

No. _____

October Term 2006

STATE OF FLORIDA,
Petitioner,

v.

GABRIEL HARDEN, ET AL.
Respondents.

**On Petition For a Writ of Certiorari
to the Florida Supreme Court**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Medicaid fraud anti-kickback statute makes it unlawful to “knowingly and willfully” pay or receive remuneration for furnishing an item or service for which payment may be made under the Medicaid program. 42 U.S.C. §1320a-7b(b)(2). The statute includes a safe harbor provision under which paragraph (b)(2) shall not apply to “any amount paid by an employer to an employee . . . for employment in the provision of covered items or services.” *Id.* § 1320a-7b(b)(3)(B). An implementing regulation clarifies that the item or service must be one “for which payment may be made in whole or in part under . . . Medicaid.” 42 C.F.R. § 1001.952(i).

The Medicaid statute authorizes state Medicaid fraud units to prosecute violations of state law, 42 U.S.C. §1396b(q)(3), the federal anti-kickback statute does not contain a preemption provision, and the Department of Health and Human Services has repeatedly stated that “conduct that is lawful under the federal anti-kickback statute may still be illegal under State law.” The questions presented are:

1. Whether persons who received remuneration for providing services for which payment is not made under Medicaid fall within the federal employee safe harbor provision.
2. Whether the anti-kickback provision of Florida’s Medicaid fraud statute is preempted by the federal anti-kickback statute.

LIST OF PARTIES

The petitioner is the State of Florida.

Respondents are Gabriel Harden, Edward Polsky, Maria Rodriquez, Bruce Eric Smith, Herbert Lee Goss, Flora Johnson, Elsa Cortorreal, Victor Rivera, Billy Madison, and Vonshella Carter.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTES AND CONSTITUTIONAL
PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 7

 A. Statutory and Regulatory Background 7

 B. Proceedings Below 11

REASONS FOR GRANTING THE WRIT 14

 A. THE FLORIDA SUPREME COURT’S
 DECISION CONFLICTS WITH THIS
 COURT’S PREEMPTION JURISPRUDENCE
 AND THE REGULATIONS, ADVISORY
 OPINIONS, AND STATEMENTS OF THE
 FEDERAL AGENCY CHARGED WITH
 ENFORCING THE MEDICAID STATUTE 15

1.	The Federal Safe Harbor Statute and Regulation Apply Only Where an Employee Provides a Covered Service	15
	a. Preemption is Inappropriate No Matter How the Safe Harbor is Construed	19
2.	The Florida Anti-Kickback Statute Should Not Have Been Held Preempted Because of Different Mens Rea Language	20
B.	THIS CASE PRESENTS IMPORTANT QUESTIONS THAT AFFECT EVERY STATE MEDICAID PROGRAM	22
	CONCLUSION	24
	APPENDIX	1a

TABLE OF AUTHORITIES

CASES

<u>Barnett Bank of Marion County, N.A. v. Nelson</u> , 517 U.S. 25 (1996)	20
<u>Brockett v. Spokane Arcades, Inc.</u> , 472 U.S. 491 (1985)	21,22
<u>California v. ARC America Corp.</u> , 490 U.S. 93 (1989)	19,20
<u>Dalton v. Little Rock Family Planning Servs.</u> , 516 U.S. 474 (1996)	21,22
<u>Exxon Corp. v. Hunt</u> , 475 U.S. 355 (1986)	22
<u>Hillsborough County v. Automated Med. Labs</u> , 471 U.S. 707 (1985)	19
<u>Medtronic v. Lohr</u> , 518 U.S. 470 (1996)	19,20
<u>United States ex rel. Obert-Hong v. Advocate Health Care</u> , 211 F. Supp. 2d 1045 (N.D. Ill. 2002)	17
<u>United States v. McClatchey</u> , 217 F.3d 823 (10th Cir. 2000)	18
<u>United States v. Starks</u> , 157 F.3d 833 (11th Cir. 1998)	17
<u>Wisconsin Pub. Intervenor v. Mortier</u> , 501 U.S. 597 (1991)	19

FEDERAL STATUTES and ADMINISTRATIVE RULES

26 U.S.C. § 3121(d)(2) 6

28 U.S.C. § 1257(a) 2

42 U.S.C. § 1320a-7b 2

42 U.S.C. § 1320a-7b(b)(2) i

42 U.S.C. § 1320a-7b(b)(3)(B) *passim*

42 U.S.C. § 1320a-7d(b) 10

42 U.S.C. § 1396a 7

42 U.S.C. § 1396a(61) 8

42 U.S.C. § 1396b(q)(3) *passim*

42 C.F.R. § 431.53 13,16

42 C.F.R. § 441.62 13,16

42 C.F.R. § 1001.952 *passim*

FLORIDA STATUTES and ADMINISTRATIVE RULES

Section 409.905, Fla. Stat. (2000) 5

Section 409.905(12), Fla. Stat. (2000) 13,16

Section 409.920, Fla. Stat. (2000) 4

Section 409.920(1)(d), Fla. Stat. (2000) 8,13,14,21

Section 409.920(2)(e), Fla. Stat. (2000) *passim*

Rule 59G-4.060, Fla. Admin. Code 16

Rule 59G-4.330, Fla. Admin. Code 13,16

OTHER AUTHORITIES

Jonathan Cone, et al., Health Care Fraud,
40 Am. Crim. L. Rev. 713 (2003) 7

Social Security Amendments of 1972, Pub. L. No. 92-603,
86 Stat. 1329 (1972) 8

H.R. Rep. No. 92-231 (1972), as reprinted in 1972
U.S.C.C.A.N. 5093 8

H.R. Rep. No. 96-1167 (1980), as reprinted in 1980
U.S.C.C.A.N. 5526 9,21

Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499,
94 Stat. 2599 (1980) 8,9

