PRESCRIBING THE RIGHT CAUSATION STANDARD: THE SIXTH CIRCUIT'S APPROACH TO HOLDING HEALTHCARE FRAUDSTERS CIVILLY LIABLE

Abstract: On March 28, 2023, in *United States* ex rel. *Martin v. Hathaway*, the U.S. Court of Appeals for the Sixth Circuit applied a textualist approach when it held that to bring a False Claims Act (FCA) action "resulting from" a violation of the Anti-Kickback Statute (AKS), a plaintiff must show but-for causation. In 2018, in *United States* ex rel. *Greenfield v. Medco Health Solutions, Inc.*, the U.S. Court of Appeals for the Third Circuit looked to the legislative history of the AKS, ultimately finding that the same phrase "resulting from" conveyed a more relaxed causation standard. This Comment argues that the Sixth Circuit employed the proper approach to statutory interpretation and that future litigants should plead a but-for causal relationship when bringing such claims under the FCA. By confining statutory interpretation to a textual analysis, lower courts will ideally exercise judicial restraint and defer to the legislature to amend the causal standard should Congress see fit to do so.

INTRODUCTION

In 2023, the Department of Justice recovered $2.68 billion in judgments and settlements for false claims made against the federal government.[1] Healthcare fraud accounted for $1.8 billion of this recovery, though it is estimated that healthcare fraud generates approximately $100 billion in illicit funds each year.[2] From medical providers double billing to patients forging prescriptions, the many forms of healthcare fraud do more than divert taxpayer dollars—healthcare fraud can put patient health at risk.[3]

[1] Press Release, Dep't of Just., False Claims Act Settlements and Judgments Exceed $2.68 Billion in Fiscal Year 2023 (Feb. 22, 2024), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023 [https://perma.cc/WYY6-8BV4]. This recovery is the result of 543 settlements and judgments brought in a single year, the highest number in history. *Id.*

[2] *Id.*; *see also The Challenge of Health Care Fraud*, NAT'L HEALTH CARE ANTI-FRAUD ASSOC. (2023), https://www.nhcaa.org/tools-insights/about-health-care-fraud/the-challenge-of-health-care-fraud/ [https://perma.cc/SF2G-QZZM] (estimating the value of funds lost each year to health care fraud to be between 3% and 10% of total healthcare expenditures, placing the total price tag at between $100 billion and $300 billion).

[3] *See* Thornton et al., *Categorizing and Describing the Types of Fraud in Healthcare*, 64 PROCEDIA COMP. SCI. 713, 715 (2015) (providing a brief overview of the most prevalent types of healthcare fraud). Relevant literature identifies more than eighteen distinct methods of healthcare fraud, including patient identity theft, manipulating diagnoses, and phantom billing. *Id.* at 715–18. Though healthcare fraud may seem like a victimless crime, certain variations can impact the quality of medical service

The federal government enacted various statutes with the intent of preventing and combatting healthcare fraud, such as the False Claims Act (FCA) and the Anti-Kickback Statute (AKS).[4] The FCA imposes civil liability for a broad range of fraudulent claims made to the federal government while the AKS criminalizes kickback schemes involving federal healthcare programs.[5] Notwithstanding the penalties these statutes impose—including treble damages under the FCA and up to ten years of imprisonment for AKS violations—healthcare fraud remains a prevalent issue nationwide.[6] In 2023, in *United States* ex rel. *Martin v. Hathaway*, the Sixth Circuit considered the claims of Dr. Martin, an ophthalmologist, who alleged that her former employer committed healthcare fraud by conditioning his patient referrals to a local hospital on that hospital's decision not to hire Dr. Martin.[7]

Part I of this Comment examines how the FCA and the AKS operate to address healthcare fraud and discusses the factual and procedural history of *Martin*.[8] Part II analyzes the disparate approaches taken by federal courts in

provided to patients. *See The Challenge of Health Care Fraud*, *supra* note 2 (summarizing cases where doctors were jailed and fined for ordering millions of dollars of unnecessary and intrusive testing for patients to collect insurance payments). For example, Dr. Harold Persaud was convicted of healthcare fraud for performing unnecessary tests, catheterizations, and heart surgeries on patients to claim $29 million in Medicare and private insurance reimbursements, $5.7 million of which was paid. Press Release, U.S. Dep't of Just., Ohio Cardiologist Sentenced to 20 Years in Prison for Overbilling Medicare and Others of $5.7 Million for Unnecessary Procedures (Dec. 18, 2015), https://www.justice.gov/opa/pr/ohio-cardiologist-sentenced-20-years-prison-overbilling-medicare-and-others-57-million#:~:text=A%20Westlake%2C%20Ohio%2C%20cardiologist%20was,Dr. [https://perma.cc/33SM-CAUU].

[4] *See, e.g.*, False Claims Act (FCA), 31 U.S.C. §§ 3729–3733 (imposing civil liability for false claims made for reimbursement by a federal healthcare program); Anti-Kickback Statute (AKS), 42 U.S.C. § 1320a-7b(b) (criminalizing kickback schemes involving federal healthcare programs); Physician Self-Referral Law, 42 U.S.C. § 1395nn (prohibiting medical providers from referring patients to entities with which the provider has a financial relationship); Exclusion Statute, 42 U.S.C. § 1320a-7 (excluding any entities convicted of healthcare fraud from participating in federal healthcare programs).

