

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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

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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.

16 All these --

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

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

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

25 MR. ROBBINS: No. I think, under

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

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

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

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

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

24 JUSTICE THOMAS: The -- 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. We don't dispute  
9 that a doctor --

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

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

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

1 writing these prescriptions.

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

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

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

23 JUSTICE KAVANAUGH: The "except as" --

24 CHIEF JUSTICE ROBERTS: What if you're

25 --

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

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

10 MR. ROBBINS: Of course.

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

17 MR. ROBBINS: Yes, you would.

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

25 MR. ROBBINS: Well --

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: -- I thought

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

6 MR. ROBBINS: Well --

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

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

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

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

2                   JUSTICE SOTOMAYOR: Counsel, can we --

3                   MR. ROBBINS: -- I -- I take --

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

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

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

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

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

1 JUSTICE SOTOMAYOR: That's the least.  
2 Now the question becomes, who has the burden of  
3 proving or not good faith, correct?

4 MR. ROBBINS: Well, that -- that's not  
5 --

6 JUSTICE SOTOMAYOR: You say it's the  
7 government.

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

10 JUSTICE SOTOMAYOR: Not good faith.

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

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

25 It is important for me to be clear

1 that my client didn't get that instruction. His  
2 jury was told, if he was outside the bounds of  
3 medicine, you may convict him, full stop. No  
4 good faith. No knowingly or intentionally.  
5 None of that.

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

9 CHIEF JUSTICE ROBERTS: Thank you.

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

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

16 MR. ROBBINS: Okay. Thank you, Your  
17 Honor.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Breyer?

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



1 intentionally to" do a variety of things.

2 As a matter of language, do the  
3 adverbs "knowingly" or "intentionally" modify  
4 the introductory clause "except as authorized by  
5 this subchapter"?

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

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

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

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

1 you've already rejected.

2 JUSTICE ALITO: Well, we rejected it  
3 in a particular case for particular reasons, but  
4 I want to forget about all that. I just want to  
5 start out with English grammar.

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

8 JUSTICE ALITO: Okay. So --

9 MR. ROBBINS: But -- but --

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

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

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

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

20 JUSTICE ALITO: No?

21 MR. ROBBINS: If it --

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

24 MR. ROBBINS: No. Well, there's a  
25 presumption as to any element that separates

1 wrongful from innocent conduct. I would not,  
2 for example, quarrel with the -- with the  
3 holding in -- in Yermian that a jurisdictional  
4 path is different.

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

8 MR. ROBBINS: Yes.

9 JUSTICE ALITO: -- of scienter?

10 MR. ROBBINS: Yes.

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

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

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

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

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

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

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

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

1 modify. It can only modify a verb, and "except  
2 as authorized" is not a verb.

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

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

10           JUSTICE ALITO: It says in a trial.

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

17           But then --

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

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

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

25           MR. ROBBINS: Well, let -- let -- let

1 me -- you know, I -- at -- at the risk of -- of  
2 recurring to statutory history, I should point  
3 out that under the Harrison Act, the -- the  
4 cognate of that provision said that the burden  
5 of proof was on the defense.

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

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

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

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

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

24           MR. ROBBINS: Correct.

25           JUSTICE ALITO: And then somebody has

1 to prove something. And when this provision  
2 says that the government doesn't have to  
3 negative it, that means that, actually, the  
4 government has to prove it and prove it beyond a  
5 reasonable doubt?

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

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

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

22 MR. ROBBINS: Well --

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

1 where that word comes from at all. It's  
2 nowhere.

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

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

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



1 purpose.

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

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

8           CHIEF JUSTICE ROBERTS: Justice  
9 Sotomayor?

10           Justice Kagan?

11           Justice Gorsuch?

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

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

20           MR. ROBBINS: Okay.

21           JUSTICE GORSUCH: As I understand,  
22 your position would still be that the "except"  
23 clause has to have some mens rea element to it  
24 because it's what distinguishes lawful from  
25 unlawful conduct; that is, a doctor would be

1 otherwise prohibited in all instances without  
2 any mens rea from -- from -- from prescribing  
3 medicines.

4 MR. ROBBINS: Correct.

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

9 MR. ROBBINS: Absolutely.

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

13 MR. ROBBINS: Precisely.

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

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

1 hand.