Medicare-Medicaid Anti-Fraud and Abuse Amendments,
Pub. L. No. 95-142, 91 Stat. 1175 (1977) 9

H. R. Rept. 95-393, (1977), as reprinted in 1977
U.S.C.C.A.N. 3039 9

Medicare and Medicaid Patient and Program Protection Act
of 1987, Pub. L. No. 100-93, 101 Stat. 680 (1987) 9

Medicare & Medicaid Programs: Fraud and Abuse, OIG
Anti-Kickback Provisions, Proposed Rule, 54 Fed. Reg. 3088
(Jan. 23, 1989) 9

Health Insurance Portability and Accountability Act of 1996,
 Pub. L. No. 104-191, 110 Stat. 1936 (1996) 10

Department of Health & Human Servs., OIG Advisory Opinion
 No. 00-7 (Nov. 17, 2000) available at
 <<http://oig.hhs.gov/fraud/docs/advisoryopinions/2000/ao007.htm>> 10

Medicare & State Health Care Programs: Fraud and Abuse,
 OIG Anti-Kickback Provisions, Final Rule, 56 Fed. Reg.
 35952 (July 29, 1991) 9,17,19

Federal Health Care Programs: Fraud and Abuse, Statutory
 Exception to the Anti-Kickback Statute for Shared Risk
 Arrangements, 64 Fed. Reg. 63504 (Nov. 19, 1999) 10

Department of Health & Human Servs., OIG Advisory Opinion
 No. 04-09 (July 15, 2004), available at
 <<http://oig.hhs.gov/fraud/docs/advisoryopinions/2004/ao0409.pdf>> 11,18

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PETITION FOR WRIT OF CERTIORARI

Petitioner State of Florida hereby petitions for a writ of certiorari to review the decision of the Florida Supreme Court in this case.

OPINIONS BELOW

The decision of the Florida Supreme Court, dated May 18, 2006 and reported at 938 So. 2d 480 (Fla. 2006), is set forth in Appendix A, pp. 1a-25a. The order of the Florida Supreme Court denying the State of Florida's motion for rehearing and clarification, dated September 6, 2006, is set forth in Appendix B, pp. 26a-27a. The decision of the District Court of Appeal of

Florida, Third District, reported at 873 So. 2d 352 (Fla. Dist. Ct. App. 2004), is set forth in Appendix C, pp. 28a-34a. The order of the Eleventh Judicial Circuit Court is set forth in Appendix D, pp. 35a-58a.

JURISDICTIONAL STATEMENT

The decision of the Florida Supreme Court was entered on May 18, 2006. The Court denied the State of Florida's motion for rehearing and clarification on September 6, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes, constitutional provisions, and federal regulations, the pertinent portions of which are set forth below:

1. Article VI, clause 2 of the United States Constitution, provides:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

2. 42 U.S.C. § 1320a-7b provides in part:

* * *

(b) Illegal remunerations

(1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in case or in kind—

(A) in return for referring an

individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

- (B) in return for purchasing, leasing, ordering or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

(2) whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

- (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

(3) Paragraphs (1) and (2) shall not apply to –

* * *

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services;

* * *

3. § 409.920, Fla. Stat. (2000), provided in pertinent part:

409.920 Medicaid provider fraud.–

(1) For purposes of this section the term:

* * *

(c) “Item or service” includes:

1. Any particular item, device, medical supply or service claimed to have been provided to a recipient and listed in an itemized claim for payment; or

2. In the case of a claim based on costs, any entry in the cost report, books of account, or other documents supporting such claim.

(d) “Knowingly” means done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result.

(2) It is unlawful to:

(a) Knowingly make, cause to be made, or aid and abet in the making of any false statement or false representation of a material fact, by commission or omission, in any claim submitted to the agency or its fiscal agent for payment.

(b) Knowingly make, cause to be made, or aid and abet in the making of a claim for items or services that are not authorized to be reimbursed by the Medicaid program.

(c) Knowingly charge, solicit, accept, or receive anything

of value, other than an authorized copayment from a Medicaid recipient, from any source in addition to the amount legally payable for an item or service provided to a Medicaid recipient under the Medicaid program or knowingly fail to credit the agency or its fiscal agency for any payment received from a third-party source.

(d) Knowingly make or any way cause to be made any false statement or false representation of a material fact, by commission or omission, in any document containing items of income and expense that is or may be used by the agency to determine a general or specific rate of payment for an item or service provided by a provider.

