No. _____

In The
Supreme Court of the United States

HENRY M. EVANS, M.D.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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June 3, 2021

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QUESTIONS PRESENTED FOR REVIEW[1]

The administration of the Medicare and Medicare programs is conducted through and governed by a large body of regulations, rules, and policies issued by CMS (the Center for Medicare & Medicaid Services), pursuant to the rule-making authority granted to it by Congress. In this Court, and every Circuit Court of Appeal except the Fifth Circuit, these regulations, rules and policies have been described as "controlling."

At his criminal trial, Dr. Evans sought to show that he had complied with the CMS definition of "homebound," and thus was not guilty of health care fraud. However, the district court refused to instruct the jury on the relevant regulations, while allowing a Government expert to give testimony on "homebound status" that was not based on the CMS regulations.

The Fifth Circuit affirmed Dr. Evans's convictions, holding that "to the extent that the Medicare regulations provide guidance as to which patients qualify as homebound, it is akin to a term of art." The Fifth Circuit further held that "the word [homebound] has a meaning outside of these parameters," and found the admission of the expert's testimony was not an abuse of discretion. The Fifth Circuit's opinion presents these questions for review by this Court:

1.) Are the Medicare rules, regulations, and policies "controlling" in a criminal prosecution under 18 U.S.C. § 1347; *i.e.* is evidence of compliance or

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[1] The caption of the case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

QUESTIONS PRESENTED FOR REVIEW
—Continued

non-compliance with the rules, regulations and policies always relevant to a determination of fraud?

2.) If the Medicare rules, regulations, and polices are not "controlling," but are "terms of art," as the Fifth Circuit opined, must these rules, regulations, and policies nevertheless guide the "reliable principles and methods" of any witness proffered as an expert in eligibility for Medicare benefits?

RELATED CASES

United States v. Jonathon Nora, 988 F.3d 823 (5th Cir. 2021), No. 18-31078. Judgment reversing defendant's judgment of conviction and sentence entered on February 24, 2021.

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Henry M. Evans, M.D. respectfully petitions this Honorable Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals affirming Evans's convictions.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Evans's convictions is reported as *United States v. Barnes, et al.*, 979 F.3d 283 (5th Cir. 2020). The opinion of the United States Court of Appeals for the Fifth Circuit denying Evans's petition for rehearing *en banc* is not reported, but is attached to this petition at App.78.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over these proceedings pursuant to 18 U.S.C. § 3231. The Court of Appeals for the Fifth Circuit had jurisdiction over Evans's appeal pursuant to 28 U.S.C. § 1291. Evans timely petitioned the Court of Appeals for the Fifth Circuit for a rehearing *en banc*, which was denied on January 4, 2021. This petition for a writ of *certiorari* is therefore timely, and this Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law. . . .

Federal Rule of Evidence 702 provides as follows:

> Rule 702. Testimony by Expert Witnesses
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods;
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

STATEMENT OF THE CASE

1. Introduction

As this Court recently wrote, "[o]ne way or another, Medicare touches the lives of nearly all Americans."[4] It is the second largest federal program, and spends over $700 billion annually.[5] Because such large amounts of money inevitably invite fraud, the scope of which is also substantial,[6] the federal government prosecutes health care fraud vigorously.[7]

One of the most important federal prosecutorial tools is the federal "Health Care Fraud Statute," 18 U.S.C. § 1347, first enacted in 1996 as part of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").[8] Like the other federal "fraud" statutes, *i.e.*, the mail fraud statute, the wire fraud statute, and the bank fraud statute, the Health Care Fraud Statute does not define fraud. Instead, Congress simply made it a federal crime "to defraud any health care benefit program." It was left to the federal courts to fill in the definitional gaps in the legislation.

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[4] *Azar v. Allina Health Services*, ___ U.S. ___, 139 S. Ct. 1804, 1808 (2019).

[5] *Id.*

[6] *See Annual Report of the Departments of Health and Human Services and Justice*, "Health Care Fraud and Abuse Control Program, FY 2014," *available at* https://www.justice.gov/criminal-fraud/file/1233021/download (Last visited 05/24/2021).

[7] *Id.*

[8] Pub. L. No. 104-191, 110 Stat. 1936 (1996).

But the Health Care Fraud Statute was not born into a complete vacuum, nor has it matured in one. Rather, it lives alongside of the other criminal statutes used to prosecute health care fraud, *e.g.*, the "Anti-Kickback Statute,"[9] and it coexists with almost countless Medicare regulations, rules, and policy statements. Because these regulations, rules, and policies have the force of law,[10] district and appellate courts have referred, and deferred[11] to them when adjudicating both civil and criminal health care fraud cases.

