No. 20-293

IN THE

Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY, SANOFI AVENTIS U.S. LLC, SANOFI US SERVICES INC., FORMERLY KNOWN AS SANOFI-AVENTIS U.S. INC., SANOFI SYNTHELABO INC., AND DOE DEFENDANTS 1 TO 100,

Petitioners,

v.

STATE OF NEW MEXICO, *ex rel.* HECTOR BALDERAS, ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF IN OPPOSITION

P. CHOLLA KHOURY
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE NEW MEXICO ATTORNEY GENERAL
408 Galisteo Street
Santa Fe, NM 87501
(505) 827-6000

CATHERINE H. DORSEY
Counsel of Record
BARON & BUDD, P.C.
600 New Hampshire Avenue, NW
Washington, DC 20037
(202) 333-4562
cdorsey@baronbudd.com

RUSSELL BUDD
BARON & BUDD, P.C.
3102 Oak Lawn Avenue,
Suite 1100
Dallas, TX 75219
(214) 521-3605

DANIEL ALBERSTONE
JONAS P. MANN
PETER KLAUSNER
BARON & BUDD, P.C.
15910 Ventura Boulevard,
Suite 1600
Encino, CA 91436
(818) 839-2333

Counsel for Respondent
(For Continuation of Appearances See Inside Cover)

298440

Burton LeBlanc
Baron & Budd, P.C.
2600 CitiPlace Drive
Baton Rouge, LA 70808
(225) 927-5441

Marcus J. Rael, Jr.
Robles, Rael & Anaya, P.C.
500 Marquette Avenue, NW,
Suite 700
Albuquerque, NM 87102
(505) 242-2228

Counsel for Respondent

QUESTION PRESENTED

Whether the New Mexico Court of Appeals properly held that a federal court's dismissal of a relator's *qui tam* action against petitioners for failure to state a claim is not a judgment on the merits and therefore does not preclude the State of New Mexico, a nonparty to the *qui tam* action, from pursuing a state court consumer protection action, arising out of different facts and asserting causes of action that relator could not have brought in the first action, against the same petitioners.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Page

Page

Page

Statutes

Page

Petitioners seek to preclude the State of New Mexico from pursuing a consumer protection action against them based solely on the dismissal of a private relator's *qui tam* action against petitioners for failure to state a claim. Petitioners contend that the *qui tam* judgment was on the merits such that *res judicata* required the New Mexico Court of Appeals to dismiss the State's action. Such a result would be contrary to this Court's precedent and finds no support in circuit precedent. Nor do petitioners identify any compelling reason for this Court to review the New Mexico Court of Appeals' run-of-the-mill determination that the requirements for claim preclusion were not satisfied. In any event, this case presents a poor vehicle for review because, regardless of whether the *qui tam* judgment was on the merits, *res judicata* does not apply because the State was not a party to relator's action, relator's suit involved a single claim under New Mexico's Medicaid False Claims Act, not at issue here, and relator could not have brought the causes of action the State now asserts.

STATEMENT

A. Statutory Background

The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, authorizes the imposition of civil penalties and treble damages against persons who commit specified acts of fraud against the United States, including the submission of false claims for payment. Suits to enforce the FCA may be brought by the Attorney General, 31 U.S.C. 3730(a), or by a private person (known as a "relator"), who may file suit in the name of the United States "for the [relator] and for the United States Government" (a "*qui tam* suit"). *Id.* 3730(b)(1).

When a relator commences a *qui tam* suit, the complaint must be filed under seal and served on the United States. *Id.* 3730(b)(2). The complaint shall remain under seal for at least sixty days. *Id.* During the sealing period, the United States may intervene and proceed with the action, in which case "the action shall be conducted by the Government." *Id.* 3730(b)(2), (b)(4)(A). If the United States declines to intervene, the relator "shall have the right to conduct the action." *Id.* 3730(b)(4)(B). If a *qui tam* action results in damages or civil penalties, the award is divided between the United States and the relator. *Id.* 3730(d).

Many states have their own versions of the FCA. See, *e.g.*, Pet. 6 n.1. New Mexico has two: the New Mexico Fraud Against Taxpayers Act (FATA), NMSA 1978, §§ 44-9-1 to -14, and the New Mexico Medicaid False Claims Act (MFCA), *id.* §§ 27-14-1 to -15. The FATA creates liability for false claims made to the State, *id.* § 44-9-3, whereas the MFCA establishes liability for false claims specific to the State's Medicaid program, *id.* § 27-14-4. As is relevant to the question presented here, the statutes' procedural requirements are virtually identical to those of the FCA.[1]

B. Procedural Background

In 2011, relator Elisa Dickson filed a *qui tam* action against petitioners in federal court alleging violations of

1. See NMSA 1978, §§ 27-14-7(B), 44-9-5 (private relator may bring an action "on behalf of the person bringing suit and for the state"); *id.* §§ 27-14-7(C), 44-9-5(C) (relator must serve the complaint on the State); *id.* §§ 27-14-7(C), 44-9-5(B)-(C) (complaint remains sealed for at least 60 days); *id.* §§ 27-14-7(E), 27-14-8(D), 44-9-5(C), (D), 44-9-6(A), (F) (State may intervene and conduct the action, or decline to intervene, in which case the relator has the right to conduct the action).

the FCA and of twenty-four state analogues, including a single claim under the MFCA. See generally *United States ex rel. Dickson v. Bristol-Myers Squibb Co.*, 332 F. Supp. 3d 927 (D.N.J. 2017) (Pet. App. 130a-183a); Pet. App. 135a & n.2 (Count XVII). Relator's fourth amended complaint (the "*Dickson* complaint") alleged that petitioners caused false claims to be submitted to federal and state governments by misrepresenting "Plavix as a superior drug to aspirin for certain indicated usages, when Plavix was no more effective than aspirin for those indicated usages and cost one hundred times more." Pet. App. 131a. The *Dickson* complaint also alleged that cost-effectiveness was a condition precedent for Medicaid reimbursement. Pet. App. 132a. Relatedly, petitioners promoted Plavix as comparably safe as aspirin, even though Plavix posed a greater risk of bleeding. See, *e.g.*, *Dickson* Compl. ¶¶ 5-7, 19, 174-77 (*Dickson*, No. 3:13-cv-01039-FLW-LHG, Dkt. No. 112, filed Aug. 16, 2016). The State of New Mexico never intervened or otherwise participated in *Dickson*, which was conducted solely by relator. Pet. App. 5a, 133a-134a. Petitioners moved to dismiss the *Dickson* complaint on several grounds, including failure to satisfy Federal Rule of Civil Procedure 9(b), failure to plead the element of materiality under *Escobar*,[2] and failure to state a claim. Pet. App. 144a-145a.

