No. 23-238

In the
Supreme Court of the United States

ROGER DALE ANDERSON,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

The Government casts this petition as substantially similar to the petition in *Ruan v. United States*, No. 22-1175 (2023).[1] That characterization is incorrect.

First, this petition not only raises an *inter* circuit conflict as in *Ruan II*, but it brings to the Court an *intra* circuit conflict amid the Sixth Circuit. Further, unlike *Ruan II*, this petition requires the Court to evaluate whether the deliberate ignorance jury instruction can save defective CSA instructions following *Ruan v. United States*, 142 S. Ct. 2370 (2022). As important, unlike *Ruan II*, this petition comes from a circuit with pattern jury instructions that define the ambiguous phrase at issue: "a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." This petition therefore requires the Court to decide whether a phrase that it has cast as "ambiguous" and "open to varying constructions" should be used to measure a physician's prescribing when circuits define that phrase divergently, if at all.

Petitioner relies on petitions *Ruan II* and *Sakkal v. United States*, No. 20-3880 (2023) to address the balance of the Government's claims: That the issue raised was not presented below and that, in any event, the decision below is faithful to the holding in *Ruan*. Both claims are, of course, incorrect.

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[1] This reply refers to the petition for certiorari in *Ruan v. United States*, No. 22-1175 (2023) as "*Ruan II*."

1. Both the *inter* and *intra* circuit conflict are genuine.

The Government insists that there is no circuit conflict because the Tenth Circuit has not foreclosed conviction under Section 841(a)(1) based on the language of Section 1306.04(a). *Ruan II*, Br. 20-22. The holding in *United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023) belies the Government's claim:

> [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, "*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 Fifth, Sixth, and Eleventh circuits have rejected the holding in *Kahn*, instead deciding that Section 1306.04(a) properly sets forth the standard to measure prescribing. *See*, *United States v. Ruan*, 56 F.4th 1291, 1297-98 (11th Cir. 2023); *United States v. Anderson*, 67 F.4th 755, 766 (6th Cir. 2023) (White, J., concurring in part and dissenting in part); *United States v. Ajayi*, 64 F.4th 243, 247-48 (5th Cir. 2023). The Sixth Circuit, however, came to an even harsher conclusion, incorporating the deliberate ignorance instruction to save a faulty Section 841(a)(1) instruction. *See*, *Anderson*, 67 F.4th at 764-66. This, in turn, led to the beginning of an internal conflict in that circuit. *See*, *United States v. Hofstetter*, 80 F.4th 725, 732 (6th Cir. 2023) (Cole, J., concurring) ("I agree with the majority that we are bound by our court's recent decision in *United States v. Anderson*, 67 F.4th 755 (6th Cir. 2023) (per curiam), and therefore join the opinion in full. But I write separately to highlight how *Anderson* conflicts with the Supreme Court's opinion in *Ruan v. United States*, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022)").

2. Deliberate ignorance and knowledge are mutually exclusive.

The Sixth Circuit, in *Anderson*, did not cite any case law, within or outside of the circuit, providing that a deliberate ignorance instruction makes up for or imposes a missing knowledge requirement. *See*, *Hofstetter*, 80 F.4th at 734 (Cole, J., concurring). That, of course, would be impossible. *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1410 (10th Cir. 1991) ("We emphasize, the same fact or facts cannot be used to prove both actual knowledge and deliberate

indifference because the two are mutually exclusive concepts. If evidence proves the defendant actually knew an operant fact, the same evidence could not also prove he was ignorant of that fact. Logic simply defies that result"); *see*, *United States v. Ramos*, 1994 U.S. App. LEXIS 28711, at *10-11 (6th Cir. Oct. 12, 1994) (relying on *de Francisco-Lopez* to find that actual knowledge and deliberate ignorance are mutually exclusive); *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391, 1400-01 (2023) (highlighting the difference between "actual knowledge" and "deliberate ignorance"); *see also*, *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 772 (2011) (Kennedy, J., dissenting) ("Willful blindness is not knowledge; and judges should not broaden a legislative proscription by analogy." (citation omitted)). The Sixth Circuit is, nonetheless, "bound by *Anderson*." *See*, *Hofstetter*, 80 F.4th at 734 (Cole, J., concurring); *see also*, *United States v. Bauer*, 82 F.4th 522, 533 (6th Cir. 2023) ("But *Anderson* controls and requires that we find the jury instructions adequate").

Petitioner insists that the Court must weigh in given that the consequences of *Anderson* are chilling, as that decision can be used to cure the absence of *mens rea* in any number of instructions. And it comes as no surprise that the Government doesn't seem all too bothered. *See*, *Hofstetter*, 80 F.4th at 734 (Cole, J., concurring) ("The government, prior to *Anderson*'s publication, agreed that the deliberate indifference instruction did not remedy the error in the jury instruction, and I agree").

