

SUPREME COURT OF THE UNITED STATES

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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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 the
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. All
16 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 registered 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 -- the -- the
23 obligation to prove good faith?

24 JUSTICE THOMAS: No, the -- the
25 standards 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. So we don't
9 dispute 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 asks,
10 to what elements does that apply? We contend
11 that it applies to the "except as authorized"
12 language in the statute. And -- and so you
13 begin with the presumption. You have the
14 statute saying "knowingly and intentionally," so
15 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 CHIEF JUSTICE ROBERTS: What if you're
24 --

25 JUSTICE KAVANAUGH: The "except as

1 authorized" -- go ahead.

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

9 MR. ROBBINS: Of course.

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

16 MR. ROBBINS: Yes, you would.

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

24 MR. ROBBINS: Well --

25 CHIEF JUSTICE ROBERTS: You don't

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: -- I thought
25 you told me that he doesn't get to say -- well,

1 maybe you didn't -- but, in the speeding
2 example, he can't -- he didn't work when he
3 said, I thought it was 70 miles an hour when it
4 was 55 --

5 MR. ROBBINS: Well --

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

9 MR. ROBBINS: Yeah. Well, let -- let
10 me just say, I -- I -- I -- rather -- I don't
11 want to bury the lead. The -- the -- the fact
12 is this -- you know, speeding is the classic
13 case of a regulatory offense, the sort of, you
14 know, situation in which scienter isn't even an
15 issue.

16 You don't get to defend the traffic
17 violation based on your state of mind. But,
18 when you're talking about sending doctors or
19 anybody for that matter to jail for mandatory
20 minimums of decades in prison, this is not a
21 regulatory offense. This is an offense as to
22 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 let's
19 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
18 that.

19 JUSTICE ALITO: No?

20 MR. ROBBINS: If it --

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

23 MR. ROBBINS: Well, there's a
24 presumption as to any element that separates
25 wrongful from innocent conduct. I would not,

1 for example, quarrel with the -- with the
2 holding in -- in Yermian that a jurisdictional
3 path is different.

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

7 MR. ROBBINS: Yes.

8 JUSTICE ALITO: -- of scienter?

9 MR. ROBBINS: Yes.

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

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

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

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

25 And let me -- let me give you -- make

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

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

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

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

1 as authorized" is not a verb.

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

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

9 JUSTICE ALITO: It says in a trial.

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

16 But then --

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

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

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

24 MR. ROBBINS: Well, let -- let -- let
25 me -- you know, I -- at the risk of -- of

1 recurring to statutory history, I should point
2 out that under the Harrison Act, the -- the
3 cognate of that provision said that the burden
4 of proof was on the defense. When CSA was
5 enacted many years later, that formulation in
6 885, I think, makes quite clear that it's just a
7 burden of coming forward, and that's all there
8 is.

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

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

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

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

23 MR. ROBBINS: Correct.

24 JUSTICE ALITO: And then somebody has
25 to prove something. And when this provision

1 says that the government doesn't have to
2 negative it, that means that, actually, the
3 government has to prove it and prove it beyond a
4 reasonable doubt?

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

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

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

21 MR. ROBBINS: Well --

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

1 nowhere.

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

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

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

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

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

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 Justice Kagan?

10 Justice Gorsuch?

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

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

19 MR. ROBBINS: Okay.

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

1 any mens rea from -- from -- from prescribing
2 medicines.

3 MR. ROBBINS: Correct.

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

8 MR. ROBBINS: Absolutely.

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

12 MR. ROBBINS: Precisely.

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

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

1 MR. ROBBINS: I agree with that.

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

8 MR. ROBBINS: Correct.

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

13 MR. ROBBINS: Yes.

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

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

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

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

22 JUSTICE GORSUCH: Be careful.

23 (Laughter.)

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

1 JUSTICE SOTOMAYOR: You were just
2 helped, counselor.

3 JUSTICE THOMAS: Yeah.

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

8 JUSTICE GORSUCH: Fair enough.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 Justice Barrett?

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

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

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

1 language?

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

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

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

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

17 JUSTICE BARRETT: I thought legitimate
18 medical purpose?

19 MR. ROBBINS: Yes.

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

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

1 JUSTICE BARRETT: So there's no
2 significance in your mind from -- departing from
3 that "knowingly and intentionally" legitimate
4 medical purpose language and your good-faith
5 formulation?

6 MR. ROBBINS: Correct.

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

9 MR. ROBBINS: Because courts seem to
10 do it all the time. And --

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

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

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

23 MR. ROBBINS: Correct.

24 JUSTICE BARRETT: So I'm taking you at
25 your word and that description in your brief and

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

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

10 JUSTICE BARRETT: Okay. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. ROBBINS: Thank you.

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

15 JUSTICE BREYER: So it's not --

16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer.

