No. 18-418

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*,
LEATRA HARPER, *et al.*,

Petitioners,

v.

MUSKINGUM WATERSHED
CONSERVANCY DISTRICT,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Sixth Circuit correctly hold that Petitioners do not plausibly state a claim under the reverse-false-claim (31 U.S.C. § 3729(a)(1)(G)) and the conversion (31 U.S.C. § 3729(a)(1)D)) provisions of the False Claims Act when Petitioners failed to satisfy the new scienter requirement (31 U.S.C. § 3729(b)) by not alleging facts showing that Respondent knowingly violated an alleged obligation to the United States pursuant to the Flood Control Act of 1939?

CORPORATE DISCLOSURE STATEMENT

Respondent Muskingum Watershed Conservancy District ("MWCD") is not a subsidiary or affiliate of a publicly-owned corporation. No publicly-owned corporation has a financial interest in the outcome.

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INTRODUCTION

Petitioners are three Ohio residents opposed to hydraulic fracturing ("fracking"), a drilling method used to extract natural gas. (*See* Pet. App. at A-3.) This is the second appeal involving a False Claims Act challenge by Petitioners to oil and gas leases entered into by Muskingum Watershed Conservancy District ("MWCD"). (*Id.*) In the first appeal, *United States ex rel. Harper v. Muskingum Watershed Conservancy District,* 842 F.3d 430 (6th Cir. 2016) ("*Harper I*"), the Sixth Circuit found that Petitioners failed to state a claim under the FCA's conversion and reverse-false-claim provisions because their complaint did not adequately allege that MWCD knew it had violated an obligation to the United States. (*Id.*) This Court denied Petitioner's Petition for a Writ of Certiorari in *Harper I* on October 2, 2017.

In the instant case ("*Harper II*"), Petitioners again claim that MWCD violated statutory and contractual obligations under the 1939 Flood Control Act by failing to transfer property interests to the United States after MWCD entered into four fracking leases from 2011-2014. (Pet. App. at A-6.) As in *Harper I,* Petitioners sued the same defendant (MWCD) under the same statute (the FCA's reverse-false-claim and conversion provisions) in a case involving the same transactions and operative facts (the four fracking leases). The government again declined to intervene. (*Id.*)

On September 20, 2016, MWCD filed a motion to dismiss *Harper II.* The district court granted MWCD's motion, concluding that the claims asserted in *Harper II* were barred under the doctrine of claim preclusion

because they should have been brought in *Harper I* or, in the alternative, that the lawsuit stemming from an alleged violation of the 1939 Flood Control Act was time-barred under the FCA's six-year statute of limitations. (Pet. App. at A26-33.) The Sixth Circuit affirmed, holding that the complaint in *Harper II* was similarly deficient to the complaint in *Harper I.* (*Id.* at A-7-9.) Because the Sixth Circuit held that the amended complaint in *Harper II* "fails to state a viable claim in any event," it did not reach the district court's finding that the lawsuit was barred by the claim preclusion doctrine or time-barred under the FCA statute of limitations.

This Court should deny the Petition because the Sixth Circuit's ruling in *Harper II* is correct and creates no conflict with the precedent of this Court or any other circuit court. *First,* Petitioners mischaracterize the Sixth Circuit's ruling, incorrectly arguing it imposes a "subjective scienter test" that "provides for a mistake of law defense," requires "pleading lack of mistake of law in the complaint," and "ignores liability based on constructive knowledge." (Pet. at 11.) *Second,* these strained and disjointed legal arguments function as an elaborate legal justification designed to obscure the unmistakable fact that Petitioners simply do not meet the new FCA scienter requirement or the pleading standards of Rule 8. Petitioners cobble together an amalgam of legal arguments and rely on inapposite Supreme Court precedent in an unsuccessful attempt to support their mischaracterization of the Sixth Circuit's ruling. (*See* Pet. at 10-19.) Yet none of the three cases upon which Petitioners primarily rely – *Safeco Insurance Company of America v. Burr,* 551 U.S. 47, n.20 (2007); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* 559 U.S.

573 (2010), and *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 579 U.S. __, 136 S. Ct. 1989 (2016) – address the scienter requirements for claims brought under the reverse-false-claim or conversion provisions of the FCA. They are therefore wholly irrelevant.

Third, to the extent that these three cases have any relevance to this action, all of them support the Sixth Circuit's ruling. And all of them have one thing in common: they all resolved a circuit split of authority. There is no circuit split here. Nor is it likely that a circuit split will develop because the Sixth Circuit's ruling is consistent with this Court's recognition that the FCA "is not an all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract." *Escobar*, 136 S. Ct. at 2003, citing *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008); *see also United States v. Southland Mgt. Corp.*, 326 F.3d 669, 684 (5th Cir. 2003); *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1271 (D.C. Cir. 2010). The Sixth Circuit's decision is also consistent with other circuit court decisions that recognize the FCA does not permit liability for innocent mistakes. *See, e.g., Science Applications Intern. Corp.*, 626 F.3d at 1274-75; *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1058 (11th Cir. 2015); *United States v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013). It is further consistent with other circuit court decisions holding that "a defendant's reasonable interpretation of any ambiguity inherent in the regulations belies the scienter necessary to establish a claim of fraud under the FCA." *United States ex rel. Hixson v. Health Mgt. Sys., Inc.*, 613 F.3d 1186, 1191 (8th Cir. 2010); *see also United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378, (D.C. Cir. 2000); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996).