2 MR. ROBBINS: I agree with that.

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

9 MR. ROBBINS: Correct.

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

14 MR. ROBBINS: Yes.

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

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

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

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

23 JUSTICE GORSUCH: Be careful.

24 (Laughter.)

25 MR. ROBBINS: I -- I understand. But

1 I -- I just feel, since I actually --

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

4 JUSTICE THOMAS: Yeah.

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

9 JUSTICE GORSUCH: Fair enough.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Kavanaugh?

12 Justice Barrett?

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

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

24 So what is the difference? And if we  
25 agree with you, why would we say good faith

1       rather than just sticking closer to the  
2       language?

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

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

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

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

18                  JUSTICE BARRETT:  I thought legitimate  
19      medical purpose?

20                  MR. ROBBINS:  Yes.

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

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

1 departing --

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

7 MR. ROBBINS: Correct.

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

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

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

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

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

24 MR. ROBBINS: Correct.

25 JUSTICE BARRETT: So I'm taking you at

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

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

11 JUSTICE BARRETT: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 MR. ROBBINS: Thank you.

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

16 JUSTICE BREYER: It's not -- no, it's  
17 not important.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Breyer.

20 I'm sorry, Mr. Robbins, Justice Breyer  
21 had a question.

22 JUSTICE BREYER: It's just that I had  
23 a different English teacher --

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

25 JUSTICE BREYER: -- Ms. Chichester. I

1 had a different English teacher, Ms. Chichester,  
2 who told us an adverb could modify a verb, an  
3 adjective, or another adverb. And as long as  
4 that's so, the teacher says to the class, Class,  
5 I don't want you to refer to Basingstoke's book  
6 about Julius Caesar unless we're talking about  
7 the Gallic wars or something, and I -- I -- but,  
8 purposely, I don't want you purposely to do  
9 that. I don't want you purposely or knowingly  
10 to talk about Basingstoke's book about the  
11 Gallic wars unless we're talking about the  
12 Gallic wars.

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

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

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

19 MR. ROBBINS: No doubt.

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

23 MR. ROBBINS: And -- and let me just  
24 say --

25 JUSTICE BREYER: -- if he chooses to.



1           MR. ROBBINS: -- for -- for -- lest I  
2 let -- leave -- leave the point unsaid --

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

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

13           With that, I thank the Court.

14           CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16           Mr. Brindley.

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

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

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

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

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

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

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

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

24           CHIEF JUSTICE ROBERTS: Counsel, you  
25 refer to the good faith definition, and I

1 understand your friend on the other side to be  
2 arguing that reduces to an idiosyncratic view of  
3 what the law ought to be.

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

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

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

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

24           So we are not suggesting that somehow  
25 he can create for himself the definition of

1 medical practice. Objective evidence will  
2 decide the definition of medical practice.

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

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

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

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

1 presumably set some standard of -- of -- of law  
2 and for what constitute usual course or  
3 whatever.

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

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

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

25 With respect to a regulation like

1 speeding, I just don't think that's the same  
2 category of situation as when we're talking  
3 about 20 and life sentences potentially and in  
4 which there needs to be a -- a principle of  
5 scienter applied and would --

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

11 MR. BRINDLEY: Yes.

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

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

21 JUSTICE KAVANAUGH: And the way this  
22 --

23 MR. BRINDLEY: -- elements of the  
24 offense.

25 JUSTICE KAVANAUGH: -- and the way

1 this plays out -- tell me if I'm wrong -- is  
2 there's objective evidence -- there's evidence  
3 about what the objective standards are for  
4 medical practice, and those will come in, and  
5 then there will be a determination of that.

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

11 MR. BRINDLEY: That is --

12 JUSTICE KAVANAUGH: That's your --

13 MR. BRINDLEY: -- absolutely right,  
14 Justice Kavanaugh.

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

23 MR. BRINDLEY: Yes. Absolutely.  
24 That's absolutely correct. We're more --

25 JUSTICE ALITO: But what if the jury

1 doesn't disbelieve it? What if the doctor  
2 really sincerely thinks that a practice that is  
3 objectively outlandish is an authorized -- is  
4 the legitimate practice of medicine? He's  
5 absolutely sincere about it.

