No. 26-377

In The
Supreme Court of the United States

FRANK PARASMO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICUS CURIAE 4
A. PAA's Extensive Review of Federal Criminal Prosecutions Involving Health-Care Practitioners 5
B. PAA's Direct Participation in the Defense of Physicians Confirmed the Need for Specialized Medical Expertise 7
C. PAA's Comparative Examination of International Approaches to Criminal Enforcement Against Physicians 9
D. PAA's Advocacy and Assistance to Physicians Facing Criminal Prosecution 10

INTRODUCTION 12

ARGUMENT 14

I. THE GOVERNMENT'S FAILURE TO DEFER TO THE STATE MEDICAL LICENSING AUTHORITY UNDERMINES THE DISTINCTION BETWEEN PROFESSIONAL MEDICAL JUDGMENT AND CRIMINAL CONDUCT 14
II. THE DISPARATE JUDICIAL TREATMENT OF PROFESSIONAL JUDGMENT EXERCISED BY ATTORNEYS AND PHYSICIANS WARRANTS HEIGHTENED SCRUTINY OF CRIMINAL PROSECUTIONS ARISING FROM MEDICAL DECISION-MAKING 20
CONCLUSION 26
CERTIFICATE OF COMPLIANCE 29
CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

Cases

Ruan v. United States,
597 U.S. 450 (2022).....11,17, 23,26

Strickland v. Washington,
466 U.S. 668, 689 (1984.....21,22,25

Statutes

21 U.S.C. § 841.....17,23,26, 27
28 U.S.C. § 2255.....21

Administrative Statutes

New York Education Law §§ 6530 and 6531.....15

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Physicians Against Abuse ("PAA" or "Amicus") is a Florida corporation established in 2019 for the purpose of addressing the increasing exposure of licensed health-care professionals to criminal prosecution arising from the exercise of professional medical judgment, particularly in matters involving controlled-substance prescribing, health-care billing, and regulatory compliance.

PAA is composed of health-care practitioners whose professional activities are directly affected by federal and state criminal enforcement policies governing the practice of medicine. Approximately 412 health-care practitioners regularly consult with PAA concerning regulatory compliance, professional liability, prescribing practices, and the potential criminal consequences associated with clinical and administrative decisions made in the ordinary course of medical practice. Participation in the organization is offered without membership fees.

PAA's principal mission is to promote a legally sound distinction between legitimate medical practice, professional misconduct, and conduct that satisfies the elements of a criminal offense. To that end, PAA educates physicians in training, independent practitioners, and other health-care professionals concerning the intersection of medical regulation and criminal enforcement, including the risk that otherwise legitimate prescribing or billing decisions may be retrospectively characterized as criminal conduct.

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[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than *amicus curiae*, its members, contributed money that was intended to fund preparation or submission of this brief. All parties have consented to the filing of this brief.

Through its continuing interaction with practicing physicians, PAA has observed a substantial shift toward defensive medical practice, particularly among younger generations of physicians. Based upon the experiences reported by practitioners who consult with the organization, fear of regulatory investigation and criminal prosecution increasingly influences clinical decision-making, physician-patient relationships, and the willingness of practitioners to provide individualized treatment for medically complex patients.

This only has resulted in compromised patient care forcing patients to seek alternative treatment methods, not just domestically but also internationally for patients who are able to afford such care.

PAA is particularly concerned that these enforcement pressures squarely undermines the traditional physician-patient relationship, historically characterized by continuity of care, individualized clinical assessment, and the physician's independent exercise of professional judgment. In PAA's experience, the prospect of criminal scrutiny has contributed to an environment in which physicians may prioritize avoidance of legal exposure over otherwise reasonable treatment decisions.

A. PAA's Extensive Review of Federal Criminal Prosecutions Involving Health-Care Practitioners

Before PAA's formal establishment as an advocacy organization, members of its governing Board undertook an extensive examination of 211 criminal cases involving convictions for health-care fraud, prescription-related offenses, and other alleged criminal conduct arising from the provision of medical services.