In September 2016, while *Dickson* remained pending, the State filed a consumer protection action against petitioners in the First Judicial District Court of New Mexico, alleging violations of the New Mexico Unfair Practices Act, the New Mexico Medicaid Fraud Act, the FATA, and various common law claims. Pet. App. 5a. The

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

State did not include a MFCA claim. *Id.* The State alleged, *inter alia*, that petitioners knew, but failed to disclose, that Plavix is ineffective for a significant percentage of New Mexico patients who lack the necessary enzyme to metabolize the drug properly; that petitioners knew, but failed to disclose, that those patients could have been easily identified through a simple genetic test; and that petitioners' marketing and sales of Plavix to those patients constituted false, deceptive, unfair, and unlawful conduct. Pet. App. 31a-32a, 38a-56a. Petitioners moved to dismiss the State's action for failure to state a claim, but the First Judicial District Court stayed the case pending resolution of the *Dickson* motion to dismiss. Pet. App. 5a-6a.

On June 27, 2017, the federal district court "dismissed" the *Dickson* complaint, Pet. App. 183a, 185a, including the MFCA claim, for failure to plead materiality. Pet. App. 151a, 162a, 164a-169a, 182a.

Petitioners subsequently moved to dismiss the State's action as barred by the doctrine of *res judicata*. Pet. App. 28a. The district court denied the motion, holding that *res judicata* was inapplicable because *Dickson* was dismissed based on relator's defective pleading rather than "on the merits of the claim." Pet. App. 28a. In addition, the district court held that "the causes of action are not the same in the two suits." Pet. App. 28a. The court explained that "[t]he relator in *Dickson* did not assert any of the claims the State asserts in this case, but rather only a single New Mexico Medicaid False Claims Act claim." Pet. App. 28a. Moreover, the district court concluded that, other than the FATA claim, "relator lacked the authority" "to assert[] the claims the State asserts here." Pet. App. 28a. The district court certified its order for interlocutory appeal. Pet. App. 29a.

The New Mexico Court of Appeals affirmed. Pet. App. 1a-20a. The court of appeals observed that, when an FCA case is fully litigated on the merits, the final judgment binds both the relator and the government. Pet. App. 10a (citing *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009)). But when a relator's action "is dismissed for reasons unrelated to the merits of the claims," such as a dismissal based on a deficient complaint, "such a dismissal does not preclude the government's claims when the government has not intervened." Pet. App. 11a (citing *United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 455-56 (5th Cir. 2005)); see also Pet. App. 9a ("the designation of [a dismissal for failure to state a claim] as 'on the merits' is something of a misnomer"); *id.* ("Such a dismissal obviously does not involve 'a judicial determination of' the actual merits"). The court of appeals concluded, therefore, that *Dickson* was "not a 'final judgment on the merits'" and did not bar the State's action. Pet. App. 20a. The court declined to reach the other two elements for claim preclusion. *Id.*

REASONS FOR DENYING THE PETITION

The New Mexico Court of Appeals' decision is a straight-forward application of well-established claim preclusion principles and does not conflict with any decision of this Court or of any federal court of appeals. The New Mexico Court of Appeals correctly declined to apply *res judicata* to the State's action based on a federal judgment that was not decided on the merits. Contrary to petitioners' assertion, the decision below does not raise any significant federal issue that warrants this Court's review. And, even if this Court were inclined

to grant review as to whether a dismissal for failure to state a claim is a judgment on the merits, this case is an unusually poor vehicle given that that issue is not outcome determinative; the court of appeals' decision is supported by the independent grounds that the actions do not involve the same parties or causes of action. The petition for a writ of certiorari should be denied.

I. THERE IS NO CIRCUIT SPLIT ON THE QUESTION PRESENTED.

Petitioners argue (Pet. 12-19) that there is a circuit split as to whether dismissal of a relator's *qui tam* action for failure to state a claim precludes a State or the United States from pursuing the same claim against the same defendant. They contend (Pet. 13-15, 17-19) that the Fifth and Eleventh Circuits have held that a dismissal with prejudice of a relator's non-intervened *qui tam* suit does not bind the government for public policy reasons (citing *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450 (5th Cir. 2005), and *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039 (11th Cir. 2015)), whereas the Seventh and Ninth Circuits have held that a dismissal with prejudice of a relator's *qui tam* action does bind the government (citing *United States ex rel. Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361 (7th Cir. 2010); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009); *Stoner v. Santa Clara Cty. Office of Educ.*, 502 F.3d 1116 (9th Cir. 2007); and *In re Schimmels*, 127 F.3d 875 (9th Cir. 1997)). Petitioners assert (Pet. 15-16) that the New Mexico Court of Appeals' decision exacerbates this split by broadening *Williams*' purported policy exception.

