No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

UNITED STATES OF AMERICA, Respondent

v.

SHAPOUR MOTAMEDI, SHAYAN MOTAMEDI, and HERIBERTO MOISES LOPEZ, Petitioners.

Joint Application Pursuant to Rule 13.5 for an Extension of Time Within Which to File a Petition for Writ of Certiorari

---

APPLICATION TO THE HONORABLE JUSTICE ELENA KAGAN
AS CIRCUIT JUSTICE

Raphael Goldman*
Email: goldman@achlaw.com
Ted W. Cassman
Email: cassman@achlaw.com
ARGUEDAS, CASSMAN, HEADLEY & GOLDMAN LLP
803 Hearst Avenue
Berkeley, CA 94710
(510) 845-3000
Counsel for Applicant Shayan Motamedi
***Counsel of Record**

Shepard S. Kopp
Email: shep@shepardkopplaw.com
LAW OFFICES OF SHEPARD S. KOPP
10100 Santa Monica Blvd., Suite 1700
Los Angeles, CA 90067
(310) 914-4444
Counsel for Applicant Heriberto Moises Lopez

Alan S. Yockelson, Esq.
Email: yockelson@appellatelaw.net
501 W. Broadway, #A-385
San Diego, CA 92101
(949) 290-6515
Counsel for Applicant Shapour Motamedi

Pursuant to Rule 13.5 of the Rules of this Court, Applicants Shapour Motamedi, Shayan Motamedi and Heriberto Moises Lopez (hereafter "Applicants") request an extension of 30 days—to June 23, 2022—of the time within which to file a petition for a writ of certiorari.

1. Applicants will ask this Court to review of the judgment of the Ninth Circuit Court of Appeals in *United States v. Motamedi* et al., Nos. 20-10364, 20-10366 & 20-10367. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

2. The Ninth Circuit Court of Appeals issued a written opinion in this matter on January 11, 2022. *See United States v. Motamedi*, Nos. 20-10364, 20-10366, 20-10367, 2022 U.S. App. LEXIS 727, 2022 WL 101951 (9th Cir. Jan. 11, 2022) (attached hereto as Exhibit A). Applicants filed a petition for rehearing en banc, which the Court of Appeals denied on February 23, 2022. *See* Exhibit B, attached. Accordingly, Applicants' petition for a writ of certiorari is due on May 24, 2022. *See* Supreme Court Rule 13.1. This Application is presented more than ten days in advance of the deadline for filing the petition for a writ of certiorari.

3. This matter presents issues relating to the contours of the Court's "nondelegation doctrine," which implements Article I, § 1 of the United States Constitution. Applicants intend to ask the Court to consider two related questions:

a. Whether Congress, in crafting 42 U.S.C. § 1230a-7b(b) and related provisions, violated Article I, § 1 of the United States Constitution by improperly vesting the Department of Health and Human Services with virtually unlimited discretion to determine which activities would be criminalized and which

would not.

b. Whether this Court should adopt—at least for legislation pursuant to which Congress delegates to an Executive agency the power to determine the scope of the criminal law—a more robust test to determine whether Congress's delegation of rulemaking authority violates the separations-of-powers principles contained in Article I, § 1 of the United States Constitution.

4. Five Justices of this Court have indicated an inclination to reconsider the contours of the nondelegation doctrine. Recently, in *Gundy v. United States*, the plurality applied the Court's long-standing "intelligible principle" test to determine whether a congressional delegation to an Executive agency passes constitutional muster. 588 U.S. __, 139 S. Ct. 2116, 2123, 2129-30 (2019) (plurality op.). But this opinion was joined by only four justices, one of whom—the late Justice Ginsburg—is no longer on the Court. The fifth vote for affirmance came from Justice Alito, whose concurring opinion stated that he would "support" an effort by the Court to "reconsider" its traditional, permissive approach to nondelegation questions. *Id*. at 2131 (Alito, J., concurring). Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, issued a dissent advocating a more robust screen against congressional delegation to Executive agencies. *Id*. at 2133-42 (Gorsuch, J., dissenting). Justice Kavanaugh did not participate in *Gundy*, but a few months later, while concurring in the denial of certiorari in another case, wrote that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases." *Paul v.*

United States, 589 U.S. __, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari); *see also National Federation of Independent Business v. DOL*, 595 U.S. __, 142 S. Ct. 661, 668-70 (2022) (Gorsuch, J., concurring, joined by Justices Thomas and Alito). Furthermore, the Court has already granted certiorari in *West Virginia v. EPA*, No. 20-1530, 595 U.S. __, 142 S. Ct. 420, 211 L. Ed. 2d 243 (2021), a case that also raises the nondelegation question.