Putting aside Petitioners' mischaracterization of the lower court's ruling and the lack of any circuit split, this case is an exceedingly poor vehicle to resolve the question presented. *First*, while Petitioners attempt to cast their question presented as a purely legal issue, the Sixth Circuit's decision clearly turned on a case-specific analysis of whether the facts alleged satisfied the pleading requirement set forth in Rule 8 and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). There is no basis for reconsideration of that fact-bound decision by this Court. Nor does the Petition argue that the Sixth Circuit's ruling affirming the district court's order dismissing the case with prejudice was incorrect.

Second, even if the question presented by Petitioners merited this Court's review, consideration of that issue would ultimately be fruitless in light of the alternative grounds for dismissal of this case: that *Harper II* is barred by the claim preclusion doctrine and that the lawsuit was filed over 70 years too late and is thus time-barred by the FCA's statute of limitations. (Pet. App. A-36-44, 53.) Moreover, dismissal is also appropriate because *Harper II* is barred by the public disclosure doctrine inasmuch as it is undisputed that national and local media covered the MWCD's decision to enter into the four fracking leases. Petitioners also are not "original sources" because none of the allegations in either of the complaints in *Harper II* show that Petitioners' knowledge is independent of or materially adds to the public information.

Accordingly, this Court should deny certiorari given the soundness of the Sixth Circuit's decision and the absence of any circuit conflict, as well as the fact that this case is undoubtedly a poor vehicle to resolve the question presented.

RESTATEMENT OF THE CASE

A. Factual Background

The MWCD was created in 1933 for flood-control and water-conservation purposes. (Pet. App. at A-4.) The following year, MWCD entered an agreement with the United States to construct dams and reservoirs within the district. (*Id.*) That project (the "MWCD Project") was later declared a flood-control project pursuant to the Flood Control Act of 1939. (*Id.*) Under the Act, the Secretary of the Army was to pay MWCD $1,500,000 in exchange for title to MWCD Project "lands, easements, rights-of-way, and other property." (*Id.*) The Department of the Army paid that amount, less $100,000 in expenses, in August 1939. (*Id.*) In November of that year, MWCD requested that the Governor of Ohio seek the state attorney general's opinion as to MWCD's authority to transfer the property. (*Id.*) The Ohio Attorney General concluded that MWCD lacked authority to transfer property interests that were necessary to perform its charter purposes. (*Id.*) The Army accepted flowage easements on Project lands in May 1940. (*Id.*)

From 2011 to 2014, MWCD entered into four leases allowing various companies to extract oil, gas, and other minerals from Project lands via fracking. (*Id.*) Beginning in 2012, MWCD also sold water from reservoirs on Project lands. (*Id.*) MWCD received and retained millions of dollars as a result of the leases and water sales. (*Id.*)

B. Procedural History

1. *Harper I*

As the district court noted in *Harper II*, "an understanding of [*Harper I*] is critical to the analysis of Respondent's dispositive motion." (Pet. App. at A-16.) In *Harper I*, Petitioners alleged that MWCD was obligated to return certain property deeded to it by the United States in 1949. (Pet. App. at A-3-4.) The deed "provided that if MWCD 'shall cease using said lands' for recreation, conservation, and reservoir development, or if MWCD 'alienate[s] or attempt[s] to alienate any part or parts thereof, the title to said lands shall revert to and revest in the United States.'" (Pet. at A-4, citing *Harper I*, 842 F.3d at 434.) Petitioners in *Harper I* argued that the fracking leases either "represented an 'attempt to alienate' the land that triggered the reverter clause in the deed" or signaled "that the land was no longer being used for 'recreation, conservation, and reservoir development' as the deed required." (*Id.*) Thus, the relators argued, "MWCD was improperly in possession of United States property." (*Id.*) They sued, invoking the reverse-false-claim and conversion provisions of the FCA. (*Id.*) The United States declined to intervene. (*Id.*)

The district court concluded that the *Harper I* claims were barred by the FCA's public disclosure provision, which requires dismissal:

> if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(*Id.* at A-5) (citing *Harper I*, 842 F.3d at 434; 31 U.S.C. § 3730(e)(4)(A)). In the alternative, the district court found that the complaint failed to state a claim because it did not allege fraud with particularity as required by Federal Rule of Civil Procedure 9(b). (Pet. App. at A-5) (citing *Harper I*, 842 F.3d at 434.) The Sixth Circuit affirmed the district court's order dismissing *Harper I* on the ground that Petitioners had failed to adequately allege the requisite knowledge "even under the more liberal pleading standard set forth in" Rule 8. (Pet. App. at A-5).

