No. _____

In the
Supreme Court of the United States

JIM C. HODGE, ET AL.,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

David Alan Warrington
Counsel of Record
KUTAK ROCK LLP
1625 Eye Street NW
Suite 800
Washington, D.C. 20006
(202) 828-2437
david.warrington@kutakrock.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the causation element standard under the False Claims Act is proximate cause, requiring both that the harm was foreseeable and that the false statement or fraudulent conduct was a substantial factor in causing the harm, or is the standard "but for" causation based solely on foreseeability?

PARTIES TO THE PROCEEDING

Jim C. Hodge; Allquest Home Mortgage Corporation, formerly known as Allied Home Mortgage Corporation; and Americus Mortgage Corporation, formerly known as Allied Home Mortgage Capital Corporation, are the Petitioners here and were the Defendants-Appellants below.

The United States of America intervened in the case below and is the Respondent here and was the Plaintiff-Appellee below.

The qui tam relator is Irene E. Mark as the personal representative of the Estate of Peter M. Belli.

CORPORATE DISCLOSURE STATEMENT

Petitioner Jim C. Hodge is an individual. The corporate petitioners, Allquest Home Mortgage, formerly known as Allied Home Mortgage Corporation, nor Americus Mortgage Corporation, formerly known as Allied Home Mortgage Capital Corporation, have no parent corporation[s] and no publicly held company owns 10% or more stock in either corporate petitioner.

LIST OF DIRECTLY RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jim C. Hodge, Allquest Home Mortgage Corporation, formerly known as Allied Home Mortgage Corporation, and Americus Mortgage Corporation, formerly known as Allied Home Mortgage Capital Corporation, respectfully petition for a writ of certiorari to review the decision of the Fifth Circuit below.

OPINIONS BELOW

The decision below is published at 933 F.3d 468 and is reprinted at Pet. App. 1-24. The order of the court of appeals denying rehearing *en banc* is reprinted at Pet. App. 46-47.

JURISDICTION

The Fifth Circuit entered its decision on August 8, 2019 (technical revision to opinion on August 9, 2019). Petitioners filed a petition for rehearing *en banc* on September 20, 2019, which was denied on November 12, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The False Claims Act 31 U.S.C. § 3729-33. The relevant provisions of the FCA §§ 3729, 3730, are reproduced at Pet. App. 48-62.

STATEMENT OF THE CASE

A. The False Claims Act

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, permits individuals, known as *qui tam* relators, to sue on behalf of the United States to recover damages for frauds against the government. The government may, but is not obligated to, intervene in a suit brought by an individual[s] under the FCA. § 3730(b)(2). The FCA permits recovery of "3 times the amount of damages which the Government sustains because of the act of" a defendant. § 3729. But the FCA "is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations." *Universal Health Servs., Inc. v. United States, ex rel Escobar*, 136 S. Ct. 1989, 2004 (2016) (holding that the materiality standard under the FCA is a rigorous and demanding standard). The FCA has a long history dating back to the post-Civil War era. *Id*. at 1966. It is one of the most frequently litigated statutes in federal courts. The federal government recovered more than $3 billion in settlements and judgments under the FCA in 2019 alone, and more than $62 billion since 1986.[1]

This case involves FCA claims against two mortgage companies and their Chief Executive Officer (CEO) who allegedly defrauded the government when they made false certifications to obtain government insurance for loans that later defaulted. Pet. App. 2-3.

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[1] https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 (last accessed: Feb. 10, 2020).

Liability under the FCA requires proof of (1) a false statement or record, (2) made with scienter, (3) that was material to the government's decision to pay, and (4) the government pays the claim and suffers **because of the actions of that person**. *See* § 3729 (emphasis added); *see also Allison Engine Co., Inc. v. United States ex rel Sanders*, 553 U.S. 662 (2008)(decided under prior 1986 version of the FCA that was later amended to clarify the law to "reflect the original intent" of the FCA *see* P.L. 111-21-May 20, 2009). This "because of" requirement is the causation element of the FCA and is the subject of this petition.