5. On March 2, 2022, the Ninth Circuit granted Applicants' motion to stay the court of appeals' mandate until this Court's disposition of a petition for a writ of certiorari.

6. Applicants request a short extension of the time within which to file their petition for a writ of certiorari because of the press of other business, the complicated nature of the issue being contested and the necessity of coordinating amongst counsel for the three Applicants. This last consideration has been complicated by the fact that one of the petitioner's attorneys recently sustained injuries when he was struck by a vehicle in a crosswalk. On the morning of April 11, 2022, Alan Yockelson, counsel for Applicant Shapour Motamedi, was crossing a road in a crosswalk in downtown San Diego when he was struck by a truck in a hit-and-run accident. Although Mr. Yockelson was fortunate to escape more serious injury, he required medical attention, and as a result of the accident has been unable for the past several weeks to sit at his desk for more than a few minutes at a time. That physical limitation has put Mr. Yockelson behind in completing his work in this case, as well as others that have looming deadlines. A thirty-day extension

of time would allow Mr. Yockelson to catch up on his work after his injury and coordinate with other counsel in this matter to complete and file a petition for a writ of certiorari raising the nondelegation questions discussed above.

For all of the foregoing reasons, Applicants respectfully request that this Court grant an extension of thirty days, up to and including June 23, 2022, within which to file a joint petition for a writ of certiorari.

Dated: May 9, 2022

Respectfully submitted,

/s/ Raphael M. Goldman

Raphael Goldman*
Email: goldman@achlaw.com
Ted W. Cassman
Email: cassman@achlaw.com
ARGUEDAS, CASSMAN, HEADLEY & GOLDMAN LLP
803 Hearst Avenue
Berkeley, CA 94710
(510) 845-3000
Counsel for Applicant Shayan Motamedi
***Counsel of Record**

Alan S. Yockelson, Esq.
Email: yockelson@appellatelaw.net
501 W. Broadway, #A-385
San Diego, CA 92101
(949) 290-6515
Counsel for Applicant Shapour Motamedi

Shepard S. Kopp
Email: shep@shepardkopplaw.com
LAW OFFICES OF SHEPARD S. KOPP
10100 Santa Monica Blvd., Suite 1700
Los Angeles, CA 90067
(310) 914-4444
Counsel for Applicant Heriberto Moises Lopez

Exhibit
A

NOT FOR PUBLICATION

FILED

JAN 11 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHAPOUR MOTAMEDI, Defendant-Appellant, and SHAYAN MOTAMEDI, Defendant, HERIBERTO MOISES LOPEZ, Defendant.	No. 20-10364 D.C. Nos. 3:18-cr-00554-WHA-1 3:18-cr-00554-WHA MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHAYAN MOTAMEDI, Defendant-Appellant,	No. 20-10366 D.C. Nos. 3:18-cr-00554-WHA-2 3:18-cr-00554-WHA

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

and

SHAPOUR MOTAMEDI; HERIBERTO MOISES LOPEZ,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HERIBERTO MOISES LOPEZ,

Defendant-Appellant,

and

SHAPOUR MOTAMEDI; SHAYAN MOTAMEDI,

Defendants.

No. 20-10367

D.C. Nos.
3:18-cr-00554-WHA-3
3:18-cr-00554-WHA

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted December 10, 2021
San Francisco, California

Before: WARDLAW, BRESS, and BUMATAY, Circuit Judges.
Concurrence by Judge BUMATAY

Shapour Motamedi, Shayan Motamedi, and Heriberto Moises Lopez

(collectively "Defendants") pleaded guilty to conspiracy to violate 42 U.S.C. §

1320a-7b(b), the "Anti-Kickback Statute." On appeal, they argue that their convictions should be vacated because a subsection of the Anti-Kickback Statute known as the "Safe Harbor Provision," 42 U.S.C. § 1320a-7b(b)(3)(E), violates the non-delegation doctrine. We have jurisdiction under 28 U.S.C. § 1291, and we affirm their convictions.

