Nos. 22-685 and 22-6653

In the Supreme Court of the United States

JERRY WAYNE WILKERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

JAYSON MONTGOMERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to sustain petitioners' convictions for committing healthcare fraud, in violation of 18 U.S.C. 1347, and paying and receiving illegal kickbacks, in violation of 42 U.S.C. 1320a-7b(b).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is not published in the Federal Reporter but is available at 2022 WL 2284387.[*]

[*] This brief refers to the petition appendix in No. 22-685 as "Pet. App.," the petition in No. 22-685 as "Wilkerson Pet.," and the petition in 22-6653 as "Montgomery Pet."

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2022. A petition for rehearing was denied on August 25, 2022 (Pet. App. 36a-37a). On November 16, 2022, Justice Kavanaugh extended the time within which to file petitions for writs of certiorari to and including January 20, 2023, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Tennessee, petitioner Wilkerson was convicted on one count of conspiring to commit healthcare fraud, in violation of 18 U.S.C. 1347 and 1349; 13 counts of wire fraud, in violation of 18 U.S.C. 1343; three counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of healthcare fraud, in violation of 18 U.S.C. 1347; eight counts of paying and receiving illegal kickbacks, in violation of 42 U.S.C. 1320a-7b(b); and one count of money laundering, in violation of 18 U.S.C. 1957. Wilkerson Judgment 1-2. Petitioner Hindmon was convicted on one count of conspiring to commit healthcare fraud, in violation of 18 U.S.C. 1347 and 1349; four counts of wire fraud, in violation of 18 U.S.C. 1343; one count of mail fraud, in violation of 18 U.S.C. 1341; one count of healthcare fraud, in violation of 18 U.S.C. 1347; and four counts of paying and receiving illegal kickbacks, in violation of 42 U.S.C. 1320a-7b(b). Hindmon Judgment 1-2. Petitioner Nicholson was convicted on seven counts of wire fraud, in violation of 18 U.S.C. 1343; one count of healthcare fraud, in violation of 18 U.S.C. 1347; and five counts of paying and receiving illegal kickbacks, in violation of 42 U.S.C. 1320a-7b(b). Nicholson Judgment 1-2. Petitioner

Chatfield was convicted on one count of conspiring to commit healthcare fraud, in violation of 18 U.S.C. 1347 and 1349; 11 counts of wire fraud, in violation of 18 U.S.C. 1343; two counts of mail fraud, in violation of 18 U.S.C. 1341; one count of healthcare fraud, in violation of 18 U.S.C. 1347; five counts of paying and receiving illegal kickbacks, in violation of 42 U.S.C. 1320a-7b(b); and four counts of money laundering, in violation of 18 U.S.C. 1957. Chatfield Judgment 1-2. And petitioner Montgomery was convicted on two counts of receiving illegal kickbacks, in violation of 42 U.S.C. 1320a-7b(b)(1). Montgomery Judgment 1. Wilkerson was sentenced to 165 months of imprisonment, to be followed by three years of supervised release; Hindmon was sentenced to 51 months of imprisonment, to be followed by three years of supervised release; Nicholson was sentenced to 30 months of imprisonment, to be followed by three years of supervised release; Chatfield was sentenced to 108 months of imprisonment, to be followed by three years of supervised release; and Montgomery was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. See Wilkerson Judgment 3-4; Hindmon Judgment 3-4; Nicholson Judgment 3-4; Chatfield Judgment 3-4; Montgomery Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-35a.

1. Petitioners were drug marketers who engaged in a pyramid scheme to defraud public and private insurers by inducing friends and family members to order unneeded prescriptions. Pet. App. 1a. Petitioners then took a cut of pharmacies' insurance reimbursements for those orders. *Ibid.* The scheme involved compound drugs: drugs with multiple ingredients that are specially prepared for a patient by a compounding

pharmacy and should only be used when a standard medication cannot meet a patient's needs, and for which insurers may pay much more than they would pay for non-compound drugs. Gov't C.A. Br. 6. "In total, the scheme extracted approximately $35 million from government and private insurers" over a roughly two-year period. Pet. App. 5a; see *id.* at 24a.

a. First, petitioners negotiated agreements with pharmacies to receive a 30% to 40% share of the reimbursement that the pharmacies would receive from insurers for certain compound drugs. Pet. App. 3a. Next, petitioners paid a pharmacist, Jared Schwab, to help devise compound drug formulas that incorporated the most expensive ingredients, including compound topical creams supposedly designed to treat pain, scars, stretch marks, and other skin conditions. *Ibid.*; Gov't C.A. Br. 8. And even though compound drugs are meant to be tailored to individual patients, Schwab assisted petitioners in preparing pre-printed prescription pads that contained the formula for each compound cream, which insurers would reimburse at $4000 to $15,000 apiece. Pet. App. 3a-4a, 6a.

