No. 18-699

In the Supreme Court of the United States

BROOKDALE SENIOR LIVING COMMUNITIES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. MARJORIE PRATHER

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

BRIEF FOR THE AMERICAN HEALTH CARE ASSOCIATION AND NATIONAL CENTER FOR ASSISTED LIVING AS AMICI CURIAE SUPPORTING PETITIONERS

JAMES F. SEGROVES
Counsel of Record
ANDREW C. BERNASCONI
REED SMITH LLP
1301 K Street, NW
Suite 1000 - East Tower
Washington, DC 20005
(202) 414-9200
jsegroves@reedsmith.com

COLIN E. WRABLEY
REED SMITH LLP
255 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131

QUESTIONS PRESENTED

This Court has affirmed False Claims Act (FCA) liability, 31 U.S.C. § 3729 *et seq.*, under a theory of "implied false certification." *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1995 (2016). For that expanded theory of fraud liability to apply, however, the contractor's violation must be material to the government's decision to pay the claim, and the contractor must know it is material. *Id.* at 1996, 2002. Despite that holding, the Sixth Circuit held that a relator's failure to plead any facts regarding an alleged regulatory violation's effect on the government's past payment of claims "has no bearing on the materiality analysis" and that scienter can be established even where the relator does not allege that the defendant knew that the regulatory violation was material to the government's decision to pay claims. That decision directly conflicts with published decisions in other circuits regarding the proper enforcement of the FCA's materiality and scienter elements.

The questions presented are:

1. Whether the failure to plead facts relating to past government practices in an FCA action can weigh against a finding of materiality.

2. Whether an FCA allegation fails when the pleadings make no reference to the defendant's knowledge that the alleged violation was material to the government's payment decision.

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. STRICT ENFORCEMENT OF THE FCA'S RIGOROUS MATERIALITY AND SCIENTER REQUIREMENTS AT THE PLEADINGS STAGE IS NECESSARY TO LIMIT IMPLIED CERTIFICATION CLAIMS AND ROOT OUT MERITLESS AND COSTLY FCA SUITS 5

II. THE SIXTH CIRCUIT'S RULING PROVIDES A ROADMAP FOR CIRCUMVENTING *ESCOBAR* IN DIRECT CONTRAVENTION OF THIS COURT'S CLEAR AND UNANIMOUS HOLDING 11

III. THIS COURT'S REVIEW IS WARRANTED TO CLARIFY *ESCOBAR* AND BRING UNIFORMITY TO LOWER COURTS' APPLICATION OF THAT CRITICAL PRECEDENT 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases:

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) 8

Bailey v. Shell W. E&P, Inc., 609 F.3d 710 (5th Cir. 2010) 19

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 7, 8, 11

Chisom v. Roemer, 501 U.S. 380 (1991) 12

COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269 (4th Cir. 1999) 15

FCC v. Fox Television Stations, Inc., 567 U.S. 239 (2012) 17

Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014) 7, 10

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 2

Steury v. Cardinal Health, Inc., 625 F.3d 262 (5th Cir. 2010) 15

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008) 8

Swift v. United States, 318 F.3d 250 (D.C. Cir. 2003) 20

United States ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890 (9th Cir. 2017), *petition for cert. pending*, No. 17-936 (filed Dec. 26, 2017) ..... *passim*

Cases—Continued: Page

United States ex rel. McBride v. Halliburton Co., 848 F.3d 1027 (D.C. Cir. 2017).....8

United States ex rel. Petratos v. Genentech Inc., 855 F.3d 481 (3d Cir. 2017).....11, 13

United States ex rel. Purcell v. MWI Corp., 807 F.3d 281 (D.C. Cir. 2015).....17

United States ex rel. Rostholder v. Omnicare, Inc., 745 F.3d 694 (4th Cir. 2014) 15

United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998).....20

United States v. Strock, No. 15-CV-887-FPG, 2018 WL 4658720 (W.D.N.Y. Sept. 28, 2018).....13

Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016).....*passim*

Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000).....1

Statutes:

