No. _____

In The
Supreme Court of the United States

UNITED STATES *EX REL.*
SHANNON MARTIN, M.D., ET AL.,

Petitioners,

v.

DARREN HATHAWAY, M.D., ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Anti-Kickback Statute (AKS) prohibits solicitation or receipt of "any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind" in return for referring an individual to a person for furnishing items or services under a Federal health care program. 42 U.S.C. §1320a-7b(b)(1)(A).

The False Claims Act (FCA), 31 U.S.C. §3729, *et seq.*, establishes criminal and civil penalties for knowingly presenting, or causing to be presented, a false or fraudulent claim to the government for payment or approval. FCA liability can attach when a defendant submits a claim for payment and fails to disclose noncompliance with a statutory requirement, such as the AKS. In 2010, Congress enacted 42 U.S.C. §1320a-7b(g), which provides "a claim that includes items or services resulting from a violation [of the AKS] constitutes a false or fraudulent claim for purposes of [the FCA]."

The questions presented are:

1. Does the term "remuneration" under the Anti-Kickback Statute encompass solicitation or receipt of any kind of reward or compensation, or is it limited to payments and other transfers of value?

2. Does 42 U.S.C. §1320a-7b(g) heighten the standard for establishing liability under the False Claims Act for actions predicated on an Anti-Kickback Statute violation?

PARTIES TO THE PROCEEDINGS

Petitioners Shannon Martin and Douglas Martin are relators under the False Claims Act for the United States of America.

Respondents are Darren Hathaway, South Michigan Ophthalmology, P.C., and Ella E.M. Brown Charitable Circle dba Oakland Hospital.

STATEMENT OF RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. *United States of America ex rel. Martin* v. *Hathaway*, No. 22-1463 (6th Cir.)
2. *United States of America ex rel. Martin* v. *Hathaway*, No. 1:19-cv-00915 (W.D. Mich.)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES, RULES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

The FCA imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. §3729(a)(1)(A). FCA actions may be brought by the Attorney General or by a private *qui tam* relator in the name of the United States. *Id.* §3730(a), (b)(1). An FCA claim can be predicated on a violation of the AKS, which prohibits medical providers from making referrals "in return for" "remuneration." 42 U.S.C. §1320a-7b(b)(1)(A).

The AKS plays a critical role in protecting against widespread abuses in the medical industry—ensuring the government only pays for care unburdened by financial conflicts. Claims resulting from an illegal kickback or bribe are deemed false under the FCA because "[t]he Government does not get what it bargained for when a defendant is paid . . . for services tainted by a kickback." *United States ex rel. Wilkins* v. *United Health Grp., Inc.*, 659 F.3d 295, 314 (3d Cir. 2011), *abrogated on other grounds by Universal Health Servs., Inc.* v. *United States*, 579 U.S. 176 (2016); *see also United States* v. *Acme Process Equip. Co.*, 385 U.S. 138, 146 (1966) ("This public policy requires that the United States be able to rid itself of a prime contract tainted by kickbacks."). The Sixth Circuit's holding undermines this essential statutory framework in two important ways.

First, the Sixth Circuit's opinion narrowly construes the term "remuneration" to be limited to either

a payment or a change to the value or cost of a service. Pet. App. 17a. This interpretation reads the term "bribe" out of the statute and creates an end-around to liability under the AKS. At least in the Sixth Circuit, medical providers can trade referrals for economic gain—at the expense of the government and patients—so long as there is no *direct* exchange.

Second, the Sixth Circuit improperly held an AKS violation can only serve as a predicate act under the FCA when there is proof of a but-for causal connection between a false claim and a specific AKS violation. *Cf.* Pet. App. 19a. This reasoning conflicts with the text and purpose of §1320a-7b(g), as well as the AKS and FCA generally. Courts have long held that FCA actions may be predicated on AKS violations. *See*, *e.g.*, *United States ex rel. McNutt* v. *Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005) ("The violation of the regulations and the corresponding submission of claims for which payment is known by the claimant not to be owed makes the claims false under sections 3729(a)(1) and (3)."). In 2010, Congress added §1320a-7b(g) to the AKS, which provides "a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim [under the FCA]." While there is disagreement amongst circuits as to the proper interpretation of the amendment, the Sixth Circuit adopted the most restrictive interpretation to date.