1. The Safe Harbor Provision provides that the Secretary of Health and Human Services (HHS) may specify by regulation payment practices to which the "illegal remunerations" prohibitions shall not apply. 42 U.S.C. § 1320a-7b(b)(3)(E). Thus, the Safe Harbor Provision delegates to the Secretary the ability to remove certain types of conduct from the scope of the offense defined by statute. Given the combined operation of the Anti-Kickback Statute and the Safe Harbor Provision, we conclude that Defendants are challenging their statute of conviction and thus have standing to assert their non-delegation argument.

2. The delegation in the Safe Harbor Provision is constitutional, however, because Congress has supplied HHS with an "intelligible principle" to guide the Secretary's discretion in setting those bounds.[1] *United States v. Gundy*,

[1] Defendants argue that that we should dispense with the traditional "intelligible principle test" for determining whether a statute violates the non-delegation doctrine, and adopt the stricter test proposed by Justice Gorsuch in his dissent in *United State v. Gundy*, 139 S. Ct. 2116, 2129, *reh'g denied*, 140 S. Ct. 579 (2019). However, as the Defendants acknowledge, "[w]e are bound to follow a controlling Supreme Court precedent until it is explicitly overruled by that Court," and the

139 S. Ct. 2116, 2123 (plurality op.), *reh'g denied*, 140 S. Ct. 579 (2019). Under modern precedent, the intelligible principle test imposes "an exceedingly modest limitation." *United States v. Melgar-Diaz*, 2 F.4th 1263, 1266 (9th Cir. 2021); *see also Gundy*, 139 S. Ct. at 2129 (plurality op.) (explaining that the intelligible principle test is "not demanding"). For example, the Supreme Court has upheld the delegation of broad conferrals of authority to regulate "in the public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943), to set "fair and equitable prices," *Yakus v. United States*, 321 U.S. at 422, 427 (1944), to set "just and reasonable rates," *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), and to issue air quality standards that are "requisite to protect the public health." *Whitman v. American Trucking Association*, 531 U.S. 457 (2001).

In this case, the instructions Congress provided to HHS are much more specific than the instructions the Supreme Court has upheld against non-delegation challenges. Congress gave the Secretary a list of nine factors to consider when promulgating exceptions to the criminal prohibition under the Safe Harbor Provision. *See* 42 U.S.C. § 1320a-7d(a)(2). Those nine factors direct the Secretary to consider whether adding a safe harbor would improve the quality of healthcare

---

intelligible principle test remains the standard for determining whether the delegation of legislative power is constitutional. *Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011); *see also Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

in the United States in general by doing things like improving "access to healthcare services," improving the "quality of health care services," and reducing incentives for doctors to "overutiliz[e]" healthcare services. *Id.* The delegation in the Safe Harbor Provision is, therefore, constitutional.

Defendants make two arguments in response, neither of which has merit. First, they argue that whatever guidance Congress provided in 42 U.S.C. § 1320a-7d(a)(2) is vitiated by the catchall section, § 1320a-7d(a)(2)(I), which permits the Secretary to consider "[a]ny other factors the Secretary deems appropriate in the interest of preventing fraud and abuse in Federal health care programs (as so defined)." They contend that this "catchall clause" allows the Secretary to consider anything she wants, so her discretion isn't cabined at all.

We disagree. For one, even considered in isolation, § 1320a-7d(a)(2)(I) provides an intelligible principle to guide the Secretary's discretion. The Secretary is directed to consider "other factors" to the extent that they serve the interest of preventing "fraud and abuse in Federal health care programs." 42 U.S.C. § 1320a-7d(a)(2)(I). That instruction reflects an intelligible principle: it is possible to evaluate whether a particular safe harbor promulgated by the Secretary is likely to prevent fraud and abuse or not. And again, that direction, even standing alone, is more stringent a guardrail than guidelines the Court has upheld in the past, such as

regulating "in the public interest," *National Broadcasting Co.*, 319 U.S. at 216, or setting "just and reasonable" rates, *Hope Natural Gas Co.*, 320 U.S. at 591.

Defendants also argue that even if 42 U.S.C. § 1320a-7d(a)(2) provides sufficient guidance in the context of a civil statute, Congress should be required to provide more guidance in the context of a criminal statute, relying on *Touby v. United States*, 500 U.S. 160 (1991). However, there, the Supreme Court said only that its case law was "not entirely clear as to whether more specific guidance is in fact required" in the context of a criminal statute, declining to resolve that question because the statute at issue "passe[d] muster even if greater congressional specificity is required in the criminal context." *Id.* at 166. Similarly here, we need not decide that question because, as discussed above, Section 7d(a)(2) clearly provides an intelligible principle which passes muster "even if greater congressional specificity is required in the criminal context." *Id*.

