No. 23-238

In the Supreme Court of the United States

ROGER DALE ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT 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 court of appeals was required to vacate petitioner's convictions for unlawful drug distribution under 21 U.S.C. 841(a) based on a theory—never raised by petitioner below—that jury instructions relating to his "authoriz[ation]" to distribute drugs, *ibid.*, erroneously incorporated the language in 21 C.F.R. 1306.04(a) that defines the scope of the relevant authorization.

RELATED PROCEEDINGS

United States District Court (S.D. Ohio):

United States v. *Pauley*, No. 19-67 (Feb. 18, 2020)

United States v. *Jordan*, No. 19-67 (July 21, 2020)

United States v. *Anderson*, No. 19-67 (Jan. 14, 2021)

United States Court of Appeals (6th Cir.):

United States v. *Anderson*, No. 21-3073 (Apr. 17, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 67 F.4th 755.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2023. A petition for rehearing was denied on June 6, 2023 (Pet. App. 62a-63a). The petition for a writ of certiorari was filed on September 5, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on one count of conspiring to unlawfully distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846; eight counts of unlawfully distributing controlled substances, in violation

of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of healthcare fraud, in violation of 18 U.S.C. 1347 and 2. Judgment 1-2. The district court sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-34a.

1. Section 841(a) of Title 21, which is part of the Controlled Substances Act (CSA or Act), 21 U.S.C. 801 *et seq.*, prohibits the knowing or intentional distribution of controlled substances "[e]xcept as authorized by" the Act. The CSA's exceptions to the prohibition against drug distribution include an exception for physicians who are "registered by" the Drug Enforcement Administration (DEA) and who prescribe controlled substances—but the exception applies only "to the extent authorized by their registration and in conformity with the other provisions" of the Act. 21 U.S.C. 822(b); see 21 U.S.C. 823(b) and (f). And controlled substances generally may be dispensed only pursuant to a "written prescription of a practitioner." 21 U.S.C. 829(a).

A federal regulation, 21 C.F.R. 1306.04(a), limits the scope of the authorization by specifying that 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." Section 1306.04(a) specifies that "[a]n order purporting to be a prescription issued not in the usual course of professional treatment" is deemed "not a prescription," and the "person issuing it[] shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." *Ibid.* And in *United States* v. *Moore*, 423 U.S. 122 (1975), this Court "h[e]ld that registered physicians can be

prosecuted under § 841 when their activities fall outside the usual course of professional practice." *Id.* at 124.

In *Ruan* v. *United States*, 597 U.S. 450 (2022), this Court held that the "'knowingly or intentionally' *mens rea*" in Section 841(a) "applies to the [statute's] 'except as authorized' clause," such that, "once a defendant meets the burden of producing evidence that his or her conduct was 'authorized,' the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." *Id.* at 457 (citation omitted). The Court reasoned, *inter alia*, that "a lack of authorization is often what separates wrongfulness from innocence." *Id.* at 458. "In addition," the Court noted, Section 1306.04(a)'s "regulatory language defining an authorized prescription is * * * 'ambiguous,' written in 'generalities, susceptible to more precise definition and open to varying constructions,'" and a "strong scienter requirement helps to diminish the risk of 'overdeterrence'" of medical practitioners. *Id.* at 459 (brackets and citations omitted).

2. Petitioner was a DEA-registered physician who practiced medicine at his independent practice, Marietta Medical, in Marietta, Ohio. Pet. App. 2a. The DEA began to investigate petitioner based on a tip from a pharmacist who was concerned about petitioner's prescribing practices for pain medication. *Ibid.* Separately, one of petitioner's patients contacted the local sheriff's office to voice concerns about petitioner's prescribing practices. *Id.* at 2a-3a. The sheriff's office put the patient in touch with the DEA, and the patient agreed to act as a confidential informant. *Id.* at 3a.

