No. _____

In The
Supreme Court of the United States

BAKER COUNTY MEDICAL SERVICES, INC.,
d/b/a ED FRASER MEMORIAL HOSPITAL,

Petitioner,

v.

DIRECTOR JOHN MORTON, U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, OFFICE OF DETENTION AND REMOVAL; U.S. MARSHAL WILLIAM B. BERGER, SR., UNITED STATES MARSHALS SERVICE, PRISONER & OPERATIONS DIVISION, PROGRAMS AND ASSISTANCE BRANCH; and ERIC H. HOLDER, JR., ATTORNEY GENERAL, UNITED STATES OF AMERICA, in his official capacity,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the current health care market, where a substantial portion of hospital revenue comes from Medicare patients, and thus participation in the Medicare program is a matter of financial survival rather than choice,

   a. Should hospital participation in the Medicare program always preclude a Fifth Amendment regulatory takings claim, or can the "option" of not participating in Medicare be so economically prohibitive that such participation is for all relevant purposes involuntary?

   b. Should the economic and social factors surrounding a hospital's participation in the Medicare program be one of multiple considerations in the Fifth Amendment regulatory takings analysis articulated by this Court in *Penn Central*, rather than the mere fact of Medicare participation being deemed the *ipso facto* determinative factor, as is held by multiple lower courts?

2. Even if participation in Medicare *is* truly voluntary under the regulatory takings analysis, can Congress take advantage of the Medicare program's EMTALA mandate, whereby participating hospitals must provide emergency medical services to everyone who presents to the emergency department without regard for their ability to pay, to create a separate and unrelated statutory scheme unilaterally setting the rate of compensation the federal government will pay for emergency medical services rendered to non-Medicare eligible persons in its custody without implicating the Takings Clause?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was Plaintiff-Appellant below, is: Baker County Medical Services, Inc., d/b/a Ed Fraser Memorial Hospital ("BCMS"). BCMS is a nonprofit hospital, organized under Chapter 617, Florida Statutes. BCMS is not a publicly traded corporation, issues no stock, and has no parent company. There is no publicly traded corporation with more than a 10 percent ownership stake in BCMS.

Respondents, who were Defendants-Appellees below, are: John Morton, Director, U.S. Dep't of Homeland Security, U.S. Immigration & Customs Enforcement, Office of Detention and Removal; William B. Berger, Sr., U.S. Marshal, U.S. Marshal Service, Prisoner & Operations Division, Programs and Assistance Branch; and Eric H. Holder Jr., Attorney General, United States of America, in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is available at *Baker County Medical Services, Inc. v. U.S. Atty. Gen.*, 763 F.3d 1274 (11th Cir. 2014). App. 1-15. The opinion of the United States District Court for the Middle District of Florida granting Respondent's motion to dismiss, *Baker County Medical Services, Inc. v. Holder*, No. 3:12-cv-01232-J-20JRK (M.D. Fla. Jul. 31, 2013), is not reported in the Federal Supplement or any electronic database known to Petitioner other than PACER, but the appendix reproduces the opinion in its entirety. App. 16-25.

JURISDICTION

The Eleventh Circuit entered judgment on August 14, 2014. The time for filing a petition for rehearing elapsed 45 days later, on September 28, 2014. Fed. R. App. P. 35(c) and 40(a)(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the U.S. Constitution states: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. The appendix reproduces the challenged statute, 18 U.S.C. § 4006, in its entirety.

STATEMENT OF THE CASE

Petitioner, Baker County Medical Services, Inc., doing business as Ed Fraser Memorial Hospital, is a 25-bed, non-profit hospital located in rural Baker County, Florida. It is the only provider of emergency room services available in the entire county. App. 3.

Petitioner is also a Medicare provider. Medicare is a federally subsidized insurance program which covers, in relevant part, basic hospital costs for persons 65 years of age or older and recipients of social security disability. 42 U.S.C. § 1395 et seq. As a condition of Medicare participation, Petitioner is required to abide by the provisions of the Emergency Medical Treatment and Active Labor Act (EMTALA). 42 U.S.C. § 1395cc; 42 U.S.C. § 1395dd. Under EMTALA, Petitioner must provide emergency medical services to all persons who present to the emergency room without regard to their ability to pay. However, EMTALA does not address payment for those services, nor does it prevent Petitioner from

later billing patients treated under EMTALA for the cost of medical services rendered.

Baker County, Florida, is also home to Baker Correctional Development Center ("Baker Correctional"), a 512-bed detention center built in 2008 to house federal detainees in the custody of the U.S. Marshal's Service ("USMS") and the U.S. Department of Homeland Security, Immigration and Customs Enforcement ("ICE"). When the government's in-house medical services contractor determines that emergency care for a detainee is required, it coordinates the transport of that detainee to Petitioner's emergency room. Although Petitioner has no contract with USMS and ICE, under the provisions of EMTALA and similar Florida state laws, it is required to evaluate and stabilize all of the federal detainees brought to the emergency room without regard for the payment to be made by or on behalf of the patient. App. 4.

The federal government is financially responsible for the medical care provided to detainees in its custody, and the government asserts that 18 U.S.C. § 4006(b) governs the amount Petitioner is to be paid for medical services rendered to the federal detainees housed at Baker Correctional. Subsection (b) was added by amendment to § 4006 in 1999 by Appendix A of an appropriations bill, and was ultimately added to the general appropriations for the Department of Justice. The statute was *not* added to provisions of EMTALA, it was *not* made part of the Medicare program's statutes or regulations, and no law was promulgated to require a hospital's acceptance of the

compensation amount in order to remain a Medicare provider. Rather, 18 U.S.C. § 4006(b) is a stand-alone statute that limits what the federal government will pay for the medical care rendered to detainees in its custody. The statute specifies that payment for services rendered to federal detainees shall not exceed the amount that would be paid for similar health care items or services under the Medicare program. § 4006(b)(1). App. 26. The statute goes on to provide that the Medicare rate for these services "shall be deemed to be full and final payment." § 4006(b)(2). App. 26.

Petitioner filed a Complaint in the United States District Court for the Middle District of Florida, Jacksonville Division, seeking a declaratory judgment that 18 U.S.C. § 4006(b) is unconstitutional as applied to Petitioner under the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2201, 2202 and 28 U.S.C. § 1331. Specifically, Petitioner alleged that § 4006(b)'s mandate that Petitioner accept the Medicare rate for medical services rendered to federal detainees, who are not Medicare patients nor even Medicare eligible, 42 C.F.R. § 411.4, amounts to an unconstitutional taking of private property without due process of law. App. 18. Respondents filed a motion to dismiss the action under Federal Rule of Civil Procedure 12(b)(6) alleging that by voluntarily choosing to participate in Medicare, Petitioner agreed to provide emergency care to all people (including federal detainees) who

present to the emergency room, and to provide this care at the rates set by applicable laws (including § 4006(b)). App. 19. Adopting the government's argument that there is an unbroken nexus between Petitioner's voluntary participation in Medicare and the requirement that Petitioner accept the rate scheme set by § 4006(b), the District Court granted the motion to dismiss. App. 24. The court stated that Respondent was entitled to dismissal of the action because "it is well established that government price regulation does not constitute a taking of private property where the regulated group is not required to participate in the regulated industry" (quoting *Whitney v. Heckler*, 780 F.2d 963, 972 (11th Cir. 1986)). App. 23. The court went on to opine that if Petitioner was unhappy with the rate it was required to accept under § 4006(b), it "remain[ed] free to terminate its Medicare provider agreement and thereby end its federal obligation to provide emergency care to those in federal custody." The District Court concluded that because Petitioner had not done so, it voluntarily agreed to provide such care "in exchange for the level of compensation that § 4006(b) authorizes." App. 24.