False Claims Act, 31 U.S.C. §§ 3729–3733 1

31 U.S.C. § 3730(c)(2) 20

31 U.S.C. § 3730(d)(2).....2

31 U.S.C. § 3730(d)(4).....10

31 U.S.C. § 3732(a) 19

31 U.S.C. § 3733.....3

31 U.S.C. § 3733(f) 3

Statutes—Continued: Page

31 U.S.C. § 3733(g) 3

31 U.S.C. § 3733(h) 3

Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.....3

42 U.S.C. § 1320a-7(b)(7) 9

42 U.S.C. § 1320a-7a(a)(1) 9

Miscellaneous:

2 John T. Boese, *Civil False Claims & Qui Tam Actions* § 5.06[E] (4th ed. 2018) 19

A. Doyle, *Silver Blaze*, in The Complete Sherlock Holmes 335 (1927).....12

Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3944 (Jan. 29, 2018) 2

Ethan Posner & Noam Kutler, Escobar *Provides New Grounds For Seeking Gov't Discovery*, Law360 (Aug. 11, 2017) 14

FAR 9.406-2(a) 10

Fed. R. Civ. P. 8.....4, 7

Fed. R. Civ. P. 9(b) 4, 7, 17

Jeff Overley, *5 Key Questions As DOJ Torpedoes Gilead FCA Suit*, Law360 (Dec. 4, 2018) 20

John T. Bentivoglio *et al.*, *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801 (2011) 8

Miscellaneous—Continued: Page

John T. Boese & Beth C. McClain, *Why* Thompson *Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 Ala. L. Rev. 1 (1999).....8

Jonathan Diesenhaus *et al.*, *Is That Claim False?: Implied False Certification Liability After* Escobar, 2017 Health L. Handbook 1 (2017).....10

Mathew Andrews, Note, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 Yale L.J. 2422 (2014) 8

Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require that All* Qui Tam *Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1 (2007).....9

Vicki W. Girard, *Punishing Pharmaceutical Companies for Unlawful Promotion of Approved Drugs: Why the False Claims Act is the Wrong Rx*, 12 J. Health Care L. & Pol'y 119 (2009).....9

INTEREST OF AMICI CURIAE

The American Health Care Association and the National Center for Assisted Living (AHCA/NCAL) serve as the national representative of more than 13,500 facilities dedicated to improving the lives of more than 1.5 million Americans who live in skilled nursing facilities, assisted living communities, and other settings throughout the United States. One way in which AHCA/NCAL promote the interests of their members is by participating as amici curiae in cases before this Court with important and far-ranging consequences for their members—including cases such as this one presenting important legal questions arising under the False Claims Act (FCA), 31 U.S.C. §§ 3729–3733. *See, e.g.*, Br. for AHCA/NCAL as Amici Curiae in Supp. of Pet'r, *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) (No. 15-7); Br. for AHCA *et al.* as Amici Curiae in Supp. of Pet'rs, *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010) (No. 08-304).[1]

Liability under the FCA is "essentially punitive in nature." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). Combining treble damages with maximum per-claim penalties now

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than AHCA/NCAL, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The petitioners and respondent have filed a blanket consent to the filing of amicus briefs. Counsel of record for petitioners and respondent received notice of AHCA/NCAL's intent to file this brief more than ten days before the due date.

exceeding $22,000, *see* Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3944, 3945 (Jan. 29, 2018), the FCA has become a tool ripe for potential abuse by those who wield its destructive power. This is especially true of FCA suits prosecuted by *qui tam* relators, who are "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997); *see also* 31 U.S.C. § 3730(d)(2) (providing that in cases such as this one in which the Federal Government declines to intervene, the relator is entitled to between 25 and 30 percent of any judgment or settlement, as well as attorney's fees and costs).

The Federal Government funds in full or in part a substantial percentage of the services provided by AHCA/NCAL's members. As a result, the threat of opportunistic *qui tam* suits looms over AHCA/NCAL's members on a daily basis—as it does for virtually everyone who provides items or services in the Nation's health-care industry.

As is pertinent here, in *Universal Health Services, Inc. v. United States ex rel. Escobar* (*Escobar*), 136 S. Ct. 1989, 1996 (2016), this Court confirmed that a "misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the [FCA]." Unfortunately, as described in detail by the petition for a writ of certiorari filed by Brookdale Senior Living Communities, Inc., *et al.* (collectively, Brookdale), application of *Escobar*'s materiality requirement has been anything but uniform.

