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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S270326

FAMILY HEALTH CENTERS OF SAN DIEGO,
Plaintiff and Appellant,

v.

STATE DEPARTMENT OF HEALTH CARE SERVICES,
Defendant and Respondent.

Court of Appeal of California
Third District
No. C089555

Superior Court of California
Sacramento County
No. 34201880002953CUWMGDS
The Hon. Steven M. Gevercer

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

COVER PAGE 1

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

REPLY BRIEF ON THE MERITS 7

I. INTRODUCTION 7

II. SUMMARY OF EVIDENCE REGARDING OUTREACH 9

III. LEGAL ARGUMENT 11

A. It is Immaterial Whether the Outreach at Issue Increased Patient Utilization. 11

B. DHCS Fails in its Strained Attempt to Deconstruct the Language of Section 2136.2 to Encompass the Outreach Activities in This Case. 13

1. Pertinent Rules of Statutory Construction. 13

2. The language in 2136.2 makes it clear that the "advertising" to which it pertains is advertising "to the general public." 14

3. In context, "advertising" in the phrase "advertising to the general public" in 2136.2 refers to widespread delivery of information. 17

4. DHCS seems to concede that Family Health's outreach is not *actually* advertising. 18

5. The word "public" in 2136.2 does not mean private. 20

6. Cases interpreting unfair business practices statutes are inapplicable. 20

7. A private and personal conversation about a specific person's medical needs does not become advertising to the general public simply because it occurs in an area open to the public. 22

8. The inapplicability of 2136.2 to Family Health's outreach is evident. 22

9. One or a few people are not "the general public" for purposes of 2136.2. 24

C. Family Health's Outreach Efforts are Directed to a Narrow and Unique Segment of Society, not to the General Public. 26

D. DHCS's Discussion about Grants is Inaccurate and not Pertinent to the Issues before this Court. 26

IV. CONCLUSION 28

CERTIFICATE OF COMPLIANCE 29

PROOF OF SERVICE 30

TABLE OF AUTHORITIES

Page

Cases:

Battle Creek Health Sys. v. Leavitt
(6th Cir. 2007) 498 F.3d 401 7

Busker v. Wabtec Corp.
(2021) 11 Cal. 5th 1147 .... 13, 17

Catholic Health Initiatives v. Sebelius
(D.C. Cir. 2010) 617 F.3d 490 7

Chern v. Bank of Am.
(1976) 15 Cal.3d 866 20

Curtis v. Irwin Indus.
(9th Cir. 2019) 913 F.3d 1146 13

Doe v. City of Los Angeles
(2007) 42 Cal.4th 531 19

Family Health Ctrs. of San Diego v. State Dept. pf Health Care Servs.
(2021) 67 Cal.App.5th 356 8

Finlan v. Chase
(2021) 68 Cal.App.5th 934 13

Ford Dealers Assn. v. Dept. of Motor Vehicles
(1982) 32 Cal.3d 347 21

Gosman v. United States
(Ct. Cl. 1978) 573 F.2d 32 .... 23, 28

Hoffman v. Superior Ready Mix Concrete, L.P.
(2018) 30 Cal.App.5th 474 13

In re Richards
(1993) 16 Cal.App.4th 93 13

Judd v. Weinstein
(9th Cir. 2020) 967 F.3d 952 13

Kaanaana v. Barrett Bus. Servs.
(2021) 11 Cal. 5th 158 17

McHugh v. Protective Life Ins.
(2021) 12 Cal. 5th 213 13

Orange Citizens for Parks & Recreation v. Superior Court (Orange)
(2016) 2 Cal. 5th 141 19

Palmer v. Workers' Comp. Appeals Bd.
(1987) 192 Cal.App.3d 1241 14

People v. Clayton
(2021) 66 Cal.App.5th 145 13

People v. Conway
(1974) 42 Cal.App.3d 875 20

People v. Miracle
(2018) 6 Cal. 5th 318 13

People v. Superior Court
(1973) 9 Cal.3d 283 20

People v. Torres
(2020) 48 Cal.App.5th 550 13

Smith v. Fair Emp.'t & Hous. Comm'n
(1996) 12 Cal.4th 1143 13

St. Cyr v. Workers' Comp. Appeals Bd.
(1987) 196 Cal.App.3d 468 13

St. Francis Hosp., Inc. v. Califano
(D.D.C. 1979) 479 F.Supp. 761 24

Statutes:

Bus. & Prof. Code, § 17500 21

Code Civ. Proc., § 1858 15

Veh. Code, § 11713 21

Other:

