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,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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February 20, 2019

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ARGUMENT

I. THE DECISION BELOW EVISCERATES THIS COURT'S RULING IN *ESCOBAR*, RAISES ISSUES OF EXCEPTIONAL IMPORTANCE FOR ALL GOVERNMENT CONTRACTORS, AND IS A SOUND VEHICLE FOR THIS COURT'S REVIEW.

A. The Decision Below Renders the Past Government Action Factor Irrelevant at the Pleading Stage.

Respondent's effort to downplay the significance of the Sixth Circuit's decision and the need for review by this Court lays bare precisely why Respondent and other would-be relators are desperate for the Sixth Circuit's misapplication of *Escobar* to remain intact: that ruling eliminates the past government action factor from the materiality analysis at the pleading stage and restores the pre-*Escobar* state of the law. Under the Sixth Circuit's holding, a relator can defeat a motion to dismiss in an implied certification case by pleading that the regulation at issue is a "condition of payment" and can act as a "mechanism of fraud prevention," while sidestepping the critical question of whether compliance with the regulation has affected past government payment decisions. Pet. App. 27. Precluding district courts from considering the lack of allegations regarding past government action is directly at odds with other Circuits, incentivizes relators to omit adverse facts about past enforcement, and invites relators to file *qui tam* lawsuits based on any manner of regulatory violations knowing that lack of past enforcement cannot be considered at the pleading stage.

Respondent's allegations are a case in point. Despite the Opposition's many allusions to medical

necessity, Respondent concedes that this case concerns only late physician signatures, not medically unnecessary care. Opp. 23; *see also United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 838 F.3d 750, 762 (6th Cir. 2016) (*Prather I*) ("[N]owhere does [the relator] allege with the particularity required by Rule 9(b) that the doctors were lying. The issue is therefore whether the late physician signatures memorializing these certifications violated the applicable Medicare regulations."). This case alleges exactly the type of technical regulatory violation that should not survive a motion to dismiss absent specific allegations that the violation actually has been or would be material in practice. Yet a divided panel at the Sixth Circuit held that the district court erred in even considering the fact that the relator was unable to allege any past government action in relation to a requirement that has existed since 1967. *See Prather I*, 838 F.3d at 764 n.5 (noting promulgation of regulation).

Respondent argues that if the Court grants certiorari "the most it could do is provide factbound guidance about the materiality of a single condition for Medicare payment: the certification timing requirement" at issue here. Opp. 15. That is incorrect. The Sixth Circuit's holding is not limited to 42 C.F.R. § 424.22(a)(2). The majority panel held not only that a relator's failure to plead past government action "has no bearing on the materiality analysis," but also that the district court erred in assigning weight to that lack of allegations. Pet. App. 22–23. The Sixth Circuit's opinion categorically prohibits district courts from considering the lack of allegations of past government action as part of the materiality analysis. That holding applies to any FCA case in which a relator elects to plead no allegations about past government

action. Respondent even suggests that it should be applicable "every time a plaintiff did not discuss some aspect of materiality (whether government action or another prong of the holistic test)." Opp. 22.

Respondent does not dispute that the Sixth Circuit's refusal to consider her failure to plead facts regarding the government's past payment actions results in a watered-down standard for pleading materiality in declined *qui tam* cases. Instead, Respondent offers policy justifications for not holding relators to the same pleading standard as the United States: relators may not have access to information about past government payment decisions; such information may not be complete; the defendant's conduct may be more egregious than previous cases; or the type of fraud may be novel, rare, or hard to detect. *See* Opp. 20–21. But policy reasons do not address the fundamental shortcoming: that courts have never held relators to a lower standard for bringing or maintaining FCA claims than the United States. If anything, the United States' declination in an implied certification case should carry all the more weight regarding the government's view as to whether compliance with the regulation in question matters to payment rather than the declination simply being ignored like it never happened. *Compare* Pet. App 26–27 (Sixth Circuit Opinion) (prohibiting considering intervention decision in materiality analysis), *with United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (considering intervention decision in materiality analysis), *and United States ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174, 179 (4th Cir. 2017) (same).

