

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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XIULU RUAN, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 20-1410  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
 )  
 ) and )  
 )  
 ) SHAKEEL KAHN, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 21-5261  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
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Pages: 1 through 99  
Place: Washington, D.C.  
Date: March 1, 2022

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XIULU RUAN, )  
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v. ) No. 20-1410

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SHAKEEL KAHN, )  
Petitioner, )

v. ) No. 21-5261

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Respondent. )

- - - - -

Washington, D.C.

Tuesday, March 1, 2022

The above-entitled matter came on for  
oral argument before the Supreme Court of the  
United States at 10:00 a.m.

1 APPEARANCES:  
2 LAWRENCE S. ROBBINS, ESQUIRE, Washington, D.C.; on  
3 behalf of the Petitioner in 20-1410.  
4 BEAU B. BRINDLEY, ESQUIRE, Chicago, Illinois; on  
5 behalf of the Petitioner in 21-5261.  
6 ERIC J. FEIGIN, Deputy Solicitor General, Department  
7 of Justice, Washington, D.C.; on behalf of the  
8 Respondent.  
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 20-1410, Ruan versus United States, and the consolidated case.

Mr. Robbins.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS  
ON BEHALF OF THE PETITIONER IN 20-1410

MR. ROBBINS: Thank you, Mr. Chief Justice, and may it please the Court:

Dr. Xiulu Ruan's jury was instructed that it could convict him of federal narcotics offenses if he prescribed "outside the usual course of professional medical practice."

The Eleventh Circuit sustained that instruction precisely because it "told the jury that good faith was a defense" as long as the appellant's conduct also was in accordance with the standards of medical practice. In other words, good faith is a defense in the Eleventh Circuit only for doctors whose prescriptions are already lawful.

No lawyer will stand up before the Court this morning and defend either that

1 instruction or the court of appeals's rationale.  
2 And small wonder. Dr. Ruan received little more  
3 than the instruction he would have gotten had  
4 this been a civil malpractice action in Alabama.

5 So, in our view, Dr. Ruan's case must  
6 be remanded, and on remand, the Eleventh Circuit  
7 should either dismiss this prosecution outright  
8 for want of sufficient proof of Alabama  
9 substantive standards or, at a minimum, order a  
10 new trial on all counts, this time governed by  
11 the correct scienter rule. And that rule, we  
12 submit, which largely tracks the law in the  
13 First, Seventh, and Ninth Circuits, is that a  
14 doctor may not be convicted under  
15 Section 841(a)(1) unless the government proves  
16 that her prescriptions were made without a  
17 good-faith medical purpose.

18 The good-faith medical purpose test  
19 makes the best sense of the statutory text, this  
20 Court's case law. It also accords with  
21 principles of federalism that are embedded in  
22 the statute itself, enables the jury to focus on  
23 the question of intent, as it always does in  
24 criminal cases, and affords an appropriate berth  
25 for doctors and patients to make the best

1 choices for the individual care of what is often  
2 invisible and yet real and intractable pain.

3 I'd be pleased to hear the Court's  
4 questions at this time. Thank you.

5 JUSTICE THOMAS: Just a couple of sort  
6 of housekeeping questions. Could you explain to  
7 me exactly what the offense is here that the  
8 government is prosecuting?

9 MR. ROBBINS: The principal offense,  
10 Justice Thomas, is 21 U.S.C. 841(a)(1), which is  
11 the -- the -- the principal narcotics  
12 distribution statute, and certain associated  
13 statutes that use the drug offense as part of  
14 the compound proof. So there's a racketeering  
15 charge, there's a money laundering charge.

16 All these --

17 JUSTICE THOMAS: Okay. So let's just  
18 stick with the first one. But there's nothing  
19 in there -- there's an exception, right, to 841?

20 MR. ROBBINS: Yes, the "except as  
21 authorized" exception. Correct.

22 JUSTICE THOMAS: Okay. So does the  
23 government have -- when the government indicts,  
24 does it have -- have to plead the exception?

25 MR. ROBBINS: No. I think, under

1 Section 885, it is not required to plead it.  
2 That is to say, the statute provides, Your  
3 Honor, that there is an obligation of the  
4 defense to put the question at issue, but, once  
5 the defense does so, the circuits are unanimous,  
6 and I -- I think correctly so, that it then  
7 falls to the government to prove the absence of  
8 good faith beyond a reasonable doubt according  
9 to whatever the legal standard for good faith  
10 is.

11 JUSTICE THOMAS: So where -- where  
12 does that come from, the -- the -- the legal  
13 standard you're talking about, in order to be  
14 register -- to be exempt from 841?

15 MR. ROBBINS: The legal standard, as  
16 -- as I understand it, Your Honor, comes from  
17 the fact that the statute has an embedded  
18 exception for physicians.

19 JUSTICE THOMAS: I understand that  
20 part, I'm sorry. Does it come from a statute or  
21 a regulation?

22 MR. ROBBINS: The ex- -- the -- the  
23 obligation to prove good faith?

24 JUSTICE THOMAS: No, the -- the  
25 standard for the exception in order to be

1 registered, to not be covered, because 841 is a  
2 broad statute, right?

3 MR. ROBBINS: 841 is a narcotics  
4 felony.

5 JUSTICE THOMAS: I know. So it covers  
6 everybody. So, if you just looked at that, a  
7 doctor would be covered?

8 MR. ROBBINS: Yes. We don't dispute  
9 that a doctor --

10 JUSTICE THOMAS: Now, but where does  
11 this standard -- in order to comply with the  
12 exception, the authorization to write  
13 prescriptions, where does that standard come  
14 from?

15 MR. ROBBINS: The standard comes from,  
16 I suggest, Justice Thomas, the presumption of  
17 scienter and the principle articulated in  
18 several of this Court's cases we cite that says  
19 in substance that a scienter standard, which is  
20 presumed and, of course, in this statute  
21 actually is express, knowingly or  
22 intentionally --

23 JUSTICE THOMAS: I thought there were  
24 standards that were set out by regulation on how  
25 a doctor was to conduct his or her affairs in

1 writing these prescriptions.

2 MR. ROBBINS: To -- well, the -- the  
3 -- the -- the Controlled Substances Act largely  
4 leaves that to states and administrative boards.  
5 There aren't lots of explicit obligations built  
6 into the statute itself.

7 On the other hand, the argument we are  
8 making today takes the "knowingly" and  
9 "intentionally" language in the statute and  
10 asks, to what elements does that apply? We  
11 contend that it applies to the "except as  
12 authorized" language in the statute. And -- and  
13 so you begin with the presumption. You have the  
14 statute saying "knowingly" and "intentionally,"  
15 so you don't have to even read that in, as this  
16 Court has done in other cases. And then the  
17 only question is, where does it apply?

18 And the only element, Justice Thomas,  
19 the only element that could possibly separate  
20 innocent from wrongful conduct is the "except as  
21 authorized" language. Nothing else can possibly  
22 make sense.

23 JUSTICE KAVANAUGH: The "except as" --

24 CHIEF JUSTICE ROBERTS: What if you're  
25 --

1 JUSTICE KAVANAUGH: -- "authorized" --  
2 go ahead.

3 CHIEF JUSTICE ROBERTS: What if you're  
4 driving along the highway and you're pulled over  
5 for speeding and the officer tells you, look, it  
6 was 55 miles an hour, you're -- you get a  
7 ticket, and you say, oh, no, I thought it was 70  
8 miles per hour? You still get the ticket,  
9 right?

10 MR. ROBBINS: Of course.

11 CHIEF JUSTICE ROBERTS: What if you  
12 say -- you're pulled over, the officer says, you  
13 know, you're speeding, it's 55, and you say, you  
14 know, I -- this is in the middle of Montana, I  
15 think it should be 70, and I was going under 70?  
16 You'd still get a ticket, right?

17 MR. ROBBINS: Yes, you would.

18 CHIEF JUSTICE ROBERTS: Well, how is  
19 that different if, instead of speed limit, we're  
20 talking about what is understood, accepted to be  
21 a -- in the course of medical practice and  
22 whatever the other thing was -- in course of  
23 professional treatment or normal medical  
24 practice?

25 MR. ROBBINS: Well --

1 CHIEF JUSTICE ROBERTS: You don't  
2 get -- in other words, you don't get to say:  
3 Okay, yeah, I realize the standard is, you know,  
4 whatever, this many prescriptions a month or a  
5 year, but I think it should be this. That --  
6 that -- you don't get an instruction on that, do  
7 you?

8 MR. ROBBINS: Well, it -- it depends  
9 -- the answer is no, you don't get an  
10 instruction that says you can pick the rules you  
11 like, no. What -- but the instruction that  
12 we're urging, which we think, by the way,  
13 follows from this Court's scienter case law,  
14 doesn't create, I -- I -- I suggest, Mr. Chief  
15 Justice, it does not create some freestanding,  
16 you know, choose your own medicine rule.

17 What it does is it tells the jury  
18 focus on intent. Focus on purpose. You are  
19 free as a member of the jury to disbelieve the  
20 doctor's profession --

21 CHIEF JUSTICE ROBERTS: Well, but I  
22 thought you told me --

23 MR. ROBBINS: -- of a good-faith  
24 medical purpose.

25 CHIEF JUSTICE ROBERTS: -- I thought

1 you told me that he doesn't get to say -- well,  
2 maybe you didn't -- but, in the speeding  
3 example, he can't -- he didn't work when he  
4 said, I thought it was 70 miles an hour when it  
5 was 55 --

6 MR. ROBBINS: Well --

7 CHIEF JUSTICE ROBERTS: -- and  
8 believed in good faith. This is Montana. You  
9 can't see anything for a hundred miles.

10 MR. ROBBINS: Yeah. Well, let -- let  
11 me just say, I -- I -- I -- rather -- I don't  
12 want to bury the lead. The -- the -- the fact  
13 is this -- you know, speeding is the classic  
14 case of a regulatory offense, the sort of, you  
15 know, situation in which scienter isn't even an  
16 issue. You don't get to defend the traffic  
17 violation based on your state of mind.

18 But, when you're talking about sending  
19 doctors or anybody for that matter to jail for  
20 mandatory minimums of decades in prison, this is  
21 not a regulatory offense. This is an offense as  
22 to which this Court's case law on -- on scienter  
23 applies with the most robust force it could.

24 And so I -- I don't -- I mean --

25 JUSTICE SOTOMAYOR: Counsel, can we --

1 MR. ROBBINS: -- I -- I take --

2 JUSTICE SOTOMAYOR: -- can -- can we  
3 separate out two issues: good faith, which goes  
4 to the extent of the knowledge, and the actual  
5 conduct that the government must prove.

6 Now I understood as I read this that  
7 841(a) says the government must prove beyond a  
8 reasonable doubt that a doctor intentionally  
9 prescribed or distributed controlled substances,  
10 and you're saying doctors can do that, so the  
11 only way they can't do it is if they prescribe  
12 it other than for a legitimate medical purpose  
13 and not in the usual course of professional  
14 practice, correct?

15 MR. ROBBINS: Well, no. Well, I --

16 JUSTICE SOTOMAYOR: No, you want to  
17 say something more, but I think that's what the  
18 statute says. The statute, by its words, says,  
19 putting in the exception, the government has to  
20 prove that he didn't do it for a medical purpose  
21 and in the normal course of business.

22 MR. ROBBINS: I -- I think that's the  
23 very least they have to prove, Your Honor.

24 JUSTICE SOTOMAYOR: That's the least.  
25 Now the question becomes, who has the burden of

1 proving or not good faith, correct?

2 MR. ROBBINS: Well, that -- that's not  
3 --

4 JUSTICE SOTOMAYOR: You say it's the  
5 government.

6 MR. ROBBINS: They say it's the  
7 government too. I mean, nobody --

8 JUSTICE SOTOMAYOR: Not good faith.

9 MR. ROBBINS: Oh, no, no, I'm sorry,  
10 Your Honor. Nobody -- nobody is going to tell  
11 you this morning that that burden somehow  
12 belongs to the defense. Everybody will concede  
13 -- if you ask my friend, Mr. Feigin, he will  
14 tell you that once the issue is put in play  
15 under 885, it then falls to the government to  
16 prove beyond a reasonable doubt, but I'd like to  
17 go -- the absence of good faith.

18 But I'd like to go back to where Your  
19 Honor began her question because you said were  
20 -- the words knowingly and intentionally must  
21 prescribe outside the bounds of medicine and  
22 without a medical purpose.

23 It is important for me to be clear  
24 that my client didn't get that instruction. His  
25 jury was told, if he was outside the bounds of

1 medicine, you may convict him, full stop. No  
2 good faith. No knowingly or intentionally.  
3 None of that.

