2022 Annual Review FCA/FCPA: Fraud and Enforcement Panel

Supplementary Materials

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PART 744—[AMENDED]

■ 1. The authority citation for 15 CFR part 744 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 18, 2020, 85 FR 59641 (September 22, 2020); Notice of November 12, 2020, 85 FR 72897 (November 13, 2020).

■ 2. Supplement No. 4 to part 744 is amended under BURMA by:

■ a. Adding in alphabetical order an entry for ''King Royal Technologies Co., Ltd.'';

■ b. Revising the listing for ''Myanmar Economic Corporation''; and

■ c. Adding in alphabetical order entries for ''Myanmar Wanbao Mining Copper, Ltd.,'' ''Myanmar Yang Tse Copper, Ltd.,'' and ''Wanbao Mining, Ltd.''.

The additions and revision read as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	*	*	*	*
BURMA	*	*	*	*
	King Royal Technologies Co., Ltd., a.k.a., the following one alias: —KRT. 4, Min Dhama Rd., Shwe Gabar 6th St, Shwe Gabar Housing, Mayangone, Yangon , Burma; *and* Room 4 Shwe Gabar 6th Yangon, Burma.	All items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	86 FR [INSERT FR PAGE NUMBER AND July 6, 2021].
	*	*	*	*
	Myanmar Economic Corporation, a.k.a., the following one alias: —MEC. Corner of Ahlone Road and Strand Road, Ahlone Township, Yangon, Burma.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	86 FR 13180, 3/8/2021. 86 FR [INSERT FR PAGE NUMBER AND July 6, 2021].
	*	*	*	*
	Myanmar Wanbao Mining Copper, Ltd., Yangon Office 70 (I)Bo Chein Street Pyay Road, Hlaing Township, Yangon, Burma.	All items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	86 FR [INSERT FR PAGE NUMBER AND July 6, 2021].
	Myanmar Yang Tse Copper, Ltd., 70/I, Bo Chein St., Ward (11), Hlaing, Yangon, Burma.	All items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	86 FR [INSERT FR PAGE NUMBER AND July 6, 2021].
	Wanbao Mining, Ltd., 70 Bo Chain Ln, Yangon, Burma.	All items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	86 FR [INSERT FR PAGE NUMBER AND July 6, 2021].
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Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2021–14367 Filed 7–2–21; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 11

[Docket No. FR–6192–F–02]

RIN 2501–AD93

Implementing Executive Order 13992, Revocation of Certain Executive Orders Concerning Federal Regulation

AGENCY: Office of General Counsel, HUD.

ACTION: Final rule.

SUMMARY: On November 10, 2020, the U.S. Department of Housing and Urban Development (HUD, or the Department) published an interim final rule that implemented Executive Order 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents.'' This order required Federal agencies to publish regulations to codify processes and procedures for issuing guidance documents. HUD created new regulations that outlined HUD policy and procedures for issuing guidance documents. On January 20, 2021, President Biden issued Executive Order 13992, ''Revocation of Certain Executive Orders Concerning Federal Regulation'' which, among other things, revoked Executive Order 13891. After considering the public comments HUD received in response to its interim final rule and given the revocation of Executive Order 13891, this final rule removes the regulations HUD created in January.

DATES: Effective August 5, 2021.

FOR FURTHER INFORMATION CONTACT: Aaron Santa Anna, Associate General Counsel, Office of Legislation and Regulations, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW, Room 10282, Washington, DC 20410–5000; telephone (202) 402–5300 (this is not a toll-free telephone number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. Executive Order 13891 on Promoting the Rule of Law Through Improved Agency Guidance Documents

On October 9, 2019 (84 FR 55235), the President issued Executive Order (E.O.) 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents.'' E.O. 13891 recognized that the Administrative Procedure Act (5 U.S.C. 551–559) (APA) exempts ''interpretive rules, general statements of policy, or rules of agency organization, procedure or practice,'' except when required by statute, from the notice and comment requirements for rulemaking. (5 U.S.C. 553(b)). E.O. 13891 stated, however, that, in the view of the last administration, agencies have sometimes used this authority to issue guidance documents that regulate the public without following the notice and comment rulemaking procedures of the APA. As a result, E.O. 13891 required Federal agencies to issue regulations to codify processes and procedures for issuing guidance documents. Among other things, E.O. 13891 required that agency regulations establish procedures for modifying, withdrawing, and using guidance documents, including requiring notice and comment for significant guidance documents, and taking and responding to petitions from the public for withdrawal or modification of a particular guidance document.

B. HUD's Interim Final Rule

In response to E.O. 13891, HUD published an interim final rule on November 10, 2020 (85 FR 71537) that established a new part 11 in title 24 of the CFR. The new part 11 required HUD to follow certain procedures in issuing guidance documents. These procedures included: Establishing a single agency website where the public can find all HUD guidance in effect; OMB review of significant guidance; public comment on significant guidance; and a procedure for the public to request withdrawal or modification of a guidance document. In issuing its interim final rule, HUD determined that good cause existed to omit advanced public comment because the rule was limited to internal HUD procedures and did not impose new requirements on members of the public. The rule took effect on December 10, 2020.

Although HUD determined that good cause existed to publish its interim final rule prior to soliciting public comment, HUD provided for a 60-day public comment period. In response to its interim final rule, HUD received seven public comments which were mostly critical of, or recommended significant changes to, the interim final rule. A summary of these comments and HUD's responses to them are provided in Section III of this document.

C. Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation of January 20, 2021

On January 20, 2021, President Biden issued E.O. 13992, ''Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation,'' which among other things, revoked E.O. 13891. E.O. 13992 also directed agencies to promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof that implemented or enforced the Executive Orders revoked. E.O. 13992 states, ''It is the policy of [the] Administration to use available tools to confront the urgent challenges facing the Nation, including the coronavirus disease 2019 (COVID–19) pandemic, economic recovery, racial justice, and climate change. To tackle these challenges effectively, executive departments and agencies (agencies) must be equipped with the flexibility to use robust regulatory action to address national priorities. This order revokes harmful policies and directives that threaten to frustrate the Federal Government's ability to confront these problems and empowers agencies to use appropriate regulatory tools to achieve these goals.''

II. This Final Rule

Given the revocation of E.O. 13891, and after considering the public comments HUD received in response to the interim final rule, HUD has decided to remove 24 CFR part 11. In reaching this conclusion, HUD concluded that the interim final rule deprives HUD of necessary flexibility to determine when and how to best issue guidance documents based on particular facts and circumstances, and unduly restricts HUD's ability to provide timely guidance on which the public can confidently rely. Notwithstanding this determination, HUD takes the opportunity in this rule to respond to public comments received in response to its interim final rule.

III. The Public Comments

The comment period for HUD's interim final rule closed on January 11, 2021. HUD received seven public comments from various housing policy and legal interest groups, a law firm, and two public housing agencies (PHAs). HUD appreciates the time that commenters took to review its interim final rule and provide helpful information and valuable comments and recommendations.

The Comments Generally

Most commenters opposed the interim final rule and urged HUD to withdraw or rescind the rule and ''abandon'' codification of 24 CFR part 11. Most commenters stated that HUD should encourage the facilitation and dissemination of guidance, particularly given the urgent need for federal response to current crises, such as the COVID–19 pandemic and lack of affordable housing, and housing discrimination. These commenters stated that the rule would make it more difficult for HUD to quickly respond to these crises and fulfill its mission of creating strong, sustainable, inclusive communities.

A majority of the commenters also thought that the rule would create confusion among HUD stakeholders and the public. Commenters stated that the interim final rule ''would have a negative impact on the successful administration of HUD's programs,'' and would ''significantly delay each program office's ability to be responsive to emergencies and emerging questions and issues and increase the workload for HUD.'' Commenters also warned that the burdens and delays imposed by the interim final rule would negatively impact the ability of stakeholders such as PHAs, tenants, and advocacy groups to carry out their respective missions and may subject their programs to litigation.

Two commenters generally supported the interim final rule but offered recommendations for significant changes, such as expanding it to provide the public an opportunity to request the issuance of new guidance or the reinstatement of rescinded guidance. One commenter recommended that HUD include an explicit judicial review

provision to make it clear when review of a document becomes final to permit an interested party to seek redress from the courts.

Comment: The Interim final rule's procedural requirements will delay the issuance of guidance and limit HUD's flexibility in issuing guidance.

Commenters expressed concern with the review of HUD guidance by the Office of Information and Regulatory Affairs (OIRA) and the need for HUD to receive and review public comments on significant guidance. One commenter stated that OIRA is a small office with a heavy workload that is slow to formally review proposed and final rules submitted by HUD. The commenter stated that adding the review of many HUD guidance documents to OIRA's workload would cause significant delays in the issuance of both HUD's guidance documents and its rules issued under the Administrative Procedure Act. Another commenter stated that ''applying such procedures to sub-regulatory guidance creates unnecessary and burdensome bureaucracy.'' Other commenters said that the review, approval, and signature process for significant guidance ''would hamper [HUD's] ability to act nimbly to issue guidance on key issues.'' Finally, one commenter noted that the rule would not only delay, but ultimately prevent, the dissemination of guidance.

Commenters also stated that allowing petitions to modify or rescind guidance documents and the requirement for HUD to respond to each petition in writing, would drain scarce agency resources and hamper HUD's ability to issue important guidance. One commenter stated that the process of permitting HUD to issue a coordinated response to similar petitions is insufficient to address delay issues. The commenter further said that HUD would be ''doing the work'' for petitioners with inadequate submissions ''by laying out a roadmap and effectively crafting arguments for petitioners to have their petitions successfully adjudicated.'' Another commenter added that the ''petition mechanism will likely confuse funding recipients,'' which in turn would create more work for HUD staff and delay day-to-day programmatic decision-making. The commenter also noted that ''the interim final rule will strip authority from the career experts who normally develop guidance . . . and place day-to-day decisions directly into the hands of non-experts''.

HUD Response: HUD agrees that the timely dissemination of guidance documents is important to the successful administration and consistent implementation of its programs. In support of this policy, HUD must have flexibility to quickly issue guidance to further the implementation of HUD's programs without additional barriers. As commenters noted, applying the notice and comment process to significant guidance documents would unnecessarily detract from HUD's ability to respond to the needs of its stakeholders and adversely impact its ability to issue regulations under the APA by diverting HUD and OMB resources away from rulemaking processes. In addition, HUD currently seeks input from the public on many of its guidance documents and often issues guidance documents in response to such input and frequently asked questions. Similarly, HUD agrees that the petition process would cause delay in HUD's ability to disseminate guidance documents. Furthermore, HUD agrees that there is no need to codify such a requirement because HUD can and does already receive requests from the public which it considers when issuing, updating, and rescinding guidance.

Comment: The ambiguity of the terms used in the interim final rule make the scope of the rule unclear.

Commenters stated that the interim final rule lacks clarity, uses ambiguous terms, and creates general implementation issues. Many commenters stated that the interim final rule does not provide clear definitions and does not clarify which types of communication are subject to the rule. For example, commenters noted that the interim final rule's definition of what constitutes ''guidance'' is vague and makes the scope of the rule unclear. One commenter noted that the definition of ''guidance'' could be read broadly enough to include ''virtually all written communications HUD delivers to stakeholders.''

One commenter found the definition of guidance lacking and recommended that legal opinions directed to parties about circumstance-specific questions and Notices of Funding Availability (NOFAs) [1] be added to the definition of guidance documents. The commenter suggested that legal opinions are helpful to more than a single PHA facing similar factual scenarios.

Commenters also stated that the definition of ''significant guidance'' is unclear, overly broad, and susceptible to variance. One commenter stated that terms used in the definition of ''significant guidance,'' such as ''serious inconsistency'' or ''interference'' with another agency, are so vague that ''if [the interim final rule is] interpreted broadly, nearly every piece of guidance not explicitly exempted from being considered significant guidance will be subject to the burdensome OIRA review and public comment process.'' The commenter also noted the lack of explanation for how economic impact analyses would be conducted for significant guidance, and the apparent lack of public access to such analyses.

HUD Response: HUD agrees that the terms and definitions used by the interim final rule lack clarity and could lead to confusion and inconsistent implementation of HUD's programs. HUD appreciates the commenters' recommendations regarding legal opinions, but each legal opinion is party- and fact-specific, and HUD does not believe that they can be made generally applicable to other similarly situated parties. As for the NOFA process, PHAs and other entities are permitted to follow-up with HUD with questions regarding NOFAs and provide feedback for future NOFAs regardless of the language in part 11.

Lastly, HUD agrees with public commenters that the definitions of ''guidance'' and ''significant guidance'' could be interpreted broadly and doing so would make issuing guidance challenging. HUD notes that the definition of ''significant guidance'' incorporated in the interim final rule mirrors the definition in E.O. 12866 (Regulatory Planning and Review) for ''significant regulatory action'' and includes ''novel legal or policy issues'' which challenges articulating a specific definition. Notwithstanding, the requirement that HUD provide an economic analysis for guidance that rises to the level of ''significant regulatory action'' creates additional challenges to the Department's ability to timely issue guidance and outweighs any benefit resulting from the interim final rule.

Comment: The interim final rule creates uncertainty.

Commenters stated that the uncertainty created by the interim final rule would negatively affect HUD constituencies that routinely rely on HUD guidance, including tenants, advocates, owners, vulnerable populations, and PHAs. One commenter stated that HUD guidance is undermined by the provision noting that ''the authority is nonbinding and unenforceable.'' The commenter stated

[1] HUD currently uses the term Notices of Funding Opportunity or ''NOFO'' for documents that would previously have been referred to as NOFAs. This change is based on the terminology used in Office of Management and Budget Management in its Guidance for Grants and Agreements (85 FR 49506, August 13, 2020). However, following the terminology used in the public comments, this document uses the term ''NOFA'' throughout.

that the interim final rule would ultimately lead to inconsistent interpretations of HUD guidance because the provision negates the purpose of issued guidance ''by inviting PHAs and owners to ignore it.'' Another commenter stated that if a guidance document, which PHAs have routinely incorporated into their policies for decades, is determined to have no legal effect or rescinded, PHAs will find themselves ''in limbo'' with no new replacement guidance.

One commenter stated that the interim final rule may adversely impact vulnerable populations and encourage discriminatory policies. For example, survivors of domestic violence, sexual assault, and stalking would be left without access to certain remedies and procedures established under guidance (but not mentioned in statutes or regulations). According to the commenter, ignoring guidance on emergency transfers leaves ''survivors without a clear path to obtaining an emergency transfer, leaving them in unsafe situations for longer periods of time.'' The commenter also stated, by way of example, that ''people with disabilities rely on HUD guidance to determine where they can live with their assistance or emotional support animals'' and provide people with disabilities a ''greater security when confronting housing discrimination.'' A commenter further asserted that ''by suggesting that PHAs or owners ignore HUD guidance, HUD encourages discriminatory policies against tenants with disabilities who need accommodations.''

Several commenters stated that the process for public petition would reduce reliance on guidance documents because it permits repeated requests for recission of certain documents, and ''create[s] a constant and ongoing state of uncertainty about whether the guidance will continue in effect or be withdrawn or modified pursuant to a petition from the public.'' Other commenters stated that it is not clear how the review of a petition would operate or what remedies would be available if the public disagrees with a determination made by HUD in response to a petition.

One commenter focused on several other aspects of the interim final rule that the commenter said are unclear, including the ''description of the public participation requirement;'' whether any exceptions to OIRA review under § 11.8 apply; how these exceptions interact with § 11.3(b); and the implications of the interim final rule on joint agency guidance. For the public participation requirement, the commenter referred to § 11.6(b), and stated that stakeholders cannot discern ''when HUD is soliciting public input on potential significant guidance.'' Another commenter stated that the applicability of the good cause exception is unclear.

One commenter stated that under the interim final rule, it is unclear how HUD would notify the public when significant guidance documents are available for comment, for example, whether HUD would publish the significant guidance documents in the **Federal Register** or post an open letter on its website. The commenter requested that HUD explain how it would choose between outreach methods.

Commenters also stated that the interim final rule lacked clarity as to whether it applies to guidance retroactively and sought clarification on whether existing guidance documents remain in effect. One commenter recommended that the scope of the interim final rule be limited to future guidance and allow current guidance to remain in place until the issuance of newly issued guidance documents.

HUD Response: HUD agrees that the processes outlined in the interim final rule lack clarity and would likely lead to the inconsistent application of HUD's programs. HUD also agrees that the use of guidance is helpful to supplement regulatory and statutory requirements and that HUD does not want to suggest, as a commenter stated, that guidance documents can be ignored. HUD agrees that HUD guidance documents that aim to prohibit and prevent discrimination against persons with disabilities and other protected classes should be reasonably relied on by stakeholders.

As for the ambiguity pointed out by commenters on procedures and processes for public petitions, identification of significant guidance for public comment, and retroactivity of the rule, HUD agrees that the rule provided minimal guidance to the public on how HUD would address those provisions and believes this further supports the determination to remove 24 CFR part 11.

Comment: The new indexed website portal is misguided.

One commenter supported HUD's use of the indexed guidance portal, but many had questions about it. A commenter questioned whether HUD has the operational capacity to establish and maintain a ''single, searchable, indexed website'' as required by the interim final rule. The commenter stated that although the interim final rule went into effect on December 10, 2020, ''it appears no such guidance website has been established.'' The commenter also asked what HUD intends to do with the guidance documents not posted on this new guidance website, or what will happen with guidance documents that are removed from the website.

Other commenters questioned whether the guidance portal will achieve the goal of making program policies more transparent. One commenter specifically noted that separating guidance documents from other types of documents (such as, NOFAs, legal briefs, and opinions) makes program administration and policies less transparent, especially since it is not clear what a guidance document is under the interim final rule. The commenter also questioned what HUD meant by describing the guidance portal as ''a single, accessible source of information'' for HUD programs and policies. The commenter recommended that ''it would be better to organize relevant documents of all types by program and subject matter, rather than by document type.''

Another commenter asked whether PHAs or members of the public could challenge HUD's decision to include or not include a guidance document on its website. The commenter noted that stakeholders ''should have a formal opportunity to inform HUD if previously-issued helpful guidance has been omitted from the guidance website.'' The commenter also recommended that HUD include on the portal cross-references to other federal agencies' guidance documents which potentially impact PHAs, such as, the Federal Highway Administration's guidance on relocation under the Uniform Relocation Assistance and Real Property Acquisition Act.

HUD Response: HUD will continue to disseminate and provide guidance documents pertaining to specific programs and agrees that continuing to organize documents by program type and subject matter may be helpful to PHAs and others using HUD programs. At the same time, it will continue to pursue ways to make its guidance documents more accessible to the public.

Comment: HUD lacked good cause to bypass the APA's notice-and-comment procedures.

Several commenters questioned HUD's authority to publish the interim final rule without first seeking public comment, noting that HUD did not adequately establish good cause to issue the rule. Commenters stated that no emergency or exigency existed to justify application of the good cause exception. These commenters said the fact that HUD issued its interim final rule more than a year after the issuance of E.O.

13891 undercuts HUD's justification to omit prior public comment. Commenters also stated that ''the approach taken by HUD in this rulemaking is wholly inconsistent with the value of public input.'' Some commenters stated that if HUD goes on to implement regulations on guidance, HUD should follow normal notice-and-comment procedure beginning with a proposed rule and should better involve stakeholders, such as PHAs.

HUD Response: HUD's authority to issue the interim final rule without the public notice period relied on both the APA and 24 CFR part 10 authority to issue rules regarding internal procedures prior to receiving public comment. HUD appreciates and understands the commenters' concerns, but HUD maintains that the interim final rule was procedural rather than substantive, because it affected only HUD internal procedures and imposed no obligations on parties outside the federal government. Specifically, the regulation required HUD to issue and maintain guidance documents in a certain manner but did not create any new obligations for parties other than HUD itself. HUD also notes that while it issued the interim final rule for immediate effect, it provided the opportunity for public comment that HUD has considered in issuing this final rule.

Comment: Changes could improve the interim final rule.

Some commenters generally supported the interim final rule but made recommendations for significant changes. One commenter supported the interim final rule's provision that provided the public a procedure to challenge the agency's issuance of guidance but recommended that the interim final rule also provide for ''judicial review after the final disposition of a petition for withdrawal or modification of guidance documents.'' The commenter reasoned that without additional procedure, regulated entities would have difficulty establishing that an agency's determination on a challenged guidance document is a ''final agency action'' subject to APA review. The commenter recommended revising § 11.6, by adding a paragraph that would provide, ''[a]ny agency pronouncement, response, or failure to respond pursuant to this section shall constitute final agency action under 5 U.S.C. 704 and shall be subject to review pursuant to 5 U.S.C. 702.''

Other commenters offered revisions to § 11.6, including adding provisions for the public to request clarification of existing guidance, reinstatement of old guidance, or creation of new guidance, and establishing a mechanism for expediting guidance when necessary. Another commenter stated that the rule does not explain how new procedures, namely the petition process, will be accessible to people with disabilities and emphasized the importance of ''ensuring that people with disabilities are afforded equal opportunity to comment during public notice and comment periods.'' One commenter recommended extending the comment period for significant guidance to 60 days, instead of the existing 30 days, because significant guidance documents ''are likely to be complex in subject matter and scope.''

HUD Response: HUD disagrees with these recommendations. Providing for ''judicial review after the final disposition of a petition for withdrawal or modification of guidance documents'' would create additional hurdles for HUD's issuance of guidance documents. Similarly, providing the public a formal opportunity to request the issuance of new guidance or the reinstatement of rescinded guidance would be extremely time consuming, require the use of limited HUD resources, and impede HUD's ability to provide timely guidance, particularly in times of crisis. Moreover, HUD believes that stakeholders already can and do question or request the revision of existing guidance, reinstatement of old guidance, or creation of new guidance. HUD believes that engagement with the public in this informal manner effectively addresses the needs of HUD stakeholders without the additional burden of creating a formal process as proposed.

President Biden's ''Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation,'' of January 20, 2021, revoking E.O. 13891 provides HUD the opportunity to remove 24 CFR part 11. Consideration of the comments received from the public provide HUD an additional basis for removing 24 CFR part 11.

IV. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Under E.O. 12866 (Regulatory Planning and Review), a determination must be made regarding whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. E.O. 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' E.O. 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.

This rule was determined not to be a ''significant regulatory action,'' under section 3(f) of E.O. 12866 and therefore was not reviewed by OMB. This rule is also not a major rule under the Congressional Review Act (5 U.S.C. 801 *et seq.*), as designated by the Office of Information and Regulatory Affairs (OIRA).

Environmental Impact

The rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and on the private sector. This rule does not impose a Federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule removes 24 CFR part 11 which would have required that HUD follow certain internal procedures in issuing guidance documents. These procedures included establishing a single agency website where the public can find all HUD guidance in effect; OMB review of significant guidance; public comment on significant guidance; and a

procedure for the public to request withdrawal or modification of a guidance document. Removal of these procedures imposes no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Executive Order 13132, Federalism

E.O. 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either: (1) Imposes substantial direct compliance costs on State and local governments and is not required by statute, or (2) preempts State law, unless the agency meets the consultation and funding requirements of Section 6 of the E.O. This Interim final rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments nor preempt state law within the meaning of the E.O.

List of Subjects in 24 CFR Part 11

Administrative practice and procedure.

PART 11 [REMOVED]

■ Accordingly, for the reasons described in the preamble and under the authority of 42 U.S.C. 3535(d), the U.S. Department of Housing and Urban Development removes 24 CFR part 11.

Dated: June 24, 2021.

Marcia L. Fudge,

Secretary.

[FR Doc. 2021–14019 Filed 7–2–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE TREASURY

Office of the Secretary

31 CFR Part 1

RIN 1505–AC73

Privacy Act; Special Inspector General for Pandemic Recovery

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Final rule.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, the Department of the Treasury, Departmental Offices (DO), is issuing a final rule to amend its regulations to exempt portion of the following new systems of records maintained by the Special Inspector General for Pandemic Recovery (SIGPR) from certain provisions of the Privacy Act. The exemption is intended to comply with the legal prohibitions against the disclosure of certain kinds of information and to protect certain information maintained in this system of records.

DATES: Effective July 6, 2021.

FOR FURTHER INFORMATION CONTACT: For questions about this notice and privacy issues, contact: Deputy Assistant Secretary for Privacy, Transparency, and Records at U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220; telephone: (202) 622–5710.

SUPPLEMENTARY INFORMATION:

Background

SIGPR was established by the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020. SIGPR has the duty to conduct, supervise, and coordinate audits, evaluations, and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury under programs established by the Secretary, as authorized by Section 4018(c) of the CARES Act, and the management by the Secretary of programs, as authorized by Section 4018(c) of the CARES Act. SIGPR's duties and responsibilities are set forth in Section 4018 of the CARES Act, and in the Inspector General Act of 1978, 5 U.S.C. app. 3. SIGPR plans to create these systems of records to facilitate SIGPR's audits, evaluations, investigations, and other operations to (1) promote economy, efficiency, and effectiveness in the administration of such programs; (2) prevent and detect fraud and abuse in the programs and operations within its jurisdiction; and (3) keep the head of the establishment and the Congress fully informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action. Treasury is publishing separately the notice of the new system of records to be maintained by SIGPR.

Under 5 U.S.C. 552a(j)(2) and (k)(2), the head of a federal agency may promulgate rules to exempt a system of records from certain provisions of 5 U.S.C. 552a if the system of records contains investigatory materials compiled for law enforcement purposes. Pursuant to these provisions, Treasury exempts the following system of records from 5 U.S.C. 552a (c)(3), (c)(4), (d)(1), (d)(2), (d)(3), (d)(4), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g) of the Privacy Act:

SIGPR .420—Audit and Evaluations Records

SIGPR .421—Case Management System and Investigative Records

SIGPR .423—Legal Records

The following are the reasons the investigatory materials contained in the above-referenced systems of records maintained by SIGPR may be exempted from various provisions of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2) and (k)(2):

(1) Exempted from 5 U.S.C. 552a(e)(4)(G) and (f)(l) (Agency Requirements and Rules) because release would give individuals an opportunity to learn whether they have been identified as suspects or subjects of investigation. As further described in the following paragraph, access to such knowledge may impair the ability of the Department of the Treasury and SIGPR (the Department/SIGPR) to carry out its respective missions, since individuals could:

(i) Take steps to avoid detection;

(ii) Inform associates that an investigation is in progress;

(iii) Learn the nature of the investigation;

(iv) Learn whether they are suspects or, instead, have been identified as alleged law violators;

(v) Begin, continue, or resume illegal conduct upon learning that they are not identified in the system of records; or

(vi) Destroy evidence needed to prove the violation.

(2) Exempted from 5 U.S.C. 552a(d)(1), (e)(4)(H) and (f)(2), (3) and (5) (Access to Records and Agency Requirements and Rules) because release might compromise the Department's/SIGPR's ability to provide useful tactical and strategic information to law enforcement agencies by:

(i) Permitting access to records contained in the systems of records such that it might provide information concerning the nature of current investigations and enable possible violators to avoid detection or apprehension by:

(A) Allowing the discovery of facts that could form the basis for violators' arrests;

(B) Enabling violators to destroy or alter evidence of alleged criminal conduct that could form the basis for arrest; and

(C) Using knowledge of the status of criminal investigations to delay the commission of a crime or commit a crime at a location that might not be under surveillance.

(ii) Permitting access to either on-going or closed investigative files might also reveal investigative techniques and

Office of the Attorney General
Washington, D. C. 20530

July 1, 2021

MEMORANDUM FOR: HEADS OF ALL DEPARTMENT COMPONENTS

FROM: THE ATTORNEY GENERAL

SUBJECT: ISSUANCE AND USE OF GUIDANCE DOCUMENTS BY THE DEPARTMENT OF JUSTICE

This Memorandum revises and clarifies the principles that should govern the issuance and use of guidance documents by the Department of Justice.

I. Introduction

A guidance document is a statement of general applicability issued by an agency to inform the public of its policies or legal interpretations. Guidance documents may take a variety of forms, including certain interpretive memoranda and manuals, policy statements, opinion letters of general applicability, and other similar materials. As it is used here, the term "guidance document" does not include legislative rules; adjudicatory or administrative actions; rulings; legal advice or trainings directed at other federal agencies; internal policies and guidelines; or litigation filings.

By definition, guidance documents "do not have the force and effect of law." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015) (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). Unlike rules promulgated through the notice and comment process, therefore, guidance documents do not bind the public and are not treated as binding by the courts. But guidance documents still serve many valuable functions. For example, interpretive guidance can "'advise the public' of how the agency understands, and is likely to apply, its binding statutes and legislative rules." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality opinion) (quoting *Perez*, 575 U.S. at 97). Guidance may also help explain an agency's programs and policies or communicate other important information to regulated entities and the public. Guidance can collect related statutes, regulations, and other requirements in a single place. And guidance materials often convey important information to the public in language that is clearer and more accessible than the underlying statutes and regulations. Guidance documents can thus serve as an important tool to promote transparency, fairness, and efficiency.

II. Rescission of previous Memoranda

Two recent Memoranda substantially changed the Department's traditional approach to guidance documents by establishing new review and approval conditions, and by placing additional restrictions and requirements on both publishing and relying on agency guidance. *See* Memorandum from the Attorney General, *Prohibition on Improper Guidance Documents* (Nov.

16, 2017) ("November 2017 Memorandum"); Memorandum from the Associate Attorney General, *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* (Jan. 25, 2018) ("January 2018 Memorandum"). Changes consistent with these memoranda were incorporated into the Justice Manual in 2018 and the Code of Federal Regulations in 2020. *See* JM 1-19.000; JM 1-20.100 to 1-20.205; 28 C.F.R. §§ 50.26 and 50.27 (2020). As explained in an Interim Final Rule being issued contemporaneously with this Memorandum, the procedures imposed by the November 2017 and January 2018 Memoranda are overly restrictive; the Memoranda and the implementing regulations have discouraged the development of valuable guidance; and the Memoranda and regulations have also generated collateral disputes and otherwise hampered Department attorneys when litigating cases where there is relevant agency guidance.

By this Memorandum, I am rescinding the November 2017 and January 2018 Memoranda. I further direct the Department to initiate the process to revise the Justice Manual to be consistent with this Memorandum, which sets forth the Department's policy regarding the issuance and use of guidance documents.

III. Principles for issuing and using guidance documents

Going forward, including in all currently pending litigation, the following principles should govern the Department's issuance of guidance documents and, as appropriate, the Department's use of guidance documents issued by both the Department and other agencies:

- The Department's guidance documents should be drafted with the recognition that they do not bind the public (except where binding by operation of a grant award or contract) or have the force and effect of law. Guidance documents may, however, set forth the Department's interpretation of binding regulations, statutes, and constitutional provisions. To reflect this distinction, Department components shall, to the greatest extent practicable: (i) label a document as guidance when it is intended as such; and (ii) cite the source of any binding legal requirements the guidance is describing.

- In the enforcement context, an agency guidance document by itself "never forms 'the basis for an enforcement action'" because such documents cannot "impose any 'legally binding requirements' on private parties." *Kisor*, 139 S. Ct. at 2420 (plurality opinion) (citation omitted). Instead, enforcement actions must be based on the failure to comply with a binding obligation, such as one imposed by the Constitution, a statute, a legislative rule, or a contract. *See, e.g.*, *id.* But Department attorneys handling an enforcement action (or any other litigation) may rely on relevant guidance documents in any appropriate and lawful circumstances, including when a guidance document may be entitled to deference or otherwise carry persuasive weight

with respect to the meaning of the applicable legal requirements. *See id.*; *see also id.* at 2424–25 (Roberts, C.J., concurring in part). To the extent guidance documents are relevant to claims or defenses in litigation, Department attorneys are free to cite or rely on such documents as appropriate.

- The Department's guidance documents should be clear, transparent, and readily accessible to the public. Department components are free to post guidance and other public-facing materials on their own websites. In addition, whenever practicable, Department components should continue posting materials to the Department's Online Guidance Portal, https://www.justice.gov/guidance; guidance documents posted there should contain unique numbers and include issuance and revision dates. While the Guidance Portal is intended for guidance documents, Department components may submit to the portal other public-facing materials that are published elsewhere when the publication of those materials on the Guidance Portal would benefit the public.

- The Department's guidance documents should reflect the breadth of expertise within the Department and should be drafted in a way that does not create inconsistencies among different components. I am directing the Office of Legal Policy to work with all relevant Department components to develop recommendations for an appropriate procedure to accomplish these goals. Those recommendations will be submitted to the Office of the Deputy Attorney General and the Office of the Attorney General for review and concurrence three months from the date of this Memorandum.

This Memorandum provides internal Department direction only. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter or proceeding. Nor does it place any limitations on otherwise lawful litigation prerogatives of the Department of Justice.

In the

United States Court of Appeals

For the Seventh Circuit

No. 20-2241

UNITED STATES OF AMERICA ex rel. TRACY SCHUTTE, *et al.*,
Relators-Appellants,

v.

SUPERVALU INC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the
Central District of Illinois.
No. 11-cv-3290 — **Richard Mills**, *Judge*.

ARGUED JANUARY 19, 2021 — DECIDED AUGUST 12, 2021

Before ROVNER, HAMILTON, and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. This Court is no stranger to False Claims Act *qui tam* actions. The present appeal, however, contains a novel question for this Circuit: does the Supreme Court's interpretation of the Fair Credit Reporting Act's scienter provision in *Safeco Insurance Company of America v. Burr*, 551 U.S. 47 (2007), apply with equal force to the False Claims Act's scienter provision? We join the four circuits that have

answered that question in the affirmative and hold that it does.

This issue comes to us in a lawsuit against Defendants (collectively, "SuperValu"), which claims that SuperValu knowingly filed false reports of its pharmacies' "usual and customary" ("U&C") drug prices when it sought reimbursements under Medicare and Medicaid. SuperValu listed its retail cash prices as its U&C drug prices rather than the lower, price-matched amounts that it charged qualifying customers under its discount program. Medicaid regulations define "usual and customary price" as the price charged to the general public. Based on our decision in *U.S. ex rel. Garbe v. Kmart Corporation*, 824 F.3d 632 (7th Cir. 2016), the district court held that SuperValu's discounted prices fell within the definition of U&C price and that SuperValu should have reported them. Relators Tracy Schutte and Michael Yarberry (the "Relators") thus established falsity, the first prong of their False Claims Act ("FCA" or "the Act") claims. On the scienter prong, however, the court applied the *Safeco* standard to the FCA and held that SuperValu did not meet it.

We agree that the scienter standard articulated in *Safeco* applies to the FCA. Here, as with the Fair Credit Reporting Act ("FCRA"), there is no statutory indication that Congress meant its usage of "knowingly," or the scienter definitions it encompasses, to bear a different meaning than its common law definition. We further hold that while the FCA's scienter provision is defined via three distinct definitions, a failure to establish the *Safeco* standard as a threshold matter precludes liability under any of these definitions. Applying this standard to the case at hand, SuperValu did not act with the

requisite knowledge under the FCA. The judgment of the district court is affirmed.

I. Background

Underlying this case is a complex regulatory scheme, the details of which inform whether SuperValu has run afoul of the FCA's prohibition on submitting false claims to the government. Before canvassing the case facts, it is necessary to provide a brief overview of both the regulatory schemes under Medicare Part D and Medicaid and our FCA precedent involving those statutes.

A. Medicare Part D and Medicaid

Medicare and Medicaid are government healthcare programs administered by the Department of Health and Human Services through the Centers for Medicare and Medicaid Services ("CMS"). Medicare Part D is a prescription drug benefit providing insurance coverage to beneficiaries. The government employs a multi-tier system to provide Medicare prescription subsidies. At the outset, CMS awards contracts to private plan sponsors to facilitate the benefits program and pays them directly, based in part on the number of enrolled beneficiaries. 42 U.S.C. § 1395w-115; 42 C.F.R. §§ 423.265, 423.315, 423.329(a), (c). Plan sponsors, in turn, enter agreements with pharmacies or with middlemen, known as Pharmacy Benefit Managers ("PBMs"), which deal directly with the pharmacies. The PBMs' contractual agreements with pharmacies specify the methods of calculating prescription drug rates for reimbursement claims, and the PBMs process claims and oversee reimbursements. *See* 42 U.S.C. § 1395w-111(i).

Medicare Part D limits prescription drug reimbursement rates to the lower of either the "actual charge" or "106 percent of the average sales price," subject to specific limitations. 42 C.F.R. § 414.904(a). While federal regulations do not define "actual charge," they do define "actual cost." 42 C.F.R. § 423.100. The actual cost for a prescription from a "network pharmacy" means the "negotiated price" set by the PBM contract with that pharmacy. *Id.* If an out-of-network pharmacy prescribed the drug, the actual cost is the U&C price. *Id.* Medicare regulations define U&C price as the price charged to "a customer who does not have any form of prescription drug coverage." *Id.* PBM contracts must comply with the Medicare Part D statute and regulations.

Medicaid operates in similar fashion but leverages the cooperative efforts of the states. 42 U.S.C. § 1396 *et seq*. The federal government and participating states jointly finance Medicaid, and the states implement the program through "state plans." To be eligible for federal funding, a state's plan must comply with the Medicaid statute and federal regulations and obtain approval from CMS. 42 U.S.C. §§ 1396-1, 1396a, 1396b. A state's plan must describe the state agency's "payment methodology for prescription drugs," and the drug reimbursement methodology must comport with federal requirements for Medicaid expenditures. 42 C.F.R. § 447.518(a)–(b). Relevant here, federal regulations limit the pharmacy reimbursement for certain prescription drugs to the lower of either "[Actual acquisition cost] plus a professional dispensing fee" or providers' "usual and customary charges to the general public."[1] 42 C.F.R. § 447.512(b). Because both Medicare and

[1] While the state plans for the four states implicated in this appeal contain definitions of U&C price that have slight variances from the

Medicaid programs involve third-party submission of claims to the government, these reimbursement processes give rise to FCA litigation.

B. *United States ex rel. Garbe v. Kmart Corporation*

We confronted one such FCA *qui tam* suit in *United States ex rel. Garbe v. Kmart Corporation*. In *Garbe*, we elaborated on the falsity prong of FCA claims in the context of U&C prices reported by pharmacies. The *Garbe* relator alleged that Kmart submitted false claims for prescription reimbursements under Medicare and Medicaid by failing to report its discount-program prices as its U&C prices. *Garbe*, 824 F.3d at 636. Instead, Kmart had reported the higher prices it charged to third-party insurers and non-program cash customers. *Id.* The district court disposed of the relator's FCA claim on a motion for partial summary judgment. On interlocutory appeal, we added the question whether the district court correctly held that Kmart's discount-program prices were U&C prices—the prices "charged to the general public." *Id.* at 637. We affirmed that determination.

Our decision referenced a variety of sources—dictionary definitions, regulatory definitions, Medicare policy, caselaw, and a CMS manual—to determine the boundaries of "usual and customary price charged to the general public." We noted that unless state regulations provided a different meaning, the U&C price "is defined as the 'cash price offered to the general public.'" *Id.* at 643. Upon consideration of these sources and the case facts, we determined that Kmart's program fell

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wording in § 447.512(b), the Relators have stipulated that these definitions are substantively equivalent to the federal definition. We consequently analyze the federal definition of U&C price for purposes of this appeal.

within the scope of "U&C price." Kmart's generic-drug discount program offered set prices and was open to the public—any customer could opt in by paying a $10 fee and providing personal information. *Id.* at 643. The discount prices were "the lowest prices for which its drugs were widely and consistently available"—over 89% of Kmart's cash customers received the discount prices. *Id.* at 635, 645; *U.S. ex rel. Garbe v. Kmart Corp.*, 73 F. Supp. 3d 1002, 1018 n.10 (S.D. Ill. 2014). We also found it significant that Kmart had offered these prices for several benefit years rather than as "a one-time 'lower cash' price." *Garbe*, 824 F.3d at 644. On those facts, we held that a pharmacy's discount-program prices could be its U&C prices when the program was offered to the public, even though the discount prices were not the retail prices charged to all customers. *Id.* at 645. We remanded *Garbe* without discussing the FCA's scienter prong. Although the scienter prong is at issue in this appeal, *Garbe* played a key role in the suit against SuperValu.

C. Factual Background

SuperValu, through several subsidiaries, operated or controlled roughly 2,500 grocery stores with over 800 in-store pharmacies between 2006 and 2016. In 2006, SuperValu's national headquarters implemented the discount program underlying this appeal, which ran until December 2016. The price-match initiative was an attempt to compete with pharmacies such as Wal-Mart, which had launched a discount program that same year offering hundreds of generic drugs at $4 per 30-day prescription. SuperValu sought to remain competitive without adopting Wal-Mart's program. According to SuperValu's Vice President of Prescription Services, implementing a $4 generics program would cost SuperValu $40–$50

million in losses if $4 was the U&C cost passed on to PBMs. Instead, SuperValu employed what it internally characterized as a "'stealthy' approach." Corporate officers framed SuperValu's price-match program as an "'exception' for customer service reasons" that would not be reported as the U&C price.

Under SuperValu's price-match program, its regional stores could match lower prices on prescription drugs offered by other, local pharmacies within a specific proximity to the regional store. But the discount was not automatic. Customers had to request a price match. Once SuperValu pharmacists verified the competitor's price, SuperValu automatically applied the discount for that customer on future refills.[2] Any customer could request a price match, including those with insurance or government healthcare plans. When applying a price-match cost for insured customers, the pharmacists overrode the price in the pharmacy's automatic system and manually entered the price-matched cost. SuperValu instructed pharmacies to process these price-match sales as cash transactions rather than third-party payor claims that would go directly to insurers.

SuperValu did not report these price-matches when it submitted reimbursement claims to third-party insurers, including Medicare Part D and Medicaid. Rather, SuperValu listed its retail price—the price for uninsured cash customers—as its U&C price. Many of SuperValu's PBM contracts contained U&C price clauses, but the contractual definitions of that term varied. Some contracts addressed reporting prices from

[2] SuperValu did not implement its automatic price override until 2008. All SuperValu's pharmacies had ceased the price-match program by December 2016, a few months after this Court decided *Garbe* in May 2016.

discount programs, either including discount programs as a blanket rule or excepting specific types of discounts. Others did not mention discounts at all. None of the contracts expressly included price-matching, although one PBM, Medco, stated in its 2007–2008 manual that it included a "competitor's matched price" in its definition of U&C price.

Between 2006 and 2016, sales under SuperValu's price-matching policy accounted for 26.6% of SuperValu's cash drug sales and 1.69% of its total prescription drug sales—roughly 6.3 million sales. In 2012, the majority of the cash sales for 44 of SuperValu's top 50 prescription drugs were made at a price-match cost rather than SuperValu's retail price.[3] SuperValu continued its price-match program until December 2016 and did not report its discount prices as its U&C prices to any PBM or state agency during that time.

D. Procedural Background

In 2011, the Relators filed this suit against SuperValu under the FCA on behalf of the federal government and several states.[4] They alleged that SuperValu knowingly caused false payment claims to be submitted to government healthcare programs between 2006 and 2016 by incorrectly reporting their U&C drug prices. The Relators' theory of the case was

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[3] The dissent cites this statistic without confining it to fiscal year 2012. We note that the Relators have identified no evidence regarding the frequency of price-match sales versus retail cash sales for SuperValu's top 50 drugs during any of the other years between 2006-2016 when its price-match program was active.

[4] In the district court, the parties stipulated to a dismissal of all Medicaid claims on behalf of the states except those on behalf of California, Illinois, Utah, and Washington.

that SuperValu price-matched to avoid losing customers to competitors with lower drug prices like Wal-Mart and made up the difference by charging government healthcare programs its higher, retail price. In effect, the Relators argued, SuperValu caused the government to subsidize its market competitiveness. The government did not intervene in this case.

The district court, relying on *Garbe*, granted summary judgment to the Relators on the falsity prong.[5] It acknowledged that SuperValu's price-match program required customers to initiate a discount and found that discount sales comprised a lower portion of SuperValu's sales—roughly 2% of total transactions and 26.9% of cash sales—compared to Kmart's discounts in *Garbe*, which amounted to 89% of its cash sales. Even so, the court held that the fact that SuperValu made its price-match policy *available* to the general public throughout a benefit year was determinative.