42 C.F.R. § 405 25

California Antitrust and Unfair Competition Law, § 17.05 (2021) 21

PRM § 600 27

PRM § 2136 12

PRM § 2136.1 12

PRM § 2136.2 .... *passim*

The Oxford Encyclopedic Dict. (1991) 15, 17

Webster's Encyclopedic Unabridged Dict. Of the English Language (2001) 15, 17

Reply Brief on the Merits

I. INTRODUCTION

In its Answering Brief on the Merits ("ABM"), the State Department of Health Care Services ("DHCS" or "the Department") asserts: "The Department agrees that outreach is a critical tool for ensuring that Medi-Cal beneficiaries are able to access the healthcare services available to them." (ABM 45.) Yet, DHCS contends that Family Health Centers of San Diego ("Family Health") and, by extension, all Federally Qualified Health Centers ("FQHCs") in California, cannot treat the costs of outreach as allowable for inclusion in the cost reports they file in the rate setting process by which an FQHC is reimbursed for services it renders to Medi-Cal patients. Unfortunately, if the position of DHCS disallowing outreach costs in the reimbursement process were to prevail, less outreach would be conducted by California FQHCs and a vast number of medically underserved individuals will not receive the critical health services available to them.

To make the case for denying allowability of outreach costs DHCS relies on Provider Reimbursement Manual[1] section 2136.2[2] which by its

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[1] The Provider Reimbursement Manual ("PRM," AA 1416-1418) consists of non-binding guidelines and interpretative rules promulgated by the U.S. Department of Health and Human Services to assist providers and intermediaries in the implementation of the Medicare regulations. (See, *Battle Creek Health Sys. v. Leavitt* (6th Cir. 2007) 498 F.3d 401, 404; *Catholic Health Initiatives v. Sebelius* (D.C. Cir. 2010) 617 F.3d 490, 491.)

[2] The pertinent provisions of 2136.2 are the following: "Costs of advertising to the general public which seeks to increase patient utilization of the provider's facilities are not allowable. Situations may occur where advertising which appears to be in the nature of the provider's public relations activity is, in fact, an effort to attract more patients. An analysis by the intermediary of the advertising copy and its distribution may then be necessary to determine the specific objective. While it is the policy of the

own terms applies *only* to "advertising to the general public" that increases patient utilization of the provider's facility. The court of appeal mistakenly adopted as the sole basis for its published decision that Family Health's outreach activities were "akin to" advertising for purposes of 2136.2. (*Family Health Ctrs. of San Diego v. State Dept. pf Health Care Servs.* (2021) 67 Cal.App.5th 356, 360, 369.) The *undisputed evidence* establishes that Family Health's outreach involves an outreach worker conversing with one or a few potential patients, determining their medical needs, helping them to qualify to for benefits where appropriate and providing medical referrals in some cases. These highly individualized encounters are with impoverished individuals belonging to a narrow segment of the general population who cannot easily be reached through TV, radio, and social media. Communicating with them requires the "boots on the ground" efforts of outreach workers going to places where homeless individuals can be found, such as rescue missions and homeless shelters and camps.

Although it seems obvious that these very personal and private conversations about medical issues are not "advertising to the general public" for purposes of 2136.2, DHCS strains throughout the ABM to explain why 2136.2 should be interpreted as applying to FQHC outreach. In the final analysis, the applicable rules of statutory construction compel rejection of DHCS's procrustean efforts to force outreach activities into the "general advertising" construct of 2136.2.

Health Care Financing Administration and other Federal agencies to promote the growth and expansion of needed provider facilities, general advertising to promote an increase in the patient utilization of services is not properly related to the care of patients."

II. SUMMARY OF EVIDENCE REGARDING OUTREACH

At the administrative hearing, Family Health presented evidence of its outreach activities primarily through the testimony of its CEO, Fran Butler-Cohen, and exhibits to which she referred. Family Health's outreach includes "a broad range of activities taking place in the street, in schools…teen outreach…at LGBT related settings, such as bars, bathhouses, clubs…also other venues such as beaches and parks." (AA 279:23–280:7.) Family Health's staff, as part of their outreach efforts, "promote awareness of the health center's services and support entry into care" of the new patients contacted. (AA 281:7–9.) Regarding such "in-person encounters" (AA 297:3–4) "…these outreach workers go out; they find the people; they identify them; they give them education; they give them the enrollment; they make the appointments; they find out the other areas that they need addressing in their lives; then they make connections and referrals so that, that can get taken care of as well." (AA 321:2–8.) Outreach workers are trained to observe what is happening in the environment where the individuals are, approach and make conversation, move the conversation to the client's needs and provide referrals in some cases. (AA 1153.)