4 So I want to be clear that the premise  
5 of Your Honor's question is a premise under  
6 which our conviction should be reversed.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 MR. ROBBINS: I see that my red light  
9 has -- has flashed, and I am embarrassed to say  
10 I don't know if I'm supposed to --

11 CHIEF JUSTICE ROBERTS: You can stand  
12 there and we're going to each see if we have  
13 questions for you.

14 MR. ROBBINS: Okay. Thank you, Your  
15 Honor.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Breyer?

18 JUSTICE ALITO: I do have a number of  
19 questions, Mr. Robbins. We're interpreting a  
20 statute, so we should start by looking at what  
21 the statute says, and it says, "except as  
22 authorized by this subchapter, it shall be  
23 unlawful for any person knowingly or  
24 intentionally to" do a variety of things.

25 As a matter of language, do the

1 adverbs "knowingly" or "intentionally" modify  
2 the introductory clause "except as authorized by  
3 this subchapter"?

4 MR. ROBBINS: The answer is yes,  
5 Justice Alito, and I'd be happy to explain why I  
6 think so.

7 JUSTICE ALITO: Well, I think my old  
8 English teacher would say no, you've gotten that  
9 answer wrong. There's no way they can modify  
10 "except as authorized by this subchapter." They  
11 modify what comes later. But explain to me why  
12 they modify it as a matter of language, not as a  
13 matter of constitutional avoidance or something  
14 like that.

15 MR. ROBBINS: No, and I'm not arguing  
16 constitutional avoidance. I am arguing the  
17 principles of -- of -- that this Court has  
18 articulated in Rehaif and other cases. But  
19 let's just talk about language.

20 Obviously, it's a -- I -- I hate to  
21 use the word holistic, but it's a holistic  
22 endeavor. The government says it only modifies  
23 the verbs that come next. That proposition  
24 you've already rejected.

25 JUSTICE ALITO: Well, we rejected it

1 in a particular case for particular reasons, but  
2 I want to forget about all that. I just want to  
3 start out with English grammar.

4 MR. ROBBINS: Okay. Well, I'm not  
5 sure grammar alone will do the trick.

6 JUSTICE ALITO: Okay. So --

7 MR. ROBBINS: But -- but --

8 JUSTICE ALITO: -- we'll move beyond  
9 grammar. So you want to say that whether or not  
10 "knowingly" and "intentionally" modify "except  
11 as authorized by this subchapter," that is an  
12 element of the offense?

13 MR. ROBBINS: It -- yes, it is.

14 JUSTICE ALITO: And, therefore -- and  
15 there's a presumption of scienter as to every  
16 element of an offense?

17 MR. ROBBINS: No, I wouldn't say that.

18 JUSTICE ALITO: No?

19 MR. ROBBINS: If it --

20 JUSTICE ALITO: I thought that was  
21 your argument. No?

22 MR. ROBBINS: Well, there's a  
23 presumption as to any element that separates  
24 wrongful from innocent conduct. I would not,  
25 for example, quarrel with the -- with the

1 holding in -- in Yermian that a jurisdictional  
2 path is different.

3 JUSTICE ALITO: Okay. So a  
4 non-jurisdictional -- as to a non-jurisdictional  
5 element, there is a presumption --

6 MR. ROBBINS: Yes.

7 JUSTICE ALITO: -- of scienter?

8 MR. ROBBINS: Yes.

9 JUSTICE ALITO: All right. Why is  
10 there a presumption that the scienter here is  
11 knowingly or intentionally as opposed to, say,  
12 recklessly?

13 MR. ROBBINS: Because it's in the  
14 statute.

15 JUSTICE ALITO: But, if linguistically  
16 they do not modify that clause, then why would  
17 you jump over recklessness to knowingly and  
18 intentionally?

19 MR. ROBBINS: Well, again, I -- I --  
20 I -- I don't mean to be disputatious, but I  
21 don't accept the proposition that they don't  
22 as -- just as -- as grammar is best understood,  
23 I think they do modify the predicate language.

24 And let me -- let me give you -- make  
25 a slightly different point, Justice Alito.

1 Twenty years -- or, actually, 20 -- you know,  
2 roughly 25 years after 841(a)(1) was enacted,  
3 Justice Alito, Congress enacted 841(h), which is  
4 the provision -- subsection that deals with  
5 Internet sales of narcotics.

6 There, you will see that they took the  
7 phrase "except as authorized" and they moved it  
8 later, which is something they could have done  
9 in 1968 when they passed the -- the organic  
10 statute to begin with.

11 I don't think it would have made a  
12 dime's worth of difference to the meaning. But,  
13 if you believe that as a matter of grammar the  
14 "knowingly" and "intentionally" can only move  
15 forward and not backwards, if it can only  
16 radiate later and not earlier, if you believe  
17 that, then you'd have to say that there's a  
18 material difference between placing it later and  
19 placing it first.

20 JUSTICE ALITO: Well, there is a  
21 material difference between placing it later and  
22 placing it first, but the problem is not just  
23 the sequence. The problem is what an adverb can  
24 modify. It can only modify a verb, and "except  
25 as authorized" is not a verb.

1                   Anyway, beyond that, what about 885?  
2           "It shall not be necessary for the United States  
3           to negative any exemption or exception set forth  
4           in this subchapter," et cetera, et cetera, "and  
5           not only in a pleading but also in any trial."

6                   MR. ROBBINS: That -- that's in a  
7           pleading -- well, that -- that's right.

8                   JUSTICE ALITO: It says in a trial.

9                   MR. ROBBINS: Yes, but that -- that --  
10          that -- that provision has been read to mean  
11          that there is a -- that the burden of coming  
12          forward, as we used to say in evidence class,  
13          the burden of coming forward falls to the  
14          defense, to put the defense at issue.

15                   But then --

16                   JUSTICE ALITO: Well, it has been read  
17          that way. Is that the proper reading?

18                   MR. ROBBINS: I think it is the proper  
19          reading.

20                   JUSTICE ALITO: Why is it the proper  
21          reading? The government doesn't have to  
22          negative this in a trial.

23                   MR. ROBBINS: Well, let -- let -- let  
24          me -- you know, I -- at the risk of -- of  
25          recurring to statutory history, I should point

1 out that under the Harrison Act, the -- the  
2 cognate of that provision said that the burden  
3 of proof was on the defense.

4 When CSA was enacted many years later,  
5 that formulation in 885, I think, makes quite  
6 clear that it's just a burden of coming forward.  
7 And that's all there is.

8 We don't dispute it. We came forward  
9 with this defense. And then the instruction  
10 took it off the table. It said to the jury: If  
11 you find that this doctor deviated from the  
12 usual course of medical practice, you can  
13 convict him, full stop.

14 JUSTICE ALITO: All right. You say  
15 that -- I don't want to belabor the point. You  
16 say that what this means is that the defense has  
17 to produce a prima facie case, right?

18 MR. ROBBINS: Well, I -- the way I  
19 would put it is --

20 JUSTICE ALITO: Has to satisfy a  
21 burden of production?

22 MR. ROBBINS: Correct.

23 JUSTICE ALITO: And then somebody has  
24 to prove something. And when this provision  
25 says that the government doesn't have to

1 negative it, that means that, actually, the  
2 government has to prove it and prove it beyond a  
3 reasonable doubt?

4 MR. ROBBINS: It does not have to  
5 allege it in its indictment, but it does have to  
6 prove it beyond a reasonable doubt, a  
7 proposition with which every single recorded  
8 case is in agreement.

9 JUSTICE ALITO: Well, that may well be  
10 -- that may well be true, but they're not our  
11 cases, and they might be wrong. And I know that  
12 what I'm suggesting about what the language  
13 means is not supported by either you or by  
14 Mr. Feigin, but we are interpreting statutes and  
15 regulations, and maybe we ought to start with  
16 what they actually say.

17 Purpose does come into this inquiry,  
18 but it's in the regulation, "for the purpose of"  
19 doing certain things.

20 MR. ROBBINS: Well --

21 JUSTICE ALITO: If you're going to  
22 find purpose someplace, that's where you have to  
23 find it. And as for good faith, I don't know  
24 where that word comes from at all. It's  
25 nowhere.

1           MR. ROBBINS: Well, it -- it -- it --  
2           it's certainly not in the statute in those  
3           words. That's true. It is, however, a useful  
4           shorthand way of capturing what it means to do  
5           something knowingly and intentionally, which are  
6           familiar terms of art that have been read to  
7           entail a good-faith defense.

8           But, Justice Alito, I think it's worth  
9           trying on for size what the world would look  
10          like under the interpretation that you're at  
11          least raising as a -- as a possibility. In that  
12          world, a doctor -- his only defense would be  
13          that he didn't know he was prescribing a  
14          controlled substance. And I suggest that that  
15          would mean that the only doctors who could  
16          possibly be acquitted have prescribed the  
17          medicine in a coma.

18          JUSTICE ALITO: No, that wouldn't --  
19          it wouldn't follow because it -- it would have  
20          to -- the prescription would have to be an  
21          invalid prescription under the regulation, and  
22          it would be invalid if it was not written for a  
23          legitimate medical purpose. He has to have that  
24          purpose.

25          Anyway, I've taken up a lot of your

1 time. I just wanted to go through the language  
2 of these provisions because, to me at least,  
3 it's important as a starting point.

4 MR. ROBBINS: With which, of course, I  
5 completely concur, Justice Alito.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Sotomayor?

8 Justice Kagan?

9 Justice Gorsuch?

10 JUSTICE GORSUCH: Counsel, I want to  
11 see if I understand it, so tell me if I make any  
12 mistakes here. But we have a dispute over how  
13 far "knowingly" and "intentionally" distribute.  
14 Put that aside.

15 Assume Justice Alito's grammar teacher  
16 was right, okay? I know you don't want to, but  
17 let's just -- let's just assume that.

18 MR. ROBBINS: Okay.

19 JUSTICE GORSUCH: As I understand it,  
20 your position would still be that the "except"  
21 clause has to have some mens rea element to it  
22 because it's what distinguishes lawful from  
23 unlawful conduct; that is, a doctor would be  
24 otherwise prohibited in all instances without  
25 any mens rea from -- from -- from prescribing

1 medicines.

2 MR. ROBBINS: Correct.

3 JUSTICE GORSUCH: And -- and so, under  
4 Staples, X-Citement Video, as far back as  
5 Morissette, we would apply a mens rea. You with  
6 me so far?

7 MR. ROBBINS: Absolutely.

8 JUSTICE GORSUCH: Okay. And then the  
9 next step is what do we do about -- and you use  
10 good faith as a shorthand for that argument.

11 MR. ROBBINS: Precisely.

12 JUSTICE GORSUCH: Okay. And then 885,  
13 in -- in your view as I understand it, provides  
14 that the government doesn't have to negative all  
15 the possible exceptions that would allow someone  
16 to hold prescription drugs.

17 So, for example, there are  
18 veterinarians, there are pharmacists, there are  
19 family members who can hold drugs for loved ones  
20 under the except -- under the exceptions  
21 provided for in the statute, and the government  
22 doesn't have to plead and prove that all of  
23 those exceptions don't apply in the case at  
24 hand.

25 MR. ROBBINS: I agree with that.

1 JUSTICE GORSUCH: Okay. But what it  
2 does provide is that you have to come forward, a  
3 burden of production, it says the burden of  
4 going forward with evidence, which is often used  
5 as another shorthand for the burden of  
6 production --

7 MR. ROBBINS: Correct.

8 JUSTICE GORSUCH: -- to invoke one of  
9 those exceptions and that when you do, then the  
10 government has the burden of proving all the  
11 elements of the crime --

12 MR. ROBBINS: Yes.

13 JUSTICE GORSUCH: -- and that one of  
14 those elements is mens rea.

15 MR. ROBBINS: I agree with all of  
16 that.

17 JUSTICE GORSUCH: Okay. All right.  
18 Thank you.

19 MR. ROBBINS: But, if I may, if that's  
20 all correct --

21 JUSTICE GORSUCH: Be careful.

22 (Laughter.)

23 MR. ROBBINS: I -- I understand. But  
24 I -- I just feel, since I actually --

25 JUSTICE SOTOMAYOR: You were just

1 helped, counselor.

2 JUSTICE THOMAS: Yeah.

3 MR. ROBBINS: Since -- since I have an  
4 individual client, I feel I ought to add that if  
5 all of those propositions are true, Justice  
6 Gorsuch, we get a new trial.

7 JUSTICE GORSUCH: Fair enough.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh?

10 Justice Barrett?

11 JUSTICE BARRETT: I do have one  
12 question. So, counsel, am I right that no  
13 circuit has adopted the test that you're  
14 proposing, this good-faith shorthand?

