No. 21-5261

IN THE SUPREME COURT OF THE UNITED STATES

SHAKEEL KAHN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in declining a requested jury instruction on the ground that it would have required acquittal on charges of the unauthorized distribution of controlled substances, in violation of 21 U.S.C. 841, based on petitioner's own subjective view of the usual course of professional practice.

2. Whether the district court abused its discretion in declining to instruct the jury in furtherance of petitioner's theory that the prescription of opioids outside the usual course of professional practice is insulated from charges of the unauthorized distribution of controlled substances, in violation of 21 U.S.C. 841, so long as a defendant can assign a general "legitimate medical purpose" to his activities.

RELATED PROCEEDINGS

United States District Court (D. Wyo.):

United States v. Kahn, No. 17-cr-29 (Aug. 19, 2019)

United States Court of Appeals (10th Cir.):

United States v. Kahn, No. 19-8054 (Feb. 25, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A40) is reported at 989 F.3d 806.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2021. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ

of certiorari was filed on July 26, 2021 (Monday). 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 District of Wyoming, petitioner was convicted on one count of conspiring to dispense and distribute controlled substances resulting in death, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), and (b)(2); one count of possessing a firearm in furtherance of a federal drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); eight counts of unlawfully dispensing a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); three counts of possessing a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); five counts of unlawfully using a communications facility in connection with a controlled-substance offense, in violation of 21 U.S.C. 843(b); one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a), (b), and (c); and two counts of laundering the proceeds of illegal activity, in violation of 18 U.S.C. 1957. Pet. App. A41-A42. The district court sentenced petitioner to 300 months of imprisonment, to be followed by five years of supervised release. Id. at A44-A45. The court of appeals affirmed. Id. at A1-A40.

1. Petitioner was a licensed physician who ostensibly specialized in pain management. Pet. App. A3-A4. In 2008,

petitioner started a medical practice in Arizona, where he regularly prescribed controlled substances, including oxycodone, alprazolam, and carisoprodol. Ibid.

Petitioner routinely performed only a perfunctory examination -- or no examination at all -- before prescribing controlled substances for a patient. See Gov't C.A. Br. 8. Petitioner also falsified notes in medical charts indicating that he had seen patients in person, completed assessments, made referrals, and collected urine samples, when in reality he had taken none of those actions. Id. at 3-4. And in 2013, petitioner began requiring his patients to sign a "drug addiction statement" attesting that petitioner was not a "drug dealer," that the patient was not an "addict[]," and that the patient would be liable to petitioner for $100,000 in the event that a civil or criminal action was brought against petitioner related to that patient's treatment. Pet. App. A4-A5.

Petitioner priced his medical services based on the number of pills he prescribed to a patient: the more pills petitioner prescribed, the more he charged a patient for an office visit. Pet. App. A4. If a patient could not afford to pay as much as petitioner requested, petitioner prescribed fewer pills or would not write a prescription at all. Ibid. And petitioner sometimes discounted his fees when a patient referred a new customer to the clinic. Gov't C.A. Br. 8. Petitioner generally operated his

practice on a "cash-only" basis, although he occasionally accepted firearms and other personal property as payment. Pet. App. A4. At times, petitioner's brother, who managed petitioner's Arizona practice, met patients in parking lots to exchange prescriptions written by petitioner for cash. Id. at A3, A5.

In late 2012, pharmacies in the area surrounding petitioner's Arizona practice began refusing to fill prescriptions written by petitioner. Pet. App. A5. In 2015, while continuing to see patients at his Arizona practice, petitioner opened a second practice in Wyoming. Ibid. Petitioner invited some of his Arizona patients to travel to Wyoming, where his prescriptions would be easier to fill, and some patients did so. Ibid.; Gov't C.A. Br. 5. And in 2015, petitioner wrote high-dose prescriptions for oxycodone, carisoprodol, and alprazolam for a young woman who paid him $1250. Gov't C.A. Br. 5-6. She filled the prescriptions and died of an oxycodone overdose two days later. Id. at 6.