(e) Knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate indirectly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service for which payment may be made, in whole or in part, under the Medicaid program.

(f) Knowingly submit false or misleading information or statements to the Medicaid program for the purpose of being accepted as a Medicaid provider.

A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

4. § 409.905, Fla. Stat. (2000), provides in pertinent part:

409.905 Mandatory Medicaid services. - The agency may make payments for the following services, which are required of the state by Title XIX of the Social Security Act, furnished by Medicaid providers to recipients who are determined to be eligible on the dates on which the services were

provided. Any service under this section shall be provided only when medically necessary and in accordance with state and federal law. Nothing in this section shall be construed to prevent or limit the agency from adjusting fees, reimbursement rates, lengths of stay, numbers of visits, number of services, or any other adjustments necessary to comply with the availability of moneys and any limitations or directions provided for in the General Appropriations Act of chapter 216.

* * *

(12) TRANSPORTATION SERVICES - The agency shall ensure that appropriate transportation services are available for a Medicaid recipient in need of transport to a qualified Medicaid provider for medically necessary and Medicaid-compensable services, provided a client's ability to choose a specific transportation provider shall be limited to those options resulting from policies established by the agency to meet the fiscal limitations of the General Appropriations Act. The agency may pay for transportation and other related travel expenses as necessary only if these services are not otherwise available.

5. 42 C.F.R. § 1001.952 provides in pertinent part:

§ 1001.952 Exceptions

The following payment practices shall not be treated as a criminal offense under section 1128B of the Act and shall not serve as the basis for an exclusion:

* * *

(i) Employees. As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs. For purposes of paragraph (i) of this section, the term employee has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2).

STATEMENT OF THE CASE

Established by Title XIX of the Social Security Act, Medicaid is a cooperative state-federal program in which each participating state designs and implements its own program subject to certain broad standards established by federal law. See 42 U.S.C. § 1396a (prescribing general requirements of a state Medicaid plan). States invest billions of dollars every year in this health care program for the poor, elderly, and disabled. Unfortunately, fraud is rife.¹

In this case the defendants admitted participation in a scheme whereby Medicaid dental providers paid van drivers \$25 in cash for each Medicaid-eligible child solicited and transported to their dental clinic. Notwithstanding unequivocal statements from Congress and the Office of Inspector General of the Department of Health and Human Services (“HHS”) that states were authorized to prosecute their own laws on fraud and that such laws were not preempted, the Florida Supreme Court held that Florida’s anti-kickback or illegal referral statute, § 409.920(2)(e), Fla. Stat. (2000), was preempted by federal Medicaid law. Applying that law, it approved defendants’ paying for patient referrals.

Although the relevant federal anti-kickback provisions date back as far as 1977, no court has previously accorded them preemptive effect. The decision of the Florida Supreme Court is wrong, it will have serious fiscal consequences, and it calls into question the legitimacy of Medicaid fraud laws in at least 32 other states that, like Florida’s, do not track the federal law. App. 115a.

A. Statutory and Regulatory Background

Congress has required participating states to have a

¹See Cone, Health Care Fraud, 40 Am. Crim. L. Rev. 713, 715 (2003) (health care fraud costs taxpayers nearly \$100 billion a year).

Medicaid fraud and abuse control unit as an element of a federally-approved Medicaid plan. See 42 U.S.C. § 1396a(61). The function expressly prescribed for such a unit is “the investigation and prosecution of violations of all applicable State laws regarding any and all aspects of fraud in connection with (A) any aspect of the provision of medical assistance and the activities of providers of such assistance under the State plan under this subchapter” 42 U.S.C. § 1396b(q)(3) (emphasis added).

Under the Florida anti-kickback statute in effect in 2000, it was unlawful to “knowingly solicit, offer, pay or receive any remuneration, including any kickback . . . directly or indirectly . . . in cash or in kind, in return for referring an individual to a person for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program. . . .” § 409.920(2)(e), Fla. Stat. (2000) (emphasis added). The term “knowingly” meant “done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result.” § 409.920(1)(d), Fla. Stat. (2000).

Congress first enacted the Medicaid anti-kickback statute in 1972. See Social Security Amendments of 1972, Pub. L. No. 92-603, § 242(b), 86 Stat. 1329, 1419 (1972). The attendant committee report made clear that these provisions were intended to address practices long considered unethical, that were unlawful in some jurisdictions, and that contributed appreciably to the cost of the Medicare and Medicaid programs. Further, they “would be in addition to and not in lieu of any other penalty provisions in state or federal law.” H.R. Rept. No. 92-231, (1972), as reprinted in 1972 U.S.C.C.A.N. 5093, 5094 (emphasis added). Criminal penalties were imposed for “such practices as the soliciting, offering, or accepting of kickbacks or bribes . . . involving providers of health care services.” Id. at 5093.

Congress added the “knowingly and willfully” mens rea element in 1980. See Omnibus Reconciliation Act of 1980, Pub.