Petitioners then identified customers—family members, friends, and others whom petitioners knew had insurance plans that would reimburse for compound medications without requiring preauthorization—and encouraged them to order compound creams along with "wellness" tablets, irrespective of whether they needed or wanted the medications. Pet. App. 4a. Petitioners did so primarily by offering the customers $100 cash payments that petitioners claimed were reimbursements for the customers' participation in clinical trials—even though no clinical trials were conducted. *Id.* at 4a, 11a, 17a-18a. Petitioners also paid customers'

co-pays so that they would not have to pay anything out of pocket. *Id.* at 4a.

Petitioners paid a nurse practitioner, Candace Craven, to sign pre-printed prescription forms without evaluating patients; they also stamped her signature on forms without her knowledge. Pet. App. 4a. To maximize their profits, petitioners often added unrequested medications to customers' orders and obtained drug refills without customers' consent. *Ibid.* Petitioners sent the prescriptions to pharmacies, which filled the prescriptions and sought reimbursement from the customers' insurers, including Tricare, a health-benefit program for military personnel. See *id.* at 3a-4a. Petitioners then received their cut of the pharmacies' insurance reimbursements, which they shared with lower-level marketers (called "downlinks") whom petitioners had recruited to sell the creams on their behalf. *Id.* at 5a.

b. Petitioners performed various roles within the scheme. Wilkerson was the "instigator and leader" of the scheme. Pet. App. 5a. He negotiated commissions with the pharmacies; set up a company to receive the commissions and pay his downlinks their cut of the profits; identified insurers providing coverage for compound medications; and targeted customers who had such insurance. *Id.* at 5a-6a. Wilkerson paid Schwab to help create the pre-printed prescription pads with formulas for compound creams. *Id.* at 6a. Wilkerson also paid Craven to sign prescriptions without evaluating patients. *Ibid.* And when one insurer stopped covering compound medications that had not been preauthorized, Wilkerson had Schwab backdate prescriptions to ensure coverage. *Id.* at 9a, 24a. Wilkerson, who had several downlinks marketing the compound creams for

him, ultimately made $13 million from the scheme. *Id.* at 7a-9a.

Chatfield "worked directly under Wilkerson." Pet. App. 9a. His family business printed the pre-filled prescription pads, and he acquired a stamp of Craven's signature to use on prescriptions. *Ibid.* Chatfield recruited his own downlinks; instructed them to tell customers that they would be paid for participating in a (nonexistent) "survey" about the creams; discussed with his downlinks "what to say if contacted by law enforcement"; and, along with his downlinks, ordered compound medications for patients who did not request or need them. *Id.* at 9a, 12a; see *id.* at 9a-14a. Chatfield earned $5.4 million from the scheme. *Id.* at 14a.

Hindmon also "worked directly under Wilkerson." Pet. App. 14a. He initially tried to market the compound drugs to doctors, but then began marketing directly to patients because Wilkerson's "nurse on staff" would sign prescriptions and allow him to "bypass the gatekeeper[s]." *Ibid.* (citation omitted). He also recruited downlinks who ordered creams for customers who did not need or request them; instructed his downlinks that they "would not receive commissions for sales to customers whose insurance did not cover compound medications"; and paid customers for their participation in the nonexistent "clinical trial." *Id.* at 14a-15a. Hindmon instructed other members of the scheme on the different returns available for different creams, emphasizing that certain formulations that used more expensive drugs "would be the best way to make money." *Id.* at 13a (citation omitted); see *id.* at 11a-12a. He earned $1 million from the scheme. *Id.* at 15a.

