relieve the government of its burden of proving the elements of an offense beyond a reasonable doubt." And applying this Court's harmless error test from Neder); *United States v. Barnhart*, 979 F.2d 647, 651 (8th Cir. 1992) ("the instruction should not be given out in all cases because, despite the instruction's cautionary disclaimer, there is a "'possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known [an illegal act] was taking place.'") (quoting and citing, *United States v. White,* 794 F.2d 367, 371 (8th Cir.1986); *United States v. Alvarado,* 838 F.2d 311, 314 (9th Cir.1987), *cert. denied,* 487 U.S. 1222, 108 S.Ct. 2880, 101 L.Ed.2d 915 (1988); ("The increasing use of ostrich instructions has prompted fears that 'the jury might convict for negligence or stupidity.'")

[4] In *Lee*, the Fifth Circuit explained that the evidence of suspicious circumstances and other evidence of knowledge presented significant evidence of actual knowledge, sufficient to render

is replete with examples of district court judges and prosecuting attorneys misapprehending the requirements necessary to establish that a defendant was "willfully blind." *Id*. Despite confusion among legal professionals as to what factual scenarios give rise to a finding of willful blindness, six circuits now find that an unsupported deliberate ignorance instruction is harmless per se because the court is bound to presume that a jury understood and correctly disregarded the instruction.

A. Courts are finding than an unsupported deliberate ignorance instruction is harmless as a matter of law.

The First, Fourth, Sixth, Eighth, Tenth, Eleventh and arguably the Third Circuits hold that, where the government establishes sufficient evidence of actual knowledge at trial, a factually unsupported willful blindness instruction is *per se* harmless. These circuits base their reasoning on the Eleventh Circuit's decision in *Stone*, 9 F.3d at 937.

Prior to *Stone*, the Eleventh Circuit applied Rule 52 harmless error analysis to erroneously issued willful blindness instructions. *Id*. ("Nonetheless, the *Rivera* Court held that the trial court's error in giving the deliberate ignorance instruction was harmless because the evidence of actual knowledge was 'so overwhelming as to compel a guilty verdict.'") (*quoting United States v. Rivera*, 944 F.2d 1563, 1570 (11th Cir. 1991)).

In *Stone*, the Eleventh Circuit held that, while the evidence of the defendant's actual knowledge was not "overwhelming," the government did present minimally sufficient evidence. *Id*. 937. ("The evidence of actual knowledge in this case was sufficient to support a guilty verdict, but was not overwhelming."). Nevertheless, the Eleventh Circuit held that under this

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the erroneous issuance of the instruction harmless, even though it did not constitute evidence of deliberate ignorance. *Lee*, 966 F.3d at 323.

Court's decision in *Griffin,* 502 U.S. at 59, minimally sufficient evidence of actual knowledge renders the erroneous issuance of a willful blindness *per se* harmless.

The defendant in *Griffin* was charged with a multi object conspiracy alleging fraud against both the DEA and the IRS. The government did not present evidence supporting allegations of fraud against the DEA. *Id*. 59. This Court held that insufficiency of the evidence as to one object in a multi object conspiracy does not provide an "independent basis" of reversal where the government presented sufficient evidence to sustain an alternative object. *Id*. 59-60. This Court distinguished *factually* insufficient charges from *unconstitutional* or *illegal* charges at issue in in *Stromberg v. California,* 283 U.S. 359 (1931) and *Yates,* 354 U.S. 298. *Id*. 59-60.

The Court reasoned that "[j]urors are not generally equipped" to determine whether a given conviction or charge is legally incorrect or unconstitutional, therefore when "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." *Id*. 59. However, where a theory of guilt is "factually inadequate … jurors *are* well equipped to analyze the evidence" and disregard an unsupported legal theory. *Id*. 59 (emphasis in original).