L. No. 96-499, § 917, 94 Stat. 2599, 2625 (1980). The legislative history indicates that Congress intended to shield from criminal prosecution those individuals “whose conduct, while improper, was inadvertent.” H.R. Rep. No. 96-1167, at 59 (1980), as reprinted in 1980 U.S.C.C.A.N. 5526, 5572.

In 1977 Congress included a safe harbor for payments made to employees in a bona fide employment relationship “for employment in the provision of covered items or services.” See Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 95-142, § 4(b)(1), 91 Stat. 1175, 1180-81 (1977). Once again, Congress noted that kickbacks, long considered unethical and unlawful, contributed significantly to health care costs. H. R. Rep. No. 95-393 (1977), as reprinted in 1977 U.S.C.C.A.N. 3039, 3052.

In 1987 Congress required HHS to issue regulations establishing specific financial arrangements--“safe harbors”--that would not violate the anti-kickback statute. See Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, §§ 4, 14, 101 Stat. 680, 688-89, 697-98 (1987). HHS made clear from the outset that its proposed regulations “would not provide immunity from civil or criminal prosecution or other sanctions under any other Federal or State laws. For example, a particular arrangement under a safe harbor . . . may run afoul of a State law that is applied by the State in a stricter fashion than the federal law.” Medicare & Medicaid Programs: Fraud and Abuse, OIG Anti-Kickback Provisions, Proposed Rule, 54 Fed. Reg. 3088, 3089 (Jan. 23, 1989).

When promulgating the final safe harbor regulations, 42 C.F.R. § 1001.952, the Office of Inspector General of HHS again stated that “conduct that is lawful under the federal anti-kickback statute or this regulation may still be illegal under State law.” Medicare & State Health Care Programs: Fraud and Abuse, OIG Anti-Kickback Provisions, Final Rule, 56 Fed. Reg. 35952, 35957 (July 29, 1991). The employee safe harbor regulation, 42 C.F.R. § 1001.952(i), tracks the statutory safe harbor language

but clarifies that the item or service furnished must be one “for which payment may be made in whole or in part under . . . Medicaid.”²

Since 1996, HHS has had authority to issue advisory opinions in response to requests for guidance as to whether a specific business arrangement violates the anti-kickback law. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 205, 110 Stat. 1936, 2000-02 (1996) (codified as 42 U.S.C. § 1320a-7d(b)). Advisory Opinion 00-7 recognizes that free transportation services are an integral part of fraudulent Medicaid and Medicare schemes and explicitly characterizes as an “abusive arrangement” van drivers soliciting and offering free transportation to Medicaid patients when the drivers are compensated on a per-patient basis. See Department of Health & Human Servs., OIG Advisory Opinion No. 00-7 (Nov. 17, 2000), available at <http://oig.hhs.gov/fraud/docs/advisory_opinions/2000/ao00-7.htm>.

Advisory Opinion 04-09 emphasizes that the statutory and regulatory safe harbors for employee compensation apply to amounts paid to employees for the furnishing of Medicaid-compensable services. “[W]e conclude that the proposed arrangement falls within the plain language of the statutory exception and regulatory safe harbor for employee compensation. The Admissions Adjustment is paid to the Union Employees

²In 1999, HHS promulgated rules to address safe harbors for certain managed care arrangements. It emphasized once more that “compliance with a safe harbor only provides protection from the Federal anti-kickback criminal statute and related administrative sanction authorities. Safe harbors do not apply to other laws, such as State licensure laws, antitrust laws or other Federal and State health care fraud laws. Further, the terms and definitions in these safe harbors do not apply to other laws, including but not limited to antitrust laws.” Federal Health Care Programs: Fraud and Abuse; Statutory Exception to the Anti-Kickback Statute for Shared Risk Arrangements, 64 Fed. Reg. 63504, 63506 (Nov. 19, 1999).

pursuant to a collective bargaining agreement as compensation for their employment in the furnishing of services payable by a Federal health care program.” See Department of Health & Human Servs., OIG Advisory Opinion No. 04-09 (July 15, 2004), available at <<http://oig.hhs.gov/fraud/docs/advisoryopinions/2004/ao0409.pdf>>.

B. Proceedings Below

In December 2000, the State of Florida, through the Office of the Statewide Prosecutor, filed a nine-count information charging Gabriel Harden and nine other individuals employed by or associated with Dental Express, Inc., or two other related corporate entities with conspiracy, racketeering, and Medicaid fraud under § 409.920(2)(e), Fla. Stat. (2000). App. 98a-114a. The State alleged that the defendants engaged in a “pay for patients” scheme in which van drivers were paid \$25 for every Medicaid-eligible child solicited and transported to defendants’ dental facility for treatment under the state Medicaid program. The State’s trial court memorandum indicated that the van drivers went into economically deprived neighborhoods to solicit eligible children and take them to the clinic. None of the children had a prior appointment. App. 66a.

