No. 24-5578

In The
Supreme Court of the United States

RANDY LAMARTINIERE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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"In the business of statutory interpretation, if it is not the best, it is not permissible." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). The courts below and the government interpret the Controlled Substances Act as equating a physician practicing medicine with a drug trafficker. This is not the best reading of the statute, and it is therefore not permissible.

The government does not dispute Dr. Lamartiniere's recitation of the facts in this case. *See generally* Opp. Br.; *see also* Sup. Ct. R. 15. And while the government downplays the importance of the facts in this case, *see* Opp. Br. at 3, the facts illuminate the error in the of the government's construction of the statute. Based on the undisputed facts of this case, there is no question that Dr. Lamartiniere was practicing medicine. Pet. at 13-17. But erroneous understandings of the Controlled Substances Act ("CSA") and this Court's opinion in *Ruan v. United States*, 597 U.S. 450 (2022) allowed for his conviction under the statute's drug trafficking provision. This Court's review is necessary to clarify the criminal law applicable to registered practitioners under the CSA.

I. THE GOVERNMENT OFFERS NO SOUND REASON FOR INTERPRETING *RUAN* DIFFERENTLY FROM *LIPAROTA*.

This Court opinion in *Ruan* was clear: "We now hold that § 841's 'knowingly or intentionally' *mens rea* applies to the 'except as authorized' clause." *Ruan v. United States*, 597 U.S. 450, 457 (2022) (quoting 21 U.S.C. § 841(a)). The Court did not hold that § 841's *mens rea* applies to the "and the vague, highly general language of the regulation," *see id.* at 464, purporting to define an "effective prescription," 21 C.F.R. § 1306.04.

The government ignores *Ruan*'s reliance on *Liparota v. United States*, 471 U.S. 419, 434 (1985), which interpreted a similarly worded statute as requiring the government to prove that a defendant "knew that his conduct was unauthorized or illegal." *Id.* at 434. The Tenth Circuit, however, correctly explained the commonality between the cases. In *Kahn II*, the Tenth Circuit described the essential holding in *Liparota* as follows:

> While the defendant in *Liparota* knew that he was purchasing food stamps below the market rate, such knowledge was not enough to establish guilt. The Supreme Court held that knowingly engaging in conduct that is, in fact, unauthorized is not sufficient, even if one is aware of all the factors that render it unauthorized. Instead, the government was required to prove that the defendant actually knew that his conduct was unauthorized under the law.

United States v. Kahn, 58 F.4th 1308, 1315 n.3 (10th Cir. 2023) ("*Kahn II*") (citations omitted). The Tenth Circuit's correctly interpreted *Ruan* as treat[ing] 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 (quoting *Ruan*, 597 U.S. at 467).

Putting the cases together, the Tenth Circuit concluded that "[j]ust as in *Liparota*, to convict under § 841(a) of the CSA, 'the Government may prove by reference to facts and circumstances surrounding the case that petitioner *knew that his conduct was unauthorized or illegal*.'" *Kahn II*, at 1315 (quoting *Liparota*, 471 U.S. at 434) (emphasis added). "However, the government's showing of objective

criteria, without proving that a defendant actually intended or knew that he or she was acting in an unauthorized way, is not enough to convict." *Id.*

The government ignores the rationale of *Kahn II* to argue that there is not a circuit split. But this is inconsistent with the Tenth Circuit's subsequent description of the opinion as "explaining that a knowing failure to act outside professional norms was not equivalent to a knowing failure to act without authorization." *Dunn v. Smith*, No. 22-2082, 2023 WL 2770960, at *5 (10th Cir. Apr. 4, 2023) (unpublished). The regulation describes professional norms. A knowing failure to abide by the professional norms described in the regulation is not the same as a knowingly prescribing without authorization. The government offer's no reason to treat *Ruan* differently than *Liparota.*

II. THE GOVERNMENT FAILS TO SUFFICIENTLY ASSESS THE SCOPE OF THE ATTORNEY GENERAL'S REGULATORY AUTHORITY UNDER THE CSA.

The governments interpretation of § 841's "except as authorized" clause rests on a fundamentally flawed reading of the CSA. Critically, the government's reading requires acceptance of the premise that an administrative agency may alter the penalty structure of a statute via regulatory fiat. But the government assumes that the Attorney General's authority is broad enough to issue a regulation limiting the scope of a registered practitioner's prescribing authority beyond the scope of the statute itself.