This judicial practice has been especially true in criminal cases, in which *almost* every court that has addressed the role of Medicare's rules and regulations has treated them as "controlling" in helping to determine what is and is not fraudulent behavior in the extremely complex and highly regulated realm of health care. Courts have implicitly and explicitly recognized both the practical, and the due process implications of prosecuting someone who followed the regulations promulgated by Medicare in good faith.

Until now. In a decision that can only be described as unprecedented, in the fullest sense of the term, the Fifth Circuit Court of Appeals has reduced Chapter 7 of the Medicare rules and regulations to a "term of art," while simultaneously disregarding the decisions of

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[9] 42 U.S.C. § 13210a-7b.

[10] *See Kisor v. Wilkie*, ___U.S. ___, 139 S. Ct. 2400 (2019), at 2415: "The regulation then just means what it means—and the court must give it effect, as the court would any law."

[11] *Id.* at 2408.

this Court in *Daubert v. Merrill Dow Pharm., Inc*,[12] *General Elec. Co. v. Joiner*,[13] and *Kumho Tire Co. Ltd. v. Carmichael*.[14] In doing so, the Fifth Circuit has decided important questions of federal law in a way that conflicts with decisions of other courts of appeals, and in a way that conflicts with decisions of this Court. Full review by this Court is warranted, because it has never addressed the question of whether the Medicare regulations, rules and policies, are "controlling" in a criminal prosecution. Review is also necessary because there is a need for this Court to define the relationship between those Medicare rules and regulations and the "reliability" required of expert testimony admitted pursuant to FRE 702.

2. The trial of Dr. Evans

In March, 2015, the United States indicted Dr. Henry Evans and 19 others for fraud related to home health care. Evans was named as a defendant in two conspiracy counts, and in eight substantive counts alleging violations of the health care fraud statute (18 U.S.C. § 1347).

In its pre-trial memorandum, the Government described its evidence of the alleged scheme, and its theory of culpability as follows:

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[12] 509 U.S. 579 (1993).

[13] 522 U.S. 136 (1997).

[14] 526 U.S. 137 (1999).

> The Government has chosen certain beneficiaries as examples of how the defendants executed the health care fraud scheme. These examples are separate counts in the Indictment, and show how the defendants caused Medicare to be billed for medically unnecessary episodes of home health services (emphasis added).

The Government contended the episodes were not medically necessary because the patients were not actually "homebound."

The entirety of the Government's indictment was built around that one factual premise. The Government contended all the defendant doctors, aided by others, falsely certified patients as "homebound," and then referred those patients to Abide Home Care Services, Inc. (Abide) for medically unnecessary treatment, purely for financial gain. As a consequence, the issue of whether the patients named in the indictment (and by inference others) were in fact "homebound" was at the center of the defendants' 21-day trial. Critically, also at the center were the Medicare regulations regarding "home health care," which were intrinsic to the indictment. In fact, references to the Medicare rules or regulations regarding home health care can be found on every single page of the 49-page indictment, except the signature page.

In *all* Medicare matters the term "homebound" has a very specific meaning: the one set out in Chapter 7 of the Medicare Benefit Policy Manual (MBPM), Pub. L. No. 100-02, Ch. 7, § 30.1.1 (Rev. 233, February 24,

2017). Judicially, the definition has been treated as "controlling." *See Caring Hearts Pers. Home Servs. v. Burwell*, 824 F.3d 968, 977 (10th Cir. 2016) ((now) Justice Gorsuch) (describing Chapter 7 of the MBPM's definition of "homebound" as a "controlling regulation").

At the trial of Evans and five of his co-defendants, the Government offered only a single expert witness on the question of whether the eight patients specifically listed in the indictment were in fact "homebound": Dr. Brobson Lutz, who was qualified (over the objection of defense counsel) as "an expert in the area of internal medicine and the medical necessity of home health services."

On direct examination, the Government questioned Lutz about each of the eight "illustrative" patients in the indictment, using the terminology of the Medicare regulations—*e.g.*, "episode"; "recertification"; "considerable and taxing effort"; "medical necessity."

In *every* case, Lutz stated categorically that the patient was not homebound for some, or all of the episodes billed to Medicare. But at *no* time during his direct testimony did Lutz, or the Government, ever indicate that Lutz might *not* be relying upon the Medicare definition of "homebound," in giving his expert opinion regarding the "homebound status" of each patient.