The ongoing controversy surrounding *Escobar*'s materiality requirement imposes a significant burden on members of the health-care industry that goes largely unseen by the public. In 2009, Congress amended the FCA by, among other things, liberalizing the use of civil investigative demands (CIDs) by the Department of Justice. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(c), 123 Stat. 1617, 1623–24 (amending 31 U.S.C. § 3733). It is now commonplace for the Department of Justice to serve CIDs on health-care providers in response to *qui tam* suits filed under seal. Such CIDs often seek numerous categories of records spanning several years, and may even require deposition testimony and answers to written interrogatories. *See* 31 U.S.C. § 3733(f), (g), (h).

Such CID-based investigations often last several years and cost providers hundreds of thousands of dollars (and sometimes more) in attorney's fees, electronic-discovery costs, and lost productivity, which cannot be recovered even in those instances where, as here, the Government eventually declines to intervene. One reason why such investigations take so long to resolve—and why many providers eventually capitulate through settlements rather than litigate the substantive merit of the allegations made against them by *qui tam* relators and/or the Government—is the legal uncertainty that currently surrounds *Escobar*'s materiality requirement.

Therefore, AHCA/NCAL and their members have a substantial interest in the questions presented here.

SUMMARY OF ARGUMENT

After decades of debate in the lower courts over the validity of the implied false certification theory of FCA liability, this Court, in *Escobar*, ruled that the theory is valid. Acknowledging the concerns this potentially boundless theory poses to defendants in countless industries, however, the Court took pains to emphasize that the FCA's "rigorous" materiality and scienter requirements must be strictly enforced—especially at the pleadings stage—to ensure fair notice of potential liability to defendants and prevent the imposition of expansive liability.

Although this direction from the Court was clear in its own right, the Court did not itself apply its materiality and scienter analysis in *Escobar*. Perhaps for that reason, some lower courts, like the Sixth Circuit in this case and the Ninth Circuit in *United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890 (9th Cir. 2017), *petition for cert. pending*, No. 17-936 (filed Dec. 26, 2017), have issued decisions reducing the Court's materiality and scienter holdings to little more than precatory suggestions. These decisions, in turn, encourage relators (and the Government) to plead fewer and less specific facts in their FCA complaints—directly contrary not only to *Escobar*, but to the mandates of Federal Rules of Civil Procedure 8 and 9(b) and this Court's long-settled jurisprudence construing those fundamental procedural rules.

As Brookdale persuasively demonstrates, the Sixth Circuit's divided ruling below and the Ninth Circuit's decision in *Campie* diverge from those of multiple other circuits and conflict with *Escobar*. They are also Exhibits A and B for why it is so critical that only complaints alleging specific and plausible facts

showing that the alleged "fraud" actually or likely affected the Government's decision whether to pay the defendant's claims—and that the defendant knew as much—can unlock the gate to onerous and costly discovery in FCA actions.

Indeed, the Sixth Circuit's diluted pleading standard in this case allows even more meritless *qui tam* suits to proceed to discovery, which, in turn, ratchets up the pressure on defendants to settle meritless suits and further encourages the filing of still more speculative claims. It also fosters the sort of *ad hoc* analysis of pleadings that is antithetical to the predictability FCA defendants need to guide their compliance efforts and avoid the burdensome litigation costs and essentially punitive damages the statute can inflict.

Accordingly, the Court should grant certiorari so that it can provide needed clarification on the proper enforcement at the pleadings stage of the FCA's materiality and scienter requirements, restore uniformity in how lower courts carry out *Escobar*'s mandate, and prevent the deleterious consequences that will follow from the Sixth Circuit's decision.

ARGUMENT

I. STRICT ENFORCEMENT OF THE FCA'S RIGOROUS MATERIALITY AND SCIENTER REQUIREMENTS AT THE PLEADINGS STAGE IS NECESSARY TO LIMIT IMPLIED CERTIFICATION CLAIMS AND ROOT OUT MERITLESS AND COSTLY FCA SUITS

As noted, this Court in *Escobar* held that the so-called "implied certification theory" of liability—predicated on alleged misrepresentations or omissions about compliance with an underlying statutory, regulatory, or contractual requirement—is actionable under the FCA. In so doing, the Court rejected "policy

arguments" about "fair notice" and expansive liability as a reason to ignore what it found to be the plain meaning of the statutory text. *Escobar*, 136 S. Ct. at 2002.

