No. 20-371

In the
# Supreme Court of the United States

CARE ALTERNATIVES,

*Petitioner*,

v.

UNITED STATES OF AMERICA; STATE OF NEW JERSEY EX. REL. VICTORIA DRUDING; BARBARA BAIN; LINDA COLEMAN; RONNI O'BRIEN,

*Respondents*.

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

## REPLY BRIEF


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## REPLY BRIEF

The Third and Eleventh Circuits are openly divided over an important and recurring question: whether a physician's good-faith clinical judgment about life expectancy is "false" for False Claims Act (FCA) purposes just because another physician (a paid expert) believes the judgment is mistaken. Whereas the Eleventh Circuit correctly refused to equate a disputed opinion with a false one and required more than "a reasonable difference of opinion among physicians" to establish falsity, *United States v. AseraCare, Inc.*, 938 F.3d 1278, 1297 (11th Cir. 2019), the Third Circuit explicitly "disagree[d]" and "reach[ed] the opposite determination," App.20-21. Consequently, despite a regulatory framework that promises "no risk" in making inherently imprecise judgments about life expectancy and terminal illnesses, Pet.6, hospice providers in New Jersey now face jury trials and the risk of crushing financial and reputational harm based on the same kind of Monday morning quarterbacking that is insufficient in Florida.

Respondents cannot deny the acknowledged circuit split on falsity, so they dismiss it as immaterial because the FCA's scienter element could potentially preclude liability in cases of reasonable disagreements within the Third Circuit. But that conflates two separate elements of an FCA claim, and it ignores that questions of scienter are inherently factbound and so claims like respondents' that would be dismissed in the Eleventh Circuit will routinely go the jury (or produce forced settlements) in the Third. Moreover, the view of the Third Circuit and respondents that an opinion that turns out to be wrong is necessarily false

is flatly inconsistent with this Court's precedents. In short, the split is both real and practically significant, the decision below is plainly wrong, and the issue is consequential, as multiple *amici* attest. This Court should grant plenary review.

## ARGUMENT

### I. The Circuits Are Unquestionably Split.

**A.** The circuit split here is clear, stark, and acknowledged. In the Eleventh Circuit's view, "a clinical judgment of terminal illness warranting hospice benefits under Medicare cannot be deemed false, for purposes of the [FCA], when there is only a reasonable disagreement between medical experts as to the accuracy of that conclusion." *AseraCare*, 938 F.3d at 1281. By contrast, the Third Circuit expressly "disagree[d]" with *AseraCare* and held that "a difference of medical opinion is enough evidence to create a triable dispute of fact regarding FCA falsity." App.21; App.22, 10.

Respondents cannot really deny this clear and acknowledged circuit split, but they go to considerable lengths (twelve pages) to minimize it. BIO.10-22. Those efforts fail and ultimately underscore what the Third Circuit expressly acknowledged: having fully considered the Eleventh Circuit's views, the Third Circuit "depart[ed] from [its] sister circuit," "reaching the opposite determination" on "nearly identical" facts. App.18, 21, 17 n.3; *see* Pet.15-19.

Respondents first emphasize that in both circuits, Medicare claims are false if they seek reimbursement for non-reimbursable services, and "opinions can be false" if not sincerely held or if no reasonable physician would agree. BIO.15. True enough. But that common

ground only sets the stage for the point on which the two circuits do indisputably differ—whether one physician's disagreement with another physician's reasonable, honestly held opinion can suffice to render that opinion "false" under the FCA. The Third Circuit says yes; the Eleventh Circuit (and virtually every other court to address the issue, *see* Pet.19 n.2) says no.

Respondents insist that even if the Third and Eleventh Circuits' "standards for *falsity*" differ, their "standard for FCA *liability*" is "essentially the same." BIO.15. That is so, respondents claim, because the kind of reasonable good-faith disputes about life expectancy that the Eleventh Circuit will dismiss for failure to create a triable issue of "falsity" will not result in FCA liability in the Third Circuit if the defendant is able to prevail on the independent element of "scienter." *Id.* at 15-16. Thus, the circuits' "difference in formulation *should* never matter." *Id.* at 10.