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

7 JUSTICE ALITO: In your view, that --  
8 that doctor must be acquitted, right?

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

15 JUSTICE ALITO: But what if the --

16 MR. BRINDLEY: -- trafficking as  
17 conventionally understood.

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

25 The doctor has to be acquitted in your



1 view?

2 MR. BRINDLEY: The -- if the jury  
3 believes that he's sincere and then his belief  
4 that that's a legitimate purpose, I think that  
5 is true. But I don't think that's very likely  
6 to occur when all the objective evidence comes  
7 in saying that's wrong.

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

10 MR. BRINDLEY: Well --

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

20 MR. BRINDLEY: I would agree with  
21 that, yes.

22 JUSTICE GORSUCH: Okay.

23 MR. BRINDLEY: I certainly would agree  
24 with that.

25 JUSTICE KAVANAUGH: Uh --

1           MR. BRINDLEY: I think the -- the risk  
2 -- I'm sorry.

3           JUSTICE KAVANAUGH: Go ahead.

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

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

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

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

25           But, if you're driving, you know, a

1 hundred in a 25 zone and you come in, oh, I  
2 thought it was actually a hundred, was the speed  
3 limit, no one's going to believe that. Isn't  
4 that the way to separate out the -- the -- the  
5 outlandish example?

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

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

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

23 If you don't know that or sincerely  
24 don't believe it, then you're not guilty, but  
25 all of the objective evidence comes in, and if

1 it says that your position is crazy, you're  
2 going to get convicted. That's the reality.

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

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

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

1     only thing that makes the doctor's writing the  
2     prescription improper or criminal is if he  
3     writes it with no legitimate purpose, not  
4     believing he's curing a malady of any kind.

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

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

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

16            JUSTICE KAVANAUGH:   If you -- yeah.

17            MR. BRINDLEY:   -- but you're going to  
18    have a hard time.

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

21            MR. BRINDLEY:   Right.

22            JUSTICE KAVANAUGH:   Right.

23            MR. BRINDLEY:   Absolutely you will.

24            JUSTICE KAVANAUGH:   If -- if the child  
25    in the car -- if the child wasn't injured.

1 MR. BRINDLEY: Yes.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Thomas, anything further?

4 Justice Breyer? No?

5 Justice Kavanaugh, anything further?

6 Thank you, counsel.

7 MR. BRINDLEY: Thank you, Mr. Chief  
8 Justice.

9 CHIEF JUSTICE ROBERTS: Mr. Feigin.

10 ORAL ARGUMENT OF ERIC J. FEIGIN

11 ON BEHALF OF THE RESPONDENT

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

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

22 They want to be free of any obligation  
23 even to undertake any minimal effort to act like  
24 doctors when they prescribe dangerous, highly  
25 addictive, and, in one case, lethal dosages of

1 drugs to trusting and vulnerable patients.

2 That's not what this Court said in  
3 Moore, where I think everyone agrees the Court  
4 implicitly adopted the jury instructions in that  
5 case, which distilled the statutory and  
6 regulatory requirements here to come up with an  
7 honest effort standard.

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

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

1                   I think there -- I can give you three  
2                   examples, we have more, but three examples of  
3                   cases, and these are admittedly stylized a bit,  
4                   but they're based in reality of -- of why this  
5                   really matters on the ground.

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

20                  Number two would be the absentee  
21                  doctor, and one problem with their standard is  
22                  it really rewards doctors for untethering  
23                  themselves not only from the medical profession  
24                  but from their patients. It's the kind of  
25                  doctor, and I think you'll see some resemblances



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

10 CHIEF JUSTICE ROBERTS: Counsel, it --

11 MR. FEIGIN: Yeah.

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

16 MR. FEIGIN: Oh --

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

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

1 very happy to argue the law.

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

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

12 (Laughter.)

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

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

23 CHIEF JUSTICE ROBERTS: So you think  
24 the government -- it -- it would be all right if  
25 the government did not have the burden of proof

1 on any of the elements here?