15 As I understand it, there's a spot in  
16 your brief where you say that the Seventh,  
17 First, and maybe Fourth Circuits, if I remember  
18 the circuits correctly, have adopted a  
19 subjective test that you say is substantially  
20 similar, but they don't say good faith; they use  
21 the "intentionally" formulation.

22 So what is the difference? And if we  
23 agree with you, why would we say good faith  
24 rather than just sticking closer to the  
25 language?

1           MR. ROBBINS: Well, good -- good faith  
2 is regularly used in the circuits. I certainly  
3 agree with Justice Alito that it isn't in so  
4 many words in the statute.

5           It is captured in the First, Seventh,  
6 and Ninth Circuit standard that the --

7           JUSTICE BARRETT: But they don't say  
8 good faith, am I right?

9           MR. ROBBINS: Well, they actually --  
10 they do use the words "good faith" if you read  
11 some of the cases, but they also say that what  
12 the jury must be told is that the government  
13 must prove beyond a reasonable doubt that the  
14 doctor knowingly and intentionally lacked a  
15 good-faith medical purpose and knowingly --

16           JUSTICE BARRETT: I thought legitimate  
17 medical purpose?

18           MR. ROBBINS: Yes.

19           JUSTICE BARRETT: So you're -- but --  
20 but -- but you're putting good faith into the  
21 formulation?

22           MR. ROBBINS: Yes, but that's simply a  
23 shorthand for knowingly and intentionally  
24 departing --

25           JUSTICE BARRETT: So there's no

1 significance in your mind from -- departing from  
2 that "knowingly and intentionally legitimate  
3 medical purpose" language and your good-faith  
4 formulation?

5 MR. ROBBINS: Correct.

6 JUSTICE BARRETT: So why do you use  
7 that instead?

8 MR. ROBBINS: Because courts seem to  
9 do it all the time, and --

10 JUSTICE BARRETT: But not the First,  
11 Seventh, and Ninth?

12 MR. ROBBINS: Well, I think, if --  
13 Your Honor, respectfully, if you read their  
14 cases, you'll find "good faith" used  
15 interchangeably.

16 JUSTICE BARRETT: But not in the  
17 instruction. I mean, you did say in your brief  
18 that they don't use that formulation in so many  
19 words, that they use the subjective intent  
20 formulation, and you described it as  
21 substantially similar.

22 MR. ROBBINS: Correct.

23 JUSTICE BARRETT: So I'm taking you at  
24 your word and that description in your brief and  
25 I'm asking you substantially similar, is there

1 any respect in which it's different and what  
2 would be the downside -- if we agree with you,  
3 what would be the downside of just using the  
4 formulation these other circuits have?

5 MR. ROBBINS: There would be no  
6 downside, and they were interchangeable, and we  
7 would be delighted if that were the result of  
8 this decision.

9 JUSTICE BARRETT: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 MR. ROBBINS: Thank you.

13 CHIEF JUSTICE ROBERTS: Oh, I'm sorry.

14 JUSTICE BREYER: It's not --

15 CHIEF JUSTICE ROBERTS: Justice  
16 Breyer.

17 I'm sorry, Mr. Robbins, Justice Breyer  
18 had a question.

19 JUSTICE BREYER: It's just that I had  
20 a different English teacher --

21 MR. ROBBINS: I'm sorry, Your Honor.

22 JUSTICE BREYER: -- Ms. Chichester. I  
23 had a different English teacher, Ms. Chichester,  
24 who told us an adverb could modify a verb, an  
25 adjective, or another adverb. And as long as

1 that's so, the teacher says to the class, Class,  
2 I don't want you to refer to Basingstoke's book  
3 about Julius Caesar unless we're talking about  
4 the Gallic wars or something, and I -- but,  
5 purposely, I don't want you purposely to do  
6 that. I don't want you purposely or knowingly  
7 to talk about Basingstoke's book about the  
8 Gallic wars unless we're talking about the  
9 Gallic wars.

10 I guess that "knowingly" applies,  
11 doesn't it, to the "unless" clause?

12 MR. ROBBINS: I -- I should think so.

13 JUSTICE BREYER: Yeah. And if you put  
14 the "unless" clause first, it applies too,  
15 doesn't it?

16 MR. ROBBINS: No doubt.

17 JUSTICE BREYER: All right. I'm  
18 really not asking you this question. I'm asking  
19 Mr. Feigin --

20 MR. ROBBINS: And -- and let me just  
21 say --

22 JUSTICE BREYER: -- if he chooses to.

23 MR. ROBBINS: -- for -- for -- lest I  
24 let -- leave -- leave the point unsaid --

25 JUSTICE BREYER: Yes. You would have

1       been good in Ms. Chichester's class.

2                   MR. ROBBINS:   Yes.   That, you know,  
3       if -- if push really came to shove, I would  
4       recur to the point that this Court made in  
5       X-Citement Video and I believe in Rehaif as well  
6       that even when it's not the most grammatically  
7       satisfying solution, the presumption that  
8       scienter extends to any element that separates  
9       wrongful from innocent conduct still obtains.

10                   With that, I thank the Court.

11                   CHIEF JUSTICE ROBERTS:   Thank you,  
12       counsel.

13                   Mr. Brindley.

14                   ORAL ARGUMENT OF BEAU B. BRINDLEY  
15                   ON BEHALF OF THE PETITIONER IN 21-5261

16                   MR. BRINDLEY:   Thank you, Mr. Chief  
17       Justice, and may it please the Court:

18                   In Gonzales versus Oregon, this Court  
19       found that as applied to doctors, the purpose of  
20       the CSA was only to prohibit the use of  
21       prescriptions to engage in drug trafficking as  
22       conventionally understood.

23                   If it is sufficient to find only that  
24       a doctor acted outside the usual course of  
25       practice without reference to the purpose of the

1 prescription, then doctors can be convicted for  
2 failing to follow medical norms even if they  
3 prescribe for -- never prescribed for an  
4 illegitimate reason.

5 This allows conviction of doctors who  
6 misapprehend the extent of their obligations but  
7 are not drug dealing as conventionally  
8 understood.

9 There are myriad mechanisms for  
10 protecting patients from doctors who violate the  
11 standard of care in various ways. That is not  
12 the function of Section 841.

13 The question under 841 is not whether  
14 a doctor was a bad doctor but whether he was a  
15 drug dealer. Thus, under 841, any good faith  
16 definition must be based solely on the sincerity  
17 of the doctor's purpose in writing the  
18 prescription.

19 And, with that, I welcome the  
20 questions of the Court.

21 CHIEF JUSTICE ROBERTS: Counsel, you  
22 refer to the good faith definition, and I  
23 understand your friend on the other side to be  
24 arguing that reduces to an idiosyncratic view of  
25 what the law ought to be.

1                   And I guess I don't know -- well, do  
2                   you agree with that? Is that what you're really  
3                   asking for, his own personal definition of what  
4                   the normal medical course of practice or  
5                   whatever is?

6                   MR. BRINDLEY: No, absolutely not,  
7                   Chief Justice Roberts, I am not.

8                   What we are asking for is that the  
9                   question of whether -- what the usual course of  
10                  professional practice is, that is an objective  
11                  question that will be answered by the  
12                  presentation of evidence and facts regarding  
13                  what the standards are.

14                  And then the question of what the  
15                  doctor's intent was is the next question. Did  
16                  the doctor intend to write the prescription  
17                  without a legitimate medical purpose? But  
18                  whether or not the prescription served a  
19                  legitimate medical purpose is an objective  
20                  question.

21                  So we are not suggesting that somehow  
22                  he can create for himself the definition of  
23                  medical practice. Objective evidence will  
24                  decide the definition of medical practice.

25                  CHIEF JUSTICE ROBERTS: Is -- is there

1 objective evidence out there, like in -- in  
2 terms of pain management prescriptions, they  
3 should be this, you know, whatever, this much a  
4 month or you should be sure not to go over this  
5 or whatever?

6 MR. BRINDLEY: There are guideposts  
7 that are provided by various state medical  
8 boards that would come into evidence. There's  
9 expert testimony that's always been admitted in  
10 all of these cases, in -- in mine and -- and  
11 Dr. Ruan's case both, and that expert testimony  
12 talks about what the standards are and the  
13 deviation from those standards that is observed.

14 And it allows the jury to decide those  
15 things --

16 CHIEF JUSTICE ROBERTS: So he  
17 presumably is charged with knowledge of that,  
18 right, just as he's charged with knowledge in my  
19 earlier discussion that the speed limit is 55,  
20 whether he really thought it was 70 or not,  
21 because ignorance of the law is no excuse. And  
22 those -- those objective standards presumably  
23 set some standard of -- of -- of law and for  
24 what constitute usual course or whatever.

25 MR. BRINDLEY: I don't agree that

1 that's a question of law. Those are questions  
2 of fact. If there is perhaps some --

3 CHIEF JUSTICE ROBERTS: Well, that's  
4 -- now you're talking about him saying, I think  
5 -- I think the speed limit ought to be 70. In  
6 other words, if there's some, whatever you look  
7 to, publication or whatever that says the number  
8 for prescriptions per, you know, month or  
9 whatever is 200, you shouldn't go over 200, it  
10 -- it -- it -- your -- your client would not be  
11 entitled to an instruction that, well, if you  
12 think it ought to be 400, then you're operating  
13 in good faith?

14 MR. BRINDLEY: And we're not  
15 suggesting that he would get an instruction that  
16 says that. What we're suggesting is the doctor  
17 must be required to -- the government must be  
18 required to prove that he didn't have a  
19 legitimate purpose for the prescription that he  
20 wrote. That's what is decisive here.

21 With respect to a regulation like  
22 speeding, I just don't think that's the same  
23 category of situation as when we're talking  
24 about 20 and life sentences potentially and in  
25 which there needs to be a -- a principle of

1       scienter applied and would --

2                   JUSTICE KAVANAUGH:   And, here, the --  
3       to follow up on the Chief Justice's question,  
4       the legal question is folded into the elements  
5       of the offense, except as authorized, right?  So  
6       that, like in Rehaif, like in Liparota --

7                   MR. BRINDLEY:   Yes.

8                   JUSTICE KAVANAUGH:   -- folds a -- what  
9       otherwise might in the abstract be thought of as  
10      a legal question into the offense.  At least  
11      that's how I understood your argument.

12                  MR. BRINDLEY:   And that's exactly  
13      right.  We think this is the precise same  
14      situation as that which existed in Rehaif, where  
15      there may be a corollary legal question, but it  
16      becomes part of the --

17                  JUSTICE KAVANAUGH:   And the way this  
18      --

19                  MR. BRINDLEY:   -- elements of the  
20      offense.

21                  JUSTICE KAVANAUGH:   -- and the way  
22      this plays out -- tell me if I'm wrong -- is  
23      there's objective evidence -- there's evidence  
24      about what the objective standards are for  
25      medical practice, and those will come in, and

1 then there will be a determination of that.

2 And the doctor may have violated that  
3 objective standard but might have legitimately  
4 thought that the standard was somewhat different  
5 and, therefore, in those circumstances should  
6 not be sent away for 20 years to prison, right?

7 MR. BRINDLEY: That is --

8 JUSTICE KAVANAUGH: That's your --

9 MR. BRINDLEY: -- absolutely right,  
10 Justice Kavanaugh.

11 JUSTICE KAVANAUGH: And -- and your  
12 further thought is, if the doctor comes in with  
13 some outlandish theory about what he or she  
14 subjectively believed, the jury will almost  
15 certainly disbelieve the doctor's testimony  
16 that, oh, I actually thought there was some kind  
17 of outlandish idea that was a legitimate medical  
18 purpose?

19 MR. BRINDLEY: Yes. Absolutely.  
20 That's absolutely correct. We're more --

21 JUSTICE ALITO: But what if the jury  
22 doesn't disbelieve it? What if the doctor  
23 really sincerely thinks that a practice that is  
24 objectively outlandish is an authorized -- is  
25 the legitimate practice of medicine? He's

1 absolutely sincere about it.

2 MR. BRINDLEY: Well, what's going --

3 JUSTICE ALITO: In your view, that --  
4 that doctor must be acquitted, right?

5 MR. BRINDLEY: Yes, because that  
6 doctor is not drug trafficking as conventionally  
7 understood. Section 841 is not meant to police  
8 whether he's following norms or whether he has a  
9 crazy idea. It's meant to police drug tacking  
10 as --

11 JUSTICE ALITO: But what if the --

12 MR. BRINDLEY: -- trafficking as  
13 conventionally understood.

14 JUSTICE ALITO: -- I mean, what if the  
15 doctor legitimately believes that legitimate  
16 medical practice encompasses giving people who  
17 are dependent on drugs the drugs they need to  
18 satisfy that dependency? That's what the doctor  
19 really thinks deep down. Put the person under  
20 truth serum and that's what the doctor thinks.