The defendants did not deny this payment scheme. In fact, they admitted making cash payments in the amount of \$25 per head to the van drivers. App. 79a-81a, 94a. In their motion to dismiss the information, defendants asserted these were employer-employee payments protected by the federal safe harbor provision, 42 U.S.C. § 1320a-7b(b)(3)(B). App. 76a-77a. The defendants did not contend then or at any subsequent time that they were providing a service (driving the vans) for which they were compensated by Medicaid. The State asserted that recruiting patients was not a covered service and the van drivers were not bona fide employees. App. 71a, 74a. At a hearing on the motion, the parties agreed the trial court could decide whether the van drivers were bona fide employees, if necessary, after an appeal addressed the constitutionality of the Florida

statute. App. 95a-97a. For purposes of deciding the motion to dismiss the information, however, it is clear the trial court assumed the van drivers were employees within the meaning of the safe harbor provision.

The trial court granted the motion to dismiss, holding that § 409.920(2)(e), Fla. Stat. (2000), was invalid under the Supremacy Clause because of implied conflict preemption. App. 44a. The court believed the payments made to the van drivers for patient referrals were protected under the safe harbor provision. Therefore, it declared that the Florida anti-kickback statute “stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” The court did not find that the van drivers were providing a Medicaid-compensable service and concluded only that 42 U.S.C. § 1320-7b(b)(3)(B) bars payments for referrals when the payments are made to third parties who are not bona fide employees. App. 44a.

The trial court also found the Florida statute preempted because its mens rea requirements differed from the federal requirements. App. 52a-53a. While § 409.920(2)(e), Fla. Stat. (2000), requires that a defendant act “knowingly,” the federal anti-kickback statute requires that he act “knowingly and willfully.” The court decided that Congress had intended to exclude negligent conduct but that the Florida law includes it, thereby frustrating Congress’ intent. App. 52a-53a. It did not explain how defendants’ admitted payments for patient referrals could have been the result of negligence or inadvertence.³

On appeal, the Florida Third District Court of Appeal affirmed. App. 28a-34a. That court held that because states had an obligation under federal law to assist some Medicaid patients

³The trial court also held that § 409.920(2)(e) violated the First Amendment because, in the court’s view, it prohibited all solicitation for any purpose. App. 54a-56a. However, neither of the state appellate courts addressed this issue.

with transportation, criminalizing the defendants' conduct stood as an obstacle to the accomplishment of the full purposes and objectives of Congress. App. 32a-33a. Like the trial court, the District Court of Appeal found § 409.920(2)(e) preempted because it allowed prosecution for negligent conduct, thus frustrating Congress' intent.

Agreeing that the issue was one of implied conflict preemption, the Florida Supreme Court affirmed the District Court of Appeal and found the Florida anti-kickback statute preempted for two reasons. App. 1a-25a. First, it held the "should be aware" language of § 409.920(1)(d), Fla. Stat. (2000), would permit prosecution of negligent behavior, whereas the federal standard of "knowingly and willfully" required that a defendant act with knowledge that his conduct was unlawful. App. 16a. The legislative history relative to the 1980 amendment indicated that Congress intended to protect conduct that "while improper, was inadvertent." App. 16a-17a. Second, the statute contained no exceptions or safe harbors and thus ran afoul of Congress' intent to shield "some relatively innocuous commercial arrangements [that] were technically covered by the [federal] statute" App. 17a-18a.

The court also rejected the State's argument that the defendants' per head referral payments were not sheltered by the safe harbor statute and regulation regardless of whether defendants were bona fide employees. App. 19a-24a. Citing various ambiguous HHS comments, it appeared to accept that an employee payment arrangement did not have to comply with the safe harbor in order to be legal under the anti-kickback statute. App. 20a-22a. Ignoring the fact that, without state approval, defendants had no authority to provide transportation services to Medicaid patients and thus were not providing a covered service for which payment could be made under the Medicaid program, see 42 C.F.R. §§ 441.62 & 431.53; Rule 59G-4.330, Fla. Admin. Code; § 409.905(12) Fla. Stat. (2000), App. 86a-92a, the court concluded that the payment arrangement was for the provision of

a covered service, i.e., transportation, and thus protected from prosecution under the federal statute. App. 23a-24a. While noting the availability of HHS advisory opinions, App. 12a, the court failed to even address Florida's reliance on HHS Advisory Opinions 00-7 and 04-09.

In order to avoid not being able to prosecute kickbacks and other Medicaid-related offenses under § 409.920(2)(e), Florida amended § 409.920(1)(d) in 2004 to add the word "willfully" and define the term "knowingly and willfully." That amendment, however, does not moot this case and other pre-2004 cases like it, or in any way lessen the need for resolution of the preemption and safe harbor issues on a nation-wide basis.

REASONS FOR GRANTING THE WRIT

The states spend billions of their own tax dollars annually on Medicaid in addition to the billions provided by the federal government. This case presents two vitally important questions. The first is whether, contrary to its plain language and HHS regulations, federal law permits patient referral payments to employees for any purpose -- even if the payment is not for a covered service. The second is whether the states, despite the express authorization to prosecute their own laws on fraud, must march in lockstep with the federal government under the federal anti-kickback provision. The answer to both questions must be no.