In 2016, while investigating petitioner's prescribing practices, the Drug Enforcement Administration (DEA) and the Wyoming Division of Criminal Investigation intercepted communications indicating that petitioner charged patients a $500-minimum fee for writing prescriptions. See Gov't C.A. Br. 6. Around the same time, officers executed search warrants at petitioner's Arizona and Wyoming residences and businesses. Ibid.; see Pet. App. A5-A6. The officers seized patient files,

money counters, ledgers, $1 million in cash, automobiles, and 49 firearms. Gov't C.A. Br. 6; see Pet. App. A6.

2. In 2017, a federal grand jury returned an indictment charging petitioner with one count of conspiring to dispense and distribute controlled substances resulting in death, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), and (b)(2); one count of possessing a firearm in furtherance of a federal drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); eight counts of unlawfully dispensing a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); three counts of possessing a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); five counts of unlawfully using a communications facility in connection with a controlled-substance offense, in violation of 21 U.S.C. 843(b); one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a), (b), and (c); and two counts of laundering the proceeds of illegal activity, in violation of 18 U.S.C. 1957. Second Superseding Indictment 1-17.

At trial, expert witnesses testified that petitioner excessively prescribed high-dose opioids and prescribed opioids in dangerous combinations without properly monitoring or counseling patients. Gov't C.A. Br. 6-7. Those experts further testified that petitioner failed to follow guidance from the Centers for Disease Control regarding opioid prescriptions and that he failed

to consider alternative treatments. Id. at 7. And the experts observed that petitioner failed to document legitimate medical reasons for prescriptions and prescribed controlled substances to patients without visits -- while falsely indicating in patient files that visits had, in fact, occurred. Ibid. On the basis of that and other evidence, the experts testified that petitioner's prescriptions were issued outside the usual course of medical practice and were not issued for legitimate medical reasons. Id. at 6.

At the close of trial, the district court instructed the jury that in order to return a guilty verdict on the conspiracy count and the counts for unlawfully dispensing a controlled substance, it was required to find, inter alia, that petitioner "knowingly or intentionally distributed or dispensed the controlled substance outside the usual course of professional medical practice or without a legitimate medical purpose." 6/21/19 Tr. 30; see id. at 27. The court provided that instruction over petitioner's objection; petitioner asked the court to instruct the jury that he could only be convicted on those counts if his actions were taken both outside the usual course of professional medical practice and without a legitimate medical purpose. Pet. App. A62-A63.

Petitioner also proposed that the jury be instructed that "[t]he good faith of a defendant, whether or not objectively reasonable, is a complete defense to the crimes charged, because

good faith on the part of a defendant is inconsistent with specific intent, which is an essential part of the charges." D. Ct. Doc. 694, at 10 (Apr. 25, 2019). The district court declined to give petitioner's particular proposed instruction, instead instructing the jury that

> [t]he good faith of [petitioner] is a complete defense to the charges in [the conspiracy count and the eight counts of unlawfully dispensing a controlled substance], because good faith on the part of [petitioner] would be inconsistent with knowingly and intentionally distributing and/or dispensing controlled substances outside the usual course of professional practice and without a legitimate medical purpose, which is an essential part of the charges.

Pet. App. A26-A27 (citation omitted). The court further instructed that "'[g]ood faith' connotes an attempt to act in accordance with what a reasonable physician should believe to be proper medical practice." Id. at A27 (citation omitted). And the court explained to the jury that "[t]he good faith defense requires the jury to determine whether [petitioner] acted in an honest effort to prescribe for patients' medical conditions in accordance with generally recognized and accepted standards of practice." Ibid. (citation omitted).

The jury found petitioner guilty on all counts. Pet. App. A41-A42. The district court sentenced petitioner to 300 months of imprisonment, to be followed by five years of supervised release. Id. at A44-A45.

3. The court of appeals affirmed. Pet. App. A1-A40.

The court of appeals acknowledged that although 21 U.S.C. 841(a)(1) generally makes it unlawful "'for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance,'" an exception applies when a registered practitioner dispenses a controlled substance with a lawful prescription. Pet. App. A30 (quoting 21 U.S.C. 841(a)(1)); see 21 U.S.C. 829. The court explained that under 21 C.F.R. 1306.04(a) "[a] prescription is lawful * * * if the prescription is 'issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'" Pet. App. A30 (quoting 21 C.F.R. 1306.04(a)).