21 The doctor has to be acquitted in your  
22 view?

23 MR. BRINDLEY: The -- if the jury  
24 believes that he's sincere and in his belief  
25 that that's a legitimate purpose, I think that

1 is true. But I don't think that's very likely  
2 to occur when all the objective evidence comes  
3 in saying that's wrong.

4 JUSTICE ALITO: No, it's not likely,  
5 but that's what your interpretation means.

6 MR. BRINDLEY: Well --

7 JUSTICE GORSUCH: Why would that be  
8 the case, counsel? If -- if the evidence is  
9 that legitimate medical practice does not  
10 include the kind of behavior of your client in  
11 this case, let's just suppose, all right, and --  
12 and that the jury could infer that your client  
13 knew that, he would be guilty, even if he had  
14 some idiosyncratic views about what medical  
15 practice should look like, right?

16 MR. BRINDLEY: I would agree with  
17 that, yes.

18 JUSTICE GORSUCH: Okay.

19 MR. BRINDLEY: I certainly would agree  
20 with that.

21 JUSTICE KAVANAUGH: Uh --

22 MR. BRINDLEY: I think the -- the risk  
23 -- I'm sorry.

24 JUSTICE KAVANAUGH: Go ahead.

25 MR. BRINDLEY: I was going to say I

1 think the risk here is -- is twofold. On the  
2 one hand, worrying about these extreme examples  
3 that are not going to come to fruition fails to  
4 take into account the terrible chilling effect  
5 that's coming and we see in the amicus briefs  
6 from the result of -- of having what turns out  
7 to be medical norms policed.

8           And I -- I think that raises the real  
9 risk that the DEA becomes a de facto national  
10 medical board that's never been authorized.

11           JUSTICE KAVANAUGH: On the  
12 hypotheticals, to pick up on the Chief Justice's  
13 hypotheticals, the speeding example, suppose  
14 there were a statute that regulated speeding  
15 that, like this statute, folded the legal  
16 requirements into the offense, okay?

17           If you come in and you -- you're going  
18 35 in a 25 zone, and you say, oh, I thought it  
19 was 35 here, maybe a jury will believe that you  
20 really did think it was 35, not 25.

21           But, if you're driving, you know, a  
22 hundred in a 25 zone and you come in, oh, I  
23 thought it was actually a hundred, was the speed  
24 limit, no one's going to believe that. Isn't  
25 that the way to separate out the -- the -- the

1 outlandish example?

2 MR. BRINDLEY: Absolutely, yes.

3 That's precisely what I'm saying. Yes.

4 CHIEF JUSTICE ROBERTS: Yeah, but  
5 that's -- you don't get to say you have a  
6 good-faith belief that it was 35, right? I  
7 mean, I'm putting aside the regulatory, you  
8 know, aspect, which I fully appreciate, but  
9 normally you don't get to think that. No matter  
10 how sincere you are, you still get the ticket.

11 MR. BRINDLEY: Depending on how the  
12 statute is written. But, if -- if the -- the  
13 thing that separates wrongful conduct within the  
14 statute and within the elements of the offense  
15 involves a corollary question of law or  
16 collateral question -- question of law, then,  
17 yes, you get a good-faith defense with respect  
18 to that.

19 If you don't know that or sincerely  
20 don't believe it, then you're not guilty, but  
21 all of the objective evidence comes in, and if  
22 it says that your position is crazy, you're  
23 going to get convicted. That's the reality.

24 JUSTICE BARRETT: But I think the  
25 Chief Justice -- so would -- would this be a

1 closer analogue to your example, to pick up on  
2 the Chief Justice's hypothetical? Except as  
3 authorized by law, you must drive under 55 miles  
4 per hour. And you say, well, I thought I was --  
5 I thought I was driving in a way that was  
6 authorized by law at a hundred miles an hour  
7 because I was trying to get my child to the  
8 emergency room. And it turns out that you're  
9 wrong, that that's not an authorized, you know,  
10 exceeding of the speed limit.

11 Is -- is that what you're trying to  
12 get at? That -- that presence of the "except as  
13 authorized by law" is what distinguishes the  
14 Chief Justice's hypotheticals from your  
15 position?

16 MR. BRINDLEY: I think somewhat that's  
17 true to some extent. What I would say is that  
18 the thing that differentiates the -- the Chief  
19 Justice's hypothetical from our position is, in  
20 this situation, we have a -- a situation where  
21 the very thing that makes the doctor's -- the  
22 only thing that makes the doctor's writing the  
23 prescription improper or criminal is if he  
24 writes it with no legitimate purpose, not  
25 believing he's curing a malady of any kind.

1                   And so, with respect to that, if he's  
2                   sincerely wrong about that, he lacks a culpable  
3                   state of mind and he should not be convicted.

4                   JUSTICE KAVANAUGH: In Justice  
5                   Barrett's hypothetical, if the statute says  
6                   "except as authorized" and you sincerely believe  
7                   you're authorized to drive a hundred to get your  
8                   child to the hospital, you should be acquitted,  
9                   right?

10                  MR. BRINDLEY: Yes, if you can  
11                  convince people it's true --

12                  JUSTICE KAVANAUGH: If you -- yeah.

13                  MR. BRINDLEY: -- but you're going to  
14                  have a hard time.

15                  JUSTICE KAVANAUGH: Yeah. You might  
16                  have a hard time if -- if there's --

17                  MR. BRINDLEY: Right.

18                  JUSTICE KAVANAUGH: Right.

19                  MR. BRINDLEY: Absolutely would.

20                  JUSTICE KAVANAUGH: If -- if the child  
21                  in the car -- if the child wasn't injured.

22                  MR. BRINDLEY: Yes.

23                  CHIEF JUSTICE ROBERTS: Justice  
24                  Thomas, anything further?

25                  Justice Breyer? No?

1 Justice Kavanaugh, anything further?

2 Thank you, counsel.

3 MR. BRINDLEY: Thank you, Mr. Chief  
4 Justice.

5 CHIEF JUSTICE ROBERTS: Mr. Feigin.

6 ORAL ARGUMENT OF ERIC J. FEIGIN

7 ON BEHALF OF THE RESPONDENT

8 MR. FEIGIN: Thank you, Mr. Chief  
9 Justice, and may it please the Court:

10 Although Petitioners are trying to  
11 disclaim it as much as they can, they really are  
12 asking this Court to transform their DEA  
13 registrations, which are premised on the idea  
14 that they're actually practicing medicine, into  
15 licenses to, at their own subjective views,  
16 violate the general rule that drug pushing is  
17 illegal.

18 They want to be free of any obligation  
19 even to undertake any minimal effort to act like  
20 doctors when they prescribe dangerous, highly  
21 addictive, and, in one case, lethal dosages of  
22 drugs to trusting and vulnerable patients.

23 That's not what this Court said in  
24 Moore, where I think everyone agrees the Court  
25 implicitly adopted the jury instructions in that

1 case, which distilled the statutory and  
2 regulatory requirements here to come up with an  
3 honest effort standard.

4 If a doctor is trying, in Moore's  
5 words, "to act as a physician," he can't be  
6 convicted under Section 841. But a doctor can't  
7 choose to be the kind of doctor who seeks a DEA  
8 registration because he wants to deal with the  
9 most dangerous drugs that we have with a  
10 recognized medical use and then decide that,  
11 notwithstanding the boundaries of that license,  
12 he can invoke it to shield all drug dealing that  
13 he's running in the guise of a doctor's office.

14 There's been some suggestion today  
15 that applying a knowledge standard, you know,  
16 what's the difference? It's all oblique, these  
17 are very oblique examples, and it's never going  
18 to matter in practice. And I'd like to -- if I  
19 get a chance later, to explain exactly why that  
20 is -- why this isn't just a matter of -- of  
21 hypotheticals.

22 I think there -- I can give you three  
23 examples, we have more, but three examples of  
24 cases, and these are admittedly stylized a bit,  
25 but they're based in reality of -- of why this

1 really matters on the ground.

2           Number one would just be the  
3 irrationally egotistical doctor, and these are  
4 the kinds of cases we have trouble even  
5 bringing, let alone convicting a doctor. It's a  
6 doctor who gets his license and his registration  
7 and he says, all right, you know, I've -- I -- I  
8 think, at bottom, the Hippocratic oath, I just  
9 want to treat patients. And he prescribes  
10 substances that are -- any other doctor would  
11 say are crazy and lethal. And he says, at  
12 bottom, we're all doctors, and my subjective  
13 belief is, at the end of the day, if any -- if  
14 doctors see patients, they got to do right by  
15 those patients. And that's number one.

16           Number two would be the absentee  
17 doctor, and one problem with their standard is  
18 it really rewards doctors for untethering  
19 themselves not only from the medical profession  
20 but from their patients. It's the kind of  
21 doctor, and I think you'll see some resemblances  
22 to the doctors here, who doesn't follow up on  
23 the background of his patients, doesn't make  
24 sure they're taking the medications, doesn't  
25 even conduct physical exams, doesn't check the

1 database to see who else is prescribing opioids,  
2 and trusts nurse practitioners, who aren't DEA  
3 registrants, aren't allowed to do this, don't  
4 have medical licenses, to do most of the  
5 prescribing. And then, when --

6 CHIEF JUSTICE ROBERTS: Counsel, it --

7 MR. FEIGIN: Yeah.

8 CHIEF JUSTICE ROBERTS: -- it seems to  
9 me that -- and the last minute or so sort of  
10 confirms it -- you're -- you're arguing evidence  
11 in a case that's about legal standards.

12 MR. FEIGIN: Oh --

13 CHIEF JUSTICE ROBERTS: You're saying  
14 this is outrageous, they're doing all this, he  
15 doesn't care, we're worried about doctors. What  
16 -- but what is it in the statute that separates  
17 innocent conduct from unlawful conduct?

18 MR. FEIGIN: Your Honor, I'm happy to  
19 -- I'm happy to argue the law. I just wanted to  
20 respond to the suggestion that this -- this  
21 doesn't really matter in the real world. I'm  
22 very happy to argue the law.

23 First of all, Your Honor,  
24 grammatically, I think as Justice Alito was  
25 pointing out with -- I'd like to address

1 Ms. Chichester in a second, but you can't have  
2 the knowing or intentionally mens rea kind of  
3 leap backward. I think counsel has not found  
4 any case that suggests --

5 CHIEF JUSTICE ROBERTS: I can't  
6 remember my grammar teacher's name, but let's  
7 put that aside.

8 (Laughter.)

9 MR. FEIGIN: Putting the grammar  
10 aside, Your Honor, even if there were any  
11 ambiguity about whether that particular mens rea  
12 applies, I think it's put to rest by  
13 Section 885(a), which clearly suggests that --  
14 not just suggests but states that Congress  
15 expected that this was not an offense element.

16 And because it's not an offense  
17 element, it's not the type of thing to which  
18 this Court has traditionally even --

19 CHIEF JUSTICE ROBERTS: So you think  
20 the government -- it -- it would be all right if  
21 the government did not have the burden of proof  
22 on any of the elements here?

23 MR. FEIGIN: So, Your Honor, we do  
24 agree with Petitioners that the ultimate burden  
25 of proof, once the burden of persuasion is

1 satisfied, is on the government. I think where  
2 -- but I think that 885 --

3 CHIEF JUSTICE ROBERTS: Once the  
4 burden of persuasion is satisfied?

5 MR. FEIGIN: I'm sorry.

6 CHIEF JUSTICE ROBERTS: Presentation  
7 --

8 MR. FEIGIN: Once the burden of  
9 production --

10 CHIEF JUSTICE ROBERTS: Yeah.

11 MR. FEIGIN: -- is satisfied. I  
12 misspoke. Thank you, Your Honor. Once the  
13 burden of production is satisfied, the burden of  
14 proof, the burden of persuasion is on the  
15 government.

16 JUSTICE SOTOMAYOR: Mr. Feigin, just  
17 articulate what that is. I don't mean to cut  
18 off the Chief, but I still don't know what you  
19 -- you understand your ultimate burden to be.

