No. _____

IN THE

Supreme Court of the United States

DR. EMMANUEL E. UBINAS-BRACHE, M.D.,

Petitioner,

v.

SURGERY CENTER OF TEXAS, LP,

Respondent.

On Petition for a Writ of Certiorari to the Texas State Court of Appeals for the Fifth District at Dallas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Animated by concerns over fraud and rising costs in federal healthcare reimbursement programs like Medicare and Medicaid, Congress enacted an anti-kickback statute prohibiting renumeration for patient referrals. Here, a Texas limited partnership operating a surgical center expelled one of its surgeon-limited partners for refusing to violate that statute. Applying state contract law, a Texas appellate court deemed this permissible under a provision in the partnership agreement authorizing expulsion "for any reason, or no reason."

The question presented is:

1. Does applying state contract law to enforce a partnership agreement's clause permitting expulsion "for any reason or no reason" obstruct Congress's efforts to control healthcare fraud, such that the anti-kickback statute preempts state law and prohibits expelling a surgeon-limited partner for refusing to violate it?

PARTIES TO THE PROCEEDING

The parties are as named on the front cover.

RELATED PROCEEDINGS

The only related proceedings are the state appellate proceedings at issue in this petition:

Ubinas-Brache v. *Surgery Center of Texas, LP*, No. 05-17-01334-CV, 2018 WL 6428151 (Tex. App.—Dallas Dec. 7, 2018, pet. denied).

Ubinas-Brache v. *Surgery Center of Texas, LP*, No. 19-0061, Supreme Court of Texas (petition for review denied Oct. 4, 2019, and motion for rehearing denied Nov. 22, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dr. Emmanuel E. Ubinas-Brache respectfully submits this petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Fifth District of Texas.

OPINIONS AND ORDERS BELOW

The Texas Supreme Court's orders refusing discretionary review (App. 14a) and denying rehearing (App. 15a) are unreported. The opinion of the Court of Appeals for the Fifth District of Texas (App. 1a–10a) is unreported but available at 2018 WL 6428151. The summary judgment of the Dallas County District Court (App. 12a–13a) is unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Texas denied review on October 4, 2019, and denied petitioner's timely motion for rehearing on November 22, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Title 42, section 1320a-7b(b)(1) of the United States Code provides in relevant part that:

> Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly 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 a Federal health care program, . . .
>
> . . . .
>
> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than 10 years, or both.

Part 42, section 1001.952(r) of the Code of Federal Regulations provides in relevant part that:

> 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:
>
> . . . .
>
> Ambulatory surgical centers.
>
> . . . .
>
> At least one-third of each surgeon investor's medical practice income from all sources for the previous fiscal year or previous 12-month period must be derived from the surgeon's performance of procedures . . . .

INTRODUCTION

To control healthcare costs, Congress enacted an anti-kickback statute prohibiting renumeration for patient referrals for services covered by federal programs like Medicare and Medicaid.

Fraud associated with these programs plagues the American healthcare system—costing taxpayers as much as $98 billion per year. *The $272 billion swindle: Why thieves love America's health-care system*, THE ECONOMIST (May 31, 2014).[1] And schemes involving illegal kickbacks are among the most common types of healthcare fraud. *See* National Health Care Anti-Fraud Association, *The Challenge of Health Care Fraud—Consumer Alert: The Impact of Health Care Fraud on You!*[2]

These schemes profit through unnecessary procedures and jacked-up medical fees that lead to skyrocketing costs and reduced insurance benefits. Congress enacted the anti-kickback statute to help guard against this type of wholesale disruption to the nation's healthcare system.

But here, a Texas limited partnership expelled a surgeon-limited partner for his refusal to accede to a demand to violate the anti-kickback statute. A Texas court of appeals applied state contract law in deeming this permissible under a provision in the partnership agreement authorizing expulsion "for any reason, or no reason." In so doing, the state court blessed the Sophie's Choice foisted onto the surgeon by his partners:

> *Join us in violating the federal anti-kickback law … or forfeit your partnership interest.*

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[1]https:/www.economist.com/united-states/2014/05/31/the-272-billion-swindle.

[2]https://www.nhcaa.org/resources/health-care-anti-fraud-resources/the-challenge-of-health-care-fraud.aspx (last visited Dec. 23, 2019).

The decision by the state court provides a template for crooked medical partnerships to use the threat of expulsion to leverage participation in kickback schemes. Unscrupulous partners can use this threat to pressure honest physicians into committing fraud—chop-blocking the federal statute, violating public policy, and obstructing Congress's effort to prevent kickbacks for patient referrals.

In light of the importance of this issue for the public healthcare market and the federal purse, this Court should grant review to hold that the anti-kickback statute preempts state law in this situation and prohibits expulsion of a surgeon-limited partner for refusing to violate it.