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

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

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

23 JUSTICE BREYER: -- Ms. Chichester. I
24 had a different English teacher, Ms. Chichester,
25 who told us an adverb could modify a verb, an

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

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

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

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

17 MR. ROBBINS: No doubt.

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

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

23 JUSTICE BREYER: -- if he chooses to.

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

1 JUSTICE BREYER: Yes. You would have
2 been good in Ms. Chichester's class.

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

12 With that, I thank the Court.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Brindley.

16 ORAL ARGUMENT OF BEAU B. BRINDLEY
17 ON BEHALF OF THE PETITIONER IN 21-5261

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

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

25 If it is sufficient to find only that

1 a doctor acted outside the usual course of
2 practice without reference to the purpose of the
3 prescription, then doctors can be convicted for
4 failing to follow medical norms even if they
5 prescribe for -- never prescribed for an
6 illegitimate reason.

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

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

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

21 And with that, I welcome the questions
22 of the Court.

23 CHIEF JUSTICE ROBERTS: Counsel, you
24 refer to the good faith definition, and I
25 understand your friend on the other side to be

1 arguing that reduces to an idiosyncratic view of
2 what the law ought to be.

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

8 MR. BRINDLEY: No, absolutely not,
9 Chief Justice Roberts, I am not.

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

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

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

1 decide the definition of medical practice.

2 CHIEF JUSTICE ROBERTS: Is -- is there
3 objective evidence out there, like in -- in
4 terms of pain management prescriptions, they
5 should be this, you know, whatever, this much a
6 month or you should be sure not to go over this
7 or whatever?

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

16 And it allows the jury to decide those
17 things --

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

1 what constitute usual course or whatever.

2 MR. BRINDLEY: I don't agree that
3 that's a question of law. Those are questions
4 of fact. If there is perhaps some --

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

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

23 With respect to a regulation like
24 speeding, I just don't think that's the same
25 category of situation as when we're talking

1 about 20 and life sentences potentially in -- in
2 which there needs to be a -- a principle of
3 scienter applied and would --

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

9 MR. BRINDLEY: Yes.

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

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

19 JUSTICE KAVANAUGH: And the way this
20 --

21 MR. BRINDLEY: -- elements of the
22 offense.

23 JUSTICE KAVANAUGH: -- and the way
24 this plays out -- tell me if I'm wrong -- is
25 there's objective evidence -- there's evidence

1 about what the objective standards are for
2 medical practice, and those will come in, and
3 then there will be a determination of that.

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

9 MR. BRINDLEY: That is --

10 JUSTICE KAVANAUGH: That's your --

11 MR. BRINDLEY: -- absolutely right,
12 Justice Kavanaugh.

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

21 MR. BRINDLEY: Yes. Absolutely.
22 That's absolutely correct. We're more --

23 JUSTICE ALITO: But what if the jury
24 doesn't disbelieve it? What if the doctor
25 really sincerely thinks that a practice that is

1 objectively outlandish is an authorized -- is
2 the legitimate practice of medicine? Absolutely
3 sincere about it.

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

5 JUSTICE ALITO: In your view, that --
6 that doctor must be acquitted, right?

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

13 JUSTICE ALITO: But what if the --

14 MR. BRINDLEY: -- trafficking as
15 conventionally understood.

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

23 The doctor has to be acquitted in your
24 view?

25 MR. BRINDLEY: The -- if the jury

1 believes that he's sincere and then his belief
2 that that's a legitimate purpose, I think that
3 is true. But I don't think that's very likely
4 to occur when all the objective evidence comes
5 in saying that's wrong.

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

8 MR. BRINDLEY: Well --

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

18 MR. BRINDLEY: I would agree with
19 that, yes.

20 JUSTICE GORSUCH: Okay.

21 MR. BRINDLEY: I certainly would agree
22 with that.

23 JUSTICE KAVANAUGH: Uh --

24 MR. BRINDLEY: I think the -- the risk
25 -- I'm sorry.

1 JUSTICE KAVANAUGH: Go ahead.

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

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

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

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

23 But, if you're driving, you know, a
24 hundred in a 25 zone and you come in, oh, I
25 thought it was actually a hundred, was the speed

1 limit, no one's going to believe that. Isn't
2 that the way to separate out the -- the -- the
3 outlandish example?