Petitioners fabricate a split where none exists. Petitioners' cited cases do not decide the *res judicata* question ostensibly presented here: whether a dismissal with prejudice of a relator's non-intervened *qui tam* action for failure to state a claim precludes the State from bringing the same cause of action against the same defendant. And, to the extent the cases include relevant dicta, the New Mexico Court of Appeals' decision that *res judicata* does not apply here—where the prior dismissal was not on the merits, the State was not a party to the *qui tam* action, and the causes of action are not the same—is not inconsistent with those cases. In any event, petitioners mischaracterize the question presented by incorrectly suggesting that the court of appeals agreed that the parties and causes of actions are the same, such that this Court's resolution of whether a dismissal for failure to state a claim is on the merits would control the outcome here. See, *e.g.*, Pet. 1-2, 7-8, 11, 17. As the briefing and opinions below demonstrate, however, all three *res judicata* elements are contested, and the New Mexico Court of Appeals only resolved the first element. Pet. App. 20a.

A. The Fifth And Eleventh Circuits Have Not Decided the Applicability of *Res Judicata* to Government Claims in FCA Actions, but Their Decisions Support the Outcome Here.

The Fifth and Eleventh Circuit cases on which petitioners rely both involved direct appeals challenging the scope of *qui tam* judgments. Neither determined whether a prior *qui tam* judgment was entitled to preclusive effect, much less adopted a public policy exception to *res judicata*. Nevertheless, both cases

support the New Mexico Court of Appeals' determination that the State is not bound by the dismissal of a relator's *qui tam* complaint for failure to state a claim.

In *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 453 (5th Cir. 2005), the district court dismissed a relator's *qui tam* suit for failure to plead fraud with particularity. The district court also dismissed with prejudice the government's claims because the United States *could* have intervened in the action, even though it did not. *Id.* at 452-53, 455. The United States appealed, and the Fifth Circuit modified the judgment to be without prejudice to the United States. *Id.* at 452, 455-56. The court of appeals explained that the FCA does not require the United States to intervene, and there may be "any number of reasons" why the United States does not intervene. *Id.* at 455. The Fifth Circuit cautioned that, by "essentially requiring the government to intervene in order to avoid forfeiting any future claims against the defendant, private parties would have the added incentive to file FCA suits lacking in the required particularity, knowing full well that the government would be obligated to intervene." *Id.* The court noted that modifying the judgment to exempt the United States guarded against the risk that the United States could be bound by the relator's deficient complaint "via *res judicata*." *Id.*

Similarly, in *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1057 (11th Cir. 2015), the Eleventh Circuit did "not decide whether a Rule 12(b)(6) dismissal precludes the government (or another relator) from bringing a False Claims Act action against a defendant, especially where the government did not intervene at any stage in the proceedings." Instead, on direct appeal, the Eleventh Circuit affirmed the district court's dismissal of relator's

qui tam action with prejudice but, following *Williams*, "modif[ied] the judgment of dismissal to be without prejudice to the government." *Id.*[3]

B. The Seventh and Ninth Circuits Have Also Not Decided the Question Presented but, in any Event, Their Decisions Do Not Favor a Different Outcome.

Petitioners contend that the Seventh and Ninth Circuits have broadly held that any dismissal of a relator's *qui tam* action binds the government. Not so. At most, those circuits have suggested that, when a relator's *qui tam* action is resolved *on its merits*, the government is precluded from filing its own suit for the same claims against the same defendant. The New Mexico Court of Appeals' decision is entirely consistent with that proposition. Thus, there is no conflict warranting this Court's review.

In *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 852 (7th Cir. 2009), the Seventh Circuit addressed whether a stipulated dismissal of an employee's

---

3. The Second Circuit also has not decided the *res judicata* issue presented here, but has, in direct appeal cases, similarly suggested that a non-merits dismissal of a relator's *qui tam* complaint should not preclude the United States (or other relators) from bringing suit. See *United States v. Quest Diagnostics, Inc.*, 734 F.3d 154, 167 (2d Cir. 2013) (district court's "decision did not foreclose the *government* (or for that matter, a different relator) from bringing suit") (footnote omitted); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 1000 n.6 (2d Cir. 1995) (despite dismissal of relator's *qui tam* complaint, "the government may independently proceed with these claims against the Defendants").

personal employment action precluded the employee from bringing a *qui tam* action against his employer and concluded that it did not. The court relied on two rationales. First, because the United States is not a party to a *qui tam* action unless it intervenes, the court held that "[i]t would be inappropriate to snuff out" the government's financial interests in the action "just because a potential relator thoughtlessly omitted a *qui tam* claim from a personal suit." *Id.* at 852. Second, the court noted that "*qui tam* litigation is subject to requirements that make combining it with a personal damages suit awkward" and that are designed to protect the United States from "bumbling relators." *Id. Lusby* did not decide any claim preclusion issue vis-à-vis the United States or a State. In any event, the New Mexico Court of Appeals' conclusion that the *Dickson* relator's unilateral actions should not bar the State's suit here is consistent with *Lusby*'s holding.

Petitioners instead rely on dicta that, "[i]f Lusby had litigated a *qui tam* action to the gills and lost, neither another relator nor the United States could start afresh." *Id.* at 853. At most, that language suggests that, when a relator's *qui tam* suit is resolved on its merits, it precludes a subsequent action by the United States as to the same cause of action. See *United States ex rel. Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361, 362 (7th Cir. 2010) (citing *Lusby* for the proposition that a *qui tam* suit resolved "on the merits or by settlement" precludes a later suit by the United States).[4] It does not suggest that the Seventh Circuit would have concluded, contrary to the New Mexico Court of Appeals' decision, that *Dickson*,

4. *Chovanec* addressed whether a *qui tam* action should be dismissed under the FCA's first-to-file bar, 31 U.S.C. 3730(b)(5), and did not decide any issue of claim preclusion. 606 F.3d at 365.

which was dismissed without reaching the merits, should bar the State's action here, particularly given that the actions do not involve the same parties or causes of action.

