No. 23-1013

In the Supreme Court of the United States

DALIBOR KABOV AND BERRY KABOV, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners are entitled to relief based on a jury instruction that finding them guilty of unauthorized distribution of controlled substances and conspiracy, in violation of 21 U.S.C. 841(a) and 846, required finding (*inter alia*) that they "intend[ed] to act outside the course of professional practice and without a legitimate medical purpose," C.A. E.R. 1253.

2. Whether the lower courts correctly rejected petitioners' due process challenges under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Napue* v. *Illinois*, 360 U.S. 264 (1959).

ADDITIONAL RELATED PROCEEDING

United States Court of Appeals (9th Cir.):

United States v. *Global Compounding, LLC*, No. 19-50098 (Sept. 16, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is not published in the Federal Reporter but is available at 2023 WL 4585957.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2023. A petition for rehearing was denied on November 14, 2023 (Pet. App. 51-52). On February 7, 2024, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 13, 2024, and the petition was filed on March 11, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners

Berry Kabov and Dalibor Kabov were convicted of one count of conspiring to distribute oxycodone, hydromorphone, hydrocodone, and promethazine with codeine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and 846; three counts of distributing oxycodone, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of conspiring to import a Schedule III controlled substance, in violation of 21 U.S.C. 952(b), 960(a)(1), and 963; three counts of importing a Schedule III controlled substance, in violation of 21 U.S.C. 952(b) and 960(a)(1), and 18 U.S.C. 2(b); and nine counts of engaging in monetary transactions in property derived from specified unlawful activity, in violation of 18 U.S.C. 1957(a) and 2(b). Pet. App. 24-25, 38-39. Berry was convicted of three counts and Dalibor of five counts of subscribing to a false tax return, in violation of 26 U.S.C. 7206(1). Pet. App. 25, 38-39. Petitioners were each sentenced to 121 months of imprisonment to be followed by three years of supervised release. *Id.* at 25-26, 39-40. The court of appeals vacated petitioners' convictions for importing controlled substances and conspiring to import controlled substances, affirmed their remaining convictions, and remanded for further proceedings. *Id.* at 1-22.

1. Section 841(a) of the Controlled Substances Act (CSA or Act), 21 U.S.C. 801 *et seq.*, prohibits the knowing or intentional distribution of controlled substances "[e]xcept as authorized by" the Act. 21 U.S.C. 841(a). The CSA's exceptions to the prohibition against drug distribution include an exception for physicians and pharmacists who are "registered by" the Drug Enforcement Administration (DEA) and who prescribe or dispense controlled substances—but the exception applies only "to the extent authorized by their registration and

in conformity with the other provisions" of the Act. 21 U.S.C. 822(b); see 21 U.S.C. 823(f) (Supp. IV 2022).

A federal regulation, 21 C.F.R. 1306.04(a), limits the scope of the authorization by specifying that a "prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." "The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription." *Ibid.* "An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of" the Act, "and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." *Ibid.*

2. Petitioners operated a scheme to sell high-potency opioids, steroids, and amphetamines to customers without valid prescriptions.

a. In December 2011, an Ohio-based inspector with the United States Postal Inspection Service (USPIS) intercepted four parcels shipped from Columbus, Ohio, to private mailboxes in Los Angeles, California, near petitioners' apartment. Gov't C.A. Br. 5. Each parcel contained between $4000 and $5000 in cash tucked in magazines and was addressed to either Dalibor or an associate. *Ibid.* That month, petitioners' bank accounts also received $24,300 in cash deposits from banks located in and near Columbus. *Ibid.* Almost immediately after

each cash deposit, petitioners withdrew the cash in Los Angeles via withdrawal slips that Dalibor signed. *Ibid.*

The following month, USPIS intercepted two packages shipped from Los Angeles to Columbus; each package contained over 300 oxycodone pills tucked in the pages of a magazine. Gov't C.A. Br. 6. A forensic examiner found Dalibor's fingerprints on the packaging of the oxycodone pills. *Ibid.* Postal inspectors later identified 15 additional parcels shipped from Columbus to Dalibor or an associate between October 2011 and January 2012. *Id.* at 7.