On appeal, Petitioner argued that the District Court erred as a matter of law by concluding that Petitioner's voluntary participation in Medicare and EMTALA necessarily mandated Petitioner's acceptance of the Medicare rate for treatment of federal detainees under § 4006(b). Pointing to the fact that § 4006(b) is not codified in, referred to, or in any way mentioned within the Medicare statute or EMTALA,

Petitioner argued that its voluntary participation in Medicare and EMTALA in no way mandated its acceptance of an unrelated statutory scheme, or prevented it from challenging that unrelated scheme as a taking under the Fifth Amendment. App. 6. The Court of Appeals for the Eleventh Circuit disagreed, however, stating that the takings challenge fails because Petitioner "seeks to challenge its rate of compensation in a regulated industry for an obligation it voluntarily undertook (namely, providing emergency treatment to federal detainees) when it opted into Medicare and became subject to EMTALA." App. 12. The Eleventh Circuit "[saw] no meaningful difference" between challenging the rate scheme for actual Medicare beneficiaries and challenging a "compulsion [to accept limited compensation] under a separate statute" governing care rendered to non-Medicare patients. App. 13.

In addition, Petitioner argued that even if the court decided that the payment scheme articulated in § 4006 was legitimately linked to participation in Medicare, the court should have still concluded that Petitioner's participation in the Medicare program is not truly voluntary under current economic realities. Not only would opting out of Medicare amount to a "grave financial setback" for the hospital, but, like EMTALA, Florida state law compels the treatment of all patients who present to the emergency room, so that Petitioner would, in any event, have no choice but to continue treating Medicare patients. App. 13. The Eleventh Circuit rejected this argument, holding

that Petitioner could not "lay 'indirect' compulsion on the part of the state at the feet of the federal government," and that "economic hardship is not equivalent to legal compulsion for purposes of takings analysis" (quoting *Garelick v. Sullivan*, 987 F.2d 913, 916 (2d Cir. 1993)). App. 13-14.

INTRODUCTION

The questions presented impact the economic viability of virtually every hospital in the nation, as almost all hospitals with emergency departments are Medicare providers and thus subject to the mandatory emergency treatment provisions of EMTALA. The notion that participation in the Medicare program is always voluntary for purposes of a Fifth Amendment regulatory takings analysis forecloses hospitals from ever questioning a Medicare regulation, even when such regulation causes a substantial shift in kind from the Medicare program itself and becomes unduly burdensome for hospitals financially. Thus, the question of whether participation in Medicare is always truly voluntary under today's health care market is an exceedingly important one.

This case presents the Court with the opportunity to clarify the regulatory takings analysis articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), and to opine for the first time on its application to government-sponsored insurance regulations, including Medicare.

Some circuits and lower courts have indicated that market conditions and economic realities should be considered when analyzing a plaintiff's participation in a regulated industry as part of the takings analysis, consistent with this Court's decision in *Penn Central* and its progeny. However, the majority of circuits and state courts rely on the less applicable holding in *Bowles v. Willingham*, 321 U.S. 503, 517 (1944) to preclude takings claims relating to Medicare participation because of its purportedly voluntary nature.

Second, irrespective of whether participation in Medicare is truly voluntary, the question of whether Congress can *use* a hospital's voluntary participation in Medicare to bind its acceptance of a wholly unrelated statutory scheme is also a question with far reaching impact, warranting a definitive answer by this Court. If left unchecked, the Eleventh Circuit's holding essentially means that the federal government could lawfully choose not to pay any amount for emergency services rendered to persons in federal custody. Or, Congress could dictate free or reduced payment rates for any class of emergency room patients it desired, without ever having to provide just compensation. These scenarios logically flow from the decision that voluntary participation in Medicare determinatively renders the Fifth Amendment's Takings Clause inapplicable to any tangentially related regulatory scheme. By addressing the questions presented, the Court can clarify Congress' ability to impose a standalone reimbursement statute, with no

discernible nexus to the Medicare program, upon Medicare providers simply because of their "voluntary" Medicare participation.

REASONS FOR GRANTING THE WRIT

I. THE IMPACT OF GOVERNMENT REGULATION ON THE PROVISION OF EMERGENCY MEDICAL CARE IS AN ISSUE OF NATIONAL IMPORTANCE

As several justices of this Court recently observed, "the provision of health care is today a concern of national dimension. . . ." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J., concurring in part). The provision of hospital-based emergency medical services is certainly no exception, as over 130 million emergency room visits occur in the United States each year. Centers for Disease Control and Prevention/National Center for Health Statistics, FastStats, *Emergency Department Visits* (last updated May 14, 2014), http://www.cdc.gov/nchs/fastats/emergency-department.htm.

Policy-makers nationwide have determined that access to stabilizing emergency medical services is essentially a legal and moral right in this country. As such, both Congress and numerous states have passed legislation requiring hospitals to provide stabilizing medical care to emergency room patients without regard to their ability to pay. *See, e.g.*, 42 U.S.C. § 1395dd, Fla. Stat. § 395.1041. However, this

social burden is placed on hospitals with little regard for how hospitals will fund this mandate. With such regulations in place, patients with private and government-sponsored insurance are vital to a hospital's overall solvency – even when those patients' government-sponsored health insurance covers less than the actual cost of services rendered.

Such is the case with Medicare. Although the Medicare rate often fails to compensate providers for the actual cost of medical services rendered, much less provide a reasonable profit, hospitals lack any real choice but to participate in Medicare and accept such payments in order to remain solvent. Medicare payments account for more than 30 percent of hospital budgets, and Medicare and Medicaid together account for approximately 55 percent of hospital revenues. E.H. Morreim, JD, PhD, *Dumping the "Anti-Dumping" Law: Why EMTALA Is (Largely) Unconstitutional and Why It Matters*, 15 Minn. J.L. Sci. & Tech. 211, 255 (2014). For rural hospitals such as Petitioner, Medicare participation is even more vital, as Medicare patients account for 45 percent of all hospitalizations. *Medicare Pays Almost Half of Rural Hospital Stays*: AHRQ News and Numbers, January 28. January 2010. Agency for Healthcare Research and Quality, Rockville, MD. http://archive.ahrq.gov/news/newsroom/news-and-numbers/012810.html. The importance of Medicare will continue to rise as the baby boomers age. E.H. Morreim, JD, PhD at 255. In 2013, people over the age of 65 constituted 14.1 percent of the U.S. population. United States

Census Bureau, State & County Quick Facts (last revised Tuesday, July 8, 2014), http://quickfacts.census.gov/qfd/states/00000.html, and an estimated 20 percent of the population is expected to be age 65 or over by 2030. United States Census Bureau, *An Aging Nation: The Older Population in the United States* (issued May 2014), http://www.census.gov/prod/2014pubs/p25-1140.pdf. With hospitals absorbing tens of billions of dollars annually in uncompensated care,[1] many, if not most, cannot afford to turn away this entire patient group, particularly when other laws would require emergency treatment of presenting Medicare beneficiaries regardless of the hospital's Medicare participation status. *See, e.g.*, Fla. Stat. § 395.1041.

Congress has repeatedly used the Medicare program as a carrot (or perhaps more aptly, a stick) to impose regulatory and statutory requirements on hospitals, including EMTALA. Because Congress can place conditions on the receipt of federal funds, participation in Medicare and compliance with its EMTALA requirement are deemed voluntary.

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[1] Although the Affordable Care Act is anticipated to reduce hospitals' uncompensated care, however, this is primarily so in states adopting the Medicaid expansion, which has added an estimated 8 million Americans to the Medicaid roster in 2014. *See* Thomas DeLeire, Karen Joynt, and Ruth McDonald, *Impact of Insurance Expansion on Hospital Uncompensated Care Cost in 2014*, Dept. of Health & Human Services ASPE Issue Brief (Sept. 24, 2014), available at http://aspe.hhs.gov/health/reports/2014/UncompensatedCare/ib_UncompensatedCare.pdf.

However, what the courts which so hold fail to consider is (1) whether there is any amount of economic pressure that could effectively render such participation involuntary for the purpose of a constitutional regulatory takings analysis, and (2) whether "voluntary" participation in Medicare can be used to justify unrelated statutory mandates, such as the one in this case, requiring Petitioner to provide emergency medical services to non-Medicare beneficiary federal detainees at the Medicare rate.

