No. 24-137

In the Supreme Court of the United States

RONALD STUART LUBETSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
NICOLE M. ARGENTIERI
Principal Deputy Assistant Attorney General
DAVID M. LIEBERMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether sufficient evidence supported petitioner's convictions for unlawful drug distribution under 21 U.S.C. 841(a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulation, and rule:

In the Supreme Court of the United States

No. 24-137

RONALD STUART LUBETSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 2024 WL 577543.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2024. A petition for rehearing was denied on May 7, 2024 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on August 5, 2024. 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 Florida, petitioner was convicted on seven counts of unlawfully distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1-2. He was sentenced to 60

months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-4a.

1. Section 841(a) 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. 21 U.S.C. 841(a). 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(f) (Supp. IV 2022). 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.*

2. In early 2016, the DEA received a complaint about petitioner from one of his patients. See Gov't C.A. Br. 3. The patient reported that he had sought treatment for an eye condition, but petitioner did not treat his eye and instead gave him an opioid prescription that

the patient neither needed nor wanted. *Ibid.* The DEA then searched prescribing records and discovered that petitioner prescribed opioids, particularly oxycodone, at a much higher rate than the average physician in Florida. *Ibid.*

A confidential source, YH, visited petitioner's office in April 2016, posing as a new patient. Gov't C.A. Br. 3. YH had no physical injuries, no pain, no limitation in her range of motion, and no loss of strength. *Ibid.* But YH reported that about a year before she had been in a car accident and a slip-and-fall accident; that, while recovering from those accidents, she took a small amount of Percocet and a muscle relaxer; and that she had residual neck pain. *Id.* at 4. YH also told petitioner that she obtained 30-milligram oxycodone pills from her "friend" and that those pills made her feel better. *Ibid.* (citation omitted). In response, petitioner provided a tutorial on the different opioids he could prescribe. *Ibid.* Petitioner also conducted a brief physical examination, during which YH displayed a full range of motion and normal strength. *Ibid.*

Petitioner wrote YH a one-month prescription for 60 30-milligram morphine pills and for a muscle relaxer. Gov't C.A. Br. 4. Petitioner did not offer any further treatment for YH's pain other than vaguely stating that she could try stretching or massage. *Ibid.* Petitioner also informed YH that he would charge $250 for the first visit and $200 for all later visits. *Ibid.*

YH had 20 more appointments with petitioner between 2016 and 2018, all of which were recorded. Gov't C.A. Br. 5. During those appointments, petitioner never physically examined YH, never asked her about her pain, never discussed any side effects the prescriptions

might cause, never discussed any alternative treatments, and never warned her about the dangers of opioid overdose or addiction. *Ibid.* But petitioner's written progress notes for those appointments falsely indicated that he had provided a physical examination and that he had discussed alternative treatments with YH. *Ibid.*

At several appointments, YH told petitioner that she was selling or sharing the opioid pills that petitioner had prescribed. Gov't C.A. Br. 5. She also told petitioner that she had run out of pills before the month was over, which indicated that she was taking higher doses than directed or was selling or sharing her pills. *Ibid.* At some appointments, YH requested specific prescriptions, including the maximum dose of 30-milligram oxycodone. *Id.* at 5-6. Finally, at every appointment, petitioner tested YH's urine for her prescribed opioids, but YH always tested negative—which indicated that she was selling, sharing, or misusing her pills. *Id.* at 6. Despite those signs that YH was selling or misusing her prescriptions, petitioner still wrote YH high-dose, high-strength opioid prescriptions at every appointment. *Ibid.*; see *id.* at 6-9 (summarizing seven appointment visits).

3. A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with 12 counts of unlawfully distributing oxycodone or morphine, in violation of 21 U.S.C. 841(a) and (b)(1)(C). Indictment 1-5. The case proceeded to trial.

a. At trial, the jury heard evidence documenting petitioner's appointments and prescribing decisions with respect to YH. See, *e.g.*, Gov't C.A. Br. 24-35. The jury also heard testimony from the government's expert, Dr. Mark Rubenstein—a Florida pain-management

physician—about the procedures for prescribing opioids to patients suffering from chronic pain. *Id.* at 9-15.