In a separate order, the district court sided with SuperValu on the scienter prong. The court first applied *Safeco*'s standard to the FCA's scienter prong and held that a failure to establish the objective scienter standard precluded liability under the FCA. Under the *Safeco* standard, the court held that SuperValu's understanding of U&C price, while incorrect, was objectively reasonable at the time. The district court first observed that there were multiple district court decisions endorsing SuperValu's view of U&C price or recognizing that the term was open to interpretation. It also took note of the unique circumstance in which *Garbe* addressed the definition

[5] SuperValu does not contest the district court's falsity holding in this appeal.

of U&C price. Because the Seventh Circuit added that question to the issues certified for interlocutory appeal, the district court suggested that we must have found the matter "sufficiently debatable to be addressed."

Based on the available caselaw, the court held that it was unclear that SuperValu's program fell within the U&C definition. Further, the court held that prior to our 2016 decision in *Garbe*, there was no authoritative guidance to warn SuperValu away from its interpretation of U&C price. In view of these conclusions, the district court entered summary judgment for SuperValu on all FCA claims, which the Relators now challenge.

II. Discussion

On appeal, the parties ask us to determine whether *Safeco* applies to the FCA's scienter standard and, if so, to what extent. Our answers to those questions will dictate the outcome of the final issue in this appeal—whether the district court properly granted summary judgment for SuperValu on the scienter prong of the FCA claim. We review the district court's determinations on these legal issues de novo and affirm the grant of summary judgment to SuperValu. *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1048, 1051 (7th Cir. 2020).

A. The False Claims Act

The FCA imposes civil liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). FCA civil claims thus require proof of two primary elements: (1) falsity and (2) scienter. The Supreme Court has also interpreted § 3729(a)(1)(A) to require that knowingly false claims be material to the government's payment decision for liability

to attach. *Univ. Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016).

Although "Congress did not define what makes a claim 'false' or 'fraudulent,'" the Supreme Court has applied the common law meaning of fraud to these terms as they are used in the FCA. *Id.* at 1999. Under that definition, a claim may be false or fraudulent through either express misrepresentations or "misrepresentations by omission." *Id.*

Unlike the falsity prong, the FCA's scienter requirement is statutorily defined. A party who submits a false claim to the government is on the hook for FCA liability only if it acted knowingly. § 3729(a)(1)(A). The FCA defines knowingly to "mean that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." § 3729(b)(1)(A). It "require[s] no proof of specific intent to defraud." § 3729(b)(1)(B). The FCA levies significant consequences against parties found liable under the Act and balances the severity of its penalties by carefully circumscribing liability, in part through its scienter requirement. *See Escobar*, 136 S. Ct. at 1995–96 (observing that FCA civil "liability is essentially punitive in nature" (internal quotation omitted)).

B. *Safeco Insurance Company of America v. Burr*

While the FCA lists the range of scienter levels encompassed by "knowingly," it does not further define those terms. SuperValu urges us to look to the Supreme Court's decision in *Safeco* for guidance. *Safeco* involved an interpretation of the FCRA's common law scienter requirement, under which plaintiffs must show that defendants acted "willfully." 15

U.S.C. § 1681n(a). As defined by the Court, the FCRA's use of that term includes both "knowing" and "reckless disregard." *Safeco*, 551 U.S. at 52, 59.

In interpreting the FCRA's scienter prong, the Court first observed "the general rule that a common law term in a statute comes with a common law meaning, absent anything pointing another way." *Id*. at 58. Finding none, it employed what amounts to a two-step inquiry for determining reckless disregard. *Id.* at 69. A defendant who acted under an incorrect interpretation of the relevant statute or regulation did not act with reckless disregard if (1) the interpretation was objectively reasonable and (2) no authoritative guidance cautioned defendants against it. *Id.* at 70. Critically, the Court emphasized that a defendant's subjective intent is irrelevant for purposes of liability. *Id.* at 68, 70 n.20. The Court also explained that failure to meet this standard would preclude a finding of knowing violations as well. *Id.* at 70 n.20.

The Court then applied that standard and held that while Safeco may have violated the FCRA, it did not do so with reckless disregard. The FCRA requires that any person who takes an "adverse action" against a consumer based on information in a consumer report notify that consumer. 15 U.S.C. § 1681m(a). An "adverse action" is statutorily defined as including "an increase" in the amount charged for "insurance, existing or applied for." § 1681a(k)(1)(B)(i). The *Safeco* plaintiffs argued that Safeco violated the FCRA when it offered new insurance applicants higher rates without notifying them that their credit scores triggered the less favorable policy offers. *Safeco*, 551 U.S. at 55. Safeco thought initial rate offers to new customers fell outside FCRA notice obligations because

it interpreted "increase" to mean rate hikes on existing policies. *Id.* at 69–70.

While Safeco's interpretation was erroneous, the Court held that it was objectively reasonable. Why? Because Safeco's "reading ha[d] a foundation" in "the less-than-pellucid statutory text." *Id.* Further, there was no court of appeals decision or authoritative guidance from the Federal Trade Commission—the agency charged with enforcing the FCRA—that "might have warned it away from the view it took." *Id*. at 70. Under the Court's two-step inquiry, these facts precluded a finding of reckless disregard. Since this decision, four circuit courts have applied the *Safeco* standard to the FCA's scienter prong. SuperValu asks us to do the same today.

C. *Safeco* applies to the FCA

To determine what the FCA's scienter provision requires, we "start, as always, with the statutory text." *Escobar*, 136 S. Ct. at 1999. The FCA defines "knowingly" as encompassing three common law standards—actual knowledge, deliberate indifference, and reckless disregard—but is silent as to what those standards mean in the context of this statute.[6] Supreme Court precedent teaches that "a common law term in a statute comes with a common law meaning, absent anything pointing another way." *Safeco*, 551 U.S. at 58. That principle informs our decision today. Here, the Relators have identified no statutory indicia that Congress intended the familiar, common

[6] The FCA imposes civil liability. We thus reference the civil, not criminal, definitions of these scienter standards throughout our discussion. *Safeco*, 551 U.S. at 60 (acknowledging distinctions between criminal and civil uses of the same scienter terms and indicating that criminal law usage has no bearing on the definitions of these terms when used in civil laws).

law terms used in § 3729 to differ from their common law meaning. Indeed, the Supreme Court has confirmed that the FCA does employ the common law meaning for other common law terms—"false" and "fraudulent"—and has limited the common law definition only to the extent that the statute expressly contradicted it. "Congress retained all other elements of common-law fraud that are consistent with the statutory text because there are no textual indicia to the contrary." *Escobar*, 136 S. Ct. at 1999 & n.2. Given that the common law meaning applies to the FCA's scienter standard, all that remains is to identify that meaning. We need look no further than the Supreme Court's decision in *Safeco*.

Safeco defined a similar common law term—"willfully," as used in the FCRA—which the Court interpreted as encompassing the same common law scienter terms used in the FCA ("knowingly" or "reckless disregard"). Referencing the common law meaning, the Court then announced a standard inquiry for reckless disregard. While reiterating that "knowingly" and "reckless disregard" remain distinct terms, the Supreme Court held that the objective scienter standard it articulated precluded liability under either term. *Safeco*, 551 U.S. at 60, 70 n.20. There is no reason why the scienter standard established in *Safeco* (for violations committed knowingly or with reckless disregard) should not apply to the same common law terms used in the FCA.

The dissent suggests that *Safeco* has no bearing simply because it interpreted a different scienter requirement in a different statute. We respectfully disagree. *Safeco* articulated an objective scienter standard for establishing willful violations, which it framed in terms of the scienter floor for that standard—reckless disregard. Likewise, reckless disregard is the

baseline scienter definition encompassed by the FCA's scienter requirement, "knowingly." *United States v. King-Vassal*, 728 F.3d 707, 712 (7th Cir. 2013) (observing that reckless disregard "is the most capacious of the three" terms used to define the FCA's scienter requirement). And *Safeco* explicitly held that the test for reckless disregard would likewise cover violations committed "knowingly." *Safeco*, 551 U.S. at 70 n.20. In view of those parallels, we see no barrier to importing the *Safeco* standard to the FCA. *See Purcell*, 807 F.3d at 284, 290.

Every other circuit court to discuss the relevance of *Safeco*'s scienter standard to the FCA has arrived at this conclusion. *United States ex rel. Streck v. Allergen*, 746 F. App'x 101, 106 (3d Cir. 2018); *United States ex rel. McGrath v. Microsemi Corp.*, 690 F. App'x 551, 552 (9th Cir. 2017); *United States ex rel. Donegan v. Anesthesia Assocs. of Kan. City, PC*, 833 F.3d 874, 879–80 (8th Cir. 2016); *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 284 (D.C. Cir. 2015). The dissent claims that the Eleventh Circuit declined to apply *Safeco* to the FCA in *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148 (11th Cir. 2017). But *Phalp* did not reject *Safeco*—it did not even cite *Safeco*. To support its conclusion, the dissent points to *Phalp*'s assertion that "scienter is not determined by the ambiguity of a regulation, and can exist even if a defendant's interpretation is reasonable." *Id.* at 1115. That is not inconsistent with *Safeco*. Under *Safeco*, an objectively reasonable interpretation of a statute or regulation does not shield a defendant from liability if authoritative guidance warned the defendant away from that interpretation. Regardless of differing views as to whether *Phalp* is consistent with the *Safeco* standard, the Eleventh Circuit did not reject *Safeco*'s applicability to the FCA. Even though the parties briefed the court on *Safeco*, that briefing does not convert the Eleventh Circuit's silence into a

decision that *Safeco* does not apply to the FCA. As it stands, no circuit has held *Safeco* inapplicable to the FCA.

The dissent would part ways with the circuits that have applied the *Safeco* standard to the FCA and look instead to the Restatement (Second) of Torts § 526, which makes subjective intent relevant to the scienter inquiry. Section 526 defines "conditions under which misrepresentation is fraudulent." It does not define "knowingly" (or any of the common law scienter terms listed in § 3729(b)(1)(A)). And it is a different provision than the Restatement provision that the Court referenced in *Safeco*, 551 U.S. at 69 (relying upon § 500, defining "reckless disregard"). We thus disagree that § 526 is relevant to the FCA's scienter provision. Take out "knowingly," and perhaps it makes sense to read general, common law fraudulent scienter into the Act. But here, Congress *has* willed a specific scienter requirement—knowingly, not "'knowing' of falsity," as the dissent suggests.

Unlike § 526, § 500 defines a term that the FCA's definition of knowingly expressly includes ("reckless disregard"). The dissent insists that because § 500—which defines "reckless disregard of safety"—applies to cases involving physical harm, it is inapplicable to "reckless disregard" as used in the FCA. But the Supreme Court applied this definition outside the physical-harm context in *Safeco*. Ultimately, the crucial point is that the Court has articulated a standard for acts committed "knowingly" or with "reckless disregard" that excludes subjective intent. In the absence of textual indicia in the FCA supporting that subjective intent matters here, we apply Supreme Court precedent to interpret the same common law terms addressed in *Safeco*.

While the dissent claims that its countervailing view is textually mandated, nothing in the language of the FCA suggests that a defendant's subjective intent is relevant. In contrast to § 526, terms such as "believes" or "have [] confidence" are conspicuously absent from the FCA, and the only reference to intent is an express disclaimer that "specific intent to defraud" is irrelevant. § 3729(b)(1)(B). We decline to graft aspects of common law fraudulent scienter into the FCA when Congress chose not to include such requirements.

The dissent instead looks to legislative history and out-of-circuit caselaw to support its reading of the FCA. We find neither source persuasive. Legislative history cannot support reading in a subjective-intent requirement that goes beyond the text of the Act's scienter provision. *See Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 599 (2011) ("Congress's authoritative statement is the statutory text, not the legislative history." (internal citation and quotation omitted)). And the circuit cases upon which the dissent relies all predate *Safeco*, as well as subsequent caselaw in each of those circuits applying *Safeco* to the FCA. Neither Restatement § 526 nor legislative history pose a barrier to applying *Safeco*.

The Relators challenge Safeco's viability on a separate basis that likewise fails. They contend that subsequent Supreme Court precedent limited *Safeco*, leaning on a 2016 patent case for this premise—*Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016). *Halo Electronics* interpreted § 284 of the Patent Act, which provides that courts may award treble damages in infringement cases. Section 284 does not specify a scienter standard, and prior to *Halo Electronics*, the Federal Circuit required plaintiffs to show that an infringer's conduct was "both objectively baseless and brought in subjective bad

faith." *Id.* at 1932–33. *Halo Electronics* clarified that § 284 liability does not depend on objective recklessness.

The problem with importing an objective recklessness inquiry into the patent context was that "such a defense insulates the infringer from enhanced damages, even if he did not act on the basis of the defense or was even aware of it." *Id.* at 1933. In rejecting that standard, the Court emphasized that the Patent Act targets "consciously wrongful" bad action and held that "[i]n the context of such deliberate wrongdoing, however, it is not clear why an independent showing of objective recklessness … should be a prerequisite to enhanced damages." *Id.* at 1932.

The defendants, citing *Safeco*, argued that bad faith is irrelevant when there is no showing of objective recklessness. *Id.* at 1933 n.*. While acknowledging the *Safeco* standard, the Court declined to apply it. It observed that "willfully is a word of many meanings whose construction is often dependent on the context in which it appears." *Id.* (internal quotation omitted). The Patent Act presented a different context than the FCRA: "[O]ur precedents make clear that 'bad-faith infringement' *is* an independent basis for enhancing patent damages." *Id.*

The Supreme Court thus did not walk back *Safeco* or adopt a new standard for objective recklessness. *Halo Electronics* simply did not apply objective recklessness in the context of a statute focused on defendants' subjective bad faith. The reasons informing that decision do not apply here. Unlike the Patent Act, the FCA expressly includes a scienter standard and limits liability to knowingly false claims. By its own terms, *Safeco* holds that a failure to establish its objective scienter standard precludes a finding that a defendant acted

knowingly. We thus hold that *Safeco*'s scienter standard applies to the FCA.

D. Failure to meet the *Safeco* standard precludes liability

Beyond the threshold question of *Safeco*'s applicability to the FCA, the parties also dispute how broadly *Safeco* reaches. We agree with SuperValu that the *Safeco* standard reaches all three of the scienter terms that define "knowingly." The dissent takes the Relators' position that even if it is relevant to the FCA, *Safeco* defines only "reckless disregard." Under this view, failure to show that a defendant meets the *Safeco* standard does not preclude liability under the actual knowledge or deliberate ignorance components of the FCA's scienter definition. The dissent contends that holding otherwise would collapse distinct scienter terms and violate the rule against surplusage. We are unconvinced.

The Supreme Court has already undermined this line of reasoning. In *Safeco*, the Court rejected the defendants' argument that it was conflating scienter terms and reaffirmed that the terms it used to define "willfully" were distinct. *Safeco*, 551 U.S. at 60. ("[A]ction falling within the knowing subcategory does not simultaneously fall within the reckless alternative."). It nevertheless held that the standard it articulated in the context of "reckless disregard" also functioned as a baseline requirement for establishing the more demanding scienter category of "knowledge." *Id.* at 70 n.20 ("Where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a *knowing* ***or*** *reckless* violator." (emphasis added)). That holding nullifies the dissent's contention.

Even aside from *Safeco*'s dismissal, the dissent's argument rests upon a false equivalence. No one disputes that the three scienter terms used to define "knowingly" are distinct and bear different meanings. Both actual knowledge and deliberate ignorance indicate higher degrees of culpability and, if implicated in a case, might render reckless disregard inapplicable. *See Purcell*, 807 F.3d at 288 (observing that reckless disregard is the loosest standard of knowledge under the FCA's scienter requirement). That does not prevent these terms, however, from sharing a common requirement.

Indeed, we do not see how it would be possible for defendants to actually know that they submitted a false claim if relators cannot establish the *Safeco* scienter standard. A defendant might suspect, believe, or intend to file a false claim, but it cannot *know* that its claim is false if the requirements for that claim are unknown. The dissent's primary concern that the *Safeco* standard eliminates culpability for deliberately indifferent defendants is likewise misplaced. The dissent postulates that under the *Safeco* standard, defendants could escape liability by making a "barely plausible" post-hoc argument about a statute's meaning, "even though the defendant ignored repeated and correct warnings." That fundamentally misapprehends *Safeco*. Under *Safeco*, a defendant will be successful only if (a) it has an *objectively* reasonable reading of the statute or regulation and (b) there was no authoritative guidance warning against its erroneous view. That test does not shield bad faith defendants that turn a blind eye to guidance indicating that their practices are likely wrong. Nor does *Safeco*'s standard excuse a company if its executive decisionmakers attempted to remain ignorant of the company's claims processes and internal policies. *Safeco* covers all three of the scienter standards listed in § 3729. When relators cannot

establish the standard articulated in *Safeco*, there is no liability under the FCA.

E. SuperValu's interpretation of "usual and customary price" was objectively reasonable under *Safeco*

Although the *Safeco* Court did not express its standard for reckless disregard in terms of elements, the Court's objectively reasonable inquiry involved two distinct questions—whether the defendant has a permissible interpretation of the relevant provision and whether authoritative guidance nevertheless warned it away from that reading.[7]

1. Permissible Interpretation

The objectively reasonable inquiry hinges on the text of the statute or regulation that the defendant allegedly violated and as such is a question of law. *Safeco*, 551 U.S. at 69; *see also Van Straaten v. Shell Oil Prods. Co. LLC*, 678 F.3d 486, 489–90 (7th Cir. 2012). If the plain language of the statute precludes the erroneous interpretation, the defendant cannot clear this hurdle. To decide whether SuperValu had a permissible interpretation of U&C price, we must first determine the source of that term and relevant definition.

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[7] Some courts have divided the *Safeco* inquiry into three steps, adding as a preliminary question whether the relevant text is ambiguous. *Donegan*, 833 F.3d at 878; *Purcell*, 807 F.3d at 288. We elect to condense the inquiry into the two issues expressly discussed in *Safeco*—permissible interpretation and authoritative guidance. The *Safeco* Court did not require a separate determination of ambiguity, and we think that the issue of textual ambiguity is subsumed within the permissible-interpretation inquiry. A defendant's erroneous interpretation cannot be reasonable if the meaning of the text is unambiguous.

Medicaid regulations define U&C price without much elaboration as the price that a pharmacy "charges to the general public."[8] 42 C.F.R. § 447.512(b); *see also Garbe*, 824 F.3d at 643–44. Federal regulations do not elaborate beyond that cursory definition or guide pharmacies on identifying the "general public" when they charge customers various prices for the same prescription.[9] "Usual and customary" might mean the price that is "charged" most frequently for a drug, but it could also indicate the retail rather than discount price. *See* GAO, Report to Congress on Trends in Usual and Customary Prices for Drugs Frequently Used by Medicare and Non-

[8] The Relators argue that for Medicare, pharmacies that have contracted with a plan sponsor or PBM report the "negotiated price" determined by the contract. On appeal, the Relators consequently look to the various formulations of U&C price in SuperValu's PBM contracts. In the district court, however, they took the opposite position: "Relators dispute that the contracts between PBMs and pharmacies 'govern the terms' by which Defendants are required to submit claims to the PBMs and in turn, whether and how much the PBMs should pay Defendants for dispensing drugs to their beneficiaries." Relators' Resp. to Defs.' Mot. for Partial Summ. J. at 9 [191-1]. As a result, they have waived any argument on appeal that the contractual definitions of U&C price are distinct from the Medicaid regulatory definition. We thus examine only § 447.512(b)'s definition of U&C price and treat the PBM contract definitions of U&C price as consistent with it.

[9] The Relators also identified four states' regulations defining U&C price, as Medicaid is implemented through the states. The regulations that were concurrent with SuperValu's price-match program used substantially the same definition of U&C price as 42 C.F.R. § 447.512(b). The Relators also claim that they are "consistent with the controlling federal definition and the U&C framework analyzed in *Garbe*." We consequently treat our analysis of the federal definition of U&C price as extending to these states and the FCA claims related to Medicaid.

Medicare Enrollees at 1 (Oct. 6, 2004) ("The usual and customary price is the undiscounted price individuals without drug coverage would pay."). "General public" may mean that discount prices qualify only if applied to all consumers or, alternatively, if they constitute the price most frequently charged to consumers. But it just as easily might encompass any discount program *offered* to the public, regardless of whether all consumers take advantage of it. *Garbe*, 824 F.3d at 643. As is, the U&C price definition is open to multiple interpretations.

Here, SuperValu interpreted its set, retail price for a prescription drug as the "price it charges to the general public." Unlike its retail price, the discount prices under SuperValu's price-match program depended upon the prices charged by local competitors and initially applied only upon customer request. In short, while its program was available to any customer requesting a valid price match, SuperValu would not necessarily charge all or most of its customers lower, price-matched costs. SuperValu thus did not view its competitor price-matching as the price that it "charged to the general public." That interpretation is not inconsistent with the text of the U&C price definition. *See Garbe*, 824 F.3d at 644 (citing § 447.512(b)).

The Relators spend little time discussing the compatibility of SuperValu's interpretation of U&C price with the regulatory text. Instead, they contend that *Garbe* forecloses any argument on objective reasonableness. *Garbe* characterized the federal regulations at issue here as having a "clear" purpose—ensuring that the government receives the benefit of the "prevailing retail market price" that pharmacies provide to consumers. *Garbe*, 824 F.3d at 644. From this, the Relators claim that we have already held that the meaning of

U&C price is unambiguous. The flaws in this argument are two-fold.

As an initial matter, it overextends our holding in *Garbe*. *Garbe* held that the correct interpretation of U&C price included certain discount program prices—it did not hold that this was the *only* objectively reasonable interpretation of the term. In fact, *Garbe* did not discuss *Safeco* at all. We had no reason to do so because we explicitly did not address the FCA's scienter prong. The decision that we did reach in *Garbe*—interpreting "U&C price"—does not influence the objectively reasonable inquiry here, either. *Safeco*'s scienter standard has bite only if a defendant's interpretation may be objectively reasonable even if it is erroneous. That SuperValu's interpretation of U&C price is incorrect under *Garbe* does not de facto render its interpretation unreasonable.

The Relators also err by calibrating objective reasonableness against the clarity of a statute or regulation's policy objective. Their *Garbe* argument rests on the assumption that any regulation with a clear *purpose* cannot be ambiguous. But *Safeco* tethered the objectively reasonable inquiry to the legal text, not its underlying policy. *Safeco*, 551 U.S. at 69–70 (holding that Safeco's erroneous interpretation was reasonable because it had a foundation in the "less-than-pellucid" statutory text). The Relators' failure to engage with the regulatory text is fatal to their objections. They have not shown that SuperValu's erroneous interpretation of U&C price was unreasonable.

Apart from the Relators' arguments based on *Garbe*, the dissent suggests a more fundamental concern with SuperValu's interpretation of U&C price. It argues that for an erroneous interpretation to be objectively reasonable, the

defendant must have held that view at the time that it submitted its false claim.[10] Otherwise, the dissent insists, defendants can avoid liability by concocting "post-hoc arguments" to justify their conduct under an objectively reasonable reading of the applicable regulation—even if they acted in bad faith. The dissent essentially argues that SuperValu believed it was violating the requirement to report its U&C price and arrived at its "interpretation" of U&C price after the fact.

Even if the Relators can raise an issue of fact on this point, it is irrelevant. The FCA establishes liability only for *knowingly* false claims—it is not enough that a defendant suspect or believe that its claim was false. *See Purcell*, 807 F.3d at 288 (holding that defendants did not violate the FCA because they "could reasonably have concluded" that their conduct complied with the law, even though they believed—and testified that they "knew"—it did not). Indeed, *Safeco* emphasized that a defendant's subjective intent does not matter for its scienter analysis—the inquiry is an objective one. This standard reflects the limits of FCA liability. *See Escobar*, 136 S. Ct. at 2003 ("The False Claims Act is not an all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations." (cleaned up)). We apply the standard as we find it and hold that SuperValu has offered an objectively reasonable interpretation of U&C price.

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[10] The dissent does not—and cannot—rely on *Safeco* for this assertion. *Safeco* made no mention of a temporal requirement when it articulated the objectively reasonable inquiry. The Relators cited *Halo Electronics* when they raised this same argument on appeal. But as explained previously, we reject the applicability of that case to the FCA.

2. Authoritative Guidance

This moves SuperValu but halfway across the scienter line. *Safeco* makes clear that a permissible interpretation is no defense if there existed authoritative guidance that should have warned defendants away from their erroneous interpretation.[11] "Authoritative guidance," as the moniker implies, must come from a source with authority to interpret the relevant text. *Safeco* also suggests that the guidance must be sufficiently specific to the defendant's incorrect interpretation.

The Supreme Court did not flesh out the boundaries of authoritative guidance, but at minimum, *Safeco* supports that it must come from a governmental source—either circuit court precedent or guidance from the relevant agency.[12] *Safeco*, 551 U.S. at 70. We are not alone in this view. Other circuit courts likewise have limited authoritative guidance to these two sources. *See Purcell*, 807 F.3d at 289 (considering only circuit court caselaw and guidance from the controlling agency); *Streck*, 746 F. App'x at 106, 108 (same). Our reading of *Safeco* automatically excludes one of the three sources of guidance proposed by the Relators—the PBM contract definitions of U&C price. The Relators also identify federal and state regulations defining U&C price, but we have considered the relevant regulatory definition above and determined that it does

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[11] The authoritative-guidance inquiry is a question of law in this case, as it entails only the interpretation of regulatory guidance.

[12] The parties agree that *Garbe* is no help to the Relators on this front, despite its status as circuit court precedent that would otherwise constitute authoritative guidance. Recall that we decided that case in May 2016, the same year that SuperValu shelved its discount program. The Supreme Court did not deny the *Garbe* certiorari petition until 2017.

not preclude SuperValu's interpretation. As a result, those definitions cannot constitute warnings that SuperValu's interpretation was erroneous.

The remaining source of guidance identified by the Relators is the CMS Medicare Prescription Drug Benefit Manual ("CMS manual" or "manual"). The Relators contend that the manual constitutes authoritative guidance which should have warned SuperValu that its discount prices amounted to U&C prices. SuperValu responds that it did not, for two reasons. First, SuperValu suggests that the manual is not "authoritative" guidance as defined by *Safeco*. It reads *Safeco* to require that authoritative agency guidance not only originate from the agency charged with implementing the relevant statute but that it be binding on the agency, such as notice-and-comment rulemaking or agency adjudication. The circuits that have addressed *Safeco*'s applicability to the FCA appear split on this question. But we need not—and do not—decide this matter today because we agree with SuperValu's second argument: the CMS manual was not sufficiently specific to warn SuperValu that its program likely would fall within the definition of U&C price.

Safeco suggests that authoritative guidance must have a high level of specificity to control an issue. In *Safeco*, the agency guidance at issue was an FTC letter to Safeco explaining that an adverse action "occurs when 'the applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report had been more favorable.'" *Safeco*, 551 U.S. at 70 n.19 (internal citation omitted). That guidance certainly related to the question on appeal—whether an "increase" in insurance rates based on a consumer report could "be understood without

reference to prior dealing (allowing a first-time applicant to sue)." *Id.* at 64–65. Nevertheless, the Supreme Court rejected the FTC letter in part because the Court thought that it "did not canvass the issue."[13] *Id.* at 70 n.19.

Upon review of the CMS manual, we conclude that it is similarly flawed. Footnote one of the manual is most salient and reads in relevant part as follows:

> We note that in cases where a pharmacy offers a lower price to its customers throughout a benefit year, this would not constitute a "lower cash price" situation that is the subject of this guidance. For example, Wal-Mart recently introduced a program offering a reduced price for certain generics to its customers. The low Wal-Mart price on these specific generic drugs is considered Wal-Mart's "usual and customary" price, and is not considered a one-time "lower cash" price. Part D sponsors consider this lower amount to be "usual and customary" and will reimburse Wal-Mart on the basis of this price.

CENTERS FOR MEDICARE & MEDICAID SERVICES, *Chapter 14—Coordination of Benefits*, *in* MEDICARE PRESCRIPTION DRUG BENEFIT MANUAL 19 n.1 (2006), https://perma.cc/MW6AH4P6.

The footnote clarifies that a pharmacy's consistent, lower-price offers are included within U&C prices. But it says nothing about price-match programs like that employed by

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[13] The Court's other reason for considering the letter unauthoritative was that the FTC had expressly stated that it was not binding on the agency. *Safeco*, 551 U.S. at 70 n.19.

SuperValu. Further, the majority of the footnote discusses a specific example—Wal-Mart's $4 generics program—which differed in significant respects from SuperValu's price-match guarantee. Wal-Mart's program employed a set lower price ($4 for 30-day generic prescriptions) automatically applied to any customer. By contrast, SuperValu's discount prices could vacillate. Its discounts depended upon the pricing of local competitors, which could vary between SuperValu's regional stores. SuperValu's discounts also were customer-initiated in the first instance. The manual did not put SuperValu on notice that this type of discount program fell within the definition of U&C price—at least, not with the specificity required to be authoritative guidance. We hold that no authoritative guidance warned SuperValu away from its permissible interpretation of U&C price. The district court correctly granted summary judgment to SuperValu on the question of scienter.

III. Conclusion

Our resolution of this case is controlled by *Safeco*. Today, we hold that *Safeco*'s standard both applies to the FCA's scienter requirement and precludes liability under it, regardless of whether relators premise their case on reckless disregard or the other scienter terms. Because SuperValu had an objectively reasonable understanding of the regulatory definition of U&C price and no authoritative guidance placed it on notice of its error, the Relators have not shown that SuperValu acted knowingly. The district court's judgment is

AFFIRMED.

HAMILTON, *Circuit Judge*, dissenting. We should reverse summary judgment for defendant SuperValu. The relators have come forward with evidence that SuperValu knowingly misled the government's agents about its "usual and customary" prices for a significant number and volume of prescription drug sales. For forty-four of the fifty top-selling drugs, SuperValu was charging the government prices *eight to fifteen times higher* than the prices it was actually charging a majority of the relevant customers. Binding circuit precedent holds that those price claims were false. SuperValu's defense is that it did not "know" its "usual and customary" price claims were false. When the False Claims Act is properly understood, however, genuine factual disputes over SuperValu's conduct and state of mind should preclude summary judgment.

This appeal presents a broad and important issue for the False Claims Act. The issue is whether the Act can reach businesses that submit false claims for government payment but claim there is some legal ambiguity that kept them from "knowing" for certain that their claims were false. Under the text and history of the Act, the answer should be yes.

The majority answers no. It thus creates a safe harbor for deliberate or reckless fraudsters whose lawyers can concoct a *post hoc* legal rationale that can pass a laugh test. The majority's new safe harbor even makes subjective bad faith "irrelevant" *in fraud cases*. Ante at 25**.** That undermines the 1986 amendments to the False Claims Act and turns the Act upside-down, losing touch with the statutory text and its history and links to the common law of fraud. I respectfully dissent.

Part I of this opinion explains the relators' claims and supporting evidence. Part II explains the better understanding of the False Claims Act's "knowledge" standard based on the

statutory text, the common law of fraud, and statutory history. Part III explains the majority's two fundamental errors in reading the statute. First, rather than focusing on the statutory text, history, and purpose of the False Claims Act itself, the majority reads far too much into *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), where the Supreme Court interpreted a different term under a different statute. Second, the majority turns into surplusage two-thirds of the False Claims Act's definition of "knowing" added in 1986.

I. *The Relators' Claims*

A. *The Relators' Evidence*

The majority explains helpfully the important role of "usual and customary" drug prices in Medicare and Medicaid. Congress has not allowed the government to do what private insurance companies do: use bargaining power to negotiate for lower drug prices. Instead, the government tries to take advantage of private competition in so-called "cash" sales of prescription drugs. See *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 644 (7th Cir. 2016). Those are sales to customers whose drug purchases are not covered by insurance. Under the statutes and regulations, SuperValu's "usual and customary" drug prices for those cash sales were caps on what the government would pay SuperValu for drugs provided to Medicare and Medicaid patients.

Starting in 2006, Walmart began offering cash sales of generic drug prescriptions for four dollars for a one-month supply and ten dollars for a three-month supply. SuperValu responded to Walmart's move with an aggressive, widely-advertised price-matching program. The result, giving relators the benefit of reasonable inferences from the evidence, was

dramatic reductions in the prices SuperValu charged most "cash" customers for many drugs for over a decade.

The applicable regulation describes the price cap as "Providers' usual and customary charges to the general public." 42 C.F.R. § 447.512(b)(2). Regulations also include this definition: "Usual and customary (U&C) price means the price that an out-of-network pharmacy or a physician's office charges a customer who does not have any form of prescription drug coverage for a covered Part D drug." 42 C.F.R. § 423.100.

In this appeal, SuperValu does not dispute that under now-binding circuit precedent, a discounted price can be the "usual and customary" price. See *Garbe*, 824 F.3d at 644–45. SuperValu also does not dispute that it pushed its price match as a matter of company policy and that it usually charged the four-dollar price for many drugs.

Relators offered evidence that SuperValu told the federal government for years that its "usual and customary" prices were much higher than those that it actually charged most cash customers for many drugs. The question here is whether plaintiffs have come forward with evidence to support a finding that SuperValu made these many false claims "knowingly."

There is room for reasonable disagreement about *exactly* how to interpret "usual and customary" prices when a seller matches a competitor's prices to keep a customer. That room for argument, says the majority, entitles SuperValu to summary judgment. As applied to these facts, though, it should be easy to find that SuperValu's claims were false and that SuperValu knew they were false.

At one end of a spectrum, imagine a local mom-and-pop pharmacy that occasionally grants a few customers' informal requests for lower prices after some comparison shopping. At the other end, imagine a nationwide chain with a nationwide program advertising that the seller will match any competitor's lower prices. Then imagine that the seller tells its pharmacists and cashiers to offer the discounted prices to all customers paying cash for drugs (i.e., without insurance or government coverage). And then imagine that the seller makes a majority of its cash drug sales at the discounted rates, not at the *much* higher prices that it officially tells the government are "usual and customary." Relators' evidence here fits this end of the spectrum—SuperValu's price matches were available to any members of the general public, who were encouraged to ask for them.

Then consider relators' evidence about the results of this nationwide, decade-long program. Focus on SuperValu's sales of the fifty highest-volume drugs, where most of the relevant money is. For forty-four of those top fifty drugs, SuperValu was making a *majority* of its cash sales for less than its claimed "usual and customary" prices. For thirty of those drugs, SuperValu was making *more than eighty percent* of its cash sales for less than its claimed "usual and customary" prices.

Then consider that SuperValu was claiming that its "usual and customary" prices for those drugs were as much as *eight to fifteen times* the discounted prices it was actually charging *most of the time*. See Dew Rebuttal Report at 7–8. Given those facts, a reasonable jury could easily find both that SuperValu's claims for reimbursement based on its "usual and customary"

prices were false under any reasonable interpretation of the term and that SuperValu knew its claims were false.

B. *Ambiguity and Knowing Fraud*

Smart lawyers and judges can debate exactly how to define "usual and customary" under the infinite variety of situations we might hypothesize. But with respect, I do not see room for reasonable disagreement about whether claimed prices eight to fifteen times the actual cash prices that SuperValu charged most of the time were in any sense "usual and customary." Without even reaching the direct evidence of knowledge, discussed below, a reasonable jury could infer that SuperValu's decade-long practice of claiming higher reimbursement levels by disregarding the much higher prices it actually charged a majority of the time was a "knowing" fraud on the government. See 31 U.S.C. § 3729(a)(1). The disconnect between its representations (the higher prices were usual and customary) and reality (much lower prices were charged most of the time) is great enough that a jury could infer knowledge, as the term is defined in the False Claims Act, on that basis alone.

Then we come to the more direct evidence that SuperValu knew that what it was doing was fraudulent. The huge gaps between actual sale prices and claimed "usual and customary" prices did not escape notice by executives. Documents show that they paid close attention to the results of the price-matching program. That's no surprise. The program responded to a major disruption in retail drug markets, with a big financial impact on cash sales. The executives also knew it had huge implications for the even higher volume of Medicare and Medicaid sales of those drugs. The executives estimated that the correct application of "usual and customary"

prices could cost SuperValu tens of millions of dollars per year.

Executives recognized that widespread price-matching could undermine what they euphemistically called the "integrity" of SuperValu's "usual and customary" price claims for government reimbursement as price-matching became more than an "'exception' for customer services reasons." And in the face of that concern, they chose what one called in an email the "stealthy" approach (scare-quotes in the SuperValu original) to ensure that word about this "exception" did not reach too many customers. The problem, of course, is that SuperValu's price-matching was not only widespread but also advertised in all its stores. It knew that these practices were undermining the "integrity" of its certifications to the government, yet went forward anyway.

The False Claims Act requires proof that a defendant knowingly submitted false claims. It defines "knowing" of falsity to include acting "in deliberate ignorance of the truth or falsity" of the information submitted to the government. 31 U.S.C. § 3729(b)(1). A jury could reasonably find that SuperValu's widespread adoption of price-matching on a scale far beyond an "exception" was at least a deliberate choice to remain ignorant about whether its ongoing claims based on supposedly "usual and customary" prices were false. A jury could also reasonably infer actual knowledge from the obvious and known effects of the gap between most actual sale prices under the nationwide price-matching and the claimed "usual and customary" prices. See *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (obvious risk of harm justifies inference of knowledge), cited in *Safeco Insurance*, 551 U.S. at 68.

SuperValu of course has arguments and evidence pointing toward its honesty and innocence. But we are reviewing a grant of summary judgment. The account set forth above is a reasonable view of the evidence in the light most favorable to the non-moving relators. A reasonable jury could find that SuperValu either actually knew or deliberately chose to keep itself in ignorance that it was submitting false, hugely inflated claims for reimbursement.

SuperValu does not dispute that it was selling forty-four of the top fifty drugs most of the time for much less than it claimed to the government were its "usual and customary" prices. Nor does it dispute that it was selling thirty of those drugs more than eighty percent of the time for much less than its claimed "usual and customary" prices. Instead, SuperValu points out that relators' case is not limited to those high-volume drugs ("cherry-picked examples," says SuperValu). Perhaps, but even if the relators tried to reach too far with other drugs, that would not mean their claims based on the "cherry-picked" drugs lack merit. The evidence of SuperValu's actions and state of mind regarding those "cherry-picked" drugs can also shed light on others. After all, the price-match program covered lots of drugs over the decade it was in place.

Relators' case here is factually complex because of time, geography, and the number of drugs involved. Their claims span a decade, during which SuperValu's price-matching practices changed in arguably important ways. Their claims also span drug sales across a host of local and regional retail markets with different competitors and matched prices. And their claims cover hundreds of different drugs. That complexity should not distract us from the sound theory at the core of relators' case. Where the price-matching program produced a

majority of actual sales at prices below the claimed "usual and customary" prices, the claimed prices could no longer be honestly deemed "usual and customary."

II. *Knowledge Under the False Claims Act*

SuperValu and the majority do not dispute this evidence or even the inferences that relators seek to draw from it. Instead, SuperValu and the majority say the evidence of SuperValu's actual knowledge and intentions is "irrelevant." Ante at 25**.** If that's correct, this case creates a safe harbor for fraudsters who claim taxpayer funds in bad faith, but whose barely-straight-faced lawyers offer an innocent explanation for their conduct. The majority even says it is irrelevant whether SuperValu actually believed and/or relied upon the *post hoc* justifications offered in litigation. "[I]t is not enough that a defendant suspect or believe that its claim was false." ***Id.,*** citing *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 288 (D.C. Cir. 2015); ante at 20 ("A defendant might suspect, believe, or intend to file a false claim, but it cannot *know* that its claim is false if the requirements for that claim are unknown.").

From 40,000 feet, that interpretation of the False Claims Act, or any cause of action for fraud, is extraordinary. It is a standard of knowledge we do not accept in any other areas of law, including criminal law. How many chief financial officers could say they did not "know"—not *really*—that the earnings reports were inflated, even if they suspected or believed they were? How many drug couriers could assert they did not really "know" that they were carrying drugs? Federal lawsuits and prosecutions are not seminars in such radical epistemological doubt. Federal courts routinely give "ostrich" instructions in response to such defenses, even in criminal cases:

"You may find that the defendant acted knowingly if you find beyond a reasonable doubt that he believed it was highly probable that [state fact as to which knowledge is in question, e.g., 'drugs were in the suitcase,' 'the financial statement was false,'] and that he took deliberate action to avoid learning that fact." Seventh Circuit Pattern Criminal Jury Instructions 4.10 (2020). We would never accept a defense theory based on such Cartesian doubt, and certainly not as a matter of law, in any other case requiring proof of knowledge of the key facts.

A. *Statutory Text and the Common Law*

Looking at the analysis more closely, the majority's interpretation conflicts with the statutory text of the False Claims Act, its common-law foundations, and its history and purposes. Let's start with the text of the Act. The key language imposes liability on a person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1).

The scienter standard is "knowingly," and the Act then defines the term:

> (b) Definitions. For purposes of this section–
>
> (1) the terms "knowing" and "knowingly"–
>
> (A) mean that a person, with respect to information–
>
> (i) has actual knowledge of the information;
>
> (ii) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud….

31 U.S.C. § 3729(b).

The three prongs of the statutory definition closely track the most authoritative summary of the common law's treatment of fraudulent scienter, used by the Supreme Court to interpret the False Claims Act. The Restatement (Second) of Torts § 526 (1977) also offers three prongs:

> A misrepresentation is fraudulent if the maker
>
> (a) knows or believes that the matter is not as he represents it to be,
>
> (b) does not have the confidence in the accuracy of his representation that he states or implies, or
>
> (c) knows that he does not have the basis for his representation that he states or implies.

The majority itself emphasizes that the Supreme Court has interpreted the False Claims Act consistently with the common law of fraud. Ante at 14, quoting *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1999 & n.2 (2016). That's certainly correct. *Escobar* relied on the Restatement (Second) of Torts, as did *Safeco* in interpreting the Fair Credit Reporting Act. 551 U.S. at 69.[1]

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[1]The majority thinks § 526 is irrelevant in interpreting the False Claims Act's scienter standard, and that § 500 is a better guide because that's what *Safeco* cited for "reckless disregard." Ante at 16, citing *Safeco*, 551 U.S. at 69. That reasoning is circular. Section 500 addresses reckless disregard for the *safety* of another person. In other words, the majority is relying on the common law of reckless driving, not the common law of fraud. *Safeco* seems to have cited § 500 for lack of anything more pertinent to violations of the technical notice requirements of the Fair Credit

As Restatement § 526 shows, the common law definition of fraud makes subjective bad faith central to fraudulent scienter. Yet the majority concludes that bad faith is irrelevant … in a fraud case! I would follow the Restatement, as echoed in the text of the False Claims Act itself. A reasonable jury could infer that SuperValu "knew" or "believed" that its higher prices were not its usual and customary prices, or, at the very least, did "not have the confidence in the accuracy" of its representations to the United States government that its certifications stated or implied. But see ante at 20 ("A defendant might suspect, believe, or intend to file a false claim, but it cannot *know* that its claim is false if the requirements for that claim are unknown.").

Reporting Act. But § 526 appears in the Restatement Division on Misrepresentation, the Chapter on Misrepresentation and Nondisclosure Causing Pecuniary Loss, the Topic on Fraudulent Misrepresentation (Deceit), and Title A, Fraudulent Character of Misrepresentation. Section 526 is titled "Conditions Under Which Misrepresentation is Fraudulent (Scienter).," Each of its three prongs is phrased in terms of what the maker of the misrepresentation "*knows*." Thus, for the common-law understanding of the False Claims Act's definition of "knowing," § 526 is right on target. (In *Escobar*, the Supreme Court relied on § 529, from the same topic on fraudulent misrepresentations. 136 S. Ct. at 1999.) And I confess to being baffled by the majority's assertion: "We decline to graft aspects of common law fraudulent scienter into the FCA when Congress chose not to include such requirements." Ante at 17**.** With respect, given the majority's stated adherence to common-law understandings, what the maker of the false claims believes or suspects fits squarely into both the second and third prongs of 31 U.S.C. § 3729(b) and Restatement (Second) of Torts § 526. The common law of reckless driving (§ 500) does not provide the relevant scienter standard for a fraud case or a fraud statute.

B. *Origins of the Statutory Definition*

The majority fails to appreciate the importance of the False Claims Act's textual definitions of "knowingly" and their common-law roots. The majority instead focuses on the Supreme Court's interpretation of a different term in a different statute. That's a mistake. The False Claims Act's three-part definition of knowingly, with the disclaimer that specific intent to defraud is not required, did not come from nowhere. It was a clear instruction from Congress to courts to relax their restrictive interpretations of "knowing" under the Act.