Nicholson likewise worked directly for Wilkerson. Pet. App. 15a. She, too, encouraged customers to order

creams by telling them that they would be paid for participating in a clinical trial. *Ibid.* She recruited her own downlinks, with whom she shared a cut of her profits, and informed one downlink that "'they just put the most expensive ingredients'" in the compound medications "to make more money." *Id.* at 16a (citation omitted); see *id.* at 15a-17a. And when the government began investigating the scheme, Nicholson instructed a downlink to not speak with law enforcement. *Id.* at 17a. Nicholson made nearly $1 million from the scheme. *Ibid.*

Montgomery was a downlink of Hindmon. Pet. App. 17a. He recruited his own customers and downlinks and reimbursed customers of his downlinks who received bills for co-pays. *Id.* at 17a-19a. Montgomery told one downlink that she would be paid $200 to $300 for each cream that she ordered and $100 for every additional customer that she recruited. *Id.* at 17a. One of Montgomery's customers and downlinks was a military servicemember, Zac Rice. *Id.* at 19a. Montgomery told Rice that he would receive payment as part of a clinical trial; added wellness tablets to his order even though he did not request them; and offered him a commission to sell creams to other service members. *Ibid.* Montgomery instructed Rice to order medications for families of service members in the service member's name to avoid copays. *Ibid.* Montgomery also ordered multiple creams for an acquaintance that the acquaintance neither requested nor needed and set up automatic 12-month refills for the acquaintance that the acquaintance did not request. *Id.* at 18a. After a federal agent contacted the acquaintance, "Montgomery told [the acquaintance] not to meet with [the agent] and tried to convince [the acquaintance] that she had spoken with a doctor before receiving the medications"—when, in

actuality, the acquaintance never spoke to a doctor about the creams. *Id.* at 18a-19a. Montgomery earned $340,000 from his role in the scheme. *Id.* at 19a.

2. A federal grand jury in the Eastern District of Tennessee returned a 178-count superseding indictment charging all petitioners with wire fraud, in violation of 18 U.S.C. 1343; healthcare fraud, in violation of 18 U.S.C. 1347; conspiring to commit healthcare fraud, in violation of 18 U.S.C. 1347 and 1349; and paying and receiving illegal kickbacks, in violation of 42 U.S.C. 1320a-7b(b). D. Ct. Doc. 322, at 7-14, 17-27 (Oct. 17, 2019). The grand jury also charged Wilkerson, Chatfield, Nicholson, and Hindmon with mail fraud, in violation of 18 U.S.C. 1341; Wilkerson and Chatfield with money laundering, in violation of 18 U.S.C. 1957; Hindmon and Montgomery with conspiring to commit money laundering, mail fraud, wire fraud, and healthcare fraud, in violation of 18 U.S.C. 371; and Chatfield with aggravated identity theft, in violation of 18 U.S.C. 1028A. D. Ct. Doc. 322, at 14-17, 28-33.

Petitioners agreed to a bench trial and did not ask the district court to make specific findings of fact. Pet. App. 20a; see Fed. R. Crim. P. 23(c) ("If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion."). Before issuing its verdict, however, the court entered an order setting forth its "understanding of the law applicable to the charges in this case" and requesting a response from the parties if they believed the law differed from its understanding. D. Ct. Doc. 355, at 1 (Nov. 19, 2019). With respect to the healthcare fraud charges, the court stated that the government was required to prove beyond a reasonable doubt that petitioners "knowingly

and willfully executed or attempted to execute a scheme" to defraud a healthcare benefit program. *Id.* at 2. With respect to the illegal kickback charges, the court stated that the government was required to prove beyond a reasonable doubt that petitioners "knowingly and willfully" offered or received remuneration in return for furnishing services for which payment may be made under a federal healthcare program. *Id.* at 3-4.

After the parties filed responses to the district court's order, the court held a hearing to discuss the applicable legal standards. Pet. App. 20a. Petitioners asked the court to consider a good-faith defense, arguing that "the requirement of willfulness necessarily implies an absence of good faith." 02/04/20 Tr. 22; see *id.* at 12-22. And the government ultimately accepted a "burden * * * to defeat good faith." *Id.* at 43. The court therefore agreed to "consider[] the [petitioners'] good faith or potential good faith as to each and every count in the indictment." *Id.* at 50. The parties did not otherwise object to the court's articulation of the knowingly and willfully standard applicable to the healthcare fraud and illegal kickback charges. See, *e.g.*, *id.* at 25 (counsel for Chatfield noting that "there isn't a dispute as to how willfully should be defined").