20 MR. FEIGIN: So, Your Honor, we place  
21 our burden exactly where Moore did, which is an  
22 honest effort, which we interpret as some  
23 objectively minimal -- minimal, reasonable  
24 effort to practice some recognizable form of  
25 medicine, which neither the doctor in --

1 JUSTICE SOTOMAYOR: I -- I'm sorry.  
2 You said to the Chief that after you've put  
3 forth an exemption, what's your ultimate burden?  
4 Meaning what do you --

5 MR. FEIGIN: Our ultimate burden --

6 JUSTICE SOTOMAYOR: -- have to prove  
7 to the jury?

8 MR. FEIGIN: -- is to prove beyond a  
9 reasonable doubt that the defendant was not even  
10 attempting to recognizably practice medicine,  
11 and --

12 JUSTICE SOTOMAYOR: Put that in --  
13 give me a jury charge.

14 MR. FEIGIN: Well, Your Honor, I think  
15 the jury --

16 JUSTICE SOTOMAYOR: Tell me the exact  
17 words.

18 MR. FEIGIN: I would -- I would point  
19 the Court precisely to the jury charge that was  
20 given in Moore, which was largely reiterated in  
21 Petitioner Kahn's case. I mean, I can read to  
22 you the jury instruction in -- in Moore. I  
23 don't recall the specific page number off the  
24 top of my head, but we think that is an adequate  
25 instruction, plus the honest effort instruction

1 that the Court notes in Footnote 20.

2 We're fine with the language being  
3 framed as good faith. We're fine with our  
4 having the burden to prove it. But what --  
5 because this isn't an offense element, I think  
6 the mens rea presumption that this Court  
7 typically applies is at least applicable here  
8 only in muted form.

9 JUSTICE BREYER: Well, why isn't it --

10 JUSTICE KAVANAUGH: Why?

11 JUSTICE BREYER: -- why isn't it an  
12 offense element? I mean, as I read the statute,  
13 it says it is an element, manufacture,  
14 distribute, or dispense, one of those three, a  
15 controlled substance, that's an element, and no  
16 authorization. That's the first element.

17 So why isn't it an element? And, of  
18 course, if it is an element, I used Ms.  
19 Chichester as a joke because I want to make a  
20 point, and I'll make the point without the joke  
21 in a second.

22 MR. FEIGIN: Well, Your Honor, I think  
23 the grammar point has been well -- well made,  
24 and --

25 JUSTICE BREYER: All right. If you

1 want the grammar point too --

2 MR. FEIGIN: And I think --

3 JUSTICE BREYER: -- I mean --

4 MR. FEIGIN: -- the other reason --

5 JUSTICE BREYER: -- first thing is,  
6 why isn't it an element?

7 MR. FEIGIN: The other reason it's not  
8 an offense element is --

9 JUSTICE BREYER: Is what?

10 MR. FEIGIN: -- I think it is clear as  
11 day that the government does not need to include  
12 it in an indictment.

13 JUSTICE BREYER: Yeah.

14 MR. FEIGIN: And an element --

15 JUSTICE BREYER: You think you have an  
16 element --

17 MR. FEIGIN: -- you would have to --

18 JUSTICE BREYER: -- in the Steele case  
19 --

20 MR. FEIGIN: -- include in -- in an  
21 indictment.

22 JUSTICE BREYER: -- where the -- the  
23 -- the -- in the United States Code, where the  
24 burden of production for the element, the  
25 non-existence thereof, is on the defendant, and

1 once it's there produced, the government has to  
2 prove beyond a reasonable doubt.

3 Now I -- I -- I mean, I don't know why  
4 you wouldn't call that an element, but maybe  
5 there's somebody somewhere who said it isn't an  
6 element. Where?

7 MR. FEIGIN: Well, Your Honor, that is  
8 actually -- something that works like that is  
9 traditionally recognized as a form of  
10 affirmative defense.

11 JUSTICE BREYER: Fine.

12 MR. FEIGIN: So you -- you'll see --

13 JUSTICE BREYER: It's an affirmative  
14 defense. And why isn't it? Once it's produced,  
15 all I want -- you might -- I'm not an expert.  
16 You might find 50 treatises who said, if it's  
17 something that the production has to be on the  
18 defendant and it is produced, after that, it's  
19 not an element, okay?

20 Just cite me to that, and I will go  
21 read it with care.

22 MR. FEIGIN: Your Honor, I -- I don't  
23 think I'm going to be able to satisfy you with  
24 quite that level of --

25 JUSTICE BREYER: Okay. Then let's go

1 to --

2 JUSTICE ALITO: I mean, isn't it --

3 JUSTICE BREYER: -- the grammar point.

4 MR. FEIGIN: -- specificity.

5 JUSTICE ALITO: -- isn't it

6 blackletter --

7 JUSTICE BREYER: The grammar point is  
8 simply this: The grammar point -- and I don't  
9 have to use my comical example -- but it's  
10 terribly easy to think of a teacher in front of  
11 a class who says to the class something like: I  
12 don't want anyone deliberately or purposely to  
13 refer to -- make up an example -- to refer to  
14 Basingstoke's book about Italy unless we're  
15 talking about the Punic wars, okay?

16 Now the kid thinks they're talking  
17 about the Punic wars, all right? Hasn't  
18 violated the rule, I would think. Now just move  
19 the "unless" clause to the first part of the  
20 sentence, and I don't think -- I can't imagine  
21 it making any difference.

22 So I don't really see the difference  
23 between the "except" clause being at the  
24 beginning of the sentence or at the end of the  
25 sentence. There, I can't see it at all. But I

1 can see your argument about it not being an  
2 element because there I am certainly not an  
3 expert, and -- and -- and if you -- if there's  
4 some authority for that, I -- I would be more  
5 than delighted to read it and think about it.

6 MR. FEIGIN: Well, Your Honor, I would  
7 encourage you to look at, for example,  
8 self-defense statutes in the states which have  
9 been interpreted to work this way and are  
10 categorized as affirmative defenses.

11 This is how Indian status is  
12 determined under Section 1152. It's the burden  
13 of production on the defendant and then the  
14 ultimate burden of proof on the government.

15 I think it can't be an offense element  
16 because it's not included in the indictment.

17 JUSTICE KAVANAUGH: You --

18 MR. FEIGIN: And I don't -- I think  
19 the way this shakes out with the history and as  
20 this Court recognized in Moore, in part 3 of  
21 Moore, which speaks purely in objective terms,  
22 including in citing the honest effort standard  
23 and using it in reviewing the sufficiency of the  
24 evidence --

25 JUSTICE KAVANAUGH: Why don't we look

1 at Morissette, though? Does -- I mean, that's  
2 the classic case and one of the most important  
3 cases in this area, the most important in this  
4 area. And the defendant there is deer hunting  
5 in an abandoned -- in property in rural  
6 Michigan, comes across these shell casings and  
7 he takes the shell casings and he was not  
8 authorized to do that, right? Not authorized to  
9 do that, as Justice Jackson says.

10 But he thought he was authorized to do  
11 that because he thought they were abandoned,  
12 right? Isn't that very analogous to this  
13 situation, not a legitimate medical purpose as  
14 objectively proved, but he thought there was a  
15 legitimate medical purpose?

16 In Morissette, not authorized to take  
17 the shell casings because they weren't  
18 abandoned, but Justice Jackson at great length  
19 and in eloquent terms says that's critical to  
20 separate someone who's truly innocent and not  
21 deserving of criminal punishment from someone  
22 who is, namely, to require the government to  
23 prove that he knew that he was not authorized to  
24 take those shell casings.

25 Why isn't that just right -- right on

1 here?

2 MR. FEIGIN: Well, let -- let me make  
3 two points in response to that, Justice  
4 Kavanaugh. One is statutory, and the other is  
5 about the mens rea presumption.

6 First, on the statutory one, I think,  
7 if you were going to select a mens rea for this,  
8 I think the last one you might pick would be  
9 knowingly or intentionally because that's the  
10 one that we know from the grammar Congress  
11 didn't apply. But -- and the statute is  
12 structured differently from the statute in  
13 Morissette.

14 But, as a question of the mens rea  
15 presumption, if the Court were inclined to think  
16 that the mens rea presumption applies, I think  
17 all the background -- first of all, 885(a), and  
18 second of all, all the background of the  
19 Harrison Act cases, which I think Mr. Robbins  
20 acknowledged, we didn't have to prove knowledge,  
21 as well as this Court's decision in Moore, which  
22 says, if anything, the CSA was meant to  
23 strengthen the Harrison Act cases, all -- plus  
24 the Court's discussion in Moore about freedom  
25 for experimentation, which the government

1 addressed in its reply brief at page 13 by  
2 pointing to the honest effort standard.

3 I think this all shakes out in a  
4 different place than it might with some other  
5 statutes. I think this is the rare type of  
6 statute where, given the grave harm that can be  
7 done to these patients, given the public, I  
8 think, as Moore recognizes, Congress drew the  
9 line at a place where it's not too much to ask a  
10 trained professional who voluntarily --

11 JUSTICE KAVANAUGH: But --

12 MR. FEIGIN: -- wants to get a --

13 JUSTICE KAVANAUGH: -- but why not  
14 have -- I'm sorry to interrupt.

15 MR. FEIGIN: Yeah.

16 JUSTICE KAVANAUGH: But the -- the  
17 problem here at the core, as I see it, is the  
18 statute says "except as authorized" and then the  
19 regs say "legitimate medical purpose."

20 Well, that's very vague language in my  
21 estimation, and reasonable people can disagree.  
22 Write more specific regs if you're -- if you  
23 have the problem that you're talking about.

24 But "legitimate medical purpose" is a  
25 very vague thing on which reasonable people can

1 disagree. Now you're positing hypotheticals  
2 where unreasonable doctors and I think juries  
3 won't believe them in those circumstances  
4 sometimes, but -- but write a more specific reg  
5 would be one answer.

6 MR. FEIGIN: Well, I -- I think it's  
7 more difficult than you're supposing in reality,  
8 Justice Kavanaugh.

9 JUSTICE KAVANAUGH: I -- I -- I'm  
10 certain it is. I -- I -- I acknowledge that. I  
11 acknowledge that. But -- but "legitimate  
12 medical purpose," don't you agree that's a  
13 somewhat vague term?

14 MR. FEIGIN: No, I don't, Your Honor.

15 First of all, as Justice Scalia  
16 pointed out in dissent in Gonzales against  
17 Oregon, but the majority didn't disagree with  
18 him on it, it's an objective standard.

19 And if I may be permitted to borrow a  
20 phrase from then Judge Gorsuch's decision in  
21 Laverne, it can be proved the old-fashioned way.

22 JUSTICE GORSUCH: Be careful.

23 MR. FEIGIN: I hope that was careful  
24 enough, Justice --

25 JUSTICE GORSUCH: I give you the same

1 admonition as I -- as I gave your -- your  
2 colleague.

3 I'd like to see if we can find some  
4 common ground on just the operation of the  
5 statute, putting aside the mens rea question for  
6 a moment. I understand that's -- that's the  
7 heart of the case, but just the statutory  
8 structure is kind of difficult to -- to parse,  
9 and I want to make sure I understand it.

10 We -- we agree that the government  
11 bears the burden of proof on all the elements  
12 required for conviction?

13 MR. FEIGIN: Yes, Your Honor.

14 JUSTICE GORSUCH: Okay. Okay. I --  
15 I -- I would hope we can start there.

16 MR. FEIGIN: I mean, that -- that's --

17 JUSTICE GORSUCH: Right.

18 MR. FEIGIN: -- traditionally true.

19 JUSTICE GORSUCH: Right.

20 MR. FEIGIN: Yes.

21 JUSTICE GORSUCH: Okay. And the  
22 "except" clause is an element because it's what  
23 separates lawful from unlawful conduct, right?

24 MR. FEIGIN: I think there we part  
25 ways, Your Honor.

1 JUSTICE GORSUCH: Well, do we?  
2 Because I -- I would have thought that, you  
3 know, it's not that the -- the physician is  
4 prescribing medicine. It's that he's doing it  
5 -- the question is whether he's doing it within  
6 the course of his registration or not.

7 MR. FEIGIN: Well, you're --

8 JUSTICE GORSUCH: So the government  
9 has to prove that he's not doing it within the  
10 course of his registration. What that  
11 encompasses put aside, but it has to prove that,  
12 right?

13 MR. FEIGIN: Well, yes, Your Honor.

14 JUSTICE GORSUCH: Okay.

15 MR. FEIGIN: At the end of the day,  
16 although 885(a), I think --

17 JUSTICE GORSUCH: Yeah, I'm going to  
18 get to that in a second.

19 MR. FEIGIN: -- makes it a form of --

20 JUSTICE GORSUCH: I'm going to get to  
21 that in a second.

22 MR. FEIGIN: -- affirmative defense.

23 JUSTICE GORSUCH: But you agree that  
24 the "except" clause is -- I mean, that's part of  
25 the government's burden of proof, is to show

1 that the -- that the physician did not act  
2 within the course of his registration at the end  
3 of the day?