A USPIS inspector tracked down petitioners' Ohio drug customer, who cooperated with the government's investigation. Gov't C.A. Br. 7. The informant recorded a series of telephone conversations with Berry during which they discussed past and future opioid transactions. *Id.* at 8. The recordings also confirmed that petitioners were the intended recipients of the parcels with cash that were sent to Los Angeles: Berry told the informant that "basically all the money you sent got confiscated by the Postal Inspection." *Ibid.* (citation omitted).

b. Because the demand for petitioners' opioids was outstripping their supply, in February 2012 petitioners opened Global Compounding Pharmacy, a retail compounding pharmacy in Los Angeles. Gov't C.A. Br. 10-11. The following month, Global Compounding obtained a registration from the DEA that authorized the pharmacy to dispense controlled substances in conformance with applicable laws and regulations. *Id.* at 11. Petitioners submitted orders for tens of thousands of pills to multiple drug wholesalers, focusing on high-potency opioids. *Id.* at 13.

Petitioners then purported to fill prescriptions—but the majority of controlled-substances prescriptions they filled were sham prescriptions that petitioners themselves initiated using the names and personal identifying information of identity-theft victims. Gov't C.A. Br. 14-17. Petitioners conspired with a licensed physician, who wrote more than 99% of the prescriptions filled at Global Compounding for oxycodone, hydromorphone, hydrocodone, and amphetamines such as Adderall. *Id.* at 17.

Due to concerns about petitioners' drug orders, several wholesalers either refused to do business with Global Compounding or eventually cut off sales to the pharmacy. Gov't C.A. Br. 18-21. At least one wholesaler reported the pharmacy to the DEA. *Id.* at 19. Petitioners then began manufacturing pills themselves. *Id.* at 21. Petitioners ordered pill-press machines from Chinese suppliers and, in early 2014, they ordered enough bulk powder of oxycodone, hydromorphone, and hydrocodone to manufacture 100,000 maximum-strength pills. *Ibid.* Despite the large number of pills that petitioners ordered, produced, and dispensed, petitioners did not report sales of many of the opioids and amphetamines they distributed, as required by California law. *Id.* at 23-24.

Petitioners also imported anabolic steroids from China, although they never registered as drug importers with the DEA and could not lawfully import controlled substances. Gov't C.A. Br. 27. And petitioners filed false tax returns, underreporting their and Global Compounding's income by approximately $1.5 million. *Id.* at 28-32. Petitioners used proceeds from the scheme to pay off large credit card bills and to purchase an expensive car. *Id.* at 29, 32-33.

3. A federal grand jury in the Central District of California returned a superseding indictment charging petitioners and Global Compounding with 50 counts of conspiracy, drug distribution, drug importation, engaging in transactions in criminally derived proceeds, filing false tax returns, and related offenses. C.A. E.R. 107-154. Two of the three substantive drug-distribution counts (Counts 2 and 3) were premised on petitioners' distribution of oxycodone in January 2012, before petitioners opened Global Compounding. *Id.* at 124-125. The drug-distribution conspiracy count (Count 1) and the third substantive drug-distribution count (Count 4) were premised at least in part on petitioners' distribution of controlled substances after they opened and obtained a DEA registration for the pharmacy. *Id.* at 112-123, 126.

a. Prior to trial, the parties jointly submitted a proposed jury instruction for the drug-distribution conspiracy count (Count 1). C.A. S.E.R. 2-3. The parties' proposed instruction explained that, to find petitioners guilty of conspiring to distribute controlled substances, the jury had to find "that [petitioners] agreed to distribute and to possess with intent to distribute" controlled substances "while acting and intending to act outside the course of professional practice and without a legitimate medical purpose." *Id.* at 2.

The government also submitted a proposed jury instruction for Count 4, the substantive drug-distribution offense that occurred after petitioners opened the pharmacy, which informed the jury that guilt required proof that petitioners' "distribution of the controlled substance was outside the usual course of professional practice and without legitimate medical purpose" and that they "acted with the intent to distribute the identified controlled

substance outside the usual course of professional practice and without legitimate medical purpose." C.A. E.R. 4553.

The final paragraph of the proposed instruction for Count 4 further explained:

> For a given approach to a distribution of a controlled substance[] to be within the "usual course of professional practice," there must be at least a reputable group of people in the pharmacy profession within the country who agree that it is consistent with legitimate pharmacy practice. In determining whether [petitioners] acted outside the usual course of professional practice, you may consider the standards to which pharmacy professional generally hold themselves, including accepted standards of care among pharmacy professionals.

C.A. E.R. 4554.

