Nos. 20-1410 & 21-5261

IN THE

Supreme Court of the United States

XIULU RUAN,
Petitioner,
v.
UNITED STATES,
Respondent.

SHAKEEL KAHN,
Petitioner,
v.
UNITED STATES,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Eleventh Circuits

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers is a nonprofit, voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members and about 40,000 total members with affiliates. NACDL is the only nationwide professional bar association for private criminal-defense lawyers, public defenders, military defense counsel, law professors, and judges.

Consistent with its mission of advancing the proper, efficient, and fair administration of justice, NACDL files several amicus briefs each year in the United States Supreme Court and other state and federal courts, all aimed at providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] Pursuant to Supreme Court Rule 37.6, amicus represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than amicus or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have provided written consent to the filing of amicus curiae briefs. See S. Ct. R. 37.3.

SUMMARY OF ARGUMENT

Our country continues to struggle with widespread overdoses and deaths caused by the rampant abuse of opioids. To combat this ongoing crisis, the federal government aggressively has prosecuted doctors and medical professionals alleged to have illegally diverted addictive pills into the black market. A common narrative in these cases is that doctors have fueled the crisis by overprescribing controlled substances as a violation of federal criminal law.

Of course, some doctors have prescribed opioids to patients for illegal reasons. Yet, many other doctors have issued well-intentioned prescriptions to treat patients for a variety of pain syndromes consistent with governing standards of professional care. Criminal liability depends on scienter. No court should interpret federal law to impose criminal penalties when a defendant doctor has acted in good faith and the government has not demonstrated the specific mental state that Congress has required.

The Controlled Substances Act imposes no criminal liability on doctors for lawfully prescribing controlled substances in the normal course of treating patients. That should come as no surprise. Society benefits when doctors prescribe drugs for legitimate medical purposes authorized by the Act.

Criminal liability attaches only when defendant doctors knowingly prescribe controlled substances to patients in circumstances *not authorized* by Congress. Consequently, the government must demonstrate that a defendant doctor knowingly prescribed drugs in illegal circumstances. When the government alleges that a doctor has violated of 21 U.S.C. § 841, lower

courts have erred in concluding that a doctor's good faith is not relevant to criminal liability.

ARGUMENT

I. The overuse and abuse of federal criminal law threatens innocent conduct.

This Court has rejected creative attempts by the government and lower courts to expand the scope of federal criminal statutes beyond their plain terms. And it should do so again here.

The Controlled Substances Act prohibits a doctor from knowingly prescribing a controlled substance outside of the usual course of professional practice. Yet the Act does not criminalize well-intentioned conduct when a doctor—in good faith—prescribes drugs to treat patients with legitimate medical needs.

A. Overcriminalization is a growing problem that this Court continues to confront.

Since the earliest days of our nation, Congress has enacted federal criminal laws. The first criminal legislation listed only thirty federal offenses. See An Act for the Punishment of Certain Crimes against the United States, Ch. 9, 1 Stat. 112–19 (1790). Yet, from that humble beginning, the number of federal criminal offenses has skyrocketed over the years. Today, tallying the total number of federal criminal offenses scattered throughout the United States Code is an exercise no one seems willing to take—not even the federal employees charged with prosecuting those crimes. See, *e.g.*, Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Wall St. J., July 23, 2011.

Estimates suggest that nearly 5,000 federal statutes and more than 300,000 federal regulations contain

potential criminal penalties.[2] It should come as "no surprise that as the volume increases, so do the number of imprecise laws." *Sykes* v. *United States*, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting). Indeed, Americans face real problems stemming from "overcriminalization" and the imposition of "excessive punishment" from federal crimes. *Yates* v. *United States*, 574 U.S. 528, 569 (2015) (Kagan, J., dissenting).[3] This Court should not condone the misapplication of federal criminal laws.

In recent years, this Court has confronted attempts by the government to shoehorn misconduct into ill-fitting federal criminal statutes. For example, public officials jeopardized the safety of local citizens when they changed the flow of traffic into New York City for no reason other than political payback. The government urged this Court to accept its broad interpretation of what it viewed to be relevant federal criminal statutes. But, because the payback scheme "did not aim to obtain money or property," this Court refused to conclude that the defendants had "violated the federal-program fraud or wire fraud laws." *Kelly* v. *United*, 140 S. Ct. 1565, 1574 (2020). To be sure, the

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[2] Heritage Foundation, Overcriminalization, https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization.