Before 1986, the False Claims Act used the terms "knowing" and "knowingly" without elaboration. When Congress added the definitions in 1986, it acted in response to court decisions that were making it difficult to bring claims against dishonest claimants absent clear evidence of actual knowledge of the falsity of the claim. We should not ignore this history. The statutory text and history show Congress's clear intent to allow False Claims Act lawsuits to proceed against businesses that fail to do basic due diligence in response to warning signs that their government payments are ill-gotten.[2]

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[2] The majority asserts it is an error to rely on statutory history to go "beyond the text" of the statute. Ante at 17**.** If the statutory text were clear as applied to this case, I might agree, but the majority obviously does not believe the statutory text of § 3729 is clear. Otherwise the majority would not need to rely on *Safeco*, addressing a different statute and different scienter standard. Since the text is not self-explanatory, it makes good sense to use reliable evidence to figure out what problem Congress was trying to solve. See also *Safeco* itself, where the Supreme Court said it was deciding as it did because there was "no indication that Congress had something different in mind." 551 U.S. at 69. The Court's comment invites

The amended three-pronged definition of "knowledge" in the False Claims Act was added in 1986 as part of a broader revision to the Act. As sponsor Senator Grassley explained, the government needed "lots of help" from Congress to identify fraudsters and bring them to justice. 132 Cong. Rec. S11243 (Aug. 11, 1986). Expanding the statute's definition of "knowledge" to reach broader degrees of culpability was an important tool to reach that goal. *Id.*

The problem, as explained in the Senate Committee report, was that courts had applied too narrow a definition of "knowledge," often requiring actual literal knowledge of a claim's falsity or even specific intent to defraud to find liability under the Act. S. Rep. 99-345 at 7, citing *United States v. Aerodex*, 469 F.2d 1003 (5th Cir. 1972) (collecting cases). Given the "remedial" goals of the False Claims Act, the Committee sought to prevent courts from allowing unscrupulous claimants, acting in bad faith, to evade liability through legal technicalities about the definition of "knowledge." See S. Rep. 99-345 at 7, 21.

The result of these earlier court decisions had been predictable: unscrupulous claimants could structure claim-processing procedures so that false claims could be filed without the relevant decision-makers truly "knowing" of the fraud. *Id.* at 7. Even if hints of possible wrongdoing surfaced, decision-makers could insulate themselves from liability by ignoring problems that even a cursory investigation would have uncovered. *Id.*

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reliance on statutory history to answer these questions where the text is not entirely clear.

In explaining the statutory text, the House Judiciary Committee noted the problems from the lack of a definition of "knowledge" and reported:

> By adopting this [three-pronged] definition of knowledge, the committee intends not only to cover those individuals who file a claim with actual knowledge that the information is false, but also to confer liability upon those individuals who deliberately ignore or act in reckless disregard of the falsity of the information contained in the claim. *It is intended that persons who ignore "red flags" that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim should be held liable under the Act.* This definition, therefore, enables the Government not only to effectively prosecute those persons who have actual knowledge, but also those who play "ostrich."

H. Rep. 99-660 at 21 (emphasis added).

The Senate Committee also focused on proverbial "ostriches" who stick their heads in the sand instead of verifying that they are not cheating taxpayers. S. Rep. 99-345 at 7, 15, 21. These ostriches need not have "conscious culpability" of wrongdoing: people who submit claims that they have "reason to know" are potentially false run the risk of violating the Act if they "fail[] to inquire" as to the falsity of the claims. 132 Cong. Rec. S11243–44 (Aug. 11, 1986; statement of Senator Grassley).

The Committee reports explained that the added definition was aimed at claimants who acted in bad faith by failing to investigate potential problems: "those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate." S. Rep. 99-345 at 7. Congress chose statutory language that could have been custom-tailored for SuperValu's approach in this case. SuperValu knew that the "integrity" of its "usual and customary" prices would be suspect if price-matching were not the "exception" but the rule, yet it kept submitting those claims through a nationwide price-matching campaign anyway, netting tens of millions of dollars of public funds annually.

This is the same standard that the Eleventh Circuit adopted in *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148 (11th Cir. 2017), another case involving arguable regulatory ambiguity. After considering the statutory text and legislative history, the court concluded that "scienter is not determined by the ambiguity of a regulation, and can exist even if a defendant's interpretation is reasonable." *Id*. at 1155, citing the Senate Committee Report indicating Congressional intent to require claimants to engage in "limited inquiry." *Phalp* also squarely rejected the majority's position here: "The district court's conclusion that a finding of scienter can be precluded by a defendant's identification of a reasonable interpretation of an ambiguous regulation that would have permitted its conduct is erroneous." *Id*. (*Phalp*'s treatment of this issue refutes the majority's attempt to explain it away. See ante at 15.) The *Phalp* court's interpretations of the Act's scienter definition should be obviously correct.

In fact, before the *Safeco* progeny cited by the majority, our colleagues in other circuits followed the amended text of the

False Claims Act and common sense: a claimant could be liable under the Act notwithstanding a purported regulatory ambiguity if the defendant deliberately ignored the falsity of the claim or otherwise acted in bad faith. *United States v. Science Applications International Corp.*, 626 F.3d 1257, 1272–73 (D.C. Cir. 2010) (affirming verdict for United States; jury could infer that defendant knew its claims were false notwithstanding "regulatory divide" in how to interpret a regulation); *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999) (reversing summary judgment: "In short, [defendant's] petition arguing that the sky will fall upon government contractors if they are precluded from relying on a 'reasonable interpretation' is not only unsupported by case law, it is also ungrounded in reality."); see also *Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1053 (8th Cir. 2002) (citing *Parsons* for the proposition that "any possible ambiguity of the regulations is water under the bridge" where contractor's misinterpretation is "knowing").[3]

In this case, the relators' evidence shows that SuperValu knew it was claiming high "usual and customary" prices that it was charging less than half the time, often less than one fifth

[3] We took a similar approach in *United States ex rel. Sheet Metal Workers Int'l Ass'n, Local Union 20 v. Horning Investments, LLC*, 828 F.3d 587 (7th Cir. 2016). The defendant argued that it relied on advice of professional experts in determining that its claims were not false. We rejected that argument on grounds inconsistent with the majority approach here. Rather than treat a professional's ability to find ambiguity as a defense in itself, we applied a much more demanding five-part test that required proof of timely, good-faith, and full disclosure to competent experts. *Id*. at 594–95. We ultimately affirmed summary judgment for the defendants, but on a different ground, that the relator simply did not have evidence that defendants were on notice that their claims were false. *Id.* at 595.

of the time. SuperValu knew that its practices raised questions about the "integrity" of its "usual and customary" prices but nonetheless ignored those concerns. The False Claims Act's statutory definition of "knowing" reaches those who know their claims are false or who act in deliberate ignorance of whether their claims were true or false. We should reverse summary judgment for SuperValu.

III. *The Majority's Safeco Tangent*

Rather than focusing on the language of the False Claims Act itself, and its origins in the common law of fraud and responses to crabbed judicial interpretations, the majority opinion takes a very different approach. It borrows the Supreme Court's treatment of a different term, "willfully," under a different statute, the Fair Credit Reporting Act, in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007). The majority adopts *Safeco*'s treatment of reckless disregard for law as a branch of "willful" misconduct. The majority then goes even further and concludes that relators must meet that standard for reckless disregard for any False Claims Act case, even if they rely on the actual-knowledge or deliberate-ignorance prongs of the Act's definition of knowing.

The majority makes two fundamental mistakes. First, the reliance on *Safeco* to understand "reckless disregard" is neither necessary nor fitting for the False Claims Act. The Act draws on a different branch of the common law (of fraud, not reckless driving), and the history of the statutory amendments shows that Congress thought it was enacting a standard quite different from the majority's. Second, by saying relators must satisfy the *Safeco* reckless-disregard standard in any case, the majority effectively nullifies two-thirds of the statutory definition of "knowing." To explain:

The question in *Safeco* was whether an insurer's decision about an initial premium rate for an insured could qualify as an "adverse action" based on a credit report that could require notice to the consumer in question. The Supreme Court ultimately held that it could but also held that Safeco had not "willfully" violated that Act because the statute and regulation were not clear as applied to initial premium decisions, so that Safeco had not acted willfully.

The Fair Credit Reporting Act does not define "willfully," which the Court described as a "word of many meanings whose construction is often dependent on the context in which it appears." 551 U.S. at 57, quoting *Bryan v. United States*, 524 U.S. 184, 191 (1998). Without more specific guidance for interpreting the term in that act, the *Safeco* Court had little choice but to construct a working definition from multiple sources. The Court focused on civil law, noting that in several civil contexts, willful violations of statutes could be shown by recklessness, which was consistent with common-law use of the term. *Id.* Then, because there was "*no indication that Congress had something different in mind*," and because the term "recklessness" is not "self-defining," the Court announced an application of that scienter standard to the Fair Credit Reporting Act. *Id.* at 57–58, 68–69.

The Court then drew on common-law definitions of "recklessness" that apply to actions putting others in physical danger. The Court described recklessness as action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known," *id*. at 68, quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994), and conduct involving "unreasonable risk of physical harm … substantially greater than that which is necessary to make his conduct negligent. *Id*. at

69, quoting Restatement (Second) of Torts § 500 (also regarding putting another person in physical danger). The Court summarized its view for the Fair Credit Reporting Act:

> *There being no indication that Congress had something different in mind*, we have no reason to deviate from the common law understanding in applying the statute. Thus, a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

551 U.S. at 69 (emphasis added; citation omitted). Along the way, the Court added footnote 20, saying that evidence of subjective bad faith would not be relevant to the definition of willfulness in 15 U.S.C. § 1681n(a) where a company followed an objectively reasonable interpretation of the Fair Credit Reporting Act.

The majority here and four other circuits have borrowed this reasoning from *Safeco* and grafted it onto the False Claims Act. Two of those circuits did so in non-precedential decisions. The two precedential decisions are *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015), and *United States ex rel. Donegan v. Anesthesia Associates of Kansas City*, 833 F.3d 874 (8th Cir. 2016). The Eleventh Circuit reached a different conclusion in *Phalp*, 857 F.3d 1148, discussed above. (The *Phalp* opinion did not discuss *Safeco* or *Purcell*, but both cases were briefed extensively, including by the United States in an amicus brief arguing that *Safeco* provided no meaningful guidance for False Claims Act cases. There is no doubt that

the Eleventh Circuit rejected *Purcell*'s borrowing of *Safeco*. It did not cite *Safeco* because, for reasons explained here, *Safeco* simply is not needed to interpret the scienter requirement of the False Claims Act.)

In the absence of better guidance for the False Claims Act and common law, reliance on *Safeco* might be understandable, if a bit of a stretch. The majority here errs, however, by overlooking *Safeco*'s directive: first check to see if "Congress had something different in mind." 551 U.S. at 57, 69. With the False Claims Act, we *do* have meaningful guidance from the statutory text, the common law, and legislative history, as discussed above.

If the majority limited its reliance on *Safeco* to the reckless-disregard prong of the False Claims Act's definition of knowing, its mistake would be more understandable. It's the majority opinion's next move that is more extraordinary and much more damaging. The majority concludes that a relator under the False Claims Act must satisfy the *Safeco* definition of reckless disregard—show that no reasonable understanding of law could justify the defendant's action, or show that the defendant disregarded "authoritative guidance"—*in every case*, even those relying on the actual-knowledge and deliberate-ignorance prongs of the definition of "knowingly." As a result, the majority holds in effect that those two-thirds of the statutory definition add zero meaning to the statute.

The majority's major premise is that "reckless disregard" is the broadest of the three prongs. Its minor premise is that any case of "actual knowledge" or "deliberate ignorance" would *always* fall within "reckless disregard," *as that term was defined in Safeco*. That too-simple heuristic may be useful in

some easy cases, but its application here is inconsistent with how courts should read statutes.

The key logical error lies in the minor premise, that any case of actual knowledge or deliberate ignorance would necessarily also be covered by *Safeco*-reckless disregard. There is no basis for that assumption, which leads away from the common law of fraud, where subjective bad faith is central.

Consider a hypothetical close to this case. A government contractor submits claims believing, subjectively, that the claims are probably false. The agency has not yet provided what *Safeco* would call "authoritative guidance," but the contractor reads the controlling regulation (correctly) to preclude its claim. Still, it decides to stay quiet, hoping it will not get caught, or at least not too quickly. In that situation, judges and jurors can say that claims were fraudulent and the contractor knew it, even if a creative lawyer can later make a non-frivolous legal argument for its innocence. Likewise, the contractor acted with fraudulent intent because it "believed" the claims were false and submitted claims in which it did not have the "confidence" it claimed. See 31 U.S.C. § 3729(b); Restatement (Second) of Torts § 526.

This bad-faith "catch us if you can" approach to public funds is exactly what Congress thought it was outlawing when it decided in 1986 that it needed to define "knowledge" more specifically for the False Claims Act, including to reach deliberate ignorance of falsity. Recall also that under the majority's approach, there is no need for a defendant to show that it actually "followed" any "objectively reasonable" interpretation of the law that would supposedly save the claims from being false. See ante at 25.

The majority's logic thus takes the False Claims Act in a direction 180 degrees away from common-law fraud. It makes subjective bad faith, including deliberate ignorance, "irrelevant." *Id*. That's contrary to both the actual-knowledge and deliberate-ignorance prongs of the Act's textual definition. It loses sight of the fact that the Act applies to "fraudulent" conduct. And it's also contrary to the common-law scienter standard in the Restatement (Second) of Torts, which is satisfied if the defendant "knows *or believes* that the matter is not as he represents it to be," or if he "does not have the confidence in the accuracy of his representation that he states or implies…." § 526 (emphasis added).

The majority rests heavily on *Safeco*'s footnote 20 to supports its new safe harbor where subjective state of mind is irrelevant. See ante at 19**.** With respect, the majority reads far too much into that footnote, which by its own terms is limited to "determining whether a company acted knowingly or recklessly for purposes of § 1681n(a)." By the majority's reading, that footnote in an opinion on credit reporting requirements, which borrowed from the common law of reckless driving, upended the common law of *fraud*, one of the paradigmatic intentional torts, where state of mind is critical. The *Safeco* Court gave no sign that its footnote intended to reach beyond § 1681n(a) or that it was creating a new element for fraud claims—the absence of any plausible reading that would render the false statement true. The majority's too-broad reading leads it to depart from the text of the False Claims Act and loses sight of Congress's clear intent.

In fact, the Supreme Court itself has warned against reading *Safeco*'s footnote 20 so broadly. It did so in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923, 1933 n.* (2016). The

Court declined to extend the *Safeco* definition of "willfully" to treble-damage awards for patent infringement under 35 U.S.C. § 284. Subjectively bad-faith infringement, focused on the defendant's state of mind when it acted, had long been an independent basis for enhanced patent damages. 136 S. Ct. at 1933 & n.*. As the majority points out here, ante at 17–18, in *Halo Electronics*, differences in the two statutes produced different scienter standards. Exactly the same reasoning should apply here. The differences between the texts and histories of the Fair Credit Reporting Act and False Claims Act should lead us to decline to extend the *Safeco* standard and its footnote 20 to the False Claims Act.

Returning to False Claims Act cases, consider, for example, *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 837–38 (6th Cir. 2018), where the Sixth Circuit reversed dismissal of a relator's complaint. The complaint alleged that the relator and other nurses had "concerns about the defendants' compliance with Medicare regulations, but were told to ignore any problems." When relator raised issues about regulatory compliance, executives told her on multiple occasions that "'[w]e can just argue in our favor if we get audited' as a solution to any compliance issues." The Sixth Circuit reasoned that the allegations about notice of compliance problems imposed an obligation on the defendants to inquire whether they were actually in compliance with regulations. The Sixth Circuit concluded the allegations supported "knowledge" under both the deliberate-ignorance and reckless-disregard prongs of the definition. *Id.* at 838. Yet under the majority's approach here, that case would have been dismissed so long as an attorney could later offer a barely-plausible theory of innocence, even though the defendant ignored repeated and correct warnings that it was violating the

regulations. Worse yet, the majority here would have dismissed the case even if the supervisors had admitted that they *knew* their submissions were non-compliant.

The majority's bottom line—that only objectively reckless disregard matters, and subjective bad faith does not—also violates one of the most common tools of statutory interpretation. It renders the actual-knowledge and deliberate-ignorance prongs of the statutory definition utterly superfluous. See *City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."), quoting *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality); *National Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 632 (2018), quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 710 (7th Cir. 2015); Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 174 (2012) ("The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition.").

The canon against surplusage is not absolute, of course. Sometimes drafters of legal documents may "intentionally err on the side of redundancy to 'capture the universe.'" *Sterling Nat'l Bank v. Block*, 984 F.3d 1210, 1218 (7th Cir. 2021), quoting Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 934 (2013); accord, e.g., *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019); *White v. United Airlines, Inc.*, 987 F.3d 616, 622 (7th Cir. 2021).

The False Claims Act definition of "knowingly" is about as strong a case for the canon against surplusage as one is

likely to find. The three prongs mirror three distinct common-law prongs for fraudulent scienter. Congress adopted them to give courts clearer guidance because Congress was disappointed with courts' interpretations of the undefined "knowing." Congressional leaders on the subject, such as Senator Grassley and Representative Berman, were concerned that courts would continue to misinterpret the statute. They explained exactly how the definition of "knowing" should be applied, as did the respective committees. The three prongs may overlap in many cases, but the adoption of the three distinct prongs in the same paragraph of the statutory text was unmistakably an effort to be both thorough and broad. Congress said as clearly as it could that the False Claims Act should reach just this kind of case.

I close with two final observations about the majority's misguided holding. First, even under the *Safeco* standard, a reasonable jury could find that SuperValu's more extreme conduct here was not reasonable. There is simply no reasonable definition of "usual and customary" that means "something we do less than half the time and that we instruct our employees not to do." Defining "usual and customary" to mean the opposite of what those two words actually mean is simply not reasonable.

Second, the majority's approach actually leaves the False Claims Act definition of knowledge *narrower* than when the 1986 amendment was passed. Consider, for example, *United States v. Mead*, 426 F.2d 118, 122–23 (9th Cir. 1970), which Representative Fish singled out as applying a too-narrow definition of knowledge. 132 Cong. Rec. H6480 (Sept. 9, 1986); see also *Aerodex*, 469 F.2d at 1007, cited negatively in S. Rep. 99-345 (collecting *Mead* as an example of then-operative

knowledge standard). In *Mead*, the court explained that where regulatory language is uncertain and even the district court misinterpreted the regulations, scienter is still a question of fact. If the government had shown that Mead knew his regulatory interpretation was wrong or had fraudulent intent, he would still be liable under the Act. See also *United States v. Ueber*, 299 F.2d 310, 314 (6th Cir. 1962), cited negatively in S. Rep. 99-345 (where contract distinguished between "direct" and "indirect" labor costs, falsity of claims for "direct" labor costs and defendant's knowledge of their falsity are questions of fact for trial; remanding for further fact-finding). Whatever "reckless disregard" means, we should not use it to *narrow* the definition of knowledge that Congress thought it was expanding.

To sum up, relators have come forward with substantial evidence of knowing fraud, as SuperValu claimed reimbursement at supposedly "usual and customary" prices for drugs that were as much as eight to fifteen times higher than the prices it was actually charging the general public a majority of the time. The evidence supports a reasonable inference of actual knowledge or at least deliberate ignorance or reckless disregard for whether its reimbursement claims were false. We should reverse summary judgment and remand for trial on relators' claims. With respect, I believe that both Congress and the Supreme Court will be surprised by this decision and the others extending *Safeco* to the False Claims Act. If the False Claims Act is to remain effective in discouraging and remedying fraudulent raids on taxpayer dollars, Congress or the Supreme Court or both will need to respond to this line of cases.

In the

United States Court of Appeals

For the Seventh Circuit

No. 20-2243

UNITED STATES OF AMERICA and the STATE OF ILLINOIS *ex rel.* THOMAS PROSE,

Plaintiffs-Appellants,

v.

MOLINA HEALTHCARE OF ILLINOIS, INC., and MOLINA HEALTHCARE, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 17 C 6638 — **Virginia M. Kendall**, *Judge.*

ARGUED JANUARY 15, 2021 — AMENDED NOVEMBER 15, 2021

Before SYKES, *Chief Judge*, and WOOD and HAMILTON, *Circuit Judges*.

WOOD, *Circuit Judge*. Sophisticated players in the healthcare market know that services come at a cost; providers charge fees commensurate with the services rendered; and payors expect to receive value for their money. There are

many options from which to choose when designing a payment scheme, including fee-for-service, prepaid services using the health-maintenance organization model (HMO), and capitation payments, to name just a few. Each of these models attempts to balance expected services against expected costs.

The present case involves a capitation system, which is similar to the traditional HMO approach in which parties agree to a fixed per-patient fee that covers all services within the scope of a governing plan. Molina Healthcare of Illinois (Molina) contracted with the state's Medicaid program (which in turn is largely funded by the federal government, see Illinois Medicaid, https://www.benefits.gov/benefit/1628) to provide multiple tiers of medical-service plans with scaled capitation rates. Among those, the Nursing Facility (NF) plan required Molina to provide Skilled Nursing Facility (SNF) services. Molina itself, however, did not deliver those services; instead, it subcontracted with GenMed to cover this obligation. Molina received a general capitation payment from the state, out of which it was to pay GenMed for the SNF component. But little time passed before Molina breached its contract with GenMed and GenMed terminated the contract. After GenMed quit, Molina continued to collect money from the state for the SNF services, but it was neither providing those services itself nor making them available through any third party. Molina never told the government about this breakdown, nor did it seek out a replacement service provider.

Thomas Prose, the founder of GenMed, brought this *qui tam* action under both the federal and the state False Claims Acts. See 31 U.S.C. § 3729 *et seq.*; 740 ILCS 175/1 *et seq.* (Because the state law does not differ in any meaningful way from the federal law, we refer in this opinion only to the federal law for

the sake of simplicity.) Prose alleged that Molina submitted fraudulent claims for payments to the Department (which was for the most part just a conduit for federal funds—a point we will not repeat) for skilled nursing facility services. Although the district court agreed with Prose that the SNF services were material to the contract, it dismissed the case at the pleading stage because it found that the complaint insufficiently alleged that Molina knew that this condition was material. But on our independent reading of the complaint, we conclude that it plausibly alleges that as a sophisticated player in the medical-services industry, Molina was aware that these kinds of services play a material role in the delivery of Medicaid benefits. We therefore reverse and remand for further proceedings.

I

We present the facts in the light most favorable to Prose, the party opposing dismissal for failure to state a claim. Molina, a subsidiary of Molina Healthcare, Inc. (Molina Healthcare), is a Managed Care Organization (MCO). It has contracted with the Illinois Department of Healthcare and Family Services to provide healthcare services for Illinois Medicaid beneficiaries. Molina's contract with the state was a "risk contract," in which the parties agree to an expected cost for services for a patient and Molina assumed the risk that the cost of those services might exceed the contracted payment amount. 42 C.F.R. § 438.2.

As part of this risk contract, Molina and the Department agreed to capitation payments—periodic contractual fees, calculated per enrollee. These fees must be "actuarily sound." *Id*. Each enrollment category had its own schedule of payments. A given category's capitation rate reflected the anticipated

costs per person on an amortized basis. There was nothing unusual about this arrangement. In the late 1980s and 1990s, the capitation-payment model became common in the health-care industry. It is similar to the more traditional health maintenance organization (HMO), in which a health insurance provider covers all care over a fixed annual fee, but it differs in some important ways. Capitation rates, in a word, are more flexible. They allow providers to establish distinct rate tiers, and the providers agree to delineate at the outset exactly what services they will furnish within each tier. Membership in each tier is correlated with factors such as age, health, and needed services. See, *e.g.*, Nina Novak, *Health Care Risk Contracting: The Capitation Alternative*, 3 HEALTH LAW. 4, 4–5 (1987). A Managed Care Organization plays an active role in the creation of the plan, as it needs to understand the risk it is assuming through its guarantee of services. See Andrew Ruskin, *Capitation: The Legal Implication of Using Capitation to Affect Physician Decision-Making Processes*, 13 J. CONTEMP. HEALTH L. & POL'Y 391, 397, 409, 411 (1997).

Molina's contract created "rate cells" that were "stratified by age … , geographic services area (Greater Chicago and Central Illinois), and setting-of-care." It defined five care settings: Nursing Facility, Waiver, Waiver Plus, Community, and Community Plus. The lowest cost and most populous of these cells was the Community group. For the Greater Chicago Community category during the contract period for February to December 2014, for example, the projected enrollee count was 261,108, and the monthly capitation rate the state paid to Molina was $53.51 for each person 65 years and older. By contrast, the highest-cost category—Nursing Facility—had 70,836 enrollees covered at a monthly rate of $3,180.30 per person 65 and older. Our case concerns this latter category.

Molina contracted to provide Skilled Nursing Facility (universally abbreviated as SNF) services for Nursing Facility enrollees. Under Illinois state law, SNF providers, known as "SNFists," are "medical professional[s] specializing in the care of individuals residing in nursing homes employed by or under contract with a MCO." 305 ILCS 5/5F-15. Molina's contract further specified that a SNFist's "entire professional focus is the general medical care of individuals residing in a Nursing Facility and whose activities include Enrollee care oversight, communication with families, significant others, PCPs, and Nursing Facility administration." SNFists perform valuable long-term care for sick, disabled, or elderly patients who need long-term medical and nursing care without hospitalization. Molina's contract with the Department emphasized that SNFist services were integral to improving the enrollee's quality of life and potentially to enabling her to be discharged from the nursing home.[1]

In order to deliver these expensive services, in April 2014 Molina entered into an agreement with GenMed, because Molina did not have the necessary qualified personnel. This contract provided that GenMed would provide SNF services for

[1] The dissent suggests that the SNFist services provided by Molina were contractually limited to "care coordination and management." That was true in some circumstances, but not all. Providers employed through the SNFist program were also expected to "deliver care" "when appropriate or necessary." And in its general definition of SNF facility services, the contract included all of "Skilled Nursing care, continuous Skilled Nursing observations, restorative nursing, and other services under professional direction with frequent medical supervision." Construing the allegations in the light most favorable to Prose, as we must, this shows that SNFist services are comprehensive, not just one of a bundle of 20 or 30 different items, as the dissent contends.

Molina's Nursing Facility enrollees. The Department was not a party to the contract, and so it continued to pay Molina the full capitation payments for the SNF recipients. Molina then used those funds to pay GenMed the agreed amount. This arrangement, however, lasted only about nine months. In January 2015, Molina stopped reimbursing GenMed and sought to renegotiate the price terms of the service agreement. GenMed continued to provide SNF services through March 2015, but it terminated the contract on April 2, 2015, after Molina continued to refuse to pay it.

From April 2, 2015, until at least April 5, 2017, Molina was not delivering SNF services to anyone, either with its own personnel or through a subcontractor. Indeed, it was not even looking for a replacement for GenMed. It did not inform the Department or the federal authorities of this change, and so the Department continued to pay it the full capitation amount for SNF services—in essence, payments for nothing. Aware of the situation because of his association with GenMed, Thomas Prose filed this *qui tam* action on September 14, 2017, alleging that Molina violated the False Claims Act by seeking and obtaining compensation despite failing to provide material services under its contract with the Department.

II

Since we are evaluating the district court's decision to grant a motion to dismiss under Rule 12(b)(6), we accept all well-pleaded facts as true and draw all reasonable inferences in favor of the non-moving party. *O'Brien v. Village of Lincolnshire*, 955 F.3d 616, 621 (7th Cir. 2020). Critically, however, this is not a case that is governed by the usual notice-pleading standards of Federal Rule of Civil Procedure 8. See, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A party bringing a case

alleging fraud must satisfy the heightened pleading standards set forth in Rule 9(b), which says that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). At the same time, Rule 9(b) carves out several matters that may be alleged generally, including "[m]alice, intent, knowledge, and other conditions of a person's mind." *Id.*

Rule 9(b)'s more demanding pleading requirements apply to suits brought under the False Claims Act. The complaint must describe the "who, what, when, where, and how" of the fraud to survive a motion to dismiss. *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 776 (7th Cir. 2016) (quoting *United States ex rel. Lusby v. Rolls–Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009)). Nonetheless, courts and litigants should not "take an overly rigid view of the formulation"; the allegation must be "precis[e]" and "substantiat[ed]," but the specific details that are needed to support a plausible claim of fraud will depend on the facts of the case. *Presser*, 836 F.3d at 766 (quoting *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co.*, 631 F.3d 436, 442 (7th Cir. 2011)). As we noted earlier, the Illinois False Claims Act applies the same standards as the federal statute. *Bellevue v. Universal Health Servs. of Hartgrove, Inc.*, 867 F.3d 712, 716 n. 2 (7th Cir. 2017).

A

Before assessing Prose's complaint, it is helpful to take a more detailed look at the False Claims Act. This statute creates a right of action under which private parties may, on behalf of the federal government, bring lawsuits alleging fraud. 31 U.S.C. § 3730(b). The actions go by the hoary Latin term "*qui tam*" (short for *qui tam pro domino rege quam pro se ipso in*

hac parte sequitur, meaning "who as well for the king as for himself sues in this matter," see Bryan A. Garner, ed., BLACK'S LAW DICTIONARY at 1444 (10th ed. 2014)). The party seeking to represent the government's interest is called a "relator." Successful relators are motivated by the prospect of recovering sizable shares of the money paid to the government after bringing a successful claim. *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 912 (7th Cir. 2009). The government has the right, but is not obligated, to proceed on a claim brought by a relator; it may elect to dismiss the action notwithstanding the party's objection. 31 U.S.C. § 3730(c)(2)(B). When the government chooses not to proceed with the action but does not dismiss the action either, the initiating party retains the right to proceed against the defendant. 31 U.S.C. § 3730(c)(3).

The Act makes it unlawful knowingly (1) to present or cause to be presented a false or fraudulent claim for payment to the United States, (2) to make or use a false record or statement material to a false or fraudulent claim, or (3) to use a false record or statement to conceal or decrease an obligation to pay money to the United States. *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 822 (7th Cir. 2011). A successful claim requires proof both that the defendant made a statement to receive money from the government and that he made that statement knowing it was false. *Id*. But there is more. Not all false statements are actionable under the Act. The plaintiff also must prove that the violation proximately caused the alleged injury. *United States v. Luce*, 873 F.3d 999, 1011–14 (7th Cir. 2017). In other words, the pecuniary losses must be "within the foreseeable risk of harm" that the false statement created. *Id.* at 1012. In addition, the defendant's conduct must meet a strict materiality requirement. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989,

1996 (2016). It is not enough simply to say that the government required compliance with a certain condition for payment. The facts must indicate that the government actually attaches weight to that requirement and relies on compliance with it. In sum, as the Third Circuit has put it, the relator must establish (1) falsity, (2) causation, (3) knowledge, and (4) materiality. *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 487 (3d Cir. 2017).

The Act is not limited to claims that are facially false. It covers a defendant's more general decision fraudulently to procure payment from the government. Consequently, while the archetypical claim is one in which a "claim for payment is itself literally false and fraudulent," *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006), courts have identified particular theories that support FCA claims, including (1) false certification to the government that the party has complied with a statute, regulation, or condition of payment; (2) promissory fraud, or fraud in the inducement, *id*. at 1172–73; and (3) implied false certification, see *Escobar*, 136 S. Ct. at 2001. The implied false certification claim involves the omission of key facts rather than affirmative misrepresentations. This type of liability arises if the "defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements[;] those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." *Id.* at 1999.

B

Prose's complaint raises allegations under all three of these approaches: factual falsity, fraud in the inducement, and implied false certification. At the same time, he contends

that these labels should be jettisoned. Taking our guidance from *Escobar*, we decline to distill one unified approach for all cases. The Court's focus on the implied false certification theory in *Escobar* signals that it continues to find that there are distinct ways in which the statute may be violated. We will follow suit.

As we now explain, we conclude that Prose has adequately stated a claim under the Act. His detailed allegations support a strong inference that Molina was making false claims. At this stage, that is enough; as the litigation proceeds, it is possible that one or more of these theories will lack support. But there is time enough for that assessment at trial or upon a motion for summary judgment.

Fraud is a serious matter. Rule 9 represents a policy decision to protect potential fraud defendants from litigation based on nothing but rumor or speculation. Instead, the relator must set forth the basis for her conclusion that fraud is afoot. *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1108 (7th Cir. 2014). But as we have been saying, that does not require the impossible. Relators with a legitimate basis for bringing False Claims Act cases will not generally have propriety information of the company they are trying to sue, and so courts do not demand voluminous *documentation* substantiating fraud at the pleading stage. All that is necessary are sufficiently detailed *allegations*.

We begin with the allegations that would support a claim for direct factual falsity—the canonical FCA claim. The question is whether Prose's allegations alert Molina in sufficient detail for Rule 9(b) purposes of how it allegedly made a "claim for payment [that] is itself literally false and fraudulent." *Hendow*, 461 F.3d at 1170. Prose contends that after April

2, 2015, Molina submitted to the government materially fraudulent enrollment forms for each *new* enrollee in the Nursing Facility category of patients. As of that date, its contract with GenMed had ended, and it could not, and did not, provide SNF services.

Rule 9(b) requires specificity, but it does not insist that a plaintiff literally prove his case in the complaint. Prose provided numerous details indicating when, where, how, and to whom allegedly false representations were made. He hardly can be blamed for not having information that exists only in Molina's files. He did provide information that plausibly supports the inference that Molina included false information about the pertinent services for new enrollees. How else could it have asked for its capitation payments based on these additional beneficiaries? A direct assertion that Molina had new enrollees who were in the skilled nursing facility tier, coupled with an assertion that Molina was seeking reimbursement for their SNF services, is not an omission. It is a statement, and in this case a statement that Prose asserts was false. He did not need any more to defeat the challenge to the adequacy of his complaint.

Prose also alleged circumstantial evidence of promissory fraud, or fraud in the inducement. Here, he needed to alert Molina with the necessary specificity of how it allegedly misrepresented its compliance with a condition of payment in order to induce the government to enter into a contract. *Hendow*, 461 F.3d at 1172–73 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943)); *cf. United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 709 (7th Cir. 2015), *abrogated by Escobar*, 136 S. Ct. 1989 ("[F]raud entails making a false representation, such as a statement that the speaker will do something *it plans not to*

do."). Prose charges that Molina fraudulently induced the Department to enter into contract renewals with Molina in 2016 and 2017 by affirmatively misrepresenting that it would continue to provide SNF services in its package for NF-category enrollees while not intending to do so.

The district court concluded that the complaint in this respect fell short because it did not include any details about the contract-renewal negotiations between Molina and the Department. But how would Prose have had access to those documents or conversations? The obligation to set out the "who, what, when, where, and how" of the fraud does not require such granular detail. Prose set forth precise allegations about the beneficiaries, the time period, the mechanism for the fraud, and the financial consequences. Once again, at trial or upon a motion for summary judgment he will face a different burden, but for now, this was enough.

Claims of fraudulent inducement also require the plaintiff to show that the defendant never intended to perform the promised act that induced the government to enter the contract. *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 917 (7th Cir. 2005) ("[F]ailure to honor one's promise is (just) breach of contract, but making a promise that one intends not to keep is fraud."). Prose put Molina on notice of this aspect of his case, too. He included details about statements made by Molina's chief operating officer (COO), Benjamin Schoen, who stated in his deposition that Molina's "staff did not have the ability or licensure to render [SNF] services." Taken together with Molina's defunct contract with GenMed and its failure to seek out a replacement SNF provider, the complaint alleges that any promise by Molina to

provide SNF services during the contract-renewal process was fraudulent on its face.

This may even have been more detail than was necessary, taking into account the fact that Rule 9(b) permits intent to be alleged generally. Construing the allegations liberally, the complaint asserts that Molina made some representations about actual SNF services that would be offered. Schoen acknowledged that Molina did not have the personnel available to perform those services. The complaint thus concludes that Molina did not and never intended to seek out another SNF service provider. This sufficed to allege intent.

Finally, even if the complaint fell short of the required specificity under Rule 9 for the first two approaches, it was sufficient to state a claim for implied false certification. The Supreme Court described that version of fraud as follows in *Escobar*:

> … [T]he implied false certification theory can be a basis for liability. Specifically, liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement. In these circumstances, liability may attach if the omission renders those representations misleading.
>
> We further hold that False Claims Act liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment. Defendants can be liable for violating requirements even if

> they were not expressly designated as conditions of payment. Conversely, even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability. What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision.

136 S. Ct. at 1995–96.

Even before *Escobar*, courts recognized express false certification—that is, an affirmative misstatement of compliance with a statute, regulation, or other contractual obligation to obtain payment from the government—as a basis of liability. *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 710–11 (7th Cir. 2014). Implied and express statements raise distinct issues, however.

Implied false certification is just another genre of fraud, and so plaintiffs must as usual satisfy Rule 9(b)'s requirements to plead falsity, materiality, and causation with particularity. (Knowledge is also an element, but it falls within the Rule's carve-out.) As the Supreme Court did in *Escobar,* we focus first on the "rigorous materiality requirement" that the plaintiff must meet. 136 S. Ct. at 1996. A misrepresentation is not material "merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment." *Id*. at 2003. Such a stipulation is "relevant, but not automatically dispositive." *Id*. But materiality requires more: typically, proof either that (1) a reasonable person would view the condition as important to a "choice of action in the transaction" or (2) the defendant knew or had reason to know that the recipient of the

representation attaches importance to that condition. *Id*. at 2002–03. Should the government decide to pay despite knowing of the party's noncompliance, that would be "very strong evidence" (though not dispositive) that the condition is not material. *Id*. In short, facts matter. The complaint must include specific allegations that show that the omission in context significantly affected the government's actions.

Prose's complaint points to many factual representations that Molina made that, he charges, amounted to implied false certification. For instance, he alleges that Molina's contract with the Department carefully created different rate cells for enrollees based on the level of care they would need; the level of care in turn yields a reasonable estimate of cost for each tier. Both are essential if the capitation payments are to be actuarially sound. The difference between the Community group and the Nursing Facility group is a whopping $3,127 per head. The middle-tier group costs roughly $600 less apiece than the Nursing Facility group. The size of the price differential alone offers strong support for a finding of materiality: it is hard to see why the government would be indifferent about paying $3,180 for services that should have been at the $54 level. The district court concluded that each enrollment form, which constituted a specific request for payment connected to the NF enrollees, was "impliedly false because it requested payment of the SNF capitation rate" when those services were not being rendered.[2]

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[2] The dissent takes issue with the numbers here, asserting that Molina provided "something close to high-tier service at high-tier rates." But that claim appears to spring from the redefinition of SNFist services as nothing more than care coordination—a definition that neither the contract nor the pleadings reflect. Just how close to "high-tier services" Molina got is best

Molina responds that the enrollment forms did not contain misleading omissions because Molina did not fraudulently manipulate the beneficiary pool to increase the number of people in the more expensive category. But that is just one way in which liability could be shown; it is not the only one.

The complaint, read in Prose's favor, contains specific allegations showing that Molina was far from a passive recipient of a favorable capitation rate. Prose was not relying on Molina's receipt of capitation payments for existing enrollees. Rather, the complaint alleges that by submitting enrollment forms for *new* enrollees after Molina canceled its contract with GenMed, Molina implicitly falsely certified that Nursing Facility enrollees had access to SNF services. But they did not. Construed in Prose's favor, the complaint describes Molina's noncompliance with a contractual requirement to provide SNF services to Nursing Facility enrollees. This is akin to the defendant's actions in *Escobar*, in which the Court found that the defendant "misleadingly omit[ted] [the] critical facts" that its care providers were not qualified to render services for which it nevertheless requested payments. 136 S. Ct. at 2001.

Molina's strongest argument against materiality relies on its contention that the government continued to contract with Molina after learning that Molina could no longer provide SNF services. Molina emphasized that the government not only continued paying it after Prose brought this case, but it also renewed its contract with Molina twice during that time. It is true that the government's continued payment of a claim

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decided on summary judgment or at trial, not here. For present purposes, Prose's complaint adequately alleges that SNFist services explain much of the cost difference between the Nursing Facility tier and the less expensive tiers.

despite "actual knowledge" that certain requirements are not met "is very strong evidence that those requirements are not material." *Escobar*, 136 S. Ct. at 2003. But this argument is better saved for a later stage, once both sides have conducted discovery. At this juncture, it appears that Molina is offering only part of the story. Later exploration will be needed before anyone can say what the government did and did not know about Molina's provision of SNF services.

For pleading purposes, Molina's barebones assertion that the government was aware of all material facts is not enough to sweep away the elaborate facts that Prose furnished. The contract itself, which fixes the cost of the NF category well above the other tiers, is powerful evidence of the materiality of the SNF services. See *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1105 (11th Cir. 2020) (finding materiality when the issue "went to the heart" of the bargain). Many things could explain the government's continued contracting with Molina. It may have expected to purge the underserved NF enrollees from the books; it may have needed time to work out a way not to prejudice Medicaid recipients who had nothing to do with this problem. Medicaid (along with the Children's Health Insurance Program, or CHIP) serves more than 71 million people nationally and accounts for $600 billion in federal spending. See Center for Medicare and Medicaid Services, Medicaid Facts and Figures, at https://www.cms.gov/newsroom/fact-sheets/medicaid-facts-and-figure. An organization like that does not turn on a dime.

For all these reasons, we conclude that Prose's complaint adequately alleged materiality for purposes of his *qui tam* action. The district court was also willing to go that far. Where Prose foundered, it thought, was on the final element of the

claim: knowledge. The court found that the complaint failed adequately to allege that Molina knew that the government viewed SNF services as material. In *Escobar*, the Supreme Court identified a two-layered knowledge requirement: the defendant must (1) knowingly violate a requirement while (2) knowing that the government viewed the requirement as material to payment. 136 S. Ct. at 1996. Even though Molina necessarily knew that it had violated the contractual requirement to provide SNF services, the district court thought that Prose's allegations that Molina knew that these services were material were conclusory and need not be accepted as true. The allegations, it said, at most supported a conclusion that Molina's actuarial consultants coordinated the payment scheme with the government. Missing, it thought, was a contention that Molina was involved in calculating the capitation rates.

This was error. First, the court failed to give proper weight to the complaint's description of Molina as a highly sophisticated member of the medical-services industry. Molina was quite familiar with capitation rates, and it knew that they are designed to allow the provider to be reimbursed for services rendered. And recall that this was a risk contract: Molina had a strong incentive to ensure that the capitation rate was high enough to cover its costs plus a reasonable profit, because it would be left holding the bag if the rate were too low. Ruskin, *supra*, at 397, 409; Novak, *supra*, at 5.

In addition, knowledge may be alleged generally, even in a case under Rule 9(b), and so the district court was wrong to insist that Prose identify concrete evidence of actual knowledge. A party seeking to establish liability under the FCA may satisfy the Act's knowledge requirement through proof of actual knowledge, deliberate ignorance of truth or

falsity, or reckless disregard for truth or falsity. 31 U.S.C. 3729(b)(1)(A)(i)–(iii). Construing the allegations in Prose's favor, there is ample detail to support a finding that Molina either had actual knowledge that the government would view skilled nursing services as a critical part of the Nursing Facility rate cell (*i.e.*, as material), or that it was deliberately ignorant on this point. Once again, these high-cost services, essential to the nursing-home population, were the very reason why the government paid a capitation rate more than fifty times as much to support them.

Molina subcontracted for SNF services because it could not provide those services. Its contract with GenMed recognized that these SNF services "fill the primary care gap" for Nursing Facility patients. The deal fell apart when Molina attempted to renegotiate its contract with GenMed to reduce the cost of those services and thus to increase its own profit margin. Molina therefore knew these services' cost and their importance, and it knew that it was unable to provide these services without a partner such as GenMed. Prose's complaint plausibly alleges this knowledge, insofar as it notes that before the actuarial consultant's resolution of the cost breakdown, Molina and the government discussed these services at the proposal stage. Requiring more concrete proof of knowledge would run afoul of Rule 9(b).

In light of this, we need not rely on Prose's other arguments. He alleges a scheme to cover up Molina's noncompliance by having its own personnel perform non-skilled work for the nursing, such as face-to-face comprehensive assessments and annual comprehensive exams. That practice does not shed much light on the problem: Molina always admitted that its personnel were not qualified to provide SNF services,

and it appears that these exams were merely non-SNF functions that Molina had delegated to GenMed.