Petitioners filed an unsuccessful Petition for Rehearing and Rehearing *En Banc* ("petition for rehearing"), arguing that the Sixth Circuit's decision rejecting Petitioner's statutory interpretation of the new FCA scienter provision "directly contradicts" this Court's 2009 decision in *Safeco Insurance Company of America v. Burr,* 551 U.S. 47, 70 n.20 (2007). (Case No. 15-4406, R. 29 at 8.) (*Harper I,* 6th Cir. Case No. 15-4406, Dkt. No. 31.) The Sixth Circuit denied the petition for rehearing. (*Id.* at Dkt. No. 32.)

On April 21, 2017, Petitioners filed a Petition for a Writ of Certiorari with this Court. (Case No. 16-1278.) This Court denied the Petition on October 2, 2017. (*Id.*)

2. *Harper II*

a. The District Court Granted MWCD's Motion to Dismiss *Harper II* With Prejudice

While *Harper I* was pending, the Petitioners filed *Harper II* on August 12, 2015, alleging that MWCD violated statutory and contractual obligations by failing to transfer property interests to the United States after determining that those interests were no longer necessary to perform its charter purposes. (N.D. Ohio Case No. 5:15-cv-0168, Compl., Dkt. No. 1.) Petitioners filed their First Amended Complaint in *Harper II* on August 17, 2016. (*Id.*, First Am. Compl., Dkt. No. 11.)

As in *Harper I*, Petitioners in *Harper II* brought suit under the FCA's reverse-false-claim and conversion provisions. Significantly, *Harper II* – like *Harper I* – was brought by the same relators against the same defendant pursuant to the same FCA statute (31 U.S.C. § 3729) and involves the same operative facts (four fracking leases entered into by MWCD from 2011 to 2014). Moreover, Petitioners acknowledged in the district court civil cover sheet that *Harper II* was related to *Harper I.* (*Id.,* Civil Cover Sheet, Dkt. No. 1-1.)

The government again declined to intervene. MWCD moved to dismiss for failure to state a claim on the following grounds: (1) the claims are barred by the claim preclusion doctrine; (2) the lawsuit is time-barred by the

FCA statute of limitations; (3) like *Harper I, Harper II* is barred by the public disclosure doctrine; (4) like *Harper I, Harper II* fails because Petitioners are not "original sources" within the meaning of the FCA; and (5) like *Harper I,* Petitioners do not state plausible reverse-false-claim and conversion claims under the FCA pursuant to Fed. R. Civ. P. 12(b)(6). (*Id.,* Mot. to Dismiss, Dkt. No. 17.)

The district court granted the motion, concluding that the claims asserted in *Harper II* were barred under the doctrine of claim preclusion because they should have been brought in *Harper I.* (Pet. App. at A-23-33.)[1] The district court recognized that "under the Sixth Circuit's articulation of federal claim preclusion, a claim will be barred by the prior litigation if the following four elements are present:" (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or should have been litigated in the prior action; and (4) an identity of the causes of action." (Pet. App. at A-25) (citing *Raw v. Liberty Mut. Fire Ins. Co.,* 462 F.3d 521, 528 (6th Cir. 2006); *Kane v. Magna Mixer Co.,* 71 F.3d 555, 560 (6th Cir. 1995); *Bittinger v. Tecumseh Prods. Co.,* 123 F.3d 877, 880 (6th Cir. 1997).

At the outset, the district court correctly recognized that Petitioners only challenged the third and fourth elements of the claim preclusion doctrine. With respect

1. Because the district court found that *Harper II* was barred by the doctrine of claim preclusion, the district court found that it need not reach Petitioners' alternative arguments. (Pet. App. at A-23-24.)

to the third element of the claim preclusion doctrine, the district court noted that "litigants cannot avoid the effects of claim preclusion by merely repacking their grievances into alternative theories of recovery or by seeking different remedies." (Pet. App. at A-27) (citing *Heike v. Cent. Mich. Univ. Bd. of Tr.,* 573 Fed. App'x 476, 482 (6th Cir. 2014). The district court then held that the issues in *Harper II* actually were or should have been litigated in *Harper I*:

> Both actions arise from the exact same series of transactions—the four fracking leases entered into by MWCD between 2011 and 2014. In each case, relators have maintained that, upon entering into these leases, MWCD was obligated to return the property to the federal government. The only legal difference between the two actions is the basis upon which relators believe the signing of the leases triggered a duty to return the property. In *Harper I*, relators relied on the reverter clause in the 1949 deed to impose liability under the FCA. In contrast, in *Harper II*, relators look to the 1939 Act for the legal hook for their FCA claims. Still, in both cases, relators have alleged that the act of entering into the leases signaled the fact that MWCD was no longer utilizing the property for its intended purposes of recreation and conservation.

