No. _____

In The
Supreme Court of the United States

SHAWN MARK HENRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Anti-Kickback Statute, 42 U.S.C. § 1320a-7(b)(1), require the government to prove that the defendant received remuneration for referring patients who the defendant knew received federal healthcare benefits?

II. Is the mere use of the internet a sufficient interstate nexus to sustain a conviction under the Travel Act, 18 U.S.C. § 1952(a)?

PARTIES TO THE PROCEEDING

Petitioner, who was a Defendant-Appellant in the Fifth Circuit, is Shawn Mark Henry.

Respondent, who was the Appellee in the Fifth Circuit, is the United States.

In addition, Mrugeshkumar Kumar Shah, Iris Kathleen Forrest, Douglas Sung Won, Michael Bassem Rimlawi, Wilton McPherson Burt, and Jackson Jacob were Defendants-Appellants in the Fifth Circuit. However, they are not parties to the proceedings in this Court.

RELATED PROCEEDINGS

United States v. Beauchamp, et al., No. 3:16-cr-00516-JJZ, U.S. District Court for the Northern District of Texas. Judgment as to Shawn Mark Henry entered on April 9, 2021.

United States v. Shah, et al., No. 21-10292, U.S. Court of Appeals for the Fifth Circuit. Consolidated judgment entered on October 2, 2023.

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Petitioner Shawn Mark Henry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

On October 2, 2023, the United States Court of Appeals for the Fifth Circuit affirmed Mr. Henry's conviction and sentence. (App. A)

JURISDICTION

A three-judge panel for the United States Court of Appeals for the Fifth Circuit affirmed Mr. Henry's conviction and sentence on October 2, 2023. (App. A)

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. Section 371 of Title 18 of the United States Code provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency

thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years or both.

II. 42 U.S.C. § 1320a-7(b)(1),(2) (commonly referred to as the Anti-Kickback Statute, and hereinafter referred to as the "AKS,") provides:

(1) 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 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 . . .

(2) Whoever knowingly and willfully offers or pays any [such] remuneration . . . to induce [such a referral] . . . shall be guilty of a felony . . . and shall be fined not more than $100,000 or imprisoned not more than 10 years, or both.

(f) [T]he term "Federal health care program" means –

(1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or part, by the United States Government (other than the

health insurance program under chapter 89 of title 5); or

(2) any State health care program, as defined in section 1320a-7(h) of this title.

(h) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

III. 18 U.S.C. § 1952(a) (hereinafter referred to as the "Travel Act,") prohibits:

> [The use of a] facility in interstate . . . commerce with [the] intent to . . . distribute the proceeds of an[ ] unlawful activity; or . . . otherwise . . . facilitate . . . an[ ] unlawful.

STATEMENT OF THE CASE

A. Proceedings Below

Dr. Shawn Mark Henry was charged with three counts in a multi-defendant indictment. Count 1 alleged Dr. Henry of violating 18 U.S.C § 371 by conspiring to violate the prohibition on receiving remuneration in return for referring patients insured by the Federal Employee Compensation Act ("FECA") to the Forest Park Medical Center ("FPMC"), in violation of 42 U.S.C. § 1320a-7b (the federal Anti-Kickback Statute "AKS"), and by conspiring to engage in commercial bribery in violation of 18 U.S.C. § 1952 ("Travel Act"); Count 8 with a substantive violation of the Travel Act, by engaging in Commercial Bribery under Texas law;

and in Count 19 with violating 18 U.S.C. § 1956(h), by engaging in a conspiracy to conceal the proceeds of the Travel Act violations, in violation of the proscriptions against money laundering.

The district court sentenced him to 90 months of imprisonment. He timely filed his notice of appeal on March 30, 2021. (ROA. 8490-8491)[1] On October 2, 2023, the United States Court of Appeals for the Fifth Circuit affirmed his conviction and sentence. (App. A)

B. Statement of Relevant Facts

Forest Park Medical Center began operations as a surgical hospital in Dallas, Texas in 2012, offering patients premium amenities and care. (ROA. 57820, 57827, 57877, 58032) As a new medical facility, it was out-of-network on virtually all health insurance plans. (ROA. 15907, 16206-16207)