Petitioners' reliance on *Stoner v. Santa Clara Cty. Office of Educ.*, 502 F.3d 1116 (9th Cir. 2007), is similarly misplaced. *Stoner* did not address claim preclusion, but whether a *pro se* relator may bring a *qui tam* action. *Id.* at 1119. In holding that relators may not act *pro se*, the Ninth Circuit stated (without analysis) that "the United States 'is bound by the relator's actions' for purposes of res judicata and collateral estoppel." *Id.* at 1126 (quoting *In re Schimmels*, 127 F.3d 875, 884 (9th Cir. 1997)). But *Schimmels* addressed the distinct question of whether dismissal of relators' adversary bankruptcy proceeding—not a *qui tam* action—had a preclusive effect on the United States' parallel bankruptcy proceeding against the same defendants. 127 F.3d at 880. The Ninth Circuit's decision was grounded, in part, on its conclusion that the dismissal was an adjudication on the merits. *Id.* at 884-85 (citing Fed. R. Civ. P. 41(b)); see also *Williams*, 417 F.3d at 456 (explaining that *Schimmels* was decided on the merits). Thus, even if *Schimmels* were directly applicable, which it is not, it would not demand a different result here, where the New Mexico Court of Appeals determined that *Dickson* was not decided on the merits, but on the complaint's deficiencies.[5]

5. In any event, the Ninth Circuit would be unlikely to reach the same result today. As *Schimmels* recognized, the court granted summary judgment because relators failed to file a timely opposition to defendants' motion. 127 F.3d at 879. As this Court has since clarified, such a decision is not on the merits for purposes of claim preclusion. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-02 (2001) (judgment on the merits is "one that actually 'passes directly on the substance of a particular claim'"); see also *infra* pp. 13-14.

In sum, petitioners' circuit split is illusory. Petitioners have identified no circuit authority (or cases from this Court) holding that dismissal of a relator's non-intervened *qui tam* action for failure to state a claim precludes the United States or a State from bringing the same cause of action against the same defendant. Even if there were a circuit split on the question presented, it is not outcome determinative here, where *res judicata* is also inapplicable because the actions do not involve the same parties or causes of action.

II. THE COURT OF APPEALS CORRECTLY REFUSED TO DISMISS THE STATE'S ACTION ON *RES JUDICATA* GROUNDS.

As the New Mexico Court of Appeals properly recognized, Pet. App. 8a, federal law governs whether a federal court judgment should be accorded preclusive effect. See, *e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008); *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 2, 139 N.M. 637, 640. *Res judicata* bars a subsequent action only when three elements are met: (1) a court renders a final judgment on the merits; (2) the parties (or their privies) are the same; and (3) the causes of action are the same. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Montana v. United States*, 440 U.S. 147, 153 (1979).

Here, the New Mexico Court of Appeals correctly decided that *res judicata* did not apply because the *Dickson* dismissal for failure to state a claim was not a judgment on the merits. That straightforward application of federal law does not warrant this Court's review. Indeed, "a state court's misapplication of federal law," Pet. 19-20, is ordinarily not grounds for granting certiorari. See S. Ct.

R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). In addition, although the court of appeals declined to decide whether petitioners had satisfied the other two requisites for *res judicata*, the record demonstrates that petitioners did not: the State was not a party to *Dickson* (or in privity with the relator), and the causes of action are not the same (nor could they be). Those are independent grounds that support the New Mexico Court of Appeals' judgment.

A. The Court of Appeals Correctly Held that *Dickson* Was Not Decided On the Merits.

Not all judgments "denominated 'on the merits'" are, in fact, on the merits such that they "are entitled to claim-preclusive effect." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-02, 503-06 (2001). This Court has explained that, in the context of *res judicata*, the phrase "on the merits" refers to an adjudication that "'passes directly on the substance of [a particular] claim,'" usually after a trial of the substantive issues. *Id.* Despite this Court's consistent construction of that term, however, the phrase has been used loosely "over the years" to encompass judgments that do not substantively adjudicate the merits and which are not entitled to preclusive effect. *Id.* at 502. As one example, this Court cited Federal Rule of Civil Procedure 41(b), which specifies that an involuntary dismissal presumptively "operates as an adjudication on the merits," even though not all such dismissals should be given preclusive effect. *Id.* at 503-06.

The New Mexico Court of Appeals properly recognized this distinction. See, *e.g.*, Pet. App. 9a ("the designation of

[a dismissal for failure to state a claim] as 'on the merits' is something of a misnomer"); Pet. App. 9a ("Such a dismissal obviously does not involve 'a judicial determination of' the actual merits"). Because *Dickson* was dismissed on the basis of relator's deficient complaint and without resolving the merits of relator's MFCA claim, the court of appeals correctly concluded that the dismissal "is not a 'final judgment on the merits' for claim preclusion purposes." Pet. App. 20a; see also Pet. App. 20a (construing *Dickson* dismissal "as without prejudice to the State's claims"). As additional support for its conclusion that the State should not be bound by *Dickson*, the court of appeals relied on *Williams* and *Urquilla-Diaz*, which held that a dismissal with prejudice of a relator's complaint for failure to state a claim should not extend to the United States' claims. Pet. App. 11a-14a.

Petitioners rely on Rule 41(b) to assert that *Dickson* was adjudicated on the merits and is entitled to preclusive effect. Pet. 20-21. But *Semtek* explicitly rejected the argument that Rule 41(b) is determinative of the claim preclusive effect of federal judgments. 531 U.S. at 503-06 (explaining that Rule 41(b)'s "on the merits" language is simply shorthand for a dismissal with prejudice); *see also Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020) ("When a court dismisses a case for failure to state a claim, but neglects to specify whether the order is with or without prejudice," then "courts [must] treat the dismissal 'as an adjudication on the merits'—*meaning a dismissal with prejudice*.") (emphasis added). Respondent does not dispute that *Dickson* was dismissed with prejudice such that relator is precluded from refiling her claim. But a dismissal with prejudice, although "undoubtedly a necessary condition" for claim preclusion, "is not a sufficient one." 531 U.S. at 506.