There are two causation standards that the Circuits have applied to FCA claims under § 3729—"but for" causation and proximate causation. "But for" causation requires only that the harm be foreseeable while proximate causation requires not only that the harm was foreseeable but also requires that the defendant's conduct was a substantial factor in causing the harm, i.e. that the conduct was a cause in fact of the harm. *Paroline v. United States*, 572 U.S. 434, 445 (2014). Proximate cause precludes "liability in situations where the causal link between the conduct and result is so attenuated that the consequence more aptly described as mere fortuity." *Id*.

Beginning in 1977 and the Third Circuit's decision in *United States v. Hibbs*, 568 F.2d 347 (3d Cir. 1977), the circuit courts that have grappled with this issue have settled on the more stringent proximate cause standard. The Fifth Circuit followed the Third Circuit in *United States v. Miller*, 645 F.2d 473 (5th Cir. 1981) in adopting proximate cause standard requiring both

foreseeability and cause-in-fact. Subsequently, the Seventh, Tenth, and District of Columbia Circuits all followed *Hibbs* and *Miller* and have adopted the proximate cause standard. The Ninth Circuit discussed both standards in *United States v. Eghbal*, 548 F.3d 1281, 1284-1285 (2008), but because it found that the conduct at issue in that case satisfied both "but for" and the more stringent proximate cause standard it did not adopt either as a clear causation standard. In the decision below, the Fifth Circuit changed the causation landscape when it decided to abandon its nearly four-decade old jurisprudence to return to the less stringent "but for" causation standard it had long rejected.

B. Factual Background and Proceedings Below

The Corporate Petitioners – referred to herein as "Allied Capital" and "Allied Corporation" – were approved by the Department of Housing and Urban Development (HUD) to originate, underwrite and make residential mortgage loans insured by the Federal Housing Administration's (FHA) unit of HUD. Petitioner Hodge served as CEO of both corporations.

"Allied Capital was a loan correspondent, meaning it could originate loans but was not permitted to hold loans" and had to have HUD approval, which came with a branch identification number, for each branch office that originated FHA loans. Pet. App. 2-3. Allied Corporation was a lender or mortgagee that could make and hold loans in its own name and was responsible for underwriting those loans to comply with HUD guidelines. *Id.*

In 2011, a *qui tam* relator filed suit against the Petitioners under, *inter alia*, the FCA. Pet. App. 3. The United States exercised its right to intervene in the lawsuit pursuant to 31 U.S.C. § 3730(b)(2). The FCA claims were based on allegations that Petitioner Allied Capital originated FHA insured loans from unregistered branches and Petitioner Allied Corporation recklessly underwrote FHA loans. *Id*. The facts of the case are summarized in the Fifth Circuit's opinion, Pet. App. 2-4. The facts pertinent to this appeal are summarized below.

1. Unregistered Branches

Between 2007 and 2010, HUD required that each individual loan correspondent branch office register by an individual branch identification number. Previously HUD allowed one registered branch in a geographic area to operate an unlimited number of unregistered "satellite" offices within that region. HUD abandoned this branch registration policy in 2010.

In 2007, after HUD instituted its new rule requiring individual branch identification numbers, Allied Capital tried to register certain existing North Carolina branches. It was unable to register them through the HUD system because, years earlier, two Allied Capital branches in North Carolina had been closed because of high default rates on loans made on manufactured housing units. Allied Capital was told it would have to re-open these closed branches and have them reinstated with HUD before any other Allied Capital branches in the geographic area could be registered and receive a branch identification number. Allied Capital sought assistance from HUD in resolving this

issue and a HUD official advised Allied Capital to use the branch identification numbers from its other branches in North Carolina that were already registered. Allied Capital followed this advice.

