No. 23-130

In the Supreme Court of the United States

SAAD SAKKAL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

There is a circuit conflict regarding whether the "as authorized" requirement in 21 U.S.C. § 841(a)(1) may be replaced by the regulatory dictates of 21 C.F.R. § 1306.04(a). Faced with numerous petitions identifying this conflict (*see*, *e.g.*, *Dr. Roger Dale Anderson v. United States of America*, No. 23-238), the government (relying on its response in *Xiulu Ruan and John Patrick Couch v. United States*, No. 22-1175),[1] gives this deepening conflict the back of the hand. But the conflict is real and more than ripe for this Court's review. As Dr. Anderson rightly states in his petition, if the conflict is not resolved it will continue to grow (at i).

Faced with this intractable conflict, the government retreats to its claim that the issue was not presented below, and that in any event the lower court correctly decided the issue. Not so. The issue was presented below. And far from being correctly decided, the decision below permits criminal legislation by bureaucracy and is unfaithful to *Ruan v. United States*, 142 S. Ct. 2370 (2022), this Court's other precedents, and the CSA.

The petition should be granted.

[1] Citations to "U.S. BIO" herein refer to the government's Brief in Opposition filed in *Xiulu Ruan and John Patrick Couch v. United States*, No. 22-1175.

1. The circuit conflict is real and deepening.

The government gives the circuit conflict short shrift. In the government's view (U.S. BIO at 19-22), *United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023), *did not foreclose* conviction under Section 841(a)(1) based on the language of Section 1306.04(a).

Wrong. Here is the Tenth Circuit's holding in *Kahn* (quoting this Court's decision in *Ruan*):

> [I]t is insufficient for the government to prove that a defendant acted without "a legitimate medical purpose" or outside the "usual course" of generally recognized "professional practice." Proof that a defendant did so is "circumstantial evidence" that may be used to prove knowledge of a lack of authorization. . . . *But, in order to a convict a defendant, the government must prove that the defendant "knew or intended that his or her conduct was unauthorized."*

58 F.4th at 1314 (emphasis added).

The jury in *Kahn* "was repeatedly instructed that it could convict Dr. Kahn if it concluded that he acted outside the usual course of professional medical practice or without a legitimate medical purpose." *Id.* at 1315. That instruction was erroneous because, as the Tenth Circuit concluded, "*Ruan* treats the two criteria in § 1306.04(a) not as distinct bases to support a conviction, but as 'reference to objective criteria' that may serve as circumstantial evidence of a defendant's subjective intent to act in an unauthorized manner." *Id.* at 1316 (citing *Ruan*, 142 S. Ct. at 2377, 2382).

The government also says that the Tenth Circuit did not consider whether the instructions for CSA conspiracy "avoided the mens rea error found in *Ruan*" (at 22). Again, incorrect. *Kahn* says: "Accordingly, as discussed above, the instructions as to Count[] One [CSA conspiracy] . . . are erroneous and did not result in harmless error." 58 F.4th at 1321.

In contrast to the Tenth Circuit's approach, the Sixth Circuit, relying on *United States v. Anderson*, 67 F.4th 755 (6th Cir. 2023), approved the instruction to Petitioner's jury that it could convict Dr. Sakkal if he "deliberately ignored a high probability that the controlled substances . . . *were distributed or dispensed outside the course of professional practice and not for a legitimate medical purpose*" (App. 19a (emphasis added). The Sixth Circuit concluded that this instruction "specifically covers the holding in *Ruan*" (App. 17a). Not so—*Khan* has it right.

The Sixth Circuit decisions below and in *Anderson* directly conflict with the Tenth Circuit's holding in *Khan*. And had Petitioner been tried in the Tenth Circuit, a jury would not have been permitted to convict him on the instructions that it received in the Sixth Circuit. This is the very definition of a circuit conflict.

The Eleventh and Fifth Circuits are also on the wrong side of the divide. *Compare, e.g.*, *United States v. Heaton*, 59 F.4th1226, 1241 (11th Cir. 2023), and *United States v. Ajayi*, 64 F.4th 243, 247-48 (5th Cir. 2023), with *Khan*, 58 F.4th at 1314-16. Without this Court's intervention, the conflict will only deepen in the future.

2. The issue was presented below but wrongly decided.

The government contends that Petitioner failed to raise this issue below (at 12-14), and that the Sixth Circuit's ruling was correct in any event (at 14-22). The government is wrong on both counts.

This Court put the issue squarely before the Sixth Circuit by remanding the case for further consideration in light of *Ruan* (App. 20a). And in *Ruan*, this Court, applying precedent and interpreting the CSA, said—repeatedly—that, to obtain a criminal conviction, the government must prove "that the defendant knowingly or intentionally acted *in an unauthorized manner*." 142 S. Ct. at 2382 (emphasis added); *see also id.* at 2375-76. While a doctor's non-compliance with Section 1306.04(a) may be "circumstantial evidence" of "knowledge of a lack of authorization," it is not synonymous with, and may not be used as a substitute for, a violation of the statutory text. *See id.* at 2382.

The Sixth Circuit failed to heed this Court's directive on remand. And the decision below was wrongly decided.

CONCLUSION

The petition in *Dr. Roger Dale Anderson v. United States of America*, No. 23-238, which raises substantially the same arguments, is currently pending before the Court. The present petition should be held pending the disposition of *Anderson*, and thereafter resolved in accordance with the Court's resolution of that case.

Respectfully submitted.

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