One example of the type of outreach Family Health workers engage in is going to places where homeless persons can be found, such as a rescue mission. (AA 322:17–25.) Ms. Butler-Cohen explained that the outreach workers provide information to homeless individuals regarding benefits of becoming eligible for Medi-Cal and the documentation required by DHCS to do so. They deal with many different situations such as a person who does not have the required divorce decree or citizenship or other eligibility issues. (AA 323:1–11.) DHCS encourages FQHCs to have "boots on the ground" for these outreach efforts. (AA 323:22–23.) The CEO observed

that Family Health's clinics are located in one of the most ethnically diverse areas of the country and include people who speak many different languages, including but not limited to Sudanese, Somali, Latino, and Ethiopian. (AA 284:8–13.)

Ms. Butler-Cohen testified that DHCS identifies the homeless as being a particularly vulnerable population "that they wanted Community Based Organizations, CBOs, and FQHCs to target and reach [them] to move them into the Medi-Cal program. Homeless are generally, as a population, very difficult to reach." (AA 287:8–14.) The year she testified (2017) "[Family Health provided] healthcare to 35,000 unique homeless persons, and we have started shelters and we have mobile units." She explained that she is very familiar with what it takes to reach homeless people and, "you don't just build a building and tell them to come. You clearly must have culturally sensitive outreach to bring them into healthcare." (AA 287:15–23.)

Family Health kept detailed records of contacts made during the course of outreach through use of an outreach activity log listing location, hours and contacts conducted. (AA 633.) This form includes the name of the particular outreach worker, how many hours that person worked, the total number of individual interactions and the total number of materials distributed, as well as how many contacts were made for each particular area of service. (AA 269:10–20.) Outreach workers often make medical appointments for people with whom they come in contact. People in the segment of society treated by Family Health, including low-income people with limited English proficiency, teens, disabled, seniors and others, are unaware that affordable healthcare or free healthcare services exist for them. Consequently, Family Health's outreach workers go into the community, make these contacts and set up appointments. Those

appointments are notated to indicate whether or not the patients completed or missed the appointments. There is a significant level of accountability for outreach workers. (AA 270:7–20.)

Hearing exhibit C illustrated the types of medical services provided to patients contacted through Family Health's outreach efforts. It lists individual Family Health outreach workers, showing the contacts or intersections each outreach worker made with specific patients and the scheduling of appointments with those patients. For example, it might show whether an appointment involved a venipuncture, pregnancy test, entry into the prenatal program, and so forth. Ms. Butler-Cohen explained that Exhibit C is simply a billing ledger that identifies the actual services rendered for each of the patients reached through outreach efforts. (AA 271:5–19; 651.)

III. LEGAL ARGUMENT

A. It is Immaterial Whether the Outreach at Issue Increased Patient Utilization.

DHCS argues that Family Health did not present sufficient evidence to bring itself within a PRM section upon which Family Health does *not* rely. (ABM 37.) Specifically, DHCS cites the finding of the Administrative Law Judge that Family Health "was unable to offer sufficient documentation to establish that its outreach activities were aimed at the goal of presenting a good public image or were directly or indirectly related to patient care. Instead, these costs were centered on patient recruitment." (ABM 37; citing, AA 112.) That language refers to PRM section 2136.<u>1</u>, not 2136.<u>2</u>. Under 2136.1, advertising costs are allowable if they are "incurred in connection with the provider's public relations activities [and are] primarily concerned with the presentation of a good public image and directly or indirectly related to patient care. Examples [of permitted advertising costs]

are: visiting hours information, conduct of management-employee relations, etc." (PRM § 2136.1 (rev. 267, 09–82).) Family Health does not argue that its outreach activities fall within the scope of 2136.1 but contends instead that its outreach activities were not any form of advertising for purposes of 2136.1, and that they were not "advertising to the general public" for purposes of 2136.2. The appellate court's decision was based on the erroneous application of 2136.2. Hence, this argument about sufficiency of the evidence is a red herring.

It bears emphasis that section 2136.2 (which is the sole basis for the appellate court's decision) does not render unallowable costs associated with increasing patient utilization *unless* the costs are for "advertising to the general public." Stated another way, any activity that increases patient utilization is an allowable cost under 2136.2, except for "advertising to the general public." Based on the undisputed evidence concerning how Family Health conducted outreach, its costs are not made unallowable by PRM 2136.2. The unique personal encounters constituting Family Health's outreach do not amount to "advertising to the general public."

It is noteworthy that the words "related to" are used in two different contexts during this appeal. One is in the language of 2136.1, as just quoted, and which is not at issue. Also, as discussed in the Opening Brief on the Merits, at pages 15 to 17, for purposes of subdivision (a) of C.F.R. 413.9, Family Health argued on appeal that the act of helping a person obtain medical care through outreach is "related to" providing that medical care, especially considering the expansive interpretation given the words "related to" by the courts. The court of appeal did not disagree with Family Health on this point and based its decision solely on its view that section 2136.2 made outreach costs unallowable.