Petitioners "object[ed] to the final paragraph of the proposed instruction," but "request[ed] that the remainder of the instruction be provided to the jury." C.A. E.R. 4555. In that objection (and a related motion in limine) petitioners asserted that the final paragraph would "lead[] the Jury to confuse civil liability with criminal culpability and hold[] [petitioners] to a stricter standard, i.e., that of a pharmacist in charge" and therefore would "lower[] the benchmark for a criminal conviction." *Id.* at 4558; see D. Ct. Doc. 141, at 4 (Jan. 2, 2017) (making a similar objection).

Before trial, the district court denied petitioners' motion in limine but agreed that "care will need to be taken to draft instructions that will address the concern" petitioners raised in their motion. C.A. E.R. 1280-1281.

b. Petitioners' trial lasted over two weeks and included approximately 30 witnesses and 300 exhibits. Gov't C.A. Br. 40. One government witness was Courtland Gettel, who purchased thousands of dollars' worth of opioids, steroids, and amphetamines from petitioners between 2013 and 2015. *Id.* at 33; see C.A. E.R. 3019-3067. Gettel testified that he bought up to 5000 pills a month for amounts between $10,000 and $30,000. Gov't C.A. Br. 33. He also testified that he overdosed on illegal drugs multiple times and was hospitalized after using drugs supplied by petitioners. *Id.* at 35. And he stated that he had been sober for 18 years before meeting petitioners, and that he had relapsed after he "had a death with [his] son, who was born in 2008, diagnosed with a genetic disease called cystic fibrosis." *Id.* at 36 (citation omitted).

At the close of trial, the district court gave the instruction on Count 1 (the conspiracy count) that was requested by the parties, under which a guilty verdict was contingent on (*inter alia*) a finding that petitioners "act[ed] and intend[ed] to act outside the course of professional practice and without a legitimate medical purpose." C.A. E.R. 1253. On Count 4 (the post-2011 drug-distribution count), the court instructed the jury that a guilty verdict on Count 4 required finding that petitioners "knowingly distributed oxycodone," that petitioners' "distribution of [oxycodone] was outside the usual course of professional practice and without legitimate medical purpose," and that petitioners "acted with the intent to distribute [oxycodone] outside the usual course of professional practice and without legitimate medical purpose." *Id.* at 1255. The court did not include the final paragraph of the proposed instructions, to which petitioners had objected, but instead instructed

the jury that "'[t]he usual course of professional practice' means the standard of pharmaceutical practice" that is "generally recognized and accepted." *Ibid.*

The jury found petitioners guilty on all submitted counts. Gov't C.A. Br. 40; C.A. E.R. 57-100.

4. a. After the jury returned its verdict, the government disclosed reports and documents concerning a federal investigation of ongoing real-estate fraud by Gettel. C.A. E.R. 27-28. Based on those documents, petitioners moved to dismiss the indictment or for a new trial under Federal Rule of Criminal Procedure 33, alleging that the government had withheld exculpatory impeachment evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and failed to correct false testimony in violation of *Napue* v. *Illinois*, 360 U.S. 264 (1959). C.A. E.R. 890-953.

Among other things, petitioners contended that the government had withheld evidence that Gettel had engaged in real-estate fraud, and had also withheld bank statements showing that Gettel had engaged in "numerous" drug transactions, "but the bank statements were devoid of any transactions with [petitioners]." C.A. E.R. 913; see *id.* at 904-911, 913. Petitioners additionally claimed that Gettel's testimony that he had relapsed because his son had died was false—both because Gettel's son was not dead and because Gettel had relapsed before he met petitioners—and that the government failed to correct Gettel's testimony. *Id.* at 897-900.

b. The district court denied petitioners' motions. C.A. E.R. 27-36. On the *Brady* claim, the court explained that because the government received the tip that led to the discovery of Gettel's real-estate fraud after the jury returned its verdict, the government "was

not aware of" that scheme "before trial" and therefore petitioners "fail[ed] to make any showing of suppression of this evidence by the prosecution." *Id.* at 30. The court also found that petitioners "failed to show that" the purported "'bank statements' exist," because the relevant documents the government produced post-trial were actually spreadsheets the FBI created during its investigation of Gettel's real-estate fraud. *Id.* at 29. And the court observed that spreadsheets created "for the purpose of investigating Gettel's real estate fraud" naturally "would not include Gettel's drug transactions with [petitioners]," and that because "Gettel's transactions with [petitioners] were in cash or by credit card" they "would not be included in" spreadsheets collecting bank transactions. *Id.* at 29-30.