But that was not because the Court deemed these policy arguments without force. Quite the contrary: it stressed that the same "concerns about fair notice and open-ended liability can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements[,]" *id.* (internal quotation marks and citation omitted), and proceeded to articulate how lower courts should carry out such "strict enforcement."

a. As to the "demanding" materiality requirement, the Court made clear that FCA liability can exist only where the underlying misrepresentation about compliance is "material to the Government's payment decision[.]" *Id.* Materiality cannot be met simply where the Government deems compliance to be a "condition of payment" or where the Government would be entitled to deny payment "if it knew of the defendant's noncompliance." *Id.* at 2003. That would sanction "an extraordinarily expansive view of liability" that the FCA "does not adopt[.]" *Id.* at 2004. What matters instead, the Court concluded, is what the Government actually would do with a claim for payment if it knew about the misrepresented or undisclosed noncompliance. *Id.* at 2002–04. Thus, whether the Government paid or refused to pay claims based on, or with knowledge of, the defendant's noncompliance with the particular statutory, regulatory, or contractual requirement at issue—and had done so in the mine run of similar cases—is central to the materiality inquiry. *Id.* at 2003–04.

The Court laid out equally strict guidelines for establishing scienter, holding that relators must show "the defendant knowingly violated a [statutory, regulatory, or contractual] requirement that the defendant knows is material to the Government's payment decision." *Id.* at 1996.

b. As important as the Court's substantive definition of the materiality and scienter requirements was the Court's procedural command that lower courts strictly enforce the materiality requirement at the motion-to-dismiss stage. Assessing materiality based on the complaint's allegations, the Court stressed, was not "too fact intensive." *Id.* at 2004 n.6. Rather, the materiality standard was "familiar and rigorous" and FCA relators now must plead materiality facts sufficient to meet the settled pleading standards under Federal Rules of Civil Procedure 8 and 9(b).

The Court's emphasis on the critical gatekeeping function of a motion to dismiss was nothing new. Time and again the Court has recognized that such motions are an "important mechanism for weeding out meritless claims[.]" *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014). They ensure that the substantial discovery and litigation burdens be imposed on defendants only where well-pleaded factual allegations elevate a claim for relief to a sufficient level of plausibility. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). It simply "is no answer to say that a claim . . . can, if groundless, be weeded out early in the discovery process[.]" *Id*.

That burden is exceptionally heavy and costly in FCA cases. Because "discovery in *qui tam* suits is particularly vitriolic," it often leads to "years of expensive

disputes over document production and depositions." Mathew Andrews, Note, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 Yale L.J. 2422, 2434 (2014); *see also United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1029 (D.C. Cir. 2017) (affirming grant of summary judgment after eight years of litigation, the denial of defendants' motion to dismiss, and defendants' production of "over two million pages of documents"). "Pharmaceutical, medical devices, and health care companies" in particular "spend billions each year" defending FCA suits. John T. Bentivoglio *et al.*, *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

c. Such an omnipresent "threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Twombly*, 550 U.S. at 559; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (acknowledging that with "even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) (expressing concern "that extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies"). This is all the more true in FCA litigation, with its attendant treble damages, civil penalties, and attorney's fees. *See* John T. Boese & Beth C. McClain, *Why* Thompson *Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 Ala. L. Rev. 1, 18 (1999) (observing that FCA's damage and penalty framework "places great pressure on defendants to settle even meritless suits").

But it is not just the potential for outsized damages and penalties that exerts such hydraulic pressure on defendants to forego the fight. Even generic allegations that a company "defraud[ed]" the Government can seriously impair a company's reputation which, "once tarnished, is extremely difficult to restore." Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require that All* Qui Tam *Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 11 (2007).