4 MR. FEIGIN: So I think what I was --  
5 just -- just to be clear, I think what I was  
6 taking issue with in your first presentation --  
7 in -- in your first formulation was calling it  
8 an element. I agree that once the defendant  
9 puts his DEA --

10 JUSTICE GORSUCH: Yes.

11 MR. FEIGIN: -- registration at issue,  
12 the ultimate burden of proof is on the  
13 government.

14 JUSTICE GORSUCH: Okay. All right.

15 MR. FEIGIN: I agree with that, yes.

16 JUSTICE GORSUCH: Okay. And,  
17 normally, the government has an obligation to  
18 negative all exceptions when it pleads and  
19 proves its case. That's normally the case.

20 MR. FEIGIN: I don't know that that's  
21 true actually, Your Honor.

22 JUSTICE GORSUCH: How about often?

23 MR. FEIGIN: I think it is sometimes  
24 true.

25 JUSTICE GORSUCH: Sometimes. Okay.

1 MR. FEIGIN: It's context-dependent.

2 JUSTICE GORSUCH: Sometimes. That's  
3 good enough.

4 And in 885, Congress recognized there  
5 are a whole lot of exceptions in this statute,  
6 right, for not just doctors but for pharmacists,  
7 for veterinarians, for owners of pets, for  
8 family members, and so it's -- it recognized  
9 that to plead and prove all of that for the  
10 government would be very difficult in 885.

11 Do we agree on that?

12 MR. FEIGIN: Yes.

13 JUSTICE GORSUCH: Okay. And so the  
14 burden of production, therefore, is incumbent  
15 upon those asserting one of the exceptions to  
16 come forward with evidence, and that's a burden  
17 of production.

18 Do we agree on that?

19 MR. FEIGIN: Yes.

20 JUSTICE GORSUCH: Okay. And then,  
21 once the -- and I think this is where you're  
22 trying to leap forward to. Once -- once the  
23 doctor comes forward with evidence suggesting  
24 that he is within the course of the exception,  
25 his actions are within the course of the

1 exception, the government still bear -- bears  
2 the final burden of proving that he was not?

3 MR. FEIGIN: Yes.

4 JUSTICE GORSUCH: Okay. And so the  
5 only question really is whether that "except"  
6 element bears a mens rea or not, and that's  
7 really the nub of the issue before us?

8 MR. FEIGIN: Again, Your Honor, I -- I  
9 -- I wouldn't call it an element, but I don't  
10 dispute your formulation. And I think where --  
11 as I was discussing with Justice Kavanaugh, I  
12 think where the mens rea element shakes out --  
13 and I think there are two places you could get  
14 it -- is at the honest effort standard, which we  
15 -- courts have interpreted as an objective  
16 standard, and we think rightly so, that this  
17 Court set up in Moore.

18 One is the mens rea presumption. As I  
19 was just saying, I do think this is the type of  
20 case particularly because it is pitched as an  
21 affirmative defense and we're dealing with  
22 trained professionals who voluntarily choose to  
23 work with dangerous substances with vulnerable  
24 patients, that the idea of some objective  
25 manifestation of at least an attempt to practice

1 some recognizable form of medicine is where the  
2 standard should land if you're -- want to go  
3 with the mens rea presumption.

4 But where I actually think Moore got  
5 it -- and I think this actually may go, Justice  
6 Thomas, to some of the questions you were asking  
7 Mr. Robbins at the beginning of his argument --  
8 is the legitimate medical purpose standard that  
9 is in both the statute and the regulations,  
10 which I think otherwise did not have much play  
11 in the Court's opinion in Moore and the Court  
12 essentially translated in that context into an  
13 honest effort standard.

14 And as I was just saying, legitimate  
15 medical purpose is an objective standard. There  
16 are legitimate and illegitimate medical  
17 purposes, and the doctor has to at least be  
18 doing something that other doctors would  
19 recognize as an attempt to be practicing as a  
20 doctor before he can wave around his DEA  
21 registration as a shield --

22 JUSTICE BARRETT: Mr. Feigin?

23 MR. FEIGIN: Yeah.

24 JUSTICE BARRETT: Can I just follow up  
25 on that? So all of this really comes from -- I

1 mean, I have many of the same questions as  
2 Justice Thomas because none of this, obviously,  
3 is in the statutory language, and the  
4 authorization clause is pretty circular.

5 So it is -- it all comes down to the  
6 regulation in Moore, am I correct?

7 MR. FEIGIN: Well, I wouldn't say it  
8 all comes down to the regulation in Moore just  
9 because -- perhaps this is more circularity, and  
10 I apologize, Your Honor, but Moore itself says  
11 that the regulation and its text are grounded in  
12 the statute ultimately.

13 JUSTICE BARRETT: But in different  
14 provisions, not in the provision that he's --  
15 that these Petitioners are both accused of  
16 violating?

17 MR. FEIGIN: That's right, but -- and  
18 this may address Justice Kavanaugh's question  
19 too. I'm not entirely certain that the  
20 government would be free to adopt a  
21 substantially different regulation than the one  
22 it has adopted given the -- both the statutory  
23 language that's already in the CSA plus this  
24 Court's interpretation in Gonzales against  
25 Oregon, like it's now pellucidly clear the

1 government can't -- I mean, it -- it can, but  
2 the -- the primary thrust of the -- it can  
3 regulate medicine, but the primary thrust of the  
4 CSA is for state regulation of medicine, and  
5 that's why the standard is worded the way that  
6 it is here.

7           And I think that standard, which was  
8 the same standard in Moore, you had the same  
9 statutes in Moore, shakes out the way that Moore  
10 did where -- where what we're looking at is, is  
11 this person actually acting as a doctor?

12           And I think it's fair to say that --  
13 and this gets to your Morissette point, Justice  
14 Kavanaugh. I think it is not innocent conduct  
15 to wave around the DEA registration after the  
16 fact --

17           JUSTICE KAVANAUGH: Well, that's --

18           MR. FEIGIN: -- for conduct --

19           JUSTICE KAVANAUGH: -- that's --

20           MR. FEIGIN: -- that wasn't relying on  
21 it to begin with. I apologize. I'm sorry.

22           JUSTICE KAVANAUGH: That's exactly  
23 what Justice Jackson said about Morissette  
24 himself in the last paragraph of the opinion but  
25 talked about that that would be a jury question.

1                   But I want to go back to something you  
2                   said earlier because I think it gets at the  
3                   heart of this. You said a legitimate medical  
4                   purpose is an objective standard, correct?  
5                   Isn't there going to be expert testimony that  
6                   comes in in many cases about whether something  
7                   was a legitimate medical practice?

8                   MR. FEIGIN: Yes, and you can see that  
9                   in the record of these cases.

10                  JUSTICE KAVANAUGH: Okay. And so  
11                  you'll have people coming in on both sides, and  
12                  the jury will to have decide what was legitimate  
13                  and what was not, right?

14                  MR. FEIGIN: Yes. And -- and, Your  
15                  Honor, I don't want to just be talking about the  
16                  --

17                  JUSTICE KAVANAUGH: But here's --  
18                  here's --

19                  MR. FEIGIN: I -- I -- I --

20                  JUSTICE KAVANAUGH: Let me finish my  
21                  question --

22                  MR. FEIGIN: Sure. Sure.

23                  JUSTICE KAVANAUGH: -- on that. So --  
24                  and there are going to -- could be close calls,  
25                  right, close calls as to what the evidence shows

1 objectively was legitimate?

2 MR. FEIGIN: Yes, Your Honor, but if I  
3 may be permitted to --

4 JUSTICE KAVANAUGH: Okay. And so, if  
5 you're wrong side of the close call as the  
6 doctor who was acting before you get to the  
7 trial, if you're on the wrong side of a close  
8 call about what you believed, you go to prison  
9 for 20 years?

10 MR. FEIGIN: Well, Your Honor, I don't  
11 really think that it is -- I don't really think  
12 that's going to be the case for doctors who make  
13 innocent mistakes because, if the jury is  
14 instructed properly, and we do think the jury  
15 instructions here were proper, and at a bare  
16 minimum, counsel was able to argue without  
17 objection that this is not just a negligence  
18 standard, that a jury has to really believe that  
19 the doctor wasn't even trying to act as a  
20 doctor.

21 And it's, I think, going to be  
22 informed by the expert's testimony as to the  
23 other piece of this, which is the usual course  
24 of medical practice. If you read the entire  
25 regulation, it's -- I mean, just the first

1 sentence of it, it's prescribing for a  
2 legitimate medical purpose by an individual  
3 practitioner acting in the course of his  
4 professional practice.

5 And all the professional practice  
6 information that's going to come in is really  
7 going to inform that determination because it's  
8 the case here, as in the case of pretty much all  
9 the people we prosecute under these provisions,  
10 that what they're doing is, as these patients  
11 did -- excuse me, these doctors did, they aren't  
12 actually examining the patients or --

13 JUSTICE GORSUCH: Mr. Feigin, again --

14 MR. FEIGIN: Yeah.

15 JUSTICE GORSUCH: -- just to -- just  
16 to -- I think, to answer Justice Kavanaugh's  
17 question, is unless there's a mens rea here, the  
18 answer is yes, that in those close cases -- and  
19 I understand the government will never bring a  
20 close case. I understand that.

21 MR. FEIGIN: Never.

22 JUSTICE GORSUCH: But just -- just --  
23 just assume hypothetically it does and that the  
24 jury believes that it's not legitimate medical  
25 purpose under your regulations. Even though

1 it's an extremely close case, that individual  
2 stands, under the government's view, unable to  
3 shield himself behind any mens rea requirement  
4 and is subject to essentially a regulatory crime  
5 encompassing 20 years to maybe life in prison.

6 MR. FEIGIN: Well, Your Honor, I think  
7 -- I think it's --

8 JUSTICE GORSUCH: I think the answer  
9 has to be yes, isn't it?

10 MR. FEIGIN: Your Honor, I think the  
11 answer is going to be yes, but with a proviso  
12 that I'd just like to -- I'd just like to add.

13 JUSTICE GORSUCH: Of course.

14 MR. FEIGIN: Which is we do not think  
15 -- and this goes a little bit to what I was just  
16 saying -- that a doctor can be convicted for  
17 something that other doctors would recognize as  
18 within the --

19 JUSTICE GORSUCH: No, of course.

20 MR. FEIGIN: -- boundaries of  
21 medicine.

22 JUSTICE GORSUCH: Of course.

23 MR. FEIGIN: So there could be --

24 JUSTICE GORSUCH: It has to be -- but  
25 it's an objective test, and once the jury

1 decides it's outside the legitimate bounds of  
2 medical practice, acknowledging the standards of  
3 the profession, that individual goes to prison,  
4 straight to prison, do not pass go.

5 MR. FEIGIN: No, Your Honor, that's  
6 where the honest effort standard comes in.

7 JUSTICE GORSUCH: Oh, so there is a  
8 mens rea now?

9 MR. FEIGIN: Yes. There's an honest  
10 effort standard here. So, if the doctor was  
11 attempting to prescribe for a legitimate --

12 JUSTICE GORSUCH: Why --

13 MR. FEIGIN: -- medical purpose --

14 JUSTICE GORSUCH: -- why isn't that  
15 just knowing and intentionally then? Why -- why  
16 -- why isn't that, if there -- there either is  
17 or there isn't a mens rea here, counsel, and  
18 I'm -- I'm really struggling to understand at  
19 this stage, at this late date, standing at the  
20 podium, where the government stands on that.

21 MR. FEIGIN: So let me be --

22 JUSTICE GORSUCH: Is there a mens rea  
23 --

24 MR. FEIGIN: -- let me be as clear as  
25 I can.

1 JUSTICE GORSUCH: -- that the  
2 government --

3 MR. FEIGIN: The -- the --

4 JUSTICE GORSUCH: -- has to prove or  
5 not?

6 MR. FEIGIN: -- the standard is  
7 legitimate medical purpose. And perhaps I  
8 misspoke in answering your question, Justice  
9 Kavanaugh. You can't be convicted so long as  
10 you took an honest effort to prescribe for a  
11 legitimate medical purpose. And there can be  
12 reasonable mistakes about what legitimate  
13 medical purposes are.

14 But, at the end of the day, we think  
15 --

16 JUSTICE GORSUCH: An honest effort.  
17 See, I don't know what that means. But I do  
18 know what knowing and intentional mean.

19 MR. FEIGIN: So --

20 JUSTICE GORSUCH: And so are you  
21 saying that the -- that there has to be some  
22 form of mens rea here that the government has to  
23 prove? Yes or no?