The procedures described by Dr. Rubenstein—for which he identified a baseline in the express requirements of Florida law—include taking a detailed medical history, conducting an extensive physical and neurological examination, and considering non-addictive medications and non-medication treatment options. Gov't C.A. Br. 10-11. Dr. Rubenstein also testified that a physician must check for "red flags," including: (1) requests for specific opioids; (2) claims that opioids are the only treatment that addresses the patient's pain; (3) negative urine tests despite the fact that the patient has an opioid prescription; (4) claims that the patient ran out of pills early; (5) admissions that the patient sold or shared pills; and (6) admissions that the patient bought opioids off the street. *Id.* at 11-12 (citation omitted). Dr. Rubenstein additionally testified that, after a physician has prescribed a patient opioids, the physician should take an updated medical history and perform a physical examination at all appointments. *Id.* at 12.

Dr. Rubenstein then testified, based on his review of the recordings of YH's appointments with petitioner, that petitioner lacked a medically legitimate reason to prescribe opioids to YH. Gov't C.A. Br. 13. Dr. Rubenstein explained that petitioner did not take a sufficiently detailed medical history to support a finding that opioid treatment was appropriate for YH; did not conduct an appropriately detailed physical examination before prescribing her opioids; and did not diagnose YH with a medical condition supporting opioid-only treatment. *Ibid.*

Dr. Rubenstein likewise testified that petitioner prescribed opioids to YH outside the usual course of professional practice. Gov't C.A. Br. 13. In support of that determination, he emphasized that petitioner failed to take a detailed medical history of YH; that he performed only a brief physical examination of YH at her first appointment; that YH had normal functions and abilities; that his diagnosis of YH did not correlate with her stated complaints and medical history; that he did not discuss other treatment options with YH; and that he did not conduct physical examinations at YH's follow-up appointments. *Id.* at 13-14.

b. At the close of the government's case, the district court denied petitioner's motion for a judgment of acquittal, finding that under the standard this Court articulated in *Ruan* v. *United States*, 597 U.S. 450 (2022), "there is sufficient evidence for a reasonable jury to find the defendant guilty." 11/2/22 Tr. 28. In making that determination, the district court observed that the negative drug tests provided "evidence that" YH was "likely not * * * taking the drugs"; that "prescription[s] [were] written without an examination"; and that petitioner ignored "indication[s]" that YH "was giving away drugs and selling drugs." *Id.* at 28-29. During the defense case, a defense expert testified that petitioner acted within the usual course of professional practice when prescribing opioids to YH. See Gov't C.A. Br. 15-19.

The jury found petitioner guilty of seven counts of unlawfully distributing a controlled substance and acquitted him on the remaining five counts. Judgment 1-2. The district court sentenced him to 60 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4.

4. The court of appeals affirmed in an unpublished, per curiam decision, Pet. App. 1a-4a, rejecting (*inter alia*) petitioner's argument that the trial evidence was insufficient to support the jury's guilty verdicts, *id.* at 2a-4a.

The court of appeals found "really no disput[e] that the jury heard enough evidence to find that [petitioner] knowingly acted outside 'the usual course of his professional practice' when issuing the oxycodone and morphine prescriptions at issue here." Pet. App. 2a (quoting 21 C.F.R. 1306.04(a)). The court declined to consider petitioner's contention that "the government didn't prove a lack of legitimate medical purpose" and therefore "did not prove the prescriptions were unauthorized" under Section 841(a)(1). *Id.* at 3a. The court noted that it had previously "held that Section 841 'requires only that the jury find the doctor prescribed a drug not for a legitimate medical purpose *or* not in the usual course of professional practice.'" *Ibid* (quoting *United States* v. *Abovyan*, 988 F.3d 1288, 1308 (11th Cir. 2021), overruled on other grounds by *Ruan*, *supra*) (internal quotation marks omitted). "Because the evidence in this case was sufficient to prove a knowing deviation from the usual course of medical practice," the court concluded that "it d[id] not matter whether there was also sufficient evidence to prove a knowing lack of legitimate medical purpose." *Id.* at 3a-4a.