The cases reviewed spanned approximately ten years and involved an examination of criminal proceedings from indictment through sentencing. PAA's review encompassed thousands of pages of court transcripts, including opening statements, closing arguments, testimony from medical experts, and testimony offered by federal investigative agents, including agents of the Federal Bureau of Investigation and the Drug Enforcement Administration.

This examination revealed what PAA perceived to be a recurring and deeply troubling deficiency in the presentation and adjudication of criminal cases involving medical professionals: the substantial disparity between the specialized clinical knowledge necessary to understand the physician's conduct and the medical expertise ordinarily possessed by prosecutors and criminal defense counsel.

In numerous proceedings reviewed by PAA, prosecutorial theories concerning medical necessity, prescribing decisions, diagnostic evaluations, and treatment protocols appeared to rest upon incomplete or insufficiently contextualized understandings of clinical practice. Of equal concern, PAA observed instances in which defense counsel failed to meaningfully challenge medical assertions that, in the organization's assessment, were inconsistent with accepted clinical practice or inadequately supported by the underlying medical evidence.

These observations raised substantial concerns regarding the ability of criminal proceedings to accurately distinguish between medical decisions that may be professionally disputed and conduct undertaken with the criminal intent required by federal law.

PAA's review showed that in majority of the cases, defense counsel lacked sufficient familiarity with the medical issues underlying the prosecution to identify material weaknesses in the Government's expert testimony, formulate appropriate objections, or effectively communicate the clinical significance of the physician's treatment decisions to the jury. Defense counsel therefore often failed to substantively defend reasonable treatment decisions, relying instead exclusively on procedural defenses. It is no wonder why there is such a high rate of pleas even among these highly educated professionals. In fact, among physicians who contact PAA, the number one reason provided for why they pled guilty while maintaining their innocence is because they felt very unsure about their own attorney understanding of the medical aspect of their case.

The resulting concern extends beyond ordinary disagreements between opposing experts. Where the clinical foundation of the prosecution is inadequately examined, a jury may receive an incomplete or distorted understanding of the physician's conduct, thereby increasing the risk that otherwise legitimate medical judgment will be mistaken for criminal wrongdoing.

B. PAA's Direct Participation in the Defense of Physicians Confirmed the Need for Specialized Medical Expertise

In addition to its retrospective examination of the 211 criminal cases, PAA's governing Board has been participating in and providing assistance to defense counsel representing health-care practitioners charged with federal criminal offenses relating to the practice of medicine.

This direct involvement reinforced PAA's conclusion that the effective defense of physicians frequently requires substantial collaboration between criminal defense attorneys and medical professionals possessing relevant clinical expertise.

Even experienced and well-intentioned defense attorneys encounter significant challenges when required to evaluate complex physician-patient interactions, interpret diagnostic studies, understand longitudinal treatment decisions, and assess the medical significance of prescribing patterns.

These challenges are particularly pronounced in prosecutions involving chronic pain management, where the appropriateness of treatment may depend upon a combination of subjective patient complaints, objective clinical findings, prior treatment failures, specialist consultations, therapeutic alternatives, and the treating physician's contemporaneous assessment of the patient's condition.

In PAA's experience, meaningful medical consultation is often essential to ensuring that defense counsel can accurately reconstruct the clinical circumstances confronting the physician and effectively present those circumstances to the trier of fact especially given that these prosecutions almost always bypass state licensing agencies and their role in regulating prescribing habits of health care practitioners.

Absent such assistance, there exists a substantial risk that the physician-patient encounter will be reduced to isolated prescribing decisions or selected portions of the medical record, divorced from the clinical context in which those decisions were made.

PAA therefore maintains that the proper adjudication of criminal charges arising from medical practice requires careful attention to the distinction between retrospective professional disagreement and evidence establishing the requisite criminal culpability.

