Supreme Court, U.S.
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No. 99-116

In The

Supreme Court of the United States

JEFFREY ALLAN FISCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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Respondent asks this Court to interpret the phrase "receives benefits" under 18 U.S.C. § 666(b) to mean the receipt of any type of economic advantage. This extremely and unjustifiably broad interpretation is contrary to the plain language, structure, and legislative history of the statute. Moreover, Respondent's misinterpretation of 18 U.S.C. § 666 violates the fundamental precepts of federalism and exceeds Congress' authority under the Spending Clause.

I. RESPONDENT'S INTERPRETATION OF 18 U.S.C. § 666 IS CONTRARY TO THE PLAIN LANGUAGE AND STRUCTURE OF THE STATUTE.

Subsection 666(b) is a jurisdictional provision, which is qualified, and significantly narrowed, by subsection 666(c). Subsection (b) expressly limits the statute's coverage to acts of theft or bribery involving an organization that "*receives . . . benefits . . . under a Federal program involving a . . . form of Federal assistance*." 18 U.S.C. § 666(b) (emphasis added). Further, subsection 666(c) expressly exempts from the statute's coverage "bona fide salary, wages, fees, or other *compensation paid, or expenses paid or reimbursed, in the usual course of business*." 18 U.S.C. § 666(c) (emphasis added).

Petitioner submits that hospitals do not receive benefits under the federal Medicare program. They are simply paid or reimbursed in the usual course of business for health care services they have provided to Medicare patients. In fact, a

hospital is a commercial enterprise existing solely for the purpose of -- and compensated in return for -- treating patients.

Respondent cannot credibly contend that Congress designed the Medicare program to provide benefits to hospitals or other health care providers. In fact, Respondent's argument that "hospitals receive enormous financial advantages from their participation in the Medicare program" is specious at best. Gov't Br. 23. Hospitals do not receive any money from the federal government simply because of their participation in the Medicare program. Hospitals receive periodic payments and year-end adjustments -- through an extremely complex cost-reporting mechanism -- only for the actual health care services provided to Medicare beneficiaries.

Respondent's arguments only serve to confuse the issue of what "receives . . . benefits" means under § 666. Certainly, the "recipients" of "benefits" include the patients under the Medicare program who receive health care services. Pet. Br. 14-18. Additionally, as noted in Petitioner's opening brief at 22-23, the "recipients" of "benefits" also include entities that receive federal funds and then further administer those funds for the benefit of program beneficiaries and to accomplish program goals. Accordingly, the term "benefits" under § 666(b) *does* denote the provision of federal funds to entities under a

specified federal program.[1] Respondent, however, would have the Court end its analysis there -- *i.e.*, at the mere receipt of federal funds. Subsection 666(c), however, qualifies subsection (b), such that recipients of federal funds, who are simply being paid for, or reimbursed for, services that they provide under the federal program, are exempted from the reach of the statute. Admittedly, § 666, as a whole, is not a model of precise statutory drafting, but one thing is certain: Respondent cannot read subsection (b) in isolation to mean that every transaction involving an entity which receives federal funds, for whatever purpose, falls under the jurisdictional reach of § 666.

It is a bedrock principle of statutory construction that the provisions of a statute must be interpreted together and that *all* provisions must be given effect. *Lockwood* v. *Exchange Bank*, 190 U.S. 294, 300 (1903); *East Tennessee, Virginia and Georgia Ry. Co.* v. *Interstate Commerce Comm'n*, 181 U.S. 1, 17 (1901). Reading subsection (b) and (c) in tandem and giving them their full effect under the plain language of the statute, it is clear that hospitals do not receive benefits under a federal program. Hospitals -- like all service providers -- are simply paid or reimbursed in the usual course of business. This construction of the statute is supported by the Court's

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[1] Such a conclusion is supported by the title of the statute: "Theft or bribery concerning programs receiving Federal funds." Additionally, the language in subsection (b) that the affected entity must receive "benefits in excess of $10,000 under a Federal program" also indicates that the statute is designed to protect entities that receive federal funds.

precedents. See, *e.g.*, *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 119 S. Ct. 930, 932 (1999) ("Under the Medicare Act . . . , the Secretary of Health and Human Services reimburses the providers of covered health services . . . ."); *Shalala* v. *Guernsey Memorial Hosp.*, 514 U.S. 87, 91 (1995) ("Under the Medicare reimbursement scheme . . . , participating hospitals furnish services . . . and are reimbursed by the Secretary through fiscal intermediaries.").

Respondent goes to great lengths in its brief to avoid the limiting effects of § 666(c). Gov't Br. 23-28. Respondent's principle claim is that § 666(c) applies only to the statute's bribery and solicitation provisions found in subsection (a) and not to the jurisdictional provision found in subsection (b). Gov't Br. 8. Respondent's claim is flawed for at least four reasons.

