No. 20-1410
(consolidated with No. 21-5261)

In the Supreme Court of the United States

XIULU RUAN AND SHAKEEL KAHN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Eleventh and Tenth Circuits

BRIEF OF ANMOL SINGH KAMRA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae is Anmol Singh Kamra, whose conviction for conspiracy to violate the same statute as is under consideration in these cases is presently pending (mid-briefing) before the United States Court of Appeals for the Third Circuit, at No. 21-1615.[1]

Kamra was 20 to 23 years old during the time period underlying the charges in his case. A member of India's Sikh minority religious community, he was born and grew up in New Delhi. Kamra moved to the United States in 2010 at age 17 to attend college. After transferring from another school, he received a bachelor's degree in business administration from Philadelphia's Drexel University in December 2013, majoring in entrepreneurship and marketing. Beginning part-time as an unpaid Drexel undergraduate studying business, and then as a full-time employee in 2014 upon graduation, Kamra worked in various positions at Campus Pharmacy, in the Drexel neighborhood. Following his college graduation, Kamra's principal responsibilities at the pharmacy included organizing its "mess" of business records, along with marketing. He had no medical or formal pharmacy education. Based solely on on-the-job training, Kamra also sometimes served as a pharmacy "tech," a job which (in Pennsylvania at least)

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[1] Pursuant to Rule 37.6, *amicus* Kamra affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and his family have made a monetary contribution intended to fund its preparation or submission. All parties have consented in writing to the filing of this brief.

requires no particular credentials or licensure. As a "tech," Kamra received guidance from and performed routine tasks for the registered pharmacists, such as counting pills for bottling and waiting on customers.

Both petitioners in the cases before this Court were licensed physicians. By filing this brief, *amicus* seeks to ensure that in formulating a proper test for "good faith" in criminal cases charging a defendant with "knowingly" dispensing or distributing a controlled substance outside the "usual course of professional practice" and not for a "legitimate medical purpose" (or with conspiring to commit, or with aiding and abetting that offense) the Court takes account of the fact that some defendants prosecuted for this offense are not themselves physicians or pharmacists, or any other sort of medical professional.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether a court trying a criminal case alleging the intentional distribution or dispensing of a controlled substance, in violation of 21 U.S.C. § 841(a),(b) – or conspiracy to do so, in violation of *id.* § 846 – should instruct the jury, whenever the evidence warrants, and in what terms, that the prohibited intent has not been proven if the jury is left with reasonable doubt whether the accused acted in "good faith."

The statute provides that there is no guilt unless the defendant acts outside of what is "authorized by"

subchapter I of chapter 13 of the Controlled Substances Act and does so "knowingly" and "intentionally." 21 U.S.C. § 841(a).[2] What is "authorized by this subchapter," the Court unanimously explained in *United States v. Moore*, 423 U.S. 122 (1975), after meticulously exploring the complex statutory scheme, is drug distribution within the "bounds of professional practice." *Id.* 142.

The proper answer to the first part of the question presented – whether a "good faith" instruction is needed in prosecutions for this offense – is Yes. In other words, "good faith," properly defined, is inconsistent with the *mens rea* for the § 841 and related § 846 offenses, and juries need to be so advised. That is, "good faith" is not an affirmative defense. Rather, it refers to evidence which may serve, if credited by the jury, to negate what could otherwise be proof beyond a reasonable doubt of an offense element. Compare, *e.g.*, *Clark v. Arizona*, 548 U.S. 735 (2006) (discussing evidence of insanity in relation to *mens rea* elements). Only distribution that is *in fact* "outside the bounds" is penalized. But even when distribution falls outside, a defendant who does not "know" or "intend" this is not guilty. A defendant who genuinely believes otherwise may

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[2] Although the statute reads "knowingly *or* intentionally," it is universally read to mean "knowingly *and* intentionally," as the disjunctive reading is illogical, given that any pertinent knowledge is necessarily included within intent. Taking the "or" literally renders the statute's "intentionally" option surplusage, a construction that is to be eschewed. *Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994) (applying this principle to construction of *mens rea* element).

have made a mistake of fact, but based on their "good faith" state of mind cannot be convicted.