Most patients have a surgical procedure performed at a particular hospital based on their surgeon's recommendation and where that surgeon has surgical privileges. (ROA. 57886, 15311) Because doctors are fiduciaries for their patients, generally they are not permitted to receive a benefit for referring their patients to a given medical facility. (ROA. 15559)

One of the founders and administrators of Forest Park Medical Center was the chief witness against the surgeon defendants. He testified at trial that the

[1] "ROA" refers to the record on appeal in the Fifth Circuit.

hospital charged insurance companies so much for out-of-network care that it could afford to waive an insured patient's copayment, usually a percentage (15 to 25%), of what the insurer paid, and in addition, reward referring surgeons with lucrative marketing and consulting agreements. (ROA. 12055, 12758, 12759)

The hospital administrator testified that in Dr. Henry's case, he arranged for the hospital's real estate entity to execute a consulting contract with Dr. Henry. This contract provided for compensation at the rate of $305 per hour for Dr. Henry to advise the hospital on how to ensure its expansion plans fulfilled the surgical needs of its doctors. (ROA. 57996-58007)

Pursuant to this contract, the hospital paid Dr. Henry $30,000 per month for 28 months. (ROA. 58007) Dr. Henry, however, submitted no hourly invoices for the $30,000 monthly fee. (ROA. 12432, 12438) The administrator testified that the payments were disguised compensation to Dr. Henry for referring his patients to the hospital for surgery.

Dr. Henry performed a total of 653 surgeries at the hospital, and 434 surgeries during the period of the consulting contract. Of those 653 surgeries, only eight patients who had 11 procedures were covered by a federal healthcare program, specifically the Federal Employee Compensation Act ("FECA"). (ROA. 52901, 9319) Thus, approximately one percent of the patients Dr. Henry performed surgery on at the hospital were subject to the AKS.

Multiple witnesses at trial testified that the doctors and principals at the hospital tried to avoid potential liability under the AKS by declining to treat patients with federal healthcare benefits. (ROA. 15308, 15548) They believed the FECA patients were *not* participants in a federal healthcare program because FECA patients' care is covered by private healthcare insurance companies such as Blue Cross Blue Shield. (ROA. 52912) Those private insurers' premiums, however, are subsidized with federal money, and do fall under the definition of a federal healthcare benefit program.

The surgeons involved in the referral scheme thus believed they were *not* treating federally insured patients at the hospital, and only *inadvertently* performed procedures on a small percentage of their patients whose insurance fell under the purview of the AKS.

The Fifth Circuit held this fact makes no difference. (App. 9-13) According to the Fifth Circuit, so long as the individual referring the patient knew that it is *possible* that a patient could be covered by a federal health insurance program, then the element of knowledge under the AKS is satisfied. As a practical matter, the Fifth Circuit thus has made every medical referral scheme subject to federal prosecution under the AKS because it is always hypothetically possible that a patient is a federal healthcare beneficiary.

In relation to the Travel Act, the government based federal court jurisdiction solely on the fact that

a check was deposited and transferred between banks via the internet. On appeal, relying on this Court's decision in *United States v. Rewis*, 401 U.S. 808 (1971), Dr. Henry argued that more was required to establish federal jurisdiction under the Travel Act. The Fifth Circuit, however, held that under the Travel Act, merely using the internet was enough to establish federal jurisdiction. (App. 26-27)

Because in today's world some use of the internet in a transaction is inevitable, the Fifth Circuit has also, as a practical matter, made every instance of local commercial bribery subject to prosecution under the Travel Act.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in this case to reaffirm important principles of federalism. The AKS should only apply to cases in which the parties are intending to defraud a federal health care benefit program, not every healthcare case in which a medical provider is rewarded for making a medical referral. Likewise, the Travel Act should not be construed to give the government the power to prosecute every case of commercial bribery when there is no significant federal nexus to the alleged bribery.

I. To violate the AKS the statute requires that the defendant knew the patient was the beneficiary of a federal healthcare program.

In its opinion in this case, the Fifth Circuit, addressing an issue of first impression, held that a defendant may be convicted of conspiring to violate the AKS so long as there was an intent to pay or receive a kickback for a medical patient that *might* be covered by federal health insurance, so long as there was at least one patient involved in the scheme who, in fact, was federally insured. (App. 9-13) "[C]ontrary to [the defendant's] argument, the Government did not have to show he knowingly referred federally insured patients for remuneration; [a]ll it had to show was that he knowingly agreed to accept remuneration for referring patients that *could* be federally insured[,] [and] that least some patients were federally insured so that payment 'may' have been made by a federal healthcare program – to establish federal jurisdiction." This interpretation of the statute is incorrect. *Id*.