The Third Circuit held the 2010 amendment clarified but did not alter existing law. *See United States ex rel. Greenfield* v. *Medco Health Sols., Inc.*, 880 F.3d

89, 95 (3d Cir. 2018). The Third Circuit declined to impose any additional requirements for FCA claims predicated on AKS violations. Comparably, the Eighth Circuit held the amendment "create[d] a but-for causal requirement between an anti-kickback violation and the 'items or services' included in the claim" under §1320a-7b(g). *United States ex rel. Cairns* v. *D.S. Med. LLC*, 42 F.4th 828, 831 (8th Cir. 2022). Nevertheless, the Eighth Circuit recognized FCA claims can be brought under pre-amendment theories. *Id*. at 837 (remanding case for a new trial).

The Sixth Circuit concurred with the Eighth Circuit as to the interpretation of §1320a-7b(g). The Sixth Circuit, however, went significantly further—imposing a but-for cause requirement for *all* FCA actions predicated on AKS violations. In the Sixth Circuit's opinion, "[w]hen it comes to violations of the [AKS], *only* submitted claims 'resulting from' the violation are covered by the [FCA]." Pet. App. 19a (emphasis added). If this notion is ratified, medical providers can accept a bribe in violation of the AKS but still avoid liability under the FCA so long as the government cannot prove an explicit connection between an illicit item or service with a particular bribe.

The government's ability to protect itself from false health care claims will vary drastically by jurisdiction until this Court intervenes to provide clarity to the rule. This Court should grant certiorari and reverse.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 63 F.4th 1043 and reproduced at Pet. App. 1a-26a. The Sixth Circuit's order denying rehearing en banc is unreported and is reproduced at Pet. App. 53a-54a. The district court's opinion and order is unreported and reproduced at Pet. App. 28a-51a.

JURISDICTION

The Sixth Circuit issued its opinion on March 28, 2023. Pet. App. 1a-26a. Petitioner filed a timely petition for rehearing en banc, which was denied on May 16, 2023. Pet. App. 53a-54a. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at Pet. App. 55a-58a: 31 U.S.C. §3729 and 42 U.S.C. §1320a-7b.

STATEMENT OF THE CASE

1. Statutory Background

1. The AKS imposes criminal liability on any person who (1) "knowingly and willfully solicits or receives any remuneration (including any kickback,

bribe, or rebate) . . . in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program"; or (2) "knowingly and willfully offers or pays any remuneration . . . to any person to induce such person . . . to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program." 42 U.S.C. §1320a-7b(b)(1), (2).

The AKS protects patients "from doctors whose medical judgments might be clouded by improper financial considerations." *United States* v. *Patel*, 778 F.3d 607, 612 (7th Cir. 2015). Courts have also recognized that "[t]he Government does not get what it bargained for when a defendant is paid by [Medicare or Medicaid] for services tainted by a kickback," whether or not it can show that a conflict-free provider would have given the same care. *Wilkins*, 659 F.3d at 314. Thus, medical providers who violate the AKS are typically liable under the FCA. *See*, *e.g.*, *id.* at 313; *United States ex rel. Hutcheson* v. *Blackstone Med., Inc.*, 647 F.3d 377, 392-394 (1st Cir. 2011); *McNutt*, 423 F.3d at 1259.

Liability can be established in multiple ways. For instance, when a provider certifies a false statement expressly stating that it has complied with the AKS. 31 U.S.C. §3729(a)(1)(B). Even without an express certification, a provider can be liable if it "makes specific representations about the goods or services provided"

but "fail[s] to disclose noncompliance with material statutory, regulatory, or contractual requirements." *Universal Health*, 579 U.S. at 190.