In addressing the second aspect of the question – the proper contours of "good faith" in this context – the Court should bear in mind that while the two petitioners happen to be physicians, individuals other than medical doctors can be and routinely are prosecuted under these statutes. Those defendants may be charged under various theories of direct and vicarious criminal liability, such as conspiracy (21 U.S.C. § 846), aiding and abetting (18 U.S.C. § 2(a)), and the so-called "*Pinkerton* doctrine."[3] The defendants so charged may be pharmacists, who have professional training and licensure obligations with respect to controlled substances. But a defendant may also be a nurse, or a physician's assistant.[4] Or the accused may be a lay person, ranging from untrained pharmacy techs (like *amicus* Kamra[5]) to anyone who assumed a role in the charged distribution or conspiracy (anything from

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[3] See *Pinkerton v. United States*, 328 U.S. 640 (1946).

[4] Depending on state law, the nature of such a defendant's licensure, and the terms of their employment, such a person may or may not have independent authority to write prescriptions for and to dispense controlled substances. See, *e.g.*, 63 Pa.Stat. § 218.3; 49 Pa.Code § 21.283, 21.284b, 21.285 (prescription authority and requirements for Certified Registered Nurse Practitioners); *compare* 63 Pa.Stat. § 422.13(f); 49 Pa.Code § 18.152(a)(2) (physician assistant).

[5] Some states apparently require pharmacy technicians to be registered with a regulatory body. See *United States v. Lovern*, 590 F.3d 1095, 1106 (10th Cir. 2009) (Kansas). Not so, in Pennsylvania.

creating fraudulent prescriptions to knowingly delivering packages).

To ensure fairness to all defendants charged in these cases, and more important to enforce the statutory *mens rea* requirement, the Court should hold that the jury must be instructed to acquit defendants as to whom the evidence gives rise at least to reasonable doubt that they harbored a subjectively honest belief that the distribution at issue was "outside the bounds of professional practice." The key to "good faith" is the honesty of each particular defendant's subjective belief, not its objective reasonableness. The latter is merely evidence bearing on the former.

A jury's finding of guilt based on a lack of "good faith" might arise from the defendant's own actions or from the defendant's knowledge of the doctor's, pharmacist's, or some other person's intentions. Any proper instruction on this point must advise the jury to consider all the relevant facts and circumstances, including the particular defendant's own pertinent education and training (or lack thereof), and that person's role in relation to any licensed professionals involved in the case.[6] For lack of a proper "good

[6] At *amicus* Kamra's own trial, the court delivered a "good faith" instruction that failed to distinguish between the knowledge expected of professionals and the situation of a non-professional (such as a pharmacy tech) who must necessarily rely on the guidance of professionals (such as a pharmacist and/or doctor). The judge rejected, in Kamra's case, a request to charge the jury to acquit if it harbored a reasonable doubt that the non-professional acted in the genuine belief, even if unreasonable, that *the doctor's* actions

faith" jury instruction at trial in the cases before the Court, the judgments of the courts of appeals as to both petitioners should be reversed.

ARGUMENT FOR *AMICUS CURIAE*

A Subjectively Genuine Belief that the Charged Distribution Was "Within the Bounds of Professional Practice" Is Inconsistent with the *Mens Rea* Element of a Section 841(a) Offense, and in the Case of a Non-Professional May Be Predicated on a Sincere Belief that the Pertinent Professional Was Acting in Good Faith.