Last, we say a word about causation. This too is an element of an FCA claim: the plaintiff must establish that the defendant's fraud "was a material element and a substantial factor in bringing about the injury." *Luce*, 873 F.3d at 1012 (internal quotation omitted). Causation here is evident. By submitting enrollment forms requesting payment for services Molina could not provide to Illinois Medicaid, Molina caused the government to pay significant sums that it would not have paid with full knowledge. That is enough to satisfy the pleading burden on causation.

Prose's complaint sufficiently alleges that Molina knew that SNF services played a major role in the significantly higher capitation rate for the NF category. It thus suffices for purposes of his False Claims Act theories. We of course express no opinion on the ultimate fate of this litigation; we hold only that Prose may proceed.

III

The final loose end we must address is Molina Healthcare's request that it be dismissed from the case. Molina Healthcare (as we briefly noted at the outset) is Molina's parent company. It contends that corporate affiliation is not enough to support its liability. Given the decision on the merits, the district court did not reach the question of parent-company liability. Neither do we; it is far too underdeveloped at this point. But it is an issue that, if properly raised again, the district court should address on remand.

The judgment of the district court is REVERSED and the case REMANDED for further proceedings consistent with this opinion.

SYKES, *Chief Judge*, dissenting. "The False Claims Act is not 'an all-purpose antifraud statute[]' or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016) (quoting *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008)). Our own precedent aligns with this understanding of the FCA's reach. *See United States v. Sanford-Brown, Ltd.* ("*Sanford-Brown II*"), 840 F.3d 445, 447 (7th Cir. 2016). The majority moves our circuit law in a different direction, establishing a new rule that a mere request for payment from the government, coupled with material noncompliance with a contractual condition, is a cognizable FCA violation subject to the full panoply of remedies authorized by the Act, including qui tam suits and treble damages. Because that rule conflicts with *Escobar* and circuit precedent, I respectfully dissent.

* * *

The government and Molina Healthcare of Illinois have a risk contract. Each month the government pays Molina a fixed sum to provide health coverage for a Medicaid beneficiary, and no matter how expensive that beneficiary's medical costs are, Molina is responsible. Molina profits when the fixed sum—the "capitation rate"—exceeds actual expenses; it swallows a loss when expenses are in excess.

The contract creates five risk pools called "rate cells" that correspond to health status, and it fixes capitation payments by rate cell—higher capitation rates are paid for rate cells that are likely to require more intensive care. The most expensive of these rate cells is for an enrollee living in a nursing facility. To enroll a beneficiary, Molina submits a

form to the government categorizing the enrollee by rate cell, and in response the government pays Molina the corresponding amount.

Molina's contract with the government specifies the "covered services" that it must provide to enrollees depending on their rate cells. As relevant here, an enrollee who resides in a skilled nursing facility is entitled to "SNFist" services, generally described as "intensive clinical management of Enrollees in Nursing Facilities." Plaintiff–relator Thomas Prose alleges that for approximately two years, Molina submitted enrollment forms to the government but knowingly did not deliver SNFist services to its nursing-facility enrollees.

To place this allegation in proper context, some background on the nature of these services is needed. The term "SNFist" is defined in the contract as a medical professional "whose entire professional focus is the general medical care of individuals residing in a Nursing Facility and whose activities include Enrollee care oversight, communication with families, significant others, [primary-care providers], and Nursing Facility administration." Or as the contract puts it more succinctly, a SNFist is a medical professional who "provide[s] Care Management and care coordination activities" for enrollees residing in nursing facilities. Importantly, "care management" is not the direct provision of medical care, personal care, or social services to nursing-home residents; rather, as the contract defines the term, "care management" comprises "[s]ervices that assist Enrollees *in*

gaining access to needed services, including medical, social, education, and other services."[1] (Emphasis added.)

The contract gives Molina the option to provide SNFist services "either through direct employment or a sub-contractual relationship," and its "SNFist Program" may use either a "facility-based Provider (Physician or nurse practitioner)" or "telephonic or field-based Registered Nurses or licensed clinical social workers," depending on the circumstances.

Because SNFist services are provided only to enrollees in nursing facilities, it's reasonable to assume that the inclusion of these services plays at least *some* role in the difference between the capitation rate for the nursing-facility rate cell and the rate cell below it. How large a role is unclear; a key question is whether Prose has alleged sufficient facts to show that the delivery of SNFist services was material to the government's decision to pay Molina for nursing-facility enrollees during the relevant time period. I will return to the materiality point later. For now, it's enough to note that SNFist services are one component of nursing-home care among many, and as explained, are contractually defined as care coordination and management. Moreover, a nursing-home enrollee is inherently a riskier beneficiary for Molina

[1] The majority uses the term "SNF services," which loosely suggests that what's at stake here is a broader spectrum of nursing-facility services. Not so. Prose's complaint alleges that from April 2, 2015, to April 5, 2017, Molina failed to deliver "SNFist services," a contractually defined term that is limited to care coordination performed by a SNFist—not a broader set of services provided by skilled nursing facilities.

to cover than a lower-tier enrollee, which also partly explains the difference in capitation rates.

In the majority's view, because Prose has alleged that Molina billed the government for the full nursing-facility capitation rate while failing to provide SNFist services, he has adequately pleaded an FCA claim for making materially false statements to the government. That reasoning might have surface appeal, but once we understand that SNFist services are just one component of nursing-home care among many, the error in the majority's reasoning becomes clear. Prose's complaint states a claim for breach of contract, but it relies on too many factually unsupported inferences to state a claim for an FCA violation.

* * *

My colleagues begin the analysis by identifying the three recognized theories of FCA liability: fraud in the inducement (or promissory fraud), express factual falsity, and implied false certification. Majority op. at 9. They also explain that Rule 9(b) of the Federal Rules of Civil Procedure requires an FCA plaintiff to plead fraud allegations with particularity rather than simply satisfy the usual plausibility standard. *Id.* at 10. I have no disagreement with these basic doctrinal points. The majority concludes, however, that even under Rule 9(b)'s demanding standards, Prose has stated an FCA claim under all three theories. In my view the complaint does not satisfy the heightened pleading standard under *any* of these theories.

A. Fraud in the Inducement

Prose alleges that Molina fraudulently induced the government to renew its contract in 2016 and 2017 by represent-

ing that it would provide SNFist services for nursing-facility enrollees while never intending to do so. I agree with the district judge that Prose's allegations are too generalized and conclusory to state a claim under this theory.

To satisfy Rule 9(b), "[t]he complaint must state the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated." *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1106 (7th Cir. 2014) (quotation marks omitted). Prose's complaint falls far short of checking these boxes. It includes no details of the contract renewals in 2016 and 2017 and does not point to any specific misleading statement made by an identified Molina representative, let alone specify the "time, place, and content" of the statement. The allegations of promissory fraud are not only vague and highly generalized, but they are made "[o]n information and belief," which is insufficient under Rule 9(b). *United States ex rel. Bogina v. Medline Indus., Inc.*, 809 F.3d 365, 370 (7th Cir. 2016) ("'[O]n information and belief' can mean as little as 'rumor has it that … .'"). In essence, Prose simply invites us to assume that because the contract was renewed at a time when Molina was not providing SNFist services, Molina necessarily made false statements to the government.

Surprisingly, the majority accepts this invitation to deviate from Rule 9(b) and forgives Prose for not describing the "who, what, when, where, and how" of the fraud, as required by the rule. *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 776 (7th Cir. 2016) (quotation marks omitted). My colleagues say that Prose cannot be expected to provide these factual particulars at the

pleading stage because he lacks access to information about the contract-renewal discussions until discovery opens that door. Majority op. at 10–11. But we are not at liberty to loosen pleading standards under circumstances where a specific false statement is hard to identify. Rule 9(b) raises the pleading burden "because of the stigmatic injury that potentially results from allegations of fraud." *Presser*, 836 F.3d at 776. Pleading a fraud claim is challenging, but that's the point: the rule "deters the filing of suits solely for discovery purposes" and "guards against the institution of a fraud-based action in order to discover whether unknown wrongs actually have occurred." 5A ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 1296 (4th ed. 2021). By permitting Prose to proceed on generic allegations of promissory fraud pleaded "on information and belief," this case will become the very "fishing expedition" that Rule 9(b) is meant to avoid. *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 777 (7th Cir. 1994).

B. Express Factual Falsity

As my colleagues explain, the archetypal FCA violation is an express factual falsehood—a "claim for payment [that] is itself literally false or fraudulent." *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006). The majority reasons that Molina's enrollment forms were factually false on their face because they amounted to "[a] direct assertion that Molina had new enrollees who were in the skilled nursing facility tier, coupled with an assertion that [it] was seeking reimbursement for their SNF services." Majority op. at 11. This reasoning extends the factual-falsity theory too far.

A direct falsehood is an affirmative misrepresentation, not an omission. For example, in *Presser* the plaintiff alleged that a medical clinic submitted claims to the government for payment using billing codes corresponding to specific psychiatric services but in fact had performed only nonpsychiatric evaluations. 836 F.3d at 778–79. Thus, the clinic made an affirmative factual misrepresentation: it billed the government specifically for service X when it actually provided service Y. *Id.* at 779 ("Acacia … allegedly billed Medicaid for a completely different treatment. The claim therefore does not involve a misrepresentation by omission; it involves an express false statement.").

Here, by contrast, Prose alleges a falsehood by omission: Molina requested capitation payments at the nursing-facility rate without disclosing that it did not deliver one of the many services required by the contract. This allegation does not describe an affirmative misrepresentation. At most, it alleges a fraudulent omission, which situates this case within the theory of implied false certification. We should analyze Prose's complaint under that framework, not expand the theory of facial factual falsity to include misleading omissions.

That was the approach taken by the Supreme Court in *Escobar*. There, the plaintiffs alleged that a medical-services contractor submitted claims for payment to the government for counseling services it had provided and listed billing codes and identification numbers corresponding to the specific services its counselors had provided, along with their job titles, respectively. The problem was that the counselors "lacked licenses to provide mental health services, yet—despite regulatory requirements to the contrary—they

counseled patients and prescribed drugs without supervision." 136 S. Ct. at 1997.

The complaint thus alleged a falsehood by omission. The Court held that allegations of fraudulent omissions might suffice to state an FCA claim based on a theory of implied false certification. *Id.* at 1999. In so holding, the Court described the paradigm case of implied false certification as follows: "When, as here, a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." *Id.*

Prose's allegations are best conceptualized as a possible claim under a theory of implied falsehood. Following *Escobar*'s lead, we should not stretch the facial-falsehood concept but instead analyze the allegations under the rubric of implied false certification.

C. Implied False Certification

Turning now to the theory that is the closest fit with Prose's allegations, I note for starters that my colleagues skip the threshold requirements announced in *Escobar* and instead move straight to the second-tier question of materiality. That approach cannot be squared with *Escobar*'s requirements for this type of FCA claim.

Escobar held that a claim for payment might be an actionable violation of the FCA under a theory of an implied false certification *if* two conditions are present: "first, the claim does not merely request payment[] but also makes specific representations about the goods or services provided; and

second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." 136 S. Ct. at 2001.

Prose's allegations do not satisfy the first of these threshold conditions. Molina's enrollment forms did not make any specific representation about the goods or services provided. They simply enrolled Medicaid beneficiaries by rate cell, which designated the appropriate capitation rate for a given enrollee. This rate-cell information was nothing more than a request for a specific amount of payment for a very broad swath of services. In *Escobar*, by contrast, the medical contractor "submit[ed] claims for payment using payment codes *that corresponded to specific counseling services*." 136 S. Ct. at 2000 (emphasis added). In other words, the claims for payment at issue in *Escobar* were specific claims that misled the government into believing something false. Here, Molina's enrollment forms made broad payment requests covering a host of services, only one of which was not delivered. That does not satisfy *Escobar*'s first condition for a cognizable claim of implied false certification.

Indeed, our own precedent confirms that a general request for payment coupled with some degree of contractual or regulatory noncompliance is not enough to support a claim of implied false certification. In *United States v. Sanford-Brown, Ltd.* ("*Sanford-Brown I*"), 788 F.3d 696 (7th Cir. 2015), *vacated United States ex rel. Nelson v. Sanford-Brown, Ltd.*, 136 S. Ct. 2506 (2016), *reinstated in part by Sanford-Brown II*, 840 F.3d at 447, we considered an FCA action brought against a for-profit college. The school signed a Program Participation Agreement with the Department of Education

in which the college agreed to comply with all regulations under Title IV in exchange for federal subsidies. *Id.* at 707–08. The college did not comply with all regulations, yet it submitted requests for funds anyway. *Id.* at 708. On remand from the Supreme Court, we held that the plaintiff had not satisfied *Escobar*'s first condition because he "offered no evidence that defendant Sanford-Brown College … made any representations at all in connection with its claims for payment, much less false or misleading representations." *Sanford-Brown II*, 840 F.3d at 447. In other words, a generic payment request—without specific representations about the goods or services provided—does not satisfy *Escobar*'s first condition and thus cannot suffice as an implied false certification.

Escobar's second condition requires the plaintiff to adequately allege (and later prove) that the defendant's failure to disclose its noncompliance with a statutory or regulatory requirement made the specific representation a misleading half-truth. A half-truth is a "representation[] that state[s] the truth only so far as it goes, while omitting critical qualifying information." *Escobar*, 136 S. Ct. at 2000. Imagine that the Green Bay Packers have a bye week and someone makes the statement, "the Packers didn't win today." That's a classic half-truth. The statement is true as far as it goes, but it directly implies a specific falsehood to an unaware fan: that the Packers lost that day.

Escobar identified some helpful examples of half-truths. "A classic example of an actionable half-truth in contract law is the seller who reveals that there may be two new roads near a property he is selling[] but fails to disclose that a third potential road might bisect the property." *Id.* "Likewise, an

applicant for an adjunct position at a local college makes an actionable misrepresentation when his resume lists prior jobs and then retirement[] but fails to disclose that his 'retirement' was a prison stint for perpetrating a $12 million bank fraud." *Id.* Or consider the half-truth at issue in *Escobar* itself: the medical contractor's submission of claims with payment codes and identification numbers corresponding to specific job titles and counseling services while not disclosing that the counselors providing the services were unlicensed. What we can distill from these examples is that a misleading half-truth arises when a defendant makes a specific statement (the Packers didn't win today) that inevitably leads the recipient to assume by implication a particular falsehood (that the Packers lost).

Prose's allegations operate at a much higher level of generality than the allegations in *Escobar*. In that case there was a tight link between the specific representations (payment codes for counseling services and ID numbers for job titles) and the falsehood inevitably implied by omission (the counselors corresponding to the identified job titles were in fact licensed for those positions). Here, there is at most only a loose association between Molina's nonspecific representation (enrolling a Medicaid beneficiary in the nursing-facility rate cell) and the alleged false implication (that SNFist services—one among many nursing-facility services—were actually provided). Where, as here, the defendant's claim for payment wouldn't necessarily lead the recipient to assume the specific falsehood alleged in the complaint, there is no half-true statement and thus no falsehood by implication.

Indeed, Molina's enrollment forms made no specific representations about the services provided beyond enrolling a

beneficiary in a given rate cell, which after all, is just a request for a certain payment amount. Considering the multitude of services provided to nursing-home enrollees, the enrollment forms wouldn't inevitably lead the government to assume any specific falsehood by implication. The enrollment forms, though perhaps misleading in a general sense, did not contain a specific half-true statement as required by *Escobar*.

* * *

The majority concentrates its implied-falsehood analysis on the question of materiality, an additional requirement for a viable FCA claim and one that *Escobar* also addressed at some length. A representation is material if "a reasonable man would attach importance to [it] in determining his choice of action in the transaction" or if "the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter." *Id.* at 2002–03 (quotation marks omitted).

My colleagues rely almost entirely on the difference in capitation rates among rate cells: $3,127 per month for a nursing-facility enrollee; about $2,500 per month for a middle-tier enrollee; and $54 for a low-tier enrollee. They conclude that "[t]he size of the price differential alone offers strong support for a finding of materiality." Majority op. at 15; *see also id.* at 17 ("The contract itself, which fixes the cost of the NF category well above the other tiers, is powerful evidence of the materiality of the SNF services."). But by omitting SNFist services, Molina didn't provide middle-tier service at high-tier rates. Instead, it provided something close to high-tier service at high-tier rates. By itself, the difference in capitation rates sheds little light on the materi-

ality question because nothing in the complaint connects that difference to SNFist services.

In some cases a large pay differential between two billing rates might alone be enough to support an inference of materiality. Not so here. The problem turns again on the nature of SNFist services. To repeat, SNFist services are care-coordination services—one of many services provided to nursing-home enrollees that in the aggregate contribute to the higher capitation rate. The complaint offers nothing to explain the effect of these particular services on the government's willingness to pay the nursing-facility capitation rate for these enrollees. Without some factual contextualization, we cannot draw an inference that Molina's nondisclosure was material to the government's decision to pay its claims during the relevant time period.

Think of it this way: If rate cell 1 corresponds to 10 services provided at a rate of $2,000 and rate cell 2 corresponds to those same 10 services plus SNFist services at a rate of $3,000, then billing at the level 2 rate while not providing SNFist services would support an inference of materiality at the pleading stage. If SNFist services are not delivered, then the contractor is providing only level 1 services, and a reasonable person would not pay much higher level 2 rates for receiving only level 1 services.

But now consider a scenario in which rate cell 2 corresponds to *30* services—the 10 in rate cell 1 plus 20 others, one of which is SNFist services. In that scenario it doesn't make sense to rely on the $1,000 price differential in considering whether the omission of SNFist services is material because the differential may be largely explained by the 19 other services separating rate cell 1 and rate cell 2. That's the

situation here—the difference in capitation rates between the nursing-home rate and the middle-tier rate is only partially explained by SNFist services, and nothing in the complaint illuminates the extent to which those services account for the differential. Without at least some contextualizing factual allegations, the capitation-rate differentials are not a useful metric for assessing materiality.

Of course, materiality might be established in other ways, but Prose's remaining arguments are unpersuasive; even the majority doesn't make use of them. For example, he points to the fact that the government specifically discussed SNFist services during 2013 contract negotiations and asks us to infer that they were material to the government's decision to pay Molina in 2015, 2016, and 2017. But the mere discussion of a contract term earlier in negotiations doesn't mean that its fulfillment is material to a later decision to pay, especially when the negotiations occurred years before. Prose also asks us to infer materiality because SNFist services were supposed to be available 24/7 and were coupled with reporting obligations. But the contract requires *every* covered service to be provided 24/7 and is replete with reporting obligations, which undermines any suggestion that SNFist services had special status.

Finally, Prose argues that SNFist services are necessarily material because payment rates are derived from actuarially precise calculations that included them. This reasoning suggests that *every* service under a contract with actuarial pricing is material. That's an unsound approach to the materiality question in this context. Although the contract may have calibrated the capitation rates to the services the government expected to be delivered, it doesn't follow that

the government would withhold payment if a *single one* of those services wasn't provided.

Escobar characterized the materiality standard as "demanding," 136 S. Ct. at 2003, and Prose has failed to meet it. Perhaps he could have done so with factual allegations showing that SNFist services account to a significant degree for the difference in capitation rates. Or perhaps he could have alleged that Molina was aware that the government "consistently refuses to pay claims in the mine run of cases" if SNFist services are omitted. *Id.* But we know the opposite is true, as my colleagues acknowledge. Majority op. at 16–17 (explaining that "the government not only continued paying [Molina] after Prose brought this case, but it also renewed its contract with Molina twice during that time"). *Escobar* explained that "if the [g]overnment regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material." *Id.* at 2003–04. As it is, we're left with only generic statements about the importance of SNFist services and a rate differential without any contextualizing factual allegations connecting the differential to the omitted services. That doesn't clear the bar.

Even if my analysis of materiality is wrong, the majority's conclusion that Prose has stated a claim for implied false certification essentially establishes a new rule that *any* claim for payment while in material noncompliance with a contract or governing law is an actionable violation of the FCA. As already explained, that conclusion conflicts with *Escobar* and circuit caselaw.

* * *

For these reasons, I would affirm the judgment dismissing the complaint for failure to state a claim. Prose's allegations fall short of satisfying Rule 9(b)'s heightened pleading standard for an actionable FCA claim under any of the three recognized theories of liability.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1811

UNITED STATES OF AMERICA, and the State of North Carolina, California and Illinois, ex rel., SCARLETT LUTZ, Relator; CHRIS REIDEL; KAYLA WEBSTER, Relator; DR. MICHAEL MAYES, Relator,

Plaintiffs – Appellees,

v.

LATONYA MALLORY,

Defendant – Appellant,

and

HEALTH DIAGNOSTIC LABORATORY INC.; SINGULEX INC.; LABORATORY CORPORATION OF AMERICA HOLDINGS; BLUEWAVE HEALTHCARE CONSULTANTS, INC.; PHILIPPE J. GOIX, PhD; FLOYD CALHOUN DENT, III; ROBERT BRADFORD JOHNSON; BERKELEY HEARTLAB, INC.; QUEST DIAGNOSTICS, INCORPORATED,

Defendants.

No. 18-1812

UNITED STATES OF AMERICA, and the States of North Carolina, California and Illinois, ex rel., SCARLETT LUTZ, Relator; DR. MICHAEL MAYES, Relator; CHRIS RIEDEL; KAYLA WEBSTER, Relator,

Plaintiffs – Appellees,

v.

CHRISTINA M. DENT; LAKELIN PINES, LLC; TRINI "D" ISLAND, LLC,

Parties-in-Interest – Defendants,

and

LATONYA MALLORY; HEALTH DIAGNOSTIC LABORATORY INC.; LABORATORY CORPORATION OF AMERICA HOLDINGS; PHILIPPE J. GOIX, PhD; BERKELEY HEARTLAB, INC.; QUEST DIAGNOSTICS, INCORPORATED; SINGULEX INC.; BLUEWAVE HEALTHCARE CONSULTANTS, INC.; FLOYD CALHOUN DENT, III; ROBERT BRADFORD JOHNSON,

Defendants.

No. 18-1813

UNITED STATES OF AMERICA, and the State of North Carolina, California and Illinois, ex rel., SCARLETT LUTZ; KAYLA WEBSTER; CHRIS RIEDEL; DR. MICHAEL MAYES,

Plaintiffs – Appellees,

v.

ROBERT BRADFORD JOHNSON; FLOYD CALHOUN DENT, III; BLUEWAVE HEALTHCARE CONSULTANTS, INC.,

Defendants – Appellants,

AROC ENTERPRISES, LLC; BLUE EAGLE FARMING, LLC; CAE PROPERTIES, LLC; WAR-HORSE PROPERTIES, LLLP; EAGLE RAY INVESTMENTS, LLC; FORSE INVESTMENTS, LLC; ROYAL BLUE MEDICAL INCORPORATED; COBALT HEALTHCARE CONSULTANTS, INC.,

Parties-in-Interest – Appellants,

and

BERKELEY HEARTLAB, INC.; LATONYA MALLORY,

Defendants.

Appeals from the United States District Court for the District of South Carolina, at Beaufort. Richard Mark Gergel, District Judge. (9:11-cv-01593-RMG; 9:14-cv-00230-RMG; 9:15-cv-02485-RMG)

Argued: December 8, 2020 Decided: February 22, 2021

Before MOTZ, WYNN, and FLOYD, Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Wynn and Judge Floyd joined.

ARGUED: William Walter Wilkins, NEXSEN PRUET, LLC, Greenville, South Carolina; Beattie Ashmore, BEATTIE B. ASHMORE, PA, Greenville, South Carolina; Nekki Shutt, BURNETTE SHUTT & MCDANIEL, PA, Columbia, South Carolina, for Defendants. Benjamin M. Shultz, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Kirsten E. Small, NEXSEN PRUET, LLC, Greenville, South Carolina, for Defendants Floyd Calhoun Dent, III and Robert Bradford Johnson. Joseph P. Griffith, Jr., JOE GRIFFITH LAW FIRM, LLC, Mt. Pleasant, South Carolina, for Appellant Floyd Calhoun Dent, III. M. Dawes Cooke, Christopher M. Kovach, John W. Fletcher, BARNWELL WHALEY PATTERSON & HELMS, L.L.C., Charleston, South Carolina, for Defendants Floyd Calhoun Dent, III and Robert Bradford Johnson and Parties-in-Interest Blue Eagle Farming, LLC, Eagle Ray Investments, LLC, Forse Investments, LLC, War-Horse Properties, LLLP, Royal Blue Medical, Inc., AROC Enterprises, LLC, CAE Properties, LLC, and Cobalt Healthcare Consultants, Inc. Jacqueline M. Pavlicek, BURNETTE SHUTT & MCDANIEL, PA, Columbia, South Carolina, for Parties-in-Interest Christina Dent, Lakelin Pines LLC, and Trini "D" Island, LLC. Joseph H. Hunt, Assistant Attorney General, Charles W. Scarborough, Melissa N. Patterson, Benjamin M. Shultz, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Sherri A. Lydon, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellees.

DIANA GRIBBON MOTZ, Circuit Judge:

LaTonya Mallory, the owner of a blood testing laboratory, and the two men who led its sales operation, Floyd Calhoun Dent III and Robert Bradford Johnson (collectively, "Defendants"), appeal a jury verdict finding them liable for multiple violations of the False Claims Act, 31 U.S.C. § 3729. During a twelve-day trial, the Government presented evidence that Defendants violated the Act in several ways, including by paying physicians for drawing patients' blood and processing the blood samples in violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b). Notwithstanding their vigorous protestations of innocence, the jury found that Defendants had indeed violated the False Claims Act and assessed actual damages in excess of $16 million. In a series of careful opinions, the district court denied their post-trial motions for judgment as a matter of law and for a new trial. After trebling the actual damages and adding civil penalties, as required by the False Claims Act, the district court entered judgment against all three Defendants for $111,109,655.30 and against Dent and Johnson for an additional $3,039,006.56. For the reasons that follow, we affirm the judgment of the district court in all respects.

I.

In 2008, Mallory founded Health Diagnostic Laboratory ("HDL"), which provided blood testing for cardiovascular disease and diabetes. One year later, Dent and Johnson formed BlueWave Healthcare Consultants, Inc., which entered into an exclusive contract with HDL to market and sell HDL's tests. In addition to a base fee, HDL agreed to pay BlueWave a percentage of its revenue based on the number of HDL blood tests that

physicians ordered. In 2010, BlueWave entered into a similar agreement with another lab, Singulex, which also provided blood testing for cardiovascular disease. This contract, too, permitted BlueWave to collect a base amount plus a sales commission based on the number of tests sold.

HDL agreed to pay BlueWave between 13.8 and 19.8 percent of the revenue it generated for HDL. Singulex agreed to pay BlueWave 24 percent of the revenue it generated for HDL. To fill out its sales force, BlueWave then contracted with other independent salespeople. Under these agreements, the salespeople also obtained commissions based on the volume of sales made.

HDL and Singulex used the same business model: in exchange for ordering one of their blood tests, the labs paid physicians a "process and handling fee" ("P&H fee"). According to Defendants, the P&H fee covered the costs physicians incurred when preserving a blood sample and shipping it to either HDL or Singulex. HDL paid physicians a $3 "draw fee" (compensation for drawing blood) plus a $17 P&H fee (compensation for handling and shipping the blood samples), for a total of $20. Singulex paid physicians $13 for drawing and processing the blood.

Between 2010 and June 2014, Medicare and TRICARE (the federal health care plan for members of the military) paid HDL approximately $538 million and HDL paid BlueWave approximately $220 million. Medicare and TRICARE paid Singulex approximately $47 million, and Singulex paid BlueWave approximately $24 million.

At trial, the Government contended that the volume-based commissions paid by HDL and Singulex to BlueWave and its sales contractors violated the Anti-Kickback

Statute because these commissions constituted "remuneration" intended to induce sales representatives to sell as many tests as possible. The Anti-Kickback Statute prohibits "knowingly and willfully" soliciting or receiving remuneration in exchange for "arranging for the furnishing" of a healthcare service and "recommending purchasing" a healthcare service. 42 U.S.C. § 1320a-7b(b)(1). It also prohibits "knowingly and willfully" paying remuneration to "induce" someone to take such actions. *Id*. § 1320a-7b(b)(2). The Government maintained that the statute thus prohibited HDL and Singulex from paying BlueWave for inducing others to arrange the tests. Similarly, the Government contended that the statute prohibited BlueWave from paying its salespeople for recommending purchase of the tests. The Government argued that since Defendants knowingly entered into agreements to pay independent contractors based on volume, they violated the Anti-Kickback Statute. Because that statute provides that a claim that violates its terms also "constitutes a false or fraudulent claim" under the False Claims Act, *id*. § 1320a-7b(g), the Government contended that this Anti-Kickback Statute violation also gave rise to liability under the False Claims Act. The jury agreed.

II.

Defendants assert that the district court fundamentally erred in denying them judgment as a matter of law. *See* Fed. R. Civ. P. 50(b). We review the denial of a judgment as a matter of law *de novo*, but reverse only if substantial evidence does not support the jury's findings. *Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 279 (4th Cir. 1999). We

can set aside the verdict only if "no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam).

A.

Defendants initially and principally contend that the Government failed to prove that they "knowingly and willfully" violated the Anti-Kickback Statute, *see* 42 U.S.C. § 1320a-7b(b)(1), and so they cannot have "knowingly" run afoul of the False Claims Act. This argument rings hollow. The Government provided abundant evidence as to Defendants' knowledge and intent.

Attorneys from within both HDL and BlueWave warned Defendants that paying commissions to independent contractors might well violate the Anti-Kickback Statute.[1] For example, in August 2012, HDL's general counsel, Derek Kung, wrote a memo to HDL board members — including Mallory — explaining that its BlueWave contract posed a "high degree of risk" of violating the Anti-Kickback Statute. Kung explained that the U.S. Department of Health and Human Services's Office of the Inspector General "has provided commentary regarding its concern over independent contractor sales agreements with compensation based on a percentage of sales." He urged the Board to change to an "employee based sales system."

Similarly, HDL employee Nicholas Pace, a lawyer who oversaw HDL's compliance efforts, testified that he recognized that the Anti-Kickback Statute prohibited arrangements

[1] Because we conclude that the Government provided sufficient evidence to show that the commissions violated the Anti-Kickback Statute and accordingly the False Claims Act, we do not address the Government's other theories of liability.

like the commission-based one with BlueWave, and that he discussed these concerns in meetings with board members, including Mallory. He told the Board that HDL's arrangement with BlueWave was concerning because HDL "rel[ied] on a third party that owned the customer relationship, paying them tens of millions of dollars under that arrangement." And in November 2013, an attorney working for BlueWave sent Johnson the opinion in *United States v. Vernon*, 723 F.3d 1234 (11th Cir. 2013), which upheld a conviction under the Anti-Kickback Statute based on the payment of commissions to a third party.

The Government also offered evidence that outside lawyers warned all three Defendants about the illegality of the commissions. Brian E. Dickerson, an attorney for BlueWave salesperson Emily Barron, testified that he cautioned BlueWave about problems with the commissions in September 2013. He recalled that Barron came to him with a legal opinion from another lawyer stating that both the P&H fees and the volume-based commission structure violated the Anti-Kickback Statute, so she asked him to review her contract with BlueWave. Dickerson agreed that the scheme was not legal and advised Barron to terminate her relationship with BlueWave.

Dickerson also attempted to reach someone at BlueWave who could offer a legal opinion as to its business practices. At one point, Mallory forwarded an email from Dickerson to her colleagues, including Dent and Johnson. In her email, Mallory stated that Dickerson "communicated to Derek [Kung] yesterday and again today that he has issues with the [BlueWave] contract."

Dickerson testified that he told three BlueWave attorneys directly that the commissions violated the Anti-Kickback Statute. He never received a legal opinion from BlueWave in response. Shortly thereafter, BlueWave fired Barron. From these clear warnings about the commissions scheme's potential illegality, a reasonable jury could certainly infer that Defendants "knowingly and willfully" offered or accepted remunerations in violation of the Anti-Kickback Statute.

Moreover, Defendants' justifications for their continued blind eye to illegal activity in no way undermines the jury's conclusion as to their knowledge. Defendants claim that because the Anti-Kickback Statute is ambiguous, they could have reasonably concluded that the statute did not prohibit volume-based commissions, and so they cannot have knowingly violated the False Claims Act. They rely on *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015), but that case involved a dispute over duties based on ambiguous contractual language, not a claim based on assertedly ambiguous statutory language. In any event, contentions "like these — that a defendant cannot be held liable for failing to comply with an ambiguous term — go to whether the government proved knowledge." *Id.* at 287. Here, unlike in *Purcell*, Defendants were repeatedly "warned away from [their] interpretation" of purportedly ambiguous terms, including by legal practitioners. *Id.* at 288. Ample evidence permitted the jury to conclude that Defendants willfully violated the Anti-Kickback Statute, and so knowingly violated the False Claims Act.

Nor do we find any more persuasive Defendants' contention that they could not have known about the commissions' illegality because attorneys helped draft the contracts

providing for commission payments. Defendants point to no legal opinion on which they relied in concluding that the Anti-Kickback Statute permitted commission payments to independent contractors. Moreover, the jury could have reasonably concluded that Defendants should have given more consideration to the many subsequent warnings about the commissions. *See U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 381 (4th Cir. 2015) ("In determining whether [defendants] reasonably relied on" the advice of counsel, the jury "was entitled to consider all the advice given to it by any source." (internal citation omitted)).

Similarly, Defendants cannot rely on outside audits as a justification for questioning the legality of the commission scheme. These audits did not require the jury to find that Defendants acted legally. In fact, one auditor specifically explained that its services were "not designed, nor should they be relied upon, to disclose . . . illegal acts."

In sum, Defendants offer no argument or evidence that required the district court to grant them judgment as a matter of law. Rather, based on all of the evidence presented at trial, a reasonable jury could conclude that Defendants willfully paid commissions to independent contractors and, accordingly, that they knowingly violated the Anti-Kickback Statute. Of course, the jury did not have to reach this conclusion — but certainly the evidence offered by the Government permitted it to do so.

B.

Defendants also contend that they are entitled to judgment as a matter of law because, assertedly, commissions to salespeople can never constitute kickbacks under the Anti-Kickback Statute. But no language in the statute so provides. Moreover, federal

appellate courts have frequently, and indeed invariably, upheld Anti-Kickback Statute violations based on commission payments to third parties. *See, e.g.*, *United States v. St. Junius*, 739 F.3d 193, 209–10 (5th Cir. 2013); *United States v. Vernon*, 723 F.3d 1234, 1256–58 (11th Cir. 2013); *United States v. Polin*, 194 F.3d 863, 864–66 (7th Cir. 1999).

The Anti-Kickback Statute does include a statutory safe harbor for commissions paid to salespeople who are "employee[s]" that have a "bona fide employment relationship" with their employer. 42 U.S.C. § 1320a-7b(b)(3)(B). But the Department of Health and Human Services has expressly recognized that this safe harbor does not cover independent contractors. In 1989, when considering regulatory safe harbors, the agency noted that "many commenters" wanted to expand the safe harbor "to apply to independent contractors paid on a commission basis," but it "declined to adopt this approach." 54 Fed. Reg. 3088, 3093 (Jan. 23, 1989). The agency explained that it refused to do so because of the "many examples of abusive practices by sales personnel who are paid as independent contractors." *Id*. The Department then noted that if employers "desire to pay [] salesperson[s] on the basis of the amount of business they generate," they "should make these salespersons employees" to avoid "civil or criminal prosecution." *Id*. Two years later, in 1991, when the Department finalized its safe harbor rules, it again refused to apply the commissions safe harbor to independent contractors "because of the existence of widespread abusive practices by salespersons who are independent contractors." 56 Fed. Reg. 35,952 (July 29, 1991).

Defendants also argue that, because BlueWave sales representatives did not directly refer HDL or Singulex tests to patients, Defendants cannot be liable under the

Anti-Kickback Statute. But they misread the plain text of the statute. The statute expressly prohibits individuals from receiving remuneration in exchange for "arranging for or recommending purchasing" healthcare services. 42 U.S.C. §§ 1320a-7b(sb)(1)(B), (b)(2)(B). This includes sales representatives who are compensated for recommending a healthcare service, like the HDL or Singulex tests, to physicians. *See Vernon*, 723 F.3d at 1254 (explaining that no provision of the Anti-Kickback Statute is "limited to payments to physicians"); *Polin*, 194 F.3d at 866 (noting that § 1320a-7b(b)(2)(B) penalizes the recommendation of healthcare services, regardless of who recommends them). Again, Defendants' argument does not provide a basis for judgment as a matter of law.

III.

In addition to their claim of entitlement to judgment as a matter of law, Defendants offer a litany of reasons why the district court assertedly erred in denying them a new trial. We review denials of a new trial for abuse of discretion, and a new trial is warranted only if the verdict is against the clear weight of the evidence, based upon false evidence, or will result in a miscarriage of justice. *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 346 (4th Cir. 2014).

A.

First, Defendants contend that they are entitled to a new trial based on a variety of purported legal errors in the district court's jury instructions.

i.

Defendants argue that the district court erred in refusing to give a stand-alone advice-of-counsel instruction. To establish the advice-of-counsel defense, a "defendant must show the (a) full disclosure of all pertinent facts to [counsel], and (b) good faith reliance on [counsel's] advice." *Drakeford*, 792 F.3d at 381 (alterations in original) (quoting *United States v. Butler*, 211 F.3d 826, 833 (4th Cir. 2000)).

Defendants requested an instruction stating that they "have asserted an affirmative defense of advice of counsel to the Government's allegations that they violated the False Claims Act" and that the affirmative defense, "if true, will completely defeat the Government's allegations under the False Claims Act." The district court refused to give this instruction because it concluded that the instruction did not fit the facts of the case.

This was so, the court explained, because Defendants did not produce evidence that they made full disclosure of all pertinent facts to counsel, nor did they identify any specific legal opinion, written or otherwise, that they relied upon from HDL and BlueWave's formation until at least 2012. In response, Defendants point to an email sent by an attorney from the law firm LeClairRyan to his colleague in 2009. However, Defendants offered no evidence that they ever read this email. And in the email, the lawyer simply says that in his "recollection, P&H fees do[] not run afoul of Anti-[K]ickback," but he "want[ed] to confirm that no recent OIG [o]pinions have slipped past [him]." This is hardly a clear endorsement of the P&H fee structure.

Furthermore, although the district court did not give the advice-of-counsel affirmative defense instruction proposed by Defendants, it did instruct the jury to consider Defendants' "good faith" reliance on legal advice. The court explained:

> A defendant who acts with a good-faith belief that his or her conduct is lawful does not willfully violate the Anti-Kickback Statute even if that belief is mistaken . . . . In determining whether a defendant acted in good faith, you must consider the totality of the evidence presented. This includes all of the legal opinions and advice received by or known to the defendant, regardless of the source, to determine whether the defendant acted in good faith.

This charge captured the essence of Defendants' proposed instruction — if the jury found that Defendants, relying on the advice of counsel, had a good-faith belief that their conduct was legal, then they did not violate the Anti-Kickback Statute. Thus, the district court's refusal to give the stand-alone advice-of-counsel instruction that Defendants requested provides no basis for reversal. *See Noel v. Artson*, 641 F.3d 580, 586 (4th Cir. 2011) (only when a requested instruction is "not substantially covered by the court's charge to the jury" does an appellate court reverse).

ii.

Defendants' next challenge to the jury instructions arises from former BlueWave sales contractor Kyle Martel's invocation of the Fifth Amendment. The district court instructed the jury that:

> [I]f you find that [a] witness was a member of a conspiracy to violate the False Claims Act, you may but are not required to infer [from their] refusal [to testify] that the witness's answer would have been unfavorable to the interests of any co-conspirator.

At trial, the Government questioned Martel for 25 minutes, and he invoked the Fifth Amendment in response to nearly every question. The Government presented Martel with

a number of exhibits, including emails he sent marketing HDL's tests as a profit source. Defendants contend that the district court improperly instructed the jury that it could infer guilt from his silence.[2]

The Supreme Court has long recognized that there exists a "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). And a "non-party's silence in a civil proceeding implicates Fifth Amendment concerns to an even lesser degree" than a party's invocation of the privilege. *LiButti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997) (quoting *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275 (3d Cir. 1986)) (internal quotation marks omitted).

In determining whether a district court may permit adverse inferences, we engage in a case-specific analysis. *See Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481 (8th Cir. 1987). Courts generally follow the factors set forth by the Second Circuit in *LiButti*: (1) the nature of the relevant relationships; (2) the degree of control of the party over the non-party witness; (3) the compatibility of interests of the party and non-party witness in the outcome of the litigation; and (4) the role of the non-party witness in the litigation. *LiButti*, 107 F.3d at 123–24.

[2] Defendants do not renew on appeal their trial challenge to the admission of Martel's invocation of his Fifth Amendment rights as violative of the Federal Rules of Evidence.

As a BlueWave contractor, Martel played a substantial role in Defendants' scheme. *See RAD Servs.*, 808 F.2d at 277 (permitting the jury to draw an adverse inference when the record was "replete with circumstantial evidence of" the witnesses' "involvement with the alleged plan"). The Government introduced evidence that BlueWave paid Martel nearly $6 million in commissions in exchange for selling HDL's tests. Evidence also showed that Martel emphasized physicians' ability to profit from P&H fees, a key component of the Government's case. And by requiring that the jury first find that Martel was a co-conspirator, the district court cabined its instruction, ensuring that the jury would only consider Martel's invocation of the Fifth Amendment to the extent it was relevant to their assessment of Defendants' liability.

It is immaterial that Martel no longer worked for BlueWave or HDL at the time of trial. Courts have often permitted invocation of the Fifth Amendment by a former employee of a company that is a party to the litigation. *See, e.g.*, *Cerro Gordo Charity*, 819 F.2d at 1481; *RAD Servs.*, 808 F.2d 271 at 276; *Brink's Inc. v. City of New York*, 717 F.2d 700, 710 (2d Cir. 1983). Accordingly, we see no error in the jury instructions permitting the jury to make adverse inferences based on Martel's testimony.

iii.

Defendants raise two additional challenges to the jury instructions. Both are meritless.

Defendants first contend that the district court erred by failing to instruct the jury that it must find that a false claim be "material." Instead, the court instructed the jury that if it found that a claim violated the Anti-Kickback Statute, the second element of the False

Claims Act — that "[t]he claim was false or fraudulent" — was necessarily satisfied. The instruction was proper. The Anti-Kickback Statute expressly states that "a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of" the False Claims Act. 42 U.S.C. § 1320a-7b(g). A violation of the Anti-Kickback Statute thus automatically constitutes a false claim under the False Claims Act. *See United States ex rel. Lutz v. United States*, 853 F.3d 131, 135 (4th Cir. 2017) ("An [Anti-Kickback Statute] violation that results in a federal health care payment is a per se false claim under the [False Claims Act]."); *see also Guilfoile v. Shields*, 913 F.3d 178, 190–91 (1st Cir. 2019).[3]

Defendants also argue that the district court erred when it told the jury that the Government must prove "that at least one purpose of the remuneration" was to induce the referral of services, rather than the "primary purpose of the remuneration." This instruction, too, was proper, as every circuit to address the issue has held. *See, e.g.*, *United States v. Borrasi*, 639 F.3d 774, 781–82 (7th Cir. 2011); *United States v. McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000); *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir.

[3] Defendants appear to argue that the district court should have also instructed the jury on the False Claims Act's "false statement" provision, which prohibits knowingly making or causing to be made "a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). But the theory of liability propounded by the Government — on which we base our holding — implicates only the "presentment" provision of that statute, which prohibits "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval." *Id*. § 3729(a)(1)(A). The district court properly instructed the jury on the elements of a "presentment" claim, so Defendants' argument is not relevant here.

1998); *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68, 71–72 (3d Cir. 1985).

B.

In addition to their jury-instruction arguments, Defendants contend that the district court abused its discretion by excluding three defense experts: Daniel Mulholland, a healthcare attorney; Jessica Schmor, a nurse; and Curtis Udell, a purported expert on the fair-market value of P&H fees.

Under Federal Rule of Evidence 702, the trial judge "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). In determining whether an expert's reasoning or methodology is scientifically valid, a court considers a host of *Daubert* factors, including whether the theory can be (and has been) tested; whether the technique is subject to peer review; the rate of error; the existence of standards controlling the technique's operation; and whether the technique has garnered general acceptance. *Id*. at 593–94.