(Pet. App. at A-27-28.) The district court rejected Petitioners' argument that the two lawsuits do not arise from the same series of transactions because *Harper I* arose from a reversion clause in a 1949 deed and *Harper II*

arose from a 1939 statute. (Pet. App. at A-28-29.) In doing so, the district court correctly held that Petitioners "are confusing the factual transactions that underlie their cases with the legal theories upon which they believe they are entitled to relief." (*Id.* at Pet. App. at A-28.) Specifically, "the series of transactions that give rise to each case are the fracking leases; the 1939 Act and the 1949 deed merely supply the legal theories for recovery." (*Id.*) The district court therefore held that MWCD met the third element of claim preclusion because Relators "cannot challenge the legality of the leases on one theory in *Harper I* and assert a different theory in [Harper II]." (*Id.* at A-29.)

Similarly, the district court held that the fourth element of the claim preclusion doctrine – the identity of claims – also compelled dismissal because "both actions arose out of the lease agreements MWCD entered into between 2011 and 2014, and therefore both share the same core of operative facts." (Pet. App. at A-30.) Indeed, the district court observed that "the FAC lifts almost verbatim much of the pleading in *Harper I* for use in *Harper II*." (*Id.*) The district court recognized that "[i]t does not matter that the underlying bases for recovery in *Harper I* and *Harper II* are different" (*id.*, citing *Heike*, 573 F. App'x at 483), and "the fact that Relators also seek to recover proceeds from MWCD's water sales does not change the significant factual overlap between the two actions." (Pet. App. at A-30) (citing *United States v. Tohono O'odham Nation*, 563 U.S. 307, 318 (2011)).

Additionally, the district court rejected Petitioners' argument that an exception to the claim preclusion doctrine exists. Specifically, the district court noted that Petitioners argued they could not have amended the

complaint in *Harper I* to bring their claims relative to the 1939 Act because it would have required refiling of the action under seal, and a failure to file under seal would have deprived the court of subject matter jurisdiction over the new claims. (Pet. App. at A-30-31.) The district court, however, recognized that even before this Court's holding in *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, -- U.S. --, 137 S. Ct. 436, 442 (2016), "the majority of district courts held that the FCA's mandatory filing requirement did not apply to amended complaints, especially where, as here, an amended complaint makes similar allegations of fraud and the government has already been afforded an opportunity to consider whether to intervene." (*Id.* at A-31). (collecting cases).

Moreover, the district court held that "even if the resealing of an amended complaint had been a jurisdictional requirement, relators have failed to identify any impediments in *Harper I* seeking leave to file an amended complaint under seal." (*Id.* at A-32.) Indeed, the district court pointed out that "Relators never sought, and therefore were never denied leave to amend the complaint in *Harper I* to add their claims under the 1939 Act." (*Id.)*

Finally, the district court also suggested that MWCD's Motion to Dismiss could be granted because it was time-barred under the FCA "based on allegations in the FAC that MWCD was aware of its duty to transfer the property as early as 1939." (*Id.* at Pet. App. A-34-35, n.4.) The district court rejected Petitioners' argument that *Harper II* "was not filed beyond the FCA's 6-year statute of limitations because it was not until 2011 to 2014 (the time MWCD executed the fracking leases) that MWCD no longer had a legal limitation on its ability to

transfer the property to the federal government." (*Id.*) The district court found that "Relators simply cannot have it both ways," explaining that "[i]f the operative facts at the heart of *Harper II* giving rise to the claims asserted therein really were the actions centering on the 1939 Act, then the present action was filed approximately 70 years too late." (*Id.*)

Accordingly, the district court dismissed *Harper II* with prejudice. Petitioners appealed.

b. The Sixth Circuit Affirmed The District Court's Order Dismissing *Harper II*

The Sixth Circuit in *Harper II* affirmed the district court's order granting the motion, holding that Petitioners failed to state a claim under the FCA's reverse-false-claim and conversion provisions because their complaint did not adequately allege that MWCD knew it had violated an obligation to the United States. (Pet. App. at A-3; A-7-10.) The Sixth Circuit in *Harper II* also affirmed the dismissal of the case with prejudice, finding that Petitioners gave no indication that their complaint could be amended to satisfy federal pleading standards. (*Id.* at A-10-12.)

i. Petitioners' Reverse-False-Claim Count

At the outset, the Sixth Circuit recognized that the reverse-false-claim provision of the FCA subjects to liability any person who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." (*Id.* at A-7) (citing 31 U.S.C. § 3729(a)(1)(G)). The Sixth Circuit

explained that "the term 'knowingly,'" as used in § 3729(a)(1)(G), must be interpreted to refer to a defendant's awareness of both an obligation to the United States and his violation of that obligation.'" (Pet. App. at A-7, citing *Harper I,* 842 F.3d at 436.) The Sixth Circuit in *Harper II* found that in *Harper I,* because "neither the [Petitioners'] complaint nor their proposed amended complaint include[d] facts that show[ed] how MWCD would have known that the fracking leases violated the deed restrictions or how MWCD 'act[ed] in deliberate ignorance' or in 'reckless disregard' of that fact," that Petitioners "failed to show anything more than a possibility that MWCD acted unlawfully." (Pet. App. at A-7) (citing *Harper I,* 842 F.3d at 438). The complaints in *Harper I* thus fell short of federal pleading standards. (Pet. App. at A-7) (citing *Harper I,* 842 F.3d at 438) (quoting 31 U.S.C. § 3729(b)(1)(A)).