2 MR. FEIGIN: So, Your Honor, we do  
3 agree with Petitioners that the ultimate burden  
4 of proof, once the burden of persuasion is  
5 satisfied, is on the government. I think where  
6 -- but I think that 885 --

7 CHIEF JUSTICE ROBERTS: Once the  
8 burden of persuasion is satisfied?

9 MR. FEIGIN: I'm sorry.

10 CHIEF JUSTICE ROBERTS: Presentation  
11 --

12 MR. FEIGIN: Once the burden of  
13 production --

14 CHIEF JUSTICE ROBERTS: Yeah.

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

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

24 MR. FEIGIN: So, Your Honor, we place  
25 our burden exactly where Moore did, which is an

1 honest effort, which we interpret as some  
2 objectively minimal -- minimal, reasonable  
3 effort to practice some recognizable form of  
4 medicine, which neither the doctor in --

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

9 MR. FEIGIN: Our ultimate burden --

10 JUSTICE SOTOMAYOR: -- have to prove  
11 to the jury?

12 MR. FEIGIN: -- is to prove beyond a  
13 reasonable doubt the defendant was not even  
14 attempting to recognizably practice medicine,  
15 and --

16 JUSTICE SOTOMAYOR: Put that in --  
17 give me a jury charge.

18 MR. FEIGIN: Well, Your Honor, I think  
19 the jury --

20 JUSTICE SOTOMAYOR: Tell me the exact  
21 words.

22 MR. FEIGIN: I would -- I would point  
23 the Court precisely to the jury charge that was  
24 given in Moore, which was largely reiterated in  
25 Petitioner Kahn's case. I mean, I can read to

1 you the jury instruction in -- in Moore. I  
2 don't recall the specific page number off the  
3 top of my head, but we think that is an adequate  
4 instruction, plus the honest effort instruction  
5 the Court notes in Footnote 20.

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

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

14 JUSTICE KAVANAUGH: Why?

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

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

1 MR. FEIGIN: Well, Your Honor, I think  
2 the grammar point has been well -- well made,  
3 and --

4 JUSTICE BREYER: All right. If you  
5 want the grammar point too --

6 MR. FEIGIN: And I think --

7 JUSTICE BREYER: -- I mean --

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

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

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

13 JUSTICE BREYER: Is what?

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

17 JUSTICE BREYER: Yeah.

18 MR. FEIGIN: And an element --

19 JUSTICE BREYER: You think you have an  
20 element --

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

22 JUSTICE BREYER: -- in the Steele case  
23 --

24 MR. FEIGIN: -- include in -- in an  
25 indictment.

1 JUSTICE BREYER: -- where the -- the  
2 -- the -- in the United States Code, where the  
3 burden of production for the element, the  
4 non-existence thereof, is on the defendant, and  
5 once it's there produced, the government has to  
6 prove beyond a reasonable doubt.

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

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

15 JUSTICE BREYER: Fine.

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

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

24 Just cite me to that, and I will go  
25 read it with care.

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

4                   JUSTICE BREYER: Okay. Then let's go  
5 to --

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

7                   JUSTICE BREYER: -- the grammar point.

8                   MR. FEIGIN: -- specificity.

9                   JUSTICE ALITO: -- isn't it  
10 blackletter --

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

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



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

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

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

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

21           JUSTICE KAVANAUGH: You --

22           MR. FEIGIN: And I don't -- I think  
23 the way this shakes out with the history and as  
24 this Court recognized in Moore, in part 3 of  
25 Moore, which speaks purely in objective terms,

1 including in citing the honest effort standard  
2 and using it in reviewing the sufficiency of the  
3 evidence --

4 JUSTICE KAVANAUGH: Why don't we look  
5 at *Morissette*, though? Does -- I mean, that's  
6 the classic case and one of the most important  
7 cases in this area, the most important in this  
8 area. And the defendant there is deer hunting  
9 in an abandoned -- in property in rural  
10 Michigan, comes across these -- a bit -- shell  
11 casings and he takes the shell casings and he  
12 was not authorized to do that, right? Not  
13 authorized to do that, as Justice Jackson says.

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

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

1     who is, namely, to require the government to  
2     prove that he knew that he was not authorized to  
3     take those shell casings.

