No. 22-1175

In The
Supreme Court of the United States

XIULU RUAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

CORRECTED BRIEF AMICUS CURIAE OF PHYSICIANS AGAINST ABUSE IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Physicians Against Abuse, ("PAA") was founded in 2019 as an advocacy group to physicians in response to the astronomical number of convictions involving "scope of practice" charges against physicians that began to percolate through the federal and state court systems in early 2000s.

PAA is made up five Board Members and is a not-for-profit Florida Corporation. PAA aids doctors in healthcare and prescription fraud investigations by providing full support to defense counsel when an indictment is already filed and by providing educational awareness to uncharged physicians across the country regarding the government's adoption and reliance on algorithmic data to create targets for criminal prosecutions.

Physician Board Members of PAA are uniquely situated in identifying the root cause of criminal prosecutions against physicians because either they have been themselves previously subjected to criminal prosecution and/or have had exposure to the criminal

[1]Consent was obtained from parties for untimely notice in filing this Amicus Brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, or its members made a monetary contribution to its preparation or submission.

court system involving physicians. Prior to founding the organization, the Board members conducted a review of 211 convictions against physicians over a ten-year span involving prescription and health care fraud. The inescapable conclusion from this review that included extensive review of trial transcripts was that the prosecutions against physicians amounted to nothing short of the 'blind leading the blind'- where *one blind* is the prosecutor and the *other blind* is the physician's own defense counsel. Based on this evidence, PAA was formed as an advocacy group to help prosecutors and the defense bar enhance their understanding of the nature of a medical practice which deals with pain patients.

With this Court's seismic ruling in *Ruan v United States*, 142 S.Ct. 2370 (2022), ("*Ruan I*"), this Court took away the ramped criminalization of the varying but acceptable spectrum of physician prescribing under 21 U.S.C. §841.

The ruling in *Ruan I* was no doubt a big blow to the Eleventh Circuit Court of Appeals which, based on its misconstruction of 21 U.S.C. §841 for decades, had been responsible for keeping innocent physicians incarcerated when these physicians differed in their treatment approach to pain patients from the government's physicians hired as expert witnesses.

In response to *Ruan I*, the Eleventh Circuit Court of Appeals embarked on creating a split on remand from *Ruan I*, deciding that the instruction of outside the scope

of medical practice and not for legitimate practice was sufficient for CSA related counts, while it was not sufficient for CSA counts as per this Court's instructions. The Tenth Circuit has decided otherwise noting that the error of misconstruction of §841 had to have permeated and infected the entirety of the trial proceedings requiring reversal on both §841 and non-§841 charges which relied on the same evidence as §841 convictions.

Pouring salt on the already existing wound of nearly two decades of misconstruing the law, the Eleventh Circuit Court of Appeals has insisted on an illogical narrow construction of this Court's ruling in *Ruan I* which should be unequivocally rejected.

SUMMARY OF ARGUMENT

Dr. Xiulu Ruan was convicted of overprescribing controlled substances outside the usual course of medical practice and was sentenced to more than 20 years in federal prison. Only the most prolific drug traffickers receive these kind of sentences, and when they do, Rule 35 reductions will typically result in shortening their sentences. Both the conviction and the sentence are offensive to due process and basic tenets of a civilized society because both the conviction and the sentence rest on nothing more than a prosecutor's unfettered discretion and a paid expert's opinion.

While *Ruan I* took away an administrative agency's intent to act as if it were Congress, it is now clear in the instant case, *Ruan II*, that significant abuses are still tolerated by the Eleventh Circuit Court of Appeals in the prosecution of physicians based on variance in their treatment of pain among patients.

ARGUMENT

I. MISCONSTRUCTION OF 21 U.S.C. §841 HAS HAD SUCH BROAD, MASSIVE AND IRREVESIBLE CONSEQUENCES THAT ALL OF ITS POISONOUS FRUITS NEED TO BE ERADICATED

It is almost incredulous that this second trip became necessary after this Court spoke clearly in *Ruan I.*

A brief historical review of the origins of the misconstruction of charges relating to controlled substances in the Eleventh Circuit Court of Appeals is informative.

In 2012, in deciding *Shelton v. Sec'y, Dep't of Corr.,* 691 F.3d 1348 (11th Cir. 2012), the Eleventh Circuit Court of Appeals, in a habeas petition pursuant to 28 U.S.C. §2254, ruled that the Florida court had not unreasonably applied clearly established federal law, "as determined by the United States Supreme Court, by upholding a Florida statute that partially eliminated the mens rea requirement for state drug offenses, against petitioner's

due process challenge, so as to entitle petitioner to federal habeas relief; the United States Supreme Court had noted that no court had undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that required a mental element and crimes that did not".

It was with *Shelton* that Eleventh Circuit Court of Appeals began to misconstrue the inherent mens rea element required for crimes charged under CSA. In fact, the Eleventh Circuit attributed its own misconstruction to this Court at the time. It reasoned that the amendment in Florida's statute had not completely eliminated mens rea but rather that it had converted one aspect of mens rea from an **element** of the **crime** into an affirmative defense, as if that was acceptable and a conversion condoned by this Court.

For the next ten (10) years, the Eleventh Circuit rejected every appeal from every physician convicted under 21 U.S.C §841 regarding lack of criminal intent, holding repeatedly that there was an objective element to decide whether the physician had acted outside the scope of practice and not for a legitimate medical purpose.

Gaining momentum from the Eleventh Circuit's misconstruction of the statutory language in 21 U.S.C §841 in *Shelton*, and in order to point fingers at someone other than themselves for the opioid crisis, federal prosecutors brought hundreds of prosecutions against

physicians because one government hired medical expert who opined that the accused physician had acted outside the scope of his professional practice and not for a legitimate medical purpose.