Relying on those provisions, the court of appeals found no abuse of discretion in the district court declining to issue petitioner's proposed good-faith instruction. Pet. App. A30-A34. The court of appeals explained that a medical practitioner violates Section 841(a) when, inter alia, he "issue[s] a prescription that [i]s objectively not in the usual course of professional practice." Id. at A31. The court stated that the "relevant inquiry" is "whether a defendant-practitioner objectively acted within that scope, regardless of whether he believed he was doing so." Ibid. And the court rejected petitioner's contention that the objective inquiry "'negates the mens rea element'" for Section 841(a) offenses, observing that "good faith defines the scope of professional practice, and thus the effectiveness of the

prescription exception and the lawfulness of the actus reus." Id. at A33 (citation omitted).

The court of appeals similarly rejected petitioner's related contention that the jury could have convicted him for "mere acts of malpractice or negligence." Pet. App. A33. The court observed that the district court's good-faith instruction had specified that petitioner "need only 'attempt' to act reasonably, and that such an attempt must be made in an 'honest effort.'" Ibid. (citation omitted). The court of appeals accordingly found that "the jury could not convict [petitioner] for merely failing to apply the appropriate standard of care; it could only convict [petitioner] if it found, beyond a reasonable doubt, that [he] failed to even attempt or make some honest effort to apply the appropriate standard of care." Id. at A34.

The court of appeals also declined petitioner's request "to revisit [its] prior holding that a licensed physician may be convicted under [Section] 841 for either prescribing outside the scope of professional practice or for no legitimate medical purpose." Pet. App. A25 (citing United States v. Nelson, 383 F.3d 1227, 1229 (10th Cir. 2004)) (quotation marks omitted). Relying on Section 841(a)(1) and 21 C.F.R. 1306.04(a), the court explained, as it had in a previous decision, that "a practitioner is authorized to dispense controlled substances" under federal law "only if he acts with a legitimate medical purpose and in the usual

course of professional practice." Pet. App. A25 (quoting Nelson, 383 F.3d at 1233). "Conversely," the court continued, "a practitioner would be unauthorized to dispense a controlled substance if he acts without a legitimate medical purpose or outside the usual course of professional practice." Ibid. (quoting Nelson, 383 F.3d at 1233).

ARGUMENT

Petitioner renews his contentions (Pet. 18-37) that the district court abused its discretion in declining to deliver his proposed good-faith instruction to the jury and that his convictions required proof not only that he acted outside the usual course of medical practice, but also that he lacked a general legitimate medical purpose. The court of appeals correctly rejected those contentions, and its decision neither contravenes any precedent of this Court nor meaningfully conflicts with any decision of another court of appeals. This Court has denied review in other cases presenting similar issues. See, e.g., Sun v. United States, 138 S. Ct. 156 (2017) (No. 16-9560); Armstrong v. United States, 558 U.S. 829 (2009) (No. 08-9339).[1] It should follow the same course here.

[1] The pending petitions in Ruan v. United States, No. 20-1410 (filed Apr. 5, 2021), Couch v. United States, No. 20-7934 (filed Apr. 5, 2021), and Naum v. United States, No. 20-1480 (filed Apr. 20, 2021), present similar questions about the appropriate formulation of the mens rea requirement for prescribing physicians charged under Section 841.

1. a. Federal law prohibits the distribution of controlled substances "[e]xcept as authorized by" the Controlled Substances Act (CSA), 21 U.S.C. 801 et seq. 21 U.S.C. 841(a). The CSA authorizes physicians who register with the DEA to dispense controlled substances, but only "to the extent authorized by their registration and in conformity with [the CSA]." 21 U.S.C. 822(b); see 21 U.S.C. 823(f).

In United States v. Moore, 423 U.S. 122 (1975), this Court held that physicians registered under the CSA may be subject to criminal liability under Section 841 "when their activities fall outside the usual course of professional practice." Id. at 124. The Court reasoned that, under the CSA's statutory predecessor, physicians "who departed from the usual course of medical practice" had been subject to the same penalties as "street pushers," and that "the scheme of the [CSA] * * * reveals an intent to limit a registered physician's dispensing authority to the course of his 'professional practice.'" Id. at 139-140.