Petitioners cite (Pet. 20) *Moitie* as establishing that a dismissal for failure to state a claim is a judgment on the merits. But *Moitie* considered and rejected "the validity of the Court of Appeals' novel exception to the doctrine of res judicata." 452 U.S. at 398, 399-402. The Court did not review the lower court's determination "that the 'technical elements' of res judicata had been satisfied," including that the dismissal for failure to state a claim was a judgment on the merits. *Id.* at 399 ("the Court of Appeals conceded that the 'strict application of the doctrine of *res judicata*' required" dismissal). Although a footnote in *Moitie* stated that such a dismissal is on the merits, *id.* at 399 n.3, *Semtek* specifically cited that footnote as an example of how the phrase "on the merits" has been misused to include judgments "that do *not* pass upon the substantive merits of a claim and hence do *not* (in many jurisdictions) entail claim-preclusive effect." 531 U.S. at 502.

Petitioners argue that the New Mexico Court of Appeals' decision conflicts with *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 936 (2009), which stated that "'the United States is bound by the judgment in all FCA actions regardless of its participation in the case.'" Pet. 4. But as the court of appeals explained, petitioners rely on "a statement of appellant's argument, not a statement of law by the Court." Pet. App. 16a. *Eisenstein* addressed only whether the United States, if it declines to intervene, is a "party" in a FCA case for purposes of the appellate filing deadline. Pet. App. 15a-16a; *Eisenstein*, 556 U.S. at 931. *Eisenstein* did not decide any *res judicata* issue.

Even if petitioners were correct that *Dickson* was decided on the merits, which they are not, petitioners have

not demonstrated that this Court's review would alter the outcome here. Petitioners raise no argument that they have satisfied the other two requirements for *res judicata*.

B. Because the State Was Not a Party to *Dickson*, the State is Not Bound by that Judgment.

It is black-letter law that a judgment does not bind a nonparty, subject to a few limited exceptions. See, *e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) ("'It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'"); *Smith v. Bayer Corp.*, 564 U.S. 299, 312-13 (2011). "The importance of this rule and the narrowness of its exceptions go hand in hand." *Bayer*, 564 U.S. at 312-13. Nonparty preclusion is premised on due process concerns that "'everyone should have his own day in court,'" *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996), and that "[a] person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." *Taylor*, 553 U.S. at 892.

As *Eisenstein* made clear, unless the United States intervenes, the United States is not a "party" to a *qui tam* action. 556 U.S. at 933. Similarly, because the State did not intervene, the State was not a party to *Dickson*. *See New Mexico ex rel. National Educ. Ass'n of New Mexico v. Austin Capital Mgmt. Ltd.*, 671 F. Supp. 2d 1248, 1250-51 (D.N.M. 2009) (applying *Eisenstein* to conclude the State was not a party to a *qui tam* suit in which it did not intervene); Pet. App. 5a. Accordingly, unless one of the

limited exceptions to nonparty preclusion applies, *Dickson* does not bind the State. *Taylor*, 553 U.S. at 884.

This Court has recognized six discrete categories in which a nonparty may be precluded by an earlier judgment: (1) a person agrees to be bound by a judgment; (2) the nonparty to be bound and a party have a pre-existing legal relationship; (3) a nonparty was "'adequately represented by someone with the same interests who was a party' to the suit"; (4) a nonparty assumed control of the litigation in which the judgment was entered; (5) a nonparty is a proxy or agent for a party; or (6) a statute expressly forbids successive litigation by non-litigants, such as in bankruptcy or probate proceedings. *Taylor*, 553 U.S. at 893-95. These exceptions to nonparty preclusion have, in the past, been loosely characterized as applying when "there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Richards*, 517 U.S. at 798.[6]

Petitioners have failed to demonstrate that any of these limited exceptions apply such that the State is bound by *Dickson*. See *Taylor*, 553 U.S. at 907 (claim preclusion is an affirmative defense that defendant must plead and prove). Categories one, five, and six are plainly inapplicable here, and petitioners raise no argument to the contrary. Charitably construed, petitioners' assertions potentially implicate the other three exceptions: a preexisting legal relationship (category 2); adequate representation (category 3); and nonparty control of the

6. More recently, this Court has avoided the term "privity" as imprecise. See, *e.g.*, *Taylor*, 553 U.S. at 894 n.8; *Montana*, 440 U.S. at 154 n.5.

litigation (category 4). As explained below, however, none of these exceptions applies.

For category 2, the legal relationship is that the *Dickson* relator is a *partial* assignee of the State's MFCA claim. *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 & n.4 (2000). It is well-established that a judgment against a partial assignee cannot bind the assignor more broadly than the scope of assignment. See Restatement (Second) of Judgments § 55 cmt. c (1982) ("A judgment for or against the partial assignee does not preclude the assignor from bringing an action on the unassigned portion of the obligation."); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4415 (3d ed.) (Wright & Miller) ("an action by an assignor or assignee should not foreclose a second action by the other on grounds of claim preclusion"). This is because "[w]hen two or more persons have concurrent ownership interests in property, a judgment for or against one of them concerning his interest does not have effects under the rules of res judicata on another such owner." Restatement (Second) of Judgments § 54. Thus, a judgment on relator's MFCA claim does not preclude the State from pursuing its interest in the unassigned portion, much less its separate consumer protection claims, in which relator has no right or legal relationship with the State.