However, cross-examination revealed that Lutz was *not* employing the Medicare definition of "homebound"

in formulating his expert opinion. He had his own definition:

> A. (By Lutz) **Well, they [the regulations] have a somewhat liberal definition of homebound** [*sic*], but the key to the whole thing is, does the person need skilled nursing visits at home or physical therapy, occupational therapy, do they need—do they need the services.
>
> * * *
>
> (Lutz, continued) My definition—or **my thinking of homebound is when somebody has an illness where they literally can't get out of the house without doing an ambulance or something, or where it takes an army or a village or something to get them out.**
>
> **I think that the—Medicare definition that you're talking about in Chapter 7 is liberal** . . . * * *
>
> Q. (By counsel for Evans) All right, I will ask you again. During your testimony over the last two days, you did not on one occasion refer to a specific Medicare regulation when determining whether or not the patient was homebound, did you, Dr. Lutz.
>
> A. (by Lutz) If I wasn't asked to, I doubt if I did.

This led to the following exchange, at a bench conference during the cross-examination of Lutz by counsel for Evans:

> (Government Counsel): I didn't ask him anything about the regulations, I asked him about—
>
> (Counsel for Evans) That's right.
>
> (Government Counsel) —in his job as an internist, his experience with home health, and based upon his looking at the records, **did they qualify for home health** and the need for skilled services.
>
> (The Court) **But he wouldn't be able to answer that without knowing something about how you qualify for home health.**
>
> (Government Counsel) **That's out of his experienc**e. **[*sic*].**
>
> (The Court) **But he can't just have made it up. He must know what the regulation[s] say—**
>
> (Government Counsel) **Well, let's ask him if he's ever read Chapter 7 before this. [*sic*]**.

Ultimately, and perhaps inadvertently, the district court concluded that Lutz was not an expert in the *relevant* field of expertise: determining whether a patient is "homebound" as defined by the MBPM:

> (The Court) But he [Lutz] hasn't testified—all—he has said in his opinion as a doctor making a decision about whether someone needs home health care services, that that would have an impact about whether they needed it. **Now whether that technically**

> **under the Medicare regulations affects the determination, I don't think this witness is qualified to testify about that.**
>
> (Counsel for Evans) Well, I think he should be, Judge, if he's going to come and give opinions about whether or not people are not homebound. * * *

Neither the other defendants, nor Evans offered any expert testimony in the defense case regarding the homebound status of any of the patients.

At the conclusion of trial all defendants specifically requested that the jury be instructed on the relevant Medicare regulations and policies governing home health care. The request was denied by the district court. Following deliberations, the jury convicted all defendants of one or more counts in the indictment. Evans was acquitted of all the conspiracy counts, and several of the substantive healthcare fraud counts, but was convicted of substantive charges of health care fraud with regard to two patients, for billings totaling $6,626.

Thereafter, Evans was sentenced to 50 months imprisonment, followed by supervised release, and ordered to pay restitution of $1,262,043.

3. Dr. Evans's appeal to the Fifth Circuit

In his appeal to the Fifth Circuit, Evans argued that the binding nature of the Medicare regulations had to prevail over the opinions of the Government's

lone expert. Because that expert was either ignorant of, or simply disregarded those regulations, his testimony was "unreliable," as the term has been defined by this Court in *Daubert v. Merrill Dow Pharm., Inc*,[15] *General Elec. Co. v. Joiner*,[16] and *Kumho Tire Co. Ltd. v. Carmichael*.[17] Evans contended that *Daubert*'s statement that expert testimony that rests solely on "subjective belief or unsupported speculation" is not reliable was a compelling basis for reversing the district court.

Evans further argued that when the holding of *Daubert* is coupled with other relevant caselaw explicitly holding that an expert's opinions in a Medicare case are unreliable when they conflict with the controlling Medicare regulations, there could be no doubt that the testimony of the Government's expert was inadmissible. Because the totality of the Government's expert testimony on the "homebound" status of the patients was based on one man's opinion, and that opinion was not based on regulations and policies that are "controlling," Evans asked that his convictions be reversed.

4. The opinion of the Fifth Circuit

The Fifth Circuit panel conceded that Lutz's expert testimony was not based on the relevant Medicare regulations and policies (App.37). It also

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[15] 509 U.S. 579 (1993).