II. CLARIFICATION OF THE *PENN CENTRAL* REGULATORY TAKINGS ANALYSIS IS NEEDED TO ADDRESS CONFUSION AND MISAPPLICATION OF LAW IN THE LOWER COURTS

A. Review is warranted to determine whether participation in Medicare is always voluntary, thus precluding a regulatory takings claim, or whether courts should consider social and economic factors impacting the nature of such participation as part of the *Penn Central* analysis

The Fifth Amendment's Takings Clause prevents the government from taking private property for public use without just compensation. The paradigmatic taking occurs when the government directly appropriates or invades real property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). However, this Court has also recognized that "there will be

instances when government actions do not encroach upon or occupy property yet still effect and limit its use to such an extent that a taking occurs." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking")).

Government regulation of property will generally be deemed a *per se* taking if it authorizes a permanent physical invasion or deprives an owner of all economically beneficial uses of her property. *Lingle*, 544 U.S. at 538. Even when regulation does not eliminate all economically beneficial use of property or require a physical invasion, it may still work a taking depending on a complex array of factors, including the regulation's economic effect on the landowner; the extent to which the regulation interferes with reasonable, investment-backed expectations; and the character of the government action. *Id.* at 538-39; *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). The regulatory takings inquiry outlined in *Penn Central* is not formulaic, and is intended to surmise whether government regulation is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 123.

Over the last three decades, a significant number of federal circuit and state courts have summarily held that voluntary participation in a price-regulated industry like health care essentially precludes any

regulatory takings claim under the Fifth Amendment. Without ever reaching the *Penn Central* regulatory takings analysis, lower courts are determining that hospitals and health care providers can never bring regulatory takings challenges to government sponsored insurance regulations because participating providers are voluntarily engaged in the regulated industry. This peremptory holding effectively means that the Takings Clause can never be implicated by a Medicare regulation.

Rather than considering the impact that participation in a highly regulated activity might have on market-backed investment expectations, or whether a hospital's purportedly voluntary participation in the Medicare program might be better characterized as compelled or coerced based on economic pressures and the current state of the health care market, these cases hold that because hospitals can opt out of Medicare or cease operating their facilities as hospitals altogether, then they voluntarily participate in this regulated industry and have no legal basis to bring a takings challenge. *See, e.g.*, *Franklin Mem. Hosp. v. Harvey*, 575 F.3d 121, 129 (1st Cir. 2009) ("Of course, where a property owner voluntarily participates in a price-regulated activity, there can be no unconstitutional taking."); *Garelick v. Sullivan*, 987 F.2d 913 (2d Cir. 1993) (holding that "a property owner must be legally compelled to engage in price-regulated activity for regulations to give rise to a taking"); *Whitney v. Heckler*, 780 F.2d 963, 972 (11th Cir. 1986) ("government price regulation does not

constitute a taking of property where the regulated group is not required to participate in the regulated industry"); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare*, 742 F.2d 442, 446 (8th Cir. 1984) ("Despite the strong financial inducement to participate in Medicaid, a nursing home's decision to do so is nonetheless voluntary. This voluntariness forecloses the possibility that the statute could result in an imposed taking of private property which would give rise to the constitutional right of just compensation. . . .").[2]

However, other courts have held that economic and other social influences can render participation involuntary for purposes of a regulatory takings claim. *See, e.g.*, *Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 678-79 (1st Cir. 1998) (holding that a state statute forcing plaintiff cigarette company to "submit its ingredient lists containing valuable trade secrets without adequate safeguards or cease doing business in an important market" was the essence of legal compulsion); *Mora v. Mejias*, 223 F.2d 814, 817 (1st

[2] These cases generally point to public utility companies as an example of involuntary participation. It is well-settled that public utility companies are entitled to just compensation under rate-setting regulations because they are legally required to furnish adequate utility services to the public without unreasonable interruptions or delay. *See Garelick v. Sullivan*, 987 F.2d 913, 916 (2d Cir. 1993); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). However, hospitals who are legally obligated to provide emergency medical services to all presenting patients are under a comparable legal compulsion.

Cir. 1955) (holding that withdrawal from the rice market to avoid price controls was not a viable solution where rice is a dietary staple of the population); *Tenoco Oil Co., Inc. v. Department of Consumer Affairs*, 876 F.2d 1013, 1027 (1st Cir. 1989) (holding that the supposed freedom to temporarily leave the gasoline market is largely illusory, where entities have fixed costs, overhead and salaries, which make such a course economically prohibitive); *Hutton Park Gardens v. Town Council of Town of West Orange*, 350 A.2d 1, 15 fn. 9 (N.J. 1975) (holding that although a landlord is theoretically able to convert its building to other uses or tear it down and construct something else, "in practice such a course is ordinarily economically prohibitive, and to force it would be confiscatory").

Albeit in a different context, this Court recently acknowledged that choosing to participate in a regulatory scheme rather than suffer large financial losses is not a truly voluntary choice. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, this Court found a condition on the receipt of federal funds to be unconstitutionally coercive. 132 S. Ct. at 2607. In rejecting a portion of the Affordable Care Act which conditioned states' receipt of federal Medicaid funds on acceptance of the terms of the Medicaid expansion plan, this Court held that "the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement' – it is a gun to the head." *Id.* at 2604. "The threatened loss of over 10 percent of a State's budget . . . is economic dragooning that leaves

the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at 2605.

Applying this case law in the regulatory takings context, the illusory "option" to terminate Medicare participation or cease operating as a hospital altogether in order to avoid the challenged regulation would not automatically preclude a takings claim. Rather, on a case-by-case basis, factors such as the economic impact of leaving the Medicare program, the infeasibility of abandoning a hospital's infrastructure and fixed assets, the effect of state laws mandating uncompensated emergency care, and the detrimental impact of a hospital's demise on the local community, would all be considered in determining whether participation in the Medicare program was in fact compelled by economic and social forces, at least for the purposes of a Fifth Amendment Takings Clause analysis. *See, e.g.*, *Methodist Hospitals, Inc. v. Indiana Family and Social Services Admin.*, 860 F. Supp. 1309, 1335 (N.D. Ind. 1994) (holding that genuine issue of material facts existed as to whether Medicaid payment regulation effected a taking with respect to participating hospital under the *Penn Central* analysis).

Many of the courts holding that participation in Medicare or similar programs is voluntary and thus precludes a regulatory takings challenge, including the Eleventh Circuit, rely on this Court's decision in the rent-control case, *Bowles v. Willingham*, 321 U.S. 503 (1944). *See, e.g.*, App. 10; *Garelick v. Sullivan*, 987 F.2d at 916; *Whitney v. Heckler*, 780 F.2d at 972.

In *Bowles*, the plaintiff landlord sued to restrain the issuance of rent control orders under the Emergency Price Control Act of 1942, a war-time act intended to stabilize or reduce rental rates in defense-area housing. 321 U.S. at 643-44. The Court held that this was not a situation involving an unconstitutional taking of property because there was no requirement that the apartments in question be used for purposes that brought them under the Act. *Id.* at 649. The *Bowles* opinion has questionable applicability to the current regulatory takings analysis, as it predates the ad hoc balancing test articulated in *Penn Central*. Moreover, *Bowles* is a war-time, rent-control case, with arguably little relevance to modern cases dealing with the provision of and payment for emergency medical services. It is this narrow and specific factual background that makes the *Bowles* opinion an improper benchmark for whether participation in Medicare is truly voluntary under the takings analysis.

This Court's holding in *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527 (1992) was also used by the Eleventh Circuit to support the government's position in this case. App. 5. In *Yee*, the petitioner mobile home park owners asserted a Takings Clause challenge to a state ordinance which restricted the owners' ability to set rates or select their tenants. 503 U.S. at 526. The owners argued that the law allowed tenants to occupy space in the park indefinitely at below-market rates, thereby transferring the right to occupy the land indefinitely at submarket rent from the owners to the tenants. *Id.* at 526-27. The Court

held that this did not amount to a physical taking, i.e., a compelled physical invasion of property, because the owners had voluntarily rented their lands to the tenants initially. *Id.* at 527-28.