The government voluntarily dismissed 12 of the counts against Wilkerson, 18 of the counts against Hindmon, and 15 of the counts against Chatfield. See Wilkerson Judgment 1; Hindmon Judgment 1; Chatfield Judgment 1. Following an 11-week trial, the district court found all petitioners guilty on some of the charges against them, as detailed above. See pp. 2-3, *supra*; see also Pet. App. 20a. The court imposed below-guidelines sentences on all petitioners, sentencing Wilkerson to 165 months of imprisonment, Hindmon to

51 months of imprisonment, Nicholson to 30 months of imprisonment, Chatfield to 108 months of imprisonment, and Montgomery to 24 months of imprisonment. Pet. App. 20a-21a; see Wilkerson Judgment 3; Hindmon Judgment 3; Nicholson Judgment 3; Chatfield Judgment 3; Montgomery Judgment 2.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-35a. As relevant here, the court rejected petitioners' assertion that the evidence was insufficient as to the mens rea element of their offenses. *Id.* at 21a-28a, 30a-33a. The court explained that because petitioners "waived a jury trial and did not request that the district court make specific findings of fact," it would "review the district court's verdict for sufficiency of the evidence alone, inferring from the record the 'facts which are relevant to the issues here' that the trial court 'could have found.'" *Id.* at 21a (citation omitted). The court of appeals emphasized that its task in reviewing the sufficiency of the evidence was "to determine whether, after viewing the evidence in the light most favorable to the prosecution and accepting all reasonable inferences that would support the judgment, *any* rational factfinder could evaluate [petitioners'] actions and decide that they knew their actions were unlawful." *Id.* at 22a. And it found that standard to be satisfied here. *Id.* at 22a-33a.

a. The court of appeals first found sufficient evidence to support petitioners' healthcare fraud convictions. Pet. App. 22a-29a. The court stated that healthcare fraud requires proof that

> (1) the defendant knowingly and willfully executed a scheme to defraud a health-care benefit program or to obtain its money or property by fraudulent pretenses, representations, or promises; (2) the scheme

> related to or included a material misrepresentation or concealment of material fact; and (3) the defendant had the intent to defraud.

Id. at 22a-23a (citation omitted); see 18 U.S.C. 1347(a). The court also noted that "fraudulent intent 'can be inferred from efforts to conceal the unlawful activity, from misrepresentations, from proof of knowledge, and from profits.'" Pet. App. 23a-24a (citations omitted).

Examining the evidence in the case, the court of appeals recognized that "[a]t every turn" petitioners "demonstrated their intent to defraud" because they

> targeted family, friends, coworkers, and service members who had insurance that wouldn't scrutinize compound drug prescriptions; they paid customers to order the creams and pills by misrepresenting that they were part of a nonexistent clinical trial, paying direct commissions, or paying the customers' copays; they created pre-set order pads with drug formulas tailored to maximize profit rather than medical efficiency; they persuaded customers to order unneeded and unwanted creams; they ordered extra creams and refills for customers without their knowledge or consent; they paid medical providers to sign prescriptions without seeing patients and stamped the providers' signature without consent; they directed pharmacists to backdate prescriptions to fall within the period before insurers stopped covering compound drugs; and these drugs were excessively expensive relative to their demonstrated benefit, netting [petitioners] millions of dollars in just two years.

Pet. App. 24a. The court thus observed that a "reasonable factfinder could easily conclude that these actions

constitute an intentional, comprehensive scheme to defraud and establish [petitioners'] guilt beyond a reasonable doubt." *Id.* at 24a-25a.

The court of appeals rejected petitioners' assertion "that they were 'merely advertising prescriptions.'" Pet. App. 25a. The court instead found sufficient evidence that petitioners both "co-opted the role of the healthcare provider" by having Craven sign prescriptions without seeing patients or simply signing her name themselves and "undermined the role of the pharmacy by paying a pharmacist" to develop "drug formulas designed for maximum profit" and "backdate prescriptions." *Ibid.* The court explained that those actions were the "essence" of petitioners' scheme to "extract massive profits from the marketing of medically unnecessary drugs." *Id.* at 26a. And while it acknowledged that petitioners participated "in differing degrees" in the scheme's "various actions," it specifically found "more than sufficient evidence * * * that each [petitioner] understood the essence of the scheme." *Ibid.*

