No. _____

In The

Supreme Court of the United States

JUDITH PAIXAO, KEVIN LOMBARD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court should reconsider *Fischer v. United States*, 529 U.S. 667, 686 (2000), because, as Justice Thomas's dissent predicted, the lower courts have interpreted it such that "any funds flowing from a federal assistance program [are] deemed 'benefits'" within the meaning of 18 U.S.C. § 666(b).

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the court of appeals (App. at 1) is reported at 885 F.3d 1203. In a summary order, the court of appeals denied the petition for rehearing en banc. App. at 14-15.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2018. App. at 1. A petition for rehearing en banc was denied on May 24, 2018. App. at 14-15. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 666(a)(1)(A) provides:

"Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that –

(i) is valued at $ 5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; [ ]

shall be fined under this title, imprisoned not more than 10 years, or both."

Subsection (b), in turn, provides:

"The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, *benefits* in excess of $ 10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."

(Emphasis added).

STATEMENT OF THE CASE

1. This case is about whether federal funds paid on behalf of veterans qualify as "benefits," not just to the veterans, but also to the third-party educational institutions in which they enroll. If so, as the court of appeals held, every such institution – and its employees – subjects itself to criminal prosecution under 18 U.S.C. § 666. App. at 5, 11-13. This is true regardless of

whether there is any nexus between the federal monies and the alleged crime. *See Salinas v. United States*, 522 U.S. 52, 56-57 (1997) (the conduct prohibited by section 666 "is not confined to a . . . transaction which affects [the] federal funds" received by the institution).

Thus, for instance, if a cook at a private college enrolling veterans embezzles from the school's cafeteria, the federal government can prosecute him or her, despite the fact that no federal money is implicated in the theft. This example illustrates the wide-reaching interpretation underlying the court of appeals' decision, and why further review is necessary.

2. The federal funds in this case came from the Vocational Rehabilitation and Employment (VRE) program at the Department of Veterans Affairs (VA). ER:58.[1] The VRE provides tuition payments and living expenses to disabled veterans so they can attend college or receive other vocational training. ER:4. Here, the VRE paid tuition payments on the veterans' behalf to the Wounded Marine Career Foundation (WMCF), a non-profit organization created to teach disabled veterans the skills necessary to find work in the entertainment industry as camera operators, editors, screenwriters, etc. ER:56.

WMCF was the brainchild of Kevin Lombard and his wife, Judith Paixao. Mr. Lombard was an Emmy-award winning cameraman. ER:52-54. After 35 years in the business, he decided to leverage his contacts and

[1] The Excerpt of Record (ER) is on file with the court of appeals.

experience to create a school that would teach wounded veterans to tell their stories through film. ER:55, 1526-27. As to what happened next, the district court summarized it best:

"[F]irst and foremost, the intention of the defendants was to provide media arts training to help rehabilitate wounded warriors and to enhance their employability." ER:2796. Along with their "lofty goal," however, came "unrealistic expectations as to what they could generate by way of gifts and grants and donations." ER:2797. And when they failed to secure sufficient donations, they looked for alternative funding.

Through perspective students, Mr. Lombard and Ms. Paixao learned about the VRE program at the VA. ER:58. They met with VA officials, who authorized several veterans to utilize VRE funds to pay for WMCF's training. ER:58. This, in turn, helped WMCF run and complete its initial classes.

However, as the district court further explained, given Mr. Lombard's and Ms. Paixao's lack of experience running a foundation, "they were clearly in over their heads." ER:2797. In the end, "financial desperation on the part of defendants, the chaotic circumstances of implementing the vision of the Foundation, . . . and the limited resources of the Foundation ultimately led the defendants" to make some "very grave mistakes." ER:2797, 2823.

Mr. Lombard and Ms. Paixao allegedly comingled funds, and made false statements to the VA in order to secure the payments. ER:8-9. But they "were not

feathering their nest with the appropriated proceeds." ER:2801. To the contrary, "defendants were using these proceeds for their ordinary living expenses. . . . [T]here's been no suggestion that they were living an extravagant lifestyle or accumulating wealth." ER:2801.

Indeed, Mr. Lombard and Ms. Paixao primarily used the VRE funds to help disabled Marines. They guided "about 80" "wounded Marines [] through the Foundation, [who all received] education in one form or another, to one extent or another[.] Many [] expressed their appreciation [] for Ms. Paixao and Mr. Lombard and their commitment to helping [] wounded warriors." ER:2799.

In short, as the district court concluded, "Ms. Paixao and Mr. Lombard stepped up. They didn't merely pay lip service to how wonderful our military is. They just didn't send a check to a military charity or serve meals to a rescue mission on a holiday where many of our homeless veterans congregate for a warm meal. Their initial caring and willingness to do something led them to action and then, unfortunately, to their troubles. But they stepped up." ER:2800-01. Their work "literally saved lives." ER:2790.