Worse still is an adverse final judgment under the FCA, which can lead to the functional equivalent of the death penalty for health-care providers. Almost all such providers depend on their participation in one or more federal health care programs such as Medicare. The Secretary of Health and Human Services may exclude from participation in such programs any individual "that the Secretary determines has committed an act which is described in section 1320a-7a . . . of this title. . . ." 42 U.S.C. § 1320a-7(b)(7). Section 1320a-7a, in turn, provides civil monetary penalties for any person who, among other things, "knowingly presents or causes to be presented . . . a claim . . . that the Secretary determines . . . is for a medical or other item or service and the person knows or should know the claim is false or fraudulent." § 1320a-7a(a)(1); *see also* Vicki W. Girard, *Punishing Pharmaceutical Companies for Unlawful Promotion of Approved Drugs: Why the False Claims Act is the Wrong Rx*, 12 J. Health Care L. & Pol'y 119, 136–37 (2009) ("The threat of exclusion . . . has been characterized as a corporate 'death sentence' for pharmaceutical companies.

Indeed, the risk of losing millions of customers covered under these programs explains many companies' willingness to settle rather than litigate issues." (footnotes omitted)).

Such draconian consequences are not restricted to health-care providers. They extend to federal contractors across the spectrum of American industry. *See, e.g.*, FAR 9.406-2(a) (civil judgment demonstrating fraud or a lack of honesty and integrity in business can result in debarment).

This environment gives relators all the incentive they need to assert even the shakiest of FCA claims, hoping to hit pay dirt by pressuring defendants to settle while facing little financial risk to themselves. *See, e.g.*, 31 U.S.C. § 3730(d)(4) (imposing heightened standard on defendants to recover attorney's fees from relators, such that defendants may recover such fees only upon a judicial finding that the relator's legal claims were "*clearly* frivolous, *clearly* vexatious, or brought *primarily* for purposes of harassment") (emphasis added). And the endorsement of implied false certification claims in *Escobar* is "destined to increase the scope and complexity of FCA investigations and litigation." Jonathan Diesenhaus *et al.*, *Is That Claim False?: Implied False Certification Liability After* Escobar, 2017 Health L. Handbook 1, 1 (2017). This makes it all the more essential that lower courts faithfully apply the early and exacting scrutiny called for by this Court's holding in *Escobar* to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp*, 134 S. Ct. at 2470.

II. THE SIXTH CIRCUIT'S RULING PROVIDES A ROADMAP FOR CIRCUMVENTING *ESCOBAR* IN DIRECT CONTRAVENTION OF THIS COURT'S CLEAR AND UNANIMOUS HOLDING

Escobar inspired hope that lower courts would help mitigate the threat of meritless FCA actions. As the petition explains, many lower courts—including multiple courts of appeals—have adhered to *Escobar*'s materiality holding and have rigorously applied the materiality requirement in deciding motions to dismiss. Pet. 19–23 (discussing, *inter alia*, *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017)). But the Sixth Circuit's decision below in this case (*Prather*)—combined with the Ninth Circuit's ruling in *Campie*[2]—are cause to wonder whether the optimism that sprung from *Escobar* is well-founded.

a. Indeed, the Sixth Circuit's decision in *Prather* erroneously breaks from *Escobar*'s mandate in fundamental respects and contradicts *Escobar*'s core holding on materiality and scienter. For starters, after characterizing *Escobar*'s materiality standard as a "holistic" one, *Prather* lists several non-dispositive, non-exhaustive factors that bear on the materiality

[2] As Brookdale notes, *Campie* rejected the defendants' motion to dismiss relators' implied certification claims where, as here, relators failed to plead any facts concerning the government's payment or approval behavior. *See Campie*, 862 F.3d at 907. The Ninth Circuit further held—directly contrary to *Escobar* (and *Twombly* too)—that relators' claims could proceed because they had alleged "more than the mere possibility that the government would be entitled to refuse payment if it were aware of the violations" at issue. *Id.* The petition for writ of certiorari in *Campie* remains pending.

inquiry—the Government's actual conduct when it comes to paying or approving claims just one among them, no more or less important than the others. Pet. App. 15–16. This flatly misreads *Escobar*.

To be sure, *Escobar* does not artificially confine the materiality analysis strictly to those facts mentioned in the Court's opinion. *Escobar*, 136 S. Ct. at 2003–04. But the Court did make crystal clear what those facts must relate to—"the *Government's payment decision*" at issue in the case at hand. *Id.* at 2002 (emphasis added). Thus, neither proof that compliance was a "condition of payment" nor evidence that the Government has the option to decline payment if it knows about noncompliance can meet the materiality requirement. *Id.* at 2003. Rather, courts must be able to determine—from the face of the complaint's allegations—whether the Government actually or likely would, or would not, pay. If, as here, the allegations do not allow that determination to be made one way or the other, *Escobar* compels dismissal.