DHCS's ABM incorrectly characterizes Family Health's position as agreeing that PRM sections 2136 et seq. should guide the court's analysis

here. (ABM 26.) To the contrary, Family Health contends that outreach is not advertising and so the PRM provisions regarding advertising do not pertain. However, because the appellate court's decision is premised on the erroneous view that 2136.2 is dispositive, the question of its applicability is before this Court.

B. DHCS Fails in its Strained Attempt to Deconstruct the Language of Section 2136.2 to Encompass the Outreach Activities in This Case.

1. Pertinent Rules of Statutory Construction.

The rules of statutory construction apply to rules and regulations of administrative agencies. (*In re Richards* (1993) 16 Cal.App.4th 93, 97–98.) To determine what a statute means, courts first consult the words themselves, giving them their usual and ordinary meaning. (*Judd v. Weinstein* (9th Cir. 2020) 967 F.3d 952, 956; *McHugh v. Protective Life Ins.* (2021) 12 Cal. 5th 213, 227, 283; *Smith v. Fair Emp.'t & Hous. Comm'n* (1996) 12 Cal.4th 1143, 1155.) If possible, every word, phrase, and sentence is given significance. (*Hoffman v. Superior Ready Mix Concrete, L.P.* (2018) 30 Cal.App.5th 474, 481.) A construction that renders any part of a statute superfluous or surplusage should be avoided (*Curtis v. Irwin Indus.* (9th Cir. 2019) 913 F.3d 1146, 1154; *People v. Clayton* (2021) 66 Cal.App.5th 145, 157–158; *People v. Miracle* (2018) 6 Cal. 5th 318, 339–340; *Finlan v. Chase* (2021) 68 Cal.App.5th 934, 942). An interpretation should not render a word nugatory. (*People v. Torres* (2020) 48 Cal.App.5th 550, 557; *St. Cyr v. Workers' Comp. Appeals Bd.* (1987) 196 Cal.App.3d 468, 473.)

Words are not considered in isolation; they are construed in context. (*Busker v. Wabtec Corp.* (2021) 11 Cal. 5th 1147, 1158.) If the statute is

reasonably susceptible to two or more interpretations, the most reasonable one should prevail. (*Palmer v. Workers' Comp. Appeals Bd.* (1987) 192 Cal.App.3d 1241, 1249.) Applying those rules to the language at issue compels rejection of DHCS's proffered interpretations.

2. The language in 2136.2 makes it clear that the "advertising" to which it pertains is advertising "to the general public."

The language at issue in PRM section 2136.2 is the following:

> "[c]osts of advertising to the general public which seek to increase patient utilization of the provider's facilities are not allowable. . . . While it is the policy of the [relevant federal agencies] to promote the growth and expansion of needed provider facilities, general advertising to promote an increase in the patient utilization of services is not properly related to the care of patients."

As discussed below, DHCS argues, *inter alia*, that these words should be construed to mean that even a private conversation between two people about one person's unique medical needs is "advertising" because the outreach worker is giving some kind of "notice" to the other person, and that this supposed "advertising" is to "the general public" because the individual receiving the information is a member of the general public, or alternatively because the private conversation occurs in an area open to the public.

Selecting one Webster's Dictionary definition of the word "advertise" as meaning "to make known to (someone)' or "give notice to," DHCS suggests that Family Health's outreach activities can be viewed as "advertising to the general public" within the meaning of PRM section 2136.2 because Family Health's outreach "gave notice to" medially at-risk

individuals how to obtain healthcare. (ABM 27–28.)[3] Apparently, DHCS believes that informing an individual about how to obtain medical care during the course of a private conversation qualifies as "advertising" for purposes of 2136.2 because the outreach worker is "giv[ing] notice to" the individual about something. The ABM suggests various hypothetical scenarios and wonders how we are to know what is subject to 2136.2 (ABM 36.) Fortunately, the answer lies in the language of the section itself.

Section 2136.2 does not use the word "advertising" in isolation. Instead, in the first instance "advertising" is modified by the prepositional phrase "*to the general public*." (Italics added.) The words "to the general public" in 2136.2 have a purpose and must be given effect. (Code Civ. Proc., § 1858.) The broad interpretation offered by DHCS would render superfluous the words "to the general public."

The word "general" also modifies the word "advertising" three sentences later in 2136.2, as follows: "…*general advertising* to promote an increase in the patient utilization of services is not properly related to the care of patients." (Italics added.) This second use of the adjective "general" in that paragraph has a limiting effect on the meaning of "advertising." The word "general" is defined, in pertinent part, as follows:

> "**1 a** completely or almost universal. **B** including or affecting all or nearly all parts or cases of things. **2** prevalent, widespread, usual. **3** not partial, particular, local, or sectional. **4** not limited in application; relating to whole classes or all cases." (The Oxford Encyclopedic Dict. (1991) p. 585, col. 2.)