However, what the Eleventh Circuit failed to consider is that this Court expressly limited its holding in *Yee* to the *physical* takings, rather than *regulatory* takings, analysis. *Id.* at 527. In fact, the Court acknowledged that the owners' arguments were within the scope of the Court's regulatory takings cases, and would be relevant to a regulatory takings analysis under *Penn Central*. *Id.* at 527, 531. However, whether the law affected a regulatory taking, rather than a conventional physical taking, was not properly before the Court. *Id.* at 537-38. As the Court explained:

> Again, this effect [of depriving owners of the ability to choose incoming tenants] may be relevant to a regulatory taking argument, as it may be one factor a reviewing court would wish to consider in determining whether the ordinance unjustly imposes a burden on petitioners that should "be compensated by the government, rather than remain[ing] disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. New York City*, 438 U.S., at 124, 98 S.Ct., at 2659. But it does not convert regulation into the unwanted physical occupation of land. Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based

> on their inability to exclude particular individuals.

Id. at 531. Although the type of voluntary participation described in *Yee* may be dispositive on the issue of a *per se* right to compensation under a physical takings analysis, it is not dispositive in the regulatory takings context.

As this Court has repeatedly described, the *Penn Central* regulatory taking analysis is a factual inquiry that must be determined on a case-by-case basis. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 538-39 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998); *Yee*, 503 U.S. at 529; *Kaiser Aetna v. U.S.*, 444 U.S. 164, 174-75 (1979); *Penn Central*, 438 U.S. at 124. As Justice O'Connor described the *Penn Central* analysis:

> The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. "The outcome instead depends largely 'upon the particular circumstances [in that] case.' " . . . *Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.

Palazzolo v. Rhode Island, 533 U.S. 606, 633-34 (2001) (O'Connor J., concurring) (internal citation omitted).

In *Palazzolo*, this Court reversed a state court ruling that a wetland owner's prior knowledge of extensive regulations on the use of specific wetland property, and acquisition of that property subject to such regulations, was not fatal to the owner's regulatory takings challenge. 533 U.S. at 626-30. As Justice O'Connor stated in her concurrence, the lower court "erred in elevating what it believed to be '[petitioner's] lack of reasonable investment-backed expectations' to 'dispositive' status." *Id.* at 634. Instead, she opined that

> [c]ourts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable [regulatory] taking has occurred. As before, the salience of these facts cannot be reduced to any "set formula." The temptation to adopt what amounts to a *per se* rule in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.

Id. at 635-36 (internal citation omitted). Therefore, although the wetlands owner purchased his property subject to and with full knowledge of existing regulation, i.e., he voluntarily chose to purchase highly-regulated property, his takings claim was not barred. Rather, the nature of his knowledge and the extent of existing regulation were facts to be considered as part

of the *Penn Central* analysis in order to determine if, in this particular case, the government regulation at issue caused economic injury which in all fairness and justice should be compensated by the government rather than disproportionately concentrated on a few people.

The *Penn Central* regulatory takings analysis is a factual inquiry depending on the circumstances of each case. This should be no less true when examining the nature of a challenger's participation in a regulated industry. Therefore, this Court should address whether challengers of regulation such as the statute at issue in this case should be legally precluded from bringing a takings claim because of their participation in Medicare, or whether they should be permitted to show that economic and social pressures render participation in the Medicare program involuntary, reducing the nature of that participation to one of many considerations under a *Penn Central* regulatory takings analysis, rather than the *ipso facto* determinative factor.

III. THE QUESTION OF WHETHER CONGRESS CAN REQUIRE A PRIVATE BUSINESS TO ACCEPT A MANDATE WITH NO JUSTIFICATION OTHER THAN THAT BUSINESS' VOLUNTARY PARTICIPATION IN AN UNRELATED STATUTORY SCHEME IS AN EXCEEDINGLY IMPORTANT QUESTION WARRANTING THIS COURT'S REVIEW

Even if this Court determines that participation in Medicare *is* truly voluntary for the purposes of the takings analysis, this Court should still review whether Congress can take advantage of the obligations flowing from that participation to bind a Medicare provider to a separate and unrelated statutory scheme without implicating the Takings Clause.

Both the Middle District of Florida and the Eleventh Circuit accepted the government's argument that the fact that § 4006 is not contained in, reference by, or any way related to Medicare or EMTALA is immaterial to whether or not Petitioner has agreed to be bound by the statute's terms. The Eleventh Circuit reasoned that there is "no meaningful difference in the Fifth Amendment sense" between binding Medicare providers to a statutory scheme enacted within Medicare (i.e., accepting the Medicare rate for actual Medicare beneficiaries), and binding them to an unrelated statutory scheme (i.e., acceptance of § 4006(b)'s rate for non-Medicare eligible federal detainees). Because the Eleventh Circuit found that it makes no difference that § 4006 is not found within Medicare or EMTALA, it was free to dispose of Petitioner's

challenge to the statute under the principle that Medicare providers cannot challenge Medicare rates as a taking because of their voluntary participation in the industry.

The question of whether Congress can pass any regulation that it chooses on a particular industry, without any connection to the statutory scheme that it will later use to prevent a challenge to that regulation as a taking, is prime for review by this Court. As it stands, Congress can pass legislation setting any level of reimbursement, or even none at all, for the medical care rendered to people within the government's custody and control. If the provider of that medical care is a Medicare participant bound by the provisions of EMTALA, any challenge to that legislation will be immediately dismissed without any examination of the legislation's economic impact.

Petitioner, like the thousands of other hospitals across the nation which participate in the Medicare program, do so because the revenue they receive from the treatment of Medicare patients is an integral part of remaining in business. In exchange for these dollars, they agree to comply with conditions that Congress may not otherwise have the power to enforce. EMTALA is one of the clearest examples. It cannot be said that Congress has the power to compel hospitals to treat, without regard for ability to pay, any person who walks through the doors of the hospital's emergency room. Such a requirement implicates the well-grounded anti-commandeering doctrine. *See New York v. United States*, 505 U.S. 144 (1992);

Printz v. United States, 521 U.S. 828 (1997). But, by conditioning the receipt of Medicare funding on compliance with EMTALA's provisions, Congress accomplishes its goal. Further, Congress imposed this condition in an unambiguous way: it made participation in EMTALA a direct requirement for all participants in the Medicare program and codified EMTALA within the Medicare statutes. 42 U.S.C. §§ 1395cc, 1395dd.

Contrast this with § 4006. Although the government asserts that it is a condition of Medicare, this statute is not referenced in, cited by, affiliated with, or related to Medicare participation. That Congress has failed to set forth this condition in clear terms is perhaps most clearly evidenced by the fact that a Medicare participant, by a thorough review of the Medicare statute and all of its accompanying conditions, would have no notice of the limited reimbursement rate that it will receive should it treat a federal detainee within its emergency room.[3] It cannot be

[3] The government suggested below that Petitioner chose to re-enroll as a Medicare provider, and thus was on notice of the provisions of EMTALA and 18 U.S.C. § 4006. The notion that this precludes a takings claim is contrary to this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001). In *Palazzolo*, a landowner who took title to a tract of land after the enactment of legislation diminishing its value was not precluded from bringing a takings challenge to that statute simply due to the fact that he was on notice of the legislation when he took title. This Court held that, to say otherwise, would "put an expiration date on the Takings Clause." *Id.* The context is different here, to be sure, but the rationale remains the same.

(Continued on following page)

said that a provider agrees to the provisions of § 4006 when it enters into a Medicare agreement.