The offense described in 21 U.S.C. § 841(a) requires the government to prove that the defendant acted "knowingly" and "intentionally." The statute makes it unlawful (and subsection 841(b) declares that unlawful conduct to be a felony offense) to distribute a controlled substance "[e]xcept as authorized by this subchapter." In *United States v. Moore*, 423 U.S. 122 (1975), this Court carefully analyzed subchapter 13.I. of the Controlled Substances Act of 1970 to reach the conclusion that what is "authorized" by that part of the Act is drug distribution within the "bounds of professional practice." *Id*. 142. The Questions on which this Court granted certiorari in the present cases implicate first the question whether the *scienter* element of the offense – and in particular, its requirement that the offense be

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in prescribing controlled substances were undertaken in good faith as to the bounds of professional practice.

committed "knowingly" – extends to the "Except" clause. If it does, then a defendant's subjectively genuine belief necessarily precludes guilt.

Because the "except" clause introduces and precedes the section's other terms, including the *mens rea* provision, the structure and plain language of the statute are frankly ambiguous "as a matter of ordinary English grammar" on the question whether the "knowingly or intentionally" requirement attaches to the introductory exception clause. *Cf. Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) ("knowingly" ordinarily applies "to all the subsequently listed elements"). But background principles of federal criminal law, as enforced by this Court in its most analogous cases, show that it does. See *Liparota v. United States*, 471 U.S. 419 (1985) (attaching *scienter* element to a statute's "in any manner not authorized" requirement, wherein lay the wrongfulness of the alleged conduct).

Nor does the statute's related procedural provision addressing "Exemptions and exceptions," 21 U.S.C. § 885(a)(1), require any different interpretation of the underlying substantive issue.[7] Rather, it supports the conclusion that the negative of the exception, when placed in issue, is an element of the

[7] That statute provides, in pertinent part: "(1) It shall not be necessary for the United States to negative any ... exception set forth in this subchapter in any ... indictment, ... or in any trial ... under this subchapter, and the burden of going forward with the evidence with respect to any such ... exception shall be upon the person claiming its benefit."

offense. That statute provides that for an indictment to be valid, the grand jury need not plead the negative of the exception, nor must the government prove the negative at trial unless the defendant first goes forward with some evidence to place the question of distribution in the course of medical or professional practice in issue. By clear implication, § 885(a) suggests that where the defendant does meet that initial "burden of going forward," the ultimate burden of proof beyond a reasonable doubt to negate the exception as an element of the offense rests squarely upon the prosecution.

Because acting outside the scope of medical practice (when placed in issue) is an element of the offense, it is unsurprising that a *mens rea* of guilty knowledge, at least, applies to that circumstance. After all, the wrongfulness of the conduct at issue resides solely in the circumstances encompassed by the statutory exception. Practicing medicine or operating a pharmacy is not presumptively unlawful conduct, to be engaged in only at one's peril and tolerated by society only in exceptional circumstances. There is nothing inherently antisocial about a doctor's or pharmacist's dispensing or distributing narcotics in the ordinary course of professional practice. To the contrary. This Court's cases therefore establish a strong presumption that the statute's *mens rea* requirement (at least "knowingly") attaches to the "outside the course" element. See *Rehaif v. United States*, 588 U.S. —, 139 S.Ct. 2191, 2195 (2019); *Elonis v. United States*, 575 U.S. 723, 737 (2015); *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Staples v. United States*, 511 U.S. 600, 610–16 (1994); *United States v. Bailey*, 444 U.S 394,

406 n.6 (1980); *Morissette v. United States*, 342 U.S. 246 (1952).

When knowledge is an element of an offense, a reasonable doubt about whether the defendant has that knowledge necessarily requires acquittal. A good faith (that is, genuine or sincere, not feigned) belief in a set of facts or circumstances inconsistent with any of the facts or circumstances of which the statute requires knowledge necessarily defeats the government's attempt to prove such "knowledge" – a term which denotes, after all, a state of mind combining belief (or at least awareness) with truth.[8] This remains so even when that belief is mistaken. *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.6(b), at 535 (3d ed. 2018).