B. The Materiality and Scienter Requirements Serve Important Gatekeeping Functions at the Pleading Stage.

Respondent argues that resolving the questions presented serves little import because if the signature timing requirement has not been material to the government's payment decisions, Petitioners can "file a motion for summary judgment or contest the matter at trial." Opp. 15, 23. Suggesting that materiality should be fully litigated through summary judgment or trial flatly contradicts *Escobar*'s unanimous directive that materiality can be addressed at the pleading stage. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2004 n.6 (2016). It also undermines the fundamental purposes of Rule 9(b)'s heightened pleading standard, which exists to "provide[] an increased measure of protection for [defendants'] reputations, and reduces the number of frivolous suits brought solely to extract settlements." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997).

Putting off consideration of materiality and scienter until summary judgment or trial forces defendants to endure profound litigation and discovery costs. In two recent post-*Escobar* decisions, courts stepped in on materiality grounds to overturn more than $1 billion in FCA judgments following adverse jury verdicts. *See United States ex rel. Harman v. Trinity Indus.*, 872 F.3d 645 (5th Cir. 2017); *United States ex rel. Ruckh v. Salus Rehab., LLC*, 304 F. Supp. 3d 1258 (M.D. Fla. 2018). Even if the right result under *Escobar* eventually was reached, that is little solace for defendants unable to endure years of expense and potentially catastrophic exposure. Given the potential consequences, enforcing the correct materiality and

scienter standard at the pleading stage is an imperative warranting certiorari in this case.

As described in the amicus briefs, FCA litigation is having an extraordinary impact on the healthcare industry. *See* Br. for the Am. Health Care Ass'n & Nat'l Ctr. for Assisted Living as Amici Curiae Supporting Pet'rs, at 3, 7–10; Br. of Amicus Curiae Nat'l Ass'n for Home Care & Hospice Inc. in Supp. of Pet'r, at 1–2. Indeed, from 1987 – 2009, relators filed an average of 288 *qui tam* cases per year. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1986 – Sept. 30, 2018*, at 1–2 (2018) (www.justice.gov/civil/page/file/1080696/download). But from 2011 – 2017, those numbers skyrocketed to an average of 684 *qui tam* cases per year. *Id.* By comparison, from 1997 – 2017, so-called frequent filers of securities class action suits filed an average of 203 new cases per year. *See* Cornerstone Research, *Sec. Class Action Filings, 2018 Year in Review*, at 1 (2019) (https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2018-Year-in-Review). Armed with rulings like the decision below, a newer breed of strike suit is just gaining momentum.

C. This Case Presents Different Questions than *Campie* and Is a Sound Vehicle for Resolving those Questions.

Respondent argues that this case poses "essentially indistinguishable questions" from *Campie* and that "[a]ll of petitioners' principal arguments" already have been rejected. Opp. 13–14. That distortion of the issues fails. The petition in *Campie*, which was denied by this Court, asked whether the government's continued payment of claims where it had actual knowledge of the alleged regulatory violation rendered allegations presumptively not material. *See Gilead*

Scis., Inc. v. United States ex rel. Campie, No. 17-936 (denied Jan. 7, 2019). This case presents a far better vehicle for this Court's review and implicates broader issues relevant to FCA cases.[1]

First, *Campie* involved a pervasive factual dispute regarding "what the government knew and when." *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 906 (9th Cir. 2017). The Petition here involves no factual issue regarding the government's actual knowledge and continued payment of claims. There are no unresolved disputes that would prevent the Court from reaching the critical questions presented in this case.

Rather, this case squarely asks whether courts are precluded from considering an FCA complaint's facial lack of allegations relating to any past government action in analyzing whether a relator has pled materiality. In addition, the *Campie* petition did not raise any question about the FCA's scienter requirement. This case therefore represents a different and far better vehicle for addressing the FCA's materiality and scienter requirements and for providing clarity and consistency to the standard for pleading those requirements.