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[3] The first dictionary definition of the verb "advertise" typically involves announcing a product or service "in some public medium of communication in order to induce people to buy or use it." (Webster's Encyclopedic Unabridged Dict. Of the English Language (2001) p.29, col. 2.)

According to Collins Dictionary online, the noun modified by the adjective "general" "is not restricted to any one thing or area…."[4] And Oxford's online dictionary at lexico.com similarly defines "general" to mean "[a]ffecting or concerning all or most people, places, or things; widespread."[5] Based on these definitions, "*general* advertising" would consist of advertising that is completely or almost completely universal and widespread. Therefore, the sharing of information during a private conversation between an outreach worker and another person about that person's unique medical needs cannot reasonably be construed as "general" advertising, assuming it is "advertising" at all. If 2136.2 was intended to be as broad as DHCS contends, there would have been no need to limit it to "general" advertising." The word "general" would be superfluous.

Moreover, if DHCS's interpretation of the PRM language were correct--that any type of "notice" from an outreach worker to a potential patient that increases patient utilization is subject to 2136.2, the entire phrase "advertising to the general public" would also be superfluous. If the scope were as broad as DHCS contends, 2136.2 would have stated something to the effect that "costs of providing any information which seeks to increase patient utilization are not allowable," instead of stating "[c]osts of advertising to the general public which seeks to increase patient utilization of the provider's facilities are not allowable." Settled rules of statutory construction compel rejection of DHCS's expansive interpretation.

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[4] https://www.collinsdictionary.com/us/dictionary/english/general

[5] Oxford University Press: https://www.lexico.com/definition/general.

3. In context, "advertising" in the phrase "advertising to the general public" in 2136.2 refers to widespread delivery of information.

As mentioned above, words are not considered in isolation; they are construed in context. (*Busker v. Wabtec Corp.*, *supra*, 11 Cal. 5th at p. 1158.) In 2136.2, two sentences after the sentence referring to "advertising to the general public" is the following sentence about allowability of public relations costs: "An analysis by the intermediary *of the advertising copy and its distribution* may then be necessary to determine the specific objective." (Italics added.) The reference to "advertising *copy*" suggests that the form of "advertising" referred to in 2136.2 involves widespread dissemination of the message, because the term "advertising copy" typically refers to "material for a newspaper or magazine article…" (The Oxford Encyclopedic English Dict. (1991) p.321, col. 2) or "the text of a news story, advertisement, television commercial, etc. …." (Webster's Encyclopedic Unabridged Dict. Of the English Language (2001) p. 448, col. 3.) Examining the language at issue in context to discern the scope and purpose and to harmonize the various parts (*Kaanaana v. Barrett Bus. Servs.* (2021) 11 Cal. 5th 158, 168), it appears "advertising" as used in 2136.2 focuses on large scale messaging through one or more forms of media as to which the concept of "advertising copy" has some relevance. Outreach is nothing like that and 2136.2 does not pertain. Further, this contextual interpretation is consistent with the typical definition of "advertisement" as "a public notice or announcement, *esp.one advertising goods and services in newspapers, posters, or in broadcasts*." (The Oxford Encyclopedic English Dict. (1991) p. 19, col. 2; italics added.) Even the definition of "advertise" offered by DHCS notes that advertising is typically accomplished "esp[ecially] by means of printed or broadcast paid announcements." (ABM 27; internal quotes omitted.)

4. DHCS seems to concede that Family Health's outreach is not *actually* advertising.

At page 33 of the ABM, DHCS argues that even if Family Health's outreach is not *actually* "advertising" it is "akin to" advertising and that is close enough to subject Family Health to the restrictions of 2136.2, stating:

> "Family Health also faults the court of appeal for describing the outreach activities as being 'akin' to advertising (as opposed to actually being advertising). (OBM 25.) But the outcome in this case should not depend on whether on views the activities as literally being advertising or as merely being 'akin to' advertising. Either way, the court of appeal was right to follow the PRM's guidance regarding advertising costs, in light of the significant overlap between outreach and advertising."

In that context, DHCS asserts that "Family Health apparently does not dispute that outreach activities in fact *are* akin to advertising," citing page 25 of the Opening Brief on the Merits ("OBM"). First, to be perfectly clear, *Family Health definitely does not accept the notion that its outreach is "akin to" advertising* (whatever that means) and there is nothing on page 25 of its OBM to suggest otherwise.

However, this discussion in the ABM makes a point presumably unintended by DHCS. That is, the appellate court's determination that outreach was "akin to" advertising means the court implicitly concluded outreach was not *actually* advertising because something that is "akin" to something else is merely similar, but by definition not identical. Hence, outreach is not advertising even under the appellate court's analysis.