Even before Congress had expressly codified the "as authorized" exception in the Controlled Substances Act, this Court held under prior law that a doctor's "good faith" belief – subjective but sincere – that appropriate medical practice called for distribution of narcotics to a patient would preclude any criminal conviction, even when the doctor failed to write a prescription as required by law. See *Linder v. United States*, 268 U.S. 5, 18 (1925) ("[W]e cannot possibly conclude that a physician acted improperly

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[8] A sincere attachment to a fact that is not actually true is still a "belief," but it is not "knowledge." See, *e.g.*, Jonathan Wayne, *The difference between belief and knowledge* (2017), *available at* https://medium.com/perspectivepublications/the-difference-between-belief-and-knowledge-cb909520a265/ (accessed 12/22/2021); BERTRAND RUSSELL, HUMAN KNOWLEDGE: ITS SCOPE AND LIMITS 109, 170–72 (1923, rev. 1948).

or unwisely or for other than medical purposes solely because he has dispensed to [an addicted patient], in the ordinary course and in good faith, four small tablets of morphine or cocaine for relief of conditions incident to addiction."). As the *Linder* Court emphasized, in explaining and limiting a number of prior holdings, whether any given defendant will prevail of course depends heavily on the particular facts of the case. *Id.* 18–22.

The briefs for the petitioners ably and thoroughly demonstrate that there is not the slightest reason to believe that Congress intended to revoke *Linder*'s "good faith" rule when enacting the present Controlled Substances Act in 1970. That doctrine is not any sort of "affirmative defense" that the defendant must establish. *Cf. Kahler v. Kansas*, 589 U.S. —, 140 S.Ct. 1021 (2020) (distinguishing between insanity defense and evidence of mental condition that may negate *mens rea* element); *Dixon v. United States*, 548 U.S. 1 (2006) (discussing defense of duress); *Martin v. Ohio*, 480 U.S. 228 (1987) (self-defense). Rather, "good faith," as used in the present context, is an application of the basic rule that a defendant's mistake of fact that negates the knowledge required as an element of the offense necessarily requires acquittal. LAFAVE, *ante*, § 5.6(b); 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 62(b), at 245–48 (1984). For all these reasons, the judgments of the courts of appeals in both petitioners' cases rejecting or limiting a "good faith" defense were wrong, and must be reversed.

In writing its opinion, the Court must bear in mind that many defendants prosecuted under 21

U.S.C. § 841 (or for conspiracy to violate that statute in violation of *id*. § 846) where the "course of professional practice" exception has been placed in issue are not themselves medical or pharmacy professionals. Prosecutions of such persons depend on various rules of vicarious or accessorial criminal responsibility. All of those doctrines require proof, as to each defendant, of at least the same level of *mens rea* as is required for the principal defendant. See, e.g., *Feola v. United States*, 420 U.S. 671, 686 (1975) (conspiratorial liability, whether for conspiracy itself under § 846 and for substantive offenses under the *Pinkerton* theory, requires at least the same level of *scienter* as the object offense); *Rosemond v. United States*, 572 U.S. 65, 71 (2014) (aiding and abetting requires proof of intent to commit principal offense). And as this Court has iterated, "without the knowledge, the intent cannot exist." *Ingram v. United States*, 360 U.S. 672, 678 & 680 (1959), quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).

Non-professionals (or allied professionals and paraprofessionals) may have some knowledge of medical practice norms, but unlike a doctor, are not necessarily expected to. And such defendants may well be dependent for any understanding they do have, on the very doctors or pharmacists who are at the center of the government's case. If working with a physician, they are expected to take direction and not substitute their own judgment for the doctor's. The result of these realities cannot be that non-professionals have less recourse to a "good faith" defense because they have no sound basis to form an independent opinion whether a given distribution is

or is not within the bounds of professional practice. Instead, the proper rule is that defendants who are not themselves professionals of the pertinent kind, but are charged with criminal liability for distribution outside the bounds of professional practice, are entitled to be acquitted if they believed in good faith that the professional was acting lawfully, including a belief that the professionals themselves believed in good faith they were acting within proper bounds.