The government ignores that the CSA does "not call on the Attorney General, or any other executive official, to make an independent assessment of the meaning of

federal law." *Gonzales v. Oregon,* 546 U.S. 243, 263 (2006). Nor does it "suggest that he may decide what the law says." *Id.* at 264. Any interpretation of the CSA vesting the Attorney general with such power "would go, moreover, against the plain language of the text to treat a delegation for the 'execution' of his functions as a further delegation to define other functions well beyond the statute's specific grants of authority." *Id.* at 264–65. To the extent that one might find ambiguity in the scope of the Attorney General's authority under the CSA, "[t]he very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities." *Loper Bright*, 144 S. Ct. at 2266. "That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate." *Id.*

That the language contained in the regulations comes from various provisions of the CSA does not help the government's argument, as "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). Under the government's reading, however, congressional placement of words in a statue is of no import. Rather, an administrative agency can pick and choose language from various parts of a statute until it obtains its preferred meaning.

III. THE GOVERNMENT MISREADS *MOORE* AS ENDORSING THE REGULATION AS DEFINING AUTHORITY UNDER § 841.

United States v. Moore, 423 U.S. 124 (1975) did not hold that 21 C.F.R. § 1306.04 defines the scope of a registered practitioner's authorization for purposes of 21 U.S.C. § 841. Indeed, *Moore* only cited to the regulation in two footnotes when discussing whether the defendant in that case could be prosecute under § 842(a)(1). *See Moore*, 423 U.S. at 138 n.12, n.13. *Moore*'s discussion of § 829, however, is entirely consistent with Petitioner's reading of the statute:

> On its face s 829 addresses only the form that a prescription must take. A written prescription is required for Schedule II substances. s 829(a). Either a written or an oral prescription is adequate for drugs in Schedules III and IV. s 829(b). The only limitation on the distribution or dispensing of Schedule V drugs is that it be "for a medical purpose." s 829(c). The medical purpose requirement explicit in subsection (c) could be implicit in subsections (a) and (b). Regulation s 306.04 makes it explicit. *But s 829 by its terms does not limit the authority of a practitioner.*

Id. at 138 n.13 (emphasis added). *Moore* relied on the statutory language itself, rather than the regulation, to hold "that registrant who may be prosecuted for the relatively minor offense of violating s 829 is [not] exempted from prosecution under s 841 for the significantly greater offense of acting as a drug 'pusher.'" *Id.* at 138. But *Moore* equated a violation of the regulation with a violation of § 829, and thus being punishable under § 842(a)(1).

That rationale is consistent with common sense reading of the statute and the regulations. The regulations in Part 1306 do not purport to implement § 841 or any of the provisions dealing with authorization. To the contrary, the scope of Part 1306 is explicitly limited to the "[r]ules governing the issuance, filling and filing of prescriptions pursuant to section 309 of the Act (21 U.S.C. 829) . . . ." 21 C.F.R. §

1306.01. Thus, even if the regulations were issued within the Attorney General's authority under the CSA, violation of the regulations in that part would not be a violation of § 841; they would be a violation of § 829. And Congress specifically provided for violations of § 829 in § 842(a)(1).

Moreover, the plain language of the regulation itself does not logically read as describing authority for purposes of § 841(a). The specific language of the regulation that addresses the applicability of penalties under the CSA does not mention authorization or § 841. It provides:

> "An order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription *within the meaning and intent of section 309 of the Act* (*21 U.S.C. 829*) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances."

21 C.F.R. § 1306.04(a) (emphasis added). The most logical reading of the text of the regulation is that issuing a prescription in violation of its terms is a violation of § 829, not § 841.

Further evidence that a knowing violation of CFR § 1306.04 does not constitute a violation of § 841 is that the statute does not expressly criminalize violation of the regulation. Section 841(a) refers to the statute itself—and not regulations—in describing to authorization. 21 U.S.C. § 841(a) ("Except as authorized by this subchapter . . . ."). And this Court has made clear that a criminal conviction for violating a regulation is permissible only if a statute explicitly provides that violation of that regulation is a crime. *See United States v. Eaton*, 144 U.S. 677, 688 (1892). Accordingly, for Congress to delegate the power to an agency to enact regulations and

subject those who violate the regulations to criminal liability, courts require Congress to speak "distinctly." *United States v. Grimaud*, 220 U.S. 506, 519 (1911). Congress has not so spoken here.