That is wrong in both theory and practice. First, respondents' argument is at war with Congress' decision to make "falsity" and "scienter" separate elements of an FCA action. An FCA plaintiff must show *both* that a claim is false *and* made with the requisite intent. By allowing a subjective difference of opinion to suffice to show falsity, the Third Circuit has improperly diluted the standard of liability. *See* pp.8-9, *infra*. Changing the subject to the separate element of scienter neither fixes the problem nor makes the circuit split on falsity disappear.

Moreover, shifting the focus to scienter makes an enormous practical difference. While "objective"

questions of falsity lend themselves to summary judgment and motions to dismiss, *see Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 187 (2015), questions of scienter go to subjective intent and thus are notoriously ill-suited to summary judgment, *e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374, 394 n.11 (1967) ("[I]t is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood."); *Crawford-El v. Britton*, 523 U.S. 574, 584-85 (1998). Thus, a rigorous standard of "falsity" is critical for weeding out cases involving mere reasonable differences of opinion. In the Third Circuit, such cases involve a disputed question of scienter for the jury. In the Eleventh Circuit, by contrast, the exact same case will not go to the jury, because contrary expert testimony shows only that the original clinical judgment is disputed, not that it is "false." That enormous difference in practical outcomes cannot be gainsaid.

Respondents next contend that "the disagreement between the Third and Eleventh Circuits is not really about the question presented, but is instead about the meaning and significance of the documentation requirement in 42 C.F.R. §418.22(b)(2)." BIO.16. That is neither correct nor an argument against certiorari.

The relevant CMS regulations require a certification that a patient has a life expectancy of six months or less, 42 C.F.R. §418.22(b)(1), and that documentation "support[s] the medical prognosis," *id.* §418.22(b)(2). Neither this case nor *AseraCare* involved an absence of supporting documentation or the provision of wholly inadequate documentation,

such that an alleged failure to comply with §418.22(b)(2)'s documentation requirement created FCA liability wholly apart from whether the underlying life expectancy prognosis required by §418.22(b)(1) was false. Accordingly, both courts treated the central question as the falsity of the underlying clinical life-expectancy judgment. The Eleventh Circuit viewed its case as turning "entirely on the following question: When can a physician's clinical judgment regarding a patient's prognosis be deemed 'false'?" *AseraCare*, 938 F.3d at 1296; *id.* at 1281, 1291, 1297. The Third Circuit likewise deemed that same question "[t]he central question on appeal." App.9; *see also* App.1, 10-11, 20-21.

To be sure, in answering that question, the two courts disagreed about what it means to provide documents that "support the medical prognosis." 42 C.F.R. §418.22(b)(2). The Third Circuit treats a dispute between the certifying doctor and the plaintiff's expert as to whether the documentation truly "supports" the prognosis as just one more fact issue for the jury. App.15-16, 20, 22. The Eleventh Circuit, by contrast, held that §418.22(b)(2) is satisfied so long as the patient's records provide a reasonable basis for the prognosis; thus, simply proffering an expert who reaches a different judgment based on the same records is not enough to show either a false prognosis or a violation of the documentation requirement. *AseraCare*, 938 F.3d at 1293-96. Accordingly, in both cases, the falsity of the prognosis and the sufficiency of the documentation are just two sides of the same coin. The question presented is deliberately framed broadly enough to capture the fundamental disagreement between the circuits over

whether a plaintiff must show more than a disagreement between doctors over how they read the medical records to create a triable issue of falsity concerning hospice certification. The exact source of that disagreement—whether it stems from different readings of §418.22(b)(2) or §418.22(b)(1) or something else—is ultimately beside the point. But to the extent even respondents concede that the Third and Eleventh Circuits read the documentation requirement differently, that only strengthens the case for review.

Finally, respondents claim in passing that they would prevail even under the Eleventh Circuit's standard, because their expert Dr. Jayes "testified that no reasonable physician could have disagreed with his assessment." BIO.17. But petitioner explained at length that this assertion is incorrect and was entirely irrelevant to the Third Circuit, *see* Pet.18 n.1, and respondents tellingly offer no rebuttal. Respondents point to "other evidence" that supports summary judgment. BIO.17-18. But the district court firmly rejected that evidence, *see* App.62-64, and the Third Circuit did not rely on it. Rather, the Third Circuit invoked only Dr. Jayes's after-the-fact expert opinion disagreeing with the judgments of petitioner's physicians and viewed that as sufficient for the issue of falsity to go the jury. In the Eleventh Circuit, that same evidence would be insufficient, and this case would be over.