First, Respondent maintains that subsection (c) applies only to subsection (a) to ensure that "the statute does not criminalize legitimate, routine business transactions involving individuals." Gov't Br. 24. Such an argument is unpersuasive. The plain language of subsection (a) -- standing alone -- makes it abundantly clear that the statute does not criminalize legitimate business transactions. For example, subsection (a)(1)(A) provides that one who "*embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts . . . property*" is subject to prosecution. Similarly, subsection (a)(1)(B) provides that one who "*corruptly* solicits or demands

. . . , or accepts or agrees to accept, anything of value" is subject to prosecution. Finally, subsection (a)(2) provides that one who "*corruptly* gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent . . . ." is subject to prosecution. The plain language of subsection (a) could not possibly be construed to criminalize legitimate business transactions.

Second, § 666 vividly illustrates Congress' keen awareness of the distinction between the term "subsection" and "section." For example, Congress stated "the circumstance described in *subsection* (b) of this *section* . . . ." 18 U.S.C. § 666(a). Similarly, Congress stated "[t]he circumstance referred to in *subsection* (a) of this *section* . . . ." 18 U.S.C. § 666(b). Congress clearly used the term *subsection* when it was referring to a portion of the statute and the term *section* when it was referring to the entire statute. Subsection (c) states: "This *section* does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. § 666(c). Accordingly, Congress unambiguously intended that the entire statute -- *i.e.*, this *section* -- would not apply to expenses reimbursed in the usual course of business.

Third, Respondent's position is illogical as a fundamental matter of statutory construction. If Congress had intended subsection (c) to apply *only* to subsection (a), and not to subsection (b), in all likelihood, Congress would have placed

the contents of subsection (c) either in or after subsection (a) and not after subsection (b).

Fourth, the construction of the statute advanced by Respondent is directly at odds with the Department of Justice's interpretation of the statute. According to the Department of Justice Manual, "18 U.S.C. § 666(c) specifically exempts *benefits* that are bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed in the usual course of business. Federal government money paid to purchase goods in a commercial transaction are not 'benefits' under the statute." 4 Department of Justice Manual 9-1593 (emphasis added). The Department of Justice properly reads subsection (b) in conjunction with subsection (c).

Accordingly, when the plain language of the statute -- taken in its entirety -- is considered, it is beyond dispute that hospitals, as service providers being reimbursed, do not "receive benefits" under a federal program within the meaning of § 666(b).

II. RESPONDENT'S INTERPRETATION OF 18 U.S.C. § 666 IS CONTRARY TO THE LEGISLATIVE HISTORY AND PURPOSE OF THE STATUTE.

Congress' intent in enacting 18 U.S.C. § 666 is remarkably clear. The statute was enacted to address malfeasance in connection with the administration of federal funds under a federal program. George D. Brown, *Stealth Statute -- Corruption, The Spending Power, and The Rise of 18 U.S.C. § 666*, 73 Notre Dame L. Rev. 247, 280 (1998) ("[T]he legislative history, fairly read, [supports] the interpretation that Congress intended to deal with a relatively narrow problem, specified forms of malfeasance in connection with the administration of federal assistance."); 4 Department of Justice Manual 9-1581 ("Congress created 18 U.S.C. § 666 to ensure the integrity of Federal program funds administered through private organizations and state, local, or Indian tribal government agencies."); 4 Department of Justice Manual 9-1593 ("Courts have interpreted [§ 666(b)] to require that the organization receive and administer the $10,000 in benefits, rather than merely be an indirect beneficiary."); *United States* v. *Zyskind*, 118 F.3d 113, 116 (2d Cir. 1997) ("Nothing in this language suggests that § 666 does not reach thefts by an agent of an organization that receives federal program moneys and administers those moneys for the benefit of program beneficiaries.").

In fact, Respondent readily concedes this fact: "The

broad language of Section 666 was enacted to ensure federal authority to prosecute acts of bribery involving agents of state and private entities that *administered* federal assistance programs." Gov't Br. 6-7 (emphasis added).

The legislative history of § 666 memorializes Congress' specific intent that "not every Federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier a Federal crime. It is, however, the intent to reach thefts and bribery in situations of the types involved in the *Del Toro*, *Hinton*, and *Mosley* cases." S. Rep. No. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510. The statute, therefore, should be construed in light of those three cases.