If the Florida Supreme Court is correct as to the first question, the anti-kickback provision would permit patient referral payments that the federal government itself has declared to be "an integral part of fraudulent or abusive schemes which lead to inappropriate steering of patients, overutilization, and the provision of medically unnecessary services." HHS OIG Adv. Op. 00-7, p. 3. Although federal regulations explicitly provide that transportation is a responsibility of the states, under the lower courts' analysis anyone employed on a commission basis to

solicit Medicaid patients and transport them to a Medicaid provider of any kind qualifies as a provider of a “covered service” regardless of state authorization. This conclusion opens entire new vistas for fraudulent conduct.

If the Florida Supreme Court is correct as to the second question, it would stifle the intent of Congress and HHS that the states be full partners in the fight against Medicaid fraud and would call into question the laws of dozens of states. Both Medicaid providers and the states need to know whether the many varying state anti-kickback laws have been preempted. See App. 115a. State-by-state adjudication will not only be wasteful but will lead to no certain resolution. Only this Court can lay these issues to rest.

**A. THE FLORIDA SUPREME COURT’S
DECISION CONFLICTS WITH THIS
COURT’S PREEMPTION
JURISPRUDENCE AND THE
REGULATIONS, ADVISORY
OPINIONS, AND STATEMENTS OF
THE FEDERAL AGENCY CHARGED
WITH ENFORCING THE MEDICAID
STATUTE.**

**1. The Federal Safe Harbor Statute and Regulation Apply
Only Where an Employee Provides a Covered Service.**

The federal safe harbor statute and the implementing HHS regulation shelter only those payments made to employees in the provision of covered items or services for which payment may be made in whole or in part under Medicaid. See 42 U.S.C. § 1320a-7b(b)(3)(B); 42 C.F.R. § 1001.952(i). The defendants have never claimed they were providing a covered service for which compensation could be made under the Medicaid program, and, in fact, they were not. Based on the plain language of the employee safe harbor provision and HHS’ repeated interpretation

of that provision, this should have disposed of their preemption argument. The employee safe harbor is not available to the defendants, and they therefore violated both the federal and state anti-kickback statutes.

The defendants' claim to be transportation providers does not satisfy the requirement of the safe harbor provision that the employee be paid for a Medicaid-compensable service. Under federal law transportation is a responsibility of the states, not Medicaid providers or their employees. See 42 C.F.R. § 441.62 and 42 C.F.R. § 431.53. App. 86a-89a. Florida has a federally-approved Medicaid plan that distinguishes between dental services providers and transportation services providers enrolled in the Medicaid program. See 59G-4.060 & 59G-4.330, Fla. Admin. Code. App. 90a-92a. Moreover, Florida is responsible for paying for transportation only where it is not otherwise available to the Medicaid recipient. See § 409.905(12), Fla. Stat. (2000). Florida's responsibility clearly does not extend to every Medicaid-eligible child solicited and transported by a van driver.

At no time did the defendants contend that any of them was a transportation services provider enrolled in the Medicaid program pursuant to the state regulation. Without that state sanction, they cannot claim to be providing a covered service and they are not entitled to compensation from Medicaid. Indeed, it is precisely this arrangement--a Medicaid provider's utilization of van drivers--that HHS condemned as an abusive practice in Advisory Opinion 00-7. Its logic is obvious. Because the Medicaid provider, be it a physician, a dentist, or other practitioner, invests not only in the patient--here, \$25 per head--but also in costly transportation equipment and services for which the practitioner receives no Medicaid compensation, it can be expected that many, to enhance their return, would be tempted to provide unneeded treatment, steer patients to associates at further cost to the state, or submit claims for treatment not provided.

The Florida Supreme Court seemed to think the only important question was whether payments were made to bona

fide employees. It ignored the fact that transportation provided by the defendants' van drivers was not a covered service under the safe harbor provision and made no mention of Advisory Opinion 00-7. App. 23a. The decision strongly suggests defendants' arrangement did not even have to comply with the safe harbor provision in order to be legal, leaving it entirely unclear what kickback payments, if any, may be prosecuted. App. 20a-21a.⁴

Florida is not aware of a single federal case holding that the safe harbor provision protects payments to employees who are not providing a covered service. Relevant authority plainly holds the contrary. See United States v. Starks, 157 F.3d 833, 839 (11th Cir. 1998) (upholding kickback convictions and stating that "even if [defendants] believed they were bona fide employees, they were not providing 'covered items or services'"). Although the lower courts seemed to think that United States ex rel. Obert-Hong v. Advocate Health Care, 211 F. Supp. 2d 1045 (N.D. Ill. 2002), holds differently, it does not. In that case a hospital network acquired the medical practices of various physicians and

⁴ In ruling on this question, the Florida Supreme Court seemed to confuse the proposed rule with the final rule. The court asserted that in explaining the final safe harbor rule, "the OIG stated that the employee exception permits 'an employer to pay an employee in whatever manner he or she chose for having that employee assist in the solicitation of program business and applied to bona fide employee-employer relationships.'" App. 19a-20a. The same misstatement appears in the trial court's order. App. 46a. These OIG comments were clearly directed to the proposed rule. See Medicare & State Health Care Programs: Fraud and Abuse, OIG Anti-Kickback Provisions, Final Rule, 56 Fed. Reg. 35952, 35953 (July 29, 1991). The final rule does not address payments to employees for solicitation of business in whatever manner the employer chooses. The employee must legitimately be furnishing a service for which payment may be made under the Medicaid program. See 42 C.F.R. § 1001.952(i). Throughout these proceedings, the defendants claimed they were providing transportation as a covered service.

signed them to employment contracts. In a qui tam action against the hospital network, the court held the physicians were entitled to compensation under the employee safe harbor because the compensation depended “on the value of the work performed by the individual doctor, not the value of any referrals.” Id. at 1050.