On petitioners' *Napue* claims, the district court determined that petitioners failed to show that Gettel's testimony that he suffered multiple hospitalizations for drug overdoses was false, or—even assuming that it was false—that the government knew of such falsity. C.A. E.R. 31. And as to Gettel's testimony that his relapse was caused by his son's death, the court determined that, "[a]ssuming Gettel's testimony was false, * * * [petitioners] fail[ed] to present any evidence that the Government knew of the falsity at the time they elicited Gettel's testimony at trial." *Ibid.*

c. Petitioners moved for reconsideration of the district court's order based on what they claimed was additional newly discovered evidence. See C.A. E.R. 13-14. Petitioners asserted that a postal inspector provided false trial testimony indicating that petitioners were connected to mailboxes that were used as part of their schemes and that the inspector falsely identified

Berry as a speaker on recorded telephone calls between Berry and an associate. See *id.* at 14-15, 17.

The district court again rejected petitioners' claims. C.A. E.R. 12-19. The court observed that "[a]s to *all*" the "claims of new evidence" petitioners "fail[ed] to explain why the alleged new evidence was not [previously] available," which "alone [was] sufficient to deny" their motions. *Id.* at 14; see *id.* at 16. The court also found that petitioners failed to show that the postal inspector's testimony about their connection to mailboxes was "material[] or that the Government, in fact, possessed such evidence and failed to disclose it." *Id.* at 15. The court additionally determined that because petitioners were "not prevented from presenting" at trial a newly proffered voice-recognition expert report, that report did "not qualify as 'newly discovered' evidence." *Id.* at 17. And the court found that petitioners "fail[ed] to show that the expert's report is material in light of the substantial amount of other evidence supporting the finding that [Berry] was in fact the speaker on the recorded calls." *Ibid.*

5. Petitioners appealed. While their appeals were pending, this Court decided *Ruan* v. *United States*, 597 U.S. 450 (2022), which addressed the mens rea for certain prosecutions for unlawful distribution of controlled substances under 21 U.S.C. 841(a). *Ruan* held that the "'knowingly or intentionally' *mens rea*" in Section 841(a) "applies to the [statute's] 'except as authorized' clause," such that, "once a defendant meets the burden of producing evidence that his or her conduct was 'authorized,' the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." 597 U.S. at 457. Subsequently, in an unpublished per curiam opinion, the

court of appeals vacated petitioners' convictions for conspiring to import controlled substances and importing controlled substances, affirmed their remaining convictions, and remanded for further proceedings. Pet. App. 1-22.

a. The court of appeals rejected petitioners' challenge to the district court's jury instructions on the drug-distribution and related conspiracy counts. Pet. App. 13-14. The court of appeals noted that petitioners "do not dispute that they invited instructional error by proposing the distribution jury instructions they now challenge on appeal." *Id.* at 13. And the court found that "[t]he record reflects that [petitioners] relinquished a known right because the arguments they raise[d] on appeal concerning the distribution instructions [were] functionally the same arguments they made to the district court to support their proposed instruction" and that therefore their "challenges to these instructions fail." *Id.* at 14.

As to the importation counts, the court of appeals "t[ook] no position" on the validity of the jury instruction. Pet. App. 15. And it vacated those convictions "for the district court to apply" *Ruan* and *Rehaif* v. *United States*, 588 U.S. 225 (2019), "in the first instance" and "decide whether the jury was properly instructed in light of those decisions." Pet. App. 15.

b. The court of appeals also affirmed the district court's denial of petitioners' motions to dismiss and for a new trial. Pet. App. 2-13.

The court of appeals rejected petitioners' *Brady* and *Napue* challenges to Gettel's testimony, explaining that petitioners' arguments "fail[ed] because the government presented overwhelming evidence of [petitioners'] guilt, and none of th[e] purported constitutional

violations or additional evidence could or would have changed the outcome of [petitioners'] trial." Pet. App. 5.