The district court excluded Mulholland's testimony as to whether Defendants "would have reason to know what the legal obligations were." The court explained that this testimony presents a legal conclusion informing the jury about how it should apply the law, which is prohibited. *See United States v. Barile*, 286 F.3d 749, 760 (4th Cir. 2002). The district court excluded Schmor's testimony because her opinion did not rest on sufficient facts or data. Schmor, a nurse, sought to testify as to Medicare's reimbursement code calculations, but she lacked personal knowledge about Medicare's precise

methodology. Similarly, the district court excluded Udell's testimony because the Court found his methodology for calculating the fair market value of P&H fees unreliable. Udell based his calculation on the amount physicians charge for various services. Because physicians consistently inflate charges to ensure they receive full reimbursement from Medicare, the court concluded that Udell's proposed figures did not represent the actual value of the processing and handling services. In excluding the testimony of these experts, the district court did not abuse its discretion.[4]

IV.

Finally, Dent challenges the district court's grant of prejudgment writs of attachment. At issue are three properties that Dent transferred to his wife and to two corporations that she controlled.

Pursuant to the Federal Debt Collection Procedures Act, the Government may obtain a prejudgment remedy in connection with a "claim for a debt." 28 U.S.C. § 3001. Under Subchapter D of the Act, the Government must first establish that a transfer is fraudulent. *Id*. § 3304. Then, the Government can rely on "applicable principles of equity"

[4] We summarily reject two additional, meritless contentions from Defendants. First, they argue that the jury rendered a fatally inconsistent verdict by imposing personal liability on Dent and Johnson but not BlueWave. The jury rendered a general verdict in this case, which in civil cases "must be accepted" notwithstanding any possible inconsistencies. *Hines v. IBG Int'l, Inc*., 813 F.2d 1331, 1334 (4th Cir. 1987). Second, using cherry-picked data, Mallory argues that the $16,601,591 damages award against her improperly included certain false claims attributed to Singulex. Given the dearth of support for her argument and our "general reluctance to inquire into the workings of the jury," *United States v. Powell*, 469 U.S. 57, 69 (1984), this challenge cannot succeed.

to void the transfer, use a remedy against "the asset transferred or other property of the transferee," or seek "any other relief the circumstances may require." *Id*. § 3306(a).

The district court found that Dent's property transfers were fraudulent. A transfer is fraudulent if the debtor makes the transfer "with actual intent to hinder, delay, or defraud a creditor." *Id*. § 3304(b)(1)(A). The statute outlines certain factors courts should look to in determining intent in this context, including whether the transfer was to an insider, whether the debtor retained control of the property after the transfer, whether the debtor had been threatened with suit before the transfer, whether the value of the consideration was roughly equivalent to the value of the asset, and whether the debtor was insolvent. *Id*. § 3304(b)(2).

Many of these factors are present here. The timing of the transfers, as well as the nominal amount of consideration, cuts in favor of the Government. Dent made the transfers several months after he knew he was under federal investigation. He received a subpoena from the Department of Health and Human Services in January 2013. On May 1, 2013, he purchased a real property for $1.6 million, and sold it to his wife for $5 that same day — consideration far less than the value of the property. In August 2013, he sold a parcel of land that he had purchased for $2.75 million to his wife, again for $5. In February 2014, Dent sold six more properties to his wife for $5, and an island to one of his wife's corporate entities for $5.

Moreover, Dent transferred the properties to an insider — either to his wife or to corporations controlled by his wife. He retained possession and control of the properties, acknowledging that one of the properties at issue remains his "family home" and that his

parents reside in another. Dent's actions meet the standard for a fraudulent transfer. *See id*. § 3304(b)(2). Accordingly, the district court did not err in granting the prejudgment writ of attachment.

V.

For the foregoing reasons, the judgment of the district court is in all respects

AFFIRMED.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 9, 2020 Decided July 6, 2021

No. 19-7139

UNITED STATES OF AMERICA, EX REL. PAUL A. CIMINO,
AND
PAUL A. CIMINO,
APPELLANT

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00907)

Tejinder Singh argued the cause for appellant. With him on the briefs was *Daniel H. Woofter*.

Amanda L. Mundell argued the cause for *amicus curiae* the United States in support of appellant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Timothy J. Shea*, United States Attorney, and *Charles W. Scarborough*, Attorney.

Catherine E. Stetson argued the cause for appellee. With her on the brief were *Jonathan L. Diesenhaus* and *Matthew J. Higgins*.

Steven P. Lehotsky, *Tara S. Morrissey*, *James C. Stansel*, *Melissa B. Kimmel*, *Alan Charles Raul*, and *Virginia A. Seitz* were on the brief for *amici curiae* the Chamber of Commerce of the United States of America and the Pharmaceutical Research and Manufacturers of America in support of appellee.

Before: SRINIVASAN, *Chief Judge*, RAO, *Circuit Judge*, and GINSBURG, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* RAO.

Concurring opinion filed by *Circuit Judge* RAO.

RAO, *Circuit Judge*: This case involves the False Claims Act ("FCA") and an alleged fraud perpetrated against the Internal Revenue Service ("IRS"). According to relator Paul Cimino, the International Business Machines Corporation ("IBM") violated the FCA by (1) using a false audit to fraudulently induce the IRS to enter into a $265 million license agreement for software the IRS did not want or need, and (2) presenting false claims for payment for software that the IRS never received. The district court dismissed Cimino's complaint, finding that he did not adequately plead his fraudulent inducement and presentment claims.

This appeal requires us to clarify whether causation is an element of fraudulent inducement under the FCA, and if so, what standard governs it. In light of Supreme Court precedents interpreting the FCA to incorporate the common law, we hold that but-for causation is necessary to establish a fraudulent inducement claim under the FCA. We hold that Cimino

plausibly pleaded causation, as well as materiality, and therefore he may proceed with his fraudulent inducement claims on remand. We affirm, however, the dismissal of Cimino's presentment claims because he failed to plead them with the requisite particularity.

I.

Since 1863, the False Claims Act has imposed liability for fraud against the government. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (codified as amended at 31 U.S.C. § 3729 *et seq*.). Congress enacted the FCA to "stop[] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (cleaned up). Congressional investigations "painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *United States v. McNinch*, 356 U.S. 595, 599 (1958). A person violates the FCA, among other ways, if he "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" by the government or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A) & (B). A violator faces civil penalties up to $10,000 per claim and treble damages. *Id*. § 3729(a)(1).

The FCA expands who can prosecute fraud against the government by allowing private persons to bring a qui tam action on the government's behalf. *See id*. § 3730(b). These so-called relators "serve as a posse of *ad hoc* deputies to uncover and prosecute frauds against the government." *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 184 (5th Cir. 2009) (cleaned up). The FCA incentivizes relators to come forward

with knowledge of false claims by sharing between ten and thirty percent of any money recovered by the government, with the precise percentage dependent upon the relator's contribution to the suit. *See* 31 U.S.C. § 3730(d).

To commence a qui tam action under the FCA, a relator files his complaint under seal, providing the government an opportunity to investigate the claims and determine whether to intervene. *Id*. § 3730(b)(2). If the government intervenes, it assumes "primary responsibility for prosecuting the action," but if the government declines, the relator may proceed with the case on his own. *Id*. § 3730(c)(1), (c)(3).

This qui tam action began when Paul Cimino filed a complaint alleging that IBM violated the FCA. As a former senior sales representative for IBM, Cimino helped sell software to the IRS. Based on knowledge acquired on the job, Cimino alleged that IBM fraudulently induced the IRS to enter a $265 million license agreement for "unwanted, unneeded" software. J.A. 6 ¶ 1. Because we must accept Cimino's factual allegations as true at the motion to dismiss stage, we recite the facts as he alleges.

Pursuant to a 2007 license agreement, the IRS used IBM's software, paying between $23 and $30 million annually. As the license agreement neared its expiration in 2012, IBM learned that the IRS was not interested in renewing the agreement because it was not using all the software purchased from IBM. For the upcoming tax season, the IRS intended to negotiate an extension only for the software that it needed.

Faced with the possibility of losing significant revenue, IBM allegedly devised a scheme to pressure the IRS into another long-term deal. IBM planned to conduct a "friendly" audit, anticipating that the IRS was overusing the software and

therefore would owe a significant amount in compliance penalties. IBM would then leverage the penalties by offering to waive them in exchange for a new agreement. IBM retained Deloitte LLP to perform the audit.

Contrary to IBM's expectations, Deloitte's initial audit showed the IRS was not significantly overusing the licenses and owed only $500,000 in compliance penalties—a relatively small amount for a contract of this size. IBM never released these audit results to the IRS. Instead, IBM worked with Deloitte to manipulate the results. For example, IBM counted licenses on discontinued servers as in constant use, even though they were never used. Deloitte first presented the number of overused licenses from this manipulated audit to Adam Kravitz at the IRS. Cimino alleged that "Kravitz rejected the audit findings because, in his words, 'IBM cannot substantiate that the IRS is out of compliance.'" J.A. 27 ¶ 88. IBM then manipulated the audit again to show an outstanding $292 million in compliance penalties. IBM shared this number with the IRS, despite the fact that one IBM employee considered the number "ridiculous," and another "was 'not comfortable representing' that number to the IRS." J.A. 28 ¶ 92. In November 2012, IBM presented another audit to Kravitz showing the IRS owed at least $91 million in compliance penalties, but Kravitz again rejected the findings.

Waiting until Kravitz was on vacation in December, IBM approached IRS officials who were "less knowledgeable about the audit." J.A. 34 ¶ 123. Deloitte presented the false audit showing the IRS was overutilizing the software to several IRS officials including Kravitz's boss, Jim McGrane, who served as the IRS's Deputy Chief Information Officer and led the IRS's software acquisitions. A week later, IBM met with McGrane and told him that, if the IRS did not enter the new license agreement, it would owe $91 million and that IBM had

retained lawyers to collect the penalties. But if the IRS entered into a new license agreement, IBM promised to waive the penalties. Chris Schumm, an IBM employee at the meeting, believed "[d]uring the course of his employment" that "the IRS was very concerned and 'scared' of the false" audit and that the audit's "findings were a substantial factor in the IRS's decision to renew the [agreement]." J.A. 36 ¶ 127. After learning about the extent of compliance penalties revealed by Deloitte's audit, McGrane approved a new license agreement in which the IRS agreed to pay IBM $265 million for a period of five years.

Once the new agreement was in place, IBM allegedly did not make good on its promise to waive the compliance penalties. IBM instead disguised the compliance penalties as an $87 million fee for prospective licenses and support, which "were, upon information and belief, never actually provided to the IRS." J.A. 38 ¶ 140. The IRS continued to pay IBM under the license agreement for the next several years, and it paid most of the $265 million contract price. In 2015, the IRS extended the license agreement for another six months at a cost of over $16 million.

Cimino filed his complaint against IBM under seal in June 2013—about six months after the IRS signed the new license agreement. Cimino's amended complaint asserts that IBM violated the FCA in two ways. First, IBM fraudulently induced the IRS to enter the agreement by using the false audit and the false compliance penalties premised upon it. Second, IBM presented false claims when it charged the IRS for prospective licenses it never provided. After a four-year investigation, the government declined to intervene in the case, and Cimino's complaint was unsealed. IBM moved to dismiss.

The district court dismissed Cimino's complaint in full. With respect to fraudulent inducement, the court held that

Cimino had to plead but-for causation, meaning that the IRS would not have entered the agreement but for IBM's false audit. According to the court, Cimino failed to do so because he never alleged that the IRS accepted the false audit's findings. The court also held Cimino failed to plausibly plead the false audit was material to the IRS, because it paid IBM most of the $265 million license agreement and extended the agreement for an additional $16 million despite its knowledge of possible fraud. As for presentment of a false claim, the court again found it implausible that the IRS "sat by idly in the face of" IBM's alleged fraud and paid millions for purportedly nothing in return. J.A. 419. Alternatively, the court held Cimino improperly pleaded this claim because he did not assert that he lacked access to relevant records, as required to plead "upon information and belief."

Cimino timely appealed the dismissal of his complaint. Although it had earlier declined to intervene, the government filed an amicus brief in support of Cimino.

II.

We begin with Cimino's claim that IBM fraudulently induced the IRS to enter into a new license agreement with IBM. The FCA makes it unlawful to "knowingly present[], or cause[] to be presented, a false or fraudulent claim for payment or approval" to the government. 31 U.S.C. § 3729(a)(1)(A). Under longstanding Supreme Court precedent, a violation of the FCA occurs when a person fraudulently induces the government to enter a contract and later submits claims for payment under that contract. *See U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), *superseded by statute on other grounds*, Act of Dec. 23, 1943, ch. 377, 57 Stat. 608, 609; *see also U.S. ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1326–27 (D.C. Cir. 2005). Although the text of the FCA

prohibits only false or fraudulent *claims*, the Court has placed a common law gloss on the statute, interpreting it to also prohibit fraudulent inducement. This means that "each claim submitted to the Government under a contract which was procured by fraud" is false "even in the absence of evidence that the claims were fraudulent in themselves." *Bettis*, 393 F.3d at 1326.

Before assessing whether Cimino properly pleaded fraudulent inducement, we must first answer the threshold question of whether causation is required to make out a fraudulent inducement claim, and if so, the proper standard of causation to apply. We hold that causation is required for a fraudulent inducement claim. Our inquiry here focuses on actual causation, which we determine under a but-for standard.

A.

Cimino argues that causation is not required to make out a claim for fraudulent inducement under the FCA.[1] While this circuit has not explicitly addressed the requirement of causation, the nature of the common law tort of fraudulent inducement as well as the Supreme Court's decisions interpreting the FCA make clear that a successful claim for fraudulent inducement requires demonstrating that a

[1] In the proceedings below, Cimino waived his argument that causation is not required, but preserved his argument regarding the proper standard for causation. Because we need not determine the standard for causation if causation is not required, we excuse Cimino's waiver and first explain why causation is required for fraudulent inducement.

defendant's fraud caused the government to enter a contract that later results in a request for payment.[2]

At common law, causation is an integral part of fraudulent inducement, which is a species of fraud. "Fraudulent inducement occurs when a party is induced through fraudulent misrepresentations to enter a contract." 37 C.J.S. *Fraud* § 111 (June 2021 update); *cf.* 28 WILLISTON ON CONTRACTS § 70:220 (4th ed. July 2020 update). The ordinary meaning of inducement incorporates a causation requirement. To "induce" means to "bring about, bring on, produce, *cause*, give rise to." *Induce*, OXFORD ENGLISH DICTIONARY 888 (2d ed. 1989) (emphasis added). As the government explains, "fraudulent inducement has a built-in causation requirement." Gov't Amicus Br. 12. If a fraudster's misrepresentations do not cause a party to enter a contract, no fraudulent inducement has occurred.

The Supreme Court has recognized that in prohibiting false or fraudulent claims, the FCA in effect incorporated a common law tort along with its common law requirements. In general, "the term 'fraudulent' [in the FCA] is a paradigmatic example of a statutory term that incorporates the common-law

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[2] The First Circuit has explained that a fraudulent inducement claim under the FCA requires causation. *See D'Agostino v. EV3, Inc.*, 845 F.3d 1, 9 (1st Cir. 2016). Other circuits have implicitly recognized that the requirements of fraudulent inducement include causation. *See U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008) (explaining that fraudulent inducement requires a "fraudulent course of conduct … that *caused* the government to pay out money or to forfeit moneys due (i.e., that involved a 'claim')") (emphasis added) (cleaned up); *see also U.S. ex rel. Longhi v. United States*, 575 F.3d 458, 467 (5th Cir. 2009); *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006).

meaning of fraud." *Escobar*, 136 S. Ct. at 1999; *see also id.* at 1999 n.2 (explaining that "we presume that Congress retained all other elements of common-law fraud that are consistent with the statutory text [when] there are no textual indicia to the contrary"). More specifically, when the Court recognized a claim for fraudulent inducement, it explained that contractors "caused the government to pay claims" under a contract that was "the result of the fraudulent bidding," "taint[ing] … every step thereafter taken." *Hess*, 317 U.S. at 543. The contractors' fraud caused, i.e. induced, the government to enter a contract, which then resulted in payments of claims.

Consistent with the common law and the Supreme Court's interpretation of the FCA, causation is a necessary element of fraudulent inducement. Because the fraud must be in the inducement, liability under the FCA for fraudulent inducement must turn on whether the fraud caused the government to contract.

Cimino raises several arguments to resist this conclusion. First, Cimino argues the text of the FCA indicates that the common law requirement of causation does not apply to fraudulent inducement claims. He notes the FCA expressly requires causation when a defendant causes someone else to violate the FCA. *See* 31 U.S.C. § 3729(a)(1)(A) & (B). And the FCA permits treble damages for "the amount of damages which the Government sustains *because of* the act of" the defendant. *Id*. § 3729(a)(1) (emphasis added). According to Cimino, these explicit causation requirements preclude a requirement of causation for fraudulent inducement.

Cimino's negative implication argument cannot carry the day. To begin with, claims for fraudulent inducement rest not on the text of the FCA, but on the recognition that the statute encompasses this common law claim, along with its common

law requirements, which include causation. Similarly, the negative implication canon "may have less force where the exclusion is a common law rule." Norman Singer & Shambie Singer, 2B SUTHERLAND STATUTORY CONSTRUCTION § 50:5 (7th ed. Nov. 2020 update). Under the presumption against change in common law, "[a] statute will be construed to alter the common law only when that disposition is clear." Antonin Scalia & Bryan A. Garner, READING LAW 318 (2012) (emphasis omitted). When Congress has abrogated the common law in the FCA, it has done so clearly. *See* 31 U.S.C. § 3729(b)(1)(B) (altering the common law scienter requirement); *Escobar*, 136 S. Ct. at 1999 n.2. When interpreting the FCA, the Supreme Court has imposed common law requirements even when the statute does not explicitly require them. *See Escobar*, 136 S. Ct. at 2002 (requiring materiality under 31 U.S.C. § 3729(a)(1)(A), although that provision makes no mention of it, and other provisions explicitly require materiality, such as § 3729(a)(1)(B)). Nothing in the text or structure of the FCA is inconsistent with applying the common law requirement of causation for fraudulent inducement.

Second, Cimino contends that causation is not required because the nexus between a defendant's fraud and the government's payment decision is covered by the element of materiality, which suffices in lieu of causation. Although related, materiality and causation are not the same. The FCA defines materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). Causation here refers to whether fraud in fact caused the government to enter into a contract. To be sure, both materiality and causation require considering the effect of a defendant's fraud on the government's decision to enter a contract. But a statement could be material—that is, capable of influencing the

government's decision to enter a contract—without causing the government to do so. *See D'Agostino v. EV3, Inc.*, 845 F.3d 1, 7–8 (1st Cir. 2016); *see also U.S. ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 491 (3d Cir. 2017) (rejecting the conflation of materiality and causation in the FCA). Fraudulent inducement requires materiality and causation, separate elements that we cannot conflate.

Cimino finally resorts to the FCA's broader purpose of redressing fraud. He argues that, if causation is required, a contractor may lie to the government to obtain a contract but dodge liability if his lie does not cause the government to enter the contract. He maintains it would be "more consistent with the FCA's broad remedial purpose to hold those defendants accountable." Cimino Br. 35. The FCA, however, is not "an all-purpose antifraud statute." *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 672 (2008). Even putting aside the difficulty of determining which statutes are remedial (all statutes seek to remedy some problem), the FCA does not make actionable every misrepresentation to the government. Nor can generalized purposes surmised from the FCA overcome the conclusion, drawn from the common law and our precedents, that a fraudulent inducement claim under the FCA requires a showing of causation.

B.

Next we turn to the proper standard for causation and explain that Cimino was required to plead actual causation under a but-for standard. Accordingly, we reject Cimino's argument that he needed to plead *only* proximate cause under the substantial factor test.

Like other torts, fraud requires both actual and proximate cause, and as already explained, fraudulent inducement under

the FCA incorporates the common law causation requirement. Actual and proximate cause, however, are often confused. Actual cause, also called cause-in-fact or factual cause, concerns whether a defendant's conduct resulted in the plaintiff's harm. It refers to the ordinary understanding of causation, which asks for "proof that the defendant's conduct did in fact cause the plaintiff's injury." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346 (2013). Proximate cause, also called legal cause, concerns whether a defendant should be held legally liable for the conduct that caused the plaintiff's harm. Only some factual causes are legally cognizable. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011). Although a defendant's conduct may have actually caused the plaintiff's harm, he is liable only if his actions are also the legal, i.e. proximate, cause of the plaintiff's harm.

To make out a claim under the FCA, Cimino must first plead actual cause because it is a well-established principle that actual cause precedes any analysis of proximate cause. Dan B. Dobbs, et al., DOBBS' LAW OF TORTS § 198 (2d ed. June 2020 update). Such factual or actual cause has traditionally been governed by the but-for test: "The traditional way to prove that one event was a factual cause of another is to show that the latter would not have occurred 'but for' the former." *Paroline v. United States*, 572 U.S. 434, 449–50 (2014). As the Supreme Court has instructed, "[t]his ancient and simple 'but for' common law causation test … supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020). We have applied a but-for test when assessing whether a defendant's fraud caused the government damages under the FCA. *See U.S. ex rel. Schwedt v. Plan. Rsch. Corp.*, 59 F.3d 196, 200 (D.C. Cir. 1995).

Indeed, actual cause is practically synonymous with but-for cause.

Therefore, to plead fraudulent inducement, Cimino had to allege actual cause under the but-for test.[3] Here that means he would have to provide sufficient facts for the court to draw a reasonable inference that IBM's false audit caused the IRS to enter the license agreement.

Cimino urges us to adopt a different approach. He argues that he need not plead facts to allege actual cause at all, so long as he pleads facts plausibly demonstrating proximate cause, which he maintains should be analyzed under the substantial factor test. And Cimino contends that his complaint satisfies this test because, even if other factors also influenced the IRS's decision to enter the agreement, he alleged that IBM's false audit was a substantial factor in that decision. But Cimino cannot simply skip over a showing of actual cause and rely only on proximate cause. Irrespective of whether Cimino properly pleaded proximate cause, he was also required to plead actual cause under the but-for standard.

Resorting again to "the policies animating the FCA," Cimino argues that we should interpret this remedial statute broadly by pulling within its orbit any fraudulent actions that were a substantial factor in the government's decision—not just those that were a but-for cause. Cimino Br. 39. Liberal

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[3] Cimino also gestures to the fact that but-for causation fails when there are multiple sufficient causes, and that the substantial factor test is applied "[w]hen each of two or more causes would be sufficient, standing alone, to cause the plaintiff's harm." DOBBS' LAW OF TORTS § 189. Cimino, however, fails to identify what the additional sufficient cause of the IRS's harm might be, so that exception has no bearing on this case.

construction of remedial statutes "needlessly invites judicial lawmaking," an invitation we decline. Scalia & Garner, READING LAW 364. Remedial statutes, like any other, should be interpreted to include all they fairly contain, not more and not less.

Cimino has presented no compelling reason to deviate from the ordinary common law rule. Therefore, he must allege but-for causation as a necessary element of a claim for fraudulent inducement under the FCA.

III.

We next consider the dismissal of Cimino's fraudulent inducement and presentment claims under the FCA, which we review de novo. *Winder v. Erste*, 566 F.3d 209, 213 (D.C. Cir. 2009). A complaint survives a motion to dismiss if it "contain[s] 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)). To qualify as plausible, the pleaded facts must "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

"[B]ecause the False Claims Act is self-evidently an anti-fraud statute," a complaint filed under it must also meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). *U.S. ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551–52 (D.C. Cir. 2002). When alleging fraud, a relator "must state with particularity the circumstances constituting fraud or mistake," although "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b). Therefore, a relator must plead his FCA claim with both plausibility and particularity. We hold that Cimino satisfied these standards

with respect to both causation and materiality for fraudulent inducement, but failed to plead with particularity his presentment claims.

A.

To make out a claim for fraudulent inducement under the FCA, a plaintiff must plead both causation and materiality.

We conclude that Cimino adequately pleaded but-for causation because he alleged facts that plausibly demonstrate the IRS would not have entered the agreement but for IBM's fraudulent conduct. Cimino asserted that "the IRS would not have entered into the License had it known that [IBM's] representations were false," J.A. 37 ¶ 131, and supported this conclusion with factual allegations. *Cf. Iqbal*, 556 U.S. at 679 (explaining that "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations"). He also alleged that, before the renewal negotiations began, the IRS wanted to *reduce* its software spending. The IRS thought it was underutilizing its IBM licenses and was not interested in renewing the entire license agreement.

Next, Cimino outlined the scheme that IBM concocted to induce the IRS to renew the license agreement. Cimino asserted that IBM devised a false audit showing the IRS was overutilizing its licenses and would owe significant compliance penalties—contrary to the IRS's expectations. IBM then presented this audit to several IRS officials, including McGrane. Although Cimino did not explicitly allege that McGrane, or any IRS official, accepted the audit, he came close; he alleged that IBM's "false representations [of compliance penalties] were relied upon by the IRS when it agreed to enter into the License." J.A. 37 ¶ 131. Moreover,

Cimino described the pivotal meeting at which IBM used the false audit to induce the IRS to enter the agreement. A week after the presentation of the audit, IBM told McGrane that it would waive the $91 million in compliance penalties if the IRS entered into the license agreement, but otherwise would seek to collect the penalties. McGrane signed off on the license agreement. One IBM employee present at this meeting thought the IRS was "very concerned" and "scared" of the audit.[4] A few weeks later, the IRS executed a new $265 million license agreement, despite previously seeking to reduce its software spending with IBM.

When we take these factual allegations together, they permit us to "draw the reasonable inference" from Cimino's complaint that but for IBM's false audit, the IRS would not have entered the agreement. *Iqbal*, 556 U.S. at 678; *see also Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 272 (D.C. Cir. 2018) (explaining that we should "draw all reasonable inferences in favor of the plaintiffs"). Cimino raises more than just general concerns of the IRS about the audit. His factual allegations "nudge[]" his theory that IBM's false audit caused the IRS to enter the agreement "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

The district court doubted that IBM could obtain the new license agreement from the IRS by approaching McGrane when Kravitz, who had twice rejected the audit, was on vacation. But that disbelief did not merit dismissal in light of

[4] After highlighting the IRS's fear of the audit, Cimino alleged that the audit's findings were a "substantial factor" in the IRS's decision to renew the license agreement. J.A. 36 ¶ 127. The district court ruled that this allegation of the incorrect legal standard was "by itself fatal." J.A. 415. We need not assume, however, the truth of Cimino's legal conclusions. *Iqbal*, 556 U.S. at 680. Instead, we focus on the facts he pleaded.

Cimino's allegations. "[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable." *Id*. at 556.

On the facts alleged at the pleading stage, along with the reasonable inferences drawn from those allegations in Cimino's favor, we find Cimino plausibly alleged that, but for IBM's false audit, the IRS would not have entered into the license agreement. Whether Cimino can prove those allegations remains to be seen.

We also conclude that Cimino plausibly pleaded materiality for fraudulent inducement under the FCA. Materiality means a defendant's fraud has "a natural tendency to influence" or was "capable of influencing" the government's payment decision. 31 U.S.C. § 3729(b)(4). For a claim of fraudulent inducement, a defendant's fraud is material if it was capable of influencing the government's decision to enter into a contract.

Cimino plausibly pleaded materiality, with largely the same facts that supported his allegations of causation. Cimino maintained that, prior to the audit, the IRS thought it was underutilizing IBM's software and did not want to renew the agreement. In order to maintain the valuable agreement, IBM presented a false audit showing that the IRS was overutilizing the software and represented that the IRS would owe compliance penalties if it did not renew the agreement. The false audit was thus *capable* of influencing the IRS's decision to renew the agreement.

IBM focuses on the fact that the IRS continued to pay for the licenses and extended the license agreement despite its

purported knowledge of Cimino's allegations of fraud.[5] To be sure, in the context of the presentment of false claims, "if the Government pays a particular claim in full despite its actual knowledge [of the fraud], that is very strong evidence" of immateriality. *Escobar*, 136 S. Ct. at 2003. We have also observed that continued payment of claims the government knows might be fraudulent suggests the fraud was not material to the government. *See U.S. ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1034 (D.C. Cir. 2017).

The question here, however, is whether Cimino plausibly *pleaded* materiality for his fraudulent inducement claims. He did so. The district court's dismissal boils down to a disbelief that the IRS would pay IBM millions of dollars after learning that it had been hoodwinked. But Federal Rule of Civil Procedure 12(b)(6) requires us to accept Cimino's factual allegations as true, and those allegations plausibly plead that IBM's false audit was material to the IRS's decision to renew the license agreement. It is plausible that, had the IRS known IBM's audit was false, it would not have renewed the agreement. It is also plausible that the IRS could have later learned of IBM's fraud and continued to pay for the licenses for any number of reasons that do not render IBM's fraud immaterial. For example, the IRS may have felt obligated to pay until it received a legal determination that it was relieved of the agreement's terms. "Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a

[5] It is not clear that the IRS's knowledge of IBM's alleged fraud was properly before the district court, as Cimino did not allege that knowledge in his complaint. *See Trudeau v. FTC*, 456 F.3d 178, 183 (D.C. Cir. 2006). IBM suggests we could take judicial notice of this fact. Because it does not change our conclusion, we assume without deciding that the district court properly considered the IRS's knowledge of IBM's alleged fraud.

complaint's factual allegations." *Twombly*, 550 U.S. at 556 (cleaned up). At a later stage in the litigation, evidence of the IRS's continued payment under the license agreement might be used to demonstrate that IBM's false audit was not material to the IRS. *See McBride*, 848 F.3d at 1034. But the resolution of these questions is for another day.[6]

We hold that Cimino plausibly pleaded causation and materiality and therefore reverse the district court's dismissal of his fraudulent inducement claims.

B.

In addition to fraudulent inducement, Cimino claimed that IBM presented false claims to the IRS when it billed the IRS for $87 million in compliance penalties disguised as new licenses and technical support. That is, Cimino alleged that IBM billed the government for services IBM did not in fact provide.

We agree with the district court that Cimino did not adequately plead the presentment of false claims. To satisfy the particularity demanded by Rule 9(b) for a presentment claim, a relator must plead details about the presentment, including when the false claims were presented and who presented those claims. *See U.S. ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1257 (D.C. Cir. 2004). Although a relator may plead allegations upon "information and belief," he may do so only when "the necessary information lies within the defendant's control," and the allegations are "accompanied by

[6] The Chamber of Commerce and Pharmaceutical Research and Manufacturers of America as amici suggest that finding materiality here will open the floodgates to meritless FCA suits. But we are not resolving the merits of whether the fraud alleged here is material and hold only that Cimino plausibly pleaded materiality.

a statement of the facts upon which the allegations are based." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994).

Cimino failed to plead with particularity IBM's presentment of false claims because he alleged only that IBM billed the IRS about $87 million for licenses that "were, upon information and belief, never actually provided to the IRS." J.A. 38 ¶ 140. He neither pinpointed *when* the false claims were presented other than sometime during the agreement's five years, nor identified *who* presented the false claims other than "IBM." *See Williams*, 389 F.3d at 1257 (rejecting as insufficient allegations that false claims were presented during an "open-ended time span" by "management"). Moreover, Cimino's allegation upon information and belief was impermissible because he failed to identify what necessary information lies within IBM's control or to flesh out any facts upon which his allegation that IBM never provided the software was based. *See Kowal*, 16 F.3d at 1279 n.3. We hold that Cimino fell short of plausibly alleging that IBM presented false claims to the IRS.

* * *

For the foregoing reasons, we affirm the dismissal of Cimino's presentment claims and reverse the dismissal of Cimino's fraudulent inducement claims and remand for further proceedings.

So ordered.

RAO, *Circuit Judge*, concurring: The panel opinion correctly applies our precedents to the issues raised by the parties. I write separately to question whether the False Claims Act ("FCA") creates a cause of action for fraudulent inducement.

The text of the FCA does not readily suggest liability for fraudulent inducement as a separate cause of action. The FCA imposes liability for fraudulent *claims*, but it says nothing about fraudulently induced *contracts*. *See United States v. Bornstein*, 423 U.S. 303, 311 (1976) ("The language of the statute focuses on false claims, not on contracts."). As relevant here, a person violates the FCA if he "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A), or when he "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," *id*. § 3729(a)(1)(B). Both provisions require a false claim, which is defined as "any request or demand, whether under a contract or otherwise, for money or property." *Id*. § 3729(b)(2). The plain meaning of the FCA requires a request for payment that is false or fraudulent.

As one commentator has posited, "[b]ecause the statute is keyed to the presentation of fraudulent 'claims,'" the text of the FCA "says nothing about, and thus does not impose liability for, non-fraudulent and non-false claims submitted under fraudulently induced contracts." C. Kevin Marshall, *Fraudulent-Inducement Actions & the FCA's Statute of Limitations*, 62 GOV'T CONTRACTOR 19 ¶ 133, May 13, 2020. If Congress had wanted to create liability for fraudulent inducement, it easily could have employed more expansive language. *See, e.g.*, Major Fraud Act of 1988, Pub. L. No. 100-700, 102 Stat. 4631 (codified as amended at 18 U.S.C. § 1031) (criminalizing "[m]ajor fraud against the United States" by imposing liability for a scheme "to obtain money or property

by means of false or fraudulent pretenses, representations, or promises").

With little discussion of the statutory text, our cases have suggested that fraudulent inducement under the FCA is a separate cause of action. Liability for fraudulently induced contracts may exist even though the claims made pursuant to the contract are genuine. As we have explained, "every claim submitted under a fraudulently induced contract constitutes a 'false claim' within the meaning of the Act (*i.e.*, is automatically tainted), even without proof that the claims were fraudulent in themselves." *U.S. ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1323 (D.C. Cir. 2005). This result does not naturally follow from the text of the FCA, which repeatedly refers to a "false or fraudulent claim" and makes no mention of creating liability for bona fide claims arising from a contract induced by fraud.

We located the origin of a fraudulent inducement cause of action under the FCA in a 1943 Supreme Court decision, *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), *superseded by statute on other grounds*, Act of Dec. 23, 1943, ch. 377, 57 Stat. 608, 609. *See Bettis*, 393 F.3d at 1326. The Court in *Hess*, however, does not explicitly discuss fraudulent inducement or state that such a cause of action exists under the FCA separate from the presentation of false claims. Instead, the Court determined that contractors who induced the government to contract under collusive bids could be subject to liability under the FCA. *Hess*, 317 U.S. at 543. Without any citation, the Court concluded "[t]his fraud did not spend itself with the execution of the contract," and so "[i]ts taint entered into every swollen estimate which was the basic cause of payment" by the government. *Id*. The Court focused on the supposed congressional intent of "reach[ing] any person who knowingly assisted in causing the government to pay claims which were

grounded in fraud," and relied on statements in the legislative history that the FCA's purpose was to protect "against those who would 'cheat the United States.'" *Id*. at 544 (cleaned up).

Despite the discussion of these sweeping purposes, *Hess* could be understood to involve actual false claims within the plain meaning of the FCA because the inflated prices appeared on the claims themselves. *See* Brief for Petitioner at 10, 12–13, *Hess*, 317 U.S. 537 (No. 173), 1942 WL 54207; Brief for Respondent at 9–11, *Hess*, 317 U.S. 537 (No. 173), 1942 WL 54208. In any event, *Hess* is hardly a model of clarity regarding the existence of a fraudulent inducement cause of action.

In following *Hess*, however, we, as well as other courts, have read that decision as recognizing a cause of action for fraudulent inducement under the FCA, without proof that claims are false or fraudulent. *See Bettis*, 393 F.3d at 1326–27 (recognizing fraudulent inducement under the FCA but holding no fraudulent inducement occurred); *see also, e.g.*, *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1173 (9th Cir. 2006); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 (4th Cir. 1999). Yet these decisions do not set forth a textual basis for fraudulent inducement under the FCA. And while we have recognized that a fraudulent inducement claim may exist under the FCA, no case in this circuit has found such liability. *See Bettis*, 393 F.3d at 1327; *U.S. ex rel. Schwedt v. Plan. Rsch. Corp.*, 59 F.3d 196, 199 (D.C. Cir. 1995). Although we are bound by the holdings of the Supreme Court and prior panels of this court, it is unclear whether the cases cited above definitively establish a separate cause of action for fraudulent inducement under the FCA, one that is unconnected to the presentation of a false or fraudulent claim.

Furthermore, reconsideration of a fraudulent inducement cause of action may be warranted because it exists in some

tension with recent Supreme Court decisions. When interpreting the FCA, the Court has focused on the specific language of the statute. *See Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507, 1512–14 (2019); *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2001–02 (2016). Indeed, the Court has explicitly disclaimed reliance on the FCA's purpose and warned against "threat[s] to transform the FCA into an all-purpose antifraud statute." *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 672 (2008); *accord Escobar*, 136 S. Ct. at 2003. Fraudulent inducement may be one of those threats that has gone unnoticed.

Finally, I note that the creation of causes of action under the FCA may pose particular separation of powers problems. In other contexts, the Supreme Court has trimmed or eliminated judge-made causes of action that lacked a basis in statute, recognizing "the tension between [courts inferring causes of action or remedies] and the Constitution's separation of legislative and judicial power." *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020); *see also Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.") (cleaned up). In addition, the FCA expands who can prosecute false claims against the government through the qui tam procedure. Others have raised serious constitutional questions about placing the execution of the laws in private hands because it contravenes Article II's vesting of all executive power in the President. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 760–63 (5th Cir. 2001) (en banc) (Smith, J., dissenting); Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 207, 211, 1989 WL 595854 (1989) (explaining that the Framers put "the power to execute the law … in hands that are both independent of the legislature and politically accountable to the

people"). Fraudulent inducement under the FCA thus may reflect a judicial expansion of a statutory cause of action layered on top of congressional expansion of prosecution outside the executive branch.

The plain meaning of the FCA, the Supreme Court's recent FCA decisions, and the lack of clarity in the precedents recognizing fraudulent inducement are all reasons for reconsidering, in an appropriate case, whether fraudulent inducement is a separate cause of action under the FCA.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11624
Non-Argument Calendar

D.C. Docket No. 4:16-cv-00290-WTM-BKE

ESTATE OF DEBBIE HELMLY, et al.,

Plaintiffs-Appellants,

versus

BETHANY HOSPICE AND PALLIATIVE CARE OF COASTAL GEORGIA, LLC,
f.k.a. Bethany Hospice of Coastal Georgia, LLC (Bethany Coastal),
BETHANY HOSPICE AND PALLIATIVE CARE, LLC,
f.k.a. Bethany Hospice, LLC (Bethany Hospice),
BETHANY BENEVOLENCE FUND, INC.,
AVA BEST, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(April 26, 2021)

Before MARTIN, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

In this *qui tam* action, Debbie Helmly and Jolie Johnson (the "Relators") appeal the dismissal of their complaint. Relators sued Bethany Hospice and Palliative Care, LLC ("Bethany Hospice") on behalf of the United States and the State of Georgia,[1] alleging that Bethany Hospice violated the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–3733, and the Georgia False Medicaid Claims Act, O.C.G.A. § 49-4-168.1. In particular, Relators alleged that Bethany Hospice violated the so-called Anti-Kickback Statute ("AKS"), 42 U.S.C. § 1320a-7b(b),[2] by paying physicians remuneration for Medicare and Medicaid patient referrals. According to Relators, Bethany Hospice submitted false claims when it billed the government for services provided to illegally-referred patients. Relators further

[1] *See* 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government."); *id*. § 3732(b) ("The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.").

[2] An entity violates the AKS when it:

> knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person . . . to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program.

42 U.S.C. § 1320a-7b(b)(2).

allege that Bethany Hospice falsely certified compliance with the AKS. Under Rule 9 of the Federal Rules of Civil Procedure, Relators were required to plead with particularity the submission of an actual false claim to the government. Because Relators failed to do so, the district court properly dismissed their complaint. Accordingly, we affirm.

I. Background[3]

Bethany Hospice provides for-profit hospice care in Georgia. It operates care facilities in four cities: Douglas, Thomasville, Waycross, and Valdosta. In 2014, Bethany Hospice opened Bethany Hospice and Palliative Care of Coastal Georgia, LLC ("Bethany Coastal"). Relators are former employees of Bethany Coastal. Helmly was employed as the administrator of Bethany Coastal from December 2014 until July 2015. Johnson was employed as a marketer during the same period.

Although Bethany Coastal was organized as a separate company from Bethany Hospice and obtained a different business license number, the two entities are both owned and operated by Ava Best and Mac Mackey and share personnel, resources, and management software. According to Relators, Best and Mackey operated Bethany Coastal "as if it were another facility office of Bethany

[3] Relators' original complaint was filed under seal. After the United States and the State of Georgia declined to intervene, the complaint was unsealed. The following facts are taken from Relators' third amended complaint (the "operative complaint").

Hospice." For that reason, Relators allege that they were "effectively . . . corporate insiders of Bethany Hospice."

Relators allege that, as corporate insiders, they learned that Bethany Hospice operated an illegal kickback referral scheme in which Bethany Hospice paid doctors in exchange for referring Medicare beneficiaries[4] to Bethany Hospice. Relators further allege that, after rendering services to the illegally referred patients, Bethany Hospice submitted claims to Medicare for reimbursement.

In particular, Helmly alleged that when she and Best were negotiating the terms of Helmly's employment as administrator of Bethany Coastal, Best offered her compensation based on the kickback scheme. During those negotiations, Best allegedly told Helmly that Best "would follow the same protocol to add compensation for . . . Helmly that [Best] used to pay referring doctors for their referrals." Under that "protocol," Helmly could make a below-market ownership investment in Bethany Coastal that would provide "huge returns" based on the number of referred patients. Helmly further alleged that Best said that she "paid all the medical directors who owned shares in Bethany Hospice according to this same formula, and the payments varied depending on the volume of referrals."

[4] Relators allege that the referral scheme involved Medicare and Medicaid beneficiaries. For simplicity, we will refer only to Medicare.

Relators also alleged that, on other occasions, Best acknowledged to them that the compensation structure was designed to avoid getting caught for FCA violations. Best was formerly employed by Odyssey Hospice—a predecessor to Bethany Hospice. Relators alleged that Odyssey also employed a kickback compensation scheme, Odyssey's owner was eventually convicted of Medicare Fraud, and Odyssey agreed to a $25 million settlement with the U.S. Department of Justice. According to Relators, Best acknowledged that kickbacks were improper but, because they were "the most effective way to get referrals," Best "tried to have the best of both worlds: paying the kickbacks to referring physicians but hiding or masking them as compensation to medical directors and part owners of Bethany Hospice."

Relators alleged that several doctors purchased ownership interests in Bethany Hospice and were paid kickbacks for referrals through "a monthly salary, dividends, and/or monthly bonuses."[5] According to Relators, that compensation was not paid for the fair market value of their work but, rather, "as inducement for or reward for referrals of patients, which constitute kickbacks." Relators' complaint points to Dr. Tanner as an example: In 2007, he purchased a 5% interest in Bethany Hospice for $20,000 and, seven years later, he sold that interest for

[5] Relators also allege that, on at least one occasion, Bethany Hospice offered its doctors a paid family vacation as a kickback.

$300,000. Relators' complaint identifies at least four other doctors (the "Bethany Hospice doctors") who are allegedly the primary participants in this compensation scheme.

Relators point to other facts to show that the scheme was operational and successful. They allege that, after purchasing an investment in Bethany Hospice, the Bethany Hospice doctors made "nearly all" or "around 95%" of their patient referrals to Bethany Hospice. Realtors also allege that they were able to access Bethany Hospice's internal billing software, Consolo, to confirm that Bethany Hospice tracked each patient admission and the doctor who referred that patient for the purpose of paying those doctors kickbacks. Relators claim that other Bethany Hospice employees confirmed that Bethany Hospice ran "weekly and monthly reports" tracking referrals and that "Best use[d] these reports to determine how much to pay referral sources."