Payments for employee-driven patient referrals are simply not sheltered. This conclusion is consistent with the “one purpose rule” adopted by at least four circuits. Under that rule, payment for a patient referral to someone who is not an employee violates the anti-kickback statute even though the payment may arguably compensate for some service. Hence, “a person who offers or pays remuneration to another person violates the Act so long as one purpose of the offer or payment is to induce Medicare or Medicaid patient referrals.” United States v. McClatchey, 217 F.3d 823, 834-835 (10th Cir. 2000) (citing cases). It strains logic to the breaking point to conclude that Medicaid providers may pay their van drivers for patient referrals--a noncovered service--but others who may provide referrals and a compensable service are subject to prosecution.

HHS has addressed this exact point in Advisory Opinion 04-09. Considering what it assumed to be a bona fide employment relationship involving physicians, HHS stated:

[W]e conclude that the Proposed Arrangement comes within the language of the statutory exception and regulatory safe harbor for employee compensation, because the compensation will be paid to the Consulting Physicians pursuant to an employment agreement for the furnishing of covered items and services.

Department of Health & Human Servs., OIG Advisory Opinion No. 04-09 (July 15, 2004), available at <<http://oig.hhs.gov/fraud/docs/advisoryopinions/2004/ao0409.pdf>> (emphasis added). The Florida Supreme Court ignored this advisory opinion just as it did HHS Advisory Opinion 00-7.

a. Preemption is Inappropriate No Matter How the Safe Harbor is Construed.

Even assuming, arguendo, that the Florida Supreme Court correctly construed federal law, preemption would be inappropriate. Congress expressly authorized the states to enforce their own laws on fraud. See 42 U.S.C. § 1396b(q)(3). Further, HHS maintained throughout the safe harbor rulemaking proceedings that “[i]ssues of state law are completely independent of the federal anti-kickback statute and [the safe harbor] regulations” and “conduct that is lawful under the federal anti-kickback statute or [the safe harbor] regulation may still be illegal under State law.” Medicare & State Health Care Programs: Fraud & Abuse, OIG Anti-Kickback Provisions, Final Rule, 56 Fed. Reg. 35952, 35957 (July 29, 1991). Ordinarily, such agency statements are considered “dispositive” by this Court unless “inconsistent with clearly expressed congressional intent . . . or subsequent developments reveal a change in [the agency’s] position.” Hillsborough County v. Automated Med. Labs., 471 U.S. 707, 714-715 (1985). Neither is the case here. HHS’ statements are plainly consistent with the mandate given the states in 42 U.S.C. § 1396b(q)(3).

Moreover, the court’s interpretation tolerates, if it does not invite, fraudulent conduct that will drain state resources. A finding of preemption in these circumstances is contrary to this Court’s jurisprudence. A state should be able to protect its own fisc from fraudulent practices where federal law does not in the absence of the clearest statement from Congress. “[B]ecause the states are independent sovereigns in our federal system,” this Court has “long presumed that Congress does not cavalierly preempt state-law causes of action.” Medtronic v. Lohr, 518 U.S. 470, 485 (1996). The states’ traditional police powers will not be presumed to have been superseded “unless that was the clear and manifest purpose of Congress.” California v. ARC America Corp., 490 U.S. 93, 101 (1989)(citation omitted). See also Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991)

(same). Congress' clear and manifest purpose was to allow states to prosecute their own laws on fraud, not to restrict those efforts.

2. The Florida Anti-Kickback Statute Should Not Have Been Held Preempted Because of Different Mens Rea Language.

The decision on the mens rea language is wrong for two reasons. First, the preemptive effect of a federal statute is ascertained through a reviewing court's "reasoned understanding" of the way in which Congress intended the statute and its regulatory scheme to operate. Medtronic, 518 U.S. at 486. Congress, in unambiguous terms, mandated that state Medicaid fraud units were to prosecute violations of state laws, see 42 U.S.C. § 1396b(q)(3), laws bound to differ not only among the states but also with federal law. Indeed, state anti-kickback laws vary greatly, both from each other and the federal statute. App. 115a. In preemption cases, this Court has interpreted explicit statutory provisions recognizing state authority "to mean what they say." Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 34 (1996). HHS was thus correct in stating that conduct lawful under the federal safe harbor law and regulation may be illegal under state law. Moreover, this is, at most, a case where a state, to protect its own resources, imposes liability where the federal government possibly does not. Ordinarily, state laws "are not preempted solely because they impose liability over and above that authorized by federal law." ARC America Corp., 490 U.S. at 105 (citations omitted).