To the contrary, the text and structure of the CSA indicates that one need not even be in strict compliance with the statutory requirements to stay within the scope of his authority for purposes of § 841, let alone compliance with regulatory requirements for filling a prescription. *See, e.g.*, 21 U.S.C. § 842(a)(1) (criminalizing the distribution or dispensation in violation of § 829). Nowhere does the statute indicate that the failure to comply with the regulations implementing § 829 can subject one to criminal penalties under § 841. As the authorization contemplated by § 841 clearly encompasses activities that are not in compliance with § 829, the statute does not clearly make violation of § 829's implementing regulations a violation of § 841, and § 1306.04 does not purport to define authorization for purposes of § 841, there is no textually sound reason to read the regulation as sub silentio redefining authorization.

IV. THE GOVERNMENT FAILS TO ADDRESS THE VAGUENESS CONCERNS OF THE REGULATION.

The key difference between the statute and the regulation is that the statute utilizes clear language: "in the course of professional practice," 21 U.S.C. § 802(21), and "medical purpose," 21 U.S.C. § 829(c). The regulation, however, narrows these grants of authority through the undefined modifiers "usual" and "legitimate". 21 C.F.R. § 1306.04. The requirement of a *legitimate* medical purpose implies that there are *illegitimate* medical purposes. Similarly, the *usual* course of professional

proactive implies that there is some rang of activity that is within the course of professional practice but unusual enough to warrant prosecution. The government, however, has never been able to delineate what an illegitimate medical purpose is or how one can, while still practicing the profession of medicine, have a practice that is so unusual that it is criminally liable under § 841.

This Court has long recognized that "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime,'" *United States v. Davis*, 588 U.S. 445, 451 (2019) (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)), and that "[v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id.*

But here, it is not the statute that is vague. "[T]o act 'in the course of professional practice' is to engage in the practice of medicine—or, as we have put it, to 'act 'as a physician.'" *Ruan*, 597 U.S. at 479 (Alito, J., concurring) (quoting *Moore*, 423 U.S. at 141). "For a practitioner to 'practice medicine,' he or she must act for a medical purpose—which means aiming to prevent, cure, or alleviate the symptoms of a disease or injury—and must believe that the treatment is a medically legitimate means of treating the relevant disease or injury." *Id.*

Here, it is the regulation that injects the vagueness and uncertainty into the meaning of § 841. The regulation grafts undefined objective legitimacy and usualness requirements onto an otherwise clear statute, thus seizing the "the legislature's

responsibility for defining criminal behavior" and handing it off "to unelected prosecutors and judges . . . ." *Davis*, 588 U.S. at 448.

The government tells doctors to fear not, as it will yield its prosecutorial discretion reasonably and responsibly. *See* Ruan v. United States, No. 20-1410, Oral Arg. Tr. at 71 (JUSTICE GORSUCH: "[I]n those close cases --and I understand the government will never bring a close case. I understand that. MR. FEIGIN: Never.") This Court has recently reiterated its longstanding framework for addressing such prosecutorial assurances:

> Finally, the Government makes a familiar plea: There is no reason to mistrust its sweeping reading, because prosecutors will act responsibly. To this, the Court gives a just-as-familiar response: We "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" "To rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor."

Dubin v. United States, 599 U.S. 110, 143 S. Ct. 1557, 1573 (2023) (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016) then *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018)) (brackets omitted).

This case offers a clear example of why to distrust prosecutorial discretion when construing criminal statutes. The government has not disputed that Dr. Lamartiniere was trying to help his patients with what he believed to be *bona fide* medical problems. The undisputed facts show that Dr. Lamartiniere was acting "act[ing] 'as a physician.'" *See Moore*, 423 U.S. at 141. But due to an erroneous interpretation of the CSA which defined the offense in terms of the vague regulation

rather than the statutory text itself, the jury was permitted to convict Dr. Lamartiniere for failing to adhere to best practices. The CSA requires more, and this Court's review is necessary to clarify the standard for lower Courts.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court will grant his Petition for Certiorari.

Respectfully Submitted,

January 2, 2025
DATE

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