Stone does not analyze factually unsupported willful blindness instructions as potentially misleading jury instructions or unsupported theory instructions. Rather, *Stone* interprets the willful blindness instruction as an *alternative means* of establishing the requisite *mens rea*. Under that logic, if evidence is factually insufficient to establish willful blindness, *Griffin* requires the appellate courts to assume that the jury disregarded it. *Stone*, 9 F.3d at 938. The Eleventh Circuit explicitly stated that it was bound by *Griffin* to assume that the jury accurately understood and followed the willful blindness instruction. *United States v. Stone*, 9 F.3d 934, 938 (11th Cir. 1993) ("Stone's contention contains the basis of its denial. If, as he contends, there was

insufficient evidence of deliberate ignorance to prove that theory beyond a reasonable doubt, then the jury, following the instruction, as we must assume it did, did not convict on a deliberate ignorance grounds").

The First, Fourth, Sixth and Eighth circuits have explicitly adopted the approach articulated by the Eleventh Circuit in *Stone*. *Mari*, 47 F.3d at 787 (finding that *Griffin* mandates that any error in issuing an unsupported conscious avoidance instruction is harmless "as a matter of law"); *United States v. Garcia-Pastrana*, 584 F.3d 351, 379 (1st Cir. 2009); *United States v. Perez-Melendez*, 599 F.3d 31, 47 (1st Cir. 2010); *United States v. Ebert*, 178 F.3d 1287; *United States v. Hernandez-Mendoza*, 611 F.3d at 419 (8th Cir. 2010) (*order denying petition for rehearing*); *United States v. Hernandez-Mendoza*, 600 F.3d 971, 979–80 (8th Cir. 2010). The Third Circuit appears to adopt a *per se* reversal standard, though their case law is less clear, or at least less well developed. In *United States v. Leahy*, 445 F.3d at 654 (citing *United States v. Mari*, 47 F.3d at 787 and *Griffin* for the proposition that where the government presents evidence of actual knowledge, any error in issuing the willful blindness instruction is harmless).

Stone represented a change in the case law. Previously these courts applied the familiar *Chapman* harmless error test to determine if the unsupported issuance of a willful blindness instruction required reversal. *Barnhart,* 979 F.2d at 652–53 ("In determining whether the error was harmless, we endeavor to determine whether, absent the error, it is 'clear beyond a reasonable doubt that the jury would have returned a verdict of guilty[.]'." In conducting this inquiry, we consider the circumstances of the error and the quality of the evidence in support of the verdict"); *United States v. Lieberman*, 106 F.3d 393 (4th Cir. 1997); *Rivera,* 944 F.2d at 1571. Prior to adopting the reasoning of *Stone*, the Tenth Circuit had found factually unsupported

willful blindness instructions to be harmful. *See United States* v. *Hilliard*, 31 F.3d 1509 (1994); *United States* v. *de Francisco-Lopez*, 939 F.2d 1405, 1412–1413(10th Cir. 1991).

The holdings of the above circuits, like the holding of the Tenth Circuit in the case at bar, are *not* based on the idiosyncrasies of the given case. Rather, these decisions hold that in *all* cases where there is minimally sufficient evidence of actual knowledge, the willful blindness instruction is necessarily harmless "as a matter of law." *Mari*, 47 F.3d at 786; *United States v. Daneshvar*, 925 F.3d 766, 782 (6th Cir. 2019) (reading of Sixth Circuit pattern deliberate ignorance instruction, even if unsupported, is harmless as a matter of law); *Hernandez-Mendoza*, 600 F.3d at 979–80 (finding that *Griffin* mandates the conclusion that the jury correctly disregarded unsupported willful blindness instruction).

The effect is that, in in these circuits, the factual predicate necessary to support a willful blindness instruction is entirely beyond review in the appellate courts. *United States v. Kennard,* 472 F.3d 851, 858 (11th Cir. 2006) ("We need not decide whether the evidence justified the deliberate ignorance instruction, [*Stone*] says that it does not matter."); *United States v. Steed,* 548 F.3d 961, 978 (11th Cir. 2008) ("we decline to decide"); *Kennard,* 472 F.3d 852, 858 (2006) (Same); *United States v. Rayborn,* 491 F.3d 513, 520 (6th Cir.2007) (same); *United States v. Monus*, 128 F.3d 376, 390–91 (6th Cir. 1997) (same); *United States v. Daneshvar*, 925 F.3d 766, 782 (6th Cir. 2019); *United States v. Perez-Melendez*, 599 F.3d 31, 47 (1st Cir. 2010) (same) *United States v. Lighty*, 616 F.3d at 378–79 (same).