Also, in 2006, Allied Capital set up and registered an office it called the National Referral Center (NRC) to facilitate access to FHA loans for branches that operated in areas that rarely originated FHA loans. Allied Capital created the NRC because FHA loans were complex and it believed that, rather than having an inexperienced branch originate the loan, it would be better to have the loan referred to experienced NRC staff. In these situations, the NRC's identification code would be listed as the originating branch.

2. Reckless Underwriting

The government presented its reckless underwriting evidence through an expert. The expert testified that certain loans failed to satisfy his understanding of HUD underwriting guidelines and were therefore ineligible for FHA insurance. The government's expert conceded that he did not make any determination as to the reason for any loan default and no government expert testified to causation. The only evidence at trial regarding the cause of any default was found in the Individual Case Summaries from Early Payment Default Audits, which listed reasons for default such as death of borrower, borrower's loss of job, etc. *See e.g.*, Pet. App. G (highlighted). There was no evidence that any defect in a loan file found by the government's expert was the cause of any subsequent loan default—a

point conceded by the government at oral argument before the Fifth Circuit.[2]

After a five-week jury trial, the government secured judgments and penalties that totaled nearly $300 million. Pet. App. 2.

The Petitioners filed post-trial motions for Judgment as a Matter of Law and for a New Trial which were both denied. Pet. App. 25-39, 40-43. In the Petitioner's motion for Judgment as a Matter of Law, the Petitioners argued that the government's case failed to meet the proximate cause standard, the district court disagreed. Pet. App. 30. According to the district court:

> Under Fifth Circuit law, the United States must show that a defendant's false statement or fraudulent course of conduct "caused the government to pay out money or to forfeit money due (i.e., that involved a claim)." *Longhi*, 575 F.3d, at 467 (citation omitted); see also *United States v. Miller*, 645 F.2d 473, 476 (5th Cir. 1981) ("The language of the [FCA] clearly requires that before the United States may recover ... damages, it must demonstrate the element of causation between the false statements and the loss."). In a federal housing case, the United States must show that the false statements in the application caused the subsequent default. *Miller*, 645 F.2d at 475.

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[2] Available at: http://www.ca5.uscourts.gov/OralArgRecordings/17/17-20720_3-11-2019.mp3 minute 38:04-39:10 (last accessed 2/10/2020).

> However, "the Fifth Circuit has not delineated a specific causation standard applicable to FCA claims." *United States v. Abbott Labs*, No. 3:06-CV-1769-M, 2016 WL 80000, at *6 (N.D. Tex. Jan. 7, 2016). Here, the Court and the parties agreed that the United States must demonstrate that Allied proximately caused the loss incurred. Proximate causation carries a more stringent standard of proof than does actual (i.e., "but for") causation. However, it is not so stringent as to require elimination of all alternative possible causes. *See Paroline v. United States*, — U.S. —, 134 S.Ct. 1710, 1719-20, 188 L. Ed. 2d 714 (2014) ("Every event has many causes, however ... and only some of them are proximate, as the law uses that term. So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result."); *United States v. Spicer*, 57 F.3d 1152, 1159 (D.C. Cir. 1995) ("It is undoubtedly true that in each case other factors also 'caused' the buyer's default, but that is of no moment, for as long as Spicer's misrepresentations were a material and proximate cause, they need not have been the sole factor causing HUD's losses.").

Pet. App. 31-32. The district court's proximate cause analysis was superficial and the proof at trial was inconsistent with even the district court's muddled proximate cause standard. The district court found proximate cause because the government claimed that, had HUD known loans were being originated from unregistered branches or were recklessly underwritten,

HUD would not have insured the loans, thus *any* later default, whether due to the death of the borrower or any other intervening cause, was therefore attributed to the Petitioner's actions. Despite the label applied by the district court, this is classic "but for" causation, not proximate causation. There was no evidence of any defaults that would have not occurred had the originating branch office been properly identified or if the complained-of loan file defects (reckless underwriting) had been absent. The district court did not cite a single such causal connection. It could not because there was no evidence of such a connection presented by the government at trial.[3]

