

In the Supreme Court of the United States

SAMUEL DAVID SILVA-RAMIREZ,
ON BEHALF OF THE UNITED STATES OF AMERICA,

Petitioner,

—V—

HOSPITAL ESPANOL AUXILIO MUTUO
DE PUERTO RICO, INC. ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the First Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44, petitioner respectfully petitions this Court for rehearing of its October 1, 2018 order dismissing the writ of certiorari in this case.

“Reproductive rights” are something broader than access to contraception and abortion alone; that is, a reproductive justice framework, as defined by advocates who first originated the term, recognizes that women’s reproductive rights include the right to have children, not to have children, and to parent in safe and humane conditions”. Luna Z, Luker K. *Reproductive Justice*, ANN REV LAW SOC SCI 2013; 9:327–52. ACOG Committee Opinion #695, April 2017.

In Puerto Rico HEAM (“Hospital Español de Auxilio Mutuo y Beneficencia Inc.”) and owners; take the USA Health funds thru Federal Guarantee Loans and “Medicare and Medicaid” [M/M], and grants a second-rate healthcare when they discriminate denying the universal right to health and family planning. U.S. citizens, by law disposition; have the right not to be discriminated in any way and receive the best medical care. When contracting; HEAM has clauses requiring to not discriminate against American citizens in Family Planning.

In *U.S.A. v. Jose Luis Vaello-Madero* (Defendant) Case 17-2133 when SSI (Supplements Security Income), when defendant was ineligible when, he moved to Puerto Rico, and U.S.A. sued for the restitution of monies wrongfully paid from the public fisc. *U.S.A. v.*

Lahey Clinic Hosp. Inc., 399 F.3d 1, 9, 12 (1st Cir. 2005) *cert denied*, 546 U.S. 815 (2005).

The U.S.A. legal capacity to discriminate against residents of P.R. in healthcare and other federal programs, including SSI, stems from a brief per curiam Supreme Court opinion. *See Califano v. Torres*, 435 U.S. (1978). This case and its sequel, *Harris v. Rosario*, permit Congress to discriminate in extending these benefits to Puerto Rico “so long as there is a rational basis for its action” *Harris v. Rosario*, 446 U.S. 651 (1980).

Very differently; sterilization Protocol of HEAM violates the “right of privacy”, invasion to the right to engage in highly personal activities, freedom of choice in marital, sexual and reproductive matters. This right of privacy is constitutionally protected, can be traced to *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *See also Poe v. Ullman*, 367 U.S. 497 (1961). Focus in the right of Privacy and marital “privacy”. *Griswold v. Connecticut*, 381 U.S. 478 (1965). *Carey v. Population Services International*, 431 U.S. 678 (1977).

Parents have a basic human right to determine freely and responsibly the number and spacing of their children,” the Tehran Proclamation by the International Conference on Human Rights at Teheran on 13 May 1968.

Taking away women’s access to information on family planning is an attack on their access to healthcare, and the right to make informed autonomous decisions about their lives and their bodies,”

More than 200 million women still lack safe and effective family planning methods largely due to the

lack of information or services, we can only expect to see higher rates of unintended pregnancies, unsafe abortions, and infant mortality in the U.S.A. (Reh.App. 8a, 9a).¹

When women are able to decide when to have children and space out their pregnancies, their children are less likely to be born prematurely or have low birth weights. (Reh.App.8a)

A study found that U.S. babies are three times more likely to die compared to 19 countries in the Organization for Economic Cooperation and Development largely due to high poverty rates and a weak social safety net.

“ABSTRACT: Postpartum tubal sterilization is one of the safest and most effective methods of contraception. Women who desire this type of sterilization typically undergo thorough counseling and informed consent during prenatal care and reiterate their desire for postpartum sterilization at the time of their hospital admission. Not all women who desire postpartum sterilization actually undergo the surgical procedure, and women with unfulfilled requests for postpartum sterilization have a high rate of repeat pregnancy (approaching 50%) within the following year.”

American College of Obstetrics and Gynecology, ACOG TECHNICAL BULLETIN, Number 530, July 2012 (Reaffirmed 2016) Committee of Health Care for Underserved

¹ “Reh.App.” refers to rehearing appendix. “Pet.App.” refers to Petition Appendix.

Women, Access to Postpartum Sterilization, 1st Paragraph.