C. PAA's Comparative Examination of International Approaches to Criminal Enforcement Against Physicians

As part of its broader examination of criminal enforcement policies affecting medical practitioners, PAA also sought information from health authorities in several European, Middle Eastern, and East Asian jurisdictions concerning the prosecution and incarceration of physicians for conduct arising from professional medical practice.

Inquiries from these jurisdictions appeared to rely heavily upon professional disciplinary mechanisms rather than criminal prosecution when addressing allegations involving the quality or appropriateness of medical treatment.

PAA's inquiries also identified examples in which criminal proceedings were associated with allegations of exceptionally serious medical misconduct, including grossly negligent surgical procedures resulting in substantial patient harm that involved for instance loss of limb or loss of a reproductive organ.

These comparative findings raised questions concerning the extent to which different jurisdictions distinguish between professional negligence, regulatory misconduct, and intentional criminal activity.

Although differences in reporting practices, criminal statutes, enforcement structures, and available data complicate direct statistical comparisons, one thing stands out and that is that the United States has increasingly employed criminal prosecution to address matters that fall more naturally within professional medical regulation. And thus the mass incarceration of physicians in the United States. PAA submits that the difference in incarceration and/or prosecution of physicians in US versus other countries is not because all criminal physicians decided to reside in the United States, but rather because there is a structural error in the system that requires immediate correction.

PAA does not suggest that physicians should be immune from criminal accountability. Rather, the organization's concern is that the criminal justice system must preserve a meaningful distinction between medical conduct warranting professional review and criminal liability. Prosecution should be pursued only if findings of professional review show evidence of criminal misconduct.

D. PAA's Advocacy and Assistance to Physicians Facing Criminal Prosecution

Consistent with its organizational mission, PAA provides educational and consultative assistance to health-care practitioners facing criminal investigations or prosecutions involving allegations of prescription fraud, health-care fraud, or other offenses arising from the practice of medicine.

At the trial level, PAA assists physicians in identifying and assembling defense teams equipped to address both the legal and clinical complexities of medical prosecutions. Such assistance may include consultation concerning the selection of lead defense counsel, the involvement of attorneys with specialized experience defending medical professionals, the retention of qualified medical experts, and the development of comprehensive medical investigations necessary to contextualize the challenged conduct.

PAA's objective is to promote the accurate presentation of clinical evidence and to ensure that the physician's professional decisions are evaluated within the medical circumstances in which they occurred.

At the appellate level, PAA's participation generally takes the form of amicus curiae submissions addressing questions of broader legal and constitutional significance concerning the prosecution of medical professionals that directly impacts every single physician.

PAA has previously participated as amicus curiae in litigation involving the criminal prosecution of physicians under the Controlled Substances Act, including proceedings associated with *Ruan v. United States,* 597 U.S. 450, No: 20-1410; *Ruan v. United States* No. 22-1175, and *Jackson v. United States* No: 23-4467(L) in the Fourth Circuit Court of Appeal.

Through these efforts, PAA seeks to assist reviewing courts in understanding the practical implications of criminal enforcement policies for physicians, patients, and the continued exercise of independent medical judgment.

INTRODUCTION

Dr. Frank Parasmo was the 'neighborhood doctor' – a concept that is under threat from prosecutorial overreach criminalizing medical judgment. Specifically, in the area of chronic pain management, today's practicing physician can no longer adequately address a patient's chronic pain without the fear that by doing so, he or she creates criminal culpability for him or herself.

Dr. Parasmo's case exemplifies these concerns. Dr. Parasmo was a community physician whose medical education and clinical experience span approximately four decades and whose treatment philosophy, as reflected in the Petition, emphasized individualized patient care, compassion, and sustained physician-patient engagement. His prescribing decisions should have been evaluated within the clinical circumstances in which they were made, rather than exclusively through retrospective assessments and parameters created by federal prosecutors who then argue, as they did in Dr. Parasmo's case, that none of these contextual factors matters in Dr. Parasmo's prescribing decisions.