Nor is the purported "holistic" nature of *Escobar*'s materiality analysis a license to ignore the "dog that did not bark"[3] that is relator's operative complaint here, which makes no mention of the Government's actual payment or approval practices at issue. To be clear, this Court did not call its materiality standard a "holistic" one—the First Circuit did, on remand in *Escobar*. *See United States v. Strock*, No. 15-CV-887-FPG, 2018 WL 4658720, at *2 (W.D.N.Y. Sept. 28,

[3] *See Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing A. Doyle, *Silver Blaze*, in The Complete Sherlock Holmes 335 (1927)).

2018) (explaining that *Escobar* "did not itself articulate any rule requiring a 'holistic approach' to materiality—rather that language comes from the First Circuit's decision on remand" and rejecting "holistic" argument as ground to reconsider materiality-based dismissal) (internal quotation marks and citation omitted). And contrary to the decision below, *Escobar* surely did not even suggest, much less hold, that a complaint which merely alleges noncompliance with a regulation that requires compliance as a condition of payment, coupled with some nebulous notion that the requirement goes to the "essence of the bargain" with the Government or acts as some amorphous "mechanism of fraud prevention," can survive the requisite strict judicial enforcement of the materiality requirement. Pet. App. 17–19, 23–27.[4]

In so ruling, the Sixth Circuit has set a dangerous precedent. For one thing, *Prather* invites judicial inventiveness, authorizing courts to manipulate the malleable boundaries of what it means to go to the "essence of the bargain" or serve as some "mechanism of

[4] That is not all the Sixth Circuit's "holistic" analysis ignored. Contrary to the views of other circuits, *see*, *e.g.*, *Petratos*, 855 F.3d at 490 (finding failure to show materiality where, in the six years since the relator disclosed evidence of the defendants' "misinformation" to the government, "the Department of Justice has taken no action against [the defendants] and declined to intervene in this suit"), the Sixth Circuit also declined to consider the significance of the Government's non-intervention, Pet. App. 26–27. Given that Government non-intervention would appear to be the kind of evidence of Government behavior particularly relevant to the materiality inquiry under *Escobar*, this finding, too, is dubious at best—and, as noted, itself conflicts with multiple circuit decisions.

fraud prevention." Almost anything can be shoehorned into these capacious terms—only the judicial imagination is a limit, and it is not much of one. This cannot be what the Court in *Escobar* intended when it announced that the materiality requirement is "rigorous" and "demanding" and must be enforced at the pleadings stage. 136 S. Ct. at 2002, 2003, 2004 n.6. It is, instead, an entrée to the "open-ended liability" the materiality (and scienter) requirements were designed to curtail. *Id.* at 2002.

b. Moreover, under *Prather*, relators have a nonstop ticket to discovery—and perhaps even to trial—without having to allege in their complaints *any* facts concerning the Government's actual behavior vis-à-vis the asserted regulatory, statutory, or contractual violation at issue in the case. As Brookdale rightly points out, *Prather* encourages relators and the government to avoid the topic altogether in their pleadings, confident that their silence will not be used against them. Pet. 4. Not only does this contradict *Escobar*, but it raises the specter of interminable FCA litigation within the Sixth Circuit and elsewhere unless this Court intercedes.

The likelihood of protracted FCA suits is greater still because "[t]ypically, when litigants seek discovery against the United States in FCA cases in which the government declined to intervene, the government tries to limit, if not avoid its discovery obligations." Ethan Posner & Noam Kutler, Escobar *Provides New Grounds For Seeking Gov't Discovery*, Law360 (Aug. 11, 2017). Compounding matters, courts may deem themselves to have only limited power to force the Government's hand when it comes to responding to discovery requests in non-intervened cases. *See*, *e.g.*,

COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 278 (4th Cir. 1999) (reasoning that "[w]hen an agency is not a party to an action, its choice of whether or not to comply with a third-party subpoena is essentially a policy decision about the best use of the agency's resources" to which courts "defer").

c. The harmful consequences of the open-ended approach the Sixth Circuit adopted are on full display in this very case. The majority below—many years *after* the claims for payment at issue were submitted—conjured up a questionable and novel condition-of-payment requirement from the relevant regulations and then leveraged that requirement to support not only a finding of materiality, but a finding of an implied false certification as well. Pet. App. 5–6, 16–27.