4 MR. BRINDLEY: Absolutely, yes.
5 That's precisely what I'm saying. Yes.

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

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

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

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

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

18 MR. BRINDLEY: I think somewhat that's
19 true to some extent. What I would say is that
20 the thing that differentiates the -- the Chief
21 Justice's hypothetical from our position is, in
22 this situation, we have a -- a situation where
23 the very thing that makes the doctor's -- the
24 only thing that makes the doctor's writing the
25 prescription improper or criminal is if he

1 writes it with no legitimate purpose, not
2 believing he's curing a malady of any kind.

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

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

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

14 JUSTICE KAVANAUGH: If you -- yeah.

15 MR. BRINDLEY: -- but you're going to
16 have a hard time.

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

19 MR. BRINDLEY: Right.

20 JUSTICE KAVANAUGH: Right.

21 MR. BRINDLEY: Absolutely would.

22 JUSTICE KAVANAUGH: If -- if the child
23 in the car -- if the child wasn't injured.

24 MR. BRINDLEY: Yes.

25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas, anything further?

2 Justice Breyer? No?

3 Justice Kavanaugh, anything further?

4 Thank you, counsel.

5 MR. BRINDLEY: Thank you, Mr. Chief

6 Justice.

7 CHIEF JUSTICE ROBERTS: Mr. Feigin.

8 ORAL ARGUMENT OF ERIC J. FEIGIN

9 ON BEHALF OF THE RESPONDENT

10 MR. FEIGIN: Thank you, Mr. Chief

11 Justice, and may it please the Court:

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

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

25 That's not what this Court said in

1 Moore, where I think everyone agrees the Court
2 implicitly adopted the jury instructions in that
3 case, which distilled the statutory and
4 regulatory requirements here to come up with an
5 honest effort standard.

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

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

24 I think there -- I can give you three
25 examples, we have more, but three examples of

1 cases, and these are admittedly stylized a bit,
2 but they're based in reality of -- of why this
3 really matters on the ground.

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

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

1 sure they're taking the medications, doesn't
2 even conduct physical exams, doesn't check the
3 database to see who else is prescribing opioids,
4 and trusts nurse practitioners, who aren't DEA
5 registrants, aren't allowed to do this, don't
6 have medical licenses, to do most of the
7 prescribing. And then, when --

8 CHIEF JUSTICE ROBERTS: Counsel, it --

9 MR. FEIGIN: Yeah.

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

14 MR. FEIGIN: Oh --

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

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

25 First of all, Your Honor,

1 grammatically, I think as Justice Alito was
2 pointing out with -- I'd like to address
3 Ms. Chichester in a second, but you can't have
4 the knowing or intentionally mens rea kind of
5 leap backward. I think counsel has not found
6 any case that suggests --

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

10 (Laughter.)

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

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

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

25 MR. FEIGIN: So, Your Honor, we do

1 agree with Petitioners that the ultimate burden
2 of proof, once the burden of persuasion is
3 satisfied, is on the government. I think where
4 -- but I think that 885 --

5 CHIEF JUSTICE ROBERTS: Once the
6 burden of persuasion is satisfied?

7 MR. FEIGIN: I'm sorry.

8 CHIEF JUSTICE ROBERTS: Presentation
9 --

10 MR. FEIGIN: Once the burden of
11 production --

12 CHIEF JUSTICE ROBERTS: Yeah.

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

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

22 MR. FEIGIN: So, Your Honor, we place
23 our burden exactly where Moore did, which is an
24 honest effort, which we interpret as some
25 objectively minimal -- minimal, reasonable

1 effort to practice some recognizable form of
2 medicine, which neither the doctor in --

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

7 MR. FEIGIN: Our ultimate burden --

8 JUSTICE SOTOMAYOR: -- have to prove?

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

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

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

17 JUSTICE SOTOMAYOR: Tell me the exact
18 words.

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

1 But we think that is an adequate
2 instruction, plus the honest effort instruction
3 that the Court notes in Footnote 20. We're fine
4 with the language being framed as good faith.
5 We're fine with our having the burden to prove
6 it.

7 But what -- because this isn't an
8 offense element, I think the mens rea
9 presumption that this Court typically applies is
10 at least applicable here only in muted form.

11 JUSTICE BREYER: Well, why isn't it?

12 JUSTICE KAVANAUGH: Why?

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

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

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

1 and --

2 JUSTICE BREYER: All right. If you
3 want the grammar point too --

4 MR. FEIGIN: And I think --

5 JUSTICE BREYER: -- I mean --

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

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

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

11 JUSTICE BREYER: Is what?

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

15 JUSTICE BREYER: Yeah.

16 MR. FEIGIN: And an element --

17 JUSTICE BREYER: You have an element
18 --

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

20 JUSTICE BREYER: -- in the Steele case
21 --

22 MR. FEIGIN: -- include in -- in an
23 indictment.

24 JUSTICE BREYER: -- where the -- the
25 -- the -- in the United States Code, where the

1 burden of production for the element, the
2 non-existence thereof, is on the defendant, and
3 once it's there produced, the government has to
4 prove beyond a reasonable doubt.