As to category 3, the *Dickson* relator did not adequately represent the State because relator and the State do not have the "'same interests.'" *Taylor*, 553 U.S. at 894 ("identity of interests" is necessary, but not sufficient, for adequate representation). In *Taylor*, this Court unanimously rejected an expansion of the

adequate representation exception (known as "virtual representation") that would have applied "whenever the relationship between a party and a non-party is close enough to bring the second litigant within the judgment." 553 U.S. at 898 (internal quotation marks omitted). The Court reasoned that, "[a] party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id.* at 900 (citations omitted). The *Dickson* relator does not satisfy that test. Even as to the MFCA claim, relator's and the State's interests are not fully aligned. For example, such a claim is brought for both the State *and* relator, NMSA § 27-14-7(B); relator has a right to continue as a party even if the State intervenes, *id.* § 27-14-8(A); and each is entitled to a separate percentage of any judgment, *id.* § 27-14-9(A), (B). Moreover, the MFCA permits the State to intervene and assume control of the action, NMSA § 27-14-7(E); to settle the claim, *id.* § 27-14-8(C); to approve any voluntary dismissal, *id.* § 27-14-7(B); and to seek dismissal of the action over relator's objection, *id.* § 27-14-8(B). More significantly, the State has a substantial interest in protecting its consumers, an interest not shared by relator. As to the second prong, the *Dickson* relator represented her own interests in the MFCA claim and did not purport to represent the State or its broader interests, including its consumer protection claims, which relator could not have brought. See *infra*, p. 23-24.

As to category 4, petitioners suggest (Pet. 17) that the State "exercise[d] substantial control" over *Dickson*

because it had the right to intervene, dismiss, or settle the action. But the State did not intervene, dismiss, or settle *Dickson*. Relator exercised sole control. See NMSA § 27-14-7(E)(2) (where State declines to intervene, relator "shall have the right to conduct the action"); *Stoner*, 502 F.3d at 1128 ("Unless it intervenes or moves to dismiss, the United States has little control over the conduct of [a relator's *qui tam*] action"). Thus, the State did not exercise any actual control that could subject it to nonparty preclusion. Cf. *Montana*, 440 U.S. at 155 (United States controlled a prior unsuccessful action by, *inter alia*, requiring the suit to be filed, reviewing and approving the complaint, and paying the attorneys' fees and costs); *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174 (5th Cir. 1987) ("It is essential that the nonparty have actual control."); accord *Bittinger v. Tecumesh Prods. Co.*, 123 F.3d 877, 887 (6th Cir. 1997).

Because none of the established exceptions for nonparty preclusion applies, petitioners urge a novel exception based on the State's status in *Dickson* as the "real party in interest." See, *e.g.*, Pet. 22. Petitioners argue that otherwise the State will get a second bite at the apple whenever a relator is unsuccessful. See, *e.g.*, Pet. 26-27. But this Court has not recognized a "real party in interest" exception to nonparty preclusion, and *Eisenstein* refutes that status as a "real party in interest" is sufficient to treat the government as a party. 556 U.S. at 934 ("[T]he United States' status as a 'real party in interest' in a *qui tam* action does not automatically convert it into a 'party.'"); *National Educ. Ass'n*, 671 F. Supp. 2d at 1250-51. Moreover, this Court recently rejected the same, second-bite-at-the-apple argument as a justification for expanding nonparty preclusion, acknowledging that

nonparty preclusion often "leads to relitigation of many issues, as plaintiff after plaintiff after plaintiff (none precluded by the last judgment because none a party to the last suit) tries his hand at establishing some legal principle or obtaining some grant of relief." *Bayer*, 564 U.S. at 316. But the Court explained that "our legal system generally applies principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs" rather than "binding nonparties to a judgment." *Id.* at 317.

Petitioners rely on dicta in *Chovanec* that "[t]he plaintiff in a *qui tam* action is, after all, the United States rather than relator." 606 F.3d at 362. But *Eisenstein* holds otherwise. 556 U.S. at 933 (United States is party to *qui tam* action only when it intervenes). Petitioners also cite *Schimmels*, 127 F.3d at 880, in which the Ninth Circuit held that the United States' bankruptcy proceeding was barred by the final judgment in relators' bankruptcy proceeding against defendants, based in part on the court's conclusion that there was privity between relators and the United States. *Id.* at 881-84. *Schimmels*' privity determination, however, relied on the United States' participation in relators' action, *id.* at 882, a fact that is not present here. In any event, *Taylor*'s rejection of a broad and amorphous expansion of the adequate representation exception, and its adherence to the discrete, limited exceptions for nonparty preclusion, cast doubt on *Schimmels*' continued vitality.

Petitioners argue (Pet. 17-18, 22) that because the government is "bound by the judgment in all FCA actions regardless of its participation in the case," *Eisenstein*, 556 U.S. at 936, the State must be in privity with relator. Not

only is that circular reasoning, *Eisenstein* did not purport to decide that issue. Moreover, *Eisenstein* expressly acknowledged that the United States could be bound by a judgment "for a host of different reasons." *Id.*

C. The Court of Appeals' Judgment is Correct for the Independent Reason that the State's Cause of Action is Not the Same as in *Dickson*.

Res judicata does not apply unless both suits involve the same cause of action. See, *e.g.*, *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594 (2020). Suits involve the same cause of action for claim preclusion "when they arise from the same transaction or involve a common nucleus of operative facts." *Id.* at 1595 (citations and internal quotation marks omitted).

To determine whether causes of action are the same, courts generally look to: (1) the relatedness of the facts in time, space, origin, or motivation; (2) whether the facts make a convenient trial unit; and (3) whether the treatment of facts conforms to the parties' expectations or business understanding or usage. See, *e.g.*, *Potter v. Pierce*, 2015-NMSC-002, ¶ 11, 342 P. 3d 54, 57; *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016); *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316 (2011) ("whether two suits involve the same claim or cause of action depends on factual overlap"); Restatement (Second) of Judgments § 24. Prior litigation acts as a bar not only to those issues that were raised and decided in the earlier litigation, but also as to those issues that could have been raised. *Moitie*, 452 U.S. at 398; *Potter*, 2015-NMSC-002, ¶ 15, 342 P.3d at 59 ("res judicata does

not bar a subsequent action unless the plaintiff could and should have brought the claim in the former proceeding").