[5] 31 U.S.C. §§ 3729–3733; 42 U.S.C. § 1320a-7b(b). The FCA imposes civil penalties upon any actor who defrauds the government for receipt of federal funds, payment, or property. 31 U.S.C. § 3729. Although healthcare fraud accounts for the majority of FCA actions, the scope of the FCA is not limited to the healthcare industry. *See* Kristen Parnigoni, Comment, *"Dueling" Experts and the False Claims Act: Weaponizing Legal Falsity to Combat Hospice Fraud*, 63 B.C. L. REV. E-SUPP. II.-111, II-111 to -112 (2022), https://lira.bc.edu/work/sc/6d0f4f1a-23f9-471f-a42c-0b3b6a97b54d) [https://perma.cc/Y6DZ-7X8V] (noting that the FCA creates civil liability for entities who submit false claims in a broad range of industries, including government contracting, education, and housing). In 2023, the Department of Justice settled or recovered funds stemming from claims of procurement fraud, pandemic fraud, cyber-fraud, and more. *See supra* note 1 and accompanying text (summarizing the broad range of FCA claims the government and private actors filed in fiscal year 2023, but noting that the majority of claims are related to healthcare fraud).

[6] *See* Press Release, *supra* note 1 (noting that healthcare fraud claims were a leading source of claims brought under the FCA during fiscal year 2023 and detailing major healthcare fraud cases).

[7] 63 F.4th 1043, 1047 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 224 (Oct. 2, 2023) (mem.).

[8] *See infra* notes 11–48 and accompanying text.

interpreting the causal standard these statutes require.[9] Part III argues that the Sixth Circuit's textualist approach to statutory interpretation is the correct method to determine what facts a plaintiff must sufficiently plead to bring a civil claim for illegal kickbacks by medical providers.[10]

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND OF *UNITED STATES EX REL. MARTIN V. HATHAWAY*: PUTTING POCKETS OVER PATIENTS

In 2023, in *United States* ex rel. *Martin v. Hathaway*, the U.S. Court of Appeals for the Sixth Circuit further entrenched a circuit split regarding the interpretation of the causal standard required for FCA lawsuits arising from alleged illegal kickbacks.[11] Section A of this Part discusses the FCA and violations of the statute resulting from activity criminalized under the AKS.[12] Section B of this Part discusses the factual and procedural history of *Martin*.[13]

A. The False Claims Act and Its Link to the Anti-Kickback Statute

The FCA imposes civil liability on any actor who defrauds the federal government by, among other things, knowingly submitting a fraudulent reimbursement claim to a government program.[14] Congress originally enacted the

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[9] *See infra* notes 49–72 and accompanying text.

[10] *See infra* notes 73–95 and accompanying text.

[11] 63 F.4th 1043, 1047 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 224 (Oct. 2, 2023) (mem.). The Sixth Circuit joined the Eighth Circuit in holding that to bring a False Claims Act action arising from a violation of the Anti-Kickback Statute, a plaintiff must plead sufficient facts to allege but-for causation. *See* United States *ex rel.* Cairns v. D.S. Med., LLC, 42 F.4th 828, 836 (8th Cir. 2022) (finding that the language of the AKS is "unambiguously causal"). These holdings break with the interpretation adopted by the Third Circuit. *See* United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 98 (3d Cir. 2018) (finding that, to prevail on summary judgment, plaintiffs need only provide evidence that at least one false claim was actually submitted to the federal government). In 2023, the District Court of Massachusetts adopted the approach of the Sixth and Eighth Circuits in holding that a plaintiff must prove that the AKS violation was the but-for cause of the FCA claim, but certified the question for interlocutory appeal to the U.S. Court of Appeals for the First Circuit, given a lack of consensus among district court judges. United States v. Regeneron Pharms., Inc., No. 20-11217-FDS, slip op. at *1–2 (D. Mass. Oct. 25, 2023). A district court judge may certify an interlocutory order for appeal when there is "substantial ground for difference of opinion" on a question of controlling law that may materially lead to the end of litigation. 28 U.S.C. § 1292(b). Chief Justice Saylor of the District of Massachusetts noted that the question of the requisite causation standard for these FCA claims is "one of national importance, as reflected in the split among the circuits as to the correct standard." *Regeneron*, slip op. at *1. The First Circuit granted the petition and certified the District Court's summary judgment ruling for appeal. United States v. Regeneron Pharms, Inc., No. 23-8036, 2023 WL 8599986, at *1 (1st Cir. Dec. 11, 2023).

[12] *See infra* notes 14–32 and accompanying text.

[13] *See infra* notes 33–48 and accompanying text.