Sterilization remained the most common method, used by 47.3% of married couples. Data from the CREST Study indicate that postpartum partial salpingectomy (Partial removal of fallopian tubes) with lower rates failure than interval, (when patient is not pregnant), when done by laparoscopy. Peterson HB, Xia Z, Hughes J.M. Wilcox L.S. Tylor LR, Trusell J., *The Risk of Pregnancy After Tubal Sterilization; Findings from the U.S. Collaborative Review of Sterilization (CREST Study)*, AM J OBSTETRICS GYNECOLOGY 1996; 174: 1161-8; discussion 1168-70 (Level II-3 [Pub Med] [Full text]).

Many sterilization procedures are planned immediately postpartum, which is an advantageous time because the woman is not pregnant, is within a medical facility, and often has insurance coverage. However, many women do not obtain their planned postpartum sterilization because of limited operating room availability, lack of motivation or coordination on the part of the health care team (obstetricians, nurses, and anesthesiologists), perceived increased risk because of the postpartum state, or misplaced or incomplete sterilization consent forms. In one study, almost 50% of women who did not receive a requested postpartum sterilization were pregnant again within 1 year. Thurman AR, Janecek T. *One-Year Follow-Up of Women with Unfulfilled Postpartum Sterilization Requests*. OBSTET GYNECOL. 2010; 116:1071-7. [PubMed] [Obstetrics & Gynecology] Federal regulations require a specific sterilization consent form to be signed 30 days before sterilization for women enrolled in Medicaid or

covered by other government insurance. *Access to Post-partum Sterilization*, Committee Opinion No. 530, American College of Obstetricians and Gynecologists. OBSTET GYNECOL. 2012; 120:212-5. [PubMed] [Obstetrics & Gynecology]

The unintended pregnancy rate for poor women is more than five times the rate for women in the highest income bracket. (5 Finer LB, Zolna MR. *Unintended Pregnancy in the United States: Incidence and Disparities*, 2006. CONTRACEPTION 2011; 84:478-85. [PubMed] [Full Text]),

Additionally, low-income women face health system barriers to contraceptive access because they are more likely to be uninsured, a major risk factor for nonuse of prescription contraceptives. Dehlendorf C, Rodriguez MI, Levy K, Borrero S, Steinauer J. *Disparities in Family Planning*; AM J OBSTET GYNECOL 2010; 202:214-20. [PubMed] [Full Text] Copyright January 2015 by the American College of Obstetricians and Gynecologists, 409 12th Street, SW, PO Box 96920, Washington, DC 20090-6920. All rights reserved. ISSN 1074-861X. *Access to Contraception*. Committee Opinion No. 615. American College of Obstetricians and Gynecologists. OBSTET GYNECOL. 2015;125:250-5. (Reh. App.17a).

Hospital Español de Auxilio Mutuo (HEAM) private corporation organized under the laws of Puerto Rico, (“P.R.”) on April 29, 1992; is non-profit hospital, not affiliated to Church and no religious purpose, and owned by Sociedad Espanola de Auxilio Mutuo (SEAM).

HEAM has a community of Catholic Sisters who give voluntary work, and no decisions inherent in the operation of HEAM.

They have a secret religious protocol of sterilization, that advances discrimination since June 20, 1996, outside of the bylaws or any document that is presented before the Federal Regulation Entities. (Pet.App. 39a).

Bylaws of HEAM 2008 allows sterilization.

This protocol, authorizes nuns, final decision; if patients are going to be sterilized or not, despite patient's will in violation of their privacy right.

This written secret protocol also required a letter of approval from a priest. This protocol is only given to the Staff doctors members of the Obstetrics and Gynecology Department.

In order to HEAM not discriminate with a religious protocol it needs an affiliation with the Catholic Church and the religious affiliation be stated within the bylaws of the Medical Staff of HEAM. *See Watkins v. Mercy Medical Hospital*, 520 F.2d 894 11 Empl. Prac. Dec. P. 10, 671. HEAM is not affiliated to the Catholic Church.

Dr. Samuel D. Silva-Ramirez “relator” (Dr. Silva) gynecologist, is an American citizen.

HEAM attested in a certification to the Department of Health and Human Services (D.H.H.S.) through its division of Survey and Certification, that it is aware of, and abides by all applicable statutes, regulations and program instructions when signing the Provider's Agreement. (Pet.App.19a-30a) according to the Rules of Evidence; Rule 901, Article IX, Authentication or Identifying Evidence § 901(b)(7)(B); “a purported public record or statement is from the office where items of this kind are kept.” This Honorable Supreme

Court can take knowledge. (Pet.App.26a-30a, example of signed parts of original of the year 2014 of PA.)

The False Statement arises out of the False Claims Act. and the Violation are fraudulent. Certification of compliance and False Fraudulent Certification to the (DHHS) and Medicare/Medicaid (M/M) and others.