A proper formulation of this rule does not demand that a defendant's understanding, in addition to being sincere, must also be found to be objectively "reasonable." Even unreasonable beliefs, if genuinely held, in fact negate any *mens rea* of knowledge (and thus also negate intent). See *Cheek v. United States*, 498 U.S. 192, 203 (1991); LAFAVE, *supra*, at 535–37; ROBINSON, *supra*, at 248–52.[9] Of course, a jury's view of the reasonableness of the defendant's professed belief may bear significantly on their assessment of the subjective sincerity of the defendant's claim and thus affect their willingness to find reasonable doubt on the basis of good faith. *Cheek*, 498 U.S. at 203–04. But reasonableness, *per se*, is not a requirement of "good faith," when invoked

[9] Were the rule otherwise, these authorities explain, the *mens rea* would be reduced to the level of negligence or perhaps recklessness.

as a mistake-of-fact defense negating a requirement of knowledge.[10]

There is a paucity of case law in the Circuits addressing the proper application of this standard to defendants who are not doctors or pharmacists, or who are complete non-professionals. But those courts which focus on the point have distinguished the standard governing physicians, pharmacists and other medical professionals from that applicable to lay persons charged with similar offenses. For instance, in *United States v. Lovern*, 590 F.3d 1095 (10th Cir. 2009), two defendants – an experienced pharmacist, and a computer technician with no medical education or any prior experience in the medical or pharmaceutical fields – were convicted of conspiracy to distribute controlled substances along with substantive distribution offenses under the CSA related to their employment by an online pharmacy. In an opinion by then-Judge Gorsuch, the panel

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[10] The Circuits that have layered a "reasonableness" requirement onto their "good faith" rulings appear to justify the result on public policy grounds, without adequately premising those decisions on either statutory language or criminal law principles. *E.g.*, *United States v. Quinones*, 635 F.3d 590, 594–95 (2d Cir. 2011) ("While those who assist practitioners in distributing controlled drugs clearly cannot be held to the standard of a reasonable practitioner, they are not free to unreasonably rely on the judgment of their employers."); *United States v. Vamos*, 797 F.2d 1146, 1152–54 (2d Cir. 1986); *United States v. Voorhies*, 663 F.2d 30, 34 (6th Cir. 1981) (approving instruction as to physician defendant that incorporated objective standard of reasonable belief).

upheld the conviction of the pharmacist, but reversed the technician's for insufficient evidence that he knew the doctor or pharmacists for whom he worked were acting outside the usual course of professional practice or without a legitimate medical purpose. *Id.* 1104–09. The court relied heavily on the defendant's lack of relevant education and training, and the paucity of even circumstantial evidence that he had the requisite knowledge.

The *Lovern* court reversed the untrained assistant's conviction despite the fact that the district court had instructed the jury that (a) the government had to prove that a defendant had acted "other than in good faith for a legitimate medical purpose and in the usual course of professional practice" and (b) that "[i]n determining whether or not a defendant acted in good faith" the jury should consider, *inter alia*, "any evidence pertaining to the particular position held by the defendant and whether the defendant had any specialized training or knowledge concerning the usual course of medical practice." *Id.* 1111 (dissent). The Tenth Circuit majority contrasted the legal "duty on pharmacists" under the CSA regulations "not to knowingly fill prescriptions issued outside the usual course of medical practice. *See* 21 C.F.R. § 1306.04(a)." *Id.* 1102. Thus, *Lovern* implicitly recognized that the good faith standard applicable to lay defendants cannot be too demanding.

For these reasons, supplementing the presentations made in the petitioners' principal briefs, the judgments of the courts below should be reversed. In framing its opinion, the Court should be attentive to

the circumstances of defendants charged under 21 U.S.C. § 841(a) with distribution or dispensing of a controlled substance outside the course of professional practice (or under *id.* § 846 with conspiracy), who are not themselves doctors or pharmacists. In sum, such defendants charged under these statutes must be acquitted if the jury, upon all the evidence, is left with a reasonable doubt whether the defendant actually (that is, in "good faith") believed that the professional in question was acting in the good faith belief that the distribution occurred within the proper bounds of professional practice.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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