Applying this standard, the Sixth Circuit held in *Harper II* that Petitioners again failed to adequately plead awareness by MWCD that the leases violated an obligation to the United States. Specifically, the Sixth Circuit found that:

> The relators' amended complaint alleges that "[a]s shown by MWCD's [1939] Board minutes, MWCD was on notice of its statutory and contractual obligations to transfer the MWCD Project lands to the United States"; that there "was no limitation on MWCD's authority to fulfill its obligation to transfer" the property interests covered by the oil and gas leases to the United States because MWCD had determined that those interests "were no longer necessary for the performance of its

> charter purposes"; and that "[d]espite being on notice of the issues related to its statutory and contractual obligations as shown by MWCD's board minutes, and being legally obligated to address them, MWCD did nothing about its obligations.

(Pet. App. at A-7-8.) Viewed in the light most favorable to the relators, the Sixth Circuit held in *Harper II* that these allegations "could create the inference that MWCD knew about the [obligation to transfer] when it signed the leases, and such an inference would be consistent with the theoretical possibility that MWCD in fact believed that the [obligation] forbade it from executing the oil and gas leases." (*Id.* at A-8.) But the Sixth Circuit then noted that "a complaint that shows no more than 'the mere possibility of misconduct' on MWCD's part is insufficient." (*Id.*) (citing *Harper I,* 842 F.3d at 438) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

Referring again to *Harper I,* the Sixth Circuit held in *Harper II* that "unless the circumstances of a case show that a defendant knows of, or 'acts in deliberate ignorance' or 'reckless disregard' of, the fact that he is involved in conduct that violates a legal obligation to the United States, the defendant cannot be held liable under the FCA." (Pet. App. at A-8) (citing *Harper I,* 842 F.3d at 438) (quoting 31 U.S.C. § 3729(b)). Applying this standard, the Sixth Circuit found that "[t]he fact that MWCD was aware of an obligation in 1939 could mean that it believed more than seventy years later that the oil and gas leases violated that obligation, but as pleaded, the amended complaint fails to "nudge[ ] [the Petitioners'] claims across the line from conceivable to plausible." (Pet. App. at A-8-9

(citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

The Sixth Circuit rejected Petitioner's argument that they plausibly pled actual knowledge or reckless disregard of the obligation and its avoidance, finding that:

> This argument misses the point made clear in *Harper* I: it is not enough that a defendant was aware of an obligation and failed to fulfill it; rather, the defendant must also have been aware (or deliberately ignored or recklessly disregarded) that its actions violated the obligation.. A complaint that requires us to "make[ ] inference upon inferences" to supply missing facts does not satisfy Rule 8's pleading requirements. [Petitioners'] amended complaint does not plausibly allege that MWCD knew, at the time it entered the fracking leases, that the leases violated an obligation incurred in 1939. It thus fails to state a plausible claim for relief under the reverse-false-claim provision of the FCA.

(Pet. App. at A-9) (internal citations omitted).

ii. Petitioners' Conversion Count

The Sixth Circuit held in *Harper II* that the Petitioners' claim of conversion likewise fails. (*Id.* at A-10.) The Sixth Circuit noted that the FCA's conversion provision applies to any person who "has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than

all of that money or property." (*Id.*) (quoting 31 U.S.C. § 3729(a)(1)(D)). Based on the Sixth Circuit's finding that the complaint in *Harper II* lacks factual allegations showing that MWCD knew it was in possession of property belonging to the United States, the Sixth Circuit held that the conversion claim was therefore properly dismissed. (Pet. App. at A-10.)

Finally, the Sixth Circuit rejected Petitioners' argument that their complaint should not have been dismissed with prejudice without leave to amend, holding that "a district court does not abuse its discretion by failing to grant leave to amend where the plaintiff has not sought leave and offers no basis for any proposed amendment." (Pet. App. at A-11) (citing *Islamic Ctr. of Nashville v. Tennessee,* 872 F.3d 377, 387 (6th Cir. 2017); *Tucker v. Middelburg-Legacy Place, LLC,* 539 F.3d 545, 551 (6th Cir. 2008). Because Petitioners did not file a motion for leave to amend in conjunction with their response to MWCD's motion to dismiss and did not "offer[] any hint as to what they could add to their complaint that might satisfy Rule 8's pleading requirement," the Sixth Circuit held that the district court did not abuse its discretion in dismissing their complaint without leave to amend. (Pet. App. At A-12.)