ARGUMENT

Petitioner renews his contention (Pet. 17-29) that insufficient evidence supported his convictions for unlawfully distributing a controlled substance, in violation of 21 U.S.C. 841(a), because in his view the government

failed to prove that his controlled-substance prescriptions lacked a legitimate medical purpose.[1] The court of appeals correctly rejected that contention, and its unpublished opinion neither contravenes any precedent of this Court nor conflicts with any decision of another court of appeals. Further review is unwarranted.

1. A prescription is "authorized" by the CSA "when a doctor issues it 'for a legitimate medical purpose . . . acting in the usual course of his professional practice.'" *Ruan* v. *United States*, 597 U.S. 450, 454 (2022) (quoting 21 C.F.R. 1306.04(a)). And in *United States* v. *Moore*, 423 U.S. 122 (1975), this Court "h[eld] that registered physicians can be prosecuted under § 841 when their activities fall outside the usual course of professional practice." *Id.* at 124.

In *Moore*, the Court affirmed the conviction of a physician based on evidence about his deficient prescription

---

[1] Petitioner also asserts (Pet. 20-21) that the court of appeals' approach in this case may have rendered this prosecution a violation of the Commerce Clause. Although he frames that as a separate issue (Pet. i), he did not raise such a Commerce Clause claim below. See Pet. C.A. Br. 18-51. Nor does the petition advance any developed argument on the issue, which appears to be specific to the manner in which the testimony in his case established the relevant medical standards. See Pet. 10, 20-21, 29; see also *Johnson* v. *Williams*, 568 U.S. 289, 299 (2013) (noting that federal courts generally "refuse to take cognizance of arguments that are made in passing without proper development"). Any forfeited as-applied claim supplies no basis for review in the first instance in this Court. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (explaining that this Court is one "of review, not of first view"); *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (explaining that this Court ordinarily does not address issues that were not pressed or passed upon below); see also, *e.g.*, Gov't Br. at 22-24, *Ruan* v. *United States*, 597 U.S. 450 (2022) (No. 20-1410) (discussing interaction of state and federal law underlying regulatory standard).

practices, which included conducting cursory or nonexistent physical exams, ignoring test results, taking inadequate precautions against diversion or misuse of drugs, issuing prescriptions in dosages and frequencies based on the patient's demand, and charging patients based on the amount of controlled substances they requested. 423 U.S. at 142-143; see *id.* at 127 (noting that "[a]ccurate records were not kept" by the physician). The jury heard evidence that petitioner engaged in similar conduct here.

First, petitioner prescribed large doses of high-strength opioid pills; indeed, he routinely gave YH a prescription for the legal monthly limit of oxycodone pills alongside a second prescription for oxycontin or morphine. Gov't C.A. Br. 28-29. Second, petitioner obtained only a cursory medical history from YH at her first appointment and renewed YH's prescriptions for years without physically examining her, conducting any medical tests, or inquiring how her pain or injuries had changed over time. *Id.* at 25-26, 29. Third, rather than charging based on whatever specific medical services might have been necessary and provided on each visit, petitioner charged a set cash fee of $250 for an initial appointment and $200 for all monthly follow-up appointments to receive opioid prescriptions. *Id.* at 29.

Fourth, petitioner never informed YH about any other treatments, like physical therapy or non-opioid medications, that could alleviate her alleged residual pain. Gov't C.A. Br. 30. Fifth, petitioner issued prescriptions to YH despite knowing that she had previously taken opioids illegally, that she was selling and sharing the opioid pills that he previously prescribed to her, and that she was not taking the opioid pills that he prescribed to her as directed. *Id.* at 30-31. YH's urine

drug screens corroborated those red flags; at each appointment, she tested negative for opioids that petitioner had previously prescribed her. *Id.* at 25.