3. Nevertheless, approximately five years after the successful first WMCF training class, the government filed a multi-count indictment against Mr. Lombard and Ms. Paixao. As relevant, counts 2-9 charged substantive violations of 18 U.S.C. § 666(a)(1)(A). The government's theory was that they "embezzled, stole,

and otherwise without authority knowingly converted . . . and intentionally misapplied, property valued at $5,000 and more that was owned by and under the care custody and control of [] WMCF." ER:19.

3. a. The case proceeded to trial. For purposes of this petition, two witnesses were material.

Cecilia Lomas worked for the VA as a VRE program counselor. ER:427. She assisted disabled veterans develop rehabilitation plans and vocational goals. ER:428. Ms. Lomas explained that VRE funds are provided to individual, qualifying veterans to pay their "tuition, fees, books, and supplies as a subsistence allowance." ER:430.

Under the VRE program, once a veteran enrolled in a school or training facility, the VA could make payments on behalf of the veteran directly to the school/facility. ER:430. Before that happened, however, the school/facility had to become an approved vendor. ER:431-32. To do so, the school submitted "a catalog that tells [the VRE program] exactly what the training will be, how much it will cost, and then [VRE staff] visit the school to make sure that the facilities are appropriate for the type of training that they're going to do." ER:433.

Ms. Lomas worked with Ms. Paixao on "vendorizing" WMCF. ER:432-33, 442-44, 2516. Even after it was approved, however, each individual student-veteran had to apply to use VRE funds to pay for WMCF training. ER:444. As Ms. Lomas explained, "[i]t is totally up

to [the veteran] whether to use [his or her] [VRE benefits] for a particular program." ER:539.

Those who chose to attend WMCF training signed an educational contract directly with WMCF, as to which the VA was not a party. *E.g.*, ER:2348. Nor did the VA have any involvement in WMCF's admissions process. ER:446-47. It could not require WMCF to accept a particular veteran. ER:447, 526. Additionally, the VRE program would not, and did not, financially support WMCF (or any school), only the individual veteran. Thus, it would "not purchase equipment for any training facilities, any schools." ER:463.

Ruth Fanning was the VRE program's director. ER:552. Like Ms. Lomas, Ms. Fanning confirmed, "the VA does not fund specific programs[,] [only] specific veterans or service members." ER:559. The VRE program, therefore, does not "take responsibility for a facility's financial solvency." ER:559. Nor would the VRE program pay the institution's costs unrelated to the individual veteran's courses. ER:589. For instance, it would not pay "salaries for staff." ER:589. Further, there were no "partnerships" between the VRE program and an institution like WMCF. ER:626. Instead, the institution was merely "considered a vendor by the VA." ER:626. In short, it is the individual veteran who is the VRE "beneficiary, not the school." ER:629.

3. b. The jury found Mr. Lombard and Ms. Paixao guilty of, among other violations, theft from an organization receiving federal benefits in violation of 18 U.S.C. § 666(a). ER:2597-2600.

4. On appeal, Mr. Lombard and Ms. Paixao argued the federal (VRE) funds paid to WMCF did not constitute "benefits," to WMCF, but only to individual veterans. As related to WMCF, the payments were compensation for services rendered, not materially different than any other tuition payments. Accordingly, the evidence was insufficient to sustain the convictions on the "benefits" element, and their convictions could not stand.

The court of appeals disagreed. Relying on this Court's decision in *Fischer v. United States*, 529 U.S. 667 (2000), it held "there was sufficient evidence from which the jury could reasonably conclude that WMCF did, indeed, receive 'benefits' within the meaning of the statute [18 U.S.C. § 666(b)]." App. at 3. The panel reasoned that, although Congress created the VRE program "primarily to benefit veterans," it was also "meant to encourage the creation and development of institutions aimed at providing services to veterans." *Id.* at 8-9. Thus, it held that VRE funds are "benefits" and affirmed the convictions. *See id.* at 11-13.

The court of appeals summarily denied rehearing en banc. App. at 14-15.

REASONS FOR GRANTING THE PETITION

In *Fischer*, the Court considered "whether [18 U.S.C. § 666] covers fraud perpetrated on organizations participating in the Medicare program." 529 U.S. at 669. The inquiry turned on whether Medicare

qualified as a "benefit" not just to the patients, but also to the providers. *See id.* The majority held that it did. *Id*.

The dissent, however, warned "the Court's reasoning is both unpersuasive and boundless; any funds flowing from a federal assistance program could be deemed 'benefits' under the Court's rationale, notwithstanding the Court's concluding disclaimer of such a result. Thus, although the Court purports to reject the Government's argument that 'benefits' means 'funds that originate in a federal assistance program,' the Court, in practice, adopts it." *Id.* at 686-87.