B. Circuits Analyzing Federal Rule Of Criminal Procedure5 52 Requiring The Government To Prove That Erroneous Issuance Of Deliberate Ignorance Instruction To Be Harmless.

The Second, Fifth, Ninth, Seventh and Eleventh Circuits allow for the possibility that a factually unsupported willful blindness instruction is prejudicial under the harmless error

standard even where the government's evidence was *sufficient* to establish actual knowledge. *Ferrarini*, 219 F.3d at 157 (rejecting the argument that errors were harmless as a matter of law)[5]; *Mendoza-Medina*, 346 F.3d at 134–35 ("We cannot assume that in every instance in which the evidence does not support the deliberate ignorance instruction the jury will disregard it."); *Ciesiolka,* 614 F.3d at 354 (applying harmless error standard)*; Macias*, 786 F.3d at 1063 (reversing for factually unsupported deliberate ignorance instruction); *Gieniec*, 933 F.2d 1016 (same); *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992) (same). The D.C. Circuit also appears to apply harmless error analysis to factually unsupported deliberate ignorance instructions. *United States v. Alston-Graves*, 435 F.3d 331, 342 (D.C. Cir. 2006) ("Just like other errors that occur at trial, erroneous instructions—even unconstitutional instructions, which this is not—can be harmless.").

Application of the harmless error standard within these circuits is not entirely consistent. The Ninth Circuit, for example, holds that in order for the issuance of a factually unsupported willful blindness instruction to be harmless, the error must be "logically harmless to defendant beyond any reasonable doubt." *United States v. Rea*, 532 F.2d 147, 149 (9th Cir. 1976); *Gieniec*, 933 F.2d 1016. This was the standard previously applied in the Eleventh Circuit prior to *Stone*. *Rivera*, 944 F.2d at 1572. Under this standard '[i]f the 'record accommodates a construction of events that supports a guilty verdict, but it does not compel such a construction,' then reversal is

[5] *In Ferrarini* the Second Circuit held that "Since we have held that conscious avoidance cannot be established when the factual context '*should have apprised* [the defendant] of the unlawful nature of [his] conduct,' … and have instead required that the defendant have been 'shown to have *decided* not to learn the key fact,' —such a result *might constitute reversible error*.." *Ferrarini,* 219 F.3d at 157 (*quoting*, *United States v.* Rodriguez*,* 983 F.2d 455, 458 (2nd Cir. 1993)). In ruling, the court referenced, but did not explicitly overturn, its previous case, *United States v. Adeniji,* 31 F.3d 58, 63 (2d Cir. 1994). In that case the Second Circuit applied *Stone* and *Griffin* to conclude that "lack of evidence of conscious avoidance, coupled with the evidence of actual knowledge, compels a finding of harmless error." *Id*.

necessary." *Id*. 1572 (quotation omitted). This appears to be based at least loosely on this Court's decision in *Yates.* The Seventh Circuit analyses the erroneous issuance of a deliberate ignorance standard under *Neder,* 527 U.S. 1, 18. *United States v. Ciesiolka,* 614 F.3d 347, 355 (7th Cir. 2010) (quoting *Neder* as requiring that the government must prove "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." In practice, both circuits essentially require "overwhelming" evidence of the defendant's actual knowledge prior to finding the erroneous issuance of a willful blindness instruction harmless. *Macias*, 786 F.3d at 1063; *United States v. Hong*, 938 F.3d 1040, 1047 (9th Cir. 2019). The Fifth Circuit does not require the government to present overwhelming evidence of a defendant's actual knowledge but will reverse unless there is "substantial evidence" of a defendant's actual knowledge. *United States v. Roussel,* 705 F.3d 184, 191 (5th Cir. 2013). This appears to be somewhat more friendly to the government than the standard imposed in the Seventh and Ninth Circuits.' Regardless of what the appropriate standard of review is, or how it should be applied, each of these courts at least admit of the existential possibility that the erroneous issuance of a willful blindness standard can justify reversal.