Applying that standard, the Court in Moore upheld the defendant physician's conviction because "[t]he evidence presented at trial" in that case "was sufficient for the jury to find that [his] conduct exceeded the bounds of 'professional practice.'" 423 U.S. at 142. Although the Court did not specifically decide what jury instructions were required, it implicitly deemed sufficient the jury instructions given. Those instructions stated

that the physician could be found guilty of violating Section 841 if he dispensed controlled substances "other than in good faith for detoxification in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States." Id. at 139 (citation omitted). They also stated that the defendant could not be found guilty if he "made 'an honest effort' to prescribe * * * in compliance with an accepted standard of medical practice." Id. at 142 n.20.

The touchstone for liability under Moore is whether a defendant acted -- or, at a minimum, "made 'an honest effort'" to act -- consistently with an objectively "accepted standard of medical practice." 423 U.S. at 142 n.20 (citation omitted). The district court's good-faith instruction in this case was consistent with Moore and adequately described the conduct required for conviction. The court instructed the jury that "good faith" was "a complete defense" to the conspiracy and Section 841(a) charges. Pet. App. A26-A27 (citation omitted). The court defined "[g]ood faith" as "attempt[ing] to act in accordance with what a reasonable physician should believe to be proper medical practice." Id. at A27 (citation omitted). And the court explained that "[t]he good faith defense requires the jury to determine whether [petitioner] acted in an honest effort to prescribe for patients' medical conditions in accordance with generally

recognized and accepted standards of practice." Ibid. Those instructions are similar to those implicitly approved in Moore.

Petitioner contends that the "standard[] for judging good faith" for Section 841(a) violations is "subjective." Pet. 29; see Pet. 26-29. But Moore did not endorse a freewheeling subjective approach, under which a defendant can argue that he acted in good faith by prescribing controlled substances in any manner that he subjectively viewed as acceptable medical practice. And the district court did not abuse its discretion in providing a good-faith instruction that was consistent with the instruction in Moore.

Petitioner suggests (Pet. 29-33) that Section 841(a) should be read to include a wholly subjective component in order to avoid serious questions about whether Section 841(a) is unconstitutionally vague. But Section 841(a) presents no constitutional vagueness concerns. As the Eighth Circuit has explained, a "reasonable person reading [Section] 841(a)(1) is on notice that distributing controlled substances violates the CSA unless such distribution fits within an exception," and "[s]uch a person is also on notice that the 'prescription exception' * * * does not apply to 'prescriptions' issued * * * outside the usual course of professional practice." United States v. Birbragher, 603 F.3d 478, 488 (8th Cir. 2010).

Other courts of appeals agree that Section 841(a) is not unconstitutionally vague. See United States v. Orta-Rosario, 469 Fed. Appx. 140, 143-144 (4th Cir.) (per curiam), cert. denied, 568 U.S. 902 (2012); United States v. Lovern, 590 F.3d 1095, 1103 (10th Cir. 2009); United States v. DeBoer, 966 F.2d 1066, 1068-1069 (6th Cir. 1992); United States v. Rosenberg, 515 F.2d 190, 197-198 (9th Cir.), cert. denied, 423 U.S. 1031 (1975); United States v. Collier, 478 F.2d 268, 270-272 (5th Cir. 1973) (all rejecting arguments that Section 841(a) is unconstitutionally vague). And petitioner points to no court of appeals decision finding Section 841(a) unconstitutionally vague when applied to physicians or pharmacists, see Pet. 37, and the government is not aware of any such decision.

b. Contrary to petitioner's assertion (Pet. 18-26), the court of appeals' decision does not implicate a division among the courts of appeals regarding the mens rea required for a Section 841(a) conviction, or the standard governing good-faith instructions for Section 841(a) offenses, that would warrant this Court's review. As explained on pages 15 to 18 of the government's brief in opposition to the petitions for a writ of certiorari in Ruan v. United States and Couch v. United States, Nos. 20-1410 & 20-7934 (July 7, 2021), every court of appeals to consider those issues has concluded that Moore calls for "an objective standard" rather than a subjective one and that an instruction focused on

what the doctor "'believed to be proper medical practice'" is "not an accurate statement of the law." United States v. Hurwitz, 459 F.3d 463, 478 (4th Cir. 2006) (citation and emphasis omitted).[2]

Petitioner contends that, in conflict with the court of appeals' decision, decisions from the First, Seventh, and Ninth Circuits require proof "that a medical practitioner intentionally acted outside the usual scope of professional practice" and "allow for instructions that define good faith 'subjectively.'" Pet. 19, 21. That contention lacks merit. As explained on pages 19 through 22 of the government's brief in opposition in Ruan and Couch, supra (Nos. 20-1410 & 20-7934), the decisions on which petitioner relies do not meaningfully differ from the court of appeals' decision here.[3]

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[2] We have served petitioner with a copy of the government's brief in opposition in Ruan and Couch. That brief is also available on the Court's online docket.