The Eleventh Circuit suggests that it does not matter that Congress chose to enact § 4006 outside of the framework granting it the authority to do so. The court held that EMTALA and § 4006 "are not wholly removed from one another; hospitals which undertake the obligation to treat federal detainees by opting into Medicare and EMTALA are governed by the reimbursement rate separately set in § 4006(b)(1)." App. 9. In fact, the statutes *are* wholly removed from one another. Moreover, this lack of a connection between § 4006 and the Medicare framework, which the Eleventh Circuit suggests is immaterial, is directly contrary to this Court's jurisprudence that conditions imposed on the receipt of federal funds be set forth in clear, unequivocal, and unambiguous terms. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) ("[b]y insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation"). *See also*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) ("we have repeatedly characterized . . . Spending Clause legislation as much in the nature of a contract. The legitimacy of Congress' exercise of the

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Petitioner should not be prevented from raising a Takings challenge to a statute simply because it is a participant in a program that the *government* unilaterally suggests compels Petitioner to comply.

spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the contract.'" (quoting *Pennhurst*, 452 U.S. at 17)).

The government relies heavily on the fact that in order to be a Medicare provider, a hospital must enter into an agreement that sets forth the conditions and requirements it must comply with in exchange for reimbursement for medical care rendered to Medicare enrollees. 42 U.S.C. § 1395cc. The agreement between a Medicare provider and the federal government is a contract, they argue: the government agrees to pay the hospital the set rates for medical services rendered to Medicare beneficiaries, and in return, the hospital agrees to abide by the conditions of participation. But the Eleventh Circuit suggests that hospitals have agreed to do more. It suggests that, not only have hospitals agreed to accept the enumerated conditions of participation set forth within the Medicare framework, they have also agreed to abide by completely separate and unrelated conditions enacted outside the bounds of the agreement. However, while Petitioner has agreed, albeit under economic compulsion, to accept the Medicare rate and to comply with EMTALA, which allows it to bill all patients for the full cost of medical services rendered, it has never agreed to accept the Medicare rate for non-Medicare eligible federal detainees.

An example may help illustrate Petitioner's point further: Assume Private Hospital enters into an agreement with Insurance Company to provide medical care to enrollees of Insurance Company's health plan

in exchange for an agreed upon rate. The contract between the parties sets forth the terms and conditions of the agreement, and each party enters the agreement knowing only that they will be bound to the terms set forth within the four corners of the contract. Can Insurance Company then send a new class of people, who are not enrollees in their health plan, to Private Hospital for medical care and unilaterally set the rate at which Insurance Company will pay the hospital for that care? Surely not. Changing the facts slightly, assume that a term of the agreement between the parties set forth that Private Hospital agreed to treat *everyone*, not just Insurance Company's enrollees, in its emergency room, but that term provided no prohibition upon Private Hospital's ability to bill for those un-enrolled patients. Could Insurance Company *then* unilaterally set the rate at which Private Hospital was bound to treat those un-enrolled patients? Again, surely not, as this unilateral action is clearly outside the parties' agreement. But that is exactly the scenario that any hospital who happens to be a Medicare provider, and also happens to treat federal detainees, finds itself.

The reason why review of whether Congress can take this action is of such critical importance is the logical outcome of the Eleventh Circuit's adopted reasoning. If Congress can pass § 4006 outside of Medicare, and then later argue that it does not matter that the statute is outside the Medicare framework, who is to say that Congress could not amend § 4006 to require that medical care rendered

to federal detainees go completely uncompensated? By the government's own admission at oral argument before the Eleventh Circuit, the purported connection between Medicare and § 4006, coupled with the Eleventh Circuit's reasoning that Medicare participation is voluntary, would wholly preclude a challenge to a statutory scheme that demanded that Petitioner and other providers treat federal detainees for free. Such an outcome has dangerous implications for any private industry that receives federal funding. The question of whether Congress has the authority to bind a private entity to a regulatory scheme without enacting that statute within the framework that grants it the initial authority to take the action is exceedingly important, and ripe for review by this Court.

CONCLUSION

Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13917

D.C. Docket No. 3:12-cv-01232-HES-JRK

BAKER COUNTY MEDICAL SERVICES, INC.,
Ed Fraser Memorial Hospital,

Plaintiff-Appellant,

versus

U.S. ATTORNEY GENERAL, DIRECTOR,
U.S. DEPARTMENT OF HOMELAND SECURITY,
U.S. IMMIGRATION & CUSTOMS ENFORCEMENT,
OFFICE OF DETENTION AND REMOVAL,
U.S. MARSHAL WILLIAM B. BERGER, SR.,
United States Marshals Service, Prisoner & Operations
Division, Programs and Assistance Branch,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(August 14, 2014)

Before JORDAN, Circuit Judge, and RYSKAMP* and BERMAN,** District Judges.

JORDAN, Circuit Judge.

The federal government bears a constitutional "obligation to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble,* 429 U.S. 97, 103 (1976). Pursuant to 18 U.S.C. § 4006(b)(1), Congress has elected to impose the Medicare rate as full compensation for medical services rendered to federal detainees.

Baker County Medical Services, d.b.a. Ed Fraser Memorial Hospital – a small, rural hospital in Baker County, Florida – sued various federal agencies and officials in federal district court, seeking a declaratory judgment that § 4006(b)(1) is unconstitutional as applied.[1] This appeal requires us to decide whether the Hospital can challenge this compensation scheme as an unconstitutional taking under the Fifth

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* Honorable Kenneth L. Ryskamp, United States District Judge for the Southern District of Florida, sitting by designation.

** Honorable Richard M. Berman, United States District Judge for the Southern District of New York, sitting by designation.

[1] The Hospital also sought to recover in quantum meruit for the difference between its actual costs for providing emergency care to federal detainees and the amount it was reimbursed at the Medicare rate for such care since 2009. The district court dismissed the quantum meruit count as barred by sovereign immunity, and the Hospital concedes that this claim fails as a matter of law.

Amendment, even though it has voluntarily opted into the Medicare program and is, as a result, required to provide emergency services to federal detainees. With benefit of oral argument, and for the reasons that follow, we conclude that the Hospital may not bring such a challenge, and affirm the district court's dismissal of the Hospital's declaratory judgment claim.

I

We review the grant of a motion to dismiss *de novo*. *See Miyahira v. Vitacost.com, Inc.*, 715 F.3d 1257, 1265 (11th Cir. 2013). Our review of constitutional questions is likewise plenary. *See United States v. Paige,* 604 F.3d 1268, 1274 (11th Cir. 2010).

In applying the Rule 12(b)(6) standard, we construe the complaint in the light most favorable to the Hospital, accepting all well-pleaded factual allegations as true. *See Miyahira,* 715 F.3d at 1265. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)).

The Hospital is a 25-bed facility that houses and operates the only emergency room in Baker County. As a Medicare provider, it must accept the Medicare payment rate as full compensation for treatment for Medicare participants. Although the government has contracted with a provider to provide on-site medical

services for federal detainees housed in a local detention facility, the Hospital has entered into no similar contract with the government to render off-site emergency care to federal detainees, who do not qualify as Medicare participants. *See* 42 C.F.R. § 411.4. The Hospital nevertheless does afford emergency services to such individuals, in keeping with its obligation to provide emergency medical treatment to all patients irrespective of their ability to pay under the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, and Florida law.

The Hospital sought a declaratory judgment that 18 U.S.C. § 4006(b)(1), as applied, amounts to an unconstitutional taking. According to the Hospital, it is forced to render emergency medical care to federal detainees but its compensation for such treatment is limited to the Medicare rate, an amount less than its actual costs. The district court dismissed the Hospital's complaint with prejudice, ruling that no taking occurred because the Hospital is under no general obligation to provide emergency treatment to federal detainees. The district court reasoned that the Hospital's only putative obligation to provide such treatment under federal law stemmed from voluntary participation in Medicare and from EMTALA, and that did not create the requisite legal compulsion to constitute a taking. The Hospital appeals.

II

Under the Takings Clause of the Fifth Amendment, "private property" shall not "be taken for public use, without just compensation." U.S. Const., amend. V. Although "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property," the Supreme Court has recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster" so as to effect a regulatory taking. *See Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 537 (2005).