C. Disagreements Among The Circuits Represent A Concrete And Definitive Circuit Split Requiring Resolution.

Disagreement as to when and whether the erroneous issuance of a deliberate ignorance instruction is susceptible to appellate review represents a significant and important circuit split. The issue will continually reoccur and is not one that the circuits are likely to resolve absent this Court's intervention. The Fourth and Eight Circuits have both issued opinions indicating that the disagreement is "illusory." *Hernandez-Mendoza*, 611 F.3d at 419; *Ebert*, 178 F.3d at 1287 ("The persuasive value of the cases holding that an unsupported ostrich instruction can be prejudicial

error is limited, since most of these opinions predate *Stone.*"). The Eighth Circuit notes that those cases finding unsupported the issuance of a deliberate ignorance instruction harmful or analyzing the possible harmlessness of a deliberate ignorance instruction do not directly address *Griffin*. *Hernandez-Mendoza*, 611 F.3d at 419.

The circuits have now had over two decades to digest and apply *Stone*. The circuits who subject the erroneous issuance of deliberate ignorance instructions to harmless error analysis *can and do* reverse convictions. *See, e.g., Gieniec*, 933 F.2d at 1016; *Mapelli*, 971 F.2d at 286 (reversing where there "was evidence that [the defendant] was knowingly skimming, not that she deliberately avoided knowing."); *Macias*, 786 F.3d at 1062. That result is literally impossible in those circuits finding an error harmless *per se*.

More concretely, the Fifth and Second circuits have explicitly rejected a per se harmlessness standard. In *Mendoza-Medina*, 346 F.3d at 134–35 the Fifth Circuit did explicitly "decline to adopt … a bright-line rule that whenever the evidence does not support the deliberate ignorance instruction there can be no harm.." *Id*. 134-5. As the Fifth Circuit recognized such a standard would render the sufficiency of evidence supporting deliberate ignorance unreversible. *Id*. The Fifth Circuit noted that it is inconsistent with its "repeated[]" admonitions "that the instruction should rarely be given because it possesses a danger of confusing the jury." *Id.*

The Second Circuit is somewhat more equivocal but seems to have similarly rejected per se harmlessness. In *Ferrarini* the Second Circuit held that "Since we have held that conscious avoidance cannot be established when the factual context '*should have apprised* [the defendant] of the unlawful nature of [his] conduct,' … and have instead required that the defendant have been 'shown to have *decided* not to learn the key fact,' —such a result *might constitute reversible error*." *Ferrarini,* 219 F.3d at 157 (2d Cir. 2000) (quoting, *Rodriguez,* 983 F.2d at

458). In ruling the court referenced, but did not explicitly overturn its previous case, *Adeniji*, applying *Stone* and *Griffin* to conclude that "lack of evidence of conscious avoidance, coupled with the evidence of actual knowledge, compels a finding of harmless error." *Adeniji,* 31 F.3d at 63.

The logic employed by the circuits which apply the harmless error test is diametrically opposed to the logic of those circuits that find harmlessness *per see*. Every circuit recognizes that the risk of issuing a deliberate ignorance instruction is that, where no evidence supports deliberate ignorance, juries might be confused into believing that a defendant can be convicted for what she should have known. However, in circuits following *Stone*, juries are assumed to have always understood and correctly followed instructions. *Stone*, 9 F.3d at 937. *See Mendoza-Medina*, 346 F.3d at 134–35 ("We cannot assume that in every instance in which the evidence does not support the deliberate ignorance instruction the jury will disregard it. We have repeatedly stated that the instruction should rarely be given *because it possesses a danger of confusing the jury*.") (emphasis added). By contrast, the particular likelihood for confusion requires that "[g]reat caution must be exercised, ... in determining which circumstances support the inference of deliberate ignorance." *Carrillo*, 435 F.3d at 781 (7th Cir. 2005).