[16] 522 U.S. 136 (1997).

[17] 526 U.S. 137 (1999).

acknowledged that the testimony "arguably may have injected confusion at trial" (App.37) and that Lutz's expert "determinations as to the homebound status of these patients [named in the indictment] could have, at a minimum, confused the jury." (App.38). But the panel never reached the question of whether this made Lutz's testimony unreliable under *Daubert*, *Joiner*, and *Kumho Tire*.

Instead, the panel found the Medicare rules, regulations, and policies to be something much less than "controlling," even in a criminal Medicare fraud case: "[t]o the extent that the Medicare regulations provide guidance as to which patients qualify as homebound, it is akin to a term of art." (App.38).

Having reduced Chapter 7 of the Medicare Benefit Policy Manual (MBPM), Pub. L. No. 100-02, Ch. 7, § 30.1.1 (Rev. 233, February 24, 2017) to a "term of art," the panel then found that it was not an abuse of discretion for there to be two definitions of "homebound" at Evans's trial. In the panel's words: "Although the record is not entirely clear, the district court appears to have drawn a distinction between "the medical necessity of home health services" and whether the patient *qualified* for home health care under Medicare." (App.37). [Parenthetically, no such distinction was ever articulated by the district judge, nor was the jury ever instructed on this distinction—or on any other aspect of the Medicare regulations governing home health care.]

Although ultimately the panel was "troubled by some aspects of Lutz's testimony," (App.38-39), it concluded that counsel's effective cross-examination "clearly demonstrated for the jury that Dr. Lutz's determinations were based on his own, more conservative view of which patients were in fact 'homebound.'" (App.39). Accordingly, the Fifth Circuit did not reverse Evans's convictions.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit has decided an important federal question in a way that conflicts with the decisions of this Court, and with the decisions of other United States courts of appeals.

This Court recently recognized that Medicare's "rule[s], requirement[s], or other statement[s] of policy" shape the "substantive legal standar[s] governing . . . the payment for services, or the eligibility . . . to furnish or receive services or benefits under Medicare."[18] It should follow that when a doctor certifies a patient as legally eligible for home health care benefits under Medicare, the relevant rules, requirements, and policies control whether that certification was false or fraudulent.

[18] *Azar v. Allina Health Services*, ___ U.S. ___, 139 S. Ct. 1804, 1809 (2019) (quoting 42 U.S.C. § 1395hh(a)(2)) (internal marks omitted).

The Court demonstrated this point in *Universal Health Services v. United States ex rel. Escobar*.[19] In addressing whether an "implied false certification" constitutes a "false or fraudulent" claim in a civil prosecution under the False Claims Act[20] [21] the Court made clear that regulatory non-compliance is central to whether the claim are false or fraudulent:

> "When, as here, a defendant makes representations in submitting a claim but omits its **violations of statutory, regulatory, or contractual requirements**, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided."[22]

The Court subsequently emphasized the importance of regulatory non-compliance in determining the misstatement's materiality: "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 False Claims Act."[23]

But while the rationales of these two decisions seemingly indicate the health care rules and regulations control all allegations of federal health care

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[19] *Universal Health Servs. v. United States ex rel. Escobar*, ___ U.S. ___, 136 S. Ct. 1989 (2016).

[20] 31 U.S.C. § 3729(a)(1)(A)

[21] *Escobar*, 136 S. Ct. at 1998-1999.

[22] *Id.* at 1999 (emphasis added).

[23] *Id.* at 2002.

fraud, the Court has never directly addressed the issue in the context of a criminal prosecution. The Circuit Courts of Appeals have, however, with divided results.

In *United States v. Mitchell*, the Eleventh Circuit explained the centrality of Medicare's rules and regulations in prosecuting criminal health care fraud: "in order to establish both that the [Medicare] claims were deceptive and that [the defendant] acted with scienter," the Government must "introduce evidence of what the Medicare laws and regulations permitted and forbad."[24] The court further emphasized that "if the law that makes a statement false is ambiguous and the defendant's statement was consistent with one reasonable interpretation of the law, the government must rule out the possibility that the defendant was acting in reliance on that interpretation."[25]

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[24] *United States v. Mitchell*, 165 F. App'x 821, 826 (11th Cir. 2006).

[25] *Id.*

In accordance with these principles, the Second Circuit,[26] Sixth Circuit,[27] and Eleventh Circuit,[28] have determined that a defendant does not defraud Medicare when their conduct does not clearly deviate from the requirements or proscriptions established by the Medicare rules and regulations.