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's Ruling Is Correct And Creates No Conflict With The Precedent Of This Court Or Any Other Circuit Court

A. Petitioners Mischaracterize The Sixth Circuit's Ruling

Petitioners mischaracterize the Sixth Circuit's ruling in *Harper II*. Specifically, Petitioners incorrectly argue that the Sixth Circuit's ruling imposes a "subjective scienter test" that "provides for a mistake of law defense," requires "pleading lack of mistake of law in the complaint," and "ignores liability based on constructive knowledge." (Pet. at 11.) The Sixth Circuit's ruling did none of these things.

Rather, the Sixth Circuit imposed an objective standard and, after carefully reviewing the factual allegations in Petitioners' amended complaint, found that Petitioners failed to plausibly allege that MWCD knew, at the time it entered the fracking leases, that the leases violated an obligation incurred in 1939. (*See* Pet. App. at A-9.) The Sixth Circuit thus held that Petitioners failed to state a plausible claim for relief under the reverse-false-claim and conversion provisions of the FCA. (*Id.* A-7-9.)

The Sixth Circuit's decision is entirely consistent with other circuit courts that have addressed the FCA's scienter standard. *See, e.g.*, *Hixson* 613 F.3d at 1191 (holding that "a statement that a defendant makes based on a reasonable interpretation of a statute cannot support a claim under the FCA if there is no authoritative

contrary interpretation of that statute," explaining "[t]hat is because the defendant in such a case could not have acted with the knowledge that the FCA requires before liability can attach."); *Jamieson Sci. & Eng'g, Inc.*, 214 F.3d at 1378 ("it is hard to see how [the relators] could ... have satisfied even the loosest standard of knowledge [under the FCA], i.e., acting in reckless disregard of the truth or falsity of the information, when the relevant legal question was unresolved"); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir.1996) (holding a defendant does not act with the requisite deliberate ignorance or reckless disregard by "tak[ing] advantage of a disputed legal question").

If Petitioners' interpretation were adopted, it would make 'the punitive treble damages and penalties afforced by civil FCA actions … interchangeable with remedies for ordinary breaches' of contract or property-law obligations.'" (*Harper I,* 842 F.3d at 437) (citing *United States v. Southland Mgt. Corp.,* 326 F.3d 669, 684 (5th Cir. 2003); *Sci. Applications Int'l Corp.,* 626 F.3d at 1271 ("strict enforcement of the FCA's scienter requirement" is necessary to "ensure that ordinary breaches of contract are not converted into FCA liability"); *see also Escobar,* 136 S. Ct. 1989 ("strict enforcement" of the FCA's "rigorous" scienter and materiality requirements is critical in order to address "concerns about fair notice and open-ended liability" under the "punitive" FCA). The Sixth Circuit's ruling is also consistent with the Senate Report to the FCA amendments, which declares that "[t]he Committee is firm in its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence." S. Rep. No. 99-345 at *7.

B. Petitioners Rely On Inapposite Precedent of This Court And, To The Extent This Precedent Has Any Relevance, It Lends Further Support To The Sixth Circuit's Ruling

In arguing that the Sixth Circuit's ruling is "at odds with … this Court's applicable precedents," (Pet. at 11), Petitioners cobble together an amalgam of legal arguments and rely on precedents of this Court that have no relevance to this action. (*See id.* at 10-19) (citing *Safeco,* 551 U.S. at 47 n.20 (2007); *Jerman,* 559 U.S. at 582-85 (2010), and *Escobar,* 136 S. Ct. at 2004 (2016)). Petitioners' strained and disjointed arguments that the Sixth Circuit ruling imposes a "subjective scienter test" that "provides for a mistake of law defense," requires "pleading lack of mistake of law in the complaint," and "ignores liability based on constructive knowledge" (Pet. at 11), are frequently difficult to follow. These arguments serve as elaborate legal justifications designed to obscure the fundamental fact that Petitioner cannot meet the FCA scienter pleading requirement. What is clear, however, is that none of the three cases upon which Petitioners rely addressed the meaning of "knowingly" as the scienter element of a claim under the reverse-false-claim or conversion provisions of the FCA. *See* 31 U.S.C. §§ 3729(b), 3729(a)(1)(D) and (G). Thus, for the reasons discussed below, these cases are not "applicable precedents" of this Court. And to the extent that any of these cases have any relevance to this action, all of them serve to lend further support to the Sixth Circuit's ruling.

1. The Sixth Circuit's Ruling Does Not Conflict With *Safeco*

Petitioners incorrectly argue that the Sixth Circuit's ruling ignores liability based on constructive knowledge and is thus contrary to *Safeco*, 551 U.S. 47 n.20. Petitioners misconstrue *Safeco* and misinterpret its application to this case. *Safeco* addressed whether "willful failure to comply" with the Fair Credit Reporting Act covers a violation committed in reckless disregard of the notice provision. *Id.* at 52. Neither a "willful failure" violation nor the Fair Credit Reporting Act are at issue here. More importantly, *Safeco* does not in any way conflict with the Sixth Circuit's ruling. In fact, *Safeco* supports it. Specifically, *Safeco* recognized in a footnote that:

> 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.*** Congress could not have intended such a result for those who followed an interpretation that could reasonably have found support in the courts, whatever their subjective intent may have been.