It is Petitioner's view, the *per se* standard articulated in *Stone* represents a significant expansion of *Griffin* that is entirely unjustified by the logic imposed in that case. However, if petitioner is wrong on that point, granting review would have the benefit of promoting judicial efficiency. The federal reporters are replete with unsupported deliberate ignorance instructions issued over defense objections. If these convictions are truly outside the powers of the appellate court to reverse, it seems unequivocally so informing the circuit courts would save a great many pages of drafting and significant judicial resources.

II. Providing For The Availability Of Appellate Review To The Issuance Of Deliberate Ignorance Instructions Represents An Issue Of Significant Judicial Importance.

The circuits universally recognize that a deliberate ignorance instruction should be "rarely given." An unsupported deliberate ignorance instruction runs the risk of a jury convicting a defendant based on what the defendant "should have known." Kenneth W. Simons, *The Willful Blindness Doctrine: Justifiable in Principle, Problematic in Practice*, 53 Ariz. St. L.J. 655, 656 (2021) (noting distinction between recklessness and deliberate ignorance). Judges and attorneys are often confused as to this distinction. The error is one of "constitutional dimensions." *de Francisco-Lopez*, 939 F.2d at 1412 (*citing Chapman v. California,* 386 U.S. 18, 24 (1967)). Despite repeated caution against causal issuance of the deliberate ignorance instruction, they have become routine.

Legal scholars, judges, and attorneys often find application of the meaning and application of deliberate ignorance difficult and confusing. At times, the deliberate ignorance instruction is articulated as an explanation on what it means for a defendant to act knowingly. Other circuits describe deliberate ignorance as an exception to a knowledge *mens rea* requirement. Kenneth W. Simons, *The Willful Blindness Doctrine: Justifiable in Principle, Problematic in Practice*, 53 Ariz. St. L.J. 655, 656 (2021) (noting "Confusion about whether [willful blindness] is a criterion distinct from knowledge. … Courts sometimes state that [willful blindness] permits an 'inference' of knowledge. But this formulation confuses the view that [willful blindness] is an alternative, independent ground for criminal liability with a second and more modest view, that evidence that a defendant was [willfully blind] is sometimes sufficient for the factfinder to conclude that the defendant actually possessed knowledge. On the second view, [willful blindness] is not an alternative to knowledge as a basis for criminal liability.").

There are several disagreements in the legal community and among the circuits as what facts are sufficient to justify a deliberate ignorance instruction. *Id*. (noting controversies including whether motive to avoid criminal liability is required, whether there must be affirmative steps or psychological avoidance, and the degree of risk of which a defendant must be aware). Is the "cutting off of normal curiosity by an effort of will" or "failure to investigate" sufficient to constitute an "act of avoidance" or are more concrete *actions* required. [6] *Macias*, 786 F.3d at 1063. If the defendants do have a duty to investigate, how thorough must that investigation be? Is it sufficient that a defendant have suspicion of *some* offense or must he have a subjective suspicion of the specific crime he was charged with committing? These issues cannot be resolved, let alone reach this Court, under the *per se* harmlessness standard.

For example, Petitioner argued that deliberate ignorance did not apply because the government did not put forth any evidence that he took any concrete action to avoid learning the truth. The government argued that failure to conduct sufficiently thorough investigations constitutes an "act of avoidance" under *Global-Tech*. If the meaning of "act" does not include "psychological avoidance," that the deliberate ignorance instruction was unsupported. This question was not addressed by the Tenth Circuit below, and under *Stone*, *cannot* be addressed except in the very rare case where the government presented absolutely no evidence of knowledge whatsoever. The Seventh Circuit, which does not apply *Stone* to preclude review, has been able to reach that issue and found that it does not. *Macias*, 786 F.3d at 1063 (7th Cir. 2015). Review of a markedly similar question was not available in the Tenth Circuit, not because

[6] This was the issue presented by petitioner in the court of appeals. The Court did not reach that issue because it found that the error was *per se* under *Griffin*.