The court of appeals also rejected petitioners' claim that evidence of their having sought legal advice "prove[d] that they thought their actions were legal." Pet. App. 27a. The court observed that petitioners had not "assert[ed] a formal advice of counsel defense and offered no evidence of what they told their attorneys in those conversations." *Ibid.* The court also found petitioners' "attempt to recast the evidence of affirmative misrepresentations * * * as omissions, and then dismiss them by arguing that they had no duty to disclose" misplaced. *Ibid.* The court explained that "a defendant can be guilty of fraud through the concealment of material information in the absence of a positive legal duty

to disclose that information," but found that, "even without [petitioners'] concealment, the[ir] affirmative misrepresentations alone can sustain [their] fraud convictions." *Id.* at 27a-28a.

b. The court of appeals also found sufficient evidence to support petitioners' convictions for paying and receiving illegal kickbacks. Pet. App. 30a-33a. The court stated that for conviction under the anti-kickback statute "the government must prove that a defendant (1) knowingly and willfully offered or paid remuneration (2) to induce that person to refer an individual (3) for the furnishing of any item or service for which payment may be made under a federal healthcare program" or that a defendant "knowingly and willfully solicited or received remuneration" in return for making such a referral. *Id.* at 30a-31a; see 42 U.S.C. 1320a-7b(b). And the court rejected petitioners' assertion that their conduct "was not fraudulent and so they did not knowingly and willfully do something the law forbids." Pet. App. 31a.

The court of appeals observed that "[b]ecause there is sufficient evidence that Wilkerson, Chatfield, Hindmon, and Nicholson participated in a scheme with intent to defraud, the intent requirement is satisfied here as well." Pet. App. 31a. The court acknowledged that "[m]ore needs to be said about Montgomery" because he was convicted only of receiving illegal kickbacks. *Ibid.* It accordingly explained that a "rational factfinder could infer" from Montgomery's "actions that he knew his conduct was unlawful[] and therefore * * * knowingly and willfully received unlawful kickbacks." *Id.* at 32a. The court emphasized that Montgomery "recruited his own downlinks by promising them commissions"; "instructed" his downlinks to tell customers that

they were being "paid as part of a clinical trial that was nonexistent"; "helped pay customers' co-payments"; and "ordered creams for customers without their knowledge or consent and instructed his downlinks to do the same." *Id.* at 31a-32a.

ARGUMENT

Petitioners contend (Wilkerson Pet. 22-29; Montgomery Pet. 9-18) that the court of appeals erred in finding sufficient evidence that they had the requisite mens rea under the healthcare fraud and anti-kickback statutes. But the court correctly determined that the evidence was sufficient to show that petitioners "knew their actions were unlawful" and therefore acted "knowingly and willfully" with respect to their violations of each statute. Pet. App. 22a, 31a-32a. The court's fact-bound and unpublished decision does not conflict with any decision of this Court and does not implicate any disagreement among the courts of appeals. Further review is unwarranted.

1. Petitioners err in contending (Wilkerson Pet. 22-29; Montgomery Pet. 9-18) that the decision below conflicts with this Court's decision in *Ruan* v. *United States*, 142 S. Ct. 2370 (2022). *Ruan* construed a different requirement in a different statute. That does not suggest any deficiency in the court of appeals' determination that the evidence here was sufficient to find that petitioners "knew their actions were unlawful." Pet. App. 22a.

Ruan addressed 21 U.S.C. 841(a), a provision in the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, that makes it unlawful, "[e]xcept as authorized by this subchapter, * * * for any person knowingly or intentionally * * * to manufacture, distribute, or dispense * * * a controlled substance." 21 U.S.C. 841(a)(1). *Ruan* held

that Section 841's "'knowingly or intentionally' *mens rea* applies to the 'except as authorized' clause." 142 S. Ct. at 2375-2376. And the Court applied that requirement to the prosecution of doctors, whom the CSA authorizes to prescribe controlled substances "'for a legitimate medical purpose . . . acting in the usual course of [their] professional practice.'" *Id.* at 2375 (quoting 21 C.F.R. 1306.04(a) (2021)).