Although Congress has the power to punish all kickbacks in a private healthcare setting, it did not do so when it enacted the AKS. The AKS is expressly limited to federal health care programs. In explaining the point of the AKS, Congress emphasized that its aim was protecting federal programs:

> Your committee believes that a specific provision defining acts subject to penalty *under the Medicare and Medicaid programs* should be included to provide penalties for certain

> practices which have long been regarded by professional organizations as unethical, as wall unlawful in some jurisdictions, *and which contribute appreciably to the cost of the Medicare and Medicaid programs*.

H.R. Rep. No. 231, 92nd Cong., 1st Sess. 107 (1971) (emphasis added).

Nevertheless, according to the Fifth Circuit, a defendant may be convicted of violating the AKS so long as a defendant knew that a patient *might* be federally insured, rather than requiring the government to prove that the defendant *knew* the patients, in fact, were federally insured. Because almost any patient *might* be federally insured, the Fifth Circuit effectively removed any requirement in an AKS case that the defendant know that federal healthcare insurance was involved.

If the Fifth Circuit is correct that so long as a defendant knew there was a hypothetical possibility that a patient had federal healthcare insurance, and that only one patient, in fact, need be federally insured, then virtually every alleged referral for payment scheme may be the subject of an AKS prosecution. It is always true that a patient "might" be covered by a federal healthcare program and almost always true that at least one patient did, in fact, possess some form of federal healthcare coverage. The Fifth Circuit's interpretation of the statute converts it from one that is clearly directed only to cases involving federal healthcare benefits, into one that universally applies no matter who the payor is.

Not only does the Fifth Circuit's opinion mean that virtually every medical referral scheme may be the subject of an AKS prosecution, it also means that if only one case in a hundred involves a federally insured patient, he or she has the necessary *mens rea* to be guilty of *conspiring* to violate the AKS in relation to all one hundred patients because they all might, hypothetically, have had federal healthcare insurance.

In reaching its conclusion, the Fifth considered this Court's decision in *Ruan v. United States*, 597 U.S. 2370 (2022). In *Ruan*, this Court discussed the scienter requirement in relation to dispensing a controlled substance in violation of 21 U.S.C. 841. This Court held that when a defendant is authorized to dispense a controlled substance, the government must prove that he knowingly and intentionally acted in an unauthorized manner. (App. 17-18) This Court noted that "knowingly" "modifies not only the words directly following it, but also those other statutory terms that 'separate wrongful from innocent acts.' " (App. 10-11) In addition, this Court stated that "knowingly" also "modifies . . . the words directly following it." (App. 7-8) Here, "federal healthcare programs" directly follows "knowingly." At the very least, then, the federal healthcare reference in the statute clarifies to which "item[s] or service[s]" the statute applies.

Nevertheless, the Fifth Circuit relied on the clause in the AKS which provides that the statute applies whenever payment "may be made in whole or in part under a Federal Health care program," to conclude that a defendant need only to know that a patient

"might" be federally insured to be guilty of conspiring to violate the AKS.

In relevant part, the statute provides:

> 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 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 . . .

42 U.S.C. § 1320a-7(b)(1),(2). The Fifth Circuit, however, misreads the import of the use of the verb "may" in this clause.

Congress was not creating a statute dealing with hypotheticals with the use of the word "may," but simply clarifying that the statute applied whenever payment is authorized under a federal program. Otherwise, a defense would arise in every case in which the federal healthcare insurance did not, for some reason, pay the claim. The statute obviously is intended to deter payment for referral schemes when federal healthcare dollars are at stake, not just when payment is, in fact, made.

The Fifth Circuit also relied in making its holding on the AKS provision in subsection (h), which provides:

> [A] person need not have actual knowledge of this section or specific intent to commit a violation of this section.