In *Del Toro*, *Hinton*, and *Mosley*, the government had provided a non-federal entity with federal funding for its operational expenses and then *also* charged that entity with administering federal funds under a specific federal program. The briberies at issue were committed in relation to the administration of those funds. *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir. 1975) (bribery of a city agency that the government funded and then charged with administering federal monies under the HUD program); *United States* v. *Hinton*, 683 F.2d 195 (7th Cir. 1982) (bribery of a community-based non-profit corporation that was funded by and charged with

administering federal monies under the HUD program), *aff'd*, 465 U.S. 482 (1984); *United States* v. *Mosley*, 659 F.2d 812 (7th Cir. 1981) (bribery of a state program funded entirely by the government and charged with administering federal monies under the CETA program).[2]

Here, the hospital did not administer any federal funds under the Medicare program. The hospital was simply reimbursed for services it provided to Medicare beneficiaries. In other words, once title to the money passed to the hospital in the ordinary course of the business transaction, the hospital had no obligation to further administer the money on behalf of the Medicare program beneficiaries. It could allocate the funds as it wished. Additionally, the alleged bribery at issue here (bribery to obtain a loan from the hospital) was wholly unrelated to the provision of -- or compensation for -- those health care services. Moreover, *Del Toro*, *Hinton*, and *Mosley* did not involve situations where an entity merely received payments for services provided under a federal assistance program.

Hypothetically, § 666 might apply where a hospital

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[2] This aspect of the legislative history -- Congress' obvious intent to "fill gaps" in the federal bribery laws to reach quasi-public or private entities administering funds under federal programs -- explains precisely why application of § 666 to hospitals is so limited. Unlike HUD and CETA programs, hospitals are pure service providers. They are paid by government funds, but they do not have any additional administrative responsibilities with respect to those funds. Their responsibilities are simply to provide services and receive compensation for those services. Such responsibilities were never intended to come within the scope of § 666.

received a grant from the federal government, was charged with administering that grant, and an individual paid a bribe to a hospital agent to persuade the agent to award him a portion of the grant money during the grant administration process. Similarly, § 666 might apply where an intermediary charged with administering funds under the Medicare program is bribed in connection with the administration of those funds.[3]

The legislative history of § 666 also memorializes Congress' intent "to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program." S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510. According to Congress, the purpose of § 666 is "to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." *Id.* at 370.

Respondent maintains that "[p]etitioner's conduct in

[3] Respondent clearly miscomprehends the role of the intermediary when it states: "A hospital providing medical assistance with federal funds intended for that purpose is no different from a fiscal intermediary for purposes of Section 666." Gov't Br. 18. Petitioner submits that for the purposes of § 666 a hospital and an intermediary are antipodal. A hospital provides medical services and is paid for those services from the federal government under the Medicare program. An intermediary receives funds from the government and, as an agent for the government, is responsible for administering those funds to the various health care providers who provide services to Medicare beneficiaries.

obtaining a loan from WVHA, a Medicare [service] provider, by fraud and giving a kickback to WVHA's chief financial officer threatened the integrity of the Medicare program in which WVHA participated." Gov't Br. 15-16. Respondent argues further that "[t]he sound administration of the program relies on officials at participating hospitals who will not be swayed by improper influences that interfere with providing medical care to patients or that drive up the costs of the program." Gov't Br. 16.

The fatal flaw in Respondent's argument, however, is that the loan from WVHA and the alleged attendant kickback had absolutely no connection to the federal Medicare program. The loan and kickback were wholly unrelated to the delivery of -- and compensation for -- health care services to patients. Fischer's and Caddick's conduct did not -- and could not -- in any way compromise the integrity of program funds. While a hospital may incur many business expenditures and losses, the only expenditures and losses considered by Medicare for reimbursement purposes are those that have an impact on patient care. See 42 C.F.R. § 413 *et seq.* (setting forth the principles of reasonable Medicare cost reimbursement).

Here, there indisputably was no theft, fraud, or bribery *involving* federal monies and, therefore, no threat to the integrity of the Medicare program.

III. PRECEDENTS CONSTRUING FEDERAL ANTI-DISCRIMINATION STATUTES ARE NOT DISPOSITIVE OF THIS CRIMINAL CASE.

The manner in which hospitals have been treated under the federal anti-discrimination statutes is not dispositive of the issue before this Court. The Court has recognized that it must exercise particular restraint in interpreting federal criminal statutes. *Dowling* v. *United States*, 473 U.S. 207, 213 (1985). Accordingly, a criminal statute cannot be interpreted based on precedents arising in the civil context. Additionally, as other courts have recognized, there are inherent policy differences between the civil anti-discrimination laws and 18 U.S.C. § 666. *United States* v. *LaHue*, 170 F.3d 1026, 1029 (10th Cir. 1999); *United States* v. *Wyncoop*, 11 F.3d 119, 123 (9th Cir. 1993).

IV. RESPONDENT'S INTERPRETATION OF 18 U.S.C. § 666 VIOLATES THE FUNDAMENTAL PRECEPTS OF FEDERALISM AND EXCEEDS CONGRESS' AUTHORITY UNDER THE SPENDING CLAUSE.