Dr. Parasmo's jury convicted him on certain counts after being instructed that only the "objective" reasonableness of his prescribing practices matters. Given that jury instruction, it is impossible to conclude that jurors would still have convicted him had they properly been instructed that they must conclude that he acted with subjective criminal intent—that he intended to act as a drug dealer. That is especially true because chronic pain

patients can be exceptionally difficult to treat. A physician needs to treat the patient's underlying condition, to minimize harm from opioids, and to ensure appropriate tapering, which is essential to avoid the serious medical concerns that can arise from withdrawal and to minimize the risk that addicted patients will seek street drugs. Given these challenges, a pain physician's prescribing practices are highly context-specific, and the question whether the physician subjectively intended to overprescribe cannot reasonably be evaluated by appellate courts on a cold record.

Unlike many physicians practicing in our current environment of prosecutorial overreach and criminalization of the practice of medicine, Dr. Parasmo had not learned how to practice medicine defensively for which he is now paying the highest price as he will head to federal prison at 80 years of age unless this Court intervenes.

While the specific issue in Dr. Parasmo's Petition is whether he is entitled to jury determination of whether the faulty jury instructions given resulted in harmless error, the overarching issue is that Dr. Parasmo should have never been subjected to a criminal prosecution without first a finding by his state regulatory agency, the New York Medical Board, that he was either overprescribing or inappropriately prescribing to the patients alleged in the indictment. And if he was still going to be prosecuted despite the absence of evaluation by his professional peers, it was absolutely critical for the jury to consider his subjective criminal intent, because there is an overwhelming risk that otherwise physicians will be sent to prison for innocent conduct.

ARGUMENT

I. THE GOVERNMENT'S FAILURE TO DEFER TO THE STATE MEDICAL LICENSING AUTHORITY UNDERMINES THE DISTINCTION BETWEEN PROFESSIONAL MEDICAL JUDGMENT AND CRIMINAL CONDUCT

At trial, the Government advanced the position that the fundamental inquiry concerning Dr. Parasmo's prescribing practices was whether his conduct conformed to the standard of medical practice and treatment generally recognized and accepted in the State of New York.

Amicus respectfully submits that the Government's reliance upon standards of medical practice recognized within the State of New York raises a fundamental question concerning the proper allocation of regulatory authority between state medical licensing agencies and federal criminal prosecutors. If it is the standard of medical practice in question, then Dr. Parasmo should have been afforded the opportunity for scrutiny by the licensing agency that regulates the medical profession in his state.

The correct forum for determining a violation of standard of medical practice is before Dr. Parasmo's professional peers who are serving on the New York Board of Medicine who are intricately familiar with the day-to-day and at times even minute-to-minute decisions that are made and sometimes need to be changed in patient care.

The determination of whether a physician's treatment decisions conform to accepted standards of medical practice falls squarely within the specialized expertise and traditional regulatory authority of state medical licensing agencies. These agencies are specifically entrusted with overseeing the practice of medicine, evaluating allegations of professional misconduct, and determining whether a physician's conduct warrants regulatory intervention or professional discipline.

In New York, the regulation of professional medical conduct is governed by a comprehensive statutory framework, including New York Education Law §§ 6530 and 6531, which identify professional misconduct and establish disciplinary authority over licensed physicians.

Yet, in the instant case, the Government pursued criminal conviction arising from Dr. Parasmo's prescribing decisions without first obtaining a determination from the state medical disciplinary authority concerning whether those decisions constituted inappropriate prescribing or otherwise departed from accepted medical practice. They did so because federal prosecutors have in many cases criminalized the practice of medicine, bypassing administrative decisions by these regulatory agencies. It is easier to sell the story that the doctor was acting as a drug dealer to a jury than it is to a group of doctors on a Board of a state licensing agency.

And it is even easier to sell the story because the jury is far more easily persuaded by passion and emotion of opioids being improperly prescribed than trained health

care professionals who have formal training about disease process, pain and how each individual patient's pain tolerance is different.