Relators further alleged that, as a result of the kickback scheme, Bethany Hospice submitted false claims for Medicare reimbursement to the government. Relators alleged that "all or nearly all of Bethany Hospice's patients put under service received coverage from Medicare." Johnson "had access to the census reports documenting each site's patients and which payor paid for the patients' care." By accessing these records, and speaking to some of Bethany Hospice's billing employees, Johnson allegedly "was able to find out about the billing and

collection from Medicare of the illicit referrals and the submission of bills for other inappropriate patients." For her part, Helmly alleged that she also had access to all billing information and "attended meetings with Ms. Best where Bethany Hospice and Bethany Coastal management discussed site productivity and census numbers for all Bethany Hospice's and Bethany Coastal's sites." And, relevant here, Relators claim to have discovered that "all (or nearly all) the hospice patients referred by [the Bethany Hospice doctors] were Medicare or Medicaid patients and that Bethany Hospice submitted claims to the Government for per diem payments for those patients knowing that they were false."

Relators' complaint included government Medicare claims data that showed that "Bethany Hospice derive[d] nearly all of its revenue from the Medicare program monies," and it provided a breakdown of Medicare referrals from the Bethany Hospice doctors.

Finally, Relators alleged that five other Bethany Hospice employees confirmed that Bethany Hospice submitted Medicare reimbursement claims for patients referred by the Bethany Hospice doctors. At bottom, Relators alleged that "all or nearly all" of Bethany Hospice's business was derived from Medicare beneficiaries and that Bethany Hospice submitted claims for Medicare reimbursement for those patients. Combined with Relators' access to the billing systems and confirmation from other employees that Bethany Hospice submitted

Medicare reimbursement claims, Relators alleged that Bethany Hospice submitted false claims to the government.

As noted, Relators' operative complaint alleged two causes of action. Relators alleged that Bethany Hospice made false or fraudulent claims for reimbursement based on illegal kickbacks, in violation of 31 U.S.C. § 3729(a)(1)(A) and O.C.G.A. § 49-4-168.1(a)(1). Relators also alleged that Bethany Hospice made false statements by certifying compliance with the AKS, in violation of 31 U.S.C. § 3729(a)(1)(B) and O.C.G.A. § 49-4-168.1(a)(2).[6]

Bethany Hospice eventually moved to dismiss the operative complaint. Bethany Hospice argued that Relators' complaint contained primarily conclusory assertions and failed to plead its claims with sufficient particularity, as required by Fed. R. Civ. P. 9(b). The Relators opposed the motion, arguing that the operative complaint satisfied the requirements of Rule 9(b).

The district court granted Bethany Hospice's motion to dismiss with prejudice. First, the district court concluded that Relators did not plead sufficiently particular facts to allege that Bethany Hospice violated the AKS. Although it acknowledged that the Relators had put forth some facts to support their allegations about a kickback scheme, the district court determined that Relators

[6] Relators also alleged that Best and Bethany Hospice retaliated against them for their investigations into the alleged FCA violations, in violation of 31 U.S.C. § 3730(h) and O.C.G.A. § 49-4-168.4. The parties agreed to settle that claim.

failed to allege particular facts about the precise nature of the kickback incentives and how much Best paid for referrals. The district court then noted that, despite Relators' access to billing reports, they failed to "provide specific dates that Bethany Hospice paid doctors, the amounts doctors were paid, or any specific patient in the reports." The district court added that Relators failed to provide enough background for the district court to infer that Dr. Tanner's ownership shares were so inflated as to constitute remuneration. Finally, the district court concluded that Relators' claim that 95% of Bethany Hospice's referrals came from the Bethany Hospice doctors lacked factual support.

Second, the district court concluded that the Relators failed to plead the submission of a false claim with particularity. The district court began by observing that Relators' complaint did not present an example of a Medicare reimbursement claim that Bethany Hospice submitted to the government on behalf of an illegally referred patient. Next, the district court addressed the Relators' argument that their inside knowledge and Bethany Hospice's Medicare referral rates were sufficient indicia of reliability to meet Rule 9(b)'s pleading standard. Relying on our FCA precedent, the district court concluded that Relators' complaint lacked sufficient indicia of reliability because Relators: (1) failed to describe Bethany Hospice's billing operations in sufficient detail, (2) failed to describe a single example of when Relators observed a false claim being

submitted, (3) did not themselves participate in the submission of false claims. Lastly, the district court explained that, under our precedent, courts may not rely on mathematical probability to conclude that a defendant submitted a false claim.

Finally, the district court dismissed Relators' false statements claim. The district court noted that Relators' complaint contained only one paragraph describing the allegedly false statements. In the district court's view, that lone paragraph lacked the factual support necessary to plead the claim with sufficient particularity.

Relators timely appealed.

II. Standard of Review

"We review a dismissal with prejudice for failure to state a claim under the False Claims Act *de novo*." *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1050 (11th Cir. 2015). We take the allegations in the complaint as true and draw all reasonable inferences in Relators' favor. *Id.*

III. Discussion

Relators argue that the district court erred when it concluded that their complaint failed to plead with particularity Bethany Hospice's kickback scheme, submission of a false claim, and certification of a false statement. We agree with the district court that Relators failed to plead with particularity the submission of

an actual false claim, and that shortcoming is fatal to Relators' case. Accordingly, we affirm the district court's dismissal of Relators' complaint.

"The FCA imposes liability on any person who 'knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; [or] knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.'" *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148, 1154 (11th Cir. 2017) (quoting 31 U.S.C. § 3729(a)(1)(A)–(B)). The AKS "makes it a felony to offer kickbacks or other payments in exchange for referring patients 'for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program.'" *McNutt ex rel. United States v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005) (quoting 42 U.S.C. § 1320a-b7(b)(1)). And, relevant here, "a claim that includes items or services resulting from a violation of [the AKS] constitutes a false or fraudulent claim for purposes of [§ 3729(a)(1)]." 42 U.S.C. § 1320a-7b(g).

Nevertheless, the FCA "does not create liability merely for a health care provider's disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe." *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002). A violation of the AKS is a separate criminal

offense. *See United States v. Sosa*, 777 F.3d 1279, 1293 (11th Cir. 2015). But a relator in a *qui tam* action must plead that a defendant "both violated the [AKS] when it unlawfully recruited a patient and then billed the government for the services provided to that patient." *Carrel v. AIDS Healthcare Found., Inc.*, 898 F.3d 1267, 1277 (11th Cir. 2018). Thus, the "act of submitting a fraudulent claim to the government is the '*sine qua non* of a False Claims Act violation.'" *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11th Cir. 2005) (quoting *Clausen*, 290 F.3d at 1311). Put differently, "[l]iability under the False Claims Act arises from the submission of a fraudulent claim to the government, not the disregard of government regulations or failure to maintain proper internal policies." *Id.*

Furthermore, complaints alleging violations of the FCA must meet the heightened pleading standard of Rule 9(b). *Id.*; *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1357 (11th Cir. 2006). Under Rule 9(b), a party "alleging fraud or mistake . . . must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). To meet this standard, we have explained that a complaint "must allege actual 'submission of a false claim,'" and that it must do so with "some indicia of reliability." *Carrel*, 898 F.3d at 1275 (quoting *Clausen*, 290 F.3d at 1311) (alteration adopted). It is not enough to "point to 'improper practices of the defendant' to support 'the inference that fraudulent claims were submitted' because 'submission . . . cannot be inferred from the

circumstances.'" *Id.* (quoting *Corsello*, 428 F.3d at 1013) (alterations adopted). In short, a relator must "allege the 'who,' 'what,' 'where,' 'when,' and 'how' of fraudulent submissions to the government." *Corsello*, 428 F.3d at 1014.

Although Relators concede that their complaint did not include any details about specific claims submitted to the government, they argue that they have met Rule 9(b)'s pleading threshold because their complaint contains sufficient indicia of reliability to support their claim that Bethany Hospice submitted false claims to the government. First, Relators rely on their complaint's allegations that they had access to and knowledge of Bethany Hospice's billing practices. For example, Relators alleged that they attended meetings in which Best "discussed site productivity and census numbers for all Bethany Hospice's and Bethany Coastal's sites." Relators further alleged that they reviewed billing data that showed that Bethany Hospice submitted Medicare reimbursement claims for patients referred by the Bethany Hospice doctors. And Relators alleged that five other Bethany Hospice employees confirmed that such claims were submitted. Second, Relators draw our attention to the numbers. They alleged that the Bethany Hospice doctors referred significant numbers of Medicare recipients to Bethany Hospice and that "all or nearly all" of Bethany Hospice's patients received coverage from Medicare. In short, Relators argue that their knowledge and access, coupled with data about

Bethany Hospice's Medicare claims submissions, lends sufficient indicia of reliability to survive Bethany Hospice's motion to dismiss. We disagree.

To begin, Relators have failed to allege any specifics about actual claims submitted to the government. Despite alleging intimate familiarity with and access to Bethany Hospice's billing practices, Relators' complaint fails to identify even a single, concrete example of a false claim submitted to the government. *See Clausen*, 290 F.3d at 1306 ("[N]o copies of a single actual bill or claim or payment were provided. No amounts of any charges by LabCorp were identified. No actual dates of claims were alleged. Not a single completed Form 1500 was provided."); *Carrel*, 898 F.3d at 1277 (noting that the plaintiff failed to allege facts about a specific claim submitted for reimbursement).

To be sure, we do not always require a sample fraudulent claim because "we are more tolerant toward complaints that leave out some particularities of the submissions of a false claim if the complaint also alleges personal knowledge or participation in the fraudulent conduct." *United States ex rel. Matheny v. Medco Health Sols., Inc.*, 671 F.3d 1217, 1230 (11th Cir. 2012). But Relators do not even attempt to provide any particular facts about a representative false claim. Moreover, Relators do not have the personal knowledge or level of participation that can give rise to some indicia of reliability. In *Carrel*, the relators "highlighted their managerial positions" at the defendant company and their attendance "at

monthly financial review meetings." 898 F.3d at 1277. But we found this kind of senior insider knowledge insufficient because "the relators failed to explain how their access to possibly relevant information translated to knowledge of actual tainted claims presented to the government." *Id.* at 1278. Relators' complaint suffers from the same flaw. The complaint alleged that at least one Relator (Helmly) attended meetings that discussed the productivity of various Bethany Hospice sites and that both Relators had access to Bethany Hospice's billing systems and confirmed from their review of those systems and conversations with other employees that Bethany Hospice submitted false claims. Those allegations are insufficient to satisfy Rule 9(b)'s particularity requirement because even with "direct knowledge of the defendants' billing and patient records," Relators have "failed to provide any specific details regarding either the dates on or the frequency with which the defendants submitted false claims, the amounts of those claims, or the patients whose treatment served as the basis for the claims." *United States ex rel. Sanchez v. Lymphatx, Inc.*, 596 F.3d 1300, 1302 (11th Cir. 2010). Additionally, Relators did not claim to have observed the submission of an actual false claim; nor did they personally participate in the submission of false claims. *See Matheny*, 671 F.3d at 1230 (crediting the complaint's allegations when one of the relators was intimately involved in a department of the defendant company that was responsible for creating the alleged false claims.); *United States v. R&F Props.*

of Lake Cnty., Inc., 433 F.3d 1349, 1356–58 (11th Cir. 2005) (crediting a complaint's allegations because one of the relators was a nurse practitioner who personally used incorrect billing codes). In sum, Relators' access and knowledge are not sufficient indicia of reliability.

Relators' reliance on Bethany Hospice's business model and Medicare claims data lends no credence to their allegation that Bethany Hospice submitted a false claim. Relators alleged that Bethany Hospice doctors referred significant numbers of Medicare recipients, that "all or nearly all" of Bethany Hospice's patients were Medicare recipients, and that Medicare claims data shows that Bethany Hospice billed the government for their patients. Therefore, Relators contend, their complaint contains sufficient indicia of reliability to allege plausibly that Bethany Hospice submitted a false claim. But we have explained that relators cannot "rely on mathematical probability to conclude that [a defendant] surely must have submitted a false claim at some point." *Carrel*, 898 F.3d at 1277; *see also Corsello*, 428 F.3d at 1012–13 (explaining that it is insufficient to "describe[] in detail a private scheme to defraud" and then speculate that claims "must have been submitted, were likely submitted or should have been submitted to the Government"). Thus, numerical probability is not an indicium of reliability. Relators attempt to distinguish *Clausen* and *Carrel* by pointing out that neither defendant in those cases billed the government for almost all its business. That

distinction is unpersuasive. Under the FCA and Rule 9(b), a false claim cannot be "inferred from the circumstances." *Corsello*, 428 F.3d at 1013. Whether a defendant bills the government for some or most of its services, the burden remains on a relator alleging the submission of a false claim to "allege 'specific details' about false claims to establish 'the indicia of reliability necessary under Rule 9(b).'" *Carrel*, 898 F.3d at 1276 (quoting *Sanchez*, 596 F.3d at 1302). Here, Relators have failed to allege any specific details about the submission of an actual false claim.[7]

In sum, Relators' complaint fails to contain some indicia of reliability to meet Rule 9(b)'s particularity requirement. Although we construe all facts in favor of Relators, we "decline to make inferences about the submission of fraudulent claims because such an assumption would 'strip[] all meaning from Rule 9(b)'s requirements of specificity.'" *Corsello*, 428 F.3d at 1013 (quoting *Clausen*, 290 F.3d at 1312 n.21); *Atkins*, 470 F.3d at 1359 ("The particularity requirement of Rule 9 is a nullity if Plaintiff gets a ticket to the discovery process without identifying a single claim." (quotation omitted)); *id.* at 1360 ("Requiring relators to

[7] Relators also rely on two other decisions that they argue support their case. *See United States ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 591 F. App'x 693, 695 (11th Cir. 2014); *Hill v. Morehouse Med. Assocs.*, 2003 WL 22019936, at *3–4 (11th Cir. Aug. 15, 2003) (per curiam). We do not read those nonprecedential decisions to be contrary to our analysis.

plead FCA claims with particularity is especially important in light of the quasi-criminal nature of FCA violations (i.e., a violator is liable for treble damages).").

Because Relators have failed to plead the submission of an actual false claim with particularity, their false statement claim also fails. The "submission of a [false] claim is . . . the *sine qua non* of a False Claims Act violation." *Clausen*, 290 F.3d at 1311. And as Relators acknowledge, "[i]f Bethany Hospice's claims were false or fraudulent, it follows that when Bethany Hospice certified its compliance with the AKS" it made false statements under § 3729(a)(1)(B). But Relators have failed to plead a false claim with particularity, so their false statement claim must also be dismissed. *See, e.g.*, *United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 199–200 (4th Cir. 2018) (dismissing a false statement claim because relators' complaint failed to allege a false claim); *United States ex rel. Strubbe v. Crawford Cnty. Mem'l Hosp.*, 915 F.3d 1158, 1166 (8th Cir. 2019) (rejecting a false statement claim because the complaint "fail[ed] to connect the false records or statements to any claim made to the government").

IV. Conclusion

Because Relators failed to allege the submission of an actual false claim with particularity, the district court properly dismissed their complaint. Accordingly, we affirm.

AFFIRMED.

NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTEGRA MED ANALYTICS LLC, Relator, Plaintiff-Appellee, and UNITED STATES OF AMERICA, Plaintiff, v. PROVIDENCE HEALTH & SERVICES; et al., Defendants-Appellants.	No. 19-56367 D.C. No. 2:17-cv-01694-PSG-SS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, Chief District Judge, Presiding

Argued and Submitted February 12, 2021
Pasadena, California

Before: BOGGS,** M. SMITH, and MURGUIA, Circuit Judges.

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

** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Relator Integra Med Analytics, LLC, claims that Providence Health & Services, its affiliated hospitals, and J.A. Thomas & Associates, Inc. (JATA), violated the False Claims Act (FCA), 31 U.S.C. §§ 3729–3733. Integra alleges that Providence submitted claims to Medicare that it coded for more lucrative secondary diagnoses that were not supported by patients' conditions. Integra based its complaint primarily on a statistical analysis of Medicare-claims data that demonstrated Providence submitted proportionally more claims with higher-paying diagnosis codes than comparable institutions.

Providence and JATA filed motions to dismiss before the district court. The court granted their motions in part and denied them in part, allowing Integra's primary FCA claim to proceed. At Defendants' request, the district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). Its certification was based on two controlling questions of law for which there was substantial ground for difference of opinion: (1) Did Integra adequately plead the falsity of Providence's Medicare claims?; and (2) Is all online information material that is "from the news media" for the purpose of the FCA's public-disclosure bar?

We have jurisdiction under 28 U.S.C. § 1292(b). We hold that Integra failed to state a plausible claim for relief because its allegations do not eliminate an obvious alternative explanation—that Providence, with JATA's assistance, was more effective at properly coding for better Medicare reimbursement than others in the

healthcare industry. Accordingly, we reverse the district court's order denying Defendants' motions to dismiss, and we remand.[1]

I. BACKGROUND

We take the following facts from the complaint as true for the purpose of reviewing a motion to dismiss. *Curtis v. Irwin Indus., Inc*., 913 F.3d 1146, 1151 (9th Cir. 2019).

Providence is "one of the nation's largest health systems, operating 34 hospitals and 600 clinics across five states." A significant portion of Providence's revenue comes from Medicare reimbursements.

Medicare reimburses hospitals on a per-discharge basis, meaning a payment for each time a patient stays at the hospital. The payment amount depends largely on the patient's "diagnosis related group" (DRG). Three types of codes contribute to the DRG: (1) A principal-diagnosis code, (2) surgical-procedure codes, and (3) secondary-diagnosis codes. There can be multiple secondary-diagnosis codes, which together represent "all conditions that coexist at the time of admission, that develop subsequently, or that affect the treatment received [or] the length of stay." Secondary-diagnosis codes can modify the base DRG's severity level to one of three levels: (1) Without complication or major complication, (2) complication or

[1] Because Integra did not adequately allege that Providence submitted false claims, we do not address whether the public-disclosure bar applies.

comorbidity (CC), and (3) major complication or comorbidity (MCC). The inclusion of a CC or MCC code can significantly increase the amount of reimbursement that the hospital receives from Medicare.

Providence, like many other hospitals, has a "clinical documentation improvement" (CDI) program that translates clinical language used by medical-treatment providers to Medicare codes. Providence retained JATA to assist its CDI program. JATA offers consulting services to healthcare providers through products and services intended to improve how they document patients' treatments.

JATA worked with Providence to train doctors to describe medical conditions that would support coding for higher-paying diagnoses. For example, JATA provided doctors "Documentation Tips" suggesting specific language conducive to coding CCs and MCCs; for example, specifying the type and degree of malnutrition. It also trained Providence CDI specialists to send allegedly "leading queries" to doctors that were designed to change their initial assessments in a way that would justify coding a CC or MCC.[2] Integra alleged that this pressure "would sometimes result in the creation of contradictory medical records," such as an initial documentation of "delirium" with the later addition of "encephalopathy These

[2] The complaint does not provide examples of leading queries used at Providence but claims it is "consistent with JATA's practice at other hospital systems."

queries were designed to stop short of telling doctors *exactly* how to document their care because that would constitute a "noncompliant" leading inquiry.

Integra, a data-analytics company, commenced this suit after its analysis of data received from the Centers for Medicare and Medicaid Services (CMS) demonstrated that Providence submitted claims coded with a higher rate of MCCs than other comparable institutions. Integra is not affiliated with Providence or JATA and did not rely on insider information such as confidential patient medical records. Instead, Integra's supported its complaint primarily through a "proprietary statistical analysis" of the CMS data.

Integra's methodology involved comparing the rate at which Providence coded higher-paying secondary diagnoses in connection with particular principal diagnoses with the rates coded by other institutions. It labeled claims as false if they were coded with an MCC at "more than twice the national rate or were used at a rate three percentage points higher than in the other hospitals." Thus if the national rate of an MCC code accompanying a specific principal diagnosis was .1% but Providence coded it .2% of the time, or if the national rate was 55% and Providence's rate was 59%, Integra would label the claims as false.

Integra's second amended complaint focuses on claims submitted between 2011 and 2017 involving three categories of secondary MCC codes: Encephalopathy, respiratory failure, and severe malnutrition. Integra refers to these

three MCCs as "misstated MCCs." Providence used at least one of these three misstated MCCs on approximately 17 percent of its Medicare claims as opposed to a 10 percent usage rate at non-Providence institutions—1.7 times as often. Integra asserts that its analysis controlled for inter-hospital variation caused by different characteristics in patient populations, "such as age, gender, and race, as well as county demographic factors such as the unemployment rate, median income, and urban-rural differences." Its analysis also found that "there was less than a one-thousandth percent chance" that Providence's greater rate of coding of these MCCs was "due to chance."[3] (Second amended complaint, ¶ 51.)

The complaint's supporting graphs also demonstrate that there was a steadily increasing trend in coding rates for the three allegedly misstated MCCs from 2011 to 2017 at comparable healthcare institutions. By 2017, non-Providence entities generally coded claims with encephalopathy, respiratory failure, and severe malnutrition at similar rates to Providence's in 2011 or 2012. Providence also showed a significant increase in coding MCCs after it hired JATA to assist with claim documentation.

[3] We note, however, that the complaint states later that Integra "only considered claim groupings where there was less than a one-in-a-thousand chance that the difference in major complication rate at Providence versus other hospitals was due to random causes." (Second amended complaint, ¶ 125.)

II. ANALYSIS

We review de novo a motion to dismiss a claim under the FCA. *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 898 (9th Cir. 2017). The "essential elements" of an FCA claim are: "(1) [A] false statement or fraudulent course of conduct, (2) made with the scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." *Campie*, 862 F.3d at 899 (quoting *United States ex rel. Hendow v. Univ. of Phx.*, 461 F.3d 1166, 1174 (9th Cir. 2006)). On appeal, Defendants contest only the first element, that Integra has adequately pleaded false or fraudulent conduct.

As with all fraud allegations, FCA claims must comply with Federal Rules of Civil Procedure 8(a) and 9(b). *See United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). Rule 8(a) requires the pleading contain a plausible claim for relief, and Rule 9(b) imposes a heightened requirement of particularity. *Ibid.* Integra's complaint fails to meet the Rule 8 standard.

Rule 8 requires "a plausible claim for relief" to survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). At this stage, we "accept as true all of the allegations contained in a complaint" but not the truth of "legal conclusions." *Id.* at 678. In evaluating plausibility, "courts must also consider an 'obvious alternative explanation' for defendant's behavior." *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 682).

An allegation merely consistent with a defendant's liability gets "the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

Integra argues that the existence of an alternative inference does not defeat a plaintiff's claim at the pleading stage. It relies on our statement in *Starr v. Baca*:

> If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im* plausible.

652 F.3d 1202, 1216 (9th Cir. 2011) (emphasis and word break in original). But the *Starr* court expressly relied on factual allegations that did not support an "'obvious alternative explanation,' within the meaning of *Iqbal*." *Ibid.* (quoting *Iqbal*, 556 U.S. at 682); *see also Eclectic Props. E.*, 751 F.3d at 996–97 (discussing the above quote from *Starr* and requiring "[s]omething more . . . , such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible" (quoting *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013)).

Here, we accept the following factual allegations: Providence submitted Medicare claims with secondary MCCs—such as encephalopathy, respiratory failure, and severe malnutrition—at a higher rate than most other comparable

institutions; this increased rate was not the result of chance or variations in patient populations; and Providence's CDI specialists and JATA staff incentivized doctors to use language conducive to coding higher-paying secondary diagnoses through their documentation tips and queries. But we need not—and cannot—accept the conclusion that these allegations resulted from fraud or that doctors recorded unsupported medical conditions.

Integra does not rule out an obvious alternative explanation, that Providence, with JATA's assistance, was simply ahead of others in its industry. This situation is unlike the competing inferences in *Starr*, "both of which [were] plausible." 652 F.3d at 1216. Integra offers only a *possible* explanation—that doctors lied about underlying medical conditions—to explain a statistical trend that is consistent with a plausible alternative (and legal) explanation.[4] It is reasonable that Providence, one of the largest healthcare systems in the country, which specifically hired consultants to improve its Medicare billing, would be at the forefront of a national trend toward coding these relevant MCCs at a higher rate. We need not accept the conclusion that the defendant engaged in unlawful conduct when its actions are in line with lawful "rational and competitive business strategy." *Twombly*, 550 U.S. at 554. Therefore,

[4] CMS has acknowledged that there is nothing "inappropriate, unethical or otherwise wrong with hospitals taking full advantage of coding opportunities to maximize Medicare payment that is supported by documentation in the medical record." Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2008 Rates, 72 Fed. Reg. 47,130, 47,180 (Aug. 22, 2007).

Integra does not state a plausible claim for relief, and its complaint must be dismissed.[5]

III. CONCLUSION

Accordingly, we REVERSE the district court's denial of the motion to dismiss and REMAND with instructions to DISMISS the complaint.

[5] We note that this conclusion does not categorically preclude statistical data from being used to meet Rule 8(a)'s pleading requirement and, when paired with particular details of a false claim, Rule 9(b).

No. 20-1138

In the Supreme Court of the United States

CIMZNHCA, LLC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, permits a private party (known as a "relator") to file a civil action "in the name of the Government" to redress certain wrongs done to the United States. 31 U.S.C. 3730(b)(1). The FCA provides that "[t]he Government may dismiss the action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A). The questions presented are as follows:

1. Whether the court of appeals had appellate jurisdiction to review the district court's denial of the United States' motion to dismiss petitioner's FCA suit.

2. Whether the court of appeals correctly reversed the district court's denial of the motion to dismiss.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 970 F.3d 835. The opinion and order of the district court denying the United States' motion to dismiss this case is not published in the Federal Supplement but is available at 2019 WL 1598109. The district court's opinion and order denying the United States' motion to alter or amend the court's earlier order (Pet. App. 39a-43a) is not published in the Federal Supplement but is available at 2019 WL 2409576.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2020. A petition for rehearing was denied on September 17, 2020 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on February 10, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, imposes civil liability for a variety of deceptive practices involving government funds and property. *Inter alia*, the Act imposes liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1)(A). A person who violates the FCA is liable to the United States for civil penalties plus three times the amount of the government's damages. 31 U.S.C. 3729(a)(1).

The FCA permits private parties, known as relators, to bring suit "in the name of the Government" against persons who have knowingly defrauded the United States. 31 U.S.C. 3730(b)(1). When such a "*qui tam*" action is filed, the government may intervene to litigate the case. See 31 U.S.C. 3730(b)(2). If the government declines to intervene, the relator may conduct the litigation, although the United States remains a "real party in interest." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 930 (2009) (citation omitted); see 31 U.S.C. 3730(b)(4)(B). In either event, the relator receives a share of any proceeds recovered through the litigation. 31 U.S.C. 3730(d). Every FCA action is premised on an alleged legal wrong done to the United States, and the statute can "be regarded as effecting a partial assignment [to the relator] of the Government's damages claim." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000).

The Act establishes several mechanisms for the Executive Branch to maintain control over an FCA suit, even when the government initially declines to intervene in the action. The government may intervene later

"upon a showing of good cause." 31 U.S.C. 3730(c)(3). The government may prevent a relator from dismissing the action, 31 U.S.C. 3730(b)(1), and it may "settle the action with the defendant notwithstanding the objections" of a relator "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances," 31 U.S.C. 3730(c)(2)(B). As relevant here, the FCA also provides that "[t]he Government may dismiss the action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A).

2. Petitioner is one of "eleven daughter companies" formed by a company called Venari Partners, each "for the single purpose of prosecuting a separate qui tam action" premised on "essentially identical [FCA] violations" allegedly committed by "dozens of defendants in the pharmaceutical and related industries across the country." Pet. App. 3a-4a. In July 2017, petitioner filed this *qui tam* suit, alleging that the defendants had defrauded the federal government and multiple state governments by illegally paying physicians kickbacks for prescribing or recommending Cimzia, a drug used to treat Crohn's disease. See *ibid.*; D. Ct. Doc. 2 (July 20, 2017) (complaint). Petitioner alleged that, in exchange for prescribing Cimzia, the defendants had provided physicians and their patients with free product education, instruction, and "reimbursement support services"—assistance for doctors in obtaining reimbursement from insurance providers for Cimzia. Pet. App. 4a.

The United States declined to intervene in petitioner's action. D. Ct. Doc. 19 (Dec. 14, 2017). About a year later, the United States moved to dismiss the suit under Section 3730(c)(2)(A), as it did in the other ten *qui tam* suits in which petitioner's sister companies had made similar allegations. D. Ct. Docs. 63, 64 (Dec. 17, 2018). The government's motion described in detail its "extensive investigation" into this group of FCA claims, and its conclusion "that further expenditure of government resources is not justified" because petitioner's "sweeping allegations lack adequate support." D. Ct. Doc. 64, at 14-15. The government also noted the "substantial costs" and "litigation burdens" that petitioner's action would impose on federal agencies if the suit were allowed to continue, given the "vast scope" of petitioner's allegations of fraud in Medicare and other government-healthcare programs. *Id.* at 14. In addition, the government observed that petitioner's "specific allegations in this case"—including that patient-education services are illegal kickbacks—"conflict with important policy and enforcement prerogatives of the federal government's healthcare programs," because the government has a significant interest in ensuring that "patients have access to basic product support relating to their [prescribed] medication." *Id.* at 15.

The government's motion to dismiss explained that, while courts of appeals have applied slightly different standards when considering such motions, dismissal of this case was appropriate under any of those standards. D. Ct. Doc. 64, at 9-16 (describing the analyses in *Swift* v. *United States*, 318 F.3d 250 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003), and *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), cert. denied, 525 U.S. 1067 (1999)).

After holding a hearing, D. Ct. Doc. 75 (Mar. 29, 2019), the district court denied the United States' motion to dismiss, 2019 WL 1598109. The court agreed with petitioner that the government's decision to dismiss this case was "arbitrary and capricious." *Id.* at *4. The court concluded that the government had not "fully investigate[d] the allegations against the specific defendants in this case," but instead had "conduct[ed] a general collective investigation [of] the eleven cases filed by the [petitioner] against various defendants nationwide." *Id.* at *3. The court also faulted the government for not conducting "a cost-benefit analysis" to determine "the costs it would likely incur versus the potential recovery that would flow to the Government if this case were to proceed." *Ibid.* And the court expressed suspicion that "the Government's true motivation" for seeking dismissal was "animus" toward petitioner as a "'professional relator[].'" *Id.* at 4. The district court subsequently denied the government's motion to alter or amend the order denying dismissal. Pet. App. 39a-43a.

3. The court of appeals reversed and remanded with instructions to dismiss petitioner's FCA claims. Pet. App. 1a-38a.

a. The court of appeals held that it had jurisdiction over the United States' appeal from the order denying the Section 3730(c)(2)(A) motion. Pet. App. 8a-23a. While the government had argued that the collateral-order doctrine authorized an immediate appeal of the district court's order, the court of appeals "s[aw] no need to create a new category of appealable collateral orders" and declined to pass on that argument. *Id.* at 8a. Instead, the court found that, "[i]n substance, the government appeals a denial of what should be deemed

a motion to intervene and then to dismiss." *Ibid.* The court stated that "[a]n intervenor comes between the original parties to ongoing litigation and interposes between them its claim, interest, or right," and that "is exactly what the government wants to do here." *Id.* at 11a.

Indeed, the court of appeals held that the FCA *requires* the United States to intervene before seeking to dismiss a *qui tam* suit under Section 3730(c)(2)(A). Pet. App. 12a-22a.[1] The court also found it appropriate to construe the district court's order as a denial of intervention, because the district court's "conclu[sion] that the government's case for dismissal was not even rational * * * necessarily expressed [the district court's] view on the government's lack of 'good cause' to intervene under" Section 3730(c)(3). *Id.* at 23a. And because "[i]t is well established that denials of motions to intervene are appealable," the court found that it had jurisdiction to decide the government's appeal. *Id.* at 8a; see *id.* at 23a (citing *Planned Parenthood of Wis., Inc.* v. *Kaul*, 942 F.3d 793, 796-797 (7th Cir. 2019)).

b. The court of appeals' conclusion that the United States must move to intervene before seeking dismissal under Section 3730(c)(2)(A) informed its view of the appropriate standard to evaluate such dismissal requests. The court found that "[t]he standard is that provided by the Federal Rules of Civil Procedure" to govern a plaintiff's motion to dismiss, "as limited by any more specific provision of the False Claims Act and any applicable background constraints on executive conduct in general." Pet. App. 23a. The court observed that, under

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[1] The court of appeals acknowledged that this conclusion diverged from the consensus view of other circuits. See Pet. App. 12a (listing cases).

Federal Rule of Civil Procedure 41(a)(1)(A)(i), a plaintiff has an "absolute" right to dismiss an action, without court permission, before the defendant serves an answer or motion for summary judgment. Pet. App. 23a-24a. The court then reasoned that, in the context of a *qui tam* suit, that rule is supplemented by Section 3730(c)(2)(A), which authorizes the government to dismiss the case with respect to the relator as well as to itself. *Id.* at 24a. The court further observed that the only FCA limitation on the United States' ability to dismiss without the relator's consent at that stage is Section 3730(c)(2)(A)'s requirement that the relator receive notice and an opportunity for a hearing. *Ibid.*

Because the court of appeals deemed the United States to have constructively intervened in this case before an answer or summary-judgment motion was filed, and because petitioner had "received notice and took its opportunity to be heard," the court found that no provision of law further constrained the government's ability to dismiss the suit. Pet. App. 25a. The court noted that, in extraordinary circumstances, the Constitution may limit the government's power to dismiss an FCA case, and that "review for fraud on the court" might be available. *Id.* at 28a; see *id.* at 26a-28a. The court concluded, however, that "[w]herever the limits of the government's power lie, this case is not close to them." *Id.* at 28a. "At bottom," the court of appeals explained, the district court had erred by "fault[ing] the government for having failed to make a particularized dollar-figure estimate of the potential costs and benefits of [petitioner's] lawsuit, as opposed to the more general review * * * undertaken and described by the government" of the allegations made by petitioner and its sister companies. *Ibid.* The court emphasized that "[n]o constit-

utional or statutory directive" mandates such an analysis, and "[t]he government is not required to justify its litigation decisions in this way." *Ibid.*

The court of appeals also "disagree[d] with" the district court's "suggestion that the government's decision here fell short of the bare rationality standard"—a standard "borrowed * * * from substantive due process cases"—that the Ninth Circuit had adopted in *Sequoia Orange*. Pet. App. 28a-29a. The court observed that agency guidance cast doubt on petitioner's theory of liability in this case, and that the government viewed petitioner's complaint as targeting patient-support services that are "beneficial to patients and the public." *Id.* at 29a. The court further agreed with the government that petitioner and its fellow companies, which were "created as investment vehicles for financial speculators[,] should not be permitted to indiscriminately advance claims on behalf of the government against an entire industry that would undermine . . . practices the federal government has determined are . . . appropriate and beneficial to federal healthcare programs and their beneficiaries." *Ibid.* (internal quotation marks omitted).

Judge Scudder concurred in the judgment. Pet. App. 37a-38a. He agreed with "the majority's analysis of the jurisdictional question and bottom-line conclusion," but would not have addressed the standard for evaluating Section 3730(c)(2)(A) motions. *Id.* at 37a. Judge Scudder concluded that, because "the government's dismissal request easily satisfied rational basis review" under the Ninth Circuit's more relator-friendly standard, "and the district court committed error concluding otherwise," the court of appeals could and should resolve this appeal on that "narrower ground[]." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 7-21) that the court of appeals lacked jurisdiction to review the district court's denial of the United States' motion to dismiss, and that the court of appeals erred in reversing the district court's decision on that motion. Petitioner is wrong on both points. The court of appeals had appellate jurisdiction under the collateral-order doctrine, and the court correctly explained why the government's request to dismiss this case was amply justified.

The jurisdictional question presented here has arisen only twice since 1986 and lacks sufficient importance to warrant this Court's review. And the modest differences among the standards by which various courts of appeals have evaluated government motions to dismiss under Section 3730(c)(2)(A) likewise provide no sound basis for further review in this case. This Court recently denied a petition for a writ of certiorari raising similar arguments, *United States ex rel. Schneider* v. *JPMorgan Chase Bank*, 140 S. Ct. 2660 (2020) (No. 16-678), and the same result is appropriate here. This case would be an unsuitable vehicle to clarify the Section 3730(c)(2)(A) dismissal standard, moreover, because the court below held that petitioner's suit would be dismissed under any standard. Further review is not warranted.

1. The court of appeals had jurisdiction to entertain the government's appeal from the denial of its motion to dismiss this *qui tam* suit. The question of appellate courts' authority to review the denial of a Section 3730(c)(2)(A) motion has arisen only recently and infrequently, and it does not require this Court's resolution here.

a. The FCA provides that "[t]he Government may dismiss" a *qui tam* action "notwithstanding the objections" of a relator who initiated the lawsuit if two conditions are satisfied: (1) the relator "has been notified by the Government of the filing of the motion," and (2) "the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A). Because that language imposes no substantive restrictions on the government's ability to dismiss *qui tam* actions, and thus preserves the Executive Branch's usual unfettered discretion to dismiss an action brought in the name of the United States to remedy wrongs done to the United States, denials of Section 3730(c)(2)(A) motions have been "very rare." Pet. App. 9a. Between 1986 and 2018, no court denied such a motion, and since then only two district courts (including the district court in this case) have done so. *Ibid.*; see *United States* v. *Academy Mortg. Corp.*, No. 16-cv-2120, 2018 WL 3208157, at *2-*3 (N.D. Cal. June 29, 2018), appeal dismissed *sub nom. United States ex rel. Thrower* v. *Academy Mortg. Corp.*, 968 F.3d 996 (9th Cir. 2020).

Because only two district courts have denied Section 3730(c)(2)(A) motions since 1986, only two circuits have considered the appropriate mechanisms for the United States to appeal such orders. In both those cases, the government has argued that denials of Section 3730(c)(2)(A) motions are collateral orders appealable under 28 U.S.C. 1291 because they are "conclusive" with respect to the United States' dismissal right, they "resolve [an] important question[] separate from the merits," and they are "effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted); see *United States ex rel. Eisenstein*

v. *City of New York*, 556 U.S. 928, 931 n.2 (2009) (observing that the United States may, without intervening, appeal certain district-court orders addressing the government's prerogatives under the Act). The United States' right to terminate a *qui tam* action over the relator's objection could not be vindicated after a suit has proceeded to its conclusion. And a district court's intrusion on the government's wide latitude to achieve dismissal of FCA suits that it views as counter-productive implicates the type of "compelling public ends" involving the "separation of powers" that warrant a collateral-order appeal. *Will* v. *Hallock*, 546 U.S. 345, 352 (2006) (citations omitted).

b. Although the court of appeals recognized that it had jurisdiction to review the district court's denial of the government's motion to dismiss, the court did not base its jurisdictional ruling on the collateral-order doctrine. See Pet. App. 8a ("We see no need to create a new category of appealable collateral orders."). The court instead held that the FCA requires the United States to intervene in a *qui tam* suit before seeking dismissal, and it construed the government's Section 3730(c)(2)(A) motion to dismiss as including a request to intervene. See *id.* at 8a-23a. The court then concluded that precedents recognizing "the immediate appealability of a denial of intervention" supported its exercise of appellate jurisdiction here. *Id.* at 10a; see *id.* at 23a; see also *id.* at 31a (finding that denial of intervention on this record would be an abuse of discretion); *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 524-525 (1947) (suggesting that an abuse of discretion in denying a motion for permissive intervention is immediately appealable).

The court of appeals' ultimate conclusion that it possessed appellate jurisdiction here was correct. The government continues to believe, however, that the collateral-order doctrine provides the appropriate basis for that conclusion. The court of appeals based its jurisdictional holding on the established principle that a district court's denial of a motion for leave to intervene is immediately appealable. See Pet. App. 10a. But the government did not seek leave to intervene in this case, either before filing its Section 3730(c)(2)(A) motion, as part of that motion, or at any time thereafter.

The court below believed that, despite the absence of any government intervention motion, the United States' motion to dismiss should be "deemed" to incorporate a request for leave to intervene. Pet. App. 8a. The court based that conclusion on its views that (1) the government sought relief that was comparable in substance to the consequences of a successful intervention motion, see *id.* at 11a; and (2) the FCA requires the government to intervene before filing a Section 3730(c)(2)(A) motion, see *id.* at 12a, 22a. But treating the government as having intervened when it elected not to do so is contrary to the balance that Congress struck in the FCA, which gives the government a *choice* whether to seek party status. See *Eisenstein*, 556 U.S. at 933 ("Congress expressly gave the United States discretion to intervene in FCA actions—a decision that requires consideration of the costs and benefits of party status."). Moreover, the court of appeals' holding that the government must intervene in order to seek dismissal under Section 3730(c)(2)(A) is erroneous and contrary to the consensus view of other circuits. See Pet. App. 12a. Thus, if the Court grants certiorari in this case, the government will defend the Seventh Circuit's jurisdictional

holding based on the collateral-order doctrine, rather than on the rationale the court below articulated.

c. The Ninth Circuit recently held that a district court's denial of a Section 3730(c)(2)(A) motion to dismiss is not appealable under the collateral-order doctrine, and that the government must instead request certification to appeal under 28 U.S.C. 1292(b) or file a petition for a writ of mandamus. See *United States ex rel. Thrower* v. *Academy Mortg. Corp.*, 968 F.3d 996, 1009 (2020). The Seventh Circuit's decision to adjudicate the government's appeal here is inconsistent with the Ninth Circuit's dismissal of the government's appeal in *Thrower*. But the Seventh Circuit did not squarely rule on the government's collateral-order argument, finding that its own rationale obviated the need to decide that issue. See Pet. App. 8a. Conversely, the Ninth Circuit in *Thrower* "was not presented with and did not consider" the jurisdictional analysis that the court below embraced here. *Id.* at 9a n.2. There is consequently no square circuit conflict with respect to either of the two specific rationales that have been offered for the exercise of appellate jurisdiction here. Given the absence of such a conflict, the fact that the court of appeals here reached the correct ultimate conclusion, and the infrequency with which this jurisdictional issue arises, the first question presented does not warrant this Court's review.

2. The court of appeals correctly held that petitioner's FCA complaint should be dismissed in accordance with the government's request for that relief under Section 3730(c)(2)(A). That holding does not warrant further review.

As the D.C. Circuit has long recognized, the FCA is best read to preserve the Executive Branch's virtually

unfettered discretion to dismiss an action brought in the name of the United States to remedy a wrong done to the United States. See *Swift* v. *United States*, 318 F.3d 250, 252, cert. denied, 539 U.S. 944 (2003). The Ninth and Tenth Circuits have applied a slightly different standard, holding that the United States may dismiss a pending *qui tam* suit so long as there is a rational basis for that disposition. See *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), cert. denied, 525 U.S. 1067 (1999); *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir.), cert. denied, 546 U.S. 816 (2005). The Seventh Circuit here articulated a third variation of the dismissal standard, derived from the Act's good-cause standard for intervention and from provisions of the Federal Rules of Civil Procedure that govern plaintiffs' dismissal motions. See Pet. App. 23a-28a. As a practical matter, however, those variations in the standard are very unlikely to be outcome-determinative, and multiple courts have found that particular FCA complaints could be dismissed without deciding precisely what standard applies.

a. Section 3730(c)(2)(A)'s specification that an FCA suit may be dismissed by "'[t]he Government'"—"meaning the Executive Branch, not the Judicial"—"suggests the absence of judicial constraint." *Swift*, 318 F.3d at 252. That inference is strengthened by this Court's recognition that a decision not to prosecute is within "the special province of the Executive Branch," to which the Constitution assigns the responsibility to take care that the laws are faithfully executed. *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985). A federal agency's "decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally

committed to an agency's absolute discretion." *Id.* at 831. The "government's judgment" that a particular FCA claim alleging a wrong done to the United States should be dismissed under Section 3730(c)(2)(A) "amounts to" a similarly "unreviewable" exercise of prosecutorial decision, because "[n]othing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Swift*, 318 F.3d at 252-253.

Other FCA provisions reinforce the D.C. Circuit's conclusion. In contrast to Section 3730(c)(2)(A), the next subsection of the Act specifies particular criteria for courts to apply when the United States seeks to exercise control over *qui tam* suits "notwithstanding the objections of the" relator. 31 U.S.C. 3730(c)(2)(A) and (B). Under Section 3730(c)(2)(B), the government may *settle* a case only if "the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. 3730(c)(2)(B). Several other FCA provisions likewise contain standards for courts to apply in resolving various types of government motions that may impact *qui tam* relators.[2] Section 3730(c)(2)(A) places no similar

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[2] See 31 U.S.C. 3730(c)(2)(C) (court may limit a relator's participation after a "showing by the Government" that unrestricted participation would "interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment"); 31 U.S.C. 3730(c)(4) (court may stay discovery "upon a showing by the Government that certain actions of discovery by the [relator] would interfere with" a related investigation or prosecution); *ibid.* (court may extend the stay "upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence" and that proposed discovery would interfere with other ongoing matters); 31 U.S.C. 3730(c)(3) (court may permit the government to

limitations on the government's authority to *dismiss* a case, and it does not articulate any substantive standards for a court to use to evaluate the government's dismissal decision. "Where Congress includes particular language in one section of a statute, but omits it in another section, * * * it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted).