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

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

13 JUSTICE BREYER: Fine.

14 MR. FEIGIN: So you really do see --

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

22 Just cite me to that, and I will go
23 read it with care.

24 MR. FEIGIN: Your Honor, I -- I don't
25 think I'm going to be able to satisfy you with

1 quite that --

2 JUSTICE BREYER: Okay. Then let's go
3 to --

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

5 JUSTICE BREYER: -- the grammar point.

6 MR. FEIGIN: -- specificity.

7 JUSTICE ALITO: -- isn't it

8 blackletter --

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

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

24 So I don't really see the difference
25 between the "except" clause being at the

1 beginning of the sentence or at the end of the
2 sentence. There, I can't see it at all. But I
3 can see your argument about it not being an
4 element because there I am certainly not an
5 expert, and -- and -- and if you -- if there's
6 some authority for that, I -- I would be more
7 than delighted to read it and think about it.

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

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

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

19 JUSTICE KAVANAUGH: You --

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

1 evidence --

2 JUSTICE KAVANAUGH: Why don't we look
3 at Morissette, though? Does -- I mean, that's
4 the classic case and one of the most important
5 cases in this area, the most important in this
6 area.

7 And the defendant there is deer
8 hunting in an abandoned -- in property in rural
9 Michigan, comes across these shell casings and
10 he takes the shell casings and he was not
11 authorized to do that, right? Not authorized to
12 do that, as Justice Jackson says.

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

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

1 prove that he knew that he was not authorized to
2 take those shell casings.

3 Why isn't that just right -- right on
4 here?

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

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

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

1 strengthen the Harrison Act cases, all -- plus
2 the Court's discussion in Moore about freedom
3 for experimentation, which the government
4 addressed in its reply brief at page 13 by
5 pointing to the honest effort standard.

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

14 JUSTICE KAVANAUGH: But --

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

16 JUSTICE KAVANAUGH: -- but why not
17 have -- I'm sorry to interrupt.

18 MR. FEIGIN: Yeah.

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

23 Well, that's very vague language in my
24 estimation, and reasonable people can disagree.
25 Write more specific regs if you're -- if you

1 have the problem that you're talking about.

2 But "legitimate medical purpose" is a
3 very vague thing on which reasonable people can
4 disagree. Now you're positing hypotheticals
5 where unreasonable doctors and I think juries
6 won't believe them in those circumstances
7 sometimes, but -- but write a more specific reg
8 would be one answer.

9 MR. FEIGIN: Well, I -- I think it's
10 more difficult than you're supposing in reality,
11 Justice Kavanaugh.

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

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

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

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

25 JUSTICE GORSUCH: Be careful.

1 MR. FEIGIN: I hope that was careful
2 enough, Justice --

3 JUSTICE GORSUCH: I give you the same
4 admonition as I -- as I gave your -- your
5 colleague.

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

13 We -- we agree that the government
14 bears the burden of proof on all the elements
15 required for conviction?

16 MR. FEIGIN: Yes, Your Honor.

17 JUSTICE GORSUCH: Okay. Okay. I --
18 I -- I would hope we can start there.

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

20 JUSTICE GORSUCH: Right.

21 MR. FEIGIN: -- traditionally true.

22 JUSTICE GORSUCH: Right.

23 MR. FEIGIN: Yes.

24 JUSTICE GORSUCH: Okay. And the
25 "except" clause is an element because it's what

1 separates lawful from unlawful conduct, right?

2 MR. FEIGIN: I think there we part
3 ways, Your Honor.

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

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

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

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

17 JUSTICE GORSUCH: Okay.

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

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

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

23 JUSTICE GORSUCH: I'm going to get to
24 that in a second.

25 MR. FEIGIN: -- affirmative defense.

1 JUSTICE GORSUCH: But you agree that
2 the "except" clause is -- I mean, that's part of
3 the government's burden of proof, is to show
4 that the -- that the physician did not act
5 within the course of his registration at the end
6 of the day?