The Court has instructed that statutes should not be interpreted in a manner that significantly alters the federal-state balance unless Congress clearly indicated its intent to do so. *United States* v. *Bass*, 404 U.S. 336, 349 (1971). The interpretation of § 666 advanced by Respondent is contrary to the fundamental precepts of federalism and exceeds Congress' authority under the Spending Clause.

Respondent's interpretation of § 666 would extend federal jurisdiction to any fraud or bribery involving an organization that received $10,000 in payments from the federal government. Such a construction "would make a federal offense out of routine local bribery, dramatically changing the state-federal balance without an express Congressional directive that it intended to do so." *United States* v. *Zwick*, 199 F.3d 672, 680 (3d Cir. 1999).

For example, a cashier's theft of $5,000 from a cash register of a grocery store that receives more than $10,000 in payments under the food stamps program could be prosecuted as a federal crime under § 666. Similarly, a bribery of an employee who works in the food services division of a hospital that receives more than $10,000 in Medicare payments could be prosecuted federally under § 666. Additionally, a clerk's theft of $5,000 from the safe of a college that receives more than $10,000 in federal educational loans could be prosecuted under § 666 in federal court. Finally, an employee in the laundry room of a hospital who steals a $5,000 automobile owned by the hospital, which happens to receive more than $10,000 in Medicare funds, could be prosecuted federally under § 666. Certainly, these offenses cannot be what Congress envisioned as "federal program theft or bribery." Such a result is clearly contrary to our federal system of government which acknowledges that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson* v. *New York*, 432 U.S. 197, 201

(1977).

Respondent's interpretation of the statute also exceeds Congress' authority under the Spending Clause, U.S. Const. art. I, § 8, cl. 1. To pass muster under the Spending Clause, legislation regulating the behavior of entities receiving federal funds must, *inter alia*, be based on a federal interest in the particular conduct to be regulated. *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987).

Respondent maintains that "Congress has a substantial interest in ensuring that its federal program funds are not dissipated or impaired by acts of fraud or corruption." Gov't Br. 9. In the instant matter, the Medicare funds were in no danger of being dissipated or impaired by Petitioner's alleged acts of fraud or corruption. The transaction sought to be influenced by Petitioner had absolutely no connection to the federal Medicare program. It involved a loan from the hospital's general funds. Loss on such a loan could never be recouped as a hospital cost through Medicare reimbursement. The hospital -- and solely the hospital -- bore the risk. See 42 C.F.R. § 413 *et seq.* (setting forth the principles of reasonable Medicare cost reimbursement). There was simply no impact on the Medicare program. *Salinas* v. *United States*, 118 S. Ct. 469, 474 (1997) (leaving open the question of to what extent the statute requires some "kind of connection" between a bribe and the expenditure of federal funds). Accordingly, there simply was no federal interest at stake -- let alone a substantial,

identifiable or significant interest. 4 Department of Justice Manual 9-297 ("As a matter of Department policy, Federal prosecutors should be prepared to demonstrate that a violation of 18 U.S.C. § 666 affects a substantial and identifiable Federal interest before bringing charges. This policy ensures that Federal prosecutions will occur only when significant Federal interests are involved.").

Finally, Respondent argues that "under [P]etitioner's construction of the word 'benefits,' Section 666 would not apply even to those acts of fraud, bribery, or theft by a hospital official that directly affected Medicare funds." Gov't Br. 33. Petitioner does not agree entirely with that conclusion, and, in any event, it was not a concern of Respondent's previously. Scenarios are easily imagined in which a hospital official bribes the intermediary in connection with its administration of Medicare funds. Such conduct could potentially fall within the ambit of the statute. Respondent, however, already has admitted that § 666 "has limited practical significance." Gov't Cert. Opp'n 10. According to Respondent, "[f]raud involving organizations that receive Medicare funds ordinarily may be prosecuted under other federal criminal statutes, such as mail or wire fraud, 18 U.S.C. 1341, 1343; the Medicare anti-kickback statute, 42 U.S.C. 1320a-7b; or the statute prohibiting theft or embezzlement in connection with health care, 18 U.S.C. 669." Gov't Cert. Opp'n 10. As Respondent readily acknowledges, Congress has enacted laws to address offenses involving the Medicare program. Section 666 should not be expanded

improperly to apply to situations that it simply was not intended to address.

CONCLUSION

For the foregoing reasons, Mr. Fischer respectfully requests that the opinion of the United States Court of Appeals for the Eleventh Circuit be reversed and that his convictions under 18 U.S.C. § 666 and 18 U.S.C. § 1957, which were premised on § 666, be reversed. Furthermore, Mr. Fischer requests that the case be remanded for further proceedings as outlined in his opening brief on the merits.

Respectfully submitted,

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