Meanwhile, the fact that there is no playbook and no one single standard for how pain should be treated by physicians got lost in the mayhem created by federal prosecutors. The fact that there are so many variables and so many factors go into coordinating a treatment protocol for any one particular pain patient that is highly dictated by the individual's own pain tolerance suddenly became insignificant. Science was no longer the objective as prosecutors saw a loophole in the construction of 21 U.S.C §841 and substituted in place of statutory language, the agency's language under 21 C.F.R. § 1306.04(a).

Physician after physician practicing without criminal intent was convicted turning this country as the only country in the world mass incarcerating physicians for the practice of medicine in an area that is based on elastic and non-uniform standards like pain management. As science left the courtrooms, prosecutors began to practice medicine inside courtrooms across the country.

When the American criminal court system that allows federal prosecutors and DEA agents to impermissibly assume the role of a physician, judging trained physicians' performance, leads to more than 3,000 physicians being incarcerated in this country, this Court must seriously consider the long term impact of leaving Petitioner's second trip to it unaddressed.

II. §841 COUNTS AND OTHER RELATED CSA COUNTS CANNOT BE SEPARATED IN ORDER TO ACHIEVE A RESULT THAT JIBES WITH ELEVENTH, SIXTH AND FIFTH CIRCUIT COURT OF APPEALS DECISIONS

The Tenth Circuit rightly recognized that the failure to instruct the jury on the "except as authorized" requirement undermined not just the CSA counts but also other related CSA counts that relied on the CSA counts as predicates.

The Eleventh, the Sixth and the Fifth Circuit, however, have not followed suit. In doing so, the Eleventh, the Sixth and the Fifth Circuits only demonstrate either their fundamental failure to understand this Court's ruling in *Ruan I* or their outright disregard for this Court's ruling in *Ruan I.* Whatever the problem is, this Court cannot allow doctors to remain in prisons in jurisdictions within the Eleventh, Sixth and Fifth Circuits while allowing doctors under the Tenth Jurisdiction to go free and get a new trial on these charges.

In each of the cases cited by Petitioner on the continued misapplication of this Court's ruling in *Ruan I,* including Petitioner's case, the facts relied upon by the government for the CSA related counts came from the facts relied upon for the actual CSA counts. Based on this, there is simply no logic in divorcing the CSA counts from CSA related counts.

III. DECISION IN *RUAN II* SHOULD HAVE FULL RETROACTIVE EFFECT

Amicus urges this Court to also clarify the retroactive application of the "except as authorized" phrase of 21 U.S.C §841. There is much confusion at the district court level about this issue as well. Where the statute is misconstrued by the court of appeals, those physicians who were convicted from as early as 2001 whose professional lives were gutted, have a constitutional right to have their case re-opened and determined under the accurate construction of the phrase "except as authorized" of 21 U.S.C. §841.

It is not fair by any measure that these physicians who were convicted prior to *Ruan I* should continue to suffer the devastating consequences of complete professional ruin because federal prosecutors decided to use an agency standard instead of the statutory standard in prosecuting cases against physicians alleged to have engaged in prescription and/or health care fraud.

IV. THE COURT SHOULD FURTHER HOLD *MENS REA* IN §841 IS AN ELEMENT OF THE OFFENSE

Another area of conflict is whether the "except as authorized" language that requires mens rea should be part of the element of the crime required to be pled in the indictment. There are already many rumblings about this issue in the lower district courts and these rumblings

already also show conflict among the district courts. Recognizing that the "fact that a criminal statute is silent concerning mens rea required for violation does not necessarily suggest that Congress intended to dispense with conventional mens rea element, which would require that defendant know facts that make his conduct illegal; rather, a court must construe statute in light of background rules of common law, in which requirements of some mens rea for crime is firmly embedded.", *Staples v. United States,* 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994), the circumstances surrounding the construction of 841 must also be resolved by this Court.

Given the wide implications and the continued confusion of differences between administrative agency language and statutory language, Amicus respectfully submits that this Court rule, in no uncertain terms, that *mens rea* in §841 and related charges must be included in an indictment as a necessary element of the offense.

FINAL WORD

Since its formation in 2019, PAA has had a stunning growth of support from physicians across this nation. PAA can represent to this Court that in the event that Petitioner's certiorari is not addressed thus allowing the mass confusion to persist, where some physicians go free but others continue to serve grossly unjust prison sentences for practicing medicine differently than a

government hired expert witness, PAA will invest all that is necessary in time and financial resources to encourage American-trained physicians to leave the country and set up their practices abroad.

A survey conducted by PAA among a sample of 15,000 physicians from Western, Mid West and Eastern parts of the country established that physicians would rather go abroad to practice medicine than become the subject of laws that are applied non uniformly based on the region of the country where they practice medicine.

Without further concrete clarification and without this Court leaving no room for further misconstruction of the statutory language, PAA is prepared to ensure the movement of physician exodus from this country becomes palpable and one that is felt, perhaps not in the immediate time frame, but one that will become a serious problem for Americans in the next five years.

No physician who spends all of their 20s and nearly all of their 30s training, in specialties involving surgery, will be willing to risk the loss of their professional career and freedom where the laws are so vague and confusing that it leaves room for trained minds of courts like the Eleventh Circuit Court of Appeals to find a loophole to justify their decades long misconstruction of statutory language.

Until justice is achieved, PAA will ensure that every physician is made aware of the fact that courts in the Eleventh, Sixth and Fifth Circuits have continued to assert illogical and untenable interpretations instead of accepting the responsibility for perpetuating one of the gravest errors in the history of the judiciary.

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Respectfully submitted,

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