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

13 JUSTICE GORSUCH: Yes.

14 MR. FEIGIN: -- registration at issue,
15 the ultimate burden of proof is on the
16 government.

17 JUSTICE GORSUCH: Okay. All right.

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

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

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

25 JUSTICE GORSUCH: How about often?

1 MR. FEIGIN: I think it is sometimes
2 true.

3 JUSTICE GORSUCH: Sometimes. Okay.

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

5 JUSTICE GORSUCH: Sometimes. That's
6 good enough.

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

14 Do we agree on that?

15 MR. FEIGIN: Yes.

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

21 Do we agree on that?

22 MR. FEIGIN: Yes.

23 JUSTICE GORSUCH: Okay. And then,
24 once the -- and I think this is where you're
25 trying to leap forward to. Once -- once the

1 doctor comes forward with evidence suggesting
2 that he is within the course of the exception,
3 his actions are within the course of the
4 exception, the government still bear -- bears
5 the final burden of proving that he was not?

6 MR. FEIGIN: Yes.

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

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

21 One is the mens rea presumption. As I
22 was just saying, I do think this is the type of
23 case particularly because it is pitched as an
24 affirmative defense and we're dealing with
25 trained professionals who voluntarily choose to

1 work with dangerous substances with vulnerable
2 patients, that the idea of some objective
3 manifestation of at least an attempt to practice
4 some recognizable form of medicine is where the
5 standard should land if you're -- want to go
6 with the mens rea presumption.

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

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

25 JUSTICE BARRETT: Mr. Feigin?

1 MR. FEIGIN: Yeah.

2 JUSTICE BARRETT: Can I just follow up
3 on that? So all of this really comes from -- I
4 mean, I have many of the same questions as
5 Justice Thomas because none of this, obviously,
6 is in the statutory language, and the
7 authorization clause is pretty circular. So it
8 is -- it all comes down to the regulation in
9 Moore, am I correct?

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

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

20 MR. FEIGIN: That's right, but -- and
21 this may address Justice Kavanaugh's question
22 too. I'm not entirely certain that the
23 government would be free to adopt a
24 substantially different regulation than the one
25 it has adopted given the -- both the statutory

1 language that's already in the CSA plus this
2 Court's interpretation in Gonzales against
3 Oregon, like it's now pellucidly clear the
4 government can't -- I mean, it -- it can, but
5 the -- the primary thrust of the -- it can
6 regulate medicine, but the primary thrust of the
7 CSA is for state regulation of medicine, and
8 that's why the standard is worded the way that
9 it is here.

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

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

20 JUSTICE KAVANAUGH: Well, that's --

21 MR. FEIGIN: -- for conduct --

22 JUSTICE KAVANAUGH: -- that's --

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

25 JUSTICE KAVANAUGH: That's exactly

1 what Justice Jackson said about Morissette
2 himself in the last paragraph of the opinion but
3 talked about that that would be a jury question.

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

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

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

17 MR. FEIGIN: Yes. And -- and, Your
18 Honor, I don't want to just be talking about the
19 --

20 JUSTICE KAVANAUGH: But here's --
21 here's --

22 MR. FEIGIN: I -- I -- I --

23 JUSTICE KAVANAUGH: Let me finish my
24 question --

25 MR. FEIGIN: Sure. Sure.

1 JUSTICE KAVANAUGH: -- on that. So --
2 and there are going to -- could be close calls,
3 right, close calls as to what the evidence shows
4 objectively was legitimate?

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

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

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

24 And it's, I think, going to be
25 informed by the expert's testimony as to the

1 other piece of this, which is the usual course
2 of medical practice. If you read the entire
3 regulation, it's -- I mean, just the first
4 sentence of it, it's prescribing for a
5 legitimate medical purpose by an individual
6 practitioner acting in the course of his
7 professional practice.

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

16 JUSTICE GORSUCH: Mr. Feigin, again --

17 MR. FEIGIN: Yeah.

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

24 MR. FEIGIN: Never.

25 JUSTICE GORSUCH: But just -- just --

1 just assume hypothetically it does and that the
2 jury believes that it's not legitimate medical
3 purpose under your regulations. Even though
4 it's an extremely close case, that individual
5 stands, under the government's view, unable to
6 shield himself behind any mens rea requirement
7 and is subject to essentially a regulatory crime
8 encompassing 20 years to maybe life in prison.

9 MR. FEIGIN: Well, Your Honor, I think
10 -- I think it's --

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

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

16 JUSTICE GORSUCH: Of course.

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

22 JUSTICE GORSUCH: No, of course.

23 MR. FEIGIN: -- boundaries of
24 medicine.

25 JUSTICE GORSUCH: Of course.

1 MR. FEIGIN: So there could be --

2 JUSTICE GORSUCH: It has to be -- but
3 it's an objective test, and once the jury
4 decides it's outside the legitimate bounds of
5 medical practice, acknowledging the standards of
6 the profession, that individual goes to prison,
7 straight to prison, do not pass go.