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[3] The district court stated that the government introduced evidence at trial that the Petitioners had made false statements regarding borrowers' creditworthiness. The district court made this statement without citation to the trial record. The lack of any citation is not surprising. The district court was unable to cite the trial record simply because there was no such evidence of any false statement regarding a borrower's creditworthiness. The Fifth Circuit explained this lack of evidence from the trial away by saying that "connecting false statements and defaults with specific loans is not feasible in a case that relies on sampling and extrapolation, as does this one." Pet. App. at 9. The Fifth Circuit's statement is not persuasive. The government had every opportunity to identify a false statement regarding the borrower's ability to pay from any of the loan files that were identified through the "sampling and extrapolation" in this case. It specifically chose not to do that and instead relied upon a theory of liability that the government's losses were caused when loans that were ineligible for FHA insurance in the first instance later defaulted. The government's evidence was "but for" causation, and the district court and Fifth Circuit modified the proximate cause standard to fit the government's evidence.

Petitioners appealed to the Fifth Circuit which affirmed the district court's judgment and also denied the Petitioners request for rehearing *en banc*. Pet. App. 1-24, 46-47.

The Fifth Circuit's Opinion Below

In affirming the district court, the Fifth Circuit held that proximate cause was the appropriate standard: "[w]e agree proximate cause is required." Pet. App. 9. But the standard it applied was simple "but for" causation.

> The defendants also challenge the sufficiency of the evidence to establish causation. The defendants argue that their incorrectly identifying the originating branch for a specific loan was not shown to have caused a specific default by a borrower. The defendants rely on caselaw that in "a federal housing case, the United States must show that the false statements in the application were the cause of subsequent defaults." *United States v. Miller*, 645 F.2d 473, 476 (5th Cir. Unit A May 1981). In *Miller*, we acknowledged that not all false statements have a causal connection to a later default, but "false statements regarding the ability of purchasers to afford housing could very well be the major factor for subsequent defaults." *Id.*

> The defendants insist that a restrictive proximate cause inquiry is needed that connects specific false statements to individual defaults. There arguably is support for that proposal in a *Miller* footnote, where the court described favorably the facts of another precedent in which "the false representations . . . arguably had some relevance to the credit worthiness of the borrower as well as the value of security, and thus causal connection with the default which later occurred." *Id.* at 476 n.3 (quoting *United States v. Hibbs*, 568 F.2d 347, 352 (3d Cir. 1977)). Yet the facts of a specific case are not necessarily a limit on the legal principles.
>
> We agree proximate cause is required. That is a common-law concept focused on the scope of risk and foreseeability. *See Paroline v. United States*, 572 U.S. 434, 445 (2014). The Supreme Court has labeled proximate cause as "a flexible concept." *Id.* at 444 (quoting *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008)). It "is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct" and "thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Id.* at 445.

Pet. App. 7-9.

After claiming to adopt proximate cause as the standard, the Fifth Circuit then did two things. First, it stated that it was not feasible to analyze individual loans for false statements to connect them to defaults of specific loans because the case involved sampling and extrapolation. Second, the Fifth Circuit held that it was foreseeable that loans from unregistered branches or that were recklessly underwritten would fail at higher rates.

> We expect that connecting false statements and defaults with specific loans is not feasible in a case that relies on sampling and extrapolation, as does this one. The government fairly reasons that HUD linked unregistered branches to higher risks of default, and that the expert evidence showed those loans, as predicted, defaulted at higher rates. It then follows that the false statements distorted the risk perceived by HUD, which caused it to insure more loans and incur more losses than it would have otherwise.
>
> This amounts to more than enough evidence for a jury to find that the false statements were a proximate cause of the losses. Viewing the risks and effects of the false statements in the aggregate reveals the relationship between the misconduct and the loss. Even if the defendants did not know which specific loans would eventually default, it was foreseeable that a higher percentage of them would result in claims.

Pet. App. 9-10.