The court of appeals observed that "[t]he evidence showed" that:

> Berry coordinated drug transactions with an informant and stated that he intended to open a "clinic" to distribute more drugs; [petitioners'] fingerprints were found in parcels with oxycodone pills; packages of cash were sent to (and seized from) [petitioners'] private mailboxes; [petitioners'] pharmacy dealt almost exclusively in the highest dosages of opioids and controlled substances desirable on the black market; [petitioners] used * * * stolen identities * * * to create phony prescriptions at their pharmacy; text messages showed that [petitioners] actively coordinated with a single physician who prescribed about 99 percent of [petitioners'] pharmacy's prescriptions; prescriptions received by the pharmacy suddenly changed to call for compounded pills when [petitioners] stopped ordering pre-manufactured pills wholesale; and discrepancies in [petitioners'] reporting to the California Department of Justice revealed that over 100,000 pills were unaccounted for.

Pet. App. 5-6. The court accordingly found that petitioners could not "satisfy the materiality standards under *Napue* [or] *Brady* * * * with regard to Gettel's testimony." *Id.* at 6.

The court of appeals likewise was "not persuaded" by petitioners' other *Napue* claims. Pet. App. 6; see *id.* at 6-10. The court rejected petitioners' claim that a postal inspector provided false trial testimony indicating that petitioners were connected to mailboxes that were used as part of their schemes. *Id.* at 6-8. The court found that petitioners failed to demonstrate that the

relevant testimony was false, or even misleading, and emphasized other evidence that connected petitioners and their associate to the mailboxes. See *ibid.* The court also rejected petitioners' claim that the inspector gave false trial testimony about recorded telephone calls between Berry and an associate, again finding that petitioners failed to demonstrate falsity and that other evidence indicated that Berry was on those calls. *Id.* at 9-10. The court therefore determined that petitioners' "*Napue* challenges fail individually and collectively because [petitioners] failed to establish that much of the evidence they challenge was 'actually false' or misleading, and there is not a reasonable probability that absent the remaining evidence, the result at trial could have been different." *Id.* at 10.

ARGUMENT

Petitioners contend (Pet. 9-19) that the Court should grant the petition for a writ of certiorari, vacate the decision below, and remand for further consideration in light of *Ruan* v. *United States*, 597 U.S. 450 (2022). But petitioners were already able to raise a *Ruan* claim in the court of appeals; they were not entitled to relief on it; and they cannot show that any other court of appeals would have granted it to them. The jury instructions in their case—which required the jury to find that petitioners "*intend[ed]* to act outside the course of professional practice and without a legitimate medical purpose," C.A. E.R. 1253 (emphasis added); see *id.* at 1255—were consistent with *Ruan*.

Petitioners also renew their contentions (Pet. 19-26) that they are entitled to relief under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Napue* v. *Illinois*, 360 U.S. 264 (1959). The lower courts accurately stated the applicable law and correctly rejected those factbound

contentions, and there is no conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioners contend (Pet. 9, 17-19) that *Ruan* undermines the jury instructions for unlawful distribution and conspiracy that were given in their case. That claim lacks merit, and they are not entitled to relief. The district court gave the instruction that petitioners proposed for the drug-distribution conspiracy count (Count 1), which required the jury to find that petitioners "agreed to distribute and to possess with intent to distribute" controlled substances "while acting and intending to act outside the course of professional practice and without a legitimate medical purpose." C.A. S.E.R. 2; see C.A. E.R. 1253. And as to the sole substantive drug-distribution offense that involved petitioners' conduct after they opened the pharmacy (Count 4), petitioners generally agreed with the government's proposed instruction. See C.A. E.R. 4555; D. Ct. Doc. 141, at 4.

Although petitioners disputed the portion of the government's proposed instruction that would have provided that "a reputable group of people in the pharmacy profession" must "agree" that an "approach to a distribution of a controlled substance[]" falls "within the 'usual course of professional practice,'" C.A. E.R. 4554; see *id.* at 4555, 4558; D. Ct. Doc. 141, at 4, the district court did not give that portion of the instruction. Instead, it instructed that "'[t]he usual course of professional practice' means the standard of pharmaceutical practice" that is "generally recognized and accepted," and that to find that petitioners "knowingly distributed oxycodone," the jury was required to find that their "distribution of [oxycodone] was outside the usual course of professional practice and without legitimate

medical purpose" and that petitioners "acted with the intent to distribute [oxycodone] outside the usual course of professional practice and without legitimate medical purpose." C.A. E.R. 1255.