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

10 JUSTICE GORSUCH: Oh, so there is a
11 mens rea now?

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

15 JUSTICE GORSUCH: Why --

16 MR. FEIGIN: -- medical purpose --

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

24 MR. FEIGIN: So let me be --

25 JUSTICE GORSUCH: Is there a mens rea

1 --

2 MR. FEIGIN: -- let me be as clear as
3 I can.

4 JUSTICE GORSUCH: -- that the
5 government --

6 MR. FEIGIN: The -- the --

7 JUSTICE GORSUCH: -- has to prove or
8 not?

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

17 But, at the end of the day, we think
18 --

19 JUSTICE GORSUCH: An honest effort.
20 See, I don't know what that means. But I do
21 know what knowing and intentional mean.

22 MR. FEIGIN: So --

23 JUSTICE GORSUCH: And so are you
24 saying that the -- that there has to be some
25 form of mens rea here that the government has to

1 prove? Yes or no?

2 MR. FEIGIN: Yes. And it is the
3 honest --

4 JUSTICE GORSUCH: Why isn't that the
5 end of the case?

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

11 JUSTICE GORSUCH: Objective honest
12 efforts is like a -- a contradiction in terms,
13 Mr. Feigin.

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

16 JUSTICE GORSUCH: There's either --

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

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

20 MR. FEIGIN: I -- I think the Court
21 had -- had one in Moore. It was the honest
22 effort mens rea, and I --

23 JUSTICE BARRETT: But where does that
24 come --

25 JUSTICE ALITO: Mr. Feigin --

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

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

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

25 If a partner asks an associate to try

1 to find case law to support a proposition and
2 give me an honest effort to do that, and I don't
3 think the partner expects the associate to
4 respond: I'm not going to run any search at all
5 --

6 JUSTICE ALITO: All right. Mister --

7 MR. FEIGIN: -- because I'm a
8 hundred percent certain that it's not going to
9 turn anything up.

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

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

23 I -- I -- I understand that there are
24 serious practical problems and questions of
25 fairness that arise if this is read as having no

1 mens rea whatsoever. But what disturbs me about
2 some of the arguments -- well, many things
3 disturb me about some of the arguments.

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

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

1 allocated differently.

2 What I really don't understand about
3 your argument is what you say about 885. I --
4 I -- I -- I'm baffled by your reading that says
5 that this allocates the burden of production to
6 the defense but not -- but not the -- the burden
7 of -- of persuasion when it says that as to any
8 exemption, including this exemption, the
9 government is not required to negative it at
10 trial.

11 MR. FEIGIN: Well --

12 JUSTICE ALITO: How do you get around
13 that?

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

16 JUSTICE ALITO: It does allocate the
17 burden of going forward --

18 MR. FEIGIN: -- of going -- on the
19 defendant.

20 JUSTICE ALITO: -- to -- to the
21 defendant, yeah.

22 MR. FEIGIN: We interpret that in
23 light of Moore and in light of where every court
24 of appeals is on this to place the ultimate
25 burden of proof on us with -- but under -- what

1 ultimately shakes out into a mens rea standard
2 that has an objective component.

3 The objective component is incredibly
4 doctor-protective. It -- all it requires is
5 some attempt to recognizably practice medicine,
6 which wasn't present in Moore and isn't present
7 in these cases.

8 CHIEF JUSTICE ROBERTS: I --

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. Just one more question from me.

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

22 Do you agree with that statement?

23 MR. FEIGIN: Your Honor, I think that
24 can inform whether an honest effort was
25 undertaken, but, at the end of the day, I think

1 the Court is correct to the -- the Eleventh
2 Circuit, that is, is correct to the extent that
3 what the Eleventh Circuit is saying is that if
4 the defendant wasn't even attempting to practice
5 medicine --

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

11 True or no?

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

17 CHIEF JUSTICE ROBERTS: Well, you
18 can't interpret it that way. It says a
19 good-faith belief.

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

21 CHIEF JUSTICE ROBERTS: So that goes
22 to his views.

23 MR. FEIGIN: -- it does say belief,
24 Your Honor. And we think the belief could have
25 been arrived at that place in a good-faith way.

1 There could be a doctor who just beneficently
2 believes that handing out prescriptions on a
3 street corner for cash is good -- is a
4 legitimate medical purpose because lots of
5 people are in pain, but I think we'd all
6 recognize that person as a drug dealer.