[3] In its brief in opposition in Ruan and Couch, supra (Nos. 20-1410 & 20-7934), the government mistakenly stated that the Seventh Circuit's decision in United States v. Kohli, 847 F.3d 483 (7th Cir.), cert. denied, 138 S. Ct. 204 (2017), did not involve "any instructional dispute." Br. in Opp. at 20, Ruan and Couch, supra (Nos. 20-1410 & 20-7934). It did in fact involve such a dispute. See Kohli, 847 F.3d at 494. However, the Seventh Circuit's affirmance of a good-faith instruction in Kohli, ibid., does not conflict with the court of appeals' affirmance of a good-faith instruction in this case. The good-faith instruction in Kohli provided, inter alia, that "[t]he Defendant may not be convicted if he merely made an honest effort to treat his patients in compliance with an accepted standard of practical practice." Id. at 489. That instruction is similar to the instruction here, which provided that "[t]he good faith defense requires the jury to determine whether [petitioner] acted in an honest effort to

Petitioner's reliance (Pet. 21-22) on the Ninth Circuit's decision in United States v. Hayes, 794 F.2d 1348 (1986), cert. denied, 479 U.S. 1086 (1987), is likewise misplaced. The district court in Hayes instructed the jury that "[g]ood faith is not merely a doctor's sincere intention towards the people who come to see him, but, rather, it involves his sincerity in attempting to conduct himself in accordance with a standard of medical practice generally recognized and accepted in the country." Id. at 1351. Although the Ninth Circuit suggested that concerns about a conviction based on a negligence standard would be "weighty," id. at 1352, its affirmance in that case does not show that it would have reversed petitioner's conviction on the particular instruction here, see ibid. (emphasizing that "[j]ury instructions * * * must be viewed as a whole and in the context of the entire trial"). And in United States v. Garrison, 888 F.3d 1057, 1064 (9th Cir. 2018), another case on which petitioner relies (Pet. 19), although the court listed "intent to distribute" controlled substances "outside the course of professional practice" as an element of the offense, id. at 1063 (citation and emphasis omitted), the Ninth Circuit did not address or resolve any dispute over the mens rea requirement for Section 841(a) offenses; rather,

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prescribe for patients' medical conditions in accordance with generally recognized and accepted standards of practice." Pet. App. A27 (citation omitted). Kohli would not require reversal where a district court provides a set of instructions like those here.

the court considered (and rejected) the defendant's sufficiency-of-the-evidence challenge to his conviction for conspiring to violate Section 841, id. at 1063-1065.

Petitioner also suggests (Pet. 19-20, 23-24) that the decision below conflicts with decisions from the Second, Fourth, Sixth, and Eighth Circuits. Again, as explained on pages 17 through 19 of the government's brief in opposition in Ruan and Couch, supra (Nos. 20-1410 & 20-7934), the Section 841(a) mens rea requirement and good-faith formulations approved of by the Second, Fourth, and Sixth Circuits do not meaningfully differ from the standard articulated by the court of appeals below. The additional decisions that petitioner cites (Pet. 19-20, 23-24) from those courts -- several of which are unpublished -- are of a piece.[4] And