In 2010, Congress amended the AKS, reaffirming the notion that AKS violations are actionable under the FCA. The amendment states, "[i]n addition to" the AKS's criminal penalties and the remedies available under §1320a-7a, any "claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of" the FCA. 42 U.S.C. §1320a-7b(g). The amendment was meant to "strengthen[ ] whistleblower actions based on medical care kickbacks" by overruling a then-recent decision—*United States ex rel. Thomas* v. *Bailey*, 2008 WL 4853630 (E.D. Ark. Nov. 6, 2008)—which held a hospital's reimbursement claims for surgeries were not false, even though the surgeon had violated the AKS, because the hospital had not itself violated the AKS or been aware of the surgeon's violation. 155 Cong. Rec. S10,853 (daily ed. Oct. 28, 2009) (Sen. Kaufman). The amendment makes clear "that all claims resulting from illegal kickbacks are 'false or fraudulent,' even when the claims are not submitted directly by the wrongdoers themselves." *Id.*; *see* 155 Cong. Rec. S10,854 (Sen. Leahy, making the same point); *see also United States ex rel. Kester* v. *Novartis Pharm. Corp.*, 41 F. Supp. 3d 323, 333 (S.D.N.Y. 2014) (discussing this legislative history).

2. The FCA "is the government's primary civil tool to redress false claims for federal funds and property involving a multitude of government operations

and functions." Press Release, U.S. Dep't of Just., Justice Department Takes Action Against COVID-19 Fraud (Mar. 26, 2021), https://perma.cc/P7BP-APY5. The government has recovered over $70 billion since Congress strengthened the FCA in 1986, including over $5.6 billion in 2021. *See* Press Release, U.S. Dep't of Just., Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021 (Feb. 1, 2022), https://perma.cc/6S99-KQDK. Most of these recoveries involve health care fraud—but the FCA also protects "a multitude of other government operations and functions." The FCA "helps to support our military and first responders by ensuring that government contractors provide equipment that is safe, effective and cost efficient." *Id*. It safeguards "American businesses and workers by promoting compliance with customs laws, trade agreements, visa requirements and small business protections." *Id*. And it protects "other critical government programs ranging from the provision of disaster relief funds to nutrition benefits for needy families." *Id*.

2. Factual Background and Procedural History

1. Respondent Ella E.M. Brown Charitable Circle dba Oaklawn Hospital (Oaklawn) is a hospital located in Marshall, Michigan. Pet. App. 4a. Respondent South Michigan Ophthalmology, P.C. (South Michigan) is the only nearby ophthalmology practice. *Id*. Respondent Dr. Darren Hathaway (Dr. Hathaway) is the sole owner of South Michigan, and Petitioner Dr. Shannon Martin (Dr. Martin) was an employee of

South Michigan. *Id*. Dr. Martin's husband, Petitioner Douglas Martin, served as the Director of Finance for Oaklawn. *Id*.

Oaklawn does not have an ophthalmology practice, and Oaklawn and South Michigan frequently cross-refer patients. *See id*. at 4a. In 2018, Hathaway began negotiating a merger with Lansing Ophthalmology, P.C. (LO)—a merger that would have resulted in Dr. Martin's termination. *See id*. at 4a. In October 2018, Oaklawn extended Dr. Martin an offer of employment contingent on the Board's approval. *Id.* After hearing about the offer, Dr. Hathaway met with Oaklawn's CEO and several other board members (and sent a letter) to block Dr. Martin's hiring. *Id.* 5a. Dr. Hathaway stated that the hiring of Dr. Martin would be the "death knell" for his practice. *Id*. As leverage, Dr. Hathaway told Oaklawn that, post-merger, he expected an increased volume of referrals and that he would "pull out his cases and take them elsewhere" if Oaklawn hired Dr. Martin. *Id.* at 5a-6a.

Several board members expressed concern over the potential loss of business from Dr. Hathaway and South Michigan, and so the Board inevitably voted to withdraw Dr. Martin's offer of employment. *Id.* at 6a. Oaklawn's Chairman of the Board personally called Dr. Hathaway to inform him of the decision. *Id.* Another board member texted Hathaway, indicating gratitude for the continued "partnership" and that she was "looking forward to increased surgical volume." *Id.* South Michigan's merger with LO fell through, and Dr. Martin opened her own practice. *See id.*

2. Petitioners filed a *qui tam* action in the Western District of Michigan under the FCA and Michigan's Medicaid False Claims Act, Mich. Comp. Laws §400.601. *Id.* Petitioners alleged that Respondents engaged in an illegal referral scheme under the FCA and AKS. *See id.* The district court dismissed the initial complaint[1] (with leave to amend) because Petitioners did not specifically identify a false claim submitted to the government. *See id.* at 7a. Petitioners filed an amended complaint identifying 22 claims. *See id.* Respondents filed another motion to dismiss. *See id.* The district court granted the motion, rejecting the federal cause of action on the merits and declining to exercise supplemental jurisdiction over the state cause of action. *Id.*

Petitioners appealed to the Sixth Circuit, and the Sixth Circuit affirmed. *Id.* at 27a. Petitioners requested rehearing en banc, which was denied. *Id.* at 53a. This petition followed.