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

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

17 The way good faith was used in Moore,
18 as -- as was explicated by the honest effort
19 standard, which I think sets forth an objective
20 standard, as several courts of appeals have
21 recognized, and it was used more in the sense of
22 like the good faith exception to the
23 exclusionary rule or something to that effect,
24 where it's really something that's objective and
25 reasonable and that what the statute is asking

1 doctors to do when it applies to doctors at the
2 end of the day is, if you're going to rely on
3 your license, be at least minimally careful when
4 you do that.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 Justice Thomas, anything further?

7 JUSTICE THOMAS: Just, Mr. Feigin, I

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

9 MR. FEIGIN: Thank you.

10 (Laughter.)

11 JUSTICE THOMAS: Because normally,

12 when there is a registration and there's
13 non-compliance with the conditions for that
14 registration, you lose your registration like a
15 car or your right to drive, that sort of thing.

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

22 Can you tell me -- and then it comes
23 up as to whether this compliance is sufficient
24 when you are indicted for the underlying 841
25 crime. Can you think of another instance in

1 which the conditions of a registration like this
2 then become a part of a criminal offense because
3 you failed to comply with those conditions?

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

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

21 Rather, you're non-compliance with the
22 conditions of that registration becomes the
23 basis or part of the basis for the underlying --
24 for the crime of distribution. It's the
25 authorization. You don't have to --

1 MR. FEIGIN: Well, Your Honor, I -- I
2 guess I'm not quite sure whether this answers
3 your question, but the terms of the statute
4 explicitly require the doctor to comply with his
5 registration. And it is understood that the
6 registration is issued only for a limited
7 purpose.

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

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

23 And I think by the same token here,
24 there may be some government authorization to do
25 something that, frankly, I don't think anyone in

1 this room, unless there's some doctor here,
2 could do, we allow doctors to do it because
3 they're trained professionals, but when they
4 exceed the scope of their registration and their
5 special ability to do it, they become the same
6 as ordinary people violating the criminal laws.

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

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

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

22 MR. FEIGIN: Sorry. I'm sorry,
23 Justice Thomas. I was misunderstanding the
24 question. That's the way it works under federal
25 law too, is that also there's a set of civil

1 revocation proceedings that can and would occur.
2 And, for example, Dr. Kahn's license was
3 revoked -- his -- sorry, I'm sorry, his DEA
4 registration as well as, I think, his state
5 license.

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

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer, anything further?

20 Justice Alito?

21 JUSTICE SOTOMAYOR: I do, counsellor.
22 Moore versus U.S., which you're relying a lot
23 on, in a footnote did set forth the trial
24 judge's instruction.

25 Have you read that? And is that an

1 instruction that you're comfortable with?

2 MR. FEIGIN: Yes, Your Honor. It
3 talks about how a sincere intention to treat the
4 patient in front of the -- this is on page 124
5 of the appendix in Moore.

6 JUSTICE SOTOMAYOR: 142, note 20. I
7 have it in front of me, so --

8 MR. FEIGIN: Yes. I'm sorry, Your
9 Honor.

10 JUSTICE SOTOMAYOR: Yeah.

11 MR. FEIGIN: I thought it was page
12 124. But I apologize.

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

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

1 MR. FEIGIN: Your Honor --

2 JUSTICE SOTOMAYOR: As setting forth
3 what you believe is the accurate instruction?

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

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

13 JUSTICE SOTOMAYOR: All right,
14 counsel --

15 MR. FEIGIN: Then the evidence --

16 JUSTICE SOTOMAYOR: -- I don't want to
17 --

18 MR. FEIGIN: -- is all objective.

19 JUSTICE SOTOMAYOR: -- eat up a lot of
20 time.

21 MR. FEIGIN: Okay.

22 JUSTICE SOTOMAYOR: So let me go to my
23 second part of my question.

24 Could you tell me whether a situation
25 could exist that a prescription was not issued

1 for a legitimate medical purpose but still is in
2 the usual course of professional practice? I
3 don't think that could be, right?

4 MR. FEIGIN: I think it is --

5 JUSTICE SOTOMAYOR: There's a medical
6 purpose --

7 MR. FEIGIN: -- it is much easier to
8 think of a converse situation --

9 JUSTICE SOTOMAYOR: Exactly.

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

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

1 You might think that that is for a
2 legitimate -- you're still prescribing the drugs
3 for a legitimate medical purpose because
4 doctor's really hoping this time the patient
5 takes the meds herself because she needs them.

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

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

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

22 JUSTICE SOTOMAYOR: No, it has to be
23 both.

24 MR. FEIGIN: -- I doubt there are very
25 many cases in which a jury -- I dare to say

1 there are probably none in which a jury thinks
2 that there was a prescription that a doctor
3 issued within the usual course of his practice
4 that was not also issued for a legitimate
5 medical purpose.