Finally, while engaging in all that conduct, petitioner also entered false progress notes into YH's patient chart stating that he had provided a complete physical examination, updated her diagnosis, and discussed alternative treatments. Gov't C.A. Br. 32. As in *Moore*, there was more than enough evidence in this case for the jury to conclude that petitioner issued controlled-substance prescriptions to YH that were not for a legitimate medical purpose in the usual course of his professional practice and, therefore, violated Section 841(a). See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (holding that evidence is sufficient if, "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") (emphasis omitted).

The district court and the court of appeals thus correctly rejected petitioner's sufficiency challenge. Petitioner identifies no decision—from this Court or another court of appeals—reaching a different result on comparable facts. And the factbound determination that sufficient evidence supports petitioner's convictions does not warrant this Court's review. This Court "do[es] not grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10. That "policy has been applied with particular rigor when 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) (citing *Graver*

Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).

2. Petitioner instead contends (Pet. 21-29) that the court of appeals erred in declining to specifically assess whether the evidence was sufficient to show that petitioner's prescriptions were not only outside "the usual course of professional practice" but also "not for a legitimate medical purpose." That contention lacks merit.

a. The regulatory text sets forth a unitary requirement that a prescription be issued "for a legitimate medical purpose by an individual practitioner *acting in* the usual course of his professional practice." 21 C.F.R. 1306.04(a) (emphasis added). At a minimum, that text requires a physician to prescribe drugs both with "a legitimate medical purpose" and "in the usual course of his professional practice." *Ibid.* A physician's prescription would therefore be unauthorized, and thus prohibited under Section 841(a), so long as he knowingly failed to do one or the other.

When presented with identical regulatory language in *Moore*, see 423 U.S. at 136 n.12, this Court consistently referred only to "professional practice" in describing criminal liability under Section 841, *id.* at 140-142. And *Moore* upheld a conviction where the jury instructions did not require multiple distinct findings about the nature of the prescriptions. See *id.* at 138-139; see also *Gonzales* v. *Oregon*, 546 U.S. 243, 285 (2006) (Scalia, J., dissenting) (explaining that, "[u]nder [this Court's] reasoning in *Moore,* writing prescriptions that are illegitimate * * * is certainly not 'in the usual course of professional practice'") (brackets and citation omitted).

b. There is no disagreement in the courts of appeals that would warrant this Court's review. Every published decision that has expressly addressed the issue

has adopted a disjunctive reading, determining that a jury may find a medical practitioner guilty of a Section 841 offense based on evidence that he knowingly distributed or dispensed a controlled substance "outside the usual course of medical practice" *or* "without a legitimate medical purpose."[2] And none of the decisions on which petitioner relies (Pet. 24-25) for his claim of a conflict held that such a disjunctive instruction is erroneous.

Petitioner errs in asserting (Pet. 23) that "[t]he Sixth, Seventh, and Tenth Circuits have vacillated between the disjunctive and conjunctive readings." See, *e.g.*, *United States* v. *Oppong*, No. 21-3003, 2022 WL 1055915, at *5 (6th Cir. Apr. 8, 2022) (noting that "binding case law does not support" the conjunctive reading); *United States* v. *Bek*, 493 F.3d 790, 798-799 (7th Cir.) (describing disjunctive instruction as "proper"), cert. denied, 552 U.S. 1010 (2007); see also *United States* v.