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[1] Seven years after the relators filed a *qui tam* complaint in *Campie* and following declination by the United States, dismissal by the district court, reversal by the Ninth Circuit, and a petition for writ of certiorari filed by the defendants, the United States submitted an amicus brief supporting the Ninth Circuit's application of *Escobar* yet indicating that if this case were remanded, the United States would move to dismiss over the relators' objection based on its determination that continued prosecution of the suit was not in the public interest. *See* Br. for the United States as Amicus Curiae, at 15, *Gilead Scis., Inc. v. United States ex rel. Campie*, No. 17-936 (filed Dec. 19, 2018).

II. COURTS OF APPEALS ARE SPLIT AS TO THE STANDARD FOR PLEADING MATERIALITY UNDER THE FCA.

Respondent argues that the materiality analysis under *Escobar* is fact-bound, driven entirely by the regulation or government agency at issue, and apparently uniformly applied. However, at issue here is not simply whether other Circuits would have "decided a case like this one differently," Opp. 20, but more fundamentally whether the legal standard used by these Courts of Appeals has become so divided that it requires this Court's intervention. As set forth in the Petition, the materiality analysis across Courts of Appeals is irreconcilable, and Respondent cannot salvage that split by recasting the issue.

In the instant case, Respondent admits that she alleged no facts about the government's past payment practices or enforcement efforts with respect to the alleged regulatory violation or any factual allegations about whether and why the alleged violation would cause the government to deny a claim for payment. Nonetheless, a divided Sixth Circuit panel held that this "has no bearing on the materiality analysis." Pet. App. 22–23. The Sixth Circuit approach *precludes* courts from considering a relator's failure to plead what this Court specifically identified as proof of materiality. *Escobar*, 136 S. Ct. at 2003. That is clearly contrary to other Circuits that consider such evidence but find it unpersuasive.

In direct opposition to the Sixth Circuit, the Third Circuit held that the relator's failure to plead any past government payment denials based on the underlying violation, any previous successful claims based on that violation, or any previous court decision upholding the relator's theory of liability "militates against a finding

of materiality." *Petratos*, 855 F.3d at 490. Respondent distinguishes *Petratos* based on the regulatory bodies involved, arguing simply that "this case is different." Opp. 19. Respondent has nothing at all to say about the legal standard applied by the court, which cannot be reconciled with the Sixth Circuit's.

As to the Fourth Circuit, Respondent acknowledges that the court in *Triple Canopy* appropriately considered allegations regarding the government's actions in the materiality analysis. *Triple Canopy*, 857 F.3d at 179. However, giving weight to government actions where they are pled and refusing to give weight to a failure to plead government action is simply inconsistent.

Finally, Respondent's attempts to distinguish relevant First Circuit cases fail to veil the Circuit split. Respondent argues that the First Circuit's decision in *Escobar* on remand stands "plainly" for the proposition that no negative inference is warranted from failure to include allegations of past government practices. Opp. 16. However, the court did consider the failure to plead in its analysis. *See United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 112 (1st Cir. 2016). The First Circuit considered the pleadings and ultimately concluded that other factors had sufficiently moved the relators over the line of materiality. *Id.* The Sixth Circuit, on the other hand, prohibits such consideration.

Similarly, in *D'Agostino*, the First Circuit rejected an argument that false statements were material where they "could have" influenced the government's FDA approval of the drug at issue, requiring that the relator plead facts showing that the underlying misrepresentations are "material to the government's payment decision itself." *D'Agostino v. ev3, Inc.*, 845

F.3d 1, 7 (1st Cir. 2016). The First Circuit reaffirmed that view after its decision on remand in *Escobar*, holding that where there was "no allegation that the FDA withdrew or even suspended product approval upon learning of the alleged misrepresentations," this was "very strong evidence that those requirements are not material." *See United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 35 (1st Cir. 2017) (quotation marks removed), *cert. denied*, 18 S. Ct. 1551 (2018). Contrary to the Sixth Circuit, the First Circuit in both of these cases considered the failure to plead facts regarding past government actions as highly relevant to the materiality analysis.