HEAM fail to disclose and illegal discriminatory written protocol for sterilization that voids their contract and the CMS 855-A (Providers Agreement) and CMS 2552-10 (Hospital Cost Report.).

M/M forms in the Certification Statement. 42 U.S. Code § 708-Nondiscrimination provisions, and the Civil Rights Act of 1964, and related nondiscrimination statutes to ensure nondiscrimination in all programs and activities of a recipient, whether those programs and activities are federally funded or not, and 45 C.F.R. § 80.3.

HEAM are in violation of 42 U.S.C. § 1320(a)(2) and 42 U.S.C. § 1320a-7b(a)(3) when it is used form CMS-2552-10, and CMS-855A. (Certification). All these previous violations to 42 U.S.C. § 1320a-7b(a)(3) were material fact or condition of payment to M/M under the Hospital Cost Reports and the Providers Agreement.

31 U.S.C. § 3729(a)(1)(A), imposes liability on those presenting “false or fraudulent claims”, does not limit claims to misrepresentation about express condition of payment. Nothing in the text supports such a restriction. And under the Act’s materiality requirement, statutory, regulatory and contractual requirements are not automatically material, even if they are labeled conditions of payment. Nor is the restriction

supported by the Act's scienter requirement. A defendant can have "actual knowledge" that a condition is material even if the Government does not expressly call it a condition of payment. What matters is not the label that the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant's know is material to the Government's payment decision. Universal Health's policy arguments are unavailing, and are amply addressed through strict enforcement of the False Claims Act (FCA's) stringent materiality and scienter provisions, *Universal Health Services Inc. v. U.S.A.*, 136 S.Ct. 1989, Supreme Court of the U.S. at 2201-2003.

U.S. Ex relator Hutchenson v. Blackstone Medical, Inc., 647 F.3d 377 (1st Cir. 2011) states:

"as the Supreme Court has held, in enacting the FCA 'Congress wrote expansively, meaning to reach all types of fraud, without qualification, that might result in financial loss to the Government.'"

U.S.A. Ex rel Hutchenson v. Blackstone Medical Inc., (*supra*) at pages 393 and 394 expresses:

"The Provider Agreement, drafted by CMS requires that hospitals and physicians acknowledge that they understand that the payment of a claim by Medicare is conditioned upon the claim and the underlying transaction complying with Medicare's laws regulations and program instructions."

It also requires that the Hospital representative sign a statement certifying that he or she is "familiar with

the laws and regulations regarding the provisions of health care services and that the services identified in this Cost Report were provided in compliance with such laws and regulations.

U.S.A. Ex rel Hutchenson v. Blackstone Medical Inc., (*supra*) at 394 and 395 expresses:

“In *Loughren*, this court held that a False statement is material if has “a natural tendency to influence, or [i]s capable of influencing, the decision making body to which it was addressed.”

“We cannot say, as a matter of law, the alleged misrepresentations in the hospital and physician claims were not capable of influencing’s decision to pay the claims. *See Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 16-17 (1st Circuit 2011) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 9292 (2007)).

HEAM acquired two types of hospital modernization loans:

- A. Loan from the Hospital Survey and Construction Act (Hill-Burton), in the years 1960, *id.* number 720025.; 42 C.F.R. § 53.112, *U.S. v. Blackstone Medical, Inc.*, 647 F.3d 377 (2011); 24 C.F.R. § 242.54; 42 U.S.C. § 300–6; *U.S. v. Anderson*, 605 F.3d 404 (2010);
- B. HEAM closed a loan from HUD in May 1983 financed or guaranteed by the U.S.A. Department of Housing of Urban Development (HUD). Amount \$3,175,000.00. The number was 056-13005 and was for Modernization

and construction of the Hospital (HEAM). It had outstanding balance years 1992, 1993 and 1994 of \$2,500,000.00. This is a violation of the Church amendment, 42 U.S.C. § 300(a)(7).

An assurance is requested under 42 C.F.R. § 53.112, *U.S. Ex rel v. Unadilla Health Care Center, Inc.*, 2010 WL 146877, page 5.

Under 42 C.F.R § 53.112 is a condition of payment exists to not discriminate by Creed, when statute requires an assurance . . .

In a letter from U.S. D.H.H.R. Dated July 21, 1997 addressed to Marilina Sierra, Financial Department Director of Auxilio Mutuo Hospital, making reference to Hill-Burton ID # 720025. Third paragraph, second sentence says:

“However, please be advised your facility’s Community Service obligation, as specified in Subpart G of the regulations, remains in effect in perpetuity.” (This part speaks about creed discrimination among others.) (Hill-Burton Act). (Pet.App.37a-38a).