---

[2] See, *e.g.*, *United States* v. *Lamartiniere*, 100 F.4th 625, 642-643 (5th Cir. 2024) ("[A] prescription is unauthorized under § 841(a)(1) if it lacks a legitimate medical purpose or was issued outside the usual course of professional practice."), petition for cert. pending, No. 24-5578 (filed Sept. 16, 2024); *United States* v. *Abovyan*, 988 F.3d 1288, 1308 (11th Cir. 2021) ("[T]he law requires only that the jury find the doctor prescribed a drug 'not for a legitimate medical purpose' or not 'in the usual course of professional practice.'") (citation omitted), overruled on other grounds by *Ruan*, *supra*); *United States* v. *Armstrong*, 550 F.3d 382, 399-400 (5th Cir. 2008) (cataloguing appellate decisions upholding disjunctive jury instructions), cert denied, 558 U.S. 829 (2009), overruled on other grounds by *United States* v. *Guillermo Balleza*, 613 F.3d 432 (5th Cir.) (per curiam), cert. denied, 562 U.S. 1076 (2010); *United States* v. *Limberopoulos*, 26 F.3d 245, 249-250 (1st Cir. 1994) ("[W]ell-established case law mak[es] clear that [Section 841] applies to a pharmacist's (or physician's) drug-dispensing activities so long as they fall outside the usual course of professional practice.").

Kahn, 58 F.4th 1308, 1316 (10th Cir. 2023) (finding error on remand from this Court in disjunctive instruction that included alternative that did not account for mens rea requirement). But even assuming intracircuit disagreement, such disagreement would not warrant this Court's review. See *Wisniewshi* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). The same would be true of any inconsistency in the Fourth Circuit, see Pet. 25, which has reserved the issue for a future case, see *United States* v. *Smithers*, 92 F.4th 237, 250 n.5 (4th Cir. 2024). And petitioner errs in suggesting (Pet. 24) that the Eighth and Ninth Circuits "appear to have settled on the conjunctive reading" at odds with the decision below.

In *United States* v. *Feingold*, 454 F.3d 1001, cert. denied, 549 U.S. 1067 (2006), the Ninth Circuit correctly recognized that the jury instructions, which included the "legitimate medical purpose" and "course of professional practice" standards in the conjunctive, as well as a good-faith instruction that "require[d] the jury to find that [the defendant] intentionally acted outside the usual course of professional practice," properly "require[d] the jury to find that [the defendant] intentionally acted outside the usual course of professional practice." *Id.* at 1008. The court emphasized the need to distinguish a conviction under Section 841 from "a finding that [a physician] has committed malpractice." *Id.* at 1010. And the court found that the instructions there had sufficiently done so. *Id.* at 1012.

The affirmance of the conviction in *Feingold*, in which the Ninth Circuit did not directly consider a disjunctive instruction, thus does not demonstrate a conflict with the court of appeals' decision in this case. The same is true of the other Ninth Circuit decisions petitioner cites

(Pet. 24), which at most stated the regulatory standard or did not fault a conjunctive instruction—and did not address whether the statute requires a conjunctive approach.[3]

Likewise, in *United States* v. *Smith*, 573 F.3d 639 (2009), the Eighth Circuit rejected the defendant's claim that "the definition of 'usual course of professional practice' in [the jury instructions] improperly conflated the standard for criminal liability with the standard for medical malpractice." *Id.* at 649. Reviewing the particular instructions delivered in that case, the court noted that "the jury was unable to convict [the defendant] unless it found a failure to adhere to prevailing medical standards *and* a lack of legitimate medical purpose." *Ibid.* But "[t]his dual showing * * * exceed[ing] that required to establish medical malpractice" was just one of several aspects of the instructions that assured the reviewing court that "the jury instructions, taken as a whole, precluded a conviction based on the civil standard of liability." *Id.* at 649-650; see *id.* at 649 ("Additional indicators that the instructions did not conflate civil and criminal standards include the fact that the court explicitly instructed that the standard of proof applicable in this case was 'beyond a reasonable doubt.'"); *id.* at 649-650 ("The court also allowed [the defendant] the possibility of a good-faith defense, which is unavailable in malpractice cases.") (footnote omitted).

---

[3] See *United States* v. *Motley*, No. 21-10296, 2023 WL 9014457, at *3 (9th Cir. Dec. 29, 2023), petition for cert. pending, No. 24-5107 (filed July 16, 2024); *United States* v. *Kabov*, No. 19-50083, 2023 WL 4585957, at *6-*7 (9th Cir. July 18, 2023), cert. denied, 144 S. Ct. 2685 (2024); *United States* v. *Wilson*, 850 Fed. Appx. 546, 547 (9th Cir. 2021) (mem.).