Petitioner was wrong, or even because the error would have been harmless, but because under a per se harmlessness standard, the question was irrelevant.

The requirement of *mens rea* in criminal prosecutions is "no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette*, 342 U.S. at 250. Deliberate ignorance instructions risk undermining the *mens rea* and confusing the jury. Nevertheless, they are now routinely issued with little to no regard for whether they are justified by the evidence or might confuse the jury. Shielding such instructions from appellate review risks the rights of innumerable defendants charged in the federal system.

III. Whether A Medical Practitioner May Be Convicted Even Where He Acts With A Legitimate Medical Purpose Presents An Issue Of Significant National Importance.

Convicting doctors of violating §841 where they issue a prescription which they believe to be serving a legitimate medical purpose has a chilling effect on the practice of medicine and the development of new or novel treatments.

Pre and early CSA cases defined whether a prescription was written in the course of a physician's "professional practice" as dependent upon whether a practitioner believed the prescription was serving a legitimate medical purpose. *See*, *Boyd v. United States*, 271 U.S. 104, 105 (1926) (quoting good faith instruction stating "whether or not the defendant in prescribing morphine to his patients was honestly seeking to cure them of the morphine habit, while applying his curative remedies, it is not necessary for the jury to believe that defendant's treatment would cure the morphine habit, but it is sufficient if *defendant honestly believed his remedy was a cure for this disease*." *Id.* 107-08 (emphasis added); *Workin v. United States*, 260 F. 137, 141 (2d Cir.

1919) ("Proof is ample to justify the conclusion that the plaintiffs in error conspired to violate this statute and used Dr. Corish to write prescriptions for narcotics without any relation to the prospect of curing the disease or its alleviation."); *United States v. Rosenberg,* 515 F2d 190, 197 (9th Cir. 1975) ("The language clearly means that a doctor is not exempt from the statute when he takes actions that he does not in good faith believe are for legitimate medical purposes."); *United States v. Jobe*, 487 F.2d 268, 269 (10th Cir. 1973) ("[W]hen a medical practitioner issues a prescription which is not for a legitimate medical purpose and is not in the usual course of his professional practice,' then he does violate the statute.") (quotation omitted); *United States v. Bartee*, 479 F.2d 489 (10th Cir. 1973) ("in our view permit the inference that [the defendant] in thus prescribing was not acting for a legitimate medical purpose and as such was not within the usual course of his professional practice."); *United States v. Collier*, 478 F.2d 268, 272 (5th Cir. 1973) ("Similarly, here the physician must make a professional judgment as to whether a patient's condition is such that a certain drug should be prescribed.").

Usual course of professional practice was historically defined by whether a petitioner was issued a prescription for the purpose of treating a legitimate medical condition. Under this standard, a doctor who honestly believed that the prescriptions he was issuing served a legitimate medical purpose could be reasonably safe from the threat of prosecution. *But see,* H.R.Rep.No.91-1444, pp. 14-15 (Noting that fallout of *Harrison Act* cases has caused a "controversy… over the extent to which narcotic drugs may be administered to an addict solely because he is an addict" has caused a chilling effect in the medical community preventing practitioners from treating addicts.).

Today, as a practical matter, prosecutions alleging that a physician acted outside the "usual course of professional practice" focus on the *methods* by which a prescription is issued,

not the practitioner's belief in a prescription's efficacy. *United States v. Naum*, 832 F. App'x 137, 142 (4th Cir. 2020) ("Because the issue of whether [the defendant's] treatment was for a legitimate medical purpose was not an element in this case, [the defendant's] contention that he acted with a legitimate medical purpose was not a viable defense. In fact, there was no dispute at trial that [the defendant's] patients suffered from addiction and required treatment.") (unpublished); *United States v. Ruan*, 966 F.3d at 1139 (11th Cir. 2020) ("And even if [the testifying patient] felt that she benefitted from the medications [the defendant] prescribed, a reasonable jury could nonetheless conclude *that the manner in which* [the defendant] prescribed them was outside the usual course of professional practice.").