While the court of appeals here framed the analysis slightly differently than the D.C. Circuit in *Swift*, that difference did not affect the outcome of this case. Like the D.C. Circuit, the court below held that the district court had plainly erred by refusing to defer to the government's justifications for dismissal stated in its Section 3730(c)(2)(A) motion. See Pet. App. 28a-29a.

b. Petitioner asserts (Pet. 11) that the court of appeals should have applied the standard endorsed by the Ninth and Tenth Circuits, which have instructed district courts to conduct a limited and highly deferential substantive review before granting the government's motion to dismiss a *qui tam* suit. In *Sequoia Orange*, the Ninth Circuit held that dismissal is justified if the government "(1) identifi[es] * * * a valid government purpose" and "(2) [shows] a rational relation between dismissal and accomplishment of the purpose." 151 F.3d at 1145 (citation omitted). "If the government satisfies the two-step test, the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Ibid.* (citation and internal quotation marks omitted). The Tenth Circuit has adopted

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intervene outside the seal period "upon a showing of good cause"); 31 U.S.C. 3730(b)(3) (court may extend the seal period "for good cause shown").

the Ninth Circuit's approach, at least for cases where the defendant has been served with the complaint. See *Ridenour*, 397 F.3d at 936.[3]

The Ninth Circuit's standard, which the court borrowed from decisions addressing "whether executive action violates substantive due process," *Sequoia Orange*, 151 F.3d at 1145, is flawed for the reasons described above and by the D.C. Circuit in *Swift*. But the narrow disagreement among the courts of appeals concerning the precise standard for evaluating Section 3730(c)(2)(A) motions made no difference to the outcome here, because dismissal of this complaint was warranted even under the standard that petitioner advocates. The Seventh Circuit "disagree[d] with the suggestion that the government's decision here fell short of the bare rationality standard borrowed by *Sequoia Orange* from substantive due process cases." Pet. App. 28a-29a. The court explained that the government had rationally determined, after a thorough investigation, that petitioner's suit could adversely impact federal healthcare programs because it targeted activity that is "beneficial to patients and the public." *Id.* at 29a. Judge Scudder issued a separate opinion in which he concluded that, "under the Ninth Circuit's standard, the government's dismissal request easily satisfied rational basis review, and the district court committed error concluding otherwise." *Id.* at 37a (Scudder, J., concurring in the judgment). "Wherever the limits of the government's power lie" in this context, "this case is not close to them." *Id.* at 28a (majority opinion).

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[3] The Tenth Circuit has reserved judgment on what standard applies when the government moves to dismiss an FCA case before the defendant has been served. See *United States ex rel. Wickliffe* v. *EMC Corp.*, 473 Fed. Appx. 849, 852-853 (2012).

Contrary to petitioner's contention (Pet. 18-21), the modest variations among the courts of appeals' standards for evaluating Section 3730(c)(2)(A) motions do not now (and may not ever) require this Court's standardization. All the courts of appeals that have considered the issue agree that government motions to dismiss under Section 3730(c)(2)(A) should receive substantial deference. Like the D.C. Circuit, the Seventh Circuit here concluded that Section 3730(c)(2)(A) imposes no substantive barriers to the United States' dismissal of a *qui tam* suit, but instead requires only the procedural steps of notice to the relator and an opportunity for a hearing. Pet. App. 24a (describing "[t]his procedural limit" as "the only authorized statutory deviation from [Federal Rule of Civil Procedure] 41"). And properly applied, the Ninth Circuit's standard for Section 3730(c)(2)(A) motions also gives the government wide latitude to dismiss an FCA case, comparable to the limited review that courts apply to substantive due process challenges to executive action. See *Sequoia Orange*, 151 F.3d at 1145.

Multiple courts have previously upheld government motions to dismiss FCA suits without choosing between the D.C. and Ninth Circuit standards described above. Those courts have recognized that both formulations are highly deferential and have concluded, in the cases before them, that the government would prevail under either one. The Second Circuit recently declined to choose between those approaches because the relator in the case before it "fail[ed] even the more stringent [*Sequoia Orange*] standard." *United States ex rel. Borzilleri* v. *AbbVie, Inc.*, 837 Fed. Appx. 813, 816 (2020). The Third Circuit similarly found it unnecessary to resolve this issue because dismissal would be warranted "even [under] the more restrictive standard." *Chang* v.

Children's Advocacy Ctr. of Del. Weih Steve Chang, 938 F.3d 384, 387 (2019), cert. denied, 141 S. Ct. 243 (2020). A number of district courts have taken the same approach. See, *e.g.*, *United States ex rel. Graves* v. *Internet Corp. for Assigned Names & Numbers, Inc.*, 398 F. Supp. 3d 1307, 1310-1311 (N.D. Ga. 2019); *United States ex rel. Johnson* v. *Raytheon Co.*, 395 F. Supp. 3d 791, 794 (N.D. Tex. 2019); *United States ex rel. Stovall* v. *Webster Univ.*, No. 15-cv-3530, 2018 WL 3756888, at *3 (D.S.C. Aug. 8, 2018). Indeed, in *Swift* itself the D.C. Circuit held in the alternative that, "[e]ven if [*Sequoia Orange*] set the proper standard, the government easily satisfied it." 318 F.3d at 254. Unless and until a case arises in which a court of appeals' choice between the *Swift* and *Sequoia Orange* standards appears to have affected the outcome, this Court's review is not warranted.

3. Petitioner's other criticisms of the decision below are both meritless and factbound.

a. Petitioner asserts (Pet. 12-14) that the court of appeals committed "manifest error" in finding that the government had adequately justified its dismissal of petitioner's FCA complaint. Pet. 14-15. That is incorrect. The government explained in detail its bases for determining that petitioner's complaint challenges conduct that is "appropriate and beneficial to federal healthcare programs and their beneficiaries." Pet. App. 29a & n.5; see D. Ct. Doc. 64, at 14 (explaining that the government's dismissal decision followed an "extensive investigation," including "consult[ations] with subject-matter experts" within the government "about [petitioner's] allegations and the applicability of regulatory safe harbors and government-issued industry guidance"). Petitioner does not substantiate its argument

(Pet. 14-15) that its interpretation of various governmental policy documents should be preferred to that of the government's own subject-matter experts. And in any event, petitioner's case-specific criticisms of the court of appeals' reasoning provide no basis for this Court's review.

b. Petitioner contends (Pet. 15-18) that the court of appeals violated procedural due-process principles by depriving it of a "meaningful hearing" before "divest[ing]" it of its "statutory interest" in this *qui tam* action. Pet. 16. That argument is flawed in several respects.

A relator has no constitutional right to pursue a claim for monetary relief that is premised on legal wrongs done to the federal government. While Congress has authorized relators to pursue such claims as partial assignees of the United States, relators' prerogatives under the FCA are subject to the limitations that the Act imposes, including the government's authority to dismiss the case.

Even if a relator's interest in an FCA suit could constitute a property interest protected by the Due Process Clause, petitioner acknowledges (Pet. 4) that the district court conducted an "extremely thorough hearing after reviewing briefs on the Government's motion to dismiss." The court of appeals' rejection of the district court's conclusions, and its determination that the district court had applied the wrong legal standard, does not show or even suggest that petitioner was denied meaningful "notice and an opportunity to be heard" on the Section 3730(c)(2)(A) motion. *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972) (describing the "fundamental" requirements of due process). Petitioner's due-process

argument simply restyles petitioner's misguided objections to the court of appeals' acceptance of the government's position that this FCA case warranted dismissal.

Petitioner describes the court of appeals as holding that "only exceptional cases will warrant a § 3730(c)(2)(A) hearing." Pet. 15. In fact, the court simply observed that the government's authority to dismiss a *qui tam* suit under Section 3730(c)(2)(A) may be limited by a court's power to prevent constitutional violations or fraud, and it stated that in "exceptional cases" Section 3730(c)(2)(A) hearings might bring such misconduct to light. Pet. App. 28a. The court did not hold that hearings are available *only* in such cases.

Petitioner asserts (Pet. 16) that the court of appeals' "acceptance of the Government's policy arguments at face value * * * raises procedural process concerns." But petitioner identifies no court that has accepted its suggestion that, whenever the government dismisses an FCA *qui tam* suit, it must disclose all of the evidence underlying its dismissal request. See Pet. 16-17 (citing *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959)). Such a requirement has no basis in the statutory text or in any court of appeals decision that has addressed the appropriate procedure for resolving a Section 3730(c)(2)(A) motion. See, *e.g.*, *Sequoia Orange*, 151 F.3d at 1145 (holding that, once the United States articulates a valid government purpose rationally related to dismissal of a pending *qui tam* suit, the relator must "demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal") (citation and internal quotation marks omitted).

Finally, petitioner invokes (Pet. 17-18) Section 3730(c)(3), which provides that, "[w]hen a [relator] pro-

ceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). That provision does not assist petitioner here. Section 3730(c)(3) "instructs the district court not to limit the relator's 'status and rights' *as they are defined by* §§ 3730(c)(1) and (2)." Pet. App. 32a (emphasis added). Thus, once a court concludes that dismissal is appropriate under Section 3730(c)(2)(A), Section 3730(c)(3) poses no further barrier to dismissal. And even apart from that common-sense reading of Section 3730(c), petitioner does not explain its cursory suggestion that an asserted infringement of its rights under that provision would constitute either a Due Process Clause violation or the type of error that would warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2021

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 7, 2021
Lyle W. Cayce
Clerk

No. 19-40906

United States of America, Ex Rel., Health Choice Alliance, L.L.C., *on behalf of* United States of America and 31 States (AR; CA; CO; CT; DE; DC; FL; GA; HI; IL; IN; IA; LA; MD; MA; MI; MN; MT; NV; NH; NJ; NM; NY; NC; OK; RI; TN; TX; VT; VA; WA),

Plaintiffs—Appellants,

versus

Eli Lilly and Company, Incorporated; VMS BioMarketing; Covance, Incorporated; United BioSource Corporation; HealthSTAR Clinical Education Solutions, L.L.C.; Covance Market Access Services, Incorporated,

Defendants—Appellees,

United States of America,

Appellee,

United States of America, Ex Rel., Health Choice Group, L.L.C., *on behalf of* United States of America and 31 States (AR; CA; CO; CT; DE; DC; FL; GA; HI; IL; IN; IA; LA; MD; MA; MI; MN; MT; NV; NH; NJ; NM; NY; NC; OK; RI; TN; TX; VT; VA; WA),

Plaintiff—Appellant,

versus

BAYER CORPORATION; AMGEN, INCORPORATED; ONYX PHARMACEUTICALS, INCORPORATED; AMERISOURCEBERGEN CORPORATION; LASH GROUP,

Defendants—Appellees,

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court
for the Eastern District of Texas
USDC No. 5:17-CV-123
USDC No. 5:17-CV-126

Before HIGGINBOTHAM, ELROD, and HAYNES, *Circuit Judges*.

JENNIFER WALKER ELROD, *Circuit Judge*:[*]

The appellants Health Choice Alliance and Health Choice Group brought *qui tam* actions under the False Claims Act on behalf of the United States alleging violations of the Anti-Kickback Statute by pharmaceutical companies. The United States moved to dismiss the actions, and the district court granted the motion. Because the actions were properly dismissed, we AFFIRM.

I.

Health Choice Alliance and Health Choice Group (collectively Health Choice) are both entities created by the National Health Care Analysis Group

[*] Judge Haynes concurs in the judgment only.

for the purpose of filing *qui tam* actions alleging instances of fraud in medicine and pharmaceuticals. Health Choice and affiliated entities brought eleven *qui tam* actions under the False Claims Act against a total of thirty-eight defendants alleging similar violations of the Anti-Kickback Statute. 31 U.S.C. § 3730(b); 42 U.S.C. § 1320a-7b(b). This appeal concerns two of those *qui tam* cases, against Eli Lilly and Company and Bayer Corporation.[1] The complaints in both the Eli Lilly and Bayer cases allege that the defendants illegally provided patient-education services to providers before a prescription had been written in violation of the Anti-Kickback Statute and certain state laws.

Health Choice filed two similar complaints against Eli Lilly and (initially) four other defendants and against Bayer and four other defendants

[1] The nine cases which are not at issue in this appeal are: *United States ex rel. CIMZNHCA v. UCB, Inc.*, 970 F.3d 835, 852, 854 (7th Cir. 2020) (remanding and instructing the district court to dismiss the case on the government's motion and stating that "[w]herever the limits of the government's power lie, this case is not close to them"), *remanded to* No. 3:17-CV-765 (S.D. Ill. Sept. 28, 2020), *cert. denied*, No. 20-1138, 2021 WL 2637991 (June 28, 2021); *United States ex rel. SMSPF, LLC v. EMD Serono, Inc.*, 370 F. Supp. 3d. 483, 491 (E.D. Pa. 2019) (granting government's motion to dismiss); *United States ex rel. NHCA-TEV, LLC v. Teva Pharm. Prods. Ltd.*, No. 17-CV-2040, 2019 WL 6327207, at *6 (E.D. Pa. Nov. 26, 2019) (granting government's motion to dismiss); *United States ex rel. SAPF, LLC v. Amgen, Inc.*, No. 16-CV-5203 (E.D. Pa. Feb. 11, 2019) (dismissing case on voluntary consent of the government and relators); *United States ex rel. SCEF, LLC v. AstraZeneca PLC*, No. 17-CV-1328, 2019 WL 5725182, at *4 (W.D. Wash. Nov. 5, 2019) (granting government's motion to dismiss); *United States ex rel. Miller v. AbbVie, Inc.*, No. 16-CV-2111 (N.D. Tex. May 09, 2019) (dismissing case on voluntary consent of relator and the government); *United States ex rel. Carle v. Otsuka Holdings Co.*, No. 17-CV-966 (N.D. Ill. Jan. 29, 2019) (dismissing case on voluntary consent of the government and relators); *United States ex rel. SMSF, LLC v. Biogen, Inc.*, No. 16-CV-11379 (D. Mass. Dec. 17, 2018) (granting defendant's unopposed motion to dismiss for failure to state a claim); *United States ex rel. Health Choice Advocates, LLC v. Gilead, et al.*, No. 5:17-CV-121 (E.D. Tex. July 27, 2018) (dismissing case on voluntary consent of relator and the government).

in the United States District Court for the Eastern District of Texas.[2] Prior to filing these complaints, Health Choice submitted pre-filing notices to and met with attorneys from the United States Attorney's Office for the Eastern District of Texas. After filing the complaints, Health Choice met with officials at the Department of Justice Civil Division in Washington, D.C. The United States declined to intervene in either case.

Health Choice then amended each of its complaints. Shortly thereafter, Eli Lilly, Bayer, and the other defendants filed motions to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 9(b), 12(b)(6). The magistrate judge held a consolidated hearing on the motions to dismiss in both cases. The magistrate judge recommended the motions be denied in part and granted in part, and the district court adopted these recommendations. Health Choice amended its complaints once more to address the pleading deficiencies identified by the district court.

In October of 2018, approximately a year after declining to intervene in the Eli Lilly and Bayer cases, the government sent notice to Health Choice that it intended to move to dismiss the complaints. *See* 31 U.S.C. § 3730(c)(2)(A). Over the next two-and-a-half months, Health Choice and the government conferred by meeting, letter, and teleconference to discuss the government's stated concerns about the case. During a teleconference with Health Choice, the government identified four specific concerns about

[2] In its negotiations with the government, Health Choice agreed to voluntarily dismiss its claims against the non-pharmaceutical defendants in the Eli Lilly case in order to "streamline" the case and reduce the administrative burden on the government. In January of 2019, Health Choice dismissed its claims, without prejudice, against all the defendants except Eli Lilly in the Eli Lilly case. Health Choice did not voluntarily dismiss any claims in the Bayer case. Amgen, Inc., Onyx Pharmaceuticals, Inc., AmerisourceBergen Corp., and Lash Group remain codefendants in the Bayer case. For simplicity, we refer only to Eli Lilly and Bayer.

the Eli Lilly and Bayer cases: "(1) whether there [was] sufficient factual and legal support to prove violations of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) (AKS); (2) the substantial costs and burdens for the United States if the *qui tam* actions were to continue; (3) certain policy interests of Medicare and other federal healthcare programs; and (4) the investigative methods employed by 'National Healthcare Analysis Group,'" Health Choice's parent organization.

On December 17, 2018, the government notified Health Choice that it intended to proceed with its motions to dismiss, and it filed those motions the same day. In its notice to Health Choice, the government cited to its own two-year investigation and the supplemental information provided by Health Choice—including documents purportedly supporting Health Choice's theory of the cases and letters from Health Choice concerning the merits and costs and benefits of the cases—as the basis of its decision to seek dismissal.

In response to the government's motions to dismiss, Health Choice first asserted that the government supported its motions primarily with "*ad hominem* attacks" against Health Choice. Health choice then argued that the district court should not afford the government unfettered discretion to dismiss and instead should hold that the government has not made the "proper showing" to warrant dismissal.

In reply, the government said it had "concluded that, not only do the allegations lack factual and legal support, but further litigation will impose burdens and costs on the government that are not justified and will undermine practices that benefit federal healthcare programs by providing patients with greater access to product education and support."

On May 14, 2018, the magistrate judge held a consolidated hearing on the government's motions to dismiss both cases. The magistrate judge recommended that the district court grant both motions. The district court

adopted the recommendations and granted the government's motions to dismiss. Health Choice timely appealed.

II.

Before turning to the merits, we must determine whether we have jurisdiction to hear this case. The district court had federal question jurisdiction over Health Choice's federal claims and supplemental jurisdiction over its state law claims. *See* 28 U.S.C. §§ 1331, 1367(a). Both Health Choice and the United States contend that appellate jurisdiction exists because the orders below are "final decisions" of the district court. 12 U.S.C. § 1291. Still, we have an independent obligation to assure ourselves of jurisdiction. *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 468 (5th Cir. 2020) (*en banc*).

We have "jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. "[T]here is no final decision if a plaintiff voluntarily dismisses a defendant without prejudice, because the plaintiff 'is entitled to bring a later suit on the same cause of action.'" *Williams v. Taylor Seidenbach, Inc.*, 958 F.3d 341, 343 (5th Cir. 2020) (*en banc*) (quoting *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 302 (5th Cir. 1978)). "And in a suit against multiple defendants, there is no final decision as to one defendant until there is a final decision as to all defendants." *Id.*; *see* Fed. R. Civ. P. 54(b).

There is a potential jurisdictional issue concerning the chronology of two events: the plaintiff's voluntary dismissal and the district court's granting of a motion to dismiss. Health Choice voluntarily dismissed, without prejudice, its claims against certain defendants in the lawsuit against Eli Lilly. Eight months later, the district court granted the United States' motion to dismiss and entered final judgment. This circuit has not decided how the finality rule of "*Williams* and *Ryan* would apply where the

[voluntary, without-prejudice] dismissal occurred before the adverse, interlocutory order." *Firefighters' Ret. Sys. v. Citco Grp. Ltd.*, 963 F.3d 491, 492 n.1 (5th Cir. 2020). This case squarely presents that question. We decline to create a circuit split and conclude that the prior without-prejudice dismissals did not deprive the district court's subsequent decision of finality. *See Schoenfeld v. Babbitt*, 168 F.3d 1257, 1265–66 (11th Cir. 1999) (holding that this sequence of events results in a final decision).

Unlike *Ryan*, this case involves a final decision. In *Ryan*, the district court granted a motion to dismiss certain paragraphs of plaintiff's complaint against the lone defendant. *See Ryan*, 577 F.2d at 300. Then, the plaintiff voluntarily dismissed without prejudice the remaining substantive allegation and requested certification under Federal Rule of Civil Procedure 54(b). This court saw the plaintiff's actions for what they were: a transparent attempt to obtain immediate appellate review over rulings that did "not amount to a termination of the litigation between the parties." *Id.* at 302. This case, by contrast, involves the plaintiff dismissing all claims against certain defendants "without prejudice before the district court entered the order [granting the government's motion to dismiss] and entered a final judgment." *See Schoenfeld*, 168 F.3d at 1265. Instead of manufacturing an appealable decision like the plaintiff in *Ryan*, Health Choice's dismissal brought about a swifter termination of the litigation.

The district court's order on the motion to dismiss was final because it "adjudicated all the claims against all the remaining parties in the action at the time it was entered." *Id.* at 1266; *cf. Cook v. City of Tyler*, 974 F.3d 537, 539 (5th Cir. 2020) ("For purposes of Section 1291 a decision is final only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" (quoting *Sealed Appellant 1 v. Sealed Appellee*, 199 F.3d 276, 278 (5th Cir. 2000))). The prior voluntary dismissal does not alter that conclusion.

III.

Satisfied that we have appellate jurisdiction, we now turn to the merits of Health Choice's appeal.

Health Choice brought its Anti-Kickback claims against Eli Lilly and Bayer on behalf of the government under the False Claims Act. 31 U.S.C. § 3730(b); 42 U.S.C. § 1320a-7b(b). The False Claims Act states that "[a] person may bring a civil action for a violation of [31 U.S.C. §] 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b). This provision authorizes individuals—relators—to bring *qui tam* lawsuits alleging a "false or fraudulent claim" for payment from the United States. *Id.* §§ 3729(a), 3730(b); *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 364 (5th Cir. 2014). Relators are entitled to a portion of the proceeds from a successful *qui tam* lawsuit.[3] 31 U.S.C. § 3730(d).

The Anti-Kickback Statute proscribes "offer[ing] or pay[ing] any remuneration (including any kickback, bribe, or rebate) . . . to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program." 42 U.S.C. § 1320a-7b(b)(2)(A). Health Choice alleges that Eli Lilly and Bayer illegally provided free product-education services from nurses in order to induce health care providers to prescribe Eli Lilly and Bayer products. The Anti-Kickback Statute makes such an allegation actionable by a *qui tam* relator by defining a violation of

[3] Amicus curiae, the Chamber of Commerce, criticizes the False Claims Act for incentivizing relators to bring *qui tam* lawsuits by offering them a portion of the recovery. Such a policy objection to Congress's chosen incentive structure is irrelevant to our construction of the statute. *See Tolbert v. RBC Capital Markets Corp.*, 758 F.3d 619, 627 n.6 (5th Cir. 2014) ("We decline, however, to engage in any policy debate that would affect how we interpret this statute.").

§ 1320a-7b as a "false or fraudulent claim for purposes of" the False Claims Act. *Id.* § 1320a-7b(g). Thus, Health Choice's Anti-Kickback Statute claims are properly brought on behalf of the United States under the False Claims Act.

In this case, as with every False Claims Act *qui tam* lawsuit, the "real party in interest" is the United States. 31 U.S.C. § 3730(c)(2)(A); *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009) (describing the United States as the "real party in interest" in any False Claims Act lawsuit). The claims here ultimately belong to the United States, not Health Choice. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (regarding the False Claims Act as "effecting a partial assignment of the Government's damages claim"). The False Claims Act allows the government to assert control over *qui tam* litigation through a number of procedural mechanisms, such as intervention, settlement, and "[t]he power to veto voluntary settlements." *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997); *accord* 31 U.S.C. § 3730(c).

The government moved to dismiss Health Choice's claims in the Eli Lilly and Bayer cases, and the district court granted both motions. Health Choice challenges the dismissals on appeal. To address Health Choice's arguments, first, we lay out the tests other circuits have adopted to assess a motion by the government to dismiss a *qui tam* action. Second, we construe the term "hearing" in 31 U.S.C. § 3730(c)(2)(A) to require something more than a forum for a relator to convince the government not to dismiss. Third, we determine that Health Choice got a hearing as required by § 3730(c)(2)(A). And fourth, we conclude that dismissal of the Eli Lilly and Bayer cases was proper even under the test most favorable to Health Choice.

A.

At oral argument, Health Choice focused mainly on the hearing requirement attendant to the government's right to "dismiss the action notwithstanding the objections of the person initiating the action." 31 U.S.C. § 3730(c)(2)(A). The government may move to dismiss once two conditions have been met. *Id.* First, the government must give notice to the *qui tam* relator of the government's motion to dismiss; second, the court must provide the relator with "an opportunity for a hearing on the motion." *Id.*

Health Choice argues that the district court erred by not affording it an evidentiary hearing before dismissing both cases. Health Choice further contends that a hearing necessarily entails the exercise of judicial power, and so the district court must engage is some meaningful review of the government's decision to dismiss.

We have not yet had an opportunity to determine what is required for the government to dismiss a case under § 3730. Four other circuits, however, have done so, and there is a deeply entrenched circuit split. *Compare Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) (giving the government unfettered discretion to dismiss *qui tam* lawsuits), *with United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (adopting a rational-relation test for reviewing the government's motion to dismiss a *qui tam* lawsuit), *and Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir. 2005) (adopting *Sequoia Orange*'s rational-relation test). *But see United States ex rel. CIMZNHCA v. UCB, Inc.*, 970 F.3d 835, 839 (7th Cir. 2020) (viewing the "choice between the competing standards as a false

one" and applying a standard "informed by Federal Rule of Civil Procedure 41").[4]

In *Swift*, the D.C. Circuit read § 3730(c)(2)(A) as "giv[ing] the government an unfettered right to dismiss an action" brought by a relator under the False Claims Act. *Swift*, 318 F.3d at 252. "The section states that 'The Government'—meaning the Executive Branch, not the Judicial—'may dismiss the action." *Id.* (quoting 31 U.S.C. § 3730(c)(2)(A)). The D.C. Circuit read no intent to create judicial review in § 3730(c)(2)(A). *Id.* Nor did the D.C. Circuit credit the relator's argument that a relator's "right to a hearing" gives the judiciary authority to review the government's decision to dismiss. *Id.* at 253. A § 3730(c)(2)(A) hearing, according to *Swift*, is simply "a formal opportunity to convince the government not to end the case," and possibly to establish fraud on the court. *Id. Swift* gives the government nearly unfettered discretion to dismiss a False Claims Act *qui tam* action.

Conversely, *Sequoia Orange* articulates a rational-relation test to scrutinize motions to dismiss filed by the government. Recognizing that "[t]he qui tam statute itself does not create a particular standard for dismissal," the Ninth Circuit approved of the "two step" burden-shifting test applied by the district court in that case. *Sequoia Orange Co.*, 151 F.3d at 1145. First, the government must identify: (1) "a valid government purpose"; and (2) "a rational relation between dismissal and accomplishment of that purpose." *Id.* Second, if the government satisfies its burden, "the burden switches to the relator 'to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.'" *Id.* (quoting *United States*

[4] *UCB* is one of the eleven cases brought by entities affiliated with Health Choice. *See supra* note 1 and accompanying text. The Seventh Circuit decided *UCB* after initial briefing and oral argument in this case. Both parties submitted supplemental letters to address *UCB*. *See* Fed. R. App. P. 28(j).

ex rel. Sequoia Orange Co. v. Sunland Packing House Co., 912 F.Supp. 1325, 1347 (E.D. Cal. 1995)).

The Tenth Circuit adopted this rational-relation test from *Sequoia Orange* because it "construe[d] the hearing language of § 3730(c)(2)(A) to impart more substantive rights for a relator" than the D.C. Circuit recognized in *Swift*. *Ridenour*, 397 F.3d at 935.

The Seventh Circuit has also weighed in on this issue, refusing to wholly adopt either the *Sequoia Orange* rational-relation test or the unfettered-discretion standard from *Swift*, criticizing both. *UCB*, 970 F.3d at 839, 850, 853. Instead, the Seventh Circuit treated the government's motion to dismiss as a motion to intervene and then "appl[ied] a standard for dismissal informed by Federal Rule of Civil Procedure 41." *Id.* at 839. The Seventh Circuit used the phrase "[s]ubject to . . . any applicable federal statute" to apply § 3730(c)(2)(A) to the government's motion. *Id.* at 850 (quoting Fed. R. Civ. P. 41(a)(1)(A)). The Seventh Circuit concluded that the government has an "absolute" right to dismiss, so long as it serves notice under Rule 41(a) and there is a hearing under § 3730(c)(2)(A). *Id.* at 849–50. Because there is no dispute in this case that Health Choice received notice of the government's motion to dismiss, application of the Seventh Circuit's approach reduces to the question of whether Health Choice "took its opportunity to be heard." *Id.* at 850.

Health Choice urges us to adopt the rational-relation test from *Sequoia Orange* and argues that the district court erred in dismissing the Eli Lilly and Bayer cases. In doing so, however, it focuses on the relator's burden and insists that the *Sequoia Orange* test "marches under the banner of arbitrary and capricious review, a foundational limitation on government action." The government, conversely, urges us to adopt the unfettered discretion standard from *Swift* and argues that both the Eli Lilly and Bayer cases were properly

dismissed. Alternatively, the government contends that the district court was correct in concluding that the government satisfied both the unfettered-discretion standard from *Swift* and the more burdensome *Sequoia Orange* standard.

B.

The meaning of the term "hearing" holds the key to the question of the court's role in assessing the government's decision to dismiss under § 3730(c)(2)(A). Because this is a question of statutory interpretation, our review is *de novo*. *See Dresser v. Meba Medical & Benefits Plan*, 628 F.3d 705, 708 (5th Cir. 2010). We are persuaded by Health Choice's argument that the term "hearing" means what is says. It includes judicial involvement and action.

Congress introduced the hearing requirement in § 3730(c)(2)(A) in 1986. False Claims Amendments Act of 1986, P.L. 99-562, 100 Stat. 3153. The fifth edition of *Black's Law Dictionary* gives the primary definition of "hearing" as a "[p]roceeding of relative formality . . . , generally public, *with definite issues of fact or law to be tried*, in which witnesses are heard and parties proceeded against have right to be heard, . . . and may terminate in final order." *Hearing*, *Black's Law Dictionary* (5th ed. 1979) (emphasis added). Similarly, the tenth edition of *Merriam-Webster's Collegiate Dictionary* defines "hearing" in the relevant legal sense as "a listening to *arguments*." Hearing, *Merriam-Webster's Collegiate Dictionary* (10th ed. 1993); *see also* Hearing *Webster's Second International Dictionary* (1934) ("A listening to arguments or proofs and arguments in interlocutory proceeding.").[5]

[5] *See Antonin Scalia & Bryan A. Garner*, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419, 423, 426, 427 (2013) ("Dictionaries tend to lag behind linguistic realities . . . .

The *Black's* definition hinges on the issues tried at the hearing, and the *Webster's* definition hinges on the argument or proofs presented at the hearing. Both definitions, then, necessarily involve something to be decided. These definitions cast doubt on the government's notion of a § 3730(c)(2)(A) hearing as merely an opportunity for the government to publicly broadcast its reasons for dismissal and for the relator to convince the government to change its mind. Such a limited notion of a hearing that leaves nothing for the court to decide or do is inconsistent with the notion that the function of federal courts is to decide actual cases and controversies. *Cf.* U.S. Const. art. III § 2; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006). Simply put, courts do not exist to provide a forum for press announcements.

While some type of actual hearing is required, we need not decide the precise bounds of the government's discretion to dismiss *qui tam* lawsuits. *Cf. United States v. Gonzales*, 520 U.S. 1, 11 (1997) ("We are hesitant to reach beyond the facts of this case to decide a question that is not squarely presented for our review."). For the reasons explained below, it is clear that Health Choice had a hearing and that dismissal was, in the very least, not arbitrary and capricious.

C.

At oral argument, counsel for Health Choice repeatedly stressed that there had been an absence of "an evidentiary hearing, as required by procedural due process" and § 3730(c)(2)(A). *See, e.g.*, Oral Argument at 1:45, 2:50. Health Choice thus states both statutory and constitutional bases for affording it an evidentiary hearing.

If you are seeking to ascertain the meaning of a term in an 1819 statute, it is generally quite permissible to consult an 1828 dictionary.").

Health Choice's statutory argument fails because a review of the record demonstrates that Health Choice did get a hearing, and the magistrate judge did not prevent Health Choice from presenting evidence at that hearing. Health Choice simply chose not to present its evidence.[6] Counsel for Health Choice admitted as much at oral argument:

> We said, "We are prepared to prove our case," but we felt, honestly . . . that there was no need for an evidentiary hearing because the government's affidavits and declarations had been thoroughly rebutted. But now that we are where we are we would like an evidentiary hearing to show that—
>
> . . . .
>
> I want to be very precise. We asked—We represented to the court we have John Mininno here prepared to testify. The magistrate judge did not respond at all. That was our submission. And why was that our submission? Because the fundamental thrust of the motion to dismiss was "NHCA [Health Choice's parent organization] is bad" and "NHCA" which is wrong . . . and the second thing that we said is the

[6] In that hearing, Health Choice split its argument into two parts, delivered by two different attorneys. In the first portion of its argument, Health Choice urged the magistrate judge to reject the D.C. Circuit's unfettered-discretion approach from *Swift* and instead adopt the rational-relation test from *Sequoia Orange* used by the Ninth and Tenth Circuits as the standard of review of the government's decision to dismiss. In the second portion of its argument, Health Choice asserted that the totality of the circumstances shows the government's decision to dismiss the Eli Lilly and Bayer cases was arbitrary and capricious.

Health Choice's standard-of-review argument at the hearing centered around the need for "an authentic and meaningful hearing with law to apply." Health Choice stressed at this hearing that "we want a hearing . . . and a meaningful hearing." Health Choice told the magistrate judge that a witness, John Mininno, was present at the hearing and that "[h]e's prepared to answer any questions that the Court might have, and the Court has the benefit of his declaration, which really is not contested by the Government." Health Choice, however, did not move to put John Mininno on the stand, nor did it offer any other evidence at the hearing. There is no indication in the record that the magistrate judge prevented Health Choice from examining John Mininno or presenting other evidence.

> Anti-Kickback statute is so vitally important and the challenge that was mounted in the motion to dismiss to our methodology with respect to interviewing witnesses is wrong. And the magistrate judge did not respond to that.
>
> . . . .
>
> I want to be very clear with the court. We did not say to the court in open court "We need an evidentiary hearing." But please don't suggest that in any way contemplates or suggests waiver. The government hasn't argued it, and if that is the case, then the government has waived a waiver argument.

Oral Argument at 7:55–8:15, 8:40–9:45, 11:00–20.

Waiver is not at issue in this case. Rather, the oral argument aptly demonstrates why there was no error here. Health Choice had a hearing before the magistrate judge.[7] It had a witness available to testify at that hearing, and the witness was not prohibited from testifying. Health Choice declined to call the witness to testify and the magistrate judge did not prevent Health Choice from presenting the witness. Health Choice's statements at oral argument suggest that it consciously and strategically chose not to offer evidence because it believed it had already won the motion. Oral Argument at 8:15–30. Even assuming that § 3730(c)(2)(A) requires the hearing to be an evidentiary hearing, there was no error because Health Choice declined to offer evidence at the hearing. *See Chang v. Child.'s Advoc. Ctr. of Del. Weih Steve Chang*, 938 F.3d 384, 387 (3d Cir. 2019) ("An 'opportunity for a hearing,' however, requires that relators avail themselves of the 'opportunity.'").

Health Choice's constitutional argument also fails. Health Choice argues that procedural due process entitled it to an evidentiary hearing, citing

[7] Health Choice does not argue that the hearing needed to be before the district court instead of the magistrate judge.

to *Hamdi v. Rumsfeld*, *Goldberg v. Kelly*, and *Thibodeaux v. Bordelon* for support. Oral Argument at 6:10; 56:04; 542 U.S. 507 (2004); 397 U.S. 254 (1970); 740 F.2d 329 (5th Cir. 1984). In Health Choice's view—and in its own words—"a *qui tam* relator surely should enjoy the modicum of protections asserted by a welfare benefits recipient." *Cf. Goldberg v. Kelly*, 397 U.S. 254 (1970). Health Choice quotes *Vermont Agency of Natural Resources* for the proposition that "the [Anti-Kickback Statute] gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery." 529 U.S. at 772. Thus, on Health Choice's reasoning, the relator has a property interest in the lawsuit that is protected by procedural due process.

Even assuming that procedural due process requires an evidentiary hearing when the government seeks to terminate a *qui tam* lawsuit brought under the False Claims Act, Health Choice's procedural-due-process argument fails for the same reason that the statutory argument failed. Health Choice had a hearing. Health Choice brought a witness, John Mininno, to that hearing. Health Choice simply chose not to call the witness or offer any other evidence. To emphasize this point, it is worth repeating Health Choice's counsel's statement at oral argument: "[W]e felt, honestly . . . that there was no need for an evidentiary hearing because the government's affidavits and declarations had been thoroughly rebutted. But now that we are where we are we would like an evidentiary hearing." Oral Argument at 7:55–8:15. Assuming *arguendo* that Health Choice had a property interest in the Eli Lilly and Bayer *qui tam* lawsuits, its property interests were adequately protected by the procedures in the district court. There was no procedural-due-process error in this case.

D.

Finally, we consider Health Choice's argument that the government failed to satisfy its burden to dismiss under § 3730(c)(2)(A). Assuming, without deciding, that *Sequoia Orange*'s more burdensome test applies,[8] we hold that dismissal was proper.

Under the *Sequoia Orange* test, the government must first show that there is: (1) "a valid government purpose; and (2) a rational relation between dismissal and accomplishment of that purpose." *Sequoia Orange Co.*, 151 F.3d at 1145. To show a rational relation, "there need not be a tight fitting relationship between [dismissal and the stated purpose]; it is enough that there are plausible, or arguable, reasons supporting the [decision to dismiss]." *Ridenour*, 397 F.3d at 937 (quoting *Sequoia Orange Co.*, 912 F.Supp. at 1347 (E.D. Cal. 1995)); *see also Jackson Water Works, Inc. v. Pub. Util's Comm'n of the State of Cal.*, 793 F.2d 1090, 1094 (9th Cir. 1986). If the government makes its showing, the burden shifts to the *qui tam* relator to show that "dismissal is fraudulent, arbitrary and capricious, or illegal." *Sequoia Orange*, 151 F.3d at 1145 (quoting *Sequoia Orange Co.*, 912 F.Supp. at 1347 (E.D. Cal. 1995)).

1.

The government made its required showing.

The government offered two valid purposes to justify dismissal. First, "the allegations . . . lack sufficient merit to justify the cost of investigation and prosecution." Second, "further litigation . . . will undermine practices

[8] The magistrate judge in her reports and recommendations, and the district court in adopting the reports and recommendations, both assumed that *Sequioa Orange* should apply and determined that dismissal was proper even under that more burdensome standard.

that benefit federal healthcare programs by providing patients with greater access to product education and support."

Health Choice alleged violations spanning a six-year period involving Medicare, Medicaid, and TRICARE. For Medicare Part D alone, the Eli Lilly allegations involve more than 32,000,000 prescriptions, from more than 400,000 physicians, for more than 1,000,000 Medicare beneficiaries. Similarly, the Bayer allegations involve nearly 500,000 prescriptions, from more than 10,000 physicians, for "tens of thousands" of Medicare beneficiaries. According to the government, the scope of these allegations would impose "substantial litigation burdens" on the United States as it monitors the cases, responds to discovery requests, prepares agency employees for depositions, *et cetera*. The government has stated a legitimate government purpose in considering litigation costs. *See Sequoia Orange*, 151 F.3d at 1146.

The government has shown a rational relation between dismissal and its cost-saving purpose. The government concluded that the litigation costs were not justified by the expected value of recovery against Eli Lilly and Bayer, particularly given the government's concerns about the merit of the underlying allegations. It reasoned that its litigation expenses would not be recouped by pursuing the case further. In that sense, dismissal is rationally related to the purpose of avoiding litigation costs.

The government also asserted in the district court that the product education services provided by Eli Lilly and Bayer "benefit[ed] federal healthcare programs" and were lawful. According to the government, federal healthcare programs have a strong interest in ensuring that benefits recipients have access to education about their prescriptions. Further, the government had previously concluded in a different context that patient-education services alone do not constitute illegal remuneration. Thus, the

government concluded that the services provided by Eli Lilly and Bayer are not only beneficial but also lawful. Promoting beneficial and lawful programs is plainly a legitimate government interest. Dismissal is rationally related to that interest because it removes an impediment to providing those services. In short, the government has satisfied its burden of showing a rational relation between dismissal and legitimate government interests.

2.

Because the government made its required showing, the burden shifts to Health Choice to show that the government's motion to dismiss is "fraudulent, arbitrary and capricious, or illegal." *Sequoia Orange*, 151 F.3d at 1145 (quoting *Sequoia Orange Co.*, 912 F.Supp. at 1347 (E.D. Cal. 1995)). Health Choice does not meet this burden. Health Choice offers little more than unsupported allegations of animus against John Mininno and the National Health Care Analysis Group, Health Choice's parent organization, to support its assertion that dismissal is arbitrary and capricious. *See* Oral Argument at 9:30.

Health Choice devotes much of its opening brief to the government's interest in the National Health Care Analysis Group's corporate structure and its apparent misunderstanding of Health Choice's claims. The government's letter to Health Choice, its motion to dismiss, and its arguments before the magistrate judge, however, show that National Health Care Analysis Group's corporate structure played no part in the government's rationale for dismissal. Moreover, to support its claim of the government's apparent misunderstanding of its claims, Health Choice offers little more than a single question asked by a government attorney.

Health Choice further offers the conclusory assertion that the one-year time period between the government's declination notice and its notice of intent to dismiss amounted to arbitrary and capricious conduct. Health

Choice cites to a Department of Justice document, referred to as the "Granston Memo," to bolster this point. The memo states that "if one waits until the close of discovery or trial [to move to dismiss a *qui tam* lawsuit], there is a risk that the court may be less receptive to the request given the expenditure of resources by the court and parties." This guidance speaks to the risk that the court will deny the government's motion to dismiss. We cannot say that the government did not follow its own guidance when it decided to take a risk contemplated by that guidance.

Finally, Health Choice insists that dismissal was arbitrary and capricious because the government failed to conduct a cost–benefit analysis. This argument, however, fails to acknowledge the government's position that Health Choice's allegations "lack sufficient merit to justify the cost of investigation and prosecution." This is a cost–benefit analysis of sorts. As explained above, the government considered the expected benefit of Health Choice's lawsuit given the government's assessment of the merits of the case.

Considering Health Choice's arguments and the record as a whole, we hold that Health Choice did not show that dismissal was "fraudulent, arbitrary and capricious, or illegal" under the strict *Sequoia Orange* standard. *Cf. Chang*, 938 F.3d at 387 (determining that relator failed to establish fraud, arbitrariness and caprice, or illegality); *Ridenour*, 397 F.3d at 937–38 ("The district court correctly concluded the Relators failed to meet their burden to show the Government's motion to dismiss was fraudulent, arbitrary and capricious, or illegal.").

* * *

For the reasons set forth above, the judgment of the district court is AFFIRMED.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*, concurring:

While this appeal touches on an unsettled area of law, the outcome here is straightforward. Under Congress's qui tam regulatory scheme, the government may assume the prosecution of a claim filed by a relator with full control over its course, or it may allow the relator to press the claim alone.[1] Where, as here, the government follows the latter course but returns to the litigation at a later stage,[2] the government's control over its prosecution is less certain, including its authority to dismiss the case, and this uncertainty has divided our sister courts.

The hearing requirement in § 3730(c)(2)(A) evidences Congress's recognition of the relator's interest in qui tam claims hitherto pursued alone. While providing textual footing for judicial oversight of the government's decision to dismiss the case, it offers little more as to its scope. This silence leaves the content of the hearing to respond to the case before the court. At a minimum, the statute compels the government to stand in open court and state for the record the reasons for its judgment that the case should not proceed. While seemingly pro forma, this statutory requirement is not empty of force for it affords a measure of public accountability.

In this case, it suffices that the relator, through able counsel, had the opportunity to engage the government's stated reasons and did so without apparent restriction on its response, including its ability to put on evidence. In sum, it is not apparent that the district court could reasonably have denied the government's motion to dismiss the claims. While this want of control

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[1] 31 U.S.C. §§ 3730(c)(1)-(5).