Petitioners here, however, were not convicted of violating Section 841 or any other provision of the CSA. And there is no dispute that both statutes at issue here require proof that the defendant acted "knowingly and willfully." See Wilkerson Pet. 22; Montgomery Pet. 9. Applying that standard, the court of appeals "determine[d]" that a "rational factfinder could evaluate [petitioners'] actions and decide that they knew their actions were unlawful." Pet. App. 22a; see, *e.g.*, *id.* at 24a ("At every turn, [petitioners] demonstrated their intent to defraud" under the healthcare fraud statute.); *id.* at 24a-25a ("A reasonable factfinder could easily conclude that these actions constitute an intentional, comprehensive scheme to defraud."); *id.* at 31a (rejecting petitioners' contention that "they did not believe their conduct was unlawful" because there was sufficient evidence of "intent" to support their illegal kickback convictions); *id.* at 32a (finding that Montgomery "knew his conduct was unlawful" and thus "had the requisite mens rea in that he knowingly and willfully received unlawful kickbacks").

Petitioners nevertheless assert that *Ruan* "clarif[ied] that 'knowingly and intentionally' is a subjective standard" and suggest that, by "listing certain of Petitioners' alleged actions and concluding that anyone engaged in those actions must have intended to engage in fraud,"

the court of appeals "appl[ied] an objective test"—which is "exactly what this Court was seeking to curtail in *Ruan*." Wilkerson Pet. 22, 28; see Montgomery Pet. 17-18. But the court of appeals found that petitioners acted with "intent to defraud" and "believe[d] their conduct was unlawful"—and therefore applied a subjective standard. Pet. App. 31a. To the extent that petitioners' actual complaint is with a factfinder inferring the requisite intent from circumstantial evidence, that complaint is baseless. It is well established that a defendant's subjective mens rea "can be inferred from circumstantial evidence." *Staples* v. *United States*, 511 U.S. 600, 615 n.11 (1994). Indeed, this Court reiterated in *Ruan* itself that the government "can prove knowledge of a lack of authorization through circumstantial evidence." 142 S. Ct. at 2382.

Petitioners note that "[t]his Court has granted certiorari, vacated lower court decisions, and remanded a number of cases in light of *Ruan*." Wilkerson Pet. 23; see Montgomery Pet. 10. But all the cases that petitioners cite (Wilkerson Pet. 23-25; Montgomery Pet. 10-12) involved 21 U.S.C. 841, the CSA provision at issue in *Ruan*; 21 U.S.C. 846, a CSA provision that prohibits conspiring to violate Section 841; or 21 U.S.C. 856, the CSA's prohibition on maintaining drug-related premises—which contains an "[e]xcept as authorized by this subchapter" phrase worded identically to Section 841's, 21 U.S.C. 856(a)(1). See, *e.g.*, U.S. Mem., *Newman* v. *United States*, 143 S. Ct. 350 (2022) (No. 22-5075). Here, however, no such proviso appears in any of the statutes under which petitioners were convicted, nor do any of their convictions turn on proof of knowledge of "the scope of a doctor's prescribing authority." *Ruan*, 142 S. Ct. at 2382. There is thus no

reason why *Ruan* would require reconsideration of the decision below and no sound basis for granting certiorari and vacating the court of appeals' judgment for that purpose.

2. At bottom, petitioners' principal complaint (Wilkerson Pet. 25-28; Montgomery Pet. 17-18) appears to be that the court of appeals erred in finding the evidence sufficient to show that they acted knowingly and willfully. Petitioners contend, for example, that "there was no showing that [they] intended to engage in any unlawful conduct," that the "'facts' that the Sixth Circuit relied on are not supported by the record," and that their underlying "actions [we]re not illegal." Wilkerson Pet. 25-27. Those contentions do not warrant this Court's review.

As a threshold matter, this Court "do[es] not grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). And "under what [the Court] ha[s] called the 'two-court rule,' the policy has been applied with particular rigor when [the] district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting); see *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). That practice alone illustrates the unsoundness of petitioners' request that this Court review the court of appeals' factbound determination as to the sufficiency of the evidence supporting the district court's findings of guilt.

In any event, the court of appeals correctly determined that the evidence was sufficient to show that petitioners had the requisite intent. "[E]vidence is sufficient to support a conviction if, 'after viewing the evidence in the light most favorable to the prosecution, *any*

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Coleman* v. *Johnson*, 566 U.S. 650, 654 (2012) (per curiam) (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979)). And, as noted above, see p. 16, *supra*, a factfinder may rely on circumstantial evidence to find intent.