This is precisely why *Amicus* supports Dr. Parasmo's Petition. If Dr. Parasmo is going to be judged by a jury of individuals who have not spent their lives practicing medicine, and if state regulatory agency procedures are going to be bypassed, then the jury should at least be presented with the subjective standard in evaluating the physician's criminal intent.

The hybrid analysis, in part by jury and then in part by an appellate court who reviews the cold record and decides on whether faulty instructions created harmless error is a brazen violation of Dr. Parasmo's constitutional right under the Sixth Amendment especially when Dr. Parasmo has been denied the benefit of a determination of his standard of medical practice by his own peers through the state regulatory proceedings.

Amicus recognizes that federal criminal jurisdiction is not contingent upon the prior initiation or completion of state disciplinary proceedings. However, the absence of such a professional assessment raises substantial concerns and reinforces the need to ensure that the full story of the criminal prosecution, including the critical question whether the physician acted with criminal intent, gets decided by the jury.

The distinction between professional misconduct and criminal wrongdoing is neither incidental nor merely procedural. It is fundamental to ensuring that physicians are not subjected to criminal punishment solely because their clinical judgments differ from those subsequently endorsed by government-retained experts.

State medical licensing authorities possess specialized institutional competence to evaluate prescribing patterns within the broader context of a physician's training, experience, patient population, clinical findings, and individualized treatment decisions. Such evaluations may distinguish negligent or professionally inappropriate treatment from legitimate differences in medical opinion and from conduct that warrants referral for criminal investigation.

By contrast, where criminal prosecution proceeds principally upon retrospective expert assessments of prescribing practices, without the benefit of an independent professional regulatory determination, there is an increased risk that disagreements over medical treatment will be characterized as evidence of criminal intent. This is especially so when the jury is not permitted to make a determination of every aspect of the criminal proceedings such as whether the physician acted with criminal intent.

This concern is particularly significant in light of this Court's decision in *Ruan v. United States*, 597 U.S. 450 (2022), which makes clear that criminal liability under 21 U.S.C. § 841 requires proof that the physician knowingly or intentionally acted in an unauthorized manner once the defendant has produced evidence that the prescribing conduct was authorized.

Accordingly, even a determination that a physician departed from accepted medical standards does not, standing alone, establish the subjective criminal intent necessary to sustain a conviction under § 841. A fortiori, a disagreement between the treating physician and a subsequently retained government expert cannot itself substitute for proof beyond a reasonable doubt of knowing or intentional unauthorized prescribing.

Amicus does not contend that physicians should be categorically insulated from criminal investigation or prosecution, nor that state medical licensing agencies possess exclusive jurisdiction over conduct that independently violates federal criminal law. Rather, *Amicus* submits that, where the gravamen of the Government's allegations concerns the appropriateness of medical treatment, and where as here, the Government's theory of the prosecution is that there was a violation of standard of medical practice, meaningful consideration of the state regulatory framework is essential to maintaining the distinction between the exercise of professional judgment and criminally culpable conduct.

The failure to preserve that distinction carries consequences extending far beyond the individual prosecution. Criminal charges against physicians may result in the immediate disruption of medical practices, the loss of professional reputation, exclusion from health care programs, financial devastation, and the deprivation of liberty. Such consequences underscore the importance of ensuring that criminal proceedings do not become a substitute for professional disciplinary processes where the underlying dispute concerns the quality or appropriateness of medical care.

These concerns are especially pronounced in the case of Dr. Parasmo, whose medical education and professional experience span approximately four decades. His prescribing practices must be evaluated in the context of the clinical knowledge, prevailing treatment philosophies, and professional standards applicable to the particular periods in which the challenged conduct occurred.

The practice of medicine, particularly the management of chronic pain, has undergone substantial changes over the past several decades. A physician's treatment decisions cannot fairly be assessed without consideration of the clinical circumstances confronting the physician, the medical knowledge reasonably available at the time the patient was being seen at the doctor's office, and the individualized needs of the patients under the physician's care.