[3] See *also* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715 (2013); Brian W. Walsh & Tiffany M. Joslyn, Nat'l Ass'n of Criminal Def. Lawyers, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (2010), www.nacdl.org/withoutintent (report detailing a study of federal criminal lawmaking and the failure of Congress to include meaningful intent requirements in criminal law proposals); Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703 (2005); Overcriminalization, NACDL, https://www.nacdl.org/Landing/Overcriminalization (listing additional resources).

Court recognized that "not every corrupt act by state or local officials is a federal crime." *Id.*

Similarly, this Court rejected the government's "expansive reading" of a criminal statute enacted by Congress to fulfill the United States' obligations under the international Convention on Chemical Weapons. *Bond* v. *United States*, 572 U.S. 844, 866 (2014). Congress provided no clear indication that the criminal provisions of the Chemical Weapons Convention Implementation Act extended to actions taken by a jilted wife who attempted to injure her husband's lover by spreading chemicals on a car door, a mailbox, and a doorknob. *Id.* at 848. The Court thus concluded that the criminal provision did not apply to "the unremarkable local offense" that the federal government sought to prosecute. *Id.*

Once again, the Court in this case must consider the proper scope of federal criminal liability. In doing so, this Court should reject any interpretation of the Controlled Substances Act that blurs the line between criminal liability and otherwise innocent conduct by doctors. Congress never intended to prohibit doctors from prescribing controlled substances in good faith to treat patients with legitimate medical needs.

B. The Controlled Substances Act only criminalizes activities that fall outside the usual course of a doctor's professional practice.

When Congress enacted the Controlled Substances Act, it recognized that many of the drugs and substances regulated under the statute "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." 21 U.S.C. § 801(1). Congress therefore established five schedules to classify drugs and substances based on their accepted medical use for treatment, the relative potential for abuse, and the likelihood of dependence if abused. See *id.* § 812.

Scienter requirements advance fundamental principles of criminal law by helping courts "separate those who understand the wrongful nature of their act from those who do not." *Rehaif* v. *United States*, 139 S. Ct. 2191, 2196 (2019) (internal quotation marks omitted).

Congress prohibited a doctor from "knowingly or intentionally" dispensing a controlled substance except as authorized by relevant provisions of the Controlled Substances Act. 21 U.S.C. § 841(a). Violations of this provision may result in felony convictions. *United States* v. *Moore*, 423 U.S. 122, 134 (1975). Congress specifically criminalized "the diversion of drugs from legitimate channels to illegitimate channels," *id.* at 135, recognizing that no doctor may knowingly act "as a drug pusher," *id.* at 138 (internal quotation marks omitted).

But Congress did not prohibit doctors from prescribing controlled substances in good faith for *legitimate* medical purposes. As this Court recognized, Congress did not intend for the criminal provisions of the Controlled Substances to "impede legitimate research."

Id. at 143. Nor did Congress seek to deprive physicians from relying on their "reasonable discretion in treating patients and testing new theories" within the medical field. *Id.*

This Court consequently held that the government may prosecute doctors under Section 841 only "when their activities fall outside the usual course of professional practice." *Id.* at 124. As the jury in *Moore* was properly instructed: a doctor cannot "be convicted if he merely made 'an honest effort' to prescribe [controlled substances] in compliance with an accepted standard of medical practice." *Id.* at 142 n.20.

Relying on *Moore*, lower courts consistently have concluded "that it is proper to instruct juries that a doctor should not be held criminally liable" under Section 841 "if the doctor acted in good faith" while prescribing controlled substances to treat patients. *United States* v. *Hurwitz*, 459 F.3d 463, 477 (4th Cir. 2006) (collecting cases). This Court should reaffirm that conclusion here.

A doctor exercising professional judgment and acting in good faith cannot be found criminally liable for "knowingly and intentionally" prescribing controlled substances outside of the usual course of professional medical practice. *United States* v. *Kohli*, 847 F.3d 483, 494 (7th Cir. 2017). To interpret Section 841 "otherwise would be to criminalize a broad range of apparently innocent conduct" by reading the "knowledge-of-illegality requirement" out of the plain statutory text enacted by Congress. *Liparota* v. *United States*, 471 U.S. 419, 426 (1985). There is no good reason for this Court to adopt that interpretation.

II. This Court should strictly enforce the mental state that Congress required to impose criminal liability under the Controlled Substances Act.