Defendants had actual knowledge of the information; acted with deliberate ignorance of the truth or falsity of the information, and/or in reckless disregard of the truth or falsity of the information based on the facts stated in this document. Defendants knowingly assisted in causing Medicare/Medicaid to pay claims which were grounded in fraud. This states a claim against HEAM.

As an example of the Ethics Committee proceedings in the request of sterilization post-partum; on a written letter by Sor Claribel Camacho HEAM nun

(not a Doctor or nurse) she wrote, denying the permission and to get her cesarean at HEAM and sterilization at another hospital.

False Claims may take many forms, the most common been a claim for goods and services not provided, or provided in violation of contract terms, specifications, statutes or regulations. *Mikes v. Strauss*, 274 F.3d 687, 697 (2nd Cir. 2001).

False Claims Action are allowed due to discriminating protocol of religious nature, under 31 U.S.C. § 3729(1)(A), 31 U.S.C. § 3729(a)(1)(B), 31 U.S.C. § 3729 (a)(1)(C) and 31 U.S.C. § 3729(a)(1)(G).

45 C.F.R. § 87.1(e) Discretionary Grants states:

“An organization that participates in programs funded by direct financial assistance from the Department shall not in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion . . .”

When a government contract is tainted with a violation of a statute or regulation, courts are generally bound to strike down the illegal contract by declaring it “Void AB INITIO.”

The False representation, statement or False Certification made to the D.H.H.S. was a material fact because a condition of payment was within the Hospital Cost Reports and Providers Agreement. *Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997).

Violations of 31 U.S.C. § 3729(a)(1)(C), 31 U.S.C. § 3729(a)(1)(A), and 31 U.S.C. § 3729(a)(1)(B), because

they conspired to make a violation, for knowingly causing to present, a false or fraudulent claim for payment or approval and for causing or using or used, a false record or statement material to an obligation to pay or transmit money or property to the government.

See for example this hypothetical situation:

In HEAM of Puerto Rico; Ms. X of 31 years, a Christian non Catholic American citizen who has 2 children and has just delivered her third daughter on Holly Thursday (Holy Week). If she have delivered on another season; her sterilization approval will have come without any pretext. The day of the sterilization on Good Friday is not approved by the Nun.

The Hospital is non-Catholic, doesn't have affiliation to Church and this is not mentioned neither in Medical bylaws or in any document presented to Federal or State Agencies. The Hospital Modernized with Federal Grants which required to sign an agreement for non-discrimination.

The Hospital doesn't require this protocol to male patients.

We have a clear conflict of Right of Privacy, the liturgical interest of the Administration and owners to promote their religion, Autonomy issues, the Right of patients to planning their family, and Gender discrimination.



REASONS FOR GRANTING THE PETITION

If this Court applies any test to deal with a state or private/Church for religious establishment; with no doubt our petition will prevail *Wilmar v. Vincent*, 454 U.S. 263 (1981), *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), *Rosenberg v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

The defendants, HEAM had knowledge, knew, acted knowing or knowingly, it is formally alleged that defendants had actual knowledge of the information, acted in deliberate ignorance of the truth or falsity of the information or acted in reckless disregard of the truth or falsity of the information, and require no proof of specific intent to defraud.

HEAM collected from Medicare/Medicaid from 2002 to 2012 approximately \$919,401,353.00. (Doc. 42-2, 3rd Amended Complaint, p.54, 87).

The FCA's materiality requirement is demanding. An undisclosed fact is material if, for instance," [n]o one can say with reason that the plaintiff would have signed this contract if informed of the likelihood" of the undisclosed fact." *Junius Constr. Co., v. Cohen*, 257 N.Y. 393, 400, 178 N.E. 672, 674.



CONCLUSION

“Whether as substantive due process or as Privacy, ‘fundamentality’ needs elaboration, especially with respect to the weight particular rights are to enjoy in the balance against public good. Justices Stone and Cardozo suggested that the freedom of speech, press and religion require extraordinary judicial protection against invasion even for the public good, because of their place at the foundations of democracy and because of the unreliability of the political process in regard to them.”

Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1428-29 (1974).

Petitioner request the granting of this Reconsideration to Writ of Certiorari to the United States First Circuit Court of Appeals.

Respectfully submitted,

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RULE 44 CERTIFICATE

The undersigned counsel of record for Petitioners certifies that, under penalty of perjury that:

1. This petition for rehearing is presented in good faith and not for delay.
2. The grounds of this petition are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

/S/ RAFAEL E. SILVA ALMEYDA

Executed on October 26, 2018