42 U.S.C. 1320a-7b(h). While this provision makes clear that Congress intended that a defendant need not be specifically aware of the AKS itself to be subject to criminal liability, it does not suggest that the government has no obligation to prove that the defendants knew the patients were covered by a federal healthcare plan. Indeed, Congress' explicit confirmation that specific intent was not required for awareness of the statute itself suggests that specific intent is required for everything else, including knowledge that a patient is covered by a federal healthcare plan. *See*, *e.g.*, *Salinas v. United States R.R. Ret. Bd.*, 592 U.S. 188, 195 (2021) (" 'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ").

The Fifth Circuit's interpretation of the AKS makes little sense and is contrary to the clear language of the statute, which requires that a defendant receive a kickback for knowingly referring patient with federal healthcare benefits.

II. To prosecute commercial bribery under the Travel Act, this Court's decision in *United States v. Rewis*, 401 U.S. 808 (1971) requires more than the mere use of the internet to establish an interstate nexus.

In *United States v. Rewis*, 401 U.S. 808 (1971), this Court reversed the criminal conviction of the

defendants based upon the tangential nature of the interstate activity on the defendants' alleged scheme. In *Rewis*, two defendants charged with Travel Act violations ran a lottery in Florida and sold lottery tickets to customers who drove to Florida from Georgia to participate in the lottery. The district court instructed the jury that the fact that two people crossed state lines to purchase a lottery ticket satisfied the interstate commerce element of the statute and that the two defendants who ran the lottery could be held liable under the act if they aided and abetted someone crossing state lines by selling a ticket to them. *Rewis*, 401 U.S. at 809.

This Court reversed the convictions, holding that the act did not reach out-of-state customers, it also did not reach the proprietors of the lottery. *Id*., at 811-813. This Court held that it was not clear that Congress intended the act to cover the mere activity of crossing state lines to engage in criminal activity. It found the Travel Act's primary aim was at purveyors of organized crime who reside in one state while operating or managing illegal activity in another. *Id*. To read the statute so that it encompassed merely traveling from one state to another to engage in illegal activity would, according to this Court, "alter sensitive federal-state relationships" and "could overextend limited federal police resources." *Id*., at 812.

In this case, the Fifth Circuit held that the mere passage of a check via the internet is sufficient to confer federal jurisdiction in a Travel Act case. (App. 26-27) In reaching this conclusion, the Fifth Circuit relied on case law that considered whether federal

jurisdiction was conferred pursuant to the Commerce Clause by means of the use of an interstate facility, rather than whether the interstate nexus pursuant to the Travel Act itself had been satisfied.

Contrary to the Fifth Circuit's decision in this case, the Seventh Circuit has held that the mere depositing of a check into the interstate banking system did not confer federal jurisdiction pursuant to the Travel Act. In *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971), jurisdiction was based upon the defendants' having accepted, in an extortion scheme, a check from their victim written on an out-of-state bank, and on their having cashed that check. There, the court held that while the defendants had committed a crime, it was not a federal crime since the use of interstate facilities, *i.e.*, the federal reserve system, "was purely incidental to appellants' . . . scheme." *Altobella*, 442 F.2d at 315.

Similarly, in *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *reh'g denied*, 493 F.2d 1124 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974), the Seventh Circuit considered a case in which the defendant was indicted for his involvement in a scheme to bribe, among others, the governor of Illinois. Federal jurisdiction was asserted on the grounds that the Federal Reserve system had been used. Specifically, three of the checks had been drawn on a local bank and had been deposited by their recipients in local banks, but the checks had cleared through a Federal Reserve bank outside the state. The Seventh Circuit in this case also concluded that "the use of interstate facilities here was so

minimal, incidental, and fortuitous, and so peripheral to the activities of [defendants] and other participants in this bribery scheme, that it was error to submit [the Travel Act counts] to the jury. *Isaacs*, 493 F.2d at 1146.

The Fifth Circuit in its opinion in this case failed to acknowledge this Court's decision in *Rewis* and the concerns for federal comity that this Court expressed in that decision. As a practical matter, by equating the interstate nexus under the Travel Act with the bare minimum of evidence necessary to generally effect interstate commerce and establish federal jurisdiction, the Fifth Circuit has "federalized" every case of alleged commercial bribery or any of the other enumerated crimes that may be the subject of the Travel Act. By doing so, it has expanded the reach of the Travel Act far beyond what Congress intended when it created the law in 1961.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should issue to review the Order of the United States Court of Appeals for the Fifth Circuit in *United States v. Shawn Mark Henry*, No. 21-10292.

Respectfully submitted,

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