3. The Sixth Circuit affirmed the district court decision on two grounds. First, the Sixth Circuit held that the definition of remuneration under the AKS is limited to "payments and other transfers of value" and does not cover the *quid-pro-quo* exchange of an action—even if having economic value to the referrer—for a referral. *See id.* at 9a, 18a. The Sixth Circuit concluded that remuneration narrowly requires either a

[1] Technically, the "initial complaint" identified by the Sixth Circuit was the first amended complaint. However, the distinction is not relevant to this appeal.

payment or change to the value or cost of a service. *Id*. at 17a. The Sixth Circuit also found a lack of remuneration because, in its opinion, the decision to withdraw Dr. Martin's tentative offer of employment merely preserved the status quo. *See id.* at 18a.

Second, the Sixth Circuit held "[n]either Oaklawn nor Dr. Hathaway submitted claims for Medicare or Medicaid reimbursement for 'items or services resulting from the violation' of the [AKS]." *Id.* at 19a (citing §1320a-7b(g)). In reaching this conclusion, the Sixth Circuit joined the Eighth Circuit in holding that the "resulting from" language in §1320a-7b(g) establishes a but-for cause barrier to criminal and civil liability. *See id.* at 20a. More specifically, it held that, for each alleged false or fraudulent claim, there must be traceable proof that it would not have been submitted to the government but-for the solicitation or receipt of remuneration. *See id.* Unlike the Eighth Circuit, however, the Sixth Circuit did not distinguish between a §1320a-7b(g) theory and other theories of liability. *See id.* at 19a ("When it comes to violations of the [AKS], *only* submitted claims 'resulting from' the violation are covered by the [FCA]." (emphasis added)).

In this case, the Sixth Circuit found that but-for causation was lacking because, in its opinion, the identified claims would have been submitted regardless of "whether the underlying business dispute occurred or not" as "Oaklawn was the only hospital in Marshall, and South Michigan was the only local ophthalmology group." *Id.* at 21a. "When Oaklawn decided not to establish an internal ophthalmology line at the hospital,

the same relationship continued just as it always had." *Id.* at 20a. Notably, under its exacting rule, the Sixth Circuit did not find it necessary to consider whether the at-issue referrals would have been made if Dr. Hathaway made good on his threat to "pull" all work from Oaklawn.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Construction of "Remuneration" is Plainly Contrary to the Text of the AKS and Defies Congress's Intent

1. By limiting the term remuneration under the AKS to money and transfers of value, the Sixth Circuit read the term "bribe" out of the statute and violated well-established canons of statutory interpretation. This far-reaching and consequential error should be corrected. The AKS prohibits the knowing or willful solicitation or receipt of "any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind . . . in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program." 42 U.S.C. §1320a-7b(b)(1)(a). The Sixth Circuit's opinion guts the AKS by limiting the definition of remuneration to cash payments and transfers of value (money and assets). *See* Pet. App. 9a, 18a. This interpretation fails to give remuneration its plain and ordinary meaning and conflicts with the text of the AKS.

This Court has previously stated: "[o]f course, 'remuneration' can encompass any kind of reward or compensation, not just money." *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070 (2018) (Gorsuch, J.). In consideration for Dr. Hathaway's continued and increased referrals, Oaklawn rewarded and compensated Dr. Hathaway by withdrawing Dr. Martin's tentative offer of employment. The remuneration Oaklawn gave to Dr. Hathaway was more valuable than a truckload of cash. Indeed, in Dr. Hathaway's own words, it would have been the "death knell" for his practice if Oaklawn hired Dr. Martin. App. Pet. 5a. There is no question that the remuneration had value and is precisely the type of transaction the AKS aims to prevent. Medical referrals should be driven by medical judgment and not by profit motivation. *See Patel*, 778 F.3d at 612 (recognizing the difficulty of ascertaining what judgments a provider would have made in the absence of the kickback or bribe).