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

18 JUSTICE SOTOMAYOR: All right. That
19 goes to your good faith, though. That's what
20 Moore was talking about.

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

1 regulation.

2 And the regulation reads as one
3 unitary piece, but what these jury instructions
4 do is they clarify for the jury not just to
5 focus on the idea that the doctor, as all the
6 doctor defendants do in these cases, just says:
7 Look, I had a patient who's in front of me who's
8 in pain. I prescribed.

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

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?
17 Justice Kavanaugh?

18 Justice Barrett?

19 JUSTICE BARRETT: Just one, hopefully,
20 quick question, Mr. Feigin.

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

1 It does seem to me, and you've said
2 that to the extent that there is some sort of
3 mens rea requirement wrapped up in this phrase,
4 honest attempt, I think you -- I understood you
5 to say to, Justice Gorsuch, that that is a sort
6 of mens rea requirement? Did I understand that
7 correctly?

8 MR. FEIGIN: Yes.

9 JUSTICE BARRETT: Okay.

10 MR. FEIGIN: I think that is -- I
11 mean, it's -- Your Honor, I -- I -- I -- I think
12 it's roughly akin to a -- a -- a form of extreme
13 objectively grounded mens rea.

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

25 And I think portions of Moore and this

1 Court's Harrison Act cases, and I think common
2 sense reflect that this is such a situation,
3 given the vulnerability of the patients and the
4 general public and the fact that these doctors
5 seek out these DEA registrations.

6 And they're licensed professionals.
7 And we shouldn't have situations like we had
8 after raiding Ruan's clinic where the price of
9 opioids on the streets doubles because suddenly
10 the supply has been cut off.

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

17 MR. FEIGIN: Well, a -- a couple of
18 points to that, Your Honor.

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

1 And the other thing I would say is, if
2 this Court were to apply the mens rea
3 presumption, it could also come from there, but
4 ultimately we are landing in the same place that
5 Moore did. We're taking this -- we have been
6 taking this Court's teachings from Moore as we
7 have for the past, you know, 47 years, and
8 applying it to these cases.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Rebuttal, Mr. Robbins?

12 REBUTTAL ARGUMENT OF LAWRENCE S. ROBBINS
13 ON BEHALF OF THE PETITIONER IN 20-1410

14 MR. ROBBINS: Thank you, Mr. Chief
15 Justice.

16 First off, with all respect to my
17 friend, Mr. Feigin, the government is not giving
18 you an accurate rendering of Moore. Footnote
19 20, the instruction to which counsel was just
20 adverting is -- states an honest efforts
21 instruction, which we say in our Section 1(b) of
22 our opening brief is satisfactory to us.

23 But it is not an objective standard.
24 The government is trying to objectify, if you
25 will, a standard that was plainly intended to be

1 subjective. Why do I say that? Because in the
2 very next paragraph of the opinion, the Court
3 says that, well, the defendant said he was just
4 trying to -- a novel technique to solve a
5 problem, but the jury didn't believe him. The
6 jury didn't believe him.

7 That says that this is a subjective
8 question. Did he make an honest effort? He
9 said he did.

10 Because he was using some novel
11 technique, but the jury rejected it. The jury
12 didn't say: Well, the reason -- a reasonable
13 doctor wouldn't do that. An objectively
14 reasonable doctor wouldn't do that. No. They
15 said we don't believe you, which is exactly what
16 juries are entitled to do when they assess the
17 purpose or intent of a defendant.

18 They do that in every case, which is
19 why we suggest that the medical purpose test
20 simplifies the jury's task and adheres to the
21 text of the statute, but if this Court is to use
22 an honest efforts test instead, a la footnote 20
23 of Moore, we should be clear that it is not an
24 objective standard at all.

25 The government's submission is, no

1 matter how they disclaim it, a negligence
2 standard gussied up as something else. But my
3 suggestion to the Court is that, you know, a
4 billion objectives here and a billion
5 reasonablenesses here, before you know it,
6 you're talking about real negligence. And
7 that's, I think, where we find ourselves with
8 the government's argument.

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

18 The Harrison Act cases manifestly
19 support us and not the government. You look --
20 need look no further than the unanimous opinion
21 in Linder to see that what matters was intent,
22 subjective intent of the doctor.

23 And I want to close with one -- just
24 one point that goes back to the Chief Justice's
25 question at the beginning of this argument. The

1 Chief Justice asked: Is there a book that tells
2 us what the right amount of medication is for a
3 certain kind of disability? The answer is there
4 is no such book. And that's the whole problem.

5 The problem is that medical standards
6 evolve. It's a constantly evolving matter. And
7 that deference to patients and their illness and
8 their doctors requires a subjective standard.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

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

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