Even so, a long line of cases instructs that no taking occurs where a person or entity voluntarily participates in a regulated program or activity. We have said that "[i]t is well established that government price regulation does not constitute a taking of property where the regulated group is not required to participate in the regulated industry." *Whitney v. Heckler,* 780 F.2d 963, 972 (11th Cir. 1986). *See also Yee v. City of Escondido, Cal.,* 503 U.S. 519, 527 (1992) ("the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property"); *Franklin Mem. Hosp. v. Harvey,* 575 F.3d 121, 129 (1st Cir. 2009) ("Of course, where a property owner voluntarily participates in a regulated program, there can be no unconstitutional taking."); *Garelick v. Sullivan,* 987 F.2d 913, 916 (2d Cir. 1993) ("[W]here a service provider voluntarily participates in a price-regulated program or activity,

there is no legal compulsion to provide service and thus there can be no taking."); *Burditt v. U.S. Dept. of Health and Human Servs.,* 934 F.2d 1362, 1376 (5th Cir. 1991) (holding that physician could not challenge imposition of a penalty for violation of EMTALA under Takings Clause because, among other things, he voluntarily accepted "responsibility to facilitate a hospital's compliance with EMTALA"); *Minn. Ass'n of Health Care Facilities, Inc. v. Minn. Dep't of Pub. Welfare,* 742 F.2d 442, 446 (8th Cir. 1984) (finding no taking because "Minnesota nursing homes . . . have freedom to decide whether to remain in business and thus subject themselves voluntarily to the limits imposed by Minnesota on the return they obtain from investment of their assets in nursing home operation"); *St. Francis Hosp. Ctr. v. Heckler,* 714 F.2d 872, 884 (7th Cir. 1983) (holding that diminished market value does not constitute a taking where plaintiffs "retain full rights and control over their net investment").

The Hospital does not dispute these general legal principles. Instead, as it succinctly frames its argument, the Hospital maintains that "because 18 U.S.C. § 4006 is not contained in, cross-referenced by, or itself ever referenced in, the Medicare or EMTALA statutes, [its] voluntary participation in both of those federal programs does not, expressly or by default, mean that [it] must agree to accept less than cost reimbursement for the treatment of federal detainees." Appellant's Reply Br. at 1. To determine whether the Hospital is correct, we first consider the statutory

framework of Medicare, Florida law regulating emergency treatment, and § 4006(b)(1), and then turn to Takings Clause precedent.

A

Medicare is a federally subsidized medical insurance program for persons over the age of 65 or recipients of social security disability benefits. *See* 42 U.S.C. § 1395 et seq. The program is comprised of two sections. Part A focuses on providing insurance and reimbursement for the costs of hospital, post-hospital, home health, and hospice care. *See* 42 U.S.C. §§ 1395c-1395i-4. Part B is a voluntary supplemental insurance program for Medicare beneficiaries who pay premiums for additional insurance. *See* 42 U.S.C. § 1395j.

As a condition of participating in and receiving payments from Medicare, a hospital must also opt into EMTALA. *See* 42 U.S.C. § 1395cc(a)(1)(I)(i). EMTALA requires hospitals with emergency departments to provide a medical screening to anyone who enters an emergency room and requests an examination for a medical condition. *See* 42 U.S.C. § 1395dd(a). If the hospital determines that the patient has an emergency medical condition, it must either provide medical services to stabilize the condition or transfer the patient to another medical facility. *See* 42 U.S.C. § 1395dd(b)(1)(a)-(b). The hospital must meet these obligations without regard to the patient's ability to pay. *See* 42 U.S.C. § 1395dd(h).

In keeping with the Florida Legislature's intent "that emergency services and care be provided by hospitals and physicians to every person in need of such care," Fla. Stat. § 395.1041(1), Florida law imposes similar obligations of its own. One statute, for example, requires every general hospital with an emergency department to provide emergency care for any emergency condition when "[a]ny person requests emergency services and care," regardless of ability to pay. *See* Fla. Stat. § 395.1041(3)(a)(1), (f). In addition, "[a] person may not be denied treatment for any emergency medical condition that will deteriorate from a failure to provide such treatment at any general hospital licensed under [C]hapter 395 [of the Florida Statutes]. . . ." Fla. Stat. § 401.45(1)(b).

B

Neither Medicare nor EMTALA establishes the reimbursement rate for emergency services provided to federal detainees. Congress instead chose to codify such a compensation scheme under 18 U.S.C. § 4006(b)(1), which provides that "[p]ayment for costs incurred for the provision of health care items and services for individuals in the custody of the United States Marshals Service, the Federal Bureau of Investigation and the Department of Homeland Security shall be the amount billed, not to exceed the amount that would be paid for the provision of similar health care items and services under the Medicare program. . . ."

Notably, although it sets a maximum reimbursement rate for the treatment of federal detainees, § 4006 includes no underlying requirement that hospitals provide such treatment in the first place. Nor is § 4006 cross-referenced in Medicare.[2]

The only other federal authority to which the parties point that mandates a hospital's treatment of federal detainees is EMTALA, which, as noted above, requires participating hospitals to provide care to anyone who visits an emergency room. Hence, although the Hospital is correct that neither Medicare nor EMTALA expressly incorporates the reimbursement scheme codified in § 4006(b)(1), these acts are not wholly removed from one another; hospitals which undertake the obligation to treat federal detainees by opting into Medicare and EMTALA are governed by the reimbursement rate separately set in § 4006(b)(1).

C

Because opting into EMTALA has committed the Hospital to treat all emergency patients, including federal detainees, we must decide whether voluntarily providing such care precludes the Hospital from challenging as a taking the rate at which it is compensated under § 4006(b)(1). We conclude that it does.

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[2] Indeed, § 4006 is codified in Title 18 of the U.S. Code, which regulates crimes and criminal procedure.

In *Bowles v. Willingham,* 321 U.S. 503 (1944), the Supreme Court annunciated the principle that voluntary participation in a regulated program defeats a takings clause challenge. In that case, the Court analyzed a constitutional challenge to a wartime federal rent control statute that resulted in a reduction in property value. The Court held that the statute did not effect a taking, reasoning that it did not compel landlords to offer their apartments for rent, and recognizing that "price control, the same as other forms of regulation, may reduce the value of the property regulated." *Id.* at 517-18.

Four decades later, we applied this rule to the regulation of Medicare reimbursement in *Whitney.* In that case, a group of physicians challenged a temporary statutory freeze on fees charged to Medicare patients as an unconstitutional taking. Underscoring that the physicians were "not required to treat Medicare patients," and observing that "the fact that Medicare patients comprise a substantial percentage of their practices does not render their participation [in Medicare] 'involuntary,'" we held that the freeze did not constitute a taking. *See* 780 F.2d at 972 & n.12.

Our sister circuits have come to similar conclusions in considering Takings Clause challenges to Medicare and Medicaid price regulation schemes. We find their decisions instructive.

In *Garelick,* for instance, the Second Circuit ruled that certain limitations on permissible charges

under Medicare Part B did not amount to a taking. Analogizing between the predicaments of the anesthesiologist plaintiffs in that case and the landlords in *Bowles,* the Second Circuit concluded that the challenged provisions "do not require anesthesiologists, or any other physicians, to provide services to Medicare beneficiaries," but instead "simply limit the amounts [the plaintiffs] may charge those Medicare beneficiaries whom they choose to serve." 987 F.2d at 916. The anesthesiologists' argument that New York state law created the requisite legal compulsion by forcing them to treat all patients, including Medicare beneficiaries, did not change the outcome, as such a theory hinged on the notion that it was the state, which was not a party in the case, "that indirectly compel[led] anesthesiologists to treat Medicare patients and thus submit to price regulations, not the federal government." *Id.* The Second Circuit also concluded that the anesthesiologists' ethical duty to treat Medicare patients did not render such treatment involuntary, reasoning that "such self-imposed requirements do not constitute the kind of governmental compulsion that may give rise to a taking." *Id.* at 917-18.