In *Wisconsin Central*, the Court held that the phrase "money remuneration" in the Railroad Retirement Tax Act, *see* 26 U.S.C. §3231(e)(1), means a currency issued by a recognized authority as a medium of exchange and does not include stock. 138 S. Ct. at 2070-71. The Court reasoned that—unlike the phrase "all remuneration" in the Federal Insurance Contributions Act, *see* 26 U.S.C. §3121(a)—"the adjective 'money' modifies the noun 'remuneration.'" *Id.*

The term "remuneration" in the AKS is not modified by the term "money." It is used expansively. *See Pfizer, Inc.* v. *HHS*, 42 F.4th 67, 75 (2d Cir. 2022) ("[T]he

plain meaning of 'remuneration' is clearly broader than a kickback, bribe, or rebate: 'Remuneration' means '[p]ayment; compensation, esp[ecially] for a service that someone has performed,' and the modifier 'any' further broadens the scope of the phrase."). Indeed, by expressly listing "bribe" as a category of remuneration, Congress chose to "includ[e]" it within the intended scope of the AKS. *Cf.* 42 U.S.C. §1301(b) ("The term 'includes' and 'including' when used in a definition contained in this chapter shall not be deemed to exclude other things otherwise within the meaning of them defined."). Any defensible definition of remuneration under the AKS must, therefore, encapsulate the term "bribe."

"The cardinal principle of statutory construction is to save and not to destroy." *United States* v. *Menasche*, 348 U.S. 528, 538 (1955). Statutes should be construed "to give effect, if possible, to every clause and word of a statute. . . ." *Id.* The surplusage canon also creates a "presumption that each word Congress uses is there for a reason." *Advocate Health Care Network* v. *Stapleton*, 581 U.S. 468, 477 (2017). Under well-established canons of statutory construction, the term "bribe" should be given its plain and common-law meaning. *See Bilski* v. *Kappos*, 561 U.S. 593, 603 (2010) ("Unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common, meaning."); *Scheidler* v. *NOW, Inc.*, 537 U.S. 393, 402 (2003) ("Absent contrary direction from Congress, [courts] begin [their] interpretation of statutory language with the general presumption that a statutory term has its

common-law meaning."). Contemporaneous definitions of the term "bribe," in both legal and lay dictionaries, include the solicitation or receipt of anything of value. *See* Black Law's Dictionary 239 (4th ed. 1968) ("The offering, giving, receiving, or soliciting of any thing of value to influence action as official or in discharge of legal or public duty."); The American Heritage Dictionary of the English Language 164 (1st ed. 1978) ("Anything, such as money, property, or a favor, offered or given to someone in position of trust to induce him to act dishonestly."). These definitions are consistent with the common law understanding of bribery, which includes the solicitation or receipt of anything of value. *See*, *e.g.*, *State* v. *Ellis*, 33 N.J.L. 102, 106-107 (N.J. 1868) ("[W]hether the offer of a bribe was before or after the application in due course of proceeding, had been embodied in an ordinance or resolution is immaterial. The offer of anything of value in corrupt payment or reward for any official act, legislative, executive, or judicial, to be done, is an indictable offence at the common law."); *State* v. *Meysenburg*, 71 S.W. 229 (Mo. 1902) ("Bribery is the voluntary giving or receiving of anything of value in corrupt payment for an official act, done or to be done."); *see also People ex rel. Dickinson* v. *Van De Carr*, 87 A.D. 386 (N.Y. App. Div. 1903) (Bribery is defined as "the giving, offering or receiving of anything of value, or any valuable service, intended to influence one in the discharge of a legal duty."); *Handley* v. *State*, 102 P.2d 947, 951 (Okla. Crim. App. 1940) ("Almost anything may serve as a bribe so long as it is of sufficient value in the eyes of the person bribed to influence his official conduct; it is not even

necessary that the thing have a value at the time when it is offered or promised. The acceptance by a public officer of a promise to take money in the future for influencing his present official act constitutes bribery."); *State* v. *Fielder*, 308 N.W.2d 56, 58 (Iowa 1982) (defining bribe as "an offer of anything of value or benefit to induce another act improperly").