> The defendants contend that the government put on no evidence that "reckless underwriting" caused defaults. The government's expert, though, testified explicitly about deficiently underwritten loans that resulted in claims. At the very least, "false statements regarding the ability of purchasers to afford housing could very well be the major factor for subsequent defaults." *Miller*, 645 F.2d at 476. The jury could have found that they were such a factor here.

Pet. App. 11.

The government's expert did not testify as to what caused any loan to default, he only testified to FHA insurance eligibility. Pet. App. 71-72. And there was no evidence at trial that there were any false statements regarding a borrower's ability to repay a loan. Nor did the government's expert determine that any loan default was caused by reckless underwriting or false originating branch identification, he conceded that he did not analyze causation. Pet. App.71. No such evidence was cited by the district court, and the Fifth Circuit merely speculated that the "jury could have found that they were such a factor here." *Id*. Speculation is neither evidence nor proof, and absent a clear standard of causation, the reach of the FCA is unmoored from any restraint.

REASONS FOR GRANTING CERTIORARI

The Court should grand certiorari to answer an exceedingly important question that has divided the circuits: what is the proper standard of causation under the FCA? In the Third, Seventh, Tenth, and District of Columbia Circuits the standard of causation is proximate cause that requires proof that the harm was foreseeable and that the false statement or fraudulent conduct was a substantial factor in causing the harm. The Fifth Circuit held to this standard for nearly four decades until its decision in this case. The Ninth Circuit has discussed both "but for" causation and proximate cause but has not adopted a clear FCA causation standard. This Court has not spoken on the appropriate causation standard under the FCA. This Court should grant review to set forth a uniform FCA causation standard. Furthermore, the Court should grant review to adopt the proximate cause standard that is consistent with the text of the FCA so as to prevent the law from being used to address an unlimited variety regulatory non-compliance.

I. The Fifth Circuit is now split with the Third, Seventh, Tenth, and District of Columbia Circuits on the proximate cause standard under the False Claims Act.

Until its decision below, the Fifth, Third, Seventh, Tenth, and District of Columbia Circuits had adopted the proximate cause standard for causation under the FCA. The Fifth Circuit opinion below created a conflict the circuits.

A. The Third Circuit was the first to adopt proximate cause in FCA cases.

The Third Circuit was the first to adopt the more stringent proximate cause standard in FCA cases. In *United States v. Hibbs*, 568 F.2d 347 (3rd Cir. 1977), a real estate broker furnished false information regarding the condition of houses that received FHA insured mortgages. When those mortgages defaulted, the government sued the broker for those false statements under the FCA. The government's argument for liability was premised on theory that "had Hibbs not furnished the false certifications, it would not have insured the mortgage and therefore would not have been called upon to make any payment post hoc ergo propter hoc." *Id*. at 351. The Third Circuit rejected that approach to causation:

> We are unable to accept this argument because it ignores the statute's [FCA] restrictive language "by reason of." The damages were sustained by the United States because of defaults of the mortgagors and to some extent were increased by the unexpected diminution of property value caused by the lead paint injunction. Neither of those events was caused by or related to the false certifications. Indeed, precisely the same loss would have been suffered by the government had the certifications been accurate and truthful.

Id. at 351.

The case against the Petitioners was strikingly similar to the claims brought against *Hibbs* that the

Third Circuit rejected. Here, there was no evidence that a false branch identification number or a defect in underwriting caused any of the loans at issue in the case to default. If a borrower died and the loan went into default because there was no one to pay the mortgage, that loss would have occurred regardless of the veracity of the branch identification number or how well the loan file was underwritten. As further explained by the Third Circuit:

> To further illustrate the extreme to which the government's argument would lead if the mortgagors had defaulted because their houses had been destroyed by a flood or some other uninsured catastrophe, the government's theory would nevertheless hold Hibbs liable because he failed to call attention to defects in the plumbing. We cannot conceive that Congress intended such an inequitable result.