[4] See United States v. Jones, 825 Fed. Appx. 335, 339 (6th Cir. 2020) ("A pharmacist's claim of good-faith compliance with proper pharmaceutical practice is judged by an objective standard, which asks whether a reasonable [pharmacist] under the circumstances could have believed, albeit mistakenly, that [s]he had acted within the scope of ordinary professional medical practice for a legitimate medical purpose.") (internal citation and quotation marks omitted; alterations in original); United States v. Li, 819 Fed. Appx. 111, 118 (3d Cir. 2020) (upholding the district court's refusal to provide a good-faith instruction because the court "instructed the jury on the requirements to prove knowledge," but not otherwise reaching conclusions regarding the appropriate mens rea requirement for Section 841(a) offenses); United States v. Godofsky, 943 F.3d 1011, 1026 (6th Cir. 2019) (explaining that in the context of Section 841(a) prosecutions "good faith * * * is more or less objective good faith: whether a reasonable doctor under the circumstances could have believed, albeit mistakenly, that he had acted within the scope of ordinary professional medical practice for a legitimate medical purpose")

the Eighth Circuit's decision United States v. King, 898 F.3d 797 (8th Cir. 2018) (cited at Pet. 24), expressly endorsed an objective standard and found that the district court appropriately refused to provide a particular good-faith instruction because the proposed instruction "misstated the applicable law" by "incorrectly suggest[ing] that the standard for appropriate medical practice was subjective, rather than objective." King, 898 F.3d at 807-808.

Petitioner additionally asserts that the court of appeals below, the Fifth Circuit, and the Eleventh Circuit, "have explicitly held that a defendant is strictly liable for acting outside the scope of professional practice," in conflict with other courts of appeals. Pet. 19; see Pet. 22. That assertion is incorrect. As the court of appeals explained in this case, the district court's good-faith instruction ensured that "the jury could not convict [petitioner] for merely failing to apply the appropriate standard of care; it could only convict [petitioner]

(emphasis omitted); United States v. Voorhies, 663 F.2d 30, 34 (6th Cir. 1981) ("Good faith * * * connotes an observance of conduct in accordance with what the physician should reasonably believe to be proper medical practice."), cert. denied, 456 U.S. 929 (1982); United States v. Purpera, 844 Fed. Appx. 614, 626-627 (4th Cir. 2021) (per curiam) (noting that in the context of Section 841 the Fourth Circuit has "made clear -- as has every [other] court to specifically consider the question -- that the good faith standard * * * must be an objective one") (quotation marks omitted), petition for cert. pending, No. 21-5086 (filed July 13, 2021).

if it found, beyond a reasonable doubt, that [he] failed to even attempt or make some honest effort to apply the appropriate standard of care." Pet. App. A34. And neither the Fifth Circuit decision nor the Eleventh Circuit decision cited by petitioner (Pet. 19) held that Section 841(a) incorporates a strict-liability standard. See United States v. Norris, 780 F.2d 1207, 1209 & n.2 (5th Cir. 1986) (observing that "the district court carefully modelled its charge after the Moore charge"); United States v. Tobin, 676 F.3d 1264, 1281 (11th Cir. 2012) (upholding an instruction that provided that "[a] controlled substance is prescribed by a physician in the usual course of professional practice * * * if he or she prescribed the controlled substance in good faith as part of his or her medical treatment for the patient in accordance with the standards of medical practice generally recognized and accepted in the United States") (citation omitted), cert. denied, 568 U.S. 1026 (2012), and 568 U.S. 1105 (2013); see also Br. in Opp. at 15-16, Ruan and Couch, supra (Nos. 20-1410 & 20-7934).

2. Petitioner further contends (Pet. 35-37) that the court of appeals erred in finding that "a practitioner would be unauthorized to dispense a controlled substance if he acts without a legitimate medical purpose or outside the usual course of professional practice." Pet. App. A25. Petitioner argues (Pet. 35) that a physician can only be convicted under Section 841(a) if

the jury finds that he distributed controlled substances outside the "usual course of professional practice" and for no "legitimate medical purpose." For the reasons explained on pages 7 to 12 of the government's brief in opposition to the petition for a writ of certiorari in Naum v. United States, No. 20-1480 (July 23, 2021), the court correctly rejected that argument.[5] And its resolution of that argument does not conflict with the published decisions of other courts of appeals, including the Ninth Circuit's decision in United States v. Feingold, 454 F.3d 1001 (9th Cir.), cert. denied, 549 U.S. 1067 (2006). See Br. in Opp. at 13-16, Naum, supra (No. 20-1480). Further review of that issue is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2021

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[5] We have served petitioner with a copy of the government's brief in opposition in Naum. That brief is also available on the Court's online docket.