[2] We do not address whether the government may dismiss without formally intervening or whether the motion to dismiss should be treated as a motion to intervene, as the Seventh Circuit has held. *United States v. UCB, Inc.*, 970 F.3d 835, 849 (7th Cir. 2020). The distinction does not affect the outcome.

leaves a relator at risk, it signifies that the risk is inherent in pursuing litigation under this statutory scheme, which also offers the possibility of large returns. The government could have prevented the relators from being involved at the start; it could have said it was aware of, but never defrauded by, the practices alleged. The government did neither here, but when it chose to dismiss, it gave legitimate reasons for doing so, ones which sound mostly in policy choices, belonging to the political branches. On these facts, I agree that the statutory prerequisites for dismissal were satisfied.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 19-3810

_____

JESSE POLANSKY, M.D., M.P.H.;
THE STATE OF CALIFORNIA, THE STATE OF COLORADO, THE STATE OF CONNECTICUT, THE STATE OF DELAWARE, THE DISTRICT OF COLUMBIA, THE STATE OF FLORIDA,THE STATE OF GEORGIA, THE STATE OF HAWAII, THE STATE OF ILLINOIS, THE STATE OF INDIANA, THE STATE OF IOWA, THE STATE OF LOUISIANA,THE STATE OF MARYLAND, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF MICHIGAN, THE STATE OF MINNESOTA, THE STATE OF MONTANA, THE STATE OF NEVADA,THE STATE OF NEW JERSEY, THE STATE OF NEW MEXICO, THE STATE OF NEW YORK, THE STATE OF NORTH CAROLINA, THE STATE OF OKLAHOMA, THE STATE OF RHODE ISLAND, THE STATE OF TENNESSEE,THE STATE OF TEXAS, THE COMMONWEALTH OF VIRGINIA, THE STATE OF WASHINGTON, and THE STATE OF WISCONSIN

v.

EXECUTIVE HEALTH RESOURCES INC;
UNITEDHEALTH GROUP INC;
UNITED HEALTHCARE SERVICES INC; OPTUM INC;
OPTUMINSIGHT INC;
OPTUMINSIGHT HOLDINGS LLC;
COMMUNITY HOSPITAL OF THE
MONTEREY PENINSULA;
YALE NEW HAVEN HOSPITAL

UNITED STATES OF AMERICA

Jesse Polansky, M.D., M.P.H.,
Appellant.

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-12-cv-04239)
Honorable Michael M. Baylson, U.S. District Judge

_____

Argued November 18, 2020

Before: JORDAN, KRAUSE, and RESTREPO, *Circuit Judges*

(Filed: October 28, 2021)

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OPINION OF THE COURT

KRAUSE, *Circuit Judge*.

The False Claims Act (FCA), 31 U.S.C. § 3729, *et seq.*, empowers not just the federal government, but also private individuals, to bring claims for fraud on the United States and to do so in the Government's name in exchange for a share of the proceeds. These individuals, known as relators, are generally on the same side as the Government, which has the option early on to either intervene or allow the relator to move forward with the action on her own. But what authority does the Government have when it declined to intervene at the outset and subsequently *opposes* the relator's suit?

To answer, we must resolve two key questions that have divided our sister circuits: (1) whether the Government in that

situation can move for dismissal without first intervening, and (2) if the Government properly moves for dismissal, what, if any, standard must it meet for its motion to be granted? For the reasons that follow, we conclude that the Government is required to intervene before moving to dismiss and that its motion must meet the standard of Federal Rule of Civil Procedure 41(a). Because we also conclude that the District Court here acted within its discretion in granting such a motion by the Government, we will affirm the Court's order of dismissal.

I. BACKGROUND

A. Factual Background

The False Claims Act has its roots in the Civil War, when "a series of sensational congressional investigations" uncovered widespread fraud by wartime contractors that had bilked the federal government by charging for "nonexistent or worthless goods." *United States v. McNinch*, 356 U.S. 595, 599 (1958). In response, Congress not only prohibited the making of false claims to the Government, 31 U.S.C. § 3729(a)(1), and empowered the United States to seek civil remedies, *id.* § 3730(a); it also legislated a private enforcement mechanism, not unlike the bounty hunting common in the rough-and-tumble world of the mid-nineteenth century. That is, the statute permits private individuals, acting in the name of the Government, to assert FCA claims "for the person and for the United States Government." *Id.* § 3730(b)(1). These relator-initiated lawsuits, known as *qui tam* actions, effectively deputize citizens to act as private attorneys general, compensated with a share of the money recovered.[1] *See id.* § 3730(d).

[1] *Qui tam* is short for "qui tam pro domino rege quam pro se imposo sequitur," which means, roughly, "who brings the action as well for the king as for himself." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 746 n.3 (9th Cir. 1993). A relator, acting in this capacity, can receive up to 30 percent of the funds recovered. 31 U.S.C. § 3730(d)(1)-(2).

This case involves such a *qui tam* action. Relator-Appellant Dr. Jesse Polansky was an official at the Centers for Medicare and Medicaid Services (CMS) before consulting for Defendant-Appellee EHR, a "physician advisor" company that provides review and billing certification services to hospitals and physicians that bill Medicare.[2] While employed as a consultant, Polansky became concerned that EHR was systematically enabling its client hospitals to over-admit patients by certifying inpatient services that should have been provided on an outpatient basis. As alleged in the complaint he eventually filed in the District Court, EHR was causing hospitals to bill the Government for inpatient stays that were not "reasonable and necessary" for diagnosis or treatment—a statutory requirement for reimbursement under the Government's Medicare program, 42 U.S.C. § 1395y(a)(1)(A), as explicated by CMS initially in guidance, and as of 2013, in a formal regulation, *see* 42 C.F.R. § 412.3(d)(1). From at least 2006 until the filing of his amended complaint in 2019, he alleged, EHR's certifications were false and caused the submission of false claims to the Government.

B. Procedural History

In 2012, on the basis of those allegations, Polansky filed this FCA action. His complaint remained *in camera* and under seal for the next two years while the Government conducted its own investigation and ultimately determined it would not participate in the case. Under the FCA, "[i]f the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). So at that point, the complaint was unsealed and Polansky, "for [himself] and for the United States Government," continued as plaintiff. *Id.* § 3730(b)(1).

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[2] Healthcare providers retain EHR to perform a second level of review of a doctor's initial inpatient/outpatient assessment. Specifically, EHR reviews determinations that patients do *not* qualify for inpatient status under the relevant criteria.

Over the next several years, the parties and the District Court invested considerable time and resources in the case. Once EHR's motion to dismiss was denied,[3] the District Court divided the case into two segments for case-management purposes: "Phase I" claims, covering EHR's certifications from 2009 to October 1, 2013, and "Phase II" claims, covering its certifications after October 1, 2013, the date that CMS's formal regulation went into effect. Because the complaint implicated hundreds of thousands of allegedly false claims, the District Court also decided to select a small number for a bellwether trial where "the jury would answer interrogatories," and the Court would then "enter judgment on all other claims encompassed by the jury verdict." *Polansky v. Exec. Health Res., Inc.*, 422 F. Supp. 3d 916, 919 (E.D. Pa. 2019). In anticipation of that trial, the Court designed a procedure for selecting the bellwether claims and appointed a special master, and the parties commenced discovery, focused on Phase I claims.

In February 2019, however, the case took an unexpected turn: The Government notified the parties that it intended to dismiss the entire action pursuant to 31 U.S.C. § 3730(c). Under paragraph (c)(1) of that section, a relator's ability to continue a suit he initiated is limited in various ways "[i]f the Government proceeds with the action." Those limits are spelled in out in paragraph (c)(2), including that "[t]he Government may dismiss the action notwithstanding the objections of the [relator]" so long as the relator receives notice and an opportunity to be heard on the Government's motion. 31 U.S.C. § 3730(c)(2)(A). Here, although the Government had originally opted not to proceed with the action and had not formally

[3] Polansky originally brought state claims against EHR, its corporate parents, and certain of its client hospitals under a number of states' FCA-equivalents. Eventually, however, he voluntarily withdrew a number of those claims, and the District Court dismissed the remainder against all defendants except EHR. The litigation that ensued therefore focused only on the FCA claims against EHR.

intervened, it pointed to § 3730(c)(2)(A) as the source of its authority to dismiss the case over Polansky's objection.

The Court stayed the proceedings while the parties negotiated with the Government. Initially, the Government acceded to Polansky's request not to dismiss his case in exchange for his filing of an amended complaint that substantially narrowed the scope of his Phase I claims. But the Government also reserved the right to reconsider, and a few months later, in August 2019, it invoked that right, and filed a motion to dismiss pursuant to § 3730(c)(2)(A). The District Court accepted that filing and, following briefing and argument, granted the Government's motion.[4] It recognized the circuit split on the issue of what standard applies to a § 3730(c)(2)(A) dismissal, but because it concluded that the Government had made an adequate showing under any of the prevailing standards, it declined to weigh in. That task now falls to us.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction pursuant to 31 U.S.C. § 3732(a) and 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review

[4] At the conclusion of the hearing on the motion to dismiss, the District Court *sua sponte* raised the question of summary judgment pursuant to Federal Rule of Civil Procedure 56(f). In granting dismissal, the Court also granted partial summary judgment "independent of dismissal based on the Government's motion" against Polansky on his Phase I claims. JA 41. Because we will affirm the order of dismissal, we have no occasion to reach that ruling. And because the District Court first granted the motion to dismiss, Polansky's claims were fully disposed of, and the Court did not need to reach summary judgment. We will therefore vacate the District Court's opinion and order insofar as it addressed summary judgment.

over a district court's interpretation of a federal statute. *See United States v. Hodge*, 948 F.3d 160, 162 (3d Cir. 2020) (citation omitted).

III. DISCUSSION

Polansky challenges the District Court's dismissal on the ground that the Government lacked statutory authority to move to dismiss in the first place. He also contends that, if the Government did have that authority, its motion should have been denied on the merits under the applicable standard.

We address these arguments in three parts. We consider, first, whether the FCA requires the Government to intervene in order to seek dismissal pursuant to § 3730(c)(2)(A)—either at the first opportunity, 31 U.S.C. §3730(c)(1), or "at a later date upon a showing of good cause," *id.* § 3730(c)(3). We next address the standard governing such motions. And finally, we discuss the consequences of these holdings for the District Court's order of dismissal in this case.[5]

[5] Amici Dean Erwin Chemerinsky, the National Whistleblower Center, and the Project on Government Oversight (Chemerinsky Amici) argue that, even if the Government's dismissal was proper as a statutory matter, it amounted to an uncompensated taking of Polansky's property interest in the action in violation of the Takings Clause. *See* U.S. Const., amend. V, cl. 5. The thrust of this argument is that relators create a property interest by investing resources in their *qui tam* actions, and that the retroactive application to them of DOJ's 2018 guidance—reversing the Government's decades-long hands-off policy toward relator-prosecuted suits—would effect an unconstitutional taking. While the idea that a relator can obtain a property interest in a *qui tam* action is open to doubt, we need not address the argument because the Chemerinsky Amici are the only ones advancing it, and we generally avoid considering arguments raised solely in amicus briefs "where[, as here,] the parties are competently represented by counsel." *New Jersey Retail Merchs. Ass'n v. Sidamon-*

A. The Government's Authority to Seek Dismissal under the FCA

We begin with the first of the questions in this area that have divided the Courts of Appeals: whether, and in what circumstances, the Government retains statutory authority to move to dismiss an FCA action, pursuant to 31 U.S.C. § 3730(c)(2)(A), if it opted not to proceed at the outset[6] and allowed the relator to move forward "for the [relator] and for the United States Government."[7] 31 U.S.C. § 3730(b)(1). The

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Eristoff, 669 F.3d 374, 382 n.2 (3d Cir. 2012) (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001)).

[6] An FCA action initiated by a relator is initially filed *in camera* and under seal and served upon the Government. 31 U.S.C. § 3730(b)(2). The Government then has 60 days, extendable "for good cause shown," to investigate the claims for itself and to decide whether to "intervene and proceed with action," *id.* § 3730(b)(2), (3). If it declines the case, the relator has the option of continuing the case alone, and if the relator does, the complaint is unsealed, is served on the defendant, and the case proceeds as an otherwise-typical civil action. *Id.* § 3730(b)(4)(B); *United States ex rel. Int'l Bhd. of Elec. Workers Local Union No. 98 v. Farfield Co.*, 5 F.4th 315, 336 (3d Cir. 2021).

[7] As a threshold matter, Appellees object that this argument was not raised before the District Court, and "arguments raised for the first time on appeal are not properly preserved for appellate review." *Simko v. U.S. Steel Corp.*, 992 F.3d 198, 205 (3d Cir. 2021). But where, as here, the failure to preserve an argument was in the nature of an "inadvertent failure to raise an argument," or forfeiture, "we will reach a pure question of law even if not raised below where refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance." *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 147 (3d Cir. 2017) (internal quotation marks omitted). That is the case here.

answer turns on the interrelationship among the subsections of § 3730(c). So we begin with the text and structure of the statute, and then consider the relevant canons of statutory construction.

Section 3730(c) sets forth the rights and relationship of the Government and relator through the life of an FCA action. Because our analysis turns on the language and structure of the statute, we excerpt its relevant provisions below:

> (1) If the Government proceeds with the action . . . [the relator] shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).
>
> (2)(A) The Government may dismiss the action notwithstanding the objections of the [relator] if the [relator] has . . . [notice and] an opportunity for a hearing[.]
>
> (B) The Government may settle the action with the defendant notwithstanding the objections of the [relator] if the court determines . . . the proposed settlement is fair, adequate, and reasonable . . . .
>
> (C) Upon a showing by the Government that [the relator's] unrestricted participation . . . would interfere with or unduly delay the Government's prosecution of the case . . . the court may, in its discretion, impose limitations on the [relator's] participation . . . .

Whether the FCA permits the Government to dismiss a relator's action that it previously declined is a pure question of statutory interpretation; the district courts would benefit from guidance on a question that has divided the Courts of Appeals, *see infra* n.8; and resolving this question is logically antecedent to the question before us: the standard that applies when the Government seeks dismissal. We therefore exercise our discretion to excuse Polansky's forfeiture.

> (D) Upon a showing by the defendant that [the relator's] unrestricted participation . . . would cause the defendant undue burden or unnecessary expense, the court may limit the [relator's] participation . . . .
>
> (3) If the Government elects not to proceed with the action, the [relator] shall have the right to conduct the action. . . . When [the relator] proceeds with the action, the court, without limiting the status and rights of the [relator], may nevertheless permit the Government to intervene at a later date upon a showing of good cause.
>
> (4) Whether or not the Government proceeds with the action, [it may seek a stay of the relator's discovery that] would interfere with [a Government investigation] . . . .

31 U.S.C. § 3730(c).

The scope of the Government's dismissal authority in this context has engendered significant debate. The parties' positions track a split among our sister circuits.[8] The

[8] *Compare United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 844 (7th Cir. 2020) (interpreting the FCA to require intervention upon a showing of good cause before the Government can move to dismiss a relator's case under § 3730(c)(2)(A)), *and United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 519-20 (6th Cir. 2009) (concluding § 3730(c)(2)(A) "applies only when the government has decided to 'proceed[] with the action'" (quoting § 3730(c)(1))), *abrogated on other grounds by United States ex rel. Rahimi v. Rite Aid Corp.*, 3 F.4th 813 (6th Cir. 2021), *with Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 934-35 (10th Cir. 2005) (holding the Government "is not required to intervene . . . before moving to dismiss the action under § 3730(c)(2)(A)"), *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) (reaching the same conclusion), *and United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (suggesting the same understanding).

Government and EHR (collectively, "Appellees") ask us to follow the D.C., Ninth, and Tenth Circuits in reading this provision as a standalone grant of dismissal authority that empowers the Government to move for dismissal of the relator's action at any point in the litigation and regardless of whether it has intervened.[9] Polansky, on the other hand, presses the view of the Sixth and Seventh Circuits that Congress authorized the Government to move for dismissal under § 3730(c)(2)(A) only when it "proceeds with the action." 31 U.S.C. § 3730(c)(1). Polansky would also have us go further, to hold that the Government has that authority only if it intervenes at the outset and, having declined to do so, it is powerless to seek dismissal *even if* it subsequently intervenes.

"[B]ear[ing] in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Mejia-Castanon v. Att'y Gen.*, 931 F.3d 224, 233-34

[9] To the extent Appellees postulate that we resolved this question in *Chang v. Children's Advocacy Center of Delaware,* 938 F.3d 384 (3d Cir. 2019), they are mistaken. The question there was whether § 3730(c)(2)(A)'s requirement for "an opportunity for a hearing on the motion" meant an in-person hearing in every case, which we held it did not, *id.* at 388. After explaining by way of background that the Government could intervene in a relator's case at the outset or allow the relator to proceed alone, *id.* at 386, we observed that "even under the latter scenario, the government may still 'dismiss the action'" pursuant to § 3730(c)(2)(A). *Id.* (quoting 31 U.S.C. § 3730(c)(2)(A)). But that passing statement cannot bear the weight Appellees would place on it. We offered no opinion one way or the other as to whether the Government was required to intervene before seeking dismissal in that "latter scenario," nor were we called upon to do so. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Grant v. Shalala*, 989 F.2d 1332, 1341 (3d Cir. 1993) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

(3d Cir. 2019) (quoting *King v. Burwell*, 576 U.S. 473, 492 (2015)), we conclude Congress intended the reading adopted by the Sixth and Seventh Circuits, *i.e.*, under § 3730(c), the Government must intervene before it can move to dismiss, but it can seek leave to intervene at any point in the litigation upon a showing of good cause. Considered in context, § 3730(c)(2) is not, as Appellees would have it, a standalone provision that grants the Government unconditional authority to seek dismissal as a non-party. That authority is granted as a "limitation[]" of the relator's rights in the first paragraph "if"—and only if—"the Government proceeds with the action." 31 U.S.C. § 3730(c)(1). "If the Government elects not to proceed with the action," on the other hand, then the relator "shall have the right to conduct the action," unencumbered by the "limitations" in subparagraph (c)(2)(A) through (c)(2)(D) on that right that paragraph (c)(2) would otherwise impose. *Id.* § 3730(c)(3).

To this, Appellees object that those limitations are not nestled under paragraph (c)(1), as one might expect if they were contingent on "the Government proceed[ing] with the action." *Id.* § 3730(c)(1). Rather, they are set forth in paragraph (c)(2), a separately numbered paragraph, on par with and not structurally subordinate to paragraph (c)(1).[10] But Appellees' argument is belied by the context of the "surrounding words and provisions" of statutory language. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 617 (3d Cir. 2015) (citation omitted). Here, the "surrounding . . . provisions" are the other

[10] The D.C. Circuit relied on this reasoning to conclude that the Government can seek dismissal regardless of whether it proceeds with the action. *Swift*, 381 F.3d at 251-52 (emphasizing that § 3730(c)(2) is neither "a subsection of § 3730(c)(1)" nor does it "contain language stating that it is applicable only in the context of § 3730(c)(1)"). But the observation that § 3730(c)(2) is not a subsection of § 3730(c)(1), while "true as a typographic matter," misses "how the five paragraphs of subsection (c) relate to one another in text and logic." *CIMZNHCA*, 970 F.3d at 845.

subparagraphs in § 3730(c)(2) that only make sense if the Government is a party in the case. Subparagraph (c)(2)(C), for example, enables the Government to limit a relator's ability to call and examine witnesses where it "would interfere with or unduly delay the Government's prosecution of the case," 31 U.S.C. § 3730(c)(2)(C), a provision that by its terms identifies the Government as a party. Subparagraph (D) grants FCA defendants a similar power to limit the relator's participation in the litigation "[u]pon a showing . . . that [such] participation . . . would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense," *id.* § 3730(c)(2)(D). But this provision, too, assumes the Government is prosecuting the case because "[o]bviously a defendant cannot 'restrict the participation' of its sole adversary in a lawsuit." *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 845 (7th Cir. 2020).

That § 3730(c)(2)(A) is conditioned on the Government proceeding under paragraph (c)(1) is also apparent from another canon of statutory construction: We must "[a]ssum[e] that every word in a statute has meaning" and "avoid interpreting part of a statute so as to render another part superfluous." *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 367 (3d Cir. 2011). Yet, if we were we to conclude, as the D.C., Ninth, and Tenth Circuits do, that the Government can move to dismiss a relator's case whether or not it "proceeds with the action," 31 U.S.C § 3730(c)(1), it would render at least two provisions superfluous: The qualifier in paragraph (c)(1) that a relator's rights are "subject to the limitations set forth in paragraph (2)" when the Government "proceeds with the action," *id.*, would be unnecessary because relators would always be subject to those limitations, regardless of whether the Government "proceeds," *id.*; and paragraph (c)(4)'s description of actions the Government may take "[w]hether or not [it] proceeds with the action" would be surplusage if every provision of paragraph (2) applied "whether or not" the Government intervened. *Id.* § 3730(c)(4).

Though we reject Appellee's interpretation as failing to read the paragraphs of § 3730(c) as "a symmetrical and coherent regulatory scheme . . . [and] an harmonious whole," *Si Min Cen v. Att'y Gen.*, 825 F.3d 177, 192 (3d Cir. 2016) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotations omitted)), neither can we accept Polansky's reading that the Government may seek dismissal *only* if it intervened at the first opportunity. Polansky grounds that reading in the Supreme Court's description of the relator's "right to conduct the action" if "the Government elects not to proceed with it," *id.* § 3730(c)(3), as "exclusive," *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 (2000)), combined with paragraph (c)(3)'s qualification that, if the Government seeks leave to intervene once the suit is already underway, it must do so "without limiting the status and rights of the [relator]." 31 U.S.C. § 3730(c)(3). Because involuntary dismissal would "limit[]" the relator's "exclusive" right to conduct the action, Polansky contends, the Government intervenes pursuant to § 3730(c)(3) without the authority it originally had to seek dismissal under § 3730(c)(2)(A).

Both of Polansky's premises are flawed. First, nothing in *Stevens* compels such a reading. The Court used "exclusive" to mean that only the relator, as opposed to any other private individual, could proceed with an FCA action after the Government declines it, which the statute explicitly states in another section.[11] *See* 31 U.S.C. § 3730(b)(5); *Stevens*, 529 U.S.

[11] The *Stevens* Court held, among other things, that *qui tam* relators have Article III standing because the FCA partially assigns the United States's claims to them. 529 U.S. at 773-74. The word "exclusive" appears only in the Supreme Court's background explanation of the FCA's framework which, in context, reads: "[i]f the Government declines to intervene within the 60–day period, the relator has the exclusive right to conduct the action, and the Government may subsequently intervene only on a showing of 'good cause.'" *Id.* at 769 (emphasis added) (citing 31 U.S.C. § 3730(b)(4), (c)(3)).

at 769. It nowhere suggests that the relator's right to control the action is exclusive vis-a-vis the Government. Second, had Congress intended so draconian a consequence as to strip the Government of *all* ability to terminate a case brought in its name, it would not have obscured it in a clause preserving the "status and rights of the [relator]." 31 U.S.C. § 3730(c)(3). Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Indeed, if anything the language of paragraph (c)(3) cuts the other way, for the statutory rights that the relator retains upon the Government's intervention can be no more or less than those originally vested by the FCA: "the right to continue as a party to the action, subject to the limitations set forth in paragraph (2)," 31 U.S.C. § 3730(c)(1), *i.e.*, subject to the Government's ability to seek dismissal pursuant to paragraph (c)(2)(A). In other words, we read § 3730(c) as a whole, as do the Sixth and Seventh Circuits, to mean that: "[I]f the Government elects not to proceed," the relator conducts the action; the Government may "intervene at a later date upon a showing of good cause;" and the relator then retains the same status and rights as if the Government originally intervened. *Id.* § 3730(c)(3). Those rights include the right to continue as a party, but "subject to the limitations set forth in paragraph (2)." *Id.* § 3730(c)(1). And under paragraph (c)(2) the Government may seek involuntary dismissal against the relator, but the relator must be provided notice and an opportunity to be heard. *Id.* § 3730(c)(2)(A).

In opposition to that reading, Appellees invoke one last canon of construction: constitutional avoidance. They argue that interpreting the statute to make intervention a prerequisite to moving to dismiss would compromise the Government's ability to control litigation brought in its name and thereby "place the FCA on constitutionally unsteady ground." *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 934 (10th Cir. 2005). Specifically, they contend, it risks violating the separation of

powers embodied in the Take Care Clause, which entrusts the Executive Branch with the duty to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3; *see Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2205 (2020) (recognizing that, although there is no "separation of powers clause," "[this] foundational doctrine[] [is] instead evident from the Constitution's vesting of certain powers in certain bodies," among them "Article II's vesting of the 'executive Power' in the President"). As a result, they urge that we eschew any requirement of intervention to avoid "grave doubts" to the statute's constitutionality. *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1622 (2021).

We recognize that the Tenth Circuit found this argument persuasive, *see Ridenour*, 397 F.3d at 934-35, but we do not see genuine constitutional doubts to avoid. As the Seventh Circuit also concluded, showing "good cause" is neither a burdensome nor unfamiliar obligation. *See CIMZNHCA*, 970 F.3d at 848-49. It is a "uniquely flexible and capacious concept," meaning simply a "legally sufficient reason," *id.* at 846 (quoting *Good Cause*, s.v. *Cause*, Black's Law Dictionary 101 (4th pocket ed. 2011)), and it is a standard the Government routinely satisfies to extend its time to investigate the relator's case under § 3730(b)(3). *See* 31 U.S.C. § 3730(b)(3) (allowing Government to extend the time it has to decide whether to proceed with the action upon "good cause shown"); *see also CIMZNHCA*, 970 F.3d at 848 (observing that even in actual criminal cases, "the government must have 'leave of court' to dismiss the prosecution" once it is underway). And, of course, as the Seventh Circuit also noted, "avoiding offense to the separation of powers in a case that actually risks it would itself weigh heavily in any 'good cause' determination," *id.* at 847, providing an adequate forum to vindicate the prerogatives of the Executive Branch.[12]

[12] We also note the long history of *qui tam* actions in Anglo-American jurisprudence, which were a common feature of the legal landscape at the time of the founding. *See Stevens*, 529 U.S. at 774-77 (recounting the history of *qui tam* actions

In sum, while we respect the contrary view of some our sister Circuits, we agree with the Seventh Circuit that the text and structure of § 3730(c), as well as settled canons of statutory interpretation, require the Government to intervene pursuant to paragraph (c)(3), before it can exercise its authority to seek dismissal pursuant to paragraph (c)(2)(A). Once it has intervened as a party, the Government is then "proceed[ing] with the action" under paragraph (c)(1); the rights of the relator are "limit[ed]" accordingly under paragraph (c)(2); and the Government can seek an involuntary dismissal of the relator's action.

B. The Applicable Standard

We next consider the standard applicable to the Government's motion. Is the Government automatically entitled to dismissal, or does that decision lie in the District Court's discretion? Or in practical terms, is the "opportunity for a hearing on the motion" in § 3730(c)(2)(A) merely a forum for the relator to attempt to "convince the [G]overnment not to end the

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in both England and at the time of the founding); *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (noting that *qui tam* statutes were "in existence for hundreds of years in England, and in this country ever since the foundation of our government"); *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805) (Marshall, C.J.) ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt [*qui tam*]."); 3 William Blackstone, Commentaries *160 (relating that forfeitures created by penal statutes "more usually . . . are given at large, to any common informer; or . . . to the people in general . . . . [I]f any one hath begun a *qui tam*, or *popular*, action, no other person can pursue it; and the verdict passed upon the defendant . . . is . . . conclusive even to the king himself."). These deep historical roots suggest that, even if the "good cause" standard reduces the Government's degree of control over a relator's suit, such a lack of direct control was not considered an unconstitutional flaw at the founding.

case," as the Government argues, Gov't Br. 28, or is it an adversarial hearing to inform the District Court's ruling on the Government's motion?

This issue, too, has divided the Courts of Appeals, *see Chang v. Children's Advocacy Center of Delaware,* 938 F.3d 384, 387 (3d Cir. 2019), which have taken three paths.[13] While the D.C. Circuit agrees with the Government that it has an "unfettered right" to dismiss, *see Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), and the Ninth and Tenth Circuits hold it to a "rational relation" standard drawn from substantive due process jurisprudence, *see United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145-46 (9th Cir. 1998); *Ridenour*, 397 F.3d at 936, the Seventh Circuit simply applies the Federal Rules of Civil Procedure as it would to any party, *see CIMZNHCA*, 970 F.3d at 849-50. Today we wade into the fray, again siding with the Seventh Circuit.

Below, we discuss the standard we adopt, and then explain why we decline to follow the competing views offered by our sister Circuits.

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[13] Amicus Taxpayers Against Fraud Education Fund (TAFEF) suggests a fourth answer—in its view, the Government "must show that dismissal is reasonable in light of all of the circumstances." TAFEF Br. 16. It argues that the legislative history behind Congress's 1986 amendments strengthening the *qui tam* provisions demonstrates that Congress intended courts to scrutinize Government motions for reasonableness. In particular, it points to a draft provision that allowed the relator to object to dismissal by the Government and to request a hearing on a number of grounds, among them that "the settlement or *dismissal is unreasonable* in light of existing evidence." *Id.* at 5 (quoting S. Rep. No. 99-345, at 26 (1986)). But this version of the statute was not the one ultimately enacted, and we are bound to interpret the language that Congress actually used.

1. The Standard We Adopt

The standard applicable to the Government's motion to dismiss follows logically from the FCA's request that the Government intervene before seeking dismissal. Having intervened, the Government becomes a party, and like any party, it is subject to the Federal Rules of Civil Procedure, including the rule governing Voluntary Dismissal.

That is Rule 41(a), which establishes different standards for a motion to dismiss depending on the procedural posture of the case. If the motion is filed before the defendant files an answer or summary judgment motion, "the plaintiff may dismiss an action without a court order" simply by filling a "notice of dismissal." Fed. R. Civ. P. 41(a)(1)(A). The effect of that notice is "automatic and immediate," such that "no order of the district court is needed to end the action," *In re Bath & Kitchen Fixtures Antitrust Litig.*, 535 F.3d 161, 165 (3d Cir. 2008). But once the action has passed the "point of no return," *id.* (quoting *Manze v. State Farm Ins. Co.*, 817 F.2d 1062, 1065 (3d Cir. 1987)), with the filing of the defendant's responsive pleading, then "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper."[14] Fed. R. Civ. P. 41(a)(2). We see no reason for these standards to apply with less force in a *qui tam* action than they do in any other civil action. As this Court has recently noted, "[i]t could hardly be clearer" that Congress intended the False Claims Act to establish "civil" proceedings, *i.e.*, "lawsuits brought in accordance with the Federal Rules of Civil Procedure," *United*

[14] We note that, as a practical matter, the considerations that inform the Government's showing of "good cause" to intervene pursuant to § 3730(c)(3) and those that convince the District Court that dismissal is "proper" under Rule 41(a) may well converge. But, as a legal matter, these are distinct inquiries, so, while the Government may move to intervene and dismiss simultaneously, these motions must be resolved by the District Court independently and in sequence.

States ex rel. Int'l Bhd. of Elec. Workers Local Union No. 98 v. Farfield Co., 5 F.4th 315, 336 (3d Cir. 2021).[15]

Of course, the FCA does add certain wrinkles. For example, while Rule 41(a) "obviously does not authorize an intervenor-plaintiff to effect involuntary dismissal of the original plaintiff's claims," *CIMZNHCA*, 970 F.3d at 850, the FCA permits the Government-as-intervenor to "dismiss the action notwithstanding the objections of the person initiating the action," 31 U.S.C. § 3730(c)(2)(A). And while a pre-answer notice of dismissal under Rule 41(a)(1)(A) is self-effectuating, "invit[ing] no response from the district court and permit[ting] no interference by it," *Bath & Kitchen*, 535 F.3d at 165, the FCA statute, even at that stage, requires the relator be given notice and an opportunity for a hearing before the case is dismissed, 31 U.S.C. § 3730(c)(2)(A). But these small modifications do not render Rule 41(a) inapplicable. To the contrary, such modifications are expressly contemplated by the Rule itself, which functions "[s]ubject to . . . any applicable federal statute." Fed. R. Civ. P. 41(a)(1)(A).

In practice, then, when the Government moves to dismiss a relator's case pursuant to § 3730(c)(2)(A), it must do so within the framework of Rule 41(a). The relator must receive notice and an opportunity for a hearing, 31 U.S.C. § 3730(c)(2)(A), and the Government must meet whatever threshold the relevant prong of Rule 41(a) requires. If the defendant has yet to answer or move for summary judgment, the Government is entitled to dismissal, Fed. R. Civ.

[15] That Congress intended the FCA to function hand in glove with the Federal Rules of Civil Procedure is apparent in the numerous cross-references to the Rules in the text of the statute. *See, e.g.*, 31 U.S.C. § 3730(b)(2) (requiring relator to serve materials on the Government "pursuant to Rule 4(d)(4)"); *id.* § 3730(b)(3) (directing service upon the defendant "pursuant to Rule 4"); *id.* § 3732(a) (instructing a summons in actions brought under section 3730 to be issued and served "as required by the Federal Rules of Civil Procedure").

P. 41(a)(1)(A), albeit with an opportunity for the relator to be heard,[16] 31 U.S.C. § 3730(c)(2)(A), subject only to the bedrock constitutional bar on arbitrary Government action.[17] *See CIMZNHCA*, 970 F.3d at 850-52. And if the litigation is already past that "point of no return," *Bath & Kitchen*, 535 F.3d at 165, then dismissal must be "only by court order, on terms the court considers proper." Fed. R. Civ. P. 41(a)(2).

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[16] The interplay of Rule 41(a)(1)(A) and § 3730(c)(2)(A) leads to the "seem[ingly] counterintuitive" conclusion that a district court may hold a hearing on a pre-answer Government motion to dismiss at which it has no substantive role. *CIMZNHCA*, 970 F.3d at 850. But as the Seventh Circuit observed, Rule 41(a)'s procedures rest atop the foundation of bedrock constitutional constraints on Government action, such that even a pre-answer dismissal could not violate the relator's rights to due process or equal protection. *Id.* at 851-52 (citing *Sequoia*, 151 F.3d at 1145; *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). So in "exceptional cases [these constitutional limits] could supply the grist for the hearing under § 3730(c)(2)(A)." *Id.* at 852.

[17] Polansky argues that the Government's dismissal was arbitrary and irrational because it did not "assess[] the potential benefits" of proceeding with the case, namely, the "potential *billion*-dollar recovery" it would receive if Polansky prevailed. Polansky Br. 36 (emphasis in original). But, even assuming a relator has a property interest in a *qui tam* action, *see supra* n.5, this argument misunderstands the showing of arbitrariness that due process requires. "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (internal quotation omitted). Thus, the constitutional question would not be whether the Government adequately weighed the costs and benefits of its actions, but whether there was "executive abuse of power" that "shocks the conscience." *Id.* In any event, Polanksy has not come close to meeting that exceedingly high standard.

As an important caveat, we note that, even in a typical case between private parties, dismissal at this later stage "should be allowed unless defendant will suffer some prejudice other than the mere prospect of a second lawsuit," *Estate of Ware v. Hosp. of the Univ. of Pa.*, 871 F.3d 273, 285 (3d Cir. 2017) (quoting *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 863 (3d Cir. 1990)), and that rule carries particular force, with constitutional implications in an FCA case, where it is the Government seeking to dismiss a matter brought in its name.[18] *See* 31 U.S.C. § 3730(c)(1) (requiring that, once the Government has intervened in an FCA action, "it shall have the primary responsibility for prosecuting the action"); *id.* § 3730(c)(2)(A) (allowing the Government to dismiss "notwithstanding the objections of the [relator]"); *CIMZNHCA*, 970 F.3d at 850

[18] While the FCA authorizes the Government, once having intervened, to dismiss the action, Rule 41(a)(2) vests a "broad grant of discretion" in district courts to dismiss "'on terms that the court considers proper,'" *Carroll v. E One Inc.*, 893 F.3d 139, 146 (3d Cir. 2018) (quoting Fed. R. Civ. P. 41(a)(2)), and we do not foreclose the court's ability to exercise that discretion to mitigate against extraordinary prejudice in an exceptional case. *Cf. Frank v. Crawley Petroleum Corp.*, 992 F.3d 987, 998 (10th Cir. 2021) (observing, in a typical case, that a district court addressing a Rule 41(a)(2) dismissal must "consider the equities not only facing the defendant, but also those facing the plaintiff" (internal quotation omitted)); *Estate of Ware v. Hosp. of the Univ. of Pa.*, 871 F.3d 273, 285 (3d Cir. 2017) (same). While the FCA imposes significant restrictions on such terms, *e.g.*, 31 U.S.C. § 3730(f) (disallowing the recovery of fees and costs against the Government); *cf. Int'l Bhd. of Elec. Workers Local Union No. 98*, 5 F.4th at 337 (noting that "the FCA does not authorize the award of prejudgment interest or consequential damages, which typically accompany recovery for fraud" (citing *Cook Cnty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 131 (2003))), we do not rule out the possibility that others remain available, *e.g.*, *Raab v. City of Ocean City, N.J.*, 833 F.3d 286, 296 (3d Cir. 2016) (imposing court's "retention of jurisdiction" over an agreement between the parties).

(explaining that the standards set out in Rule 41(a) are limited by "any applicable background constraints on executive conduct in general"); *see also Seila Law*, 140 S. Ct. at 2205 (noting that "separation of powers" is a "foundational doctrine").

2. The Alternative Approaches Among the Courts of Appeals

While we respect and have carefully weighed the considered views of other courts, we are satisfied that we have chosen the best path forward.

The D.C. Circuit has interpreted § 3730(c)(2)(A) to "give the government an unfettered right to dismiss an action." *Swift*, 318 F.3d at 252. It reached that conclusion by analogizing the Government's motion to the exercise of prosecutorial discretion, *id.*, which is reserved to the executive, and reasoning that "[n]othing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Id.* at 253. While the Court acknowledged that § 3730(c)(2)(A)'s hearing requirement "points to a role for the courts in deciding whether the case must go forward despite the government's decision to end it," it concluded that the "function of a hearing" is "simply to give the relator a formal opportunity to convince the government not to end the case." *Id.*

Appellees (alongside amicus United States Chamber of Commerce, Commerce Br. 9-10) have pressed these points with us as well, but we are unconvinced. For one, the analogy to prosecutorial discretion is too loose a fit because *qui tam* actions involve not just the Government but also the relator in the role of "prosecutors," each with its own interest in the action. And as Congress recognized in assuring the relator a hearing on the Government's motion, those interests can be different.

In addition, reading § 3730(c)(2)(A) to give the Government "unfettered" discretion to dismiss would make it

incongruous with other provisions of the FCA. For example, § 3730(b)(1) requires "the court and the Attorney General [to] give written consent" for the relator to voluntarily dismiss an action. Appellees' reading thus would mean that the court had more of an oversight role when the Government and relator agreed to dismiss than it would when the Government wanted to force a dismissal against the relator's will. Likewise, because § 3730(c)(2)(B) requires a court to find a proposed settlement, to which a relator objects, to be "fair, adequate, and reasonable," Appellees' reading would require more judicial oversight of an opposed *settlement* than of a *dismissal*—despite the far more severe consequences for the relator.[19] Finally, an unfettered discretion standard creates tension with § 3730(c)(2)(A)'s provision for a hearing, which implies some role for the Article III judge; in contrast, that standard would limit the court's role to "serv[ing] . . . some donuts and coffee . . . while the parties carry on an essentially private conversation in its presence." *CIMZNHCA*, 970 F.3d at 850 (internal quotation omitted).

Polansky asks us to go the other way and adopt the rational relation test promulgated by the Ninth Circuit and followed by the Tenth, which is drawn from the former's substantive due process jurisprudence. *See Sequoia*, 151 F.3d at 1145; *Ridenour*, 397 F.3d at 936. Under this test, the court requires "(1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the

[19] The share of the proceeds that a relator receives, either by settlement or judgment award, is a function of the Government's role in the action. If the Government "proceeds with [the] action," the relator is entitled to between 15 and 25 percent of the recovery. 31 U.S.C. § 3730(d)(1). If the Government does not proceed, the relator receives between 25 and 30 percent of the recovery, plus attorneys' fees and costs. *Id.* § 3730(d)(2). But if the Government merely dismisses, the relator gets nothing, as there is no possibility for recovery. As one amicus puts it, "a dismissal is effectively a settlement for zero dollars." TAFEF Br. 14.

purpose." *Sequoia*, 151 F.3d at 1145. If the Government satisfies that two-prong test, "the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Id.* (internal quotation marks omitted).

But neither does that slipper fit. The right against arbitrary government action may provide a constitutional floor, but the Federal Rules of Civil Procedure are built above it, and the Ninth Circuit's approach omits that structure entirely. And Rule 41(a) duly provides standards for voluntary dismissal, promulgated by the Supreme Court and with Congressional oversight.

In sum, our review of the alternate approaches confirms the one on which we have settled: When the Government declines to adopt a relator's FCA action, and the relator elects to proceed on his or her own, the Government must intervene pursuant to § 3730(c)(3) before it can seek to dismiss under § 3730(c)(2)(A). And when it does so, its motion to dismiss is governed by the provisions of Rule 41(a).

C. Whether the District Court's Grant of Dismissal was a Reasonable Exercise of Discretion

Having clarified the operation of § 3730(c)(2)(A), we now consider the propriety of the District Court's order in this case granting the Government's motion to dismiss. While we ordinarily review a district court's grant of a motion to dismiss de novo, *see Chang*, 938 F.3d at 386-87 (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir. 2009)), we review a district court's order under Rule 41(a)(2) for an abuse of discretion. *Carroll v. E One Inc.*, 893 F.3d 139, 145 (3d Cir. 2018).

We start with the requirement that the Government intervene under § 3730(c)(3) before seeking to dismiss the relator's case. Although the Government did not formally file such a motion before the District Court, that is no cause for remand on this record. Instead, we construe the Government's motion

to dismiss as including a motion to intervene because "intervention was in substance what the government sought and in form what the False Claims Act requires." *CIMZNHCA*, 970 F.3d at 849 (treating a government motion to dismiss as a motion to intervene as well); *see also Swift*, 318 F.3d at 252 (assuming that, if intervention "were . . . a requirement, we could construe the government's motion to dismiss as including a motion to intervene"). And, by thoroughly examining the Government's stated reasons for moving to dismiss and granting the motion, the District Court necessarily found the Government had shown the "legally sufficient reason" for intervening that good cause requires. *CIMZNHCA*, 970 F.3d at 846.

Moving on to the District Court's grant of dismissal, we perceive no abuse of discretion. The Court exhaustively examined the interests of the parties, their conduct over the course of the litigation, and the Government's reasons for terminating the action. It discussed, for instance, the litigation costs that Polansky's suit imposed on the Government, including "internal staff obligations," "anticipated . . . document production," and the need to expend attorney time preparing and defending depositions of CMS personnel. *Polansky*, 422 F. Supp. 3d at 928. It also noted three events that took place in the run-up to the Government's motion that justified its interest in discontinuing the action: (1) the Government and Polansky apparently disagreed on the extent to which Polansky had actually narrowed his case pursuant to their agreement; (2) EHR deposed Polansky; and (3) a mere five days before the Government sought to dismiss the case, the District Court overruled the Government's objections to the Special Master's rejection of its deliberative process privilege and ordered it to begin producing documents.

The District Court also adequately considered the prejudice to the non-governmental parties, concluding that, even though the litigation was at an advanced stage and significant resources had been expended on it by both the parties and the Court, there was little risk of prejudice to EHR because it supported the Government's motion. As for Polansky, the District

Court considered his argument that, by dismissing the case, the Government was "leaving billions of dollars of potential recovery on the table," but concluded that there were "genuine concerns" that "the potential benefits he highlights will be realized," both because Polansky maintained he had significantly narrowed his claims and because the prospect of success was doubtful. *Id.* at 927. The Court also noted that Polansky had engaged in potentially sanctionable conduct during the course of discovery, and that this "behavior was material and plays a role in the final disposition of this case." *Id.* at 920.

In light of this thorough examination and weighing of the interests of all the parties, and Rule 41(a)(2)'s "broad grant of discretion" to shape the "proper" terms of dismissal, we conclude that District Court did not abuse its discretion in granting the Government's motion to dismiss on the terms that it did. *Carroll*, 839 F.3d at 146. We will, therefore, affirm the dismissal of Polansky's action.