To permit criminal liability to arise from the retrospective application of disputed medical judgments, without sufficient consideration of these circumstances and without proof of the requisite subjective *mens rea*, has converted professional regulatory disagreements into federal criminal offenses with the added caveat that not even the full story is decided by the jury, offending the very essence of the Sixth Amendment under the United States Constitution.

The Government may prosecute knowingly or intentionally unauthorized prescribing, but it may not dispense with the requirement of criminal intent merely by contending with the benefit of hindsight that a physician's treatment decisions without were objectively unreasonable. Instead the jury must consider every aspect of the

physician's treatment including his state of mind as he was actually in the room observing examining the patient. In cases like this one where the jury was instructed that the physician's subjective state of mind was irrelevant, it will almost always be necessary to conduct a new trial for the jury to determine whether the physician acted with criminal intent. This is especially important in the context of physicians like Dr. Parasmo who deal with a challenging patient population where patients are addicted but also have real underlying pain which require medical attention.

If the jury is only asked to evaluate whether, in hindsight, the prescriptions were objectively unreasonable, there is an intolerable risk that physicians who deal with complex and challenging patients like Dr. Parasmo will be sent to prison for difficult judgments made entirely in good faith.

II. THE DISPARATE JUDICIAL TREATMENT OF PROFESSIONAL JUDGMENT EXERCISED BY ATTORNEYS AND PHYSICIANS WARRANTS HEIGHTENED SCRUTINY OF CRIMINAL PROSECUTIONS ARISING FROM MEDICAL DECISION-MAKING

A fundamental inconsistency exists in the degree of judicial deference afforded to the professional judgment of attorneys as compared to that afforded to physicians. Although both professions require the exercise of specialized knowledge, independent judgment, and decisions made under circumstances uniquely known to the professional at the time, the judicial treatment of their respective professional decisions differs substantially.

In the context of claims alleging ineffective assistance of counsel under 28 U.S.C. § 2255, this Court has long recognized that judicial scrutiny of an attorney's professional performance must be highly deferential. In *Strickland v. Washington*, 466 U.S. 668, 689 (1984), this Court expressly held that courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The Court further cautioned against the distorting effects of hindsight, recognizing that strategic decisions made by trial counsel must be evaluated from counsel's perspective at the time rather than through the retrospective judgment of others.

The underlying rationale of *Strickland* is both compelling and instructive: a professional who is directly engaged in making consequential decisions possesses a contemporaneous understanding of the circumstances that cannot be fully replicated by an individual reviewing those decisions after the fact. Accordingly, courts are cautioned against substituting retrospective disagreement for a legally sufficient demonstration of deficient professional performance.

Yet, in criminal prosecutions of physicians arising from the prescribing of controlled substances, the exercise of medical judgment is frequently subjected to a markedly different form of scrutiny. If these medical judgments are going to be submitted to a jury, it is exceptionally important to ensure that the jury considers the relevant question—whether the defendant subjectively acted with criminal intent.

This disparity raises substantial concerns regarding the extent to which criminal liability may be predicated

upon competing professional opinions rather than proof of conduct undertaken with the requisite criminal intent.

There is no principled justification for allowing retrospective disagreement alone to substitute for proof of criminal intent when the professional judgment under scrutiny is that of a treating physician. The medical profession, no less than the legal profession, requires individualized decision-making informed by specialized training, experience, and circumstances that may not be fully appreciated by those reviewing the professional's conduct years later.

The analogy to *Strickland* is particularly significant. Just as trial counsel is uniquely positioned to assess the circumstances confronting a defendant during criminal proceedings, a treating physician is uniquely positioned to evaluate the patient's presenting symptoms, medical history, diagnostic findings, treatment response, and other clinically relevant considerations at the time treatment decisions are made.

This distinction is especially consequential in the management of chronic pain, where treatment decisions frequently require individualized assessments involving subjective complaints, objective findings, therapeutic alternatives, and the physician's continuing evaluation of the patient's condition.