Numerous state statutes also define "bribe" to include "anything of value." *See*, *e.g.*, Ala. Code §13A-10-121(a) ("A person commits the crime of bribing a witness if he offers, confers or agrees to confer any thing of value upon a witness or a person he believes will be called as a witness in any official proceeding. . . ."); Cal. Pen. Code §7(6) ("The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity."); Idaho Code §18-101(6) ("The word 'bribe,' signifies anything of value or advantage, present or prospective, or any promise or it is given, in his action, vote or opinion, in any public or official capacity."); N.M. Stat. §30-24-2 ("Demanding or receiving bribe by public officer or public employee consists of any public officer or public employee soliciting or accepting, directly or indirectly, anything of value, with intent to have his decision or action on any question, matter, cause, proceeding or appointment influenced thereby, and which by law is pending or might be brought before him in his official capacity.").

Unsurprisingly, federal statutes are no different. Under federal bribery law, a public official accepts a bribe when she "corruptly . . . receives . . . anything of value . . . in return for . . . being influenced in the performance of any official act." 18 U.S.C. §201(b)(2). As it relates to programs receiving federal funds, bribery includes instances where a person "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or State, local or Indian tribal government, or any agency thereof. . . ." 18 U.S.C. §666(a)(2); *see also* 15 U.S.C. §78dd-1(a) (defining bribe under the Foreign Corrupt Practices Act to include "anything of value"). *Cf.* 41 U.S.C. §8701 (Kickback is defined as "money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind. . . ."). The Sixth Circuit's opinion is simply contrary to the text of the AKS under any reasonable interpretation.

2. The Sixth Circuit's reading is also repugnant to the legislative history of the AKS. The AKS protects patients "from doctors whose medical judgments might be clouded by improper financial considerations." *Patel*, 778 F.3d at 612. As originally enacted, the AKS did not refer to "remuneration" and only applied to "kick-back[s]," "bribe[s]," or "rebate[s] of any fee or charge." Social Security Amendments of 1972, Pub. L. No. 92-603, tit. II, §242(b), (c), 86 Stat. 1329, 1419-1420. Congress, however, amended the statute to expand the scope beyond kickbacks and bribes to "any remuneration (including any kickback, bribe, or rebate)" that is offered, paid, solicited, or received "directly or indirectly, overtly or covertly, in cash or in

kind." Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 95-142, §4(a), 91 Stat. 1175, 1180 (1977). The amendments were intended to broaden the reach of the AKS, not limit it. *See* OIG Anti-Kickback Provisions, 56 Fed. Reg. 35,952, 35,958 (July 29, 1991) ("Congress's intent in placing the term 'remuneration' in the statute in 1977 was to cover the transferring of anything of value in any form or manner whatsoever."). Thus, the Sixth Circuit's narrow reading of the term "remuneration" cannot be reconciled with the commonly understood meaning of the term "bribe" or Congress's intent to expand the scope of the AKS.

II. The Court Should Grant Certiorari to Resolve a Circuit Split and Correct the Sixth Circuit's Atextual Narrowing of the False Claims Act

1. Courts have long held that AKS violations give rise to actions under the FCA. *See*, *e.g.*, *McNutt*, 423 F.3d at 1259 (Pryor, J.) ("The violation of the regulations and the corresponding submission of claims for which payment is known by the claimant not to be owed makes the claims false under sections 3729(a)(1) and (3)."); *Hutcheson*, 647 F.3d at 379 (Lynch, C.J.) ("[I]n alleging that the hospital and physician claims represented compliance with a material condition of payment that was not in fact met, [plaintiff] states a claim under the FCA that the hospital and physician claims for payment at issue in this case were materially false or fraudulent."). The Court recently affirmed

this notion in a unanimous opinion. *Universal Health Servs.* v. *United States ex rel. Escobar*, 579 U.S. 176, 181 (2016) ("[FCA] liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement.").