By their plain terms, criminal statutes should define exactly what conduct will render a person liable to criminal penalties. *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). The government traditionally must prove both "an evil-meaning mind" and "an evil-doing hand" before it may impose a criminal punishment. *Morisette* v. *United States*, 342 U.S. 246, 251 (1952). Standing alone, neither element justifies criminal liability.

"The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis* v. *United States*, 341 U.S. 494, 500 (1951). Indeed, courts have recognized a mens rea requirement as a component of criminal law for centuries. See, *e.g.*, Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 Hastings L.J. 815, 821–50 (1980) (tracing the development of the legal principle that a criminal defendant could be convicted only upon proof of a guilty mind). The mens rea requirement separates criminal misconduct from otherwise innocent conduct. *Carter* v. *United States*, 530 U.S. 255, 269 (2000); accord *Elonis* v. *United States*, 575 U.S. 723, 737 (2015).

No court may "rewrite the words" used by Congress in defining the scope of federal criminal liability. *United States* v. *Sheridan*, 329 U.S. 379, 389 (1946). When Congress uses the word "knowingly" in a criminal statute, federal courts must interpret that statutory term consistent with its ordinary usage. *Flores-Figueroa* v. *United States*, 556 U.S. 646, 652 (2009). This Court should not interpret a federal

criminal statute to allow the conviction of an individual who acted without the requisite mental intent required by Congress to establish a criminal violation of the law.

Under the Controlled Substances Act, Congress rationally "exempted" from criminal liability the lawful acts taken by doctors in the normal course of treating patients. *Moore*, 423 U.S. at 131. That makes imminent sense, as doctors should be allowed to prescribe controlled substances for legitimate medical purposes to maintain the health and welfare of their patients. See 21 U.S.C. § 801(1).

Put another way, Congress contemplated that a doctor "knowingly or intentionally" may prescribe controlled substances "as authorized" under the relevant provisions of the Controlled Substances Act. *Id.* § 841(a). Such conduct "shall be unlawful" only when the doctor "knowingly or intentionally" prescribes a controlled substances in circumstances *not authorized* by Congress. See *id.* To establish criminal liability the government therefore must demonstrate "that the defendant knew his conduct to be unauthorized by statute." *Liparota*, 471 U.S. at 425.

The government must *prove* that a doctor prescribed controlled substances for no "legitimate medical reason" to impose criminal liability as a violation of Section 841(a) of the Controlled Substances Act. *United States* v. *Outler*, 659 F.2d 1306, 1309 (5th Cir. 1981). The "lack of a legitimate medical reason is as essential to the offense charged against [a doctor] *as the requisite mens rea*." *Id.* (emphasis added). This Court should reinforce that requirement here.

Understandably, many doctors fear criminal sanctions when prescribing controlled substances especially

as our nation "is in the midst of an unprecedented opioid epidemic." Opioid Crisis, Human Res. & Services Admin., https://www.hrsa.gov/opioids. The Federal Bureau of Investigations has announced that it continues to work with law enforcement agencies to investigate medical professionals and doctors "who provide illegal prescriptions and distribute controlled substance medications that fuel the opioid epidemic in our country."[4]

Medical professionals and doctors "can find themselves stuck in the middle between aggressive prosecutors and patients in need of pain treatment." Christopher Brown, *DOJ Keeps Up Pressure on Doctors Who Prescribe Opioids Illegally*, Bloomberg Law (Jan. 24, 2020).[5] It is important for this Court to enforce the statutory mens rea requirement in determining whether a doctor prescribed controlled substances without a legitimate medical purpose or beyond the bounds of accepted medical practice. The lower courts erred in concluding that good faith is not relevant to criminal liability when the government alleges that a doctor has violated of 21 U.S.C. § 841.

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[4] Press Release, U.S. Attorney's Office, District of Columbia, *Doctor Licensed in the District of Columbia and Virginia Charged With Unlawful Distribution of Controlled Substances* (Sept. 17, 2021), https://www.justice.gov/usao-dc/pr/doctor-licensed-district-columbia-and-virginia-charged-unlawful-distribution-controlled.

[5] Available at https://news.bloomberglaw.com/health-law-and-business/doj-keeps-up-pressure-on-doctors-who-prescribe-opioids-illegally.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Appeals for the Tenth and Eleventh Circuits should be reversed.

Respectfully submitted,

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