The Eighth Circuit reached an analogous result in analyzing a takings challenge to a Minnesota statute conditioning nursing homes' participation in the state's Medicaid program on acceptance of limits on rates charged to certain residents. *See Minn. Ass'n of Health Care Facilities,* 742 F.2d at 446. Although it recognized "the strong financial inducement to

participate in Medicaid," the Eighth Circuit concluded that "a nursing home's decision to do so is nonetheless voluntary," a fact that "forecloses the possibility that the statute could result in an imposed taking of private property which would give rise to the constitutional right of just compensation[.]" *Id.* It declined the nursing homes' invitation to apply cases analyzing takings in the context of public utility rates, reasoning that, unlike public utilities, nursing homes "have freedom to decide whether to remain in business and thus subject themselves voluntarily to the limits imposed by [the state] on the return they obtain from investment of their assets in nursing home operation." *Id.*

D

For the same reason the landlords in *Bowles* and the plaintiffs who contested Medicare and Medicaid payment schemes in its wake could not prevail, the Hospital's takings challenge to the reimbursement rate in § 4006(b)(1) fails. Like those plaintiffs, the Hospital seeks to challenge its rate of compensation in a regulated industry for an obligation it voluntarily undertook (namely, providing emergency treatment to federal detainees) when it opted into Medicare and became subject to EMTALA. *See Whitney,* 780 F.2d at 972 (holding that no taking occurred because physicians were "not required to treat Medicare patients").

The Hospital attempts to distinguish *Whitney* and the other post-*Bowles* cases discussed above on

the ground that they addressed legal compulsion in the context of Medicare or Medicaid, rather than compulsion under a separate statute regulating reimbursement for treatment of federal detainees. But we see no meaningful difference in the Fifth Amendment sense. Just as physicians who voluntarily treat Medicare beneficiaries cannot establish the legal compulsion necessary to challenge Medicare reimbursement rates as a taking, so too is the Hospital precluded from challenging the rate at which it is compensated for its voluntary treatment of federal detainees, a regulated industry in which the Hospital as a "regulated group is not required to participate." *Whitney,* 780 F.2d at 972.

The Hospital also disputes the notion that its participation in Medicare and EMTALA, and by extension its treatment of federal detainees, is truly voluntary, but its arguments do not change our analysis. The Hospital maintains that, even if it were to withdraw from Medicare and EMTALA, it would have no practical choice but to continue treating federal detainees who require emergency services because Florida state law compels it to treat everyone who enters its emergency room. But the Hospital has neither named the state as a defendant nor challenged the constitutionality of the relevant Florida statutes, and hence cannot lay "indirect" compulsion on the part of the state at the feet of the federal government. *See Garelick,* 987 F.2d at 916. Although the Hospital contends that opting out of Medicare would amount to a grave financial setback, "economic

hardship is not equivalent to legal compulsion for purposes of takings analysis." *Id.* at 917. *See also Minn. Ass'n of Health Care Facilities,* 742 F.2d at 446 (holding that a "strong financial inducement to participate" in a regulated program does not render such participation involuntary). This contention, therefore, does not carry the day.

Finally, the Hospital points out that its withdrawal from Medicare would leave Medicare participants with no hospital in Baker County from which they could receive emergency care. This grim prospect provides a sympathetic backdrop for the Hospital's takings challenge and, if it came to pass, would result in hardship to Medicare participants in Baker County. Yet it does not diminish the underlying voluntariness of the Hospital's participation in Medicare, as "the fact that practicalities may in some cases dictate participation [in Medicare] does not make participation involuntary." *St. Francis Hosp. Ctr. v. Heckler,* 714 F.2d 872, 875 (7th Cir. 1983).[3]

III

We recognize the financial difficulties and perceived inequity that may come with shortfalls in a rural hospital's reimbursement for costs associated

[3] As counsel for the Hospital acknowledged at oral argument, the fact that the Hospital is the only one of its kind in Baker County does not affect the merits of its Fifth Amendment claim.

with providing emergency treatment to federal detainees, but conclude that the Takings Clause of the Fifth Amendment is not the proper vehicle for altering this harsh reality. As is so often the case, the Hospital's most effective remedy may lie with Congress rather than the courts.

The district court's dismissal of the Hospital's declaratory judgment action is affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

BAKER COUNTY MEDICAL SERVICES, INC., d/b/a Ed Fraser Memorial Hospital,

Plaintiff,

v.

ERIC H. HOLDER, JR., Attorney General, United States of America, in his official capacity, DIRECTOR JOHN MORTON, U.S. Department of Homeland Security, U.S. Immigration & Customs Enforcement, Office of Detention and Removal, and U.S. MARSHAL WILLIAM B. BERGER, SR., United States Marshals Service, Prisoner & Operations Division, Programs and Assistance Branch,

Defendants. /

Case No.: 3:12-cv-01232-J-20JRK

(Filed Jul. 31, 2013)

ORDER

This cause is before this Court on Defendants' Motion to dismiss (Dkt. 13, filed March 1, 2013); Plaintiff's response (Dkt. 17, filed March 28, 2013); and Defendants' reply (Dkt. 21, filed May 7, 2013).

The Court has duly considered these filings and now issues this Order.

I. BACKGROUND

To participate in Medicare, a hospital must agree to meet the requirements of the Emergency Medical Treatment and Active Labor Act ("EMTALA"). 42 U.S.C. § 1395cc(a)(1)(I)(i); 42 U.S.C. § 1395dd. EMTALA requires Medicare hospitals to provide emergency care to any individual who needs it, regardless of ability to pay for the care. 42 U.S.C. § 1395dd; *Harry v. Marchant*, 291 F.3d 767, 770 (11th Cir. 2002) (en banc). This obligation to provide emergency care includes federal prisoners who present at an emergency room for examination or treatment.

Plaintiff is a small hospital located in rural Baker County, Florida, and is a participant in Medicare. According to the Amended Complaint, Plaintiff has only 25 in-patient beds and operates both an on-site nursing home facility and an emergency room. Plaintiff's emergency room is the only one located within the County, and it is the most conveniently-located emergency room for persons housed in a nearby detention facility who are in the custody of the U.S. Marshals Service ("USMS") and U.S. Immigration and Customs Enforcement ("ICE"). The Constitution requires the government to provide medical care to those in its custody. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Hamm v. DeKalb Cnty.*, 774 F.2d 1567, 1572-74 (11th Cir. 1985); *Jordan v. Doe*, 38 F.3d 1559,

1564-65 (11th Cir. 1994). Because of the operation of both this constitutional mandate and the EMTALA's emergency care requirement, Plaintiff routinely provides emergency care to federal inmates housed in the Baker County facility and the government pays for their care.

Plaintiff asserts in the Amended Complaint that the government pays too little. Under 18 U.S.C. § 4006(b)(1), for health care provided to persons in federal custody, the government pays "the amount billed, not to exceed the amount that would be paid for the provision of similar health care items and services under the Medicare program." According to the Amended Complaint, this maximum rate frequently falls well below Plaintiff's actual cost for providing emergency care. Plaintiff contends that § 4006(b) "arbitrarily" sets the Medicare rate as the maximum amount that Defendants will pay for emergency services, It further asserts that it "is statutorily obligated to provide the emergency care, while unable to contract with the federal government for a higher rate." "The effect of the mandated rate," Plaintiff concludes, "is to require [Plaintiff] to provide emergency care to the federal prisoners below its costs for providing emergency service."

Accordingly, Plaintiff seeks in Count I of the Amended Complaint a declaration that § 4006 "is unconstitutional as applied to [Plaintiff] because it amounts to an unconstitutional taking of private property without due process of law, or without just compensation, under the Fifth and Fourteenth

Amendments to the U.S. Constitution."[1] In Count II, Plaintiff "seeks recovery, retroactively, for the amount of the difference between the actual billed charges and the amounts paid by the Defendants for emergency medical care provided by [Plaintiff] to federal prisoners since 2009" – a total of $288,715.45.