STATEMENT

In 2010, Dr. Emmanuel E. Ubinas-Brache contributed $400,000 to become a surgeon-limited partner in Surgery Center of Texas, L.P., a limited partnership that operates an ambulatory surgical center in Dallas, Texas. Record.255–56. SCOT's partnership agreement requires that each surgeon-limited partner derive at least one-third of his or her practice from procedures performed at SCOT's center. Record.49, 269.

SCOT's one-third requirement tracks an exemption in the federal anti-kickback law governing medical providers. Federal law makes it a felony to offer or receive renumeration to induce referrals for procedures reimbursed under federal health-care programs including Medicare and Medicaid. 42 U.S.C. § 1320a-7b(b)(1). But an exemption permits ambulatory surgical centers to impose up to a one-

third income requirement on surgeon investors. 42 C.F.R. § 101.952(r).

SCOT's partnership agreement ordinarily requires the partnership to repurchase a terminated partner's interest at fair market value. But an "adverse terminating event" permits repurchase for as little as $100. Record.77, 297. An adverse terminating event occurs where a partner is deemed unsuitable to remain a partner "for any reason, or no reason . . . ." Record.42.

Ubinas met the one-third requirement throughout his tenure in SCOT. Record.144–45, 383–84. But in 2015, two board members of SCOT's general partner told Ubinas that he had to perform more procedures at their facility—and one of them threatened termination if Ubinas failed to comply. Record.145, 384.

This threat violated the anti-kickback statute. And it wasn't idle. In September 2015—with Ubinas meeting his one-third requirement but having failed to comply with the illegal demand—SCOT terminated his partnership interest. Because termination occurred under an adverse terminating event, SCOT paid Ubinas just $100. Record.256–58.

Ubinas sued SCOT in state court for breach of contract, alleging the partnership expelled him for failing to accede to its illegal demand to violate the anti-kickback statute. The trial court granted summary judgment to SCOT. (App. 12a–13a).

The state court of appeals assumed without deciding that SCOT violated the anti-kickback statute by requiring Ubinas to derive more than one-third of his income from procedures at the SCOT

facility. Applying Texas contract law, the court of appeals nevertheless held that the provision in SCOT's partnership agreement permitting termination for "any reason, or no reason" authorized termination even for failing to violate the federal anti-kickback statute. (App. 8a).

The Supreme Court of Texas denied discretionary review (App. 14a) and denied a timely-filed motion for rehearing (App. 15a).

REASONS FOR GRANTING THE WRIT

Hardly a day goes by that Americans don't encounter a media report about healthcare fraud—often involving illegal kickbacks for patient referrals to physician-owned facilities. Watching prosecutors pursue the perpetrators, what surgeon in his right mind would think that he could be expelled from a limited partnership operating a surgical center because he didn't accede to a demand to violate the federal anti-kickback statute? Yet that's exactly what happened to Dr. Ubinas. And the state court of appeals deemed it permissible.

1. This Court should grant the writ to hold that conflict preemption prevents a partnership from expelling a surgeon-limited partner for refusing a demand to violate the anti-kickback statute.

A. The anti-kickback statute.

Congress has made it a felony offense to offer or receive anything of value to induce referrals for procedures reimbursed under federal health-care programs including Medicare or Medicaid. 42 U.S.C.

§ 1320a-7b(b)(1). Violations are punishable by both criminal penalties and civil fines. *Ibid.*

The statute provides an exception for payment practices specified in regulations promulgated by the Secretary of the Department of Health and Human Services (HHS). The Secretary of HHS has used this safe-harbor authority to permit certain payments from ambulatory surgical centers to qualified physician-investors. 42 C.F.R. § 1001.952(r). That section reserves safe-harbor status for payments to physician-owners who earn at least one-third of their medical income from performing Medicare-approved procedures and who perform at least one-third of those procedures at the center. 42 C.F.R. § 1001.952(r)(3)(ii)(iii), (r)(5).

SCOT's partnership agreement tracks this one-third exemption. The state court assumed without deciding that SCOT violated the anti-kickback statute by expelling Ubinas for failing to accede to the illegal demand that he perform more than one-third of his procedures as the facility. (App. 8a).

B. Federal preemption doctrine.

This Court has recognized three categories of preemption: (1) express preemption where a federal statute contains "explicit pre-emptive language"; (2) implied field preemption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; and (3) implied conflict preemption, in which "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress." *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (plurality opinion).

The anti-kickback statute does not contain explicit preemptive language, nor does it contain a scheme of federal regulation so pervasive as to indicate field preemption. Thus, this case involves implied conflict preemption. *See ibid*. As a result, the question is whether state law interposes an obstacle to the achievement of Congress's discernable objectives. *Ibid.*, at 98.

C. Permitting expulsion of a surgeon-limited partner for refusing a demand to violate the anti-kickback statute obstructs Congress's objectives.