Id. at 70, n.20 (emphasis added). The Sixth Circuit's decision is entirely consistent with *Safeco* because it applied an objective scienter standard, holding that Petitioners did not plausibly allege that MWCD was aware (or deliberate ignored or recklessly disregarded) at the time that it entered the fracking leases that the

leases violated an obligation incurred in 1939. (Pet. App. at A-9). Significantly, the Sixth Circuit recognized that "a complaint that requires us to 'make inference upon inferences' to supply missing facts does not satisfy Rule 8's pleading requirements." (*Id.*, citing *Harper I,* 842 F.3d at 438). The Sixth Circuit's ruling is also consistent with other circuit court holdings regarding the FCA scienter standard. *See, e.g. Hixson,* 613 F.3d at 1191; *Jamieson Sci. & Eng'g, Inc.*, 214 F.3d at 1378; *Sonoma County Water Agency*, 81 F.3d at 1478. There is absolutely no need to revisit this sound decision.

Petitioners' argument that the Sixth Circuit's ruling "require[s] [Petitioners] to plead lack of mistake of law" (Pet. at 15) is wrong. The Sixth Circuit merely required Petitioners to identify the basis of MWCD's knowledge pursuant to *Iqbal* and the FCA scienter requirement. Because Petitioners failed to do so, dismissal was appropriate.

2. The Sixth Circuit's Ruling Does Not Conflict With *Jerman*

Petitioners also misconstrue *Jerman* and misinterpret its application to this case. *Jerman* is a Fair Debt Collection Practices Act ("FDCPA") case involving the application of an FDCPA statute, 15 U.S.C. § 1692k(c), that allows "modest statutory damages for 'intentional' conduct, including violations resulting from mistaken interpretation of the FDCPA." *Jerman,* 559 U.S. at 584. *Jerman* made clear that the scienter standard for an "intentional" violation is distinct from a "knowing" violation under the FDCPA. *See id.* at 582-83 ("an action may be 'intentional' for purposes of civil liability, even

if the actor lacked *actual knowledge* that her conduct violated the law.") (emphasis added). Further underscoring the distinction between a "knowing" and "intentional" violation under the FDCPA, *Jerman* recognized that "the more onerous penalties of the FTC Act were reserved for debt collectors whose intentional actions reflected "*actual knowledge or knowledge fairly implied on the basis of objective circumstances*." *Id.* at 584. (emphasis added). These more onerous penalties are balanced by the availability of a mistake-of-law statutory defense in FDCPA cases. *See id.*

Petitioners argue that the mere fact that the FDCPA explicitly provides for a mistake-of-law defense means that the FCA, a wholly separate statute, somehow precludes such a defense. (Pet. at 16-17). Petitioners' argument flies in the face of numerous relevant appellate decisions that recognize the FCA does not permit liability for innocent mistakes. *See, e.g., Science Applications Intern. Corp.*, 626 F.3d at 1274-75 ("Although Congress defined 'knowingly' to include some forms of constructive knowledge, its definition of that term imposes liability for mistakenly false claims only when the defendant deliberately avoided learning the truth or engaged in aggravated gross negligence"); *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1058 (11th Cir. 2015) (the FCA's "language makes plain that liability does not attach to innocent mistakes or simple negligence"); *United States v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013) ("innocent mistakes or negligence are not actionable under the FCA"). Petitioners' argument also conflicts with other circuit courts that have held that "a defendant's reasonable interpretation of any ambiguity inherent in the regulations belies the scienter necessary to establish a claim of fraud under the FCA."

Hixson, 613 F.3d at 1191; *see also Jamieson Sci. & Eng'g, Inc.*, 214 F.3d at 1378; *Sonoma County Water Agency*, 81 F.3d at 1478 (9th Cir.1996). Finally, Petitioners' argument conflicts with the legislative history of the FCA. *See* S. Rep. No. 99-345 at *7.

Thus, to the extent that *Jerman* has any relevance to this action, it – like *Safeco* – actually buttresses the Sixth Circuit's ruling because it required Petitioners to plead actual knowledge or knowledge that is fairly implied on the basis of objective facts in order to state an FCA claim under the reverse-false-claim or conversion provisions. (*See* Pet. App. at A-9-11). Because Petitioners' complaint in *Harper II* suffered from this fatal pleading deficiency, the Sixth Circuit's ruling should not be disturbed.