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

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

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

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

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

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

15 JUSTICE KAVANAUGH: But --

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

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

19 MR. FEIGIN: Yeah.

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

24 Well, that's very vague language in my  
25 estimation, and reasonable people can disagree.

1 Write more specific regs if you're -- if you  
2 have the problem that you're talking about.

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

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

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

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

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

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

1 JUSTICE GORSUCH: Be careful.

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

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

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

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

17 MR. FEIGIN: Yes, Your Honor.

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

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

21 JUSTICE GORSUCH: Right.

22 MR. FEIGIN: -- traditionally true.

23 JUSTICE GORSUCH: Right.

24 MR. FEIGIN: Yes.

25 JUSTICE GORSUCH: Okay. And the

1 "except" clause is an element because it's what  
2 separates lawful from unlawful conduct, right?

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

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

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

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

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

18 JUSTICE GORSUCH: Okay.

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

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

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

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

1 MR. FEIGIN: -- affirmative defense.

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

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

14 JUSTICE GORSUCH: Yes.

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

18 JUSTICE GORSUCH: Okay. All right.

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

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

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



1 JUSTICE GORSUCH: How about often?

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

4 JUSTICE GORSUCH: Sometimes. Okay.

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

6 JUSTICE GORSUCH: Sometimes. That --  
7 that -- that's good enough.

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

15 Do we agree on that?

16 MR. FEIGIN: Yes.

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

22 Do we agree on that?

23 MR. FEIGIN: Yes.

24 JUSTICE GORSUCH: Okay. And then,  
25 once the -- and I think this is where you're

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

7             MR. FEIGIN:  Yes.

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

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

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

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

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

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

1 JUSTICE BARRETT: Mr. Feigin?

2 MR. FEIGIN: Yeah.

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

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

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

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

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

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

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

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

21 JUSTICE KAVANAUGH: Well, that's --

22 MR. FEIGIN: -- for conduct --

23 JUSTICE KAVANAUGH: -- that's --

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

1 JUSTICE KAVANAUGH: That's exactly  
2 what Justice Jackson said about Morissette  
3 himself in the last paragraph of the opinion but  
4 talked about that would be a jury question.

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

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

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

18 MR. FEIGIN: Yes. And -- and, Your  
19 Honor, I don't want to just be talking about the  
20 --

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

23 MR. FEIGIN: I -- I -- I --

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

1 MR. FEIGIN: Okay. Sure.

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

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

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

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

25 And it's, I think, going to be

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

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

17 JUSTICE GORSUCH: Mr. Feigin, again --

18 MR. FEIGIN: Yeah.

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

25 MR. FEIGIN: Never.



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

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

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

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

17 JUSTICE GORSUCH: Of course.

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

23 JUSTICE GORSUCH: No, of course.

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

1 JUSTICE GORSUCH: Of course.

2 MR. FEIGIN: So there could be --

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

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

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

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

16 JUSTICE GORSUCH: Why --

17 MR. FEIGIN: -- medical purpose --

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

25 MR. FEIGIN: So let me be --

1 JUSTICE GORSUCH: Is there a mens rea

2 --

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

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

7 MR. FEIGIN: The -- the --

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

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

18 But, at the end of the day, we think  
19 --

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

23 MR. FEIGIN: So --

24 JUSTICE GORSUCH: And so are you  
25 saying that the -- that there has to be some

1 form of mens rea here that the government has to  
2 prove? Yes or no?

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

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

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

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

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

17 JUSTICE GORSUCH: There's either --

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

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

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

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

1 JUSTICE ALITO: Mr. Feigin --

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

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

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

1           If a partner asks an associate to try  
2   to find case law to support a proposition and  
3   give me an honest effort to do that, and -- I  
4   don't think the partner expects the associate to  
5   respond: I'm not going to run any search at all  
6   --

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

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

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

24           I -- I -- I understand that there are  
25  serious practical problems and questions of

1 fairness that arise if this is read as having no  
2 mens rea whatsoever. But what disturbs me about  
3 some of the arguments -- well, many things  
4 disturb me about some of the arguments.

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

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

1 burden of production and the burden of  
2 persuasion can be allocated differently.

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

12           MR. FEIGIN: Well --

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

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

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

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

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

23           MR. FEIGIN: We interpret that in  
24 light of Moore and in light of where every court  
25 of appeals is on this to place the ultimate



1 burden of proof on us with -- but under -- what  
2 ultimately shakes out into a mens rea standard  
3 that has an objective component.