AFFIRMED.

United States v. Motamedi, et al., Nos. 20-10364, 20-10366, 20-10367
BUMATAY, Circuit Judge, concurring:

I agree we should affirm the Appellants' convictions here, but I would do so without reaching the merits of their non-delegation claim. I thus concur in the judgment of the court only.

The Appellants were convicted of conspiracy to violate 42 U.S.C. § 1320a-7b(b)—the Anti-Kickback Statute. *See* 18 U.S.C. § 371. The Anti-Kickback Statute makes it a felony to receive or pay kickbacks, bribes, or rebates in return for purchasing "any item or service for which payment may be made in whole or in part under a Federal health care program." 42 U.S.C. § 1320a-7b(b)(1), (b)(2). The Statute, however, establishes various safe harbors to criminal liability. *See* 42 U.S.C. § 1320a-7b(b)(3). One of those safe harbors invites the Secretary of Health and Human Services to promulgate regulations exempting certain "payment practice[s]" from criminal liability under the Statute. 42 U.S.C. § 1320a-7b(b)(3)(E).

In yet another law, Congress provided criteria to HHS for establishing and modifying these safe harbors. 42 U.S.C. § 1320a-7d(a)(2). This law set out eight relatively specific factors for HHS to consider in adopting or amending a safe harbor regulation. *See* 42 U.S.C. § 1320a-7d(a)(2)(A)–(H). But the law ends with what's been called a "catchall provision"—permitting HHS to consider "[a]ny other factors the Secretary deems appropriate in the interest of preventing fraud and abuse in Federal health care programs." 42 U.S.C. § 1320a-7d(a)(2)(I). It is here that the

Appellants complain.

Appellants contend that this catchall provision grants HHS almost unfettered authority to decide which actions are criminal under the Anti-Kickback Statute with no meaningful congressional guidance. They claim that such a provision violates the non-delegation doctrine as traditionally understood, *see Mistretta v. United States*, 488 U.S. 361, 372 (1989), and especially under the robust non-delegation view articulated by Justice Gorsuch, *see Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting). They then ask us to reverse their convictions based on the violation of the non-delegation doctrine.

There's one problem with that: Assuming they are right—that the catchall provision provides no "intelligible principle" and thus Congress has unconstitutionally delegated its authority to HHS—the catchall provision is easily severable from the Anti-Kickback Statute. "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law." *United States v. Taylor*, 693 F.2d 919, 921–22 (9th Cir. 1982) (quoting *United States v. Jackson*, 390 U.S. 570, 585 (1968)). Given the text, structure, and chronological development of the Anti-Kickback Statute and the safe harbor regulations, I find it unlikely that Congress would have chosen to discard the entire law prohibiting kickbacks if it could not also include the catchall provision for

establishing safe harbors. *See id.* at 922.

So even if we were to strike the catchall provision as a violation of the non-delegation doctrine, the rest of the Anti-Kickback Statute would remain fully operative and Appellants' convictions under § 1320a-7b(b) and 18 U.S.C. § 371 would be untouched. *Id.* I thus join the majority in affirming their convictions.

Exhibit B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 23 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHAPOUR MOTAMEDI, Defendant-Appellant, and SHAYAN MOTAMEDI, Defendant, HERIBERTO MOISES LOPEZ, Defendant.	No. 20-10364 D.C. Nos. 3:18-cr-00554-WHA-1 3:18-cr-00554-WHA Northern District of California, San Francisco ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHAYAN MOTAMEDI, Defendant-Appellant, and SHAPOUR MOTAMEDI; HERIBERTO	No. 20-10366 D.C. Nos. 3:18-cr-00554-WHA-2 3:18-cr-00554-WHA Northern District of California, San Francisco

MOISES LOPEZ,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HERIBERTO MOISES LOPEZ,

Defendant-Appellant,

and

SHAPOUR MOTAMEDI; SHAYAN MOTAMEDI,

Defendants.

No. 20-10367

D.C. Nos.
3:18-cr-00554-WHA-3
3:18-cr-00554-WHA

Before: WARDLAW, BRESS, and BUMATAY, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing en banc. The full court has been advised of the petition and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.