No. 21-994

In the Supreme Court of the United States

JOHN N. KAPOOR, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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The government labors to paint the petition as a fact-bound dispute about evidentiary sufficiency in a single criminal trial. Those efforts obscure the real issues at stake. Though the First Circuit addressed the sufficiency of the evidence against petitioner, its resolution of that issue turned on two important *legal* questions. Those questions matter for many federal prosecutions beyond petitioner's. And it is on those questions of law that petitioner seeks certiorari. While the government posits reasons why the Court cannot or should not address those questions here, those reasons can be quickly dismissed and pose no obstacles to this Court's review.

First, this Court should grant the petition to decide whether a non-physician may be convicted of conspiring with physicians to prescribe controlled substances under Section 841(a) of the Controlled Substances Act (CSA), 21

U.S.C. § 841(a), without regard to the non-physician's understanding that the physicians viewed their prescribing to be within the usual course of professional practice. The government claims this question "is not properly presented because both the jury instructions and the court of appeals' decision embraced" petitioner's reading. BIO 17. But petitioner has never argued that the district court applied the wrong standard. Indeed, the district court, correctly understanding the burden of proof, found that the government failed to present sufficient evidence. The problem was the First Circuit, which did not endorse the district court's understanding of the government's burden, and which necessarily rejected it in reversing the district court.

Second, this Court should grant review to resolve the longstanding split over whether a federal court must grant a judgment of acquittal when, after construing the evidence in the light most favorable to the government and considering both exculpatory and inculpatory inferences, the evidence of guilt and innocence is in equipoise. The government says this question is "not implicated" here because the First Circuit purported to adhere to the equipoise rule. BIO 24. But a court's formal recitation of the governing legal standard cannot insulate its ruling from review if in substance the court rejects the correct rule. In reinstating the CSA and honest-services RICO predicates, the panel below broke from the circuits following the equipoise rule, because it *only* assessed the circumstantial evidence and inferences supporting guilt and ignored the evidence and inferences to the contrary (including as to good faith).

The government also contends that the Court should deny review because petitioner's RICO conviction "would remain intact even if the jury's verdict on the CSA and

honest-services racketeering predicates were overturned." BIO 27. But if the CSA and honest-services predicates were irrelevant, the government would not have cross-appealed the district court's grant of a judgment of acquittal on them. Instead, the government recognized the critical importance of those predicates, which the district court had relied upon to admit inflammatory testimony about how certain patients were harmed by Subsys. Because the First Circuit improperly reinstated those predicate convictions, it never confronted petitioner's argument that he was entitled to a new trial because of spillover prejudice.

The legal questions presented by this petition are of great consequence to federal prosecutions across the country and worthy of review. At the very least, the Court should hold this petition pending its decisions in *Ruan v. United States* (No. 20-1410), and *Kahn v. United States* (No. 21-5261). Those cases present issues inextricable from the first question presented in this case, and an order granting, vacating, and remanding the case to the First Circuit may be appropriate in their wake.

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER A NON-PHYSICIAN CHARGED IN A § 841(A) CONSPIRACY CAN RELY ON A GOOD-FAITH DEFENSE.

The Court should grant review to resolve the uncertainty over the availability and scope of a good-faith defense to a § 841(a) conspiracy prosecution for non-physicians, like petitioner. The government disputes the circuit conflict, but its efforts are unpersuasive.

The government first tries to show that the Sixth Circuit, which has declined to require a good-faith instruction for a non-physician defendant, *see* Pet. 17, "allowed a

pharmacy technician charged with violating Section 841(a) to argue good faith." BIO 23. But the case it cites, *United States v. DeBoer*, 966 F.2d 1066 (6th Cir. 1992), merely *rejected* the pharmacist technician's argument that the jury had been improperly instructed. The government does not explain how that conclusion (one arising under plain-error review) can be understood as a holding that such instructions are *required*. If that were so, the Sixth Circuit would have followed that precedent in *United States v. Gowder*, 841 F. App'x 770 (6th Cir. 2020), 18 years later. Moreover, even if the Sixth Circuit had embraced a good-faith defense, a circuit conflict would remain because the First Circuit effectively rejected that defense in this case, *see infra* at 5–7, whereas the Second Circuit recognizes it, *see* Pet. 16–17.