The evidence at trial showed, among other things, that petitioners "paid customers to order the creams and pills by misrepresenting that they were part of a nonexistent clinical trial"; "persuaded customers to order unneeded and unwanted creams"; "directed pharmacists to backdate prescriptions to fall within the period before insurers stopped covering compound drugs"; and "paid medical providers to sign prescriptions without seeing patients and stamped the providers' signature without consent." Pet. App. 24a; see pp. 3-8, 10-14, *supra*. As the court of appeals correctly found, a "reasonable factfinder could easily conclude that these actions constitute an intentional, comprehensive scheme to defraud and establish [petitioners'] guilt beyond a reasonable doubt." Pet. App. 24a-25a.

Petitioners' specific sufficiency challenges lack merit. First, petitioners assert that the court of appeals "went out of its way to accept the government's version of events." Wilkerson Pet. 26. But that was the correct standard of review: when reviewing sufficiency of the evidence, a court of appeals "must resolve all conflicts in the testimony in the government's favor and draw every reasonable inference from the evidence in favor of the government." *United States* v. *Bashaw*, 982 F.2d 168, 171 (6th Cir. 1992); see *Burks* v. *United States*, 437 U.S. 1, 16-17 (1978). Second, petitioners claim that their "actions [we]re not illegal" because "marketers in any industry target specific customers" and "it is standard

practice to collect patient information for possible use in a clinical trial." Wilkerson Pet. 26-27. But the court did not hold that it was illegal to market drugs to customers; instead, it found that petitioners' conduct here—targeting specific customers who had insurance that would not scrutinize compound drug prescriptions, paying them to order creams, lying to them about their participation in a nonexistent clinical trial, and ordering them additional medications without their knowledge—showed that petitioners knowingly and willfully engaged in a scheme to defraud and knowingly and willfully paid and received illegal kickbacks. Pet. App. 24a-28a, 30a-31a.

Third, citing comments that the district court made at sentencing, petitioners suggest that the court "found [them] liable based on a failure to disclose theory." Wilkerson Pet. 25. But the court did not make any factual findings in connection with its verdicts because petitioners "did not request" such findings. Pet. App. 21a. Thus, the court of appeals "inferr[ed] from the record" facts "that the trial court 'could have found.'" *Ibid.* (citation omitted). The district court's statements at sentencing are therefore irrelevant to the question decided by the court of appeals: whether the evidence at trial was sufficient to sustain petitioners' convictions. In any event, while "a defendant can be guilty of fraud through the concealment of material information in the absence of a positive legal duty to disclose that information," the court of appeals made clear that, "even without [petitioners'] concealment, the[ir] affirmative misrepresentations alone can sustain [their] fraud convictions." *Id.* at 27a-28a.

Montgomery's sufficiency challenges likewise lack merit. The district court's statement at sentencing that

Montgomery "'should have known' that what he was doing was unlawful," Montgomery Pet. 17, is no more germane than the statements made at the other petitioners' sentencing hearings. And Montgomery's assertion (Pet. 18, 22) that the court of appeals affirmed his convictions based on actions taken solely by other petitioners disregards that court's express acknowledgment that "[m]ore needs to be said about Montgomery, since he was not convicted of fraud." Pet. App. 31a. Montgomery's assertion also disregards the court's corresponding specific finding of sufficient evidence, based on Montgomery's own actions, that "he knew his conduct was unlawful, and therefore he had the requisite mens rea in that he knowingly and willfully received unlawful kickbacks." *Id.* at 32a; see pp. 7-8, 13-14, *supra* (discussing the court's analysis specific to Montgomery in more detail).

3. Petitioners err in contending that the decision below conflicts with decisions from the First, Second, and Eleventh Circuits holding "that the government must establish that the defendant knew that his or her actions were fraudulent or unlawful" and "deepens a split within the Fifth Circuit" on that issue. Wilkerson Pet. 29; see Montgomery Pet. 18-19. As discussed above, see pp. 14-17, *supra*, the court of appeals applied the standard that petitioners advocate and that they attribute to those other circuits. And any intra-circuit disagreement in the Fifth Circuit would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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