This evokes precisely the fair notice concerns that opponents of the implied certification theory expressed to the Court in *Escobar*, and that the Court in *Escobar* sought to "allay." 136 S. Ct. at 2002. *Escobar* did find that the FCA's text supports the implied certification theory as a means to establish the falsity element of an FCA claim "at least in some circumstances." *Id.* at 1999. But that did nothing to change the inherent unfairness of the theory or the likelihood that its application "could short-circuit the very remedial process the Government has established to address [regulatory] non-compliance[,]" *United States ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 702 (4th Cir. 2014) (internal quotation marks and citation omitted), and convert the FCA into precisely what it is not: "a general enforcement device for federal statutes, regulations, and contracts," *Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 269 (5th Cir. 2010) (internal quotation marks and citation omitted).

d. *Prather*'s scienter analysis likewise deviates sharply from *Escobar* and risks creating just as much mischief as the Sixth Circuit's flawed materiality finding. *Escobar*'s scienter holding could not be clearer: "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 1996.

Yet, the Sixth Circuit majority divined Brookdale's supposed knowledge that its compliance with a certain regulatory requirement was material from mere allegations that there were concerns about compliance and that Brookdale knew some physicians might not later sign patient certifications—without *any* allegations that Brookdale knew its supposed noncompliance actually would impact the Government's payment decisions. Pet. 30–31. And to make matters worse, the majority rested its finding of knowing regulatory noncompliance in 2011 and 2012 based on a novel and unprecedented interpretation of the relevant regulation in 2016—unknowable at the time the claims and payments at issue in the case were made.

Here again, *Escobar*'s expressed concerns with "fair notice and open-ended liability" are realized. 136 S. Ct. at 2002. "Strict enforcement of the FCA's knowledge requirement helps to ensure that innocent mistakes made in the absence of binding interpretive guidance are not converted into FCA liability, thereby avoiding the potential due process problems posed by penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *United States ex rel. Purcell v. MWI Corp.*, 807

F.3d 281, 287–88 (D.C. Cir. 2015) (internal quotation marks and citation omitted).

This is all the more critical after *Escobar*, which requires not only knowledge of noncompliance, but also knowledge by the defendant that the noncompliance is material to the Government's payment decision. Yet, as Judge McKeague explained in dissent, Brookdale now is subject to liability "for recklessly disregarding" a regulatory requirement that did not exist until 2016 (when the Sixth Circuit majority created it) and where "nothing—absolutely nothing—in the existing law required [Brookdale] to provide affirmative justifications for late signatures during the billing process." Pet. App. 61. This engenders fundamental due process concerns of fair notice, for it stands to reason that one cannot know his or her conduct violates a regulation and is likely to affect another's decision-making based on a court's interpretation of that regulation several years after the fact. *See*, *e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.").

Prather's materiality and scienter holdings—which encourage the pleading of fewer, and less specific, facts—ultimately run counter to Rule 9(b), which demands *more* particularity in pleading fraud-based actions, not less, even though this Court made clear in *Escobar* that Rule 9(b) applies to the materiality element every bit as much as it does to the falsity element. 136 S. Ct. at 2004 n.6.

III. THIS COURT'S REVIEW IS WARRANTED TO CLARIFY *ESCOBAR* AND BRING UNIFORMITY TO LOWER COURTS' APPLICATION OF THAT CRITICAL PRECEDENT

The Sixth Circuit's departures from *Escobar* confirm the need for this Court to grant certiorari so that it can clarify and reinforce what it said in *Escobar* and prevent the likely migration of FCA suits to the Sixth Circuit, hoping to take advantage of the lax scrutiny of FCA pleadings *Prather* calls for.

a. As discussed above, *Prather* all but obliterates the significance of what this Court in *Escobar* stressed is central in determining whether a misrepresented or concealed regulatory, statutory, or contractual violation is material under the FCA: the Government's payment or approval, or non-payment or rejection, of a claim. And *Prather*'s scienter analysis renders what is supposed to be a "demanding" scienter requirement all but toothless—with possibly serious constitutional due process ramifications.