The Sixth Circuit's decision that the failure to plead past government action has no bearing on the materiality analysis directly contradicts decisions from the First, Third, and Fourth Circuits. That split requires this Court's intervention.

III. COURTS OF APPEALS ARE SPLIT AS TO THE STANDARD FOR PLEADING SCIENTER UNDER THE FCA.

Respondent concedes that *Escobar* mandates a double-knowledge standard in implied certification cases but argues that review by this Court is unwarranted because the Sixth Circuit correctly applied the double-knowledge standard and other Circuits already are following it. Opp. 24–28. Both arguments are wrong.

The Sixth Circuit may have quoted the double-knowledge standard, but it applied only a single-knowledge standard, holding that scienter was properly pled based only on allegations that Brookdale recklessly disregarded its compliance with the physician signature timing requirement on home health

claims. The panel majority did not require allegations that Brookdale knew or should have known that its alleged lack of compliance was material to payment of claims. That holding only goes halfway in carrying out *Escobar*'s directive that FCA liability requires that "the defendant knowingly violated a requirement *that the defendant knows is material*." 136 S. Ct. at 1996 (emphasis added).

Only by requiring a relator to plead facts showing that a defendant had knowledge that its failure to comply with a legal requirement would have affected the government's payment decision can the scienter factor effectively address "concerns about fair notice and open-ended liability," as *Escobar* stated that it would. *Escobar*, 136 S. Ct. at 2002 (citing *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1270 (C.A.D.C. 2010) (*SAIC*)). Otherwise, defendants are left subject to "essentially punitive" FCA liability, *id*. at 1996, for violating any of the "thousands of complex statutory and regulatory provisions," *id*. at 2002, regardless of whether the defendant had any basis for knowing that compliance with the requirement mattered to the government's payment of claims.

Respondent does not dispute that prior to *Escobar*, all but one Circuit analyzing FCA scienter required only that a relator allege that the defendant have knowledge of its legal violation, not knowledge of materiality. Pet. 27–28 (citing cases). The First Circuit in particular expressly rejected knowledge of materiality as a requirement. *United States ex rel. Loughren v. Unum Grp.*, 613 F.3d 300, 312–13 (1st Cir. 2010). These circuits directly conflicted with the D.C. Circuit opinion cited throughout *Escobar*, which held that knowledge of materiality is required. *SAIC*, 626 F.3d at 1271.

Five Circuits other than the Sixth have analyzed scienter since *Escobar* without requiring the defendant's knowledge of materiality. Pet. 28–29. Respondent attempts to minimize those cases, but does not dispute that none required the plaintiff to allege or prove double knowledge. Rather, those courts continue to apply the prevailing pre-*Escobar* standard, in some instances citing the same pre-*Escobar* authority. *See, e.g.*, *Harman*, 872 F.3d at 657 (quoting *United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 259–60 (5th Cir. 2014)).

Respondent attempts to distinguish *Polukoff*, *United Healthcare*, and *Miller* because those cases involve express certification rather than implied certification. Opp. 27. But Respondent cites no authority for nor offers any justification why a different scienter standard applies in express certification cases. Respondent also misstates First Circuit precedent by arguing the First Circuit "changed course" from *Loughren* when addressing *Escobar* on remand. Opp. at 26. Respondent cherry-picks a quotation of *Escobar* from the procedural background section of the First Circuit's opinion. The First Circuit did not address scienter at all in its substantive legal discussion. *See Escobar*, 842 F.3d at 103. Neither did it address or overturn *Loughren*. The First Circuit's decision on remand is not a course correction on the standard for pleading scienter.

For years courts have split on the fundamental elements of the FCA's scienter requirement. The continuing split establishes that *Escobar* did not resolve those disagreements, even though this Court explicitly called out scienter as one of the two elements that cabin liability in implied certification cases. This case provides the opportunity for the Court to clarify

the FCA's scienter element and how that rigorous requirement should be enforced.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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