Id. This is precisely the issue in this case that both the district court and Fifth Circuit glossed over.

B. In *Miller*, the Fifth Circuit followed the Third Circuit in adopting proximate cause.

Hibbs' holding and reasoning was expressly adopted by the Fifth Circuit in *United States v. Miller*, 645 F.2d 473, 475-476 (5th Cir. 1981). *Miller* held that the government must prove "causation between the false statements and the loss" and that "**[i]n the context of a federal housing case, the United States must show that the false statements in the application were the cause of subsequent defaults.**" *Miller*,

645 F.2d at 476 (emphasis added). The government failed to make that connection in this case.

Just as in this case, *Miller* involved mortgage applications for FHA loans with federal mortgage insurance. *Id*. 474. Unlike here, it was alleged that the *Miller* defendants knew that certain statements regarding the creditworthiness, net worth, amount of down payment, and past and present debt of the borrowers, were false when the applications were submitted to HUD. *Id*. at 474-475. There was no such allegation against the Petitioners here, the pertinent allegations were that the government incurred losses because the Petitioners had originated loans from unregistered branches and recklessly underwritten loans. This is precisely what the jury was asked to answer, not whether they found false statements regarding borrowers' ability to repay loans. Pet. App. G.

In the district court's denial of the Petitioners' motion for judgment as a matter of law, the district made a bare claim that the government had put on evidence that the Petitioners had made false statements regarding borrower's creditworthiness, but the district court's statement is unadorned with any citation to the trial record and in fact no such evidence was presented at trial. At oral argument before the Fifth Circuit panel, the government conceded that there was no such evidence, but instead of reversing the district court on this failure of proof alone, the Fifth Circuit explained the lack of any such evidence by saying that "connecting false statements and defaults with specific loans is not feasible in a case that relies

on sampling and extrapolation, as does this one." Pet. App. at 9.

C. The Seventh, Tenth and District of Columbia Circuits all follow *Hibbs* and *Miller* and adopt the more stringent proximate cause standard.

The Seventh Circuit specifically adopted *Miller's* proximate cause standard and overruled its own prior "but for" causation precedent in *United States v. Luce*, 873 F.3d 999 (2017). In *Luce*, a mortgage company owner falsely certified that he was not under criminal investigation or indictment on his annual certifications to HUD in order to remain eligible to originate FHA loans. When some of those loans defaulted, the government sued to recover under the FCA for those false statements. The Seventh Circuit disagreed with the government's theory of liability.

The Seventh Circuit explained that proximate cause required both a cause in fact and legal cause where legal cause was whether the injury was a foreseeable consequence of the specific wrongful conduct and were cause in fact was conduct that was a substantial factor in causing the injury. *Id.* at 1012. While damage resulting from Luce's false statements may have been foreseeable, they were not the cause in fact of the harm. *Id.* In other words, pertinent here, if the borrower dies and the loan goes into default, the truth or falsity of the originating branch identification number or whether the loan was correctly underwritten is of no moment. The Fifth Circuit's opinion below rests solely on legal cause and obviates

the substantial factor requirement thus, it conflicts with *Luce*.

The Tenth Circuit also followed the Third Circuit's *Hibbs* holding in *United States, ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 714 (2006). In *Hibbs*, the Tenth Circuit held that a "sufficient nexus between the conduct of the party and the ultimate presentation of the false claim [was required] to support liability under the FCA." The Tenth Circuit's proximate cause standard requires a causal connection between the specific fraudulent conduct and the loss, not that the loss was merely foreseeable. *Id.* In this case, there was no evidence that the false branch identification numbers or that deficiencies in underwriting caused any loss, therefore, the government's evidence in this case would be insufficient to satisfy the Tenth Circuit standard, hence the obvious conflict with the Fifth Circuit's holding below.