The language of section 2136.2 does not indicate in any way that costs should be disallowed for activities *similar* to advertising. To read that into the section violates fundamental rules of statutory construction. As this

Court has stated: "… in construing this, or any statute, we may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does. Our office … is simply to ascertain and declare what is in the relevant statutes, not to insert what has been omitted, or to omit what has been inserted." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545; internal citations and quotation marks omitted.) "[A] court … may not rewrite the statute to conform to an assumed intention which does not appear from its language." (*Ibid.*; internal citations and quotation marks omitted.) The invitation of DHCS to this Court to broaden 2136.2 by effectively inserting "akin to" before the words "advertising to the general public" should be declined as contrary to that fundamental rule of statutory construction. Unfortunately, the court of appeal accepted that same invitation from DHCS and committed reversible error as a result.

DHCS asserts at ABM 28 that "in many contexts the terms 'advertising' and outreach' are used in tandem or interchangeably," citing *Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal. 5th 141, 154 *(Orange)*. DHCS misreads *Orange*, which does not stand for the proffered proposition. *Orange* involved a request that the City of Orange amend its general plan to permit residential development on public open space. A development committee established by the City of Orange to deal with disputes among local landowners, developers, and residents conducted "outreach and evaluation" to develop a specific plan for use of particular property. (*Id.* at p. 146.) The word "outreach" also appears in the context of guidelines of the Governor's Office for facilitating public involvement in such processes, and in which it recommended "conducting advertising and outreach to different segments of the community…." (*Id.* at p. 154.) DHCS's assertion that the terms "advertising" and "outreach" are used interchangeably or are overlapping concepts "in many contexts" is based

completely on this one, isolated reference in a case having nothing to do with the outreach activities of an FQHC like Family Health. And, although *Orang*e does not explain what "outreach" meant in the context of the Governor's Office guidelines at issue therein, presumably it meant something other than "advertising," or it would not have been necessary to use both words in the same sentence.

5. The word "public" in 2136.2 does not mean private.

Apparently, DHCS also contends the words "general public" in the phrase "advertising to the general public" are ambiguous and could even encompass a private conversation between two people for purposes of 2136.2. (ABM 36.) The noun "public" when referring to people is defined as "**2**: the people as a whole **:** POPULACE …."[6] Obviously, a private conversation between a few people about the personal health needs of someone who belongs to a narrow and unique segment of society, is not directed to the populace or community as a whole and therefore does not constitute "advertising to the general public."

6. Cases interpreting unfair business practices statutes are inapplicable.

DHCS cites cases[7] involving statutes that regulate specific business practices and prohibit public dissemination of false or misleading

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[6] Merriam-Webster online https://www.merriam-webster.com/dictionary/public; italics added.

[7] *Chern v. Bank of Am.* (1976) 15 Cal.3d 866; *People v. Superior Court* (1973) 9 Cal.3d 283; *People v. Conway* (1974) 42 Cal.App.3d 875.

information in various contexts[8] for the proposition that a private communication between a Family Health outreach worker and an indigent person about that person's medical needs qualifies as an "advertisement." (AB 30–31.) Concerning those statutes, the Legislature chose to use exceptionally broad language. As stated in *Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, in reference to Vehicle Code section 11713: "Indeed, [that statute] makes it unlawful to disseminate untrue or misleading statements before the public by any manner or means whatever. *Broader language would be difficult to find*." (*Id.* at p. 357; italics added.) "[T]he body of the subdivision refers generally to statements made or disseminated to the public, a definition broad enough to include oral statements to individual members of the public." (*Id.* at p. 459.) The court in *Ford Dealers* noted the Legislature has chosen to use "the same broad language" in Vehicle Code section 11713 as it did in Business and Professions Code section 17500. (*Id*. at p. 359.) The statutory meaning of "advertising" in those statutes includes all manner of disseminating information, so that even one-on-one representations can sometimes be viewed as falling within their scope. As one treatise notes: "Statements or representations governed by section 17500 need not be 'advertising' in any lay sense." (California Antitrust and Unfair Competition Law, § 17.05, subd. D (2021).) The instant case obviously does not involve one of those statutes or any form of unlawful business practices law, and the expansive interpretation given to the concept of "advertising" in those statutes does not apply, especially since the form of advertising disallowed by 2136.2 is advertising "to the general public."

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[8] The statutes discussed are Vehicle Code section 11713 and Business and Professions Code section 17500.

7. A private and personal conversation about a specific person's medical needs does not become advertising to the general public simply because it occurs in an area open to the public.

