

No. 24-5646

IN THE SUPREME COURT OF THE UNITED STATES

LISA HOFSCHULZ AND ROBERT HOFSCHULZ, PETITIONERS

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 24-5646

LISA HOFSCHULZ AND ROBERT HOFSCHULZ, PETITIONERS

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (Pet. 21-37) that the district court abused its discretion when instructing the jury, in accord with 21 C.F.R. 1306.04(a), that a medical practitioner may be found guilty of the unauthorized distribution of a controlled substance, in violation of 21 U.S.C. 841(a)(1), if he “knowingly caused to be distributed or dispensed the controlled substance” and “did so by intentionally distributing or dispensing the controlled substance outside the usual course of professional medical practice, and not for legitimate medical purpose.” Pet. App. A6 (emphasis omitted).

This Court has recently denied petitions for writs of certiorari raising similar claims, and it should follow the same course here.

To the extent that petitioners are claiming that the district court erred in its incorporation of Section 1306.04(a)'s definition of when a prescription is authorized into the jury instructions, the Court recently denied a similar claim in the (second) petition for a writ of certiorari in Ruan v. United States, 144 S. Ct. 377 (2023) (No. 22-1175), and the claim does not warrant further review for the reasons stated on pages 14-19 of the brief in opposition in that case. To the extent that petitioners are claiming that the regulatory standard is itself flawed because it is phrased disjunctively rather than conjunctively, the Court recently denied a similar claim in Lubetsky v. United States, No. 24-137 (Nov. 12, 2024), and the claim does not warrant further review for the reasons explained on pages 10-15 of the brief in opposition in that case.¹ And, in any event, the jury at petitioners' trial was instructed using the conjunctive formulation. See Pet. App. A10.

The only circuit decision that petitioners assert (e.g., Pet. 9-10, 22-27) is in conflict with the decision below is the Tenth Circuit's decision in United States v. Kahn, 58 F.4th 1308 (2023). But as explained in the (second) brief in opposition in Ruan, the

¹ The government has served petitioners with a copy of its responses in Ruan and Lubetsky, which are also available on the Court's electronic docket.

Tenth Circuit in Kahn found error in a disjunctive jury instruction that omitted Section 841(a)(1)'s means rea requirement when describing one of the two criteria in Section 1306.04(a), and did not clearly adopt an approach under which a defendant may avoid conviction even if he knows or intends to prescribe drugs outside the circumstances described in that provision. See Br. in Opp. at 20-21, Ruan, supra (No. 22-1175). And any fact-specific issues that petitioners may have with the instructions in their case do not warrant this Court's review. See Sup. Ct. R. 10.

The petition for a writ of certiorari should be denied.²

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NOVEMBER 2024

² The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.