In any event, the government's argument about the Sixth Circuit misses the forest for the trees, as it ignores the underlying logic of petitioner's argument. The disagreement about a good-faith defense for non-physicians like petitioner is inextricable from the larger split over the availability of a good-faith defense in § 841(a) prosecutions for physicians.

A circuit holding that physicians themselves cannot rely on their honest, good-faith belief that their own prescriptions fall within the usual course of business would presumably not permit a physician's alleged co-conspirators to rely on a good-faith defense, either. In a circuit that recognizes a good-faith defense, by contrast, the government would need to prove that the non-physician's supposed co-conspirators understood that the physician was not acting in good faith. That follows from basic principles of conspiracy liability. "All members of a conspiracy must share the same criminal objective." *Ocasio v. United States*, 578 U.S. 282, 293–94 (2016). That "heightened

mental state" is necessary to "separate[] criminality itself from otherwise innocuous behavior." *United States v. Bailey*, 444 U.S. 394, 405 (1980).

This Court is aware of the circuit split on a good-faith defense for physicians given the grant of certiorari in *Ruan* and *Kahn*. Certainly, not every circuit has directly addressed good faith in the context of non-physician defendants. But the government has told us that such cases will proliferate given that petitioner's case was a "landmark" that will serve as a "model" for future prosecutions. Pet. 2.

The government also contends that the good-faith issue "is not properly presented because both the jury instructions and the court of appeals' decision embraced precisely the intent standard that petitioners ask this Court to endorse." BIO 17. This claim misreads petitioner's argument and the First Circuit's decision.

To start with, petitioner has never contended that the district court misunderstood the government's burden. It is *because* the district court understood that burden that it granted petitioner's motion for a judgment of acquittal on the CSA and honest-services predicates after the jury verdict. As the district court put it, the prosecution did not offer "evidence sufficient to prove that [petitioner] specifically intended, much less intended beyond a reasonable doubt, that healthcare practitioners would prescribe Subsys to patients that did not need it or to otherwise abdicate entirely their role as healthcare providers." App. 133a.

The problem, instead, was the court of appeals' understanding of the government's burden of proof. The First Circuit recited that "the government had to prove that the defendants specifically intended that a licensed practitioner would prescribe Subsys 'with no legitimate medical

purpose.'" App. 23a (quoting *United States v. Volkman*, 797 F.3d 377, 391 (6th Cir. 2015)). But the panel honored that standard in the breach.

Consider that the First Circuit never discussed the good-faith issue in reversing the district court's judgment of acquittal. It did not invoke good faith as the relevant standard. And it did not assess *any* evidence or inferences consistent with petitioner's good faith.[1] Particularly glaring is the court of appeals' failure even to acknowledge uncontradicted testimony by Dr. Gavin Awerbuch—the top Subsys prescriber in the country, who pled guilty and testified at trial as a government witness—supporting petitioner's good-faith defense. Rather than implicating petitioner, Dr. Awerbuch testified that he told petitioner about legitimate medical uses of Subsys, and conceded that it would have been reasonable for petitioner to believe that his prescriptions were medically legitimate. *See* Pet. 22–25. Had the First Circuit understood that petitioner could not be convicted if he believed in good faith that his alleged co-conspirators' prescriptions were medically legitimate, it would at least have mentioned this testimony, even if only to explain why it did not change the sufficiency analysis.

The government tries to excuse the First Circuit's omission by claiming that petitioner "failed to cite th[e] conversation [with Awerbuch] below when disputing the evidence of their intent." BIO 22 (citing C.A. Response

[1] The panel's only discussion of "good faith" came in response to different arguments by different defendants about different legal issues. *See* App. 66a (defendant Lee's joinder argument); 73a (defendant Lee's supervisory condonation argument); 79a–80a (defendant Simon's conflict-of-interest argument).

and Reply Br. 18–36). But in the same brief that the government cites, petitioner defended the district court's acquittal ruling by emphasizing that "one of the practitioners testified that, when Kapoor inquired about how the doctor was prescribing so much, the practitioner assured Kapoor that he was *legitimately* prescribing Subsys off-label for 'patients with chronic pain, and that [he] use[s] Subsys to treat patients with chronic pain.'" C.A. Response and Reply Br. 9 (quoting C.A. App. 1656) (alterations and emphasis in original). The government itself quotes this testimony immediately before claiming, incorrectly, that petitioner never drew the court of appeals' attention to it.