Significantly, "if more than one party has a right to relief arising out of a single transaction, each such party has a separate claim for purposes of merger and bar." Restatement (Second) of Judgments § 24 cmt. a; Wright & Miller § 4407 ("it is assumed that each plaintiff has a distinctive cause of action no matter how closely related to the claims of the other plaintiffs"); accord *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1272 (5th Cir. 1986).[7]

Here, the causes of action are not the same for two reasons. First, even if the suits arose out of the same transaction, the State and relator are separate parties and therefore have separate claims against petitioners. See Restatement (Second) of Judgments § 24 cmt. a. For example, relator and the State have separate claims under the MFCA. See, *e.g.*, NMSA § 27-14-9(A), (B) (action is brought for both the State *and* relator, relator has right to a share of the State's recovery, and relator may remain a party even if the State intervenes). Similarly, although relator could have brought an action under FATA (but did not), relator could not have brought the State's other consumer protection claims, which belong only to the State. See NMSA §§ 57-12-8, 57-12-11 (only the State may bring Unfair Practices Act claim for civil penalty); *id.* § 30-44-3 (only the State may enforce civil remedies under

7. For example, if A and B are injured in a car accident caused by C, even though A's and B's causes of action arise out of the same transaction, A and B, as separate parties, each have a separate claim. If A sues C, B is not required to join that suit or risk preclusion of his claim.

Medicaid Fraud Act). Thus, at least absent intervention, relator's action cannot bar the State's separate claims.

Petitioners assert (Pet. 22-23) that because the State could have intervened and brought its claims in *Dickson*, the State's action should be precluded. But there is no requirement that a State intervene in a *qui tam* action to assert any claims it might have against the defendant or risk claim preclusion. See, *e.g.*, *Williams*, 417 F.3d at 455; Wright & Miller § 4452 ("a nonparty is not obliged to seize an available opportunity to intervene in pending litigation that presents questions affecting the nonparty"). Otherwise, a State would be required to identify all false claims actions filed on its behalf in every jurisdiction, and then move to intervene (or move to dismiss), regardless of whether, at the time, the State was even aware of whether it had other claims concerning the same transaction. *Williams*, 417 F.3d at 455; Pet. App. 17a. That would run counter to the statutes' purpose, which is for *qui tam* relators to assist the State in enforcement. See, *e.g.*, *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, 2015-NMSC-025, ¶ 25, 355 P.3d 1, 9 (FATA incentivizes "private individuals to act on behalf of the public good by bringing suit"); accord *United States ex rel. Berge v. Board of Trustees*, 104 F.3d 1453, 1458 (4th Cir. 1997). Requiring the State to intervene would also be contrary to principles of permissive joinder. See Fed. R. Civ. P. 20(a) (persons "may join" as plaintiffs in one action where the right to relief "aris[es] out of the same transaction").

Second, the causes of action are not the same because they do not arise from a common nucleus of fact. The relevant claim in *Dickson* was relator's MFCA claim. Pet. 4a. The State's action here does not include a MFCA

claim, but instead seeks relief under different causes of action. Pet. 5a. Although the fact that the State's claims involve different legal theories is not determinative, see, *e.g.*, Restatement (Second) of Judgments § 24 cmt. c, the fact that the State's claims are based on different facts is. The State's action is premised on petitioners' efforts to conceal that Plavix is ineffective for a substantial portion of New Mexico's patients who lack an enzyme necessary to metabolize the drug, despite the fact that a simple genetic test could have identified the affected patients. Pet. App. 31a-32a, 38a-56a. In contrast, relator's MFCA claim focused on petitioners' fraudulent marketing of Plavix as superior to aspirin, despite allegations that Plavix was not as safe as aspirin because it worked too well for certain patients, resulting in an increased risk of bleeding. *Dickson* Compl. ¶¶ 5-7, 19, 174-77. That the two actions allege two different schemes to conceal two different defects, which affected two different patient populations, demonstrates that there is no factual overlap and the causes of action are not the same.[8]

Petitioners nevertheless suggest that both suits arise out of the same operative facts—petitioners' fraudulent marketing of Plavix. Pet. 28-29. But petitioners view the operative facts at too high a level of generality. As this Court has made clear, the suits must involve the "'very same claim.'" *Taylor*, 553 U.S. at 892. Where the operative facts concern separate defects of the drug, separate marketing schemes, and different affected patient

8. Although *Dickson*'s first amended complaint included some background allegations that Plavix was ineffective for certain patients who could not metabolize the drug, those allegations were omitted from relator's subsequent complaints. See, *e.g.*, Pet. App. 110a-112a.

populations, the facts do not form a convenient trial unit and the claims are not the same. See Restatement (Second) of Judgments § 24.

III. THERE IS NO FEDERAL ISSUE WARRANTING THIS COURT'S REVIEW.

A. There is No Federalism Problem.

Petitioners assert (Pet. 23) that this Court's review is warranted because the New Mexico Court of Appeals collaterally reviewed and rewrote the federal court's judgment in *Dickson*. That argument lacks merit.

As this Court stated in *Bayer*, "a court does not usually get to dictate to other courts the preclusion consequences of its own judgment." 564 U.S. at 307 (internal quotation marks omitted). Rather, "[d]eciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court." *Id.;* accord *United States ex rel. Vaughn v. United Biologics, LLC*, 907 F.3d 187, 192 (5th Cir. 2018). That is precisely what the court of appeals did here, applying well-established federal law.

Petitioners further contend (Pet. 23) that the New Mexico Court of Appeals improperly revised the federal judgment in *Dickson* by making it without prejudice to the State, even though the judgment did not explicitly "exempt[] the State from its *res judicata* effects." But the court of appeals did no such thing. Consistent with federal law governing claim preclusion and the *Dickson* judgment, the court of appeals correctly presumed, absent contrary language, that the judgment did not apply to nonparties.

Petitioners argue (Pet. 24) that the State should have sought to modify the *Dickson* judgment on direct appeal to clarify that it was without prejudice to the State. But the State would have had no reason to do so, since the judgment applied only to the parties, not the State. Nor is it clear that the State could have sought such relief, at least absent intervention. See *Vaughn*, 907 F.3d at 192. Moreover, the fact that the United States has sought modification of judgments in other cases, out of an abundance of caution, does not mean that the State was required to do so here or risk preclusion.