In 2010, Congress passed an amendment to expressly provide for FCA actions based on AKS violations. 42 U.S.C. §1320a-7b(g) provides, "[i]n addition to the penalties provided for in this section or section 1128A, a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of subchapter III of chapter 37 of title 31, United States Code." The Third Circuit explained the amendment clarified but did not alter existing law. *United States ex rel. Greenfield* v. *Medco Health Sols., Inc.*, 880 F.3d 89 (3d Cir. 2018). *Id*. at 95. The Third Circuit rejected the argument that the "resulting from" language in the AKS imposes a but-for cause standard for FCA claims. *Id.* The panel reasoned such an interpretation would produce incongruous results—i.e., where a defendant could be convicted for criminal conduct under the AKS but insulated from civil liability under the FCA. *Id*. at 96. Congress's clear intent was "to ensure that *all* claims resulting from illegal kickbacks are considered false claims for the purpose of civil actions under the [FCA]." *Id*. (emphasis in original). The Southern District of New York reached a similar conclusion. *United States ex rel.*

Kester v. *Novartis Pharm. Corp.*, 41 F. Supp. 3d 323, 332 (S.D.N.Y. 2014) ("Congress gave absolutely no indication that it intended to amend the definition of the word 'false' in the FCA, or to limit the FCA's reach where kickbacks were concerned.").

Reaching a contrary result, the Eighth Circuit concluded §1320a-7b(g) "creates a but-for causal requirement between an anti-kickback violation and the 'items or services' included in the claim." *United States ex rel. Cairns* v. *D.S. Med. LLC*, 42 F.4th 828, 831 (8th Cir. 2022). The court briefly acknowledged *Greenfield*, but took issue with its heavy reliance on legislative history. *Id*. at 836. Nevertheless, the Eighth Circuit emphasized that its ruling was narrow, stating: "[w]e do not suggest that every case arising under the [FCA] requires a showing of but-for causation. Rather, when a plaintiff seeks to establish falsity or fraud through the 2010 amendment, it must prove that a defendant would not have included particular 'items or services' but for the illegal kickbacks." *Id*. The holding in *Cairns* was clearly based on the fact that "the government's sole theory *at trial* hinged on the 2010 amendment, the district court never instructed the jury on but-for causation, and there is no telling what the jury would have done if it had, we remand for a new trial." *Id*. at 837 (emphasis added).

The Sixth Circuit's opinion went significantly further than the Eighth Circuit's narrow holding.[2]

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[2] The breadth of the Sixth Circuit's holding is particularly concerning given that its broad-sweeping reasoning was applied

Relying on *Cairns*, the Sixth Circuit interpreted "resulting from" in the 2010 amendment as requiring but-for causation for all AKS-related FCA claims. Pet. App. 19a ("When it comes to violations of the [AKS], *only* submitted claims 'resulting from' the violation are covered by the [FCA]." (emphasis added)). The opinion offers no explanation or justification for extending this standard—something the panel in *Cairns* was careful not to do.

The 2010 amendment was never intended to displace pre-amendment law. Indeed, a recent district court decision within the Eighth Circuit relied on this important distinction. As explained by the district court, "[n]othing in the text of the 2010 Amendment indicates that it was intended to supplant or overrule existing case law that allowed parties to pursue an FCA claim based on a violation of the AKS when that party could demonstrate that the AKS violation was materially false." *United States ex rel. Fesenmaier* v. *Cameron-Ehlen Grp., Inc.*, 2023 U.S. Dist. LEXIS 788, at *7 (D. Minn. Jan. 4, 2023).

2. The Sixth Circuit's opinion erroneously construes §1320a-7b(g). The phrase "resulting from" must be read in context, not in isolation. Its decision overly fixates on the phrase "resulting from" without considering the link between the broader scheme and the

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at the pleading stage. *See Johnson* v. *City of Shelby*, 574 U.S. 10, 12 (2014) (explaining that a plaintiff must plead facts sufficient to show that her claim has substantive plausibility and that it is unnecessary to set out a legal theory for the plaintiff's claim for relief).

submitted false claim. A "violation" of the AKS is not always a singular act and can include a broader scheme with multiple subparts—e.g., a bribe, a referral, and the furnishing of medical items or services. To the extent "resulting from" invokes but-for causation, it should be analyzed in view of the *entire* violation. In short, "[a] claim that includes items or services resulting from a [tainted referral] constitutes a false or fraudulent claim for purposes of [the FCA]." 42 U.S.C. §1320a-7b(g).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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