Smith thus never held that a disjunctive instruction would have been categorically erroneous, or a conjunctive instruction categorically necessary, to appropriately define the Section 841 offense. And the other Eighth Circuit decisions petitioner cites (Pet. 25) describe the standard non-disjunctively. See *United States* v. *King*, 898 F.3d 797, 807 (2018) ("The government bore the burden of establishing that [the defendant's] actions were not for legitimate medical purposes in the usual course of medical practice."); *United States* v. *Elder*, 682 F.3d 1065, 1068-1069 (2012) ("[T]he government must prove that the physician's activities 'fall outside the usual course of professional practice.'") (citation omitted). Indeed, even petitioner himself appears (Pet. 25 & n. 12) to harbor doubt about whether the Eighth Circuit in fact follows his preferred approach.

c. Furthermore, even if another court of appeals had endorsed petitioner's preferred conjunctive reading, this Court's review would still be unwarranted, because it would not affect the outcome here.

In reviewing petitioner's challenge to the sufficiency of the evidence, an appellate court must review the evidence "in the light most favorable to the prosecution" and assume that the jury accepted the expert's testimony. *Jackson*, 443 U.S. at 319. And even if petitioner's conjunctive reading of Section 1306.04(a)'s regulatory language was correct, his sufficiency claim would still fail because the trial record contains sufficient evidence that the prescriptions he wrote for YH lacked a legitimate medical purpose—as the jury was "specifically instructed" to find, Pet. 14.

The court of appeals, which rejected any claim of factbound error in the admission of the relevant evidence, see Pet. App. 2a n.1, would have no reason to set

aside that jury finding. The government's expert testified at trial that petitioner's prescriptions were not for a legitimate medical purpose *and* were provided outside the usual course of professional practice. Gov't C.A. Brief 13-15. That testimony provides ample support for the jury's finding, and petitioner has identified no basis for supposing that the court of appeals would have concluded otherwise.

To the contrary, courts of appeals have repeatedly recognized that the same evidence will ordinarily support a finding that a physician acted "without a legitimate medical purpose" and a finding that he or she acted "outside the usual course of his or her professional practice."[4] The court below would not have deemed this case

---

[4] See *Armstrong*, 550 F.3d at 397-398 (explaining that "knowingly distributing prescriptions outside the course of professional practice is a sufficient condition to convict a defendant" and that the phrases "outside the scope of professional practice" and "without a legitimate medical purpose" may be "considered interchangeable"); *United States* v. *Rosenberg*, 515 F.2d 190, 197 (9th Cir.) (finding "it difficult to understand how [a physician] can argue that he was not acting for legitimate medical reasons yet was acting in the course of his professional practice" and explaining that a determination that a physician acted outside "the course of professional practice" means that he took "actions that he d[id] not in good faith believe [were] for legitimate medical purposes"), cert. denied, 423 U.S. 1031 (1975); see also *United States* v. *Rottschaefer*, 178 Fed. Appx. 145, 147-148 (3d Cir.) (noting that "[s]everal courts have held that 'there is no difference in the meanings'" of the two phrases) (citation omitted), cert. denied, 549 U.S. 887 (2006); *United States* v. *Daniel*, 3 F.3d 775, 778 (4th Cir. 1993) (equating the two phrases), cert. denied, 510 U.S. 1130 (1994); *United States* v. *Kirk*, 584 F.2d 773, 784 (6th Cir.) (same), cert. denied, 439 U.S. 1048 (1978); *United States* v. *Plesons*, 560 F.2d 890, 897 n.6 (8th Cir.) (same), cert. denied, 434 U.S. 966 (1977).

to be an outlier, and further review would accordingly lack practical significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
NICOLE M. ARGENTIERI
Principal Deputy Assistant Attorney General
DAVID M. LIEBERMAN
Attorney

OCTOBER 2024