That the government makes such a weak forfeiture argument shows how difficult it is to defend the panel's ruling on the merits. The only way to make sense of the decision is that the First Circuit felt no need to consider a non-physician's good-faith belief that a physician thought his prescriptions were medically legitimate. That view is wrong and it dangerously expands conspiracy liability for pharmaceutical manufacturers. The issue merits this Court's review.

II. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER A FEDERAL COURT SHOULD ENTER A JUDGMENT OF ACQUITTAL WHEN THE EVIDENCE IS IN EQUIPOISE.

The Court should also grant review to address the acknowledged circuit split on whether courts should apply the "equipoise rule" when evaluating evidentiary sufficiency. Pet. 26–28. The government does not contest the split, and instead argues that the Court should not resolve it here because the court of appeals claimed to follow the equipoise rule. BIO 24. But a lower court cannot insulate

an erroneous judgment from review simply by reciting the correct legal standard. *See*, *e.g.*, *Price v. Vincent*, 538 U.S. 634, 639 (2003) (reversing where the lower court recited, but did not apply, the governing legal rule).

Under the equipoise rule, a court must reverse if the evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence." *United States v. Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009) (Gorsuch, J.). The panel disregarded the rule by considering only inferences from the evidence that supported a guilty verdict. *See* Pet. 30–32.

In response, the government gestures at "numerous" pieces of evidence supposedly showing that the evidence was not in equipoise here. *See* BIO 25–26. Those cursory efforts prove petitioner's point. For example, the government repeats the court of appeals' assertion that petitioner "effectively directed Insys salespersons, who were not health-care professionals, to enforce mandatory ranges of dosages." App. 27a. Yet petitioner highlighted for the First Circuit numerous pieces of evidence showing that Insys pursued a strategy of encouraging higher Subsys dosing because of FDA-endorsed clinical findings that lower doses were ineffective for most patients, and because it sought to make Subsys a replacement for competitor pain-relief drugs prescribed at higher doses. *See* C.A. Response and Reply Br. 31–36. The First Circuit ignored this evidence entirely. *See* App. 26a.

Similarly, the government relies on a single email—one not sent to petitioner and which no one confirmed that petitioner ever read—which in cursory fashion asserts that one of the thousands of Subsys prescribers nationwide ran a "pill mill." C.A. Response and Reply Br. 20–24. If the First Circuit was serious about applying the equipoise rule, it should have at least acknowledged (as the

district court did) the limited weight of this stray piece of evidence, and weighed it against Dr. Awerbuch's exculpatory testimony, the fact that *none* of the 13 bribed prescribers inculpated petitioner, and scores of other co-operators' testimony that they did not intend to cause medically illegitimate prescriptions. *Id.* 9–10.

This petition's premise is not that the First Circuit weighed the evidence inappropriately. It is that the First Circuit failed to weigh the exculpatory evidence and inferences *at all*, which is tantamount to *rejecting* the equipoise rule. Judge Newman once warned that many federal appellate courts "do not take seriously their obligation to assess sufficiency of evidence in light of the 'reasonable doubt' standard" and "end their inquiry upon noticing the existence of 'some' evidence of guilt." Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. Rev. 979, 996 (1993). By resolving the conflict over the equipoise rule, this Court can ensure that courts evaluate evidentiary sufficiency consistent with due process.

* * *

Nearly 80 years ago, this Court admonished that in a conspiracy case against a drug manufacturer "the evidence of knowledge must be clear, not equivocal" and that "charges of conspiracy are not to be made out by piling inference upon inference." *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943). In reinstating the acquitted predicates, the First Circuit did what this Court cautioned against. Its errors implicate important legal questions deserving review.