3. The Sixth Circuit's Ruling Does Not Conflict With *Escobar*

Escobar addressed the viability of the implied false certification theory of liability and the materiality requirement under the FCA, not the scienter requirement applicable to FCA claims brought under the reverse-false-claims and conversion provisions. For this reason, it is wholly distinguishable from the instant case. To the extent that *Escobar* has any relevance to this lawsuit, it buttresses the Sixth Circuit's ruling because it affirmed this Court's holding that "strict enforcement" of the FCA's "rigorous" scienter and materiality requirements is critical in order to address "concerns about fair notice and open-ended liability" under the "punitive" FCA. *Escobar*, 136 S. Ct. at 2002. It also affirmed that "the False Claims Act is not an 'all-purpose antifraud statute,' or a vehicle for punishing garden-variety breaches of contract or

regulatory violations." *Id.* at 2003, citing *Allison Engine,* 553 U.S. 662 at 672. Accordingly, there is no conflict with this Court's precedent.

C. There Is No Circuit Split To Resolve, Nor Is One Likely to Develop

While *Safeco, Jerman,* and *Escobar* presented dramatically different legal issues from the question presented for this Court's resolution, these three cases have one thing in common: all of them resolved a circuit split of authority. That is not the case here. Indeed, the Sixth Circuit in *Harper I,* 842 F.3d at 439, recognized that "no court aside from the district court in this litigation" has applied the new scienter requirements of § 3729(a)(1)(D) and 3729(a)(1)(G). No circuit court case was located that is contrary to the Sixth Circuit's scienter interpretation of the reverse-false-claims and conversion provisions of the FCA in *Harper I* or *Harper II.* Nor do Petitioners argue that any such circuit split exists.

Moreover, it is highly unlikely that a circuit split will develop. The Sixth Circuit's carefully reasoned ruling in *Harper II* was based upon the detailed statutory construction analysis set forth in *Harper I,* which in turn relied upon controlling precedent of this Court. *Harper I,* 842 F.3d at 436-37 (citing *Flores-Figueroa v. United States,* 556 U.S. 646, 650 (2009)). It is also entirely consistent with other circuit court decisions addressing the FCA scienter standard. *See Hixson,* 613 F.3d at 1191; *Siewick*, 214 F.3d at 1378; *Sonoma County Water Agency*, 81 F.3d at 1478 (9th Cir.1996).

The Sixth Circuit's holding is also consistent with the precedent of this Court and other circuits that the

purpose of the False Claims Act is "not an all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract." *Escobar*, 136 S. Ct. at 2003, citing *Allison Engine*, 553 U.S. 662, 672. Nor is it a mechanism for punishing innocent mistakes or negligence. *See, e.g., Science Applications Intern. Corp.,* 626 F.3d at 1274-75; *Urquilla-Diaz,* 780 F.3d at 1058; *United States v. King-Vassel,* at 712 (7th Cir. 2013). And as discussed below, a circuit split is unlikely to occur in light of the unique facts of this case. Accordingly, this Court should deny the Petition because no circuit split of authority exists, nor is it likely to develop.

II. This Case Is Not An Appropriate Vehicle For Resolving the Question Presented

A. Petitioners Seek Fact-Bound Error Correction Regarding Whether They State A Plausible Claim Under Rule 8, Which Does Not Merit This Court's Review

While Petitioners attempt to cast their question presented for review as a purely legal issue, the Sixth Circuit's decision clearly turned on a case-specific analysis of whether the facts alleged in petitioners' complaint satisfied the Rule 8 pleading standard set forth in *Iqbal* with respect to the FCA scienter requirement. This Court's rules make clear that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (Sup. Ct. R. 10.)

The Sixth Circuit in *Harper II* relied upon a statutory construction analysis of the FCA's scienter provision

that relied on this Court's precedents, closely reviewed Petitioner's complaint, and concluded that Petitioners did not "plausibly allege that MWCD knew, at the time it entered the fracking leases, that the leases violated an obligation incurred in 1939." (Pet. at A-9.) There is no basis for reconsideration of that fact-bound determination by this Court.

B. This Court Should Deny the Petition Because Of The Existence of Alternative Grounds for Dismissal

Even if the question presented by petitioners merited this Court's review, consideration of that issue would ultimately be fruitless in light of the alternative grounds for dismissal of this case. First, the district court held that *Harper II* was barred by the claim preclusion doctrine because "the claims arise from the same factual transactions in *Harper I,* which achieved a final decision on the merits and involved the same parties as this case." (Pet. App. At A33.) Second, the district court held that *Harper II* was barred by the FCA's six-year statute of limitation because "if the operative facts at the heart of *Harper II* giving rise to the claims asserted therein really were the actions centering on he 1939 Act, then the present action was filed approximately 70 years too late. (Pet. App. at A-35.)

Finally, this Court should deny the Petition because *Harper II* is barred by the public disclosure doctrine inasmuch as it is undisputed that national and local media covered the MWCD's decision to enter into the four fracking leases. Petitioners also are not "original sources" because none of the allegations in either of the

complaints in *Harper II* show that Petitioners' knowledge is independent of or materially adds to the public information.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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