On appeal, petitioners "d[id] not dispute that they invited instructional error by proposing the distribution jury instructions they now challenge on appeal." Pet. App. 13. "[U]nder the 'invited error' doctrine," a party "may not complain on appeal of errors that he himself invited or provoked" the district court "to commit." *United States* v. *Wells*, 519 U.S. 482, 488 (1997) (citation omitted). Invited error is a species of "waive[r]" that treats as "unreviewable" alleged errors that the defendant caused or induced. Pet. App. 14 (quoting *United States* v. *Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc)); cf. *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) ("[T]here would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested."); *Johnson* v. *United States*, 318 U.S. 189, 201 (1943) ("We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him.").

The court of appeals here noted that, pursuant to the agreed-upon instructions, "[t]he district court instructed the jury that the government needed to prove beyond a reasonable doubt that '[petitioners] acted with the intent to distribute the identified controlled substance outside the usual course of professional practice and without legitimate medical purpose.'" Pet. App. 13 n.4. And it found that "[t]he record reflects that [they] relinquished a known right because the arguments they

raise on appeal concerning the distribution instructions are functionally the same arguments they made to the district court to support their proposed instruction." *Id.* at 14. Petitioners provide no basis for concluding that they were nonetheless entitled to appellate relief, where the ultimate result of the process in the district court was instructions fully consistent with *Ruan*.

Long before this Court's decision in *Ruan*, the Ninth Circuit had held that Section 841(a)(1) required the government to prove "that the practitioner acted *with intent to distribute [controlled substances] outside the course of professional practice*." *United States* v. *Feingold*, 454 F.3d 1001, 1008 (emphasis added), cert. denied, 549 U.S. 1067 (2006). Accordingly, the district court instructed the jury that, for the drug-distribution conspiracy count, the jury was required to find that petitioners both acted and were "*intending* to act outside the course of professional practice and without a legitimate medical purpose"—that is, without authorization. C.A. E.R. 1253 (emphasis added). And for the relevant substantive drug-distribution count, the jury was required to find that petitioners both distributed oxycodone "outside the usual course of professional practice and without legitimate medical purpose" and "acted *with the intent* to distribute [oxycodone] outside the usual course of professional practice and without legitimate medical purpose." *Id.* at 1255 (emphasis added). The government was therefore required to prove that petitioners "knowingly or intentionally acted in an unauthorized manner." *Ruan*, 597 U.S. at 457.

Petitioners therefore err in asserting (Pet. 17-19) that the jury was instructed solely on an objective standard. It is of course true that "the regulation defining the scope of a doctor's prescribing authority does so by

reference to objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice.'" *Ruan*, 597 U.S. at 467 (quoting 21 C.F.R. 1306.04(a)). The district court accordingly explained that the phrase "'usual course of professional practice' means the standard of pharmaceutical practice" that is "generally recognized and accepted." C.A. E.R. 1255. But the jury was also required to find that petitioners subjectively intended to act outside the usual course of professional practice and without a legitimate medical purpose, see pp. 8-9, 15-17, *supra*, which is precisely what *Ruan* requires. And, contrary to petitioners' assertion (Pet. 8, 18-19), the government did not suggest a purely objective standard in its closing argument; instead, it correctly stated that "if" a person is "acting outside the course of professional practice * * * the question [be]comes: Is that what [the person] *intended* to do?" C.A. E.R. 4327 (emphasis added). The instructions here therefore provide no basis for the Court to grant the petition, vacate the judgment below, and remand for further proceedings in light of *Ruan*.[1]

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[1] Petitioners appear to suggest (Pet. 7, 9) that their *Ruan* arguments are applicable to all three of their drug-distribution counts. But *Ruan* would not apply to Counts 2 and 3, which involved petitioners' drug sales before they obtained a DEA license for Global Compounding. As discussed, see pp. 2-3, *supra*, the CSA prohibits the knowing or intentional distribution of controlled substances "[e]xcept as authorized by" the Act, 21 U.S.C. 841(a), and DEA-registered entities are "authorized" to distribute controlled substances in some situations. *Ruan* addressed how Section 841(a)'s "'knowingly or intentionally' *mens rea* applies * * * [a]fter a defendant produces evidence that he or she was authorized to dispense controlled substances." 597 U.S. at 454. Petitioners have never suggested that their drug sales before they obtained a DEA license

Although petitioners dispute the court of appeals' reliance on the invited error doctrine, the court perceived them not to contest its applicability, see Pet. App. 13, and they cannot show that any other circuit would grant them any form of relief on these facts. Petitioners are wrong to assert (Pet. 16) that the Court's decision in *Wells* "forecloses the application of the invited error doctrine here." *Wells* explained both that the invited-error doctrine is "valuable" and that this Court "ha[s] treated an inconsistency between a party's request for a jury instruction and its position before this Court" as a relevant "consideration[] bearing on" whether to grant a writ of certiorari. 519 U.S. at 488. And it declined to apply the invited-error doctrine in a circumstance where—unlike here—the court of appeals "ruled on" the question and an intervening decision "rendered" a jury-instruction error "reversible." *Id.* at 489. Nothing in *Wells* suggests that petitioners are entitled to a remedy where the instructions were correct.