During one visit to Marietta Medical, the confidential informant told petitioner "that he was 'in full-blown withdrawal,'" yet petitioner nevertheless wrote him a

prescription for Vicodin. Pet. App. 3a (citation omitted). Petitioner wrote that prescription without giving the informant a physical examination or reviewing his medical records. *Id.* at 7a. On another visit, the informant picked up a Vicodin prescription from the office without seeing petitioner. *Id.* at 3a. The informant's experience was not uncommon: petitioner would often leave signed prescriptions for his staff to pass out to patients the next day, without petitioner actually seeing the patients. *Id.* at 7a.

The DEA's investigation also revealed that a pregnant woman with obvious physical signs of being an intravenous drug user had walked into Marietta Medical and requested "a particular opioid," which petitioner "prescribed" to her "'no questions asked.'" Pet. App. 6a (citation omitted). Petitioner's staff described the atmosphere at Marietta Medical as "chaos" due to petitioner's unpredictable hours and the large numbers of patients lined up outside the clinic waiting for prescriptions. *Id.* at 8a (citation omitted). And multiple area pharmacists voiced concerns about petitioner's prescribing practices after they noticed that he was writing an increasing number of opioid prescriptions for young patients. *Ibid.* The suspicious behavior was so widely noticed that area pharmacists "agreed as a group to stop filling prescriptions for pain medications written by [petitioner]." *Id.* at 9a.

3. A federal grand jury returned an indictment charging petitioner with one count of conspiring to unlawfully distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846; nine counts of unlawfully distributing controlled substances, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of conspiring to commit healthcare fraud, in violation of 18

U.S.C. 1347 and 1349; and three counts of healthcare fraud, in violation of 18 U.S.C. 1347 and 2. Indictment 12-18. Before trial, the government dismissed one unlawful distribution count, two healthcare fraud counts, and the healthcare fraud conspiracy count. Pet. App. 3a n.1.

At the close of trial, the government proposed jury instructions that incorporated the regulatory language in Section 1306.04(a) as the touchstone for Section 841(a) liability. See D. Ct. Doc. 234, at 4-9 (Feb. 4, 2020). Petitioner did not object to the instructions' incorporation of the regulatory language. See 3/4/2020 Tr. 124-150. Petitioner did, however, advocate a good-faith instruction, which would have provided that if a doctor dispenses a drug in "good faith," "then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of medical practice" and therefore "lawfully." Pet. App. 11a-12a (citation omitted). The instruction would have defined good faith as "good intentions in the honest exercise of best professional judgment as to a patient's need" and that "the doctor acted in accordance with what he believed to be proper medical practice." *Id.* at 11a (citation omitted).

The district court declined to issue such an instruction, on the view that doing so would be inconsistent with circuit precedent. Pet. App. 12a. But the court observed that another instruction covered the same ground as the proposed good-faith instruction. *Ibid.* The court instructed the jury that, in order to find petitioner guilty of violating Section 841(a)(1), it must find: (1) that petitioner "knowingly or intentionally dispensed or distributed a Schedule II controlled substance"; and (2) that petitioner "prescribed the drug without a legitimate medical purpose and outside the

course of professional practice." *Id.* at 16a, 110a (citation omitted). In describing the terms related to the second element, the court instructed the jury that:

> Although knowledge of the defendant cannot be established merely by demonstrating he was careless, knowledge may be inferred if the defendant deliberately blinded himself to the existence of a fact. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substance was distributed or dispensed without a legitimate medical purpose in the usual course of professional practice, then you may find that the defendant knew this was the case. But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed or dispensed other than for a legitimate medical purpose while acting in the usual course of professional practice, and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part are not the same as knowledge and are not enough to find him guilty on this count.

Id. at 112a.

The jury found petitioner guilty on all counts that had not been dismissed. Pet. App. 12a; Judgment 1-2.