**B.** Respondents fare no better in denying the broader disarray in the circuits over when clinical judgments and other opinions are "false" under the FCA. Respondents distinguish *U.S. ex rel. Polukoff v. St. Mark's Hospital*, 895 F.3d 730 (10th Cir. 2018),

because it involved a certification that a medical procedure was "reasonable and necessary," rather than a terminal-illness certification. BIO.22-23. But that distinction is immaterial. As the Tenth Circuit recognized, a "reasonable and necessary" certification is just another species of "medical judgment." *Polukoff*, 895 F.3d at 742. Accordingly, the Tenth Circuit's holding that such a medical judgment can be "'false' under the FCA" any time an opposing expert disagrees, *id.* at 743—even if the judgment was reasonable and honestly made—aligns with the decision below. App.15-16.

*U.S. ex rel. Riley v. St. Luke's Episcopal Hospital*, 355 F.3d 370 (5th Cir. 2004), by contrast, held that "expressions of opinion or scientific judgments about which reasonable minds may differ cannot be 'false.'" *Id.* at 376. Respondents claim that *Riley* actually "supports the Third Circuit's emphasis on scienter." BIO.23. But *Riley* addressed falsity, not scienter (a word that features only once in the opinion), and was invoked by the district court here in finding no triable issue of falsity. App.57.

Respondents likewise fail to distinguish *United States v. Paulus*, 894 F.3d 267 (6th Cir. 2018), which held that "opinions—when given honestly—are almost never false." *Id.* at 275. Respondents argue that *Paulus* "confirms the Third Circuit's holding … that an expert's review of medical records can support a factual finding that those records do not support a diagnosis." BIO.25. But the relevant question is not whether an expert's review of medical records can ever support a factual finding of falsity. The question is what that review must reveal to create a triable issue

of falsity. In the Third and Tenth Circuits, all an expert need conclude is that she has a different opinion. In the Eleventh, Fifth, and Sixth Circuits, the expert must go further and identify a factual basis to show that no reasonable expert could hold a different opinion or that the contrary viewpoint was not honestly held.

There is a world of difference between those two standards, and the difference goes to the heart of what makes an opinion "false." While courts have little trouble determining what makes a statement of fact false (and distinguishing between falsity and scienter in that context), those same questions have confounded and divided the circuits when it comes to allegedly false opinions. The undeniable split between the Eleventh and Third Circuits in the hospice context fully justifies certiorari. But the ability to provide guidance on the circuits' broader confusion over when opinions are false provides an additional reason to grant the petition.

## II. The Decision Below Is Wrong.

The decision below is not only certworthy, but deeply flawed. Reasonable minds can differ on matters of opinion without either view being false, and clinical judgments about something as unpredictable as life expectancy can turn out to be wrong without being false.

Respondents and the Third Circuit expressly disagree. As respondents bluntly put it: "The petition argues that the mere fact that a prediction turns out to be wrong does not make it false when made. Yes it does, *because 'wrong' and 'false' mean the same thing in this context*." BIO.33 (emphasis added). That view

is profoundly mistaken. As this Court explained in *Omnicare*, "a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless whether [a plaintiff] can ultimately prove the belief wrong." 575 U.S. at 186. A prohibition on false statements "is not ... an invitation to Monday morning quarterback [a speaker's] opinions." *Id.*

Tellingly, respondents do not claim that the Third Circuit's decision is consistent with *Omnicare*. Instead, they deem *Omnicare* irrelevant because "the range of misstatements and misdeeds that can trigger FCA liability is broader than the triggers for Section 11" of the Securities Act. BIO.34. Respondents have it backwards. The FCA "incorporates the common-law meaning of fraud," *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S.Ct. 1989, 1999 (2016), whereas *Omnicare* announced a rule that was deliberately *broader* than the common law, *see* 575 U.S. at 197-99 (Scalia, J., concurring in part and concurring in the judgment). That the decision below embraces a concept of falsity substantially broader than even *Omnicare* thus proves it is wrong *a fortiori*.