Standards methods a physician should employ in long term pain management are disputed in the medical community and evolving. Deborah Hellman, *Prosecuting Doctors for Trusting Patients*, 16 Geo. Mason L. Rev. 701, 710 (2009) ("what constitutes standard or accepted practice in the treatment of patients in chronic pain is evolving at great speed."). "There are no specific guidelines concerning what is required to support a conclusion that an accused acted outside the usual course of professional practice." *United States v. August,* 984 F.2d 705, 713 (6th Cir.1992); *United States v. Kirk*, 584 F.2d 773, 784 (6th Cir. 1978).

Without the addition of "medical purpose," the "usual course of professional practice" becomes unconstitutionally vague. "It is common ground that this Court, where possible, interprets congressional enactments so as to avoid raising serious constitutional questions." *Cheek v. United States*, 498 U.S. 192, 203 (1991); *Skilling v. United States*, 561 U.S. 358, 408–09 (2010). The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is

prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The "usual course of professional practice" standard, standing alone, is indeterminate as to (1) how "usual course" should be determined and (2) the degree of compliance required before a prescription becomes criminal. *Johnson v. United States*, 576 U.S. 591, 597 (2015) ("By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.").

It is unclear by what standard the "usual course of professional practice" should be measured. Should it be measured by a panel of experts, what most doctors actually do, or a doctor's individual professional judgment? *Colautti v. Franklin*, 439 U.S. 379, 393-4 (1979) (finding "sufficient reason" vague in the context for failing to identify whether the phrase should be judged from the perspective of the "treating physician" or a "cross-section of the medical community"); *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) ("Who decides whether a particular activity is in 'the course of professional practice' or done for a 'legitimate medical purpose'?").

The indeterminacy of the standard has led to a well-documented chilling effect on the willingness of physicians to treat patients suffering from chronic pain. Michael C. Barnes et al., Demanding Better: A Case for Increased Funding and Involvement of State Medical Boards in Response to America's Drug Abuse Crisis, 106 J. MED. REG. 3, 6–21, 8 (2020); Lagisetty, Pooja, *et al*., "*Assessing reasons for decreased primary care access for individuals on prescribed opioids*," PAIN. 2021 May; Vol 162. Issue 5. p 1379-1386 (*Available at*, DOI: 10.1097/j.pain.0000000000002145 (last visited, July 22, 2021)); Rima J. Oken, *Curing Healthcare Providers' Failure to Administer Opioids in the Treatment of Severe Pain*, 23

Cardozo L. Rev. 1917, 1944 (2002); MM. Reidenberg & O. Willis, *Prosecution of Physicians for Prescribing Opioids to Patients,* 81 CLINICAL PHARMACOLOGY & THERAPEUTICS903, 903 (2007); Kelly K. Dineen, *Addressing Prescription Opioid Abuse Concerns in Context: Synchronizing Policy Solutions to Multiple Complex Public Health Problems*, 40 Law & Psychol. Rev. 1, 51 (2016).

Without requiring the government to prove that a physician issued a prescription without a "medical purpose," a doctor may be prosecuted even if his prescriptions actually *were* serving a legitimate medical purpose. In other words, without "medical purpose," §841 allows practitioners to be convicted for issuing prescriptions that other doctors either have not or would not regardless of whether those prescriptions were actually effective.

A construction of §841 allowing for the conviction based only on a violation of current medical norms, cannot be consistently limited to the prosecution of pain management specialists. As this Court recognized, "Congress understandably was concerned that the drug laws do not impede legitimate research and that physicians be allowed reasonable discretion in treating patients and testing new theories." *United States v. Moore*, 423 U.S. 122, 143 (1975).

Almost definitionally, every development in medicine required some physician to act first, sometimes incurring the ridicule of fellow practitioners. Taking novel steps exposes a doctor to the risk of civil liability or sanction by regulatory boards. However, on an intuitive level, if one cannot be held liable in civil court because their prescription was efficacious, it seems odd that they can be found a drug dealer under §841 for the same prescription.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court will grant his Petition for Certiorari.

Respectfully Submitted,

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