Defendants have jointly moved to dismiss the Amended Complaint. They argue that Count II is barred by sovereign immunity and should be dismissed under Fed. R. Civ. P. 12(b)(1), and Count I fails to state a claim under Fed. R. Civ. P. 12(b)(6). Specifically, as to Count I, Defendants argue that § 4006(b) "does not take property, let alone without just compensation or due process," because "it reasonably regulates compensation for services the plaintiff voluntarily provides the government." Dkt. 13 at p. 1. Defendants maintain that Plaintiff has voluntarily chosen to participate in Medicare and therefore has freely agreed to provide emergency care to anyone who presents at its emergency room, including federal inmates. Because Plaintiff remains free to decline participation in the Medicare program and release itself from the requirements of EMTALA, Defendants assert that § 4006(b) does not amount to a "taking" or "deprivation" of Plaintiff's property.

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[1] Because Plaintiff has sued the federal government, its reliance on the Fourteenth Amendment – which applies only to state and local governments – is misplaced. This Court will therefore limit its discussion to Plaintiff's Fifth Amendment claim.

Plaintiff, in its response, agrees that Count II is barred by sovereign immunity and thus concedes that Defendants are entitled to dismissal of that count. Dkt. 17 at pp. 1-2. Plaintiff opposes, however, Defendants' Motion insofar as it seeks dismissal of Count I. Plaintiff argues that it is not challenging the Medicare reimbursement scheme for actual Medicare patients or its obligation under EMTALA to provide emergency care to anyone who presents at its emergency room. Rather, Plaintiff contends, it challenges only § 4006(b) imposition of the Medicare rates for services that Plaintiff renders to non-Medicare patients – i.e., federal inmates. Plaintiff concedes, however, that it has "indeed agreed to treat all who present to the ER under EMTALA as a condition of receiving Medicare funding." Dkt. 17 at p. 6.

II. STANDARD

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may assert by motion the defense of a court's lack of subject-matter jurisdiction over a plaintiff's claims. An assertion that the United States, as sovereign, is immune from suit goes directly to a court's subject-matter jurisdiction and is properly presented in a Rule 12(b)(1) motion. *Bennett v. United States*, 102 F.3d 486, 488 n.1 (11th Cir. 1996).

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may assert by motion the defense of a plaintiff's "failure to state a claim upon which relief

may be granted." In ruling on a motion to dismiss pursuant to this Rule, a court is required to accept all allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1303 (11th Cir. 2008) (quoting *Castro v. Sec'y of Homeland Sec.*, 472 F.3d 1334, 1336 (11th Cir. 2006). However, the Supreme Court has ruled that "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely,'" *Id.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)), a complaint must "simply call[ ] for enough facts to raise a reasonable expectation that discovery will reveal evidence of" the necessary element. *Twombly*, 550 U.S. at 556. The complaint must identify "facts that are suggestive enough to render [the element] plausible." *Id.*

Therefore, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570), and "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 566). Thus, "only a complaint that states a plausible claim for relief

survives a motion to dismiss." *Id.* at 679 (citing *Twombly*, 550 U.S. at 556). "[B]are assertions . . . [which] amount to nothing more than a 'formulaic recitation of the elements' [of a claim] . . . are conclusory and not entitled to be assumed true." *Iqbal*, 556 U.S. at 681.

III. DISCUSSION

The Parties are correct that this Court lacks power to adjudicate the claim in Count II because it is barred by sovereign immunity. "[T]he United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Testan*, 424 U.S. 392, 399 (1976) (*quoting United States v. Sherwood*, 312 U.S. 584, 586 (1941). "The protections of sovereign immunity also generally extend to agencies of the United States and employees of those agencies sued in their official capacity." *Bank of America, N.A. v. U.S. Internal Revenue Serv.*, 663 F. Supp. 2d 1308, 1312 (M.D. Fla. 2009). Plaintiff concedes that it can point to no statute in which Congress has waived the government's sovereign immunity with respect to Plaintiff's monetary claim. This Court, therefore, lacks jurisdiction over Count II, and that count will be dismissed under Fed. R. Civ. P. 12(b)(1).

In addition, Defendants are entitled to dismissal of Count I because § 4006(b) does not "deprive[ ]" Plaintiff of, or "take[ ]," its "property." U.S. CONST.

amend V. "It is well established that government price regulation does not constitute a taking of property where the regulated group is not required to participate in the regulated industry." *Whitney v. Heckler*, 780 F.2d 963, 972 (11th Cir. 1986). This is because a "taking" results only when the government uses legal or physical force to significantly burden a person's property rights. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005); *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992); *Bowles v. Willingham*, 321 U.S. 503, 517 (1944). In view of these well-established principles, the government may set the reimbursement rate for Medicare patients, for example, without triggering the Fifth Amendment's Takings Clause – hospitals are not required to treat Medicare patients, and participation in Medicare is entirely voluntary. *Whitney*, 780 F.2d at 972; *see also* 42 U.S.C. § 1395cc(b)(1) (hospitals are free to terminate their Medicare provider agreements). Additionally, hospitals have no "property" interest in – and, therefore, no Fifth Amendment claim to – compensation for Medicare services greater than the levels authorized by Medicare. *Memorial Hospital v. Heckler*, 706 F.2d 1130, 1137 (11th Cir. 1983).

Just as hospitals are not required to treat Medicare patients, they are not legally compelled to treat federal inmates, either. The statute that Plaintiff challenges, 18 U.S.C. § 4006(b), does not require Plaintiff to treat federal inmates; it merely provides that if Plaintiff elects to treat a federal inmate, the

government will not pay more than the Medicare rate. Nor does any other federal law compel Plaintiff to treat federal inmates. EMTALA does, of course, require Plaintiff to treat anyone who presents at its emergency room, but as even Plaintiff acknowledges, it *voluntarily agreed* to the requirements of EMTALA as a condition of receiving Medicare funding. Plaintiff remains free to terminate its Medicare provider agreement and thereby end its federal obligation to provide emergency care to those in federal custody. *See* 42 U.S.C. § 1395cc(b)(1). Because it has not yet chosen to do so, Plaintiff has voluntarily agreed to provide emergency care to persons in the custody of ICE and USMS in exchange for the level of compensation that § 4006(b) authorizes. § 4006(b), therefore, does not "deprive[ ]" Plaintiff of, or "take[ ]," its "property," and Count I will be dismissed under Fed. R. Civ. P. 12(b)(6).

IV. CONCLUSION

In light of the foregoing discussion, it is hereby **ORDERED AND ADJUDGED**:

1. Defendants' Motion to dismiss (Dkt. 13, filed March 1, 2013) is **GRANTED**;
2. The Clerk is directed to enter **JUDGMENT** for Defendants and against Plaintiff; and
3. The Clerk is directed to **TERMINATE** all pending motions and **CLOSE** this case.

DONE AND ORDERED at Jacksonville, Florida, this 31st day of July of July, 2013.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

Copies to:
John D. Buchanan, Jr., Esq.
Jonathan Gordon Cooper, Esq.

TITLE 18 – CRIMES AND CRIMINAL PROCEDURE

§ 4006. Subsistence for prisoners

(a) IN GENERAL. – The Attorney General or the Secretary of Homeland Security, as applicable, shall allow and pay only the reasonable and actual cost of the subsistence of prisoners in the custody of any marshal of the United States, and shall prescribe such regulations for the government of the marshals as will enable him to determine the actual and reasonable expenses incurred.

(b) HEALTH CARE ITEMS AND SERVICES. –

(1) IN GENERAL. – Payment for costs incurred for the provision of health care items and services for individuals in the custody of the United States Marshals Service, the Federal Bureau of Investigation and the Department of Homeland Security shall be the amount billed, not to exceed the amount that would be paid for the provision of similar health care items and services under the Medicare program under title XVIII of the Social Security Act.

(2) FULL AND FINAL PAYMENT. – Any payment for a health care item or service made pursuant to this subsection, shall be deemed to be full and final payment.