The dissent was prescient. As the decision in this case demonstrates, the lower courts have interpreted *Fischer* such that the term "benefits" will apply to "any federal assistance program that provides funds to any organization." *Id*. at 690. Because this is incompatible with the plain language of the statute, the Court should grant certiorari to clarify that federal funds are not synonymous with "benefits."

1. The *Fischer* decision is at the center of this case. Petitioners begin there.

1. a. In answering the "benefits" question, the Court articulated the following test: "To determine whether an organization participating in a federal assistance program receives 'benefits,' an examination must be undertaken of the program's structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does

here, on whether the recipient's own operations are one of the reasons for maintaining the program." *Id*. at 681.

As to Medicare, the Court began by explaining that, unlike many federal programs, "[p]roviders of [Medicare] health care services . . . qualify to participate in the program upon satisfying a comprehensive series of statutory and regulatory requirements, including particular accreditation standards." *Id.* at 672.

Moreover, beyond the participation requirements, "Medicare attains its objectives through an elaborate funding structure. Participating health care organizations, in exchange for rendering services, receive federal funds on a periodic basis." *Id.* at 673. These payments "are not limited to the immediate costs of an individual treatment procedure." *Id.* Rather, participating institutions may receive funding for "amounts which enhance [their] capacity to provide ongoing, quality services not only to eligible patients but also to the community at large." *Id.*

Having examined the Medicare payment system, the Court turned more directly to "[t]he sole point in contention[,] whether those payments constituted 'benefits,' within the meaning of subsection (b)." *Id.* at 676. It concluded that, because "Medicare operates with a purpose and design above and beyond point-of-sale patient care, [] it follows that the benefits of the program extend in a broader manner as well." *Id.* at 677-78.

Specifically, "[t]he health care provider is receiving a benefit in the conventional sense of the term, unlike the case of a contractor whom the Government does not regulate or assist for long-term objectives or for significant purposes beyond performance of an immediate transaction. Adequate payment and assistance to the health care provider is itself one of the objectives of the [Medicare] program. These purposes and effects suffice to make the payment a benefit within the meaning of the statute." *Id.* at 680.

The Court, however, attempted to cabin its conclusion to the Medicare program. It cautioned against interpreting section 666's "benefits" requirement without boundaries such that it ensnares all "federal funds disbursed under an assistance program[.]" *Id.* at 681. To this end, it explained, "[a]ny receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Id.*

1. b. The dissent, as noted, warned the majority had accomplished just that – upsetting the proper federal balance. In the dissent's view, "the only persons who receive 'benefits' under Medicare are the individual elderly and disabled Medicare patients, not the medical providers who serve them. Payments made by the Federal Government to a Medicare health care provider to reimburse the provider for the costs of services rendered, rather than to provide financial aid to the hospital, are not 'benefits.'" *Id*. at 682.

The dissent explained, "an organization 'receives . . . benefits' within the meaning of § 666(b) only if the federal funds are designed to guard, aid, or promote the well-being of the organization, to provide useful aid to the organization, or to give the organization financial help in time of trouble." *Id.* at 683. Accordingly, "payments made by the Federal Government to a Medicare health care provider as part of a market transaction are not 'benefits.'" *Id*.

The applicable "statute and regulations make clear that medical providers are entitled only to reimbursement for the actual or estimated cost of services rendered to Medicare patients and that individual elderly and disabled patients – not hospitals – are the beneficiaries of the Medicare program." *Id.* at 685. On the other hand, "Medicare's provisions for reimbursing providers' costs do nothing more than establish a market exchange of payment for services, and so cannot be said to provide 'benefits' within the meaning of 18 U.S.C. § 666(b)." *Id.* at 686.

The dissent further predicated the wide-ranging consequences of the majority's contrary conclusion. "Although the Court disclaims the Government's argument that 'benefits' means only funds provided under a federal assistance program, the Court, in practice, adopts it. The Court's expansive rationale could be applied to any federal assistance program that provides funds to any organization. This result is inconsistent with the plain meaning of the statute. If Congress had meant to apply § 666 to any organization that receives

'funds' totaling more than $10,000 per annum, it would have said so." *Id*. at 690.

Finally, the dissent "doubt[ed] that there is any federal assistance program that does not provide 'benefits' to organizations under the Court's expansive rationale[.]" *Id.* at 691.

2. This case proves the dissent's point. In holding that, under *Fischer*, VRE payments constitute "benefits" to third-party institutions for purposes of section 666, the court of appeals adopted the broadest possible interpretation. And it did so despite that fact that the VRE program is expressly designed *only* to aid individual veterans, not institutions.