Second, the Florida Supreme Court erred in finding that Florida law stood as an obstacle to the full purposes and objectives of Congress. Florida's anti-kickback law did not forbid what federal law allows. Both criminalize the same intentional act -- making referral payments. In these circumstances, the difference between the federal and Florida mens rea standards is inconsequential; the Florida standard cannot be held to frustrate Congress' purposes.

Congress' use of the word "willfully" was intended to

shield only inadvertent conduct. App. 10a, 17a, 19a. See H. R. Rept. 96-1167, at 59 (1980), reprinted in 1980 U. S. Code Cong. & Admin. News 5526, 5572. It defies logic to conclude that one may inadvertently or negligently pay or accept a fee for a patient referral or, as here, devise a scheme to do so repeatedly. Such conduct is far outside the norms of medical practice. Application of Florida's "should be aware" language to the intentional conduct at issue in this case would not undermine Congress' full purposes and objectives, which include minimizing losses due to fraud from the hundreds of billions of dollars expended every year. Here, Florida has not sought to prosecute negligent conduct, but conduct that every physician should know to be improper.

Finally, even assuming that the "should be aware" language fatally conflicts with the federal anti-kickback statute, the Florida Supreme Court erred in concluding that the Supremacy Clause required the statute to be preempted in its entirety. It is well-established that in preemption cases a court "should not extend its invalidation of a state statute further than necessary to dispose of the case before it." Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476 (1996) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985)).

If the "should be aware" language from § 409.920(1)(d), Fla. Stat. (2000), were stricken, the word "knowingly" would mean "done by a person who is aware . . . of the nature of his conduct and that his or her conduct is substantially certain to cause the intended result." The Florida Supreme Court did not consider whether it would frustrate Congress' full purposes and objectives for a state to prosecute someone who intended to pay or accept kickbacks for patient referrals and who was "aware of the nature of his conduct" and that it would "cause the intended result." Logically, this language would refer to someone who knew his or her conduct was unlawful, not one who was acting negligently or inadvertently. Perhaps because the Florida Supreme Court found the defendants entitled to the safe harbor

exception, it thought such an analysis unnecessary. Nevertheless, it erroneously held the definition of “knowingly” preempted beyond the extent of actual conflict with the federal statute. See Dalton, 516 U.S. at 476. Because respondents are not entitled to the federal safe harbor exception, this additional analysis should be undertaken. See Brockett, 472 U.S. at 507; Exxon Corp. v. Hunt, 475 U.S. 355, 376 (1986). On this basis the decision below should be vacated and the case remanded for further consideration.

**B. THIS CASE PRESENTS
IMPORTANT QUESTIONS
THAT AFFECT EVERY
STATE MEDICAID
PROGRAM.**

The Florida Supreme Court’s decision also calls into question under the Supremacy Clause the Medicaid fraud laws of numerous states. Sixteen states and the District of Columbia have no statutory safe harbor provision like 42 U.S.C. § 1320-7b(b)(3)(B) (2000). Nineteen states do have such a provision. App. 115a. Two states, Missouri and New Mexico, have a mix of laws with and without safe harbors. Undoubtedly, most states would strongly object to Medicaid providers paying kickbacks for patient referrals to employees who provide no Medicaid compensable service. In addition, only three states use the federal mens rea term “knowingly and willfully,” nine use only the word “knowingly,” and nineteen states and the District of Columbia have no mens rea language at all. Others use such terms as “purposely,” “intentionally,” “knowingly or intentionally,” and “intentionally or with reckless disregard.” App. 115a.

Congress gave the states a clear command--to prosecute “violations of all applicable State laws regarding any and all aspects of fraud” in connection with their Medicaid programs. 42

U.S.C. § 1396b(q)(3) (emphasis added). Under their Medicaid fraud laws, Florida and many other states would prosecute those who pay or accept payment for patient referrals. According to the decision below, however, the federal anti-kickback statute affords a safe harbor to such payment schemes, even though they are recognized as intimately associated with fraudulent practices, and preempts more rigorous state laws. Fraud is endemic to the Medicaid program and it is vital that the states know how far their powers extend in this area. Congress has repeatedly characterized patient referral payments as unethical and found they increase the costs of the Medicaid program. See Statement of the Case, supra, pps. 2 & 3. HHS has condemned, not endorsed, the use of van drivers. If prohibiting kickbacks to so-called employees for patient referrals serves to deter fraud, the states should be permitted to do so.

The Florida Supreme Court was equally short-sighted with respect to the mens rea issue. Applying its reasoning, any state anti-kickback statute whose mens rea language is not identical to the federal standard of “knowingly and willfully” would be facially preempted even when--as here--the state is not prosecuting negligent or inadvertent conduct. The Florida Supreme Court did not attempt to explain how the “full purposes and objectives” of Congress under the federal anti-kickback law would be frustrated by slightly differing mens rea standards when a state is not prosecuting negligent or inadvertent conduct. Whether the laws of a majority of states could be found preempted under such reasoning is an important question that should be resolved now.

The Florida Supreme Court’s decision, as precedent, is fraught with consequences for the states. State-by-state adjudication of the issues presented can only be wasteful and ultimately inconclusive. The decision is wrong and should be reversed.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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