III. THE VALIDITY OF PETITIONER'S ENTIRE CONVICTION TURNS ON THE CSA AND HONEST-SERVICES PREDICATES.

The government is incorrect that "this case presents a

poor vehicle for considering petitioners' challenges to the court of appeals' determination that there was sufficient evidence underlying the jury's CSA and honest-services racketeering verdicts because—even if those verdicts were overturned—petitioners' RICO convictions would still stand." BIO 26. Petitioner has a powerful argument—one the First Circuit did not reach—that his conviction should be overturned and remanded for a new trial due to spillover prejudice from evidence improperly admitted to support the CSA and honest-services charges.

The district court permitted the jury to hear extensive, inflammatory testimony from patients who suffered adverse events while taking Subsys. That testimony, combined with prosecutorial rhetoric, sought to portray petitioner as a callous billionaire who made money by intentionally causing patient harm. *See* C.A. Response and Reply Br. 55–67. Because the court of appeals reinstated the predicates on which the district court acquitted, it did not grapple with petitioner's spillover argument at all. If this Court reversed, the First Circuit would finally have to confront this argument on remand. That live claim is sufficient to make this case an appropriate vehicle for review. *Cf. Corcoran v. Levenhagen*, 558 U.S. 1 (2009) (reversing and remanding to permit consideration of issues the court of appeals ignored).

This Court need not take petitioner's word. The government's own conduct shows it recognizes that the reinstated predicate convictions matter. After the district court overturned the CSA and honest-services verdicts but left the RICO conspiracy conviction in place, the government *appealed* that decision. Would it have done so if it were certain the "judgment would remain intact even if the jury's verdict on the CSA and honest-services racketeering predicates were overturned" (BIO 27)? Surely not.

The government realized that, without the overturned predicates, the entire conviction stood on shaky ground.

This is why the government grudgingly concedes that a ruling against it "might permit petitioners to renew" their prejudicial-spillover argument. BIO 28 n.4. All the government can muster after that concession (buried in a footnote) is that the *district court* rejected the prejudicial spillover argument. But petitioner never got the chance to have that ruling reviewed by the court of appeals. The government also says that the First Circuit "rejected analogous evidentiary spillover claims" brought by petitioner's co-defendant (*id.*)—but that co-defendant was differently situated, as the court of appeals emphasized that the jury *acquitted* him of the CSA and honest-services charges. *See* App. 62a–63a. If this Court rules for petitioner, he would get the appellate review of the spillover argument that the First Circuit short-circuited.

IV. AT THE LEAST, THIS COURT SHOULD HOLD THE PETITION PENDING THE DECISIONS IN *RUAN* AND *KAHN* FOR A POSSIBLE GRANT, VACATUR, AND REMAND.

Even if the Court is not yet prepared to consider the questions presented on the merits, it should hold the petition pending the decisions in *Ruan* and *Kahn*. The availability of a good-faith defense for physicians will almost certainly bear on the good-faith defense for their alleged non-physician co-conspirators—particularly since *Ruan* involves physicians with whom petitioner himself supposedly conspired. If the Court recognizes a good-faith defense in *Ruan*, it would be appropriate to grant, vacate, and remand petitioner's judgment so that the First Circuit may consider the decisions' implications for the judgment.

The government distinguishes *Ruan* on the ground that it involves a dispute over jury instructions whereas petitioner's case involves a sufficiency-of-the-evidence challenge. *See* BIO 18. That is no reason to rule out a remand. Both cases turn on the same question: the proper interpretation of § 841(a) and thus the elements the government must prove to obtain a conviction. *See Musacchio v. United States*, 577 U.S. 237, 243 (2016) (holding that "a sufficiency challenge should be assessed against the elements of the charged crime"); *Neder v. United States*, 527 U.S. 1, 8 (1999) (recognizing as error "a jury instruction that omits an element of the offense"). *Ruan* and *Kahn* will clarify the elements that the government must prove under § 841(a), and that bears on whether the government presented sufficient evidence to prove those elements in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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