3. Section 1306.04(a) is defined inconsistently across circuits, if at all.

"[A] lack of authorization is often the critical thing distinguishing wrongful from proper conduct." *Ruan*, 142 S. Ct. at 2378. But whether prescribing is authorized depends on the circuit a physician finds themselves. In the Tenth Circuit, for example, the jury decides what is authorized following testimony and evidence at trial. *See*, *Kahn*, 58 F.4th at 1314. The Fifth, Sixth, and Eleventh circuits limit authorization to the language set forth in Section 1306.04(a). And the Sixth Circuit has further limited authorization under the definition it has imposed. *See*, Sixth Circuit Committee on Pattern Criminal Jury Instructions, Pattern Criminal Jury Instructions, Instruction 14.02C (Mar. 1, 2023).[2]

That definition is as follows:

> The phrase 'a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice' means acting in accordance with generally recognized and accepted professional standards in the field in which the individual practices. In considering whether the defendant acted for a legitimate medical purpose in the usual course of professional practice, you may consider all of the

[2] https://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/Chapter%2014.pdf

> defendant's actions and the circumstances surrounding them.

Id.

The Eighth Circuit is the only other circuit that has grappled with defining Section 1306.04(a). *See*, Eighth Circuit Committee on Pattern Criminal Jury Instructions, Pattern Criminal Jury Instructions, Instruction 6.21.841A, Committee Comments (2023). [3] The Eighth Circuit, prior to *Ruan*, defined "usual course of professional practice" as measured with an objective generally recognized and accepted medical practice as opposed to a physician's self-defined, subjective particular practice. *Id*. 611. Following *Ruan,* however, the Eighth Circuit expelled that definition because it found that this Court "rejected this objective standard." *Id*.

The Sixth Circuit, in direct conflict, has maintained its stalwart use of objective generally recognized and accepted medical practice in defining Section 1306.04(a)—that definition referenced above. This represents the second layer of *inter* circuit conflict. That is, *first* a circuit decides whether to define authorization using the ambiguous dictates of Section 1306.04(a); and *second* the circuit decides how to define that ambiguous dictate, if at all. The Government rejects the first layer of this divide, but it fails to even grapple with the second layer that lies beneath.

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[3] https://juryinstructions.ca8.uscourts.gov/instructions/criminal/Criminal-Jury-Instructions.pdf

4. The issue raised was presented below but decided wrongly.

The Government insists that Petitioner failed to raise his stated issue in the court of appeals, and that, in any event, the issue is moot because the Sixth Circuit's ruling was correct. Br. 8. Both claims are divorced from reality.

In *Ruan*, this Court, applying precedent and interpreting the CSA, instructed—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. Further, while a doctor's noncompliance 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. That was the issue decided in *Ruan*—the very same issue that the court of appeals suspended briefing for because it found that: "One issue in the case is common to an issue pending before the Supreme Court this term." *See*, Doc. 40, Sixth Circuit Letter, Case No. 21-3073 (6th Cir.).

Moreover, even if the Government were correct, this petition raises aspects of an overall argument that plainly was presented to both this Court and the court of appeals below. *See*, *Ruan II*, Reply Br. 4. This Court has not steered away such petitions. *See*, *Id*. (citing *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim;

parties are not limited to the precise arguments they made below").

Bottom line, the Sixth Circuit looked past this Court's directive in *Ruan*, leading it to invent new case law by holding that deliberate ignorance instructions substantially cover the *mens rea* prescribed in criminal statutes. The Court's action is needed.

CONCLUSION

As it stands, the Attorney General has drafted an ambiguous regulation designed for and used at administrative hearings. That regulation is also used in criminal prosecutions to convict physicians, but how Section 1306.04(a) is defined, if at all, depends on the circuit where the physician is prosecuted. In some circuits, for example, the Fifth, Sixth, and Eleventh circuits, Section 1306.04(a) continues to set forth the standard against which physician prescribing is measured. In the Tenth Circuit, however, Section 1306.04(a)'s dictates are expelled from CSA prosecutions. The Sixth Circuit, standing alone, has turned to the deliberate ignorance instruction to cure defective CSA instructions that fail to set forth the *mens rea* prescribed in *Ruan*. And the Government, for its part, grasps at whatever it can to keep as many doctors as it can in prison, and the chaotic landscape it blinds itself to lends itself very well to that initiative. This all resolved if authorization under Section 841(a)(1) is prescribed as the benchmark to measure prescribing.

Respectfully submitted,

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