The District of Columbia Circuit also adopted the proximate cause standard articulated in *Hibbs* and *Miller*. Pointedly, the District of Columbia Circuit held that the FCA "does not contemplate liability for all damages that would not have arisen 'but for' the false statement." *United States, ex rel., Schwedt v. Planning Research Corp.*, 59 F.3d 196, 200 (1995). The panel opinion's standard is nothing more than a "but for" the fact that the loans were FHA insured, HUD would not have suffered a loss, a standard that conflicts with the District of Columbia Circuit.

II. The Opinion Below cites *Miller* and proximate cause in name but applies "but for" causation.

Miller could not have been clearer: "[i]n the context of a federal housing case, the United States must show that the false statements in the application were the cause of subsequent defaults." *Miller*, 645 F.2d at 476. The Fifth Circuit acknowledged this standard but backed away from it in the opinion below by arguing that proximate cause is "a flexible concept." Pet. App. 9 (internal citations omitted). But, flexible or not, proximate cause still requires more than an "attenuated" causal connection between the conduct and the harm. *Paroline*, 572 U.S. at 445. This causal connection was not present in the case below. With its opinion below requiring only foreseeability to satisfy the FCA's causation element, the Fifth Circuit changed the definition of proximate cause, abrogated *Miller*, and created a conflict with the other circuits.

The Fifth Circuit fell victim to the *post hoc ergo propter hoc* fallacy ("after this, therefore because of this"). According to the Fifth Circuit, because the loans were ineligible for FHA insurance because of a false statement regarding branch identification numbers by the Petitioners or reckless underwriting, any later default was necessarily the result of that false statement or reckless underwriting: "[t]he government's expert, though, testified explicitly about deficiently underwritten loans that resulted in claims." Pet. App. 11. This is not a sufficiently proximate causal connection to support FCA liability under the rule adopted by the Third, Seventh, Tenth and District

of Columbia Circuits, as well as the Fifth Circuit until that standard was overturned in this case. It bears repeating what the Third Circuit held in *Hibbs*:

> We are unable to accept this argument because it ignores the statute's [FCA] restrictive language "by reason of." The damages were sustained by the United States because of defaults of the mortgagors and to some extent were increased by the unexpected diminution of property value caused by the lead paint injunction. Neither of those events was caused by or related to the false certifications. Indeed, precisely the same loss would have been suffered by the government had the certifications been accurate and truthful.
>
> To further illustrate the extreme to which the government's argument would lead if the mortgagors had defaulted because their houses had been destroyed by a flood or some other uninsured catastrophe, the government's theory would nevertheless hold Hibbs liable because he failed to call attention to defects in the plumbing.

Id. at 351. Thus, even if the originating branch had been properly registered and/or if the loan file been perfectly underwritten, if the borrower died and the loan went into default, the government would have suffered the same loss. The false branch identification numbers and the underwriting flaws the government complained of in this case therefore could not be the proximate cause of the government's losses in those instances.

Furthermore, the jury was only asked whether they found loans to have been originated from unregistered branches or recklessly underwritten—they were not asked, nor did they find, that either wrongly identifying the originating branch or reckless underwriting loan caused a loan to default. Pet. App. H. If such a causal connection had been made, certainly the district court or the Fifth Circuit would have said so in their opinions. To overcome this complete failure of proof, both the district court and Fifth Circuit limited their proximate cause analysis to foreseeability alone, rather than analyzing both foreseeability and causation-in-fact as required by the sister circuits. Pet. App. 8-10, 31-32. Thus, liability was found here because when the jurors found that the loans were ineligible for FHA insurance the Petitioners became liable for any defaulted loan, regardless of the cause of the default—*post hoc ergo propter hoc.*

If the this is the appropriate causation standard, the FCA's reach becomes open-ended and any regulatory violation will sustain liability for the law's treble damages and other penalties. With the decision below, the Fifth Circuit has not only changed the definition of proximate cause, it has placed itself in conflict with the Third, Seventh, Tenth, and District of Columbia Circuits.

III. This Court's decision in *Escobar* should guide it now in setting the FCA's causation standard.

This Court's decision in *United Health Serv., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), set forth a clear and workable materiality standard for

FCA claims. The work of this Court in that decision can and should guide it here.