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

9 CHIEF JUSTICE ROBERTS: I --

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

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

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

23 Do you agree with that statement?

24 MR. FEIGIN: Your Honor, I think that  
25 can inform whether it -- an honest effort was

1     undertaken, but, at the end of the day, I think  
2     the Court is correct to the -- the Eleventh  
3     Circuit, that is, is correct to the extent that  
4     what the Eleventh Circuit is saying is that if  
5     the defendant wasn't even attempting to practice  
6     medicine --

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

12                   True or no?

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

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

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

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

24                   MR. FEIGIN:  -- it does say belief,  
25    Your Honor.  And we think the belief could have

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

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

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

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

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

6 CHIEF JUSTICE ROBERTS: Thank you.

7 Justice Thomas, anything further?

8 JUSTICE THOMAS: Just, Mr. Feigin, I  
9 -- I sympathize with the position you're in.

10 MR. FEIGIN: Thank you.

11 (Laughter.)

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

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

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

1 Can you think of another instance in which the  
2 conditions of a registration like this then  
3 become a part of a criminal offense because you  
4 fail to comply with those conditions?

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

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

22 Rather, your non-compliance with the  
23 conditions of that registration becomes the  
24 basis or part of the basis for the underlying  
25 crime -- for the crime of distribution. It's

1 the authorization. You don't have to --

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

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

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

24 And I think, by the same token here,  
25 there may be some government authorization to do

1 something that, frankly, I don't think anyone in  
2 this room, unless there's some doctor here,  
3 could do, we allow doctors to do it because  
4 they're trained professionals, but, when they  
5 exceed the scope of their registration and their  
6 special ability to do it, they become the same  
7 as ordinary people violating the criminal laws.

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

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

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

23 MR. FEIGIN: Ah. Sorry. I'm sorry,  
24 Justice Thomas. I was misunderstanding the  
25 question. That's the way it works under federal

1 law too, is that also there's a set of civil  
2 revocation proceedings that can and would occur.  
3 And, for example, Dr. Kahn's license was  
4 revoked -- his -- sorry, I'm sorry, his DEA  
5 registration as well as, I think, his state  
6 license.

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

18           JUSTICE THOMAS: Thank you.

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

21           Justice Alito?

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



1           Have you read that? And is that an  
2 instruction that you're comfortable with?

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

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

9           MR. FEIGIN: I'm sorry, Your 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, we --

2 JUSTICE SOTOMAYOR: -- as setting  
3 forth what you believe is the accurate  
4 instruction?

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

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

14 JUSTICE SOTOMAYOR: All right,  
15 counsel --

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

17 JUSTICE SOTOMAYOR: -- I don't want to  
18 --

19 MR. FEIGIN: -- is all objective.

20 JUSTICE SOTOMAYOR: -- eat up a lot of  
21 time, so let me --

22 MR. FEIGIN: Okay.

23 JUSTICE SOTOMAYOR: -- go to my second  
24 part of my question.

25 Could you tell me whether a situation

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

5 MR. FEIGIN: I think it is --

6 JUSTICE SOTOMAYOR: There's no medical  
7 purpose --

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

10 JUSTICE SOTOMAYOR: Exactly.

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

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

1 sell them.

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

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

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

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

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

25           MR. FEIGIN: -- I doubt there are very

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

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

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

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

1 because I think it informs the entire  
2 regulation.

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

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

16 JUSTICE SOTOMAYOR: Thank you.

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

19 Justice Barrett?

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

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

1 the honest attempt standard.

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

9           MR. FEIGIN: Yes.

10          JUSTICE BARRETT: Okay.

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

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

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

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

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

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

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



1 context.

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

10           CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12           Rebuttal, Mr. Robbins?

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

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

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

24           But it is not an objective standard.  
25 The government is trying to objectify, if you

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

8           That says that this is a subjective  
9 question. Did he make an honest effort? He  
10 said he did 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  
16 what juries are entitled to do when they assess  
17 the 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  
22 use an honest efforts test instead, a la  
23 Footnote 20 of Moore, we should be clear that it  
24 is not an 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 -- I resist it because, in  
12 point of fact, Congress has placed this "except  
13 as authorized" downstream instead of upstream,  
14 and I don't think there's a dime's worth of  
15 difference between those two formulations  
16 between 841(a)(1) and 841(h), which was enacted  
17 20-plus years later to deal with Internet sales.

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

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

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

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## Official

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