DHCS implies that because these private conversations often occurred in areas open to the public, the "general public" component was satisfied. (ABM 29–30.) Not surprisingly, DHCS cites no authority for that notion. The outreach conversations were on a personal basis and involved the unique medical needs of the particular individuals involved. Outreach workers have "individual interactions." (AA 269.) They talk to these individuals in such places as on the streets, in alleys and homeless encampments and shelters, parks and beaches where public nurses will not even go. (AA 288:2–11.) An outreach worker typically engages an individual in places frequented by homeless folks, such as rescue missions. (AA 322:17–25.) Outreach is conducted in culturally diverse areas, where different languages are spoken, exercising culturally sensitive communication skills. (AA 287/310.) Whether or not these private conversations occurred in areas open to the public is irrelevant to the analysis. Moreover, the medically at-risk people helped through outreach are often homeless and literally *live* in public spaces. That is where they are to be found. If outreach did not happen in public spaces, it would not happen at all.

8. The inapplicability of 2136.2 to Family Health's outreach is evident.

DHCS also posits that it is difficult to discern, from one case to another, if a particular form of outreach crosses the line from allowable to non-allowable advertising for purposes of the PRM. (AB 29.) Whether or not

that is a legitimate concern in the abstract, drawing a line in this case presents no difficulty whatsoever. All of the evidence about how Family Health conducted its outreach described highly individualized encounters consisting of personal conversations with at-risk individuals about each person's unique health needs and how to obtain medical services. DHCS did not counter that evidence and offered no evidence to the effect that Family Health's outreach involved mass communications to the general public.

The case of *Gosman v. United States* (Ct. Cl. 1978) 573 F.2d 32, 38, cited by DHCS in this context, is not helpful to its argument. The type of general advertising at issue in *Gosman* by radio, tv and other media was properly disallowed because it was "general advertising." *Gosman* is completely consistent with the position of Family Health in this case and demonstrates what is properly within the scope of 2136.2. *Gosman* did not involve outreach and obviously the form of general advertising at issue in that case is completely unlike the outreach activities in this case.

At page 29 of its ABM, DHCS quotes the following from *Gosman*: "general advertising to promote an increase in patient utilization of services is not properly related to the care of patients." Aside from the fact that Family Health's outreach is not "general advertising," a close reading of *Gosman* reveals that the Federal Circuit Court was not stating its own view in that regard but was summarizing the conclusions of the administrative hearing panel under review. *(Id*. at p. 628.) In any event, *Gosman* bears no relationship to the circumstances of the instant case.

9. One or a few people are not "the general public" for purposes of 2136.2.

DHCS also argues that because a single person is technically a *member* of the general public, a conversation with even one person can be interpreted as "advertising to the general public" for purposes of 2136.2. (ABM 36.) However, section 2136.2 by its own terms does not make a cost unallowable if it is an activity directed to a *member* of the general public; to be disallowed the cost must consist of advertising directed to the general public as a group. As noted, *general* means widespread like the media advertising disallowed in *Gosman*.

Ironically, DHCS essentially argues in this context that the guideline upon which it relies to disallow Family Health's outreach costs (2136.2) is ambiguous as to the meaning of "general public," and DHCS suggests various hypotheticals that might be confusing if they should ever arise. (ABM 36.) DHCS seems to blame Family Health to the extent there is confusion in the language of the PRM, suggesting that Family Health should offer guidance for handling such potential, future scenarios. (*Id*.) Perhaps a case may arise in the future in which it will be difficult to determine if certain outreach activities constitute "advertising to the general public," *but this is not that case*. The undisputed evidence regarding outreach in this case leaves no doubt that Family Health's outreach activities, directed to a unique and narrow segment of the population, is neither "advertising to the general public" nor "general advertising" to which 2136.2 refers.

Taking a different tack, DHCS cites *St. Francis Hosp., Inc. v. Califano* (D.D.C. 1979) 479 F.Supp. 761, 764, as support for the argument that the words "general public" in the phrase "advertising to the general public" means that all communications are "to the general public" unless the

recipient is an existing patient of the provider. (ABM 35–36.) *St. Francis* involved a hospital that implemented “the Tel-Med system” of recorded health messages and “was not restricted to the plaintiff's patients; it was available to the community at large.” The hospital sought to invoke 2136.1 contending it was an allowable public relations expense. The federal trial court concluded that because the Tel-Med system was designed for the benefit of the community at large, it was not “related to the care of beneficiaries” for purposes of 42 C.F.R. section 405. (*Id.*) The case concerned neither FQHC outreach, nor FQHCs in any other regard. .

DHCS’s attempt to adapt that concept to the present circumstance fails. The obvious (and patient care “related”) purpose of outreach, as the record is replete in demonstrating, is to enable medically underserved individuals to obtain needed care which they are not currently receiving. At a minimum, advising a homeless person about available medical services and helping to arrange for the person to receive those services is “related to” those services.[9] The idea that the activity must be directed to an existing patient to meet the “related to” standard is incompatible with the language of 2136.1 itself, pursuant to which costs are allowable for advertising about “visiting hours,” which would be directed primarily to people *visiting* patients—not directly to care of the patient. Allowable advertising under 2136.1 also includes advertising about “information, conduct of management-employee relations, etc.” None of that is directed to existing patients but is necessarily “related to” patient care since it is specifically an allowable cost under 2136.1.