4. The court of appeals affirmed. Pet. App. 1a-34a.

a. The court of appeals determined that the district court did not abuse its discretion by declining to give the proposed good-faith instruction. Pet. App. 12a-18a. The court of appeals observed that "[a]t the time briefing in this case was completed, * * * binding precedent" in the Sixth Circuit "held that the subjective good

faith of the defendant was irrelevant to the 'except as authorized' clause for physicians" charged under Section 841(a). *Id.* at 14a (citing *United States* v. *Godofsky*, 943 F.3d 1011, 1026-1027 (6th Cir. 2019)). But because this Court decided *Ruan* while petitioner's appeal was pending, the court of appeals evaluated the instructions in this case in light of *Ruan* and found them to be sufficient. See *ibid.*

The court of appeals determined that, regardless of whether the proposed good-faith instruction was a correct statement of the law, the instructions given to the jury comported with *Ruan*'s holding. Pet. App. 16a-18a. It observed that the jury instructions "specifically cover[ed] the holding of *Ruan*, by referring continuously to the 'knowledge of the defendant,' his 'deliberate ignorance,' and if he 'knew' that the prescriptions were dispensed illegitimately." *Id.* at 17a (citation omitted). And it explained that those instructions "go beyond an objective view of the 'usual course of professional practice' and instead direct the jury's attention to [petitioner's] subjective mindset in issuing the prescriptions." *Ibid.*

b. Judge White dissented on the jury-instruction issue. Pet. App. 30a-34a. In her view, the deliberate-ignorance instruction fell short of *Ruan*'s requirement that the defendant have knowledge that he was prescribing drugs without a legitimate medical purpose and outside the course of professional practice, while the proposed good-faith instruction comported with *Ruan*. *Id.* at 31a-34a.

ARGUMENT

Petitioner contends (Pet. 16-20) that the jury instructions at his trial erred in incorporating language from 21 C.F.R. 1306.04(a) as the measure of whether his

drug-prescribing practices were "authorized" under the CSA. 21 U.S.C. 841(a). That is a new argument that petitioner never raised before. See Pet. C.A. Br. 13-59; Pet. C.A. Reply Br. 5-31. Indeed, in the court of appeals petitioner asserted the opposite of what he now argues in this Court. See Pet. C.A. Br. 56 (asserting that the jury must "evaluate whether [petitioner] prescribed controlled substances outside the course of professional practice and for no legitimate medical purpose"); Pet. C.A. Reply Br. 5-6 ("To convict [petitioner] for the unlawful distribution of controlled substances, the prosecution had to prove that [petitioner] distributed a controlled substance, and in doing so, that he acted intentionally or knowingly, and did not act for a legitimate medical purpose in the usual course of his professional practice.") (brackets omitted).

This Court recently denied the second petition for a writ of certiorari in *Ruan* v. *United States*, No. 22-1175 (2023), which made substantially the same substantive arguments as the petition here.[1] For the reasons explained in the government's brief in opposition to the petition in *Ruan*, a copy of which is being served on petitioner, petitioner's new claim lacks merit and does not warrant further review. See Br. in Opp. at 12-22, *Ruan*, *supra* (No. 22-1175). As with the same claim in *Ruan*, petitioner's new argument was never passed upon below. See *id.* at 12-14. Petitioner's claim is also foreclosed by precedent and rests on a misinterpretation of the CSA and this Court's decision in *Ruan*. See *id.* at 14-19. And petitioner has not identified any circuit

[1] Another pending petition for a writ of certiorari incorporates the arguments in the denied *Ruan* petition. See *Sakkal* v. *United States*, No. 23-130 (filed Aug. 7, 2023).

conflict that would warrant review by this Court. See *id.* at 19-22.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2023

[2] In addition to the Tenth Circuit's decisions in *United States* v. *Kahn*, 58 F.4th 1308 (2023), and *United States* v. *Henson*, No. 19-3062, 2023 WL 2319289 (Mar. 2, 2023), which are addressed in the government's *Ruan* brief, Br. in Opp. at 19-22 & n.2, *Ruan*, *supra* (No. 22-1175), petitioner also contends (Pet. 15) that the court of appeals' decision conflicts with the Ninth Circuit's unpublished decision in *United States* v. *Kabov*, No. 19-50083, 2023 WL 4585957 (July 18, 2023). But that decision, which is unpublished and nonprecedential, did not address the question presented. It explicitly "t[ook] no position on the parties' arguments * * * and remand[ed] for the district court to apply * * * *Ruan*" to the defendants' CSA convictions "in the first instance." *Id.* at *7.