24 MR. FEIGIN: Yes. And it is the  
25 honest --

1 JUSTICE GORSUCH: Why isn't that the  
2 end of the case?

3 MR. FEIGIN: We -- because we think  
4 the appropriate mens rea is the one that the  
5 Court applied in Moore, which is an objective  
6 honest effort standard under which the defendant  
7 has to show some --

8 JUSTICE GORSUCH: Objective honest  
9 efforts is like a -- a contradiction in terms,  
10 Mr. Feigin.

11 MR. FEIGIN: I -- I don't think so,  
12 Your Honor. For example, if a partner --

13 JUSTICE GORSUCH: There's either --

14 MR. FEIGIN: -- were to ask --

15 JUSTICE GORSUCH: But you say there is  
16 a mens rea. You agree with that?

17 MR. FEIGIN: I -- I think the Court  
18 had -- had one in Moore. It was the honest  
19 effort mens rea, and I --

20 JUSTICE BARRETT: But where does that  
21 come --

22 JUSTICE ALITO: Mr. Feigin --

23 JUSTICE BARRETT: -- but where does  
24 that come from? Because, in Moore, it's almost  
25 like the Court just announced it and -- and

1 we've gone back and forth about how "knowingly"  
2 and "intentionally," Ms. Chichester aside, don't  
3 necessarily grammatically modify the "except"  
4 clause in the statute, so, to Justice Gorsuch's  
5 question, where does the intent element come  
6 from? It's just Moore. I asked before is this  
7 all just Moore and the regulation. Is it just  
8 Moore because Moore said it?

9 MR. FEIGIN: I don't think Moore  
10 brought it out as -- as such. I think Moore  
11 could have been getting it from one of two  
12 places. One is some muted form of the mens rea  
13 presumption that's adapted for these  
14 circumstances where what you have is an  
15 affirmative defense.

16 And the other is from the legitimate  
17 medical purpose regulatory standard, which is  
18 itself drawn from the statute. But I -- I --  
19 courts have understood the term "honest effort"  
20 as an objective standard, as I think they  
21 should.

22 If a partner asks an associate to try  
23 to find case law to support a proposition and  
24 give me an honest effort to do that, and -- I  
25 don't think the partner expects the associate to

1 respond: I'm not going to run any search at all

2 --

3 JUSTICE ALITO: All right. Mister --

4 MR. FEIGIN: -- because I'm a hundred  
5 percent certain that it's not going to turn  
6 anything up.

7 JUSTICE ALITO: Mr. Feigin, let me  
8 suggest a way of finding a mens rea in this  
9 combination of statutory provisions and a  
10 regulation, and it can be found in the  
11 regulation. It can be read into the regulation,  
12 which does say it must be done for a purpose.

13 So you can read in some sort of mens  
14 rea there. I think you might read in the mens  
15 rea of recklessness so that a doctor who knows  
16 what a legitimate medical purpose is but -- or  
17 doesn't -- is -- is reckless as to the -- as to  
18 ascertaining what a medical purpose is would  
19 fall within the prohibition.

20 I -- I -- I understand that there are  
21 serious practical problems and questions of  
22 fairness that arise if this is read as having no  
23 mens rea whatsoever. But what disturbs me about  
24 some of the arguments -- well, many things  
25 disturb me about some of the arguments.

1           One is the ungrammatical reading of  
2     the statute itself. The second is the idea that  
3     the "except" clause is an element. If it's an  
4     element, it has to be pled in the indictment  
5     as -- as far as I'm aware. And, therefore, the  
6     indictments in -- I haven't looked at the  
7     indictments in this case -- but they would be  
8     invalid if they don't allege that. So these --  
9     these Petitioners would not only be entitled  
10    potentially to a new trial, they'd be entitled  
11    to have the indictments dismissed, and all the  
12    other indictments would be -- that have been  
13    provided here have been -- have been flawed.

14           And then you have the problem of 885.  
15    The "except" clause is an exception. It's like  
16    a justification under the common law. It  
17    doesn't have to be pled in the indictment, and  
18    it's not one of the things that necessarily has  
19    to be proven beyond a reasonable doubt. It's  
20    more in the nature of an affirmative defense,  
21    and as to an affirmative defense, the -- the  
22    burden of production and the burden of  
23    persuasion can be allocated differently.

24           What I really don't understand about  
25    your argument is what you say about 885. I --

1 I -- I -- I'm baffled by your reading that says  
2 that this allocates the burden of production to  
3 the defense but not -- but not the -- the burden  
4 of -- of persuasion when it says that as to any  
5 exemption, including this exemption, the  
6 government is not required to negative it at  
7 trial.

8 MR. FEIGIN: Well --

9 JUSTICE ALITO: How do you get around  
10 that?

11 MR. FEIGIN: Well, it says, Your  
12 Honor, that the burden of going forward is --

13 JUSTICE ALITO: It does allocate the  
14 burden of going forward --

15 MR. FEIGIN: -- of going -- on the  
16 defendant.

17 JUSTICE ALITO: -- to -- to the  
18 defendant, yeah.

19 MR. FEIGIN: We interpret that in  
20 light of Moore and in light of where every court  
21 of appeals is on this to place the ultimate  
22 burden of proof on us with -- but under -- what  
23 ultimately shakes out into a mens rea standard  
24 that has an objective component.

25 The objective component is incredibly

1 doctor-protective. It -- all it requires is  
2 some attempt to recognizably practice medicine,  
3 which wasn't present in Moore and isn't present  
4 in these cases.

5 CHIEF JUSTICE ROBERTS: I --

6 MR. FEIGIN: And a doctor who's seeing  
7 and examining patients or doing all the types of  
8 things that the doctor in Moore didn't do and  
9 that these Petitioners didn't do really doesn't  
10 have anything to fear under this statute.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel. Just one more question from me.

13 An opinion from the Eleventh Circuit,  
14 it's quoted at page 16 in Mr. Robbins' brief,  
15 says that a physician's good-faith belief that  
16 he dispensed a controlled substance in the usual  
17 course of his professional practice is  
18 irrelevant.

19 Do you agree with that statement?

20 MR. FEIGIN: Your Honor, I think that  
21 can inform whether it -- an honest effort was  
22 undertaken, but, at the end of the day, I think  
23 the Court is correct to the -- the Eleventh  
24 Circuit, that is, is correct to the extent that  
25 what the Eleventh Circuit is saying is that if

1 the defendant wasn't even attempting to practice  
2 medicine --

3 CHIEF JUSTICE ROBERTS: No, they're  
4 not saying that. What they're saying is that a  
5 good-faith belief that he dispensed a controlled  
6 substance in the usual course of his  
7 professional practice is irrelevant.

8 True or no?

9 MR. FEIGIN: It -- I think to the  
10 extent -- I -- I -- I -- I'm -- I interpret that  
11 statement to mean that the defendant's own  
12 subjective views can't override everything else  
13 and result in an acquittal.

14 CHIEF JUSTICE ROBERTS: Well, you  
15 can't interpret it that way. It says a  
16 good-faith belief.

17 MR. FEIGIN: Well, it does say --

18 CHIEF JUSTICE ROBERTS: So that goes  
19 to his views.

20 MR. FEIGIN: -- it does say belief,  
21 Your Honor. And we think the belief could have  
22 been arrived at that place in a good-faith way.  
23 There could be a doctor who just beneficently  
24 believes that handing out prescriptions on a  
25 street corner for cash is good -- is a

1 legitimate medical purpose because lots of  
2 people are in pain, but I think we'd all  
3 recognize that person as a drug dealer.

4 CHIEF JUSTICE ROBERTS: Well, it  
5 sounds to me like we're getting back to some of  
6 the questions earlier, that you would want to  
7 put on evidence to say: Well, whatever he says,  
8 that's not good faith.

9 MR. FEIGIN: Well, Your Honor, I don't  
10 think we are -- I -- I think the way that good  
11 faith was used in Moore and as has been pointed  
12 out here today, it's not a standard that appears  
13 anywhere in the statute or the regulations.

14 The way good faith was used in Moore,  
15 as -- as was explicated by the honest effort  
16 standard, which I think sets forth an objective  
17 standard, as several courts of appeals have  
18 recognized, and it was used more in the sense of  
19 like the good faith exception to the  
20 exclusionary rule or something to that effect,  
21 where it's really something that's objective and  
22 reasonable and that what the statute is asking  
23 doctors to do when it applies to doctors at the  
24 end of the day is, if you're going to rely on  
25 your license, be at least minimally careful when

1 you do that.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas, anything further?

4 JUSTICE THOMAS: Just, Mr. Feigin, I

5 -- I sympathize with the position you're in.

6 MR. FEIGIN: Thank you.

7 (Laughter.)

8 JUSTICE THOMAS: Because normally,  
9 when there is a registration and there's  
10 non-compliance with the conditions for that  
11 registration, you lose your registration, like a  
12 car or your right to drive, that sort of thing.

13 This case, you have the DEA  
14 registration, but it's self-policed. You -- you  
15 can retain it under certain conditions, that is,  
16 that you comply with the standards of the  
17 medical profession of prescribing drugs, et  
18 cetera.

19 Can you tell -- and then it comes up  
20 as to whether this compliance is sufficient when  
21 you are indicted for the underlying 841 crime.  
22 Can you think of another instance in which the  
23 conditions of a registration like this then  
24 become a part of a criminal offense because you  
25 fail to comply with those conditions?

1                   MR. FEIGIN: Well, Your Honor, the --  
2 I -- I'm not thinking of one right off the top  
3 of my head. I mean, one imperfect analogy is,  
4 for example, the standardized conditions of  
5 supervised release, which are not necessarily  
6 codified. They may be in the guidelines, but  
7 you can be subject to additional penalties for  
8 them, although those penalties relate back to  
9 the original crime. I don't --

10                   JUSTICE THOMAS: I'm thinking more of  
11 an authorization. The -- this is sort of an odd  
12 arrangement where you have conduct that is  
13 illegal, that is, distributing certain drugs,  
14 except if you are registered and the  
15 registration isn't withdrawn, thus, meaning that  
16 if you -- subsequent distribution without that  
17 registration is illegal.

18                   Rather, your non-compliance with the  
19 conditions of that registration becomes the  
20 basis or part of the basis for the underlying  
21 crime -- for the crime of distribution. It's  
22 the authorization. You don't have to --

23                   MR. FEIGIN: Well, Your Honor, I -- I  
24 guess I'm not quite sure whether this answers  
25 your question, but the terms of the statute

1 explicitly require the doctor to comply with his  
2 registration, and it is understood that the  
3 registration is issued only for a limited  
4 purpose.

5           And I think the right way to think  
6 about this is that our laws have a general  
7 prohibition against the distribution of these  
8 dangerous substances. Physicians have a special  
9 exemption that they're granted, but their  
10 special exemption ends when they start violating  
11 the terms of the license the government has  
12 given them to do something.

13           One -- one analogy might be, Your  
14 Honor, I don't know whether it's a perfect  
15 analogy again, but, you know, there may be  
16 certain things we allow police officers to do,  
17 like exceed the speed limit, Mr. Chief Justice,  
18 that we don't allow them to do in, for example,  
19 the course of their daily life.

20           And I think, by the same token here,  
21 there may be some government authorization to do  
22 something that, frankly, I don't think anyone in  
23 this room, unless there's some doctor here,  
24 could do, we allow doctors to do it because  
25 they're trained professionals, but, when they

1 exceed the scope of their registration and their  
2 special ability to do it, they become the same  
3 as ordinary people violating the criminal laws.

4 JUSTICE THOMAS: And my only point  
5 is -- and I won't belabor it -- is that if a  
6 doctor in -- in -- in the State of Virginia, for  
7 example, does not comply with his or her  
8 license, then you lose your license to practice  
9 medicine. So it's regulatory.

10 Here, there isn't that intermediate  
11 step, that is, that you lose your registration  
12 that allows you to prescribe certain drugs.  
13 Instead, it's folded into the underlying  
14 criminal violation. That's all I'm saying.

15 It's -- and I just -- my concern was  
16 that we seem to be doing things -- two things at  
17 the same time with some quite significant  
18 criminal penalties.

19 MR. FEIGIN: Ah. Sorry. I'm sorry,  
20 Justice Thomas. I was misunderstanding the  
21 question. That's the way it works under federal  
22 law too, is that also there's a set of civil  
23 revocation proceedings that can and would occur.  
24 And, for example, Dr. Kahn's license was  
25 revoked -- his -- sorry, I'm sorry, his DEA

1 registration as well as, I think, his state  
2 license.