A subsequently retained expert, regardless of professional qualifications, does not occupy the same clinical position as the treating physician. Such an expert may properly evaluate the medical records, applicable standards of practice, and the reasonableness of the treatment provided. Nevertheless, retrospective

disagreement, by prosecutors and hired experts by prosecutors should not be conflated with proof that the treating physician knowingly or intentionally acted outside the bounds of authorized medical practice.

Indeed, this Court's decision in *Ruan v. United States,* 597 U.S. 450 (2022), reinforces the critical distinction between an objectively disputed medical decision and criminally culpable prescribing conduct. In *Ruan*, this Court held that, once a defendant produces evidence that his or her conduct was authorized, the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner under 21 U.S.C. § 841.

It is essential that the jury conclude beyond a reasonable doubt that the physician intended to act as a drug dealer or whether he exercised his clinical judgment as a physician in good faith.

The constitutional concern is not that physicians should enjoy immunity from criminal prosecution, but that criminal culpability cannot depend on mere concentrations of oxycodone, hydrocodone or MMEs [2] that have been advanced largely by government hired experts as parameters to assess alleged inappropriate prescribing.

The prosecution of Dr. Parasmo illustrates the significance of this distinction. His convictions on thirty-two counts arose from prescribing decisions made in the course of treating patients whose clinical circumstances he personally evaluated. The Government's retrospective

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[2] MME is a term that is defined as "morphine milligram equivalent" which purports to measure opioid exposure and overdose risk. This is an arbitrary parameter and is not by any means a comprehensive parameter that detects overdose risk although sitting in on some federal criminal trials you would think this is the 'be all' of determinations for overdose risk. Federal prosecutors like to rely on MME arguments because that gives them a way to argue something concrete to the jury. It is extremely rare that any state regulatory agency rely on MMEs as means to gauge overdose risk because trained health care professionals know that this is not a reliable method. It provides little to nothing in overdose cases. It is not a biologic determination that takes into consideration the mechanism of action of opioids at different pain receptors in different individuals.

assessment of those decisions differed from the contemporaneous perspective of the physician who examined the patients, assessed their conditions, and formulated individualized treatment plans.

As reflected in the Petition, Dr. Parasmo introduced substantial evidence at trial supporting the legitimacy and good-faith nature of his medical decision-making. Specifically, the Petition identifies evidence that Dr. Parasmo ordered diagnostic testing, referred patients to specialists for evaluation and treatment of their underlying pain-producing conditions, attempted to reduce their reliance upon controlled substances, and pursued alternative therapeutic measures, including medications that were not controlled substances. FN 3.[3]

Such evidence is directly relevant to whether Dr. Parasmo knowingly or intentionally prescribed controlled substances outside the scope of authorized medical practice. It also underscores the danger of allowing retrospective differences in medical opinion to substitute for the Government's burden of establishing criminal intent.

The issue is not whether a physician's prescribing decisions are categorically insulated from subsequent review. They are not. Rather, the issue is whether the criminal justice system adequately distinguishes between a legitimate disagreement concerning medical treatment and the knowing or intentional unlawful distribution of controlled substances.

Where the alleged criminal conduct consists principally of medical decisions made in the course of treating patients, the absence of a prior determination by

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[3] As stated in the Petition, Dr. Parasmo introduced evidence that he "ordered numerous tests, referred his patients to a wide variety of specialists to treat their pain inducing conditions, tried to wean them off the controlled substances, and looked for alternative treatments to control his patients' pain, including prescribing medications other than a controlled substance." *See Petition at 6.*

the appropriate state medical licensing authority further underscores the need for careful judicial examination of the Government's theory of criminal liability. Although federal prosecution does not categorically require a preceding state medical board determination, the expertise and regulatory authority of state medical boards remain relevant to understanding the distinction between professional error and criminal wrongdoing. And where these administrative steps are bypassed, the need to have a jury determine all aspects of a criminal prosecution including the aspect whether there was harmless error in faulty jury instructions.