Nor did any of the circuit decisions that petitioners cite (see Pet. 14-15) grant relief where a defendant acknowledged inviting any error and no error in fact occurred. For example, in the decision on which petitioners most heavily rely, *United States* v. *Duldulao*, 87 F.4th 1239 (11th Cir. 2023), the court "'decline[d]'" to "invoke" the invited-error doctrine "on the facts of th[at] case—a criminal appeal involving an instructional error in defining a substantive offense flowing directly from [the court's] longstanding and clear precedent and

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were authorized. Accordingly, the district court correctly instructed the jury that, to find petitioners guilty on Counts 2 and 3, it only needed to find that petitioners "knowingly distributed oxycodone" and "knew that it was oxycodone or some other prohibited drug." C.A. E.R. 1255.

attributable to both parties"—and instead reviewed the jury instructions "for plain error," *id.* at 1256-1257 (citation omitted). The court emphasized that it was "not authorizing a free-roving change-in-law exception to the rule of invited error." *Ibid.* There is no reason to suppose that it, or any other court, would vacate petitioners' distribution-related convictions that were based on the *Ruan*-compliant instructions here, and there is no reason for this Court to do so either.

2. Petitioners separately renew (Pet. 19-26) their *Brady* and *Napue* claims, but the courts below correctly denied those claims as well. There is no conflict with any decision of this Court or of another court of appeals. And the highly factbound nature of the claims, which the lower courts both rejected, would make further review in this Court particularly unwarranted. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a [writ of] certiorari to review evidence and discuss specific facts."); see also *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).

a. To establish a *Brady* claim, a defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the establishment of the defendant's guilt or innocence. 373 U.S. at 87-88. Evidence is material under *Brady* if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different." *Kyles*, 514 U.S. at 435 (citation omitted). And to establish a *Napue* claim, a defendant must show that: (1) trial testimony or evidence was false or misleading; (2) the government knew or should have known that it was false or misleading; and (3) the testimony was material. See 360 U.S. at 269; *United States* v. *Agurs*, 427 U.S. 97, 103-104 (1976). False testimony is material under *Napue* if there is "any reasonable likelihood that the false testimony could * * * affect[] the judgment of the jury." *Agurs*, 427 U.S. at 103.

The courts below correctly articulated those standards. See Pet. App. 2-4; C.A. E.R. 29, 31. And they properly applied the correctly stated standards to the particular facts here. On petitioners' *Brady* claims involving Gettel's real-estate fraud (Pet. 20, 24), as the district court explained (C.A. E.R. 30), the government was unaware of Gettel's fraud until after the jury returned its verdict, so there was no evidence for the government to withhold before or during the trial. And while petitioners assert (Pet. 20, 24) that there are "bank records" that the government failed to produce before trial, the lower courts correctly recognized that the relevant documents are not bank records, but are instead spreadsheets created by the FBI during its investigation of Gettel's real-estate fraud, which postdated the trial. C.A. E.R. 29-30. The government therefore did not withhold those documents either. See *ibid.* Petitioners do not contest, or even address, those findings. Nor do they explain why the documents would be material in this case, thereby failing another *Brady* requirement.

The lower courts likewise correctly rejected on numerous bases petitioners' *Brady* and *Napue* claims (Pet. 5 n.3, 20) challenging Gettel's testimony. Petitioners

have failed to demonstrate that Gettel's testimony about his hospitalizations was false or—even assuming that it was false—that the government was aware of its falsity. See C.A. E.R. 31. And, assuming that Gettel's testimony about his son's death and the timing of his relapse was false, petitioners have failed to provide any evidence that the government was aware of the falsity before trial. See *ibid.* In any event, as the court of appeals explained, Pet. App. 5-6, given the overwhelming evidence of petitioners' guilt, see pp. 3-5, 12-14, *supra*, Gettel's allegedly false or suppressed testimony would not have changed the outcome of the trial and therefore was not material. Again, petitioners do not meaningfully contest the district court's and the court of appeals' independently sufficient bases for rejecting their challenges to Gettel's testimony, and thus provide no sound basis for this Court to overturn the result below.