3           That is a separate proceeding, but  
4 we're -- I -- I don't think it makes any sense  
5 and the statutes don't require that the  
6 revocation of the license, the registration as a  
7 civil action precede the prosecution because, if  
8 it did, then you'd get basically one free shot.  
9 You could start dealing drugs on a street  
10 corner, you'd get your license revoked, and  
11 then, if you -- only if you did it again would  
12 you be violating the criminal laws. I don't  
13 think that's how it works.

14           JUSTICE THOMAS: Thank you.

15           CHIEF JUSTICE ROBERTS: Justice  
16 Breyer, anything further?

17           Justice Alito?

18           JUSTICE SOTOMAYOR: I do, counselor.  
19 Moore versus U.S., which you're relying a lot  
20 on, in a footnote did set forth the trial  
21 judge's instruction.

22           Have you read that? And is that an  
23 instruction that you're comfortable with?

24           MR. FEIGIN: Yes, Your Honor. It  
25 talks about how a sincere intention to treat the

1 patient in front of the -- this is on page 124  
2 of the appendix in Moore.

3 JUSTICE SOTOMAYOR: 142, Note 20. I  
4 have it in front of me, so --

5 MR. FEIGIN: I'm sorry, Your Honor.

6 JUSTICE SOTOMAYOR: Yeah.

7 MR. FEIGIN: I thought it was page  
8 124. But I apologize.

9 A sincere intention to treat the  
10 patients in front of the doctor would be not  
11 enough. There has -- the doctor has to be  
12 sincere in attempting -- and I think it's the  
13 "attempting" language that we'd primarily be  
14 relying on here --

15 JUSTICE SOTOMAYOR: So my -- my  
16 question is basically, you think this is a  
17 correct statement of the law? And you could be  
18 right. It could be a typo in the memo I was  
19 given. So it could be 124 instead of 142. But  
20 the point is, are you happy with that  
21 instruction --

22 MR. FEIGIN: Your Honor, we --

23 JUSTICE SOTOMAYOR: -- as setting  
24 forth what you believe is the accurate  
25 instruction?

1 MR. FEIGIN: Yes, except I think  
2 what's more important than the precise terms of  
3 the jury instruction in Moore is how the Court  
4 understood it in Moore.

5 And to the extent this Court might now  
6 read it as a non-objective standard, I really  
7 don't think that's how the Court was reading it  
8 in Moore because there's really not a -- a --  
9 any suggestion of that. It's cited and --

10 JUSTICE SOTOMAYOR: All right,  
11 counsel --

12 MR. FEIGIN: -- then the evidence --

13 JUSTICE SOTOMAYOR: -- I don't want to  
14 --

15 MR. FEIGIN: -- is all objective.

16 JUSTICE SOTOMAYOR: -- eat up a lot of  
17 time, so let me --

18 MR. FEIGIN: Okay.

19 JUSTICE SOTOMAYOR: -- go to my second  
20 part of my question.

21 Could you tell me whether a situation  
22 could exist that a prescription was not issued  
23 for a legitimate medical purpose but still is in  
24 the usual course of professional practice? I  
25 don't think that could be, right?

1 MR. FEIGIN: I think it is --

2 JUSTICE SOTOMAYOR: There's no medical  
3 purpose --

4 MR. FEIGIN: -- it is much easier to  
5 think of a converse situation --

6 JUSTICE SOTOMAYOR: Exactly.

7 MR. FEIGIN: -- or something. But let  
8 me give this one -- let me give this one -- one  
9 try, Your Honor, which is you might have a  
10 doctor who has a patient -- I -- I think -- I  
11 think the reason for allowing a conviction to  
12 rest on either of them is because it clarifies a  
13 situation like the following.

14 A doctor has a patient in front of him  
15 who's legitimately in pain, legitimately does  
16 need some opioids, but there are strong  
17 indications, for example, through bodily fluid  
18 tests and so forth, that although she's been  
19 receiving the pain medications, she's not  
20 actually taking them and she's probably just  
21 giving them to somebody else and is going to  
22 sell them.

23 You might think that that is for a  
24 legitimate -- you're still prescribing the drugs  
25 for a legitimate medical purpose because the

1 doctor's really hoping this time the patient  
2 takes the meds herself because she needs them.

3 But it's outside the usual course of  
4 medical practice because all the indicators of  
5 diversion show that the doctor really should not  
6 be prescribing these drugs to that patient.

7 JUSTICE SOTOMAYOR: Well, I'm not sure  
8 how that's not the same thing, meaning why would  
9 prescribing it ever be considered medically  
10 legitimate if in the objective, ordinary  
11 standard of business it's not considered  
12 appropriate?

13 MR. FEIGIN: Well, I think -- I think,  
14 Your Honor, it clarifies to the jury that what  
15 the jury needs to look for -- like, it's simply  
16 not enough for the jury to think that there's a  
17 legitimate medical purpose. As we say in our  
18 brief --

19 JUSTICE SOTOMAYOR: No, it has to be  
20 both, though.

21 MR. FEIGIN: -- I doubt there are very  
22 many cases in which a jury -- I -- I -- I -- I  
23 dare to say there are probably none in which a  
24 jury thinks that there was a prescription that a  
25 doctor issued within the usual course of his

1 practice that was not also issued for a  
2 legitimate medical purpose.

3 I was positing one scenario where  
4 perhaps a jury might have -- might think that,  
5 but I think, in reality, the real reason for  
6 splitting them out in the way that we think the  
7 jury instructions here properly did is because  
8 of the converse situation where a doctor just,  
9 you know, meets someone on the street who says,  
10 I have pain, writes out a script, and hands it  
11 to him without even examining him or doing any  
12 of the other things you'd think a doctor would,  
13 other than signing an illegible signature on the  
14 bottom of a prescription.

15 JUSTICE SOTOMAYOR: All right. That  
16 goes to your good faith, though. That's what  
17 Moore was talking about.

18 MR. FEIGIN: Well, Your Honor, I think  
19 the legitimate medical purpose also does play a  
20 role in generating, as I was suggesting to  
21 Justice Barrett, the good-faith standard because  
22 I think it informs the entire regulation.

23 I mean, the regulation reads as one  
24 unitary piece, but what these jury instructions  
25 do is they clarify for the jury not just to

1 focus on the idea that the doctor, as all the  
2 doctor defendants do in these cases, just says:  
3 Look, I had a patient who's in front of me who's  
4 in pain. I prescribed.

5 Not that that's not enough, that the  
6 doctor has to be really doing things the way a  
7 doctor would and have it ultimately shake out to  
8 be the kind of prescription that we'd expect a  
9 doctor to write. The defendant has to at least  
10 be attempting to do that.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?  
13 Justice Kavanaugh?

14 Justice Barrett?

15 JUSTICE BARRETT: Just one hopefully  
16 quick question, Mr. Feigin.

17 So just so that I understand, I asked  
18 before, is all of this coming from the  
19 regulation and from Moore because it's not in  
20 the text of the statute. We've talked about the  
21 honest attempt standard.

22 It does seem to me and you've said  
23 that to the extent that there is some sort of  
24 mens rea requirement wrapped up in this phrase,  
25 honest attempt, I think you -- I understood you

1 to say to Justice Gorsuch that that is a sort of  
2 mens rea requirement? Did I understand that  
3 correctly?

4 MR. FEIGIN: Yes.

5 JUSTICE BARRETT: Okay.

6 MR. FEIGIN: I think that is a -- I  
7 mean, it's -- Your Honor, I -- I -- I -- I think  
8 it's roughly akin to a -- a -- a form of extreme  
9 objectively grounded mens rea.

10 And I say "extreme" as I mean  
11 incredibly defendant-friendly, not similar to  
12 civil law, as we've pointed out in our brief.  
13 Defendant-friendly kind of criminal standard  
14 that you could see if you looked at Model Penal  
15 Code 202 and the commentary thereof where, you  
16 know, really, if you just have a defendant who's  
17 acting in a grossly unreasonable fashion, that  
18 that's sufficient and it's a context-dependent  
19 inquiry as to whether that's the right mens rea  
20 that depends on the circumstances.

21 And I think portions of Moore and this  
22 Court's Harrison Act cases and I think common  
23 sense reflect that this is such a situation  
24 given the vulnerability of the patients and the  
25 general public and the fact that these doctors

1 seek out these DEA registrations, and they're  
2 licensed professionals.

3 And we shouldn't have situations like  
4 we had after raiding Ruan's clinic where the  
5 price of opioids on the streets doubles because  
6 suddenly the supply has been cut off.

7 JUSTICE BARRETT: Okay. Can I just  
8 then, just to wrap up, so that honest attempt  
9 requirement, which is some form of mens rea,  
10 exists by the government's grace because of the  
11 regulation because nothing in the statutory text  
12 requires it?

13 MR. FEIGIN: Well, a -- a couple of  
14 points to that, Your Honor.

15 As I've earlier suggested and I think  
16 as Moore bears out, the regulatory language is  
17 grounded in the statutory language itself. So  
18 I'm uncertain whether the government would  
19 really be able to adopt a substantially  
20 different regulation to govern this particular  
21 context.

22 And the other thing I would say is, if  
23 this Court were to apply the mens rea  
24 presumption, it could also come from there, but,  
25 ultimately, we are landing in the same place

1 that Moore did. We're taking this -- we have  
2 been taking this Court's teachings from Moore,  
3 as we have for the past, you know, 47 years, and  
4 applying it to these cases.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Rebuttal, Mr. Robbins?

8 REBUTTAL ARGUMENT OF LAWRENCE S. ROBBINS  
9 ON BEHALF OF THE PETITIONER IN 20-1410

10 MR. ROBBINS: Thank you, Mr. Chief  
11 Justice.

12 First off, with all respect to my  
13 friend, Mr. Feigin, the government is not giving  
14 you an accurate rendering of Moore. Footnote  
15 20, the instruction to which counsel was just  
16 adverting, is -- states an honest efforts  
17 instruction, which we say in our Section 1(b) of  
18 our opening brief is satisfactory to us.

19 But it is not an objective standard.  
20 The government is trying to objectify, if you  
21 will, a standard that was plainly intended to be  
22 subjective. Why do I say that? Because, in the  
23 very next paragraph of the opinion, the Court  
24 says that, well, the defendant said he was just  
25 trying a novel technique to solve a problem, but

1 the jury didn't believe him. The jury didn't  
2 believe him.

3 That says that this is a subjective  
4 question. Did he make an honest effort? He  
5 said he did because he was using some novel  
6 technique, but the jury rejected it. The jury  
7 didn't say: Well, the reason -- a reasonable  
8 doctor wouldn't do that. An objectively  
9 reasonable doctor wouldn't do that. No. They  
10 said, we don't believe you, which is exactly  
11 what juries are entitled to do when they assess  
12 the purpose or intent of a defendant.

13 They do that in every case, which is  
14 why we suggest that the medical purpose test  
15 simplifies the jury's task and adheres to the  
16 text of the statute. But, if this Court is to  
17 use an honest efforts test instead, a la  
18 Footnote 20 of Moore, we should be clear that it  
19 is not an objective standard at all.

20 The government's submission is, no  
21 matter how they disclaim it, a negligence  
22 standard gussied up as something else. But my  
23 suggestion to the Court is that, you know, a  
24 billion objectives here and a billion  
25 reasonablenesses here, before you know it,

1 you're talking about real negligence, and  
2 that's, I think, where we find ourselves with  
3 the government's argument.

4           The proposition that this is  
5 ungrammatical, I resist it. But even if it were  
6 ungrammatical, and I resist it because, in point  
7 of fact, Congress has placed this "except as  
8 authorized" downstream instead of upstream, and  
9 I don't think there's a dime's worth of  
10 difference between those two formulations  
11 between 841(a)(1) and 841(h), which was enacted  
12 20-plus years later to deal with Internet sales.

13           The Harrison Act cases manifestly  
14 support us and not the government. You look  
15 need -- need look no further than the unanimous  
16 opinion in Linder to see that what matters was  
17 intent, subjective intent, of the doctor.

18           And I want to close with one -- just  
19 one point that goes back to the Chief Justice's  
20 question at the beginning of this argument. The  
21 Chief Justice asked: Is there a book that tells  
22 us what the right amount of medication is for a  
23 certain kind of disability? The answer is there  
24 is no such book, and that's the whole problem.

25           The problem is that medical standards

1 evolve. It's a constantly evolving matter. And  
2 the deference to patients and their illness and  
3 their doctors requires a subjective standard.

4 I thank the Court.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel. The case is submitted.

7 (Whereupon, at 11:36 a.m., the case  
8 was submitted.)

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## Official - Subject to Final Review

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## D

## Official - Subject to Final Review

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