This Court sometimes applies a presumption against preemption. But that presumption does not apply here, to a case involving a federal statute designed to police fraud in federal healthcare programs.

This Court declined to apply the presumption against preemption under similar circumstances in *Buckman Co.* v. *Plaintiff's Legal Comm.*, 531 U.S. 341 (2001). This Court recognized that the petitioner's dealings with a federal agency were prompted, and governed, by a federal statute. *Id.* at 347–48. As a result, the case did not implicate "federalism concerns" or "the primacy of state regulation of matters of health and safety," and no presumption against preemption applied. *Ibid.* at 348 (citing *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996)).

Similar concerns exist here. SCOT's ability to impose the one-third requirement—and its inability

to impose any greater requirement—flow from federal law. The billings to Medicare and Medicaid by SCOT and Ubinas occur under federal statutes and are subject to the anti-kickback statute. And that statute exists to prevent fraud against federal agencies.

As this Court has noted, "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied' such as to warrant a presumption against finding federal pre-emption of a state-law cause of action. To the contrary, the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Buckman Co.* v. *Plaintiff's Legal Comm.*, *supra*, at 347 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Consistent with these principles, no presumption against preemption should obtain in this case.

As previously noted, the anti-kickback statute contains no explicit preemption provision. But the statute may still be subject to implicit conflict preemption. Conflict preemption exists where state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). And that undoubtedly is the situation here.

Left unchecked, the lower court's decision arms crooked partners with a potent weapon to pressure honest physicians into committing healthcare fraud (or, worse yet, expel them—leaving surgical centers under the exclusive control of fraudsters).

This Court has found preemption where the interests at stake are "uniquely federal" in nature. *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504–05 (1988). The entire point of the anti-kickback statute is to prevent fraud and control costs in federal healthcare reimbursement programs like Medicare and Medicaid. These "uniquely federal" interests involve reducing government expenditures and regulating the national healthcare system.

Permitting medical limited partnerships to pressure surgeon-limited partners into committing healthcare fraud by requiring them to violate the anti-kickback statute—at the risk of losing their partnership interests—obstructs Congress's objective in enacting the statute. As a result, conflict preemption should prevent application of state-law contract principles to permit such an expulsion.

2. The issue is important because of its effect on healthcare costs, insurance benefits, and the federal purse.

In 2017, Medicare alone spent $4.6 billion on procedures performed in ambulatory surgical centers. MedPac, Report to the Congress: Medicare Payment Policy 127 (March 2019). In Texas, for example, more than fifty percent of outpatient surgeries occur in these centers—almost all of them owned by surgeon-owned partnerships like SCOT.[3]

Several of these surgeon-owned centers and hospitals have been used in large-scale fraud schemes involving kickbacks to physicians for procedure

[3] Tex. Ambulatory Surgical Ctr. Soc'y, *Ambulatory Surgery Center Facts*, www.texasascsociety.org/surgery-center-facts (last visited Dec. 23, 2019).

referrals—the very issue implicated here.

To give the Court an idea of the magnitude of these schemes, just one recent case in Dallas—involving only surgical facility—resulted in a jury finding of more than $40 million in illegal kickbacks. Kevin Krause, *Surgeons, hospital owner convicted in massive kickback scheme involving Forest Park Medical Center*, DALLAS MORNING NEWS (April 9, 2019) at 1A. And that is just one facility.

In fiscal year 2018, three hospital systems—based in Michigan, Montana, and Florida, respectively—agreed to pay a combined total of more than $360 million to resolve fraud allegations by the federal government that included payment of illegal kickbacks. Dept. of Health & Human Servs. and Dept. of Justice, Health Care Fraud & Abuse Control Program Annual Report for Fiscal Year 2018 25–28 (May 2019).

These are just a few of the many schemes involving hundreds of millions of dollars. This massive explosion in healthcare fraud—including kickbacks—engenders serious public-policy concerns. Inflated bills caused by kickbacks mean skyrocketing costs for governmental entities and, ultimately, taxpayers. These costs have resulted in some cities reducing insurance benefits for employees. Kevin Krause, *$400,000 back-surgery bill shows harm cheating doctors do to taxpayers and insurers, prosecutors say*, DALLAS MORNING NEWS (March 21, 2019) at 1A. The issue presented by this petition engenders real-world consequences for the American healthcare system.

CONCLUSION

"If impunity is not demolished, all efforts to bring an end to corruption are in vain." Rigoberta Menchu Tum, *The Plague of Corruption: Overcoming Impunity and Injustice*, in GLOBAL CORRUPTION REPORT 2001, at 155 (Robin Hodess, Jesse Banfield & Toby Wolfe eds. Transparency Int'l 2001)). This Court should grant the petition for a writ of *certiorari* and vindicate Congress's goals in enacting the anti-kickback statute.

Respectfully submitted,

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