Finally, both the district court and the court of appeals correctly rejected petitioners' remaining *Napue* claims. See Pet. 21-22. Petitioners have never demonstrated the falsity of either (1) the postal inspector's testimony connecting mailboxes to petitioners' schemes or (2) his testimony regarding recorded telephone calls between Berry and a co-conspirator. See Pet. App. 6-10; C.A. E.R. 14-15, 17. And, as both lower courts explained, even assuming that the evidence was false, in light of the overwhelming evidence of petitioners' guilt there "is not a reasonable probability that absent the remaining evidence, the result at trial could have been different." Pet. App. 10; see C.A. E.R. 15, 17.

b. Petitioners contend (Pet. 23-24) the court of appeals failed to properly assess "the cumulative effect of all" suppressed or false evidence. *Kyles*, 514 U.S. at 421. But, as discussed, the courts below generally found

that the government neither suppressed evidence nor proffered false evidence, so there was no "cumulative effect" to assess. *Ibid.* And, in any event, the court of appeals expressly found that petitioners' "*Napue* challenges fail individually *and collectively* because [petitioners] failed to establish that much of the evidence they challenge was 'actually false' or misleading, and there is not a reasonable probability that *absent the remaining evidence*, the result at trial could have been different." Pet. App. 10 (emphases added). Thus, contrary to petitioners' assertion (Pet. 24), the court of appeals' decision does not "conflict with this Court's authority."

Petitioners highlight (Pet. 23) the court of appeals' statement that "Gettel's testimony was unnecessary to secure [petitioners'] convictions," Pet. App. 5, as evidence that it did not, in fact, apply the correct "reasonable likelihood" standard. But that single statement does not provide a sound basis for inferring that the court was in fact not applying the standard that it said that it was applying—let alone that the circuit's approach in general conflicts with this Court's teachings. Cf. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386 (2008) (reviewing court should not lightly presume error by lower court); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions."). To the contrary, the court of appeals correctly stated that "testimony [is] material" under *Napue* if there is a "'reasonable likelihood that the false testimony could have affected the judgment of the jury'" and found that "none of" the "additional evidence could or would have changed the

outcome of [petitioners'] trial." Pet. App. 3, 5 (citation and emphasis omitted).[2]

c. Finally, petitioners contend (Pet. 3, 19, 24, 27) that the Court should hold this case for *Glossip* v. *Oklahoma*, cert. granted, 144 S. Ct. 691 (Jan. 22, 2024) (No. 22-7466). *Glossip* presents a question of "[w]hether the State's suppression of the key prosecution witness's admission [that] he was under the care of a psychiatrist and failure to correct that witness's false testimony about that care and related diagnosis violate" *Brady* and *Napue*, and "[w]hether the entirety of th[at] suppressed evidence must be considered when assessing the materiality of *Brady* and *Napue* claims." Pet. at i, *Glossip*, *supra* (No. 22-7466). But irrespective of how the Court resolves those questions in *Glossip*, it would not suggest any error in the outcome here.

Particularly given the highly fact-specific nature of *Brady* and *Napue* claims, petitioners would not be entitled to relief if this Court were to find in *Glossip* that the State violated *Brady* and *Napue* and that, when considered in its entirety, the relevant evidence and testimony was material. As explained above, the court of appeals here has already found that, even assuming that evidence here was suppressed or false, the entirety of that evidence was not collectively material. See pp. 12-

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[2] Petitioners suggest (Pet. 24-26) that the court of appeals erred in concluding that they forfeited a due process challenge to the district court's admission of certain phone call recordings. See Pet. App. 12-13. But petitioners have not asked this Court to grant a petition for a writ of certiorari to address that factbound forfeiture determination. See Pet. 24-26. And, in any event, the court of appeals correctly found that petitioners' due process claim was "forfeited because [petitioners] did not raise" that particular claim "in a motion to suppress before trial, and the district court never addressed it." Pet. App. 13; see Gov't C.A. Br. 87-88.

14, *supra*. There therefore is no sound reason to hold this case pending this Court's decision in *Glossip*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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