Finally, the decision below is fatally inconsistent not just with *Omnicare* but with CMS' assurance that hospices and doctors face "no risk" in making difficult prognoses about life expectancy. Pet.6. That assurance is true enough in the Eleventh Circuit, which requires a demanding showing of falsity. But if there is a triable issue of falsity whenever an expert has a different opinion about the inexact science of life expectancy, then risk abounds.

## III. The Question Presented Is Exceptionally Important And This Case Is An Ideal Vehicle.

**A.** Respondents contend that the question presented "does not matter." BIO.18. But Petitioner's *amici*—which include multiple hospice-provider and physicians' organizations—beg to differ. As they explain, the Third Circuit's conception of FCA falsity will cause hospice providers to err on the side of withholding services in order to reduce their exposure to financial and reputational harm, thereby leaving patients with fewer palliative care options that obviate the need for more expensive and more painful alternatives. Hospice.Br.14-16, 22. Furthermore, the many multistate hospices operating on both sides of the circuit split will be placed in an untenable position. *Id.* at 21-27. And the ill effects are hardly limited to the hospice context. *See* Chamber.Br.10-17.

Respondents paint with a broad brush in suggesting that the hospice industry is rife with fraud. If that is true, then relators will have little difficulty surmounting the Eleventh Circuit's standard of falsity. But equating legitimate differences of opinion with falsity and fraud only obscures the bad actors and chills the provision of necessary care.

Respondents claim that "nobody is bringing fraud cases predicated solely on a difference of opinion between physicians." BIO.18. But that is precisely what is left of respondents' case. And if the decision below stands, this will not be the last such case. Respondents relatedly contend that "FCA liability is also not a major concern for compliant hospices," BIO.19, but the entire industry is deeply concerned

precisely because the decision below moves the goalposts on compliance. If all it takes to be deemed non-compliant is an expert willing to take a different view of medical records, then no hospice is safe from the threat of litigation. That is a far cry from the "no risk" CMS promised to doctors and hospices in making difficult judgments about life expectancy.

**B.** Certiorari is warranted now. Respondents deem the circuit split "shallow," BIO.14, but do not dispute that further percolation will not ameliorate the split given the Third Circuit's considered rejection of the Eleventh Circuit's conclusion and the Eleventh Circuit's considered rejection of the government's arguments. Pet.33-34. This Court, moreover, routinely grants certiorari to resolve square splits between two circuits, *e.g.*, *Nichols v. United States*, 136 S.Ct. 1113 (2016), and the confusion on the broader issue extends well beyond two circuits.

Respondents identify four supposed vehicle problems, but each is illusory. First, respondents identify two more recently promulgated regulations governing hospice certification. *See* BIO.26. But while those regulations add additional boxes for a hospice to check before certifying a patient for hospice care, they do not bear on the basic falsity question at issue here. *AseraCare* acknowledged them without suggesting they changed the analysis in the least. *See* 938 F.3d at 1292-93 & nn.6-7. And if all one needs to get to the jury on falsity is a difference of medical opinion, future litigation will not turn on the niceties of compliance with these or any subsequent objective requirements.

Second, respondents assert that the case is "interlocutory," and "no court has yet considered all the elements of FCA liability." BIO.26-27. But that is just a reprise of respondents' mistaken view that all these cases should go to the jury on the question of scienter. The question whether claims like this should be dismissed at the summary judgment stage for failure to create a triable issue of falsity (as the district court held) or tried with a focus on scienter is perfectly presented in this interlocutory posture.

Third, respondents argue that FCA falsity should not be evaluated "through the idiosyncratic lens of hospice eligibility." BIO.27. But the circuit split on hospice eligibility can only be resolved in that context, and a program where eligibility turns critically on a clinical judgment that is necessarily imprecise is a well-nigh perfect context to consider whether there is a difference between a disputed opinion and a false one.

Finally, respondents contend that this Court would have to address the "separate question" of when "a violation of the documentation requirement" renders a claim false. BIO.27-30. But as explained, there is no "separate question" regarding the documentation requirement. And to the extent this Court can clarify the proper approach to the documentation requirement in the course of resolving the question presented, that is a feature, not a bug.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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