B. The Court of Appeals Did not Create a Public Policy Exception to *Res Judicata*.

Petitioners contend (Pet. 21-23) that the New Mexico Court of Appeals created a public policy exception to *res judicata* for government litigants in *qui tam* cases, contrary to this Court's holding in *Moitie*. But the court of appeals did not craft any *res judicata* exception. Instead, it simply determined that, because *Dickson* was not decided on the merits, *res judicata* did not apply. Pet. App. 20a. That is in stark contrast to *Moitie*, where the federal court of appeals determined that all three elements for *res judicata* were satisfied, but nevertheless declined to apply the doctrine on policy grounds. *Moitie*, 452 U.S. at 399.

IV. IN ANY EVENT, THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW.

Even if this Court were inclined to grant certiorari, the State's action presents a poor vehicle to decide whether a dismissal of a relator's *qui tam* action for failure to state a claim precludes the State's action.

First, the New Mexico Supreme Court dismissed the writ of certiorari as improvidently granted, allowing the court of appeals' decision to stand. That the New Mexico Supreme Court did not consider the case to raise a sufficiently important issue for review counsels even more strongly against this Court's review. See, *e.g.*, NMSA § 34-5-14(B) (New Mexico Supreme Court has authority to review decisions, *inter alia,* that present an "issue of substantial public interest").

Second, there is a question as to whether this Court has jurisdiction pursuant to 28 U.S.C. 1257(a) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481-83 (1975). See Pet. 24 n.7. It is not clear that the New Mexico Court of Appeals' judgment on the federal issue is final such that a decision by this Court on the merits would terminate the litigation. 420 U.S. at 486. If this Court were to grant certiorari and conclude that *Dickson* was decided on the merits, the New Mexico Court of Appeals would still need to determine whether petitioners satisfied the other elements for *res judicata*.

Finally, because the New Mexico Court of Appeals only addressed one of the three elements for *res judicata*, this Court could not determine that the State's action is precluded (and that the court of appeals' judgment should be reversed) unless the Court determines that petitioners met all three elements. That would require this Court, in the first instance, to render a fact-bound decision as to whether the parties and causes of action are the same. See, *e.g.*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109, 110 (2001) (per curiam) (Court "is a court of final review and not first review" and "ordinarily does not decide in the first instance issues not decided below")

(internal quotation marks omitted). That counsels against granting certiorari here. See, *e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question."). In addition, that those two factors provide an independent legal basis for sustaining the lower court's judgment also weighs against certiorari. See *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (when the challenged issue may not affect the ultimate judgment because it may be affirmed on alternate grounds, that issue "can await a day when it is posed less abstractly").

V. THERE IS NO NEED FOR A REMAND.

This Court should decline to grant certiorari and remand in light of this Court's decisions in *Lucky Brand* and *Lomax*. This Court has recognized that a GVR order may be appropriate when there is a "reasonable probability" that "a redetermination may determine the ultimate outcome of the litigation." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Petitioners have failed to satisfy that standard here.

As explained above, the court of appeals' decision is supported by three independent grounds: (1) the *Dickson* judgment was not on the merits; (2) the State was not a party to *Dickson*; and (3) the State's action does not involve the same claims. Assuming *arguendo* that, on remand, the New Mexico Court of Appeals might conclude that, in light of *Lucky Brand*, relator's and the State's claims arise out of the same transaction, there is no "reasonable probability" that the court of appeals would conclude that

the State's action is precluded. That is because the court of appeals' decision would still be compelled because of petitioners' failure to demonstrate that *Dickson* was decided on the merits, that the State was a party to *Dickson*, and that the State's and relator's claims are the same (even though they are separate parties). See, *e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017) (courts may affirm judgment below on any ground supported by the record). In any event, there is nothing in *Lucky Brand* that would support a conclusion that the two suits, which depend on different fraudulent marketing schemes to conceal entirely different drug defects that affected entirely distinct sets of patients, arose out of the same transaction.

Similarly, reconsideration in light of *Lomax* would also be unlikely to change the court of appeals' decision. The court of appeals already determined, consistent with *Lomax*, that *Dickson* was dismissed with prejudice as to relator. See *Lomax*, 140 S. Ct. at 1725 (explaining that a dismissal for failure to state a claim, pursuant to Rule 41(b), is presumed to be "a dismissal with prejudice" absent language to the contrary); Pet. App. 19a-20a (explaining that the *Dickson* "order did not provide for a fifth amendment and disposed of all of Relator's claims"). And the court of appeals' concomitant determination, that *Dickson* was without prejudice to the State, Pet. App. 19a-20a, is in no way undermined by *Lomax*, which does not address the effect of a dismissal on nonparties.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

P. Cholla Khoury
Assistant Attorney General
Office of the New Mexico
Attorney General
408 Galisteo Street
Santa Fe, NM 87501
(505) 827-6000

Russell Budd
Baron & Budd, P.C.
3102 Oak Lawn Avenue,
Suite 1100
Dallas, TX 75219
(214) 521-3605

Burton LeBlanc
Baron & Budd, P.C.
2600 CitiPlace Drive
Baton Rouge, LA 70808
(225) 927-5441

Catherine H. Dorsey
Counsel of Record
Baron & Budd, P.C.
600 New Hampshire Avenue, NW
Washington, DC 20037
(202) 333-4562
cdorsey@baronbudd.com

Daniel Alberstone
Jonas P. Mann
Peter Klausner
Baron & Budd, P.C.
15910 Ventura Boulevard,
Suite 1600
Encino, CA 91436
(818) 839-2333

Marcus J. Rael, Jr.
Robles, Rael & Anaya, P.C.
500 Marquette Avenue, NW,
Suite 700
Albuquerque, NM 87102
(505) 242-2228

Counsel for Respondent