To permit criminal convictions to rest upon a mere divergence of medical opinion or mere composition of concentrations of oxycodone in the prescribed medications would risk transforming the criminal justice system into an instrument for adjudicating disagreements over clinical judgment without adequate regard for the statutory requirement of criminal intent.

The principles articulated in *Strickland,* although arising in the distinct constitutional context of ineffective assistance of counsel, demonstrate this Court's longstanding recognition of the dangers inherent in judging professional decisions through the distorting lens of hindsight. Those concerns are no less consequential when the professional judgment under examination involves a physician's treatment of patients and the potential deprivation of that physician's liberty.

Accordingly, this Court should reverse the findings of the Second Circuit and resolve the conflict in favor of Dr. Parasmo that it should be the jury deciding whether faulty jury instructions created harmless error and ultimately did not affect the outcome of the proceedings.

CONCLUSION

Amicus respectfully urges this Court to address the continuing injustice arising from the criminalization of legitimate medical judgment through the retrospective second-guessing of physicians' clinical decisions by prosecutors. And where medical judgment is on trial, this Court should not permit appellate panel of judges to make a determination whether faulty jury instructions resulted in harmless error because other facts presented amounted to overwhelming evidence as determined by judges, and not the jury.

The United States has established comprehensive regulatory mechanisms for evaluating physicians' professional conduct, including state medical licensing boards vested with specialized expertise and statutory authority to investigate, evaluate, and discipline departures from accepted standards of medical practice. Although such regulatory authority does not displace federal criminal jurisdiction, the distinction between professional regulatory violations and criminal misconduct must remain constitutionally and statutorily meaningful. And where these regulatory pathways are bypassed, the government's burden of proof should extend to every aspect of a criminal proceeding requiring the government to prove beyond a reasonable doubt to a jury that a previously given faulty jury instructions was harmless error.

Amicus recognizes that this Court's decision in *Ruan v. United States*, 597 U.S. 450 (2022), resolved a critical question concerning the mens rea required to sustain a conviction under 21 U.S.C. § 841 when a physician is

prosecuted for allegedly unauthorized prescribing. Nevertheless, as Dr. Parasmo's Petition illustrates, the principles articulated in *Ruan* require faithful and consistent application by the lower courts if they are to provide meaningful protection against convictions predicated upon retrospective disagreements concerning the exercise of medical judgment.

The continuing failure to distinguish between objectively disputed medical treatment and knowingly or intentionally unauthorized prescribing threatens fundamental principles of due process and the constitutional guarantee of a fair criminal trial. Where a jury is permitted to convict a physician without being properly instructed concerning the Government's burden to establish the requisite subjective mens rea, the resulting conviction raises substantial questions concerning its validity under *Ruan* and the Fifth and Sixth Amendments.

Accordingly, *Amicus* respectfully requests that this Court grant the Petition and provide further clarification that a physician's criminal liability under 21 U.S.C. § 841 cannot be established by appellate panel of judges determining what evidence was overwhelming in the face of a faulty jury instruction such that a retrial would not alter the outcome of the proceedings.

The constitutional protections afforded to criminal defendants cannot depend upon their profession.

Physicians are entitled to the same fundamental guarantees of due process, the presumption of innocence, proof beyond a reasonable doubt, and a jury determination of every essential element of the charged offense, including whether faulty jury instructions resulted in harmless error.

For these reasons, *Amicus Curiae* respectfully urges this Court to grant the Petition for a Writ of Certiorari and grant such further relief as may be necessary to ensure that Dr. Parasmo's convictions are evaluated under the proper legal standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I certify that: This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5,156 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Century Schoolhouse 12-point font using Microsoft Word 2022.

/s/ Michael Cohen

MICHAEL COHEN, ESQ

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Supreme Court by using the electronic filing system of the United States Supreme Court. A booklet format of this brief is being mailed to the Court and all counsel of record as of this date.

Dated: November 4, 2026

/s/ Michael Cohen

_____

MICHAEL COHEN, ESQ