The Fifth Circuit, however, breaks new ground with this case by holding that Medicare's regulatory definition of "homebound" is something less than a controlling legal standard when determining whether a doctor defrauded Medicare by falsely certifying patients as "homebound." This holding cannot be squared with the rules established by this Court and opinions of the other Circuit Courts of Appeals.

Nor can it be reconciled with the basic principles of fair notice and due process. By promulgating a specific definition of "homebound," Medicare established

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[26] *See Siddiqi v. United States*, 98 F.3d 1427, 1439 (2d Cir. 1996) (finding that, as a legal matter, a defendant could not have intentionally defrauded Medicare where the permissibility *vel non* of the defendant's billing under a certain code was "unclear").

[27] *See United States v. Levin*, 973 F.2d 463, 465-470 (6th Cir. 1992) (determining that "as a matter of law . . . the government could not prove the required element of intent to support a conviction of [Medicare fraud]" where the relevant Medicare regulation had been "rendered ambiguous by numerous opinion letters issued by the government").

[28] *See United States v. Whiteside*, 285 F.3d 1345, 1351-1353 (11th Cir. 2002) (holding that the Government failed to prove the defendant defrauded Medicare where "the defendant's interpretation" of the pertinent "Medicare regulations . . . was not unreasonable" and there existed "no Medicare regulation, administrative ruling, or judicial decision" indicating otherwise).

the legal standard against which homebound certifications should be measured.[29] Evans was entitled to rely on this definition as an "authoritative assurance that punishment [would] not attach" if his certifications complied with this standard.[30] And to allow Evans's certifications to be evaluated, not by Medicare's own standard, but by the Government witness's own standard—admittedly distinct from Medicare's—would be to render the boundaries of "fraud" in the health care context "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[31]

In *Caring Hearts*, Justice Gorsuch highlighted the Constitutional issues at stake when the Government ignores the controlling standards set forth in Medicare's rules and regulations, while seeking to penalize private citizens for failing to comply with the same:[32]

> "This case has taken us to a strange world where the government itself—the very 'expert' agency responsible for promulgating the 'law' no less—seems unable to keep pace with its own frenetic lawmaking. A world Madison worried about long ago, a world in which the laws are 'so voluminous they cannot be read' and constitutional norms of due

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[29] *See Allina Health Services*, 139 S. Ct. at 1809.

[30] *See United States v. Laub*, 385 U.S. 475, 487 (1967).

[31] *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

[32] Notably, Justice Gorsuch was addressing CMS's regulatory qualifications for being "homebound." *See Caring Hearts*, 824 F.3d at 970.

> process, fair notice, and even the separation of powers seem very much at stake. But whatever else one might say about our visit to this place, one thing seems to us certain: **an agency decision that loses track of its own controlling regulations and applies the wrong rule in order to penalize private citizens can never stand**."[33]

That the same would hold true in a criminal prosecution might have been assumed—until now. Review by this Court is necessary to conclusively establish the legal significance of these rules and regulations in criminal health care fraud prosecutions.

2. The Fifth Circuit has decided a second important question of federal law which has not been, but which should be decided by this Court.

If the Fifth Circuit had treated Chapter 7 of the Medicare Benefit Policy Manual (MBPM), Pub. L. No. 100-02, Ch. 7, § 30.1.1 (Rev. 233, February 24, 2017) as "controlling," this issue might not have arisen. But by treating the contents of that chapter as a "term of art," *i.e.*, by reducing its legal status, the Fifth Circuit inadvertently highlighted the need for this Court to speak authoritatively on the legal status of Medicare regulations, rules, and policies, insofar as they inform and form the basis of expert opinions. This need is especially acute in criminal prosecutions.

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[33] *Id.* at 976 (emphasis added).

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[34] the Court created a new, consistent set of standards for determining when expert scientific testimony would be admissible in a federal trial, standards that were consistent with the Federal Rules of Evidence—specifically FRE 702. One of those standards was a requirement that "[p]roposed testimony . . . be supported by appropriate validation—*i.e.*, "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability."[35]

Four years after *Daubert*, the Court granted *certiorari* in *General Elec. Co. v. Joiner*[36] "to determine what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*" The Court unanimously held that the appropriate standard was "abuse of discretion." In his concurring opinion, Justice Breyer quoting *Daubert*, emphasized the importance of the trial judge's "gatekeeper" role, and the need to ensure that "any and all scientific testimony or evidence is not only relevant, but reliable."[37]

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[34] 509 U.S. 579 (1993).