The Court noted that the FCA treble damages and civil penalties make the FCA "essentially punitive in nature." *Id*. at 1996 (quoted citation omitted). And the Court also pointedly "emphasize[d]" "that the [FCA] is not a means of imposing treble damages and other penalties for insignificant regulatory . . . violations," *Id*. at 2004. This Court acknowledged "concerns about . . . open-ended liability" under the FCA in the context of program-wide certifications in regulatory programs (like here) but held that those concerns "can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements," reaffirming that those "requirements are rigorous." *Id*. at 2002 (quoted citation omitted).

As discussed above, the courts of appeal that have grappled with the causation standard were also concerned with the open-ended liability that would come with a less stringent causation standard for FCA claims. And each adopted proximate cause as the appropriate standard requiring that the harm be foreseeable and that the conduct at issue be causally connected to the resulting harm. What the Fifth Circuit did below is to keep the term proximate cause, but it eliminated the causal connection element from the concept. Rather than requiring the conduct to be a substantial factor in causing the harm, the Fifth Circuit has now adopted a proximate cause standard that only requires the harm to be foreseeable. Thus, the Fifth Circuit's new proximate cause standard is different from "but for" causation in name only. And

contrary to the teaching of *Escobar*, in the Fifth Circuit, the FCA's reach is nearly unlimited.

IV. The Court should adopt the proximate cause standard from *Hibbs*.

In order to anchor the reach of the FCA to its language informed by the common law, this Court should adopt the proximate cause standard adopted by the Third Circuit in *Hibbs*, because it "strikes the proper analytical balance and comports with the rule requiring strict construction of punitive civil statutes." *Sikkenga*, 472 F.3d at 715 n.17. And, contrary to the assertion made by the Fifth Circuit below, the *Hibbs* standard is workable in cases that involve sampling and extrapolation. The government could have taken from the sampled loans, each file that contained a fraudulent statement regarding the borrower's creditworthiness or ability to repay the loan and extrapolated those findings over the universe of defaulted loans. That is how a causal connection is made—and it is what was not done in this case. Adopting the *Hibbs* standard, which was adopted by the Seventh Circuit in *Luce*, the Tenth Circuit in *Sikkenga*, the District of Columbia Circuit in *Schwedt*, and by the Fifth Circuit in *Miller* (effectively abrogated by the Fifth Circuit in the opinion below), will provide litigants with a uniformed standard and resolve the confusion and inconsistency present in FCA jurisprudence today. Adopting the *Hibbs* standard returns the Fifth Circuit to where it stood before it upended its own jurisprudence in this case and will provide consistency across the circuits.

V. This case presents an ideal opportunity for the Court to resolve this circuit split and decide a question of exceptional importance to FCA litigants.

As noted above, the FCA is one of the most heavily litigated statutes in federal courts and is one of the primary vehicles through which the federal government pursues those who commit fraud against it. The question of the proper causation standard under the FCA is important to the litigants as they should not be left to guess what standard applies. Neither should it be the case where litigants in the various circuits are held to different standards for the same conduct under the same federal statute. Given the FCA's severe penalties which this Court considers punitive in nature, *Escobar*, 136 S. Ct. at 1996, resolution of the split between the circuits is exceedingly important.

This case is an excellent vehicle for resolving this exceedingly important and recurring question. The Fifth Circuit's opinion below conflicts directly with the law in four other circuits because the Fifth Circuit eliminated the proximate cause requirement that the conduct at issue in FCA cases be a substantial factor in causing the harm to the government in order for liability to be imposed. The Court can settle this split between the circuits as to the causation standard of the FCA.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

David Alan Warrington
Counsel of Record
KUTAK ROCK LLP
1625 Eye Street NW
Suite 800
Washington, D.C. 20006
(202) 828-2437
david.warrington@kutakrock.com

Counsel for Petitioners