[9] Family Health’s briefing on appeal discussed in detail why its outreach advising people how to obtain medical services is necessarily “related to” providing of those medical services. The appellate court did not disagree with Family Health and based its decision solely on the perceived applicability of 2136.2.

C. Family Health's Outreach Efforts are Directed to a Narrow and Unique Segment of Society, not to the General Public.

Family Health's outreach is not directed to "the general public." It is directed only to a unique and limited segment of "the general public." FQHCs like Family Health "serve communities that may have financial disadvantages, language barriers, geographic barriers, or other specific needs. They serve high-need areas determined by the federal government facing high levels of poverty, negative health outcomes, and limited access to health care services."[10] Outreach is an essential activity for an FQHC to fulfill its mission for meeting the needs of medically underserved individuals. DHCS acknowledges "that outreach is a critical tool for ensuring that Medi-Cal beneficiaries are able to access the healthcare services available to them." (ABM 45.) This "target group" comprised of homeless, destitute, incapacitated and others in peril, clearly is not synonymous with the "general public." Regardless of the term given to Family Health's outreach activities, under no reasonable interpretation are these activities directed "to the general public." Hence, Family Health's outreach is not subject to section 2136.2.

D. DHCS's Discussion about Grants is Inaccurate and not Pertinent to the Issues before this Court.

The discussion toward the end of the ABM about grants as a substitute for allowing outreach costs to be included in the rate setting process (ABM

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[10] Warrick, Anna, *The Role of Federally Qualified Health Centers in Serving the Medi-Cal Population* (Spring 2017) Occidental College Urban and Environmental Policy Student Scholarship. https://scholar.oxy.edu/uep_student/9. Footnotes omitted.

48–49) is inaccurate, confuses two distinct concepts and not pertinent to the issues in any event. Most importantly, it was not a basis for the appellate court's decision.

The ABM incorrectly equates grant revenue with reimbursable costs. Grants constitute funding for specific new or expanded programs, a process which is entirely distinct from the question at issue here of whether outreach costs are properly included in an FQHC's Medi-Cal cost report for purposes of calculating its rate per visit for providing covered medical services to Medi-Cal beneficiaries. Grant funding is just that, funding for specified FQHC programs, and bears no relationship to the determination of what constitutes an allowable cost in an FQHC's Medi-Cal cost report, which is the issue here.

The PRM, Part 1, Chapter 6, titled "Grants, Gifts, and Income from Endowments" provides in section 600:

> "For cost reporting periods beginning on or after October 1, 1983, *grants* ... whether or not the donor restricts the use for a specific purpose, *are not deducted from a provider's operating costs in computing reimbursable cost.* For periods beginning prior to October 1, 1983, restricted grants, gifts, or endowment income designated by a donor for paying specific operating costs were deducted from the particular operating cost or group of costs." (Italics added.)

Thus, according to the PRM itself, even if grant funds had been available for the particular outreach efforts at issue (which was not established by DHCS in this case), that would not have been a proper basis for DHCS to determine that outreach was not an allowable cost.

Although the DHCS suggests that the effect of the Court of Appeal's decision was simply to deny FQHCs *additional payment* via Medi-Cal reimbursement for these outreach costs supposedly funded through a

separate federal grant, DHCS cited no evidence that the outreach costs it disallowed in this case were funded through any federal grant. There is no support in the record or applicable law that particular grants will fill the gap if Family Health's outreach costs are not allowed for the reimbursement process.

IV. CONCLUSION

Consistent with the commonly understood meaning of "general advertising" as reflected in dictionary definitions, *Gosman v. United States*, *supra*, 573 F.2d at p. 31, demonstrates that 2136.2's reference to advertising to the general public involves advertising through TV, radio and other forms of mass media. (*Id.* at pp. 628–629.) On the other hand, a personal and private conversation between an outreach worker and indigent individuals about available healthcare services is not "advertising to the general public" and not subject to 2136.2. Further, the "target group" of medically underserved people living in homeless shelters, encampments and other squalor conditions cannot reasonably be considered the "general public." The linguistic contortions in the ABM do not overcome the plain language of section 2136.2. Settled rules of statutory construction compel the conclusion that Family Health's outreach is not subject to 2136.2 and accordingly, for the reasons stated above and in all the briefing submitted by Family Health, it is respectfully requested that the erroneous decision of the appellate court be reversed.

Respectfully submitted,

Dated: April 12, 2022 By: /s/ George Murphy

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Dated: April 12, 2022 By: /s/ George Murphy

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Supreme Court of California

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