[35] *Daubert*, 509 U.S. at 590 (footnote omitted).

[36] 522 U.S. 136 (1997).

[37] *General Elec. Co. v. Joiner*, 522 U.S. 136, 520 (Breyer, J., concurring) (quoting *Daubert v. Merrell Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)).

Two years after *General Elec. Co. v. Joiner*, the Court handed down its decision in *Kumho Tire Co., Ltd. v. Carmichael*.[38] In *Kumho Tire* the Court extended the central holdings, and some of the analytical factors of *Daubert* to non-scientific experts, such as engineers. As with *Daubert* and *Joiner*, the *Kumho Tire* court again emphasized that the touchstones for the admissibility of *any* expert testimony are relevancy and reliability. And *Kumho Tire* again stressed the importance of the trial judge's general "gatekeeping" obligation; *i.e.*, that he or she must exclude irrelevant or unreliable expert testimony.

Since its opinions in *Daubert, Joiner*, and *Kumho Tire*, this Court has not addressed any aspect of either FRE 702, or the admissibility of expert testimony. But the lower courts certainly have. As of this writing, the lower courts, both state and federal, have cited these three cases in excess of 50,000 times. Although it is impossible to summarize a body of law that large, the federal caselaw is consistent on several points: it is the district judge who must function as a "gatekeeper," *i.e.*, it is the judge, not the jury, who must determine which expert testimony is reliable, and therefore admissible, and which is unreliable, and therefore inadmissible. Moreover, consistent with the teachings of this Court, Circuit Courts of Appeals have always held that the admission of unreliable testimony is an error—one which often results in a reversal of a conviction,

[38] 526 U.S. 137 (1999).

because of the evidentiary significance of expert testimony.

But the question that has not been settled by those courts is the role that federal regulations, rules, and policies play in creating "reliable principles and methods" upon which to base expert testimony. Nor has it been answered by this Court—although the need for guidance is critical, given the burgeoning number of health care fraud prosecutions. A moment's reflection demonstrates why.

A typical indictment for health care fraud under 18 U.S.C. § 1347, like the one returned in this case, will make numerous references to the Medicare regulations. And the indictment will allege that those regulations and rules were not followed during the scheme to defraud. Then, at trial, the Government's medical expert will reference those regulations and rules in his or her expert testimony, and opine on the question of whether the defendant(s) complied with them. Assuming the Government's expert finds non-compliance, the jury must then decide whether that non-compliance was fraudulent.

This approach to prosecuting health care fraud is the template for U.S. Attorneys around the United States. *See, e.g.*, *United States v. Martinez*;[39] *United States v. Chhibber*;[40] *United States v. Anderson*;[41]and

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[39] *United States v. Martinez*, 588 F.3d 301 (6th Cir. 2009), cert. den., 562 U.S. 1017 (2010).

[40] *United States v. Chhibber*, 741 F.3d 852 (7th Cir. 2014).

[41] *United States v. Anderson*, 980 F.3d 423 (5th Cir. 2020).

United States v. Memar.[42] And rightfully so, because it honors the Federal Rules of Evidence, and the principles established by this Court in *Daubert*, *Joiner*, and *Kumho Tire*.

That template was plainly ignored by the prosecutors in Dr. Evans's case, and the district court did nothing to deter or correct the prosecution's mistakes. But what is relevant for this Court is the Fifth Circuit's apparent disregard for the Federal Rules of Evidence, and the caselaw of this Court. The testimony of the Government's "expert" was reliable only insofar as it was a product of "reliable principles and methods"; it was relevant only insofar as it made the "fact" of the patients' homebound status under the Medicare regulations and rules more or less probable; and it was admissible under FRE 702 only insofar as it helped the jury "understand the evidence or determine a fact in issue."

But instead of acknowledging that the testimony of Dr. Brobson Lutz failed all three of these requirements for admissibility, the Fifth Circuit downgraded the legal status of the Medicare regulations and rules, and seriously undermined the foundational requirements for expert testimony in a criminal prosecution for health care fraud. While there is of course some judicial reluctance to overturn a jury's verdict in a multi-defendant, multi-day trial, that reluctance

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[42] *United States v. Memar*, 906 F.3d 652 (7th Cir. 2018).

cannot be allowed to serve as an impetus for the erosion of well-established principles of law.

CONCLUSION

Wherefore this Court is respectfully urged to grant this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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