As a result, in courts governed by (or that can elect to follow) *Prather*, relators need not—and are incentivized to not—mention the Government's past payment practices in their complaints. Nor must relators plead facts to show the defendant knew its alleged noncompliance was material to the Government's decision to pay or not pay a claim.

b. These relator-friendly rulings in *Prather* (and *Campie*) assuredly will attract *qui tam* and Government FCA suits alike, enabled by the FCA's expansive venue and nationwide service-of-process provisions. An FCA case may be brought "in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant, can be found, resides,

transacts business, or in which any act proscribed by [the FCA] occurred." 31 U.S.C. § 3732(a). And a "summons . . . shall be issued by the appropriate district court and served at any place within or outside the United States." *Id.* Under these provisions, "[w]hen the nationwide service of process and nationwide venue are combined, they can easily require individuals and corporations to defend [FCA] cases far from their homes and far from where the corporations or individuals have ever conducted business." 2 John T. Boese, *Civil False Claims &* Qui Tam *Actions* § 5.06[E] at 5-147 (4th ed. 2018).

As a result, FCA suits against prominent healthcare providers like Brookdale—which operates in 45 States—may be brought in various different circuits, thus allowing relators to take advantage of more favorable FCA precedents by filing suit in circuits like the Sixth and the Ninth. This is forum-shopping at its worst, just another form of opportunistic behavior that strikes at the heart of what the FCA is intended to accomplish. *See Bailey v. Shell W. E&P, Inc.*, 609 F.3d 710, 721 n.3 (5th Cir. 2010) (stating that "attempts at forum shopping constitute the opportunistic and parasitic behavior that the FCA seeks to preclude").

c. Review is all the more warranted here in light of the Government's post-*Escobar* litigation strategy in FCA cases and the likely survival of the Ninth Circuit's flawed decision in *Campie*. In the wake of *Escobar*, the Government has filed a flurry of briefs—including in this Court—advocating a sharply limited and erroneous reading of *Escobar* and how the FCA's scienter and materiality requirements should be enforced. Pet. 35–36. In its recent brief responding to

this Court's call for its views in *Campie*, the Government noted its approval of *Prather* and specifically endorsed the Sixth Circuit's interpretation of *Escobar* and FCA pleading requirements. Br. for U.S. as Amicus Curiae at 13–14, *Gilead Scis., Inc. v. United States ex rel. Campie*, No. 17-936 (U.S. Nov. 30, 2018).

The Government also asserted in *Campie* that if that case "is remanded to the district court, the government will move to dismiss respondents' suit under Section 3730(c)(2)." *Id.* at 15. This suggests that the Government will in other FCA cases likewise seek to preserve appellate rulings it likes by invoking its power to dismiss. *See* Jeff Overley, *5 Key Questions As DOJ Torpedoes Gilead FCA Suit*, Law360 (Dec. 4, 2018) ("DOJ may see its commitment to dismissal [in *Campie*] as a way to ensure that the Ninth Circuit's *Escobar* precedent isn't eviscerated"). And according to at least some circuits, that unilateral dismissal power is broad and largely unchecked by meaningful judicial review. *See Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) (recognizing Government's "unfettered right" to dismiss). *But see United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (requiring Government to show dismissal is rationally related to a "valid government purpose").

In the end, the Government's representation that it will dismiss *Campie* if that case is remanded to the district court may lead this Court to deny review in *Campie*. But that is all the more reason for the Court to grant the petition here so that it can clarify and reiterate what it said in *Escobar* and bring uniformity to what is now an increasingly splintered legal landscape on such critical and impactful FCA issues.

CONCLUSION

For the foregoing reasons and those contained in Brookdale's petition, the petition should be granted.

Respectfully submitted.

JAMES F. SEGROVES
Counsel of Record
ANDREW C. BERNASCONI
REED SMITH LLP
1301 K Street, NW
Suite 1000 - East Tower
Washington, DC 20005
(202) 414-9200
jsegroves@reedsmith.com

COLIN E. WRABLEY
REED SMITH LLP
255 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131

DECEMBER 2018