2. a. The VRE program is "intended to enable veterans with service-connected disabilities to become employable and to obtain and maintain suitable employment." *Jackson v. McDonald*, 606 Fed. App'x 999, 1000 (Fed. Cir. 2015). Its goal is to aid each disabled veteran as an individual. *See Cochran v. Shinseki*, 2010 U.S. App. Vet. Claims LEXIS 2409, *3 (2010) (The program "provide[s] to veterans 'all services and assistance necessary to enable them to achieve maximum independence in daily living . . . and to obtain and maintain suitable employment.'") (citation omitted).

What it is *not* designed to do, however, is support any particular organization or the community generally. *See id.* For example, VRE payments cannot be used to subsidize the institution generally – *e.g*., by covering employee salaries. *See* 48 C.F.R. §§ 831.7001-1, 831.7001-3, 871.207; ER:601. Rather, the payments

can cover only the veteran's *direct* costs – tuition, fees, and supplies. *See* 48 C.F.R. § 871.207; 38 C.F.R. § 21.210.

Moreover, the VA "may not award a contract or agreement to any institution or training establishment that requires [the] VA [ ] pay a minimum charge." 48 C.F.R. § 871.204. Instead, by design, such payments are limited to fees for services rendered. ER:518, 559, 586, 589. This was confirmed by VA officials during trial: "The VA will not pay for what the veteran doesn't receive." ER:1936.

> Q. [T]he V.A. doesn't fund schools, [ ] it sponsors individuals?
>
> A. Correct.
>
> Q. And the *individual [is] actually the beneficiary, not the school*?
>
> A. *Yes*.

ER:629 (emphasis added).

Thus, the VRE program's veteran-centric limitations and market-based payment system leads to the conclusion that its payments are not "benefits" to the third-party institutions; they are fee-for-service transactions.

Based on *Fischer*, however, the court of appeals held the opposite was true: "a federal program may have, as a secondary purpose, the goal of establishing a 'sound and effective . . . system' for distributing benefits to their ultimate recipients. *Fischer*, 529 U.S. at

680. That is, federal payments may promote the dual purposes of reimbursing an institution for its services while, at the same time, ensuring that those services remain 'available . . . [at] a certain level and quality.' *Id*. at 679-80." App. at 8.

The court of appeals continued, "[t]he government acted with such dual purposes here. The VRE program exists not just to assist veterans but also 'to provide for *all services and assistance* necessary to [assist] veterans.' With that end in mind, Congress instructed the Secretary to 'actively promote *the development and establishment* of employment, training, and other related opportunities for . . . veterans.' That broad *programmatic* interest suggests that, in this instance, the government acted as more than a buyer in the normal course of business. Rather, the government established a program meant to encourage the creation and development of institutions aimed at providing services to veterans." *Id.* 8-9 (emphasis in original, citations omitted). The court of appeals, therefore, concluded that, under *Fischer*, "WMCF received 'benefits' within the meaning of § 666(b)." *Id.* at 12.

2. b. This is exactly the troubling result the dissent in *Fischer* predicted. And it is no outlier. To the contrary, along with the Ninth, the First, Second, and Fifth Circuits have also interpreted *Fischer* to sanction a broad view of federal "benefits."

- *United States v. Dubon-Otero*, 292 F.3d 1 (1st Cir. 2002).

In *Dubon-Otero*, the court held that, under *Fischer*, "[i]t is now well established that benefits under § 666 are not limited solely to primary target recipients or beneficiaries." *Id*. at 9. Thus, it did not matter that the organization at issue received federal money "indirectly" through a local municipality. *Id.* That money was nevertheless a "benefit." *See id*.

- *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011).

In *Bahel*, "the United States' payments to the U.N. [were] made . . . to advance the government's foreign policy objectives, specifically, the policy of participating in collective endeavors to secure the benefits of world peace." *Id*. at 627. Thus, "the United States' payment of dues to the U.N., similar to Medicare funding, 'provide[s] *benefits*[.]'" *Id.* at 629 (emphasis in original).

- *United States v. Hildenbrand*, 527 F.3d 466 (5th Cir. 2008).

In *Hildenbrand*, "HUD offered certain of its properties to nonprofit companies [including the defendants'] for purchase at discounted prices, usually 10% to 30% below the fair market value." *Id.* at 470. These discounts were "benefits" for purposes of section 666. *See id.* at 478.

These cases establish that, post-*Fischer*, the lower courts have allowed federal funds to become synonymous with federal benefits. Under the plain language of section 666, however, this is untenable. As *Fischer* itself noted, "[o]ther cases may present questions

requiring further examination and elaboration of the term 'benefits.'" 529 U.S. at 682. This is that case.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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