[14] 31 U.S.C. § 3729(a)(1)(A). The FCA prohibits seven types of fraudulent behavior, including knowingly presenting a false claim for payment to the government, knowingly failing to deliver the entire amount of payment or property due to the government, knowingly making fraudulent payments

FCA in 1863 to prohibit defense contractor fraud against the federal government during the Civil War.[15] Today, the FCA exists as a primary tool for preventing abuse of taxpayer dollars through fraudulent schemes.[16] The FCA permits private citizens, known as *qui tam* relators, to bring a lawsuit on behalf of the federal government against fraudsters.[17] *Qui tam* relators may inde-

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or material statements to the government, and conspiring to commit any such fraudulent act. § 3729(a)(1)(A)–(G). Although most of the FCA's provisions require that a plaintiff demonstrate that a defendant acted "knowingly," plaintiffs do not need to prove specific intent to defraud. § 3729(b)(1)(B). The statute imposes a civil penalty on offenders of between $5,000 and $10,000, plus treble damages (adjusted for inflation). § 3729(a)(1)(A); Adjustments to Penalties for Violations Occurring on or Before November 2, 2015, 28 C.F.R. § 85.3 (2016)*; see also Damages*, BLACK'S, *supra* note 14 (defining "treble damages" as "[d]amages that, by statute, are three times the amount of actual damages that the fact-finder determines is owed").

[15] CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863). Originally titled "Frauds in Military Claims," Congress enacted the earliest version of the FCA in 1863 to prohibit fraud against the federal government during the Civil War. *Id.* The FCA's origins have also earned it the moniker "Lincoln's Law" after the sixteenth President of the United States Abraham Lincoln, who led the Union during the Civil War. Justin P. Tschoepe, *A Fraud Against One Is Apparently a Fraud Against All: The Fraud Enforcement and Recovery Act's Unprecedented Expansion of Liability Under the False Claims Act*, 47 HOUS. L. REV. 743, 743 (2010). In 1861, the House appointed a select committee to investigate defense contractor fraud that culminated in three reports and thousands of pages of exposed violations. ALBERT SIDNEY BOLLES, THE FINANCIAL HISTORY OF THE UNITED STATES, FROM 1861–1885, at 230–31 (1886). These fraudulent acts were severe enough to put military operations at risk, such as when the Union Army unknowingly purchased inoperable firearms and shells filled with saw-dust instead of gun powder. CONG. GLOBE, at 955. States urged Congress to address and prevent these frauds. *See* H.R. MISC. DOC. No. 37-34 (1862) (recognizing the dangers of contractor fraud and calling upon Congress, on behalf of the State of New York, to enact additional laws to remedy the issue). The resulting legislation was a precursor to the modern FCA. 31 U.S.C. §§ 3729–3733.

[16] *See* Press Release, *supra* note 1 (quoting Acting Associate Attorney General Benjamin C. Mizer on the importance of the FCA in identifying fraud and protecting government programs).

[17] 31 U.S.C. § 3730(b)(2)–(b)(4)(B). "*Qui tam*" is shorthand for the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "if the king therefore himself commences this suit, he shall have the whole forfeiture." 3 WILLIAM BLACKSTONE, COMMENTARIES *160. *Qui tam* actions are rooted in early English law, at a time when "common informers" would bring suits for private wrongs that they claimed affected a royal interest, seeking a portion of any ultimate recovery. *The History and Development of Qui Tam*, Note, 1972 WASH. U. L. REV. 81, 83–85. As the federal government lacked adequate resources for investigating cases of fraud during the Civil War, the earliest version of the FCA permitted *qui tam* relators to do the work instead. *See* Tschoepe, *supra* note 15, at 748 (describing the FCA as a direct response to the government's need for additional resources in combatting fraud during the Civil War). In 1943, the FCA was amended to restrict *qui tam* actions by, among other things, depriving courts of jurisdiction to hear *qui tam* actions based on the government's existing knowledge at the time the complaint was filed and limiting a *qui tam* relator's percentage cut of any recovery proceeds. *Id.* at 751. This change came in response to a growing number of cases filed by *qui tam* relators who would lie in wait for the government to file a criminal fraud indictment, and then file an FCA claim based on those exact facts in an attempt to profit off of any future payout. *Id.* at 750; *see, e.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 545 (1943) (holding that a *qui tam* relator need not conduct his or her own investigation to bring an FCA claim). In 1986, Congress again amended the FCA, this time to encourage more *qui tam* actions by increasing the relators' potential earnings and introducing protections for whistleblowers. Tschoepe, *supra* note 15, at 752; False Claims Amendment Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).

pendently pursue an FCA action in exchange for a portion of any reward that might eventually be recovered, pending the government's exercise of its reserved right to intervene in the suit.[18]

To bring a civil action under the FCA, a plaintiff must allege that the reimbursement claim at issue is either legally or factually false.[19] A court will find that a reimbursement claim is legally false if the fraudster lies about their compliance with the statutory and/or regulatory requirements that control how the claim should be made.[20] One way to prove that a claim is legally false is through the AKS.[21] The AKS criminalizes fraudulent transactions made to induce or reward referrals of items or services that a federal healthcare program will reimburse.[22] Congress enacted the AKS to address concerns that financial

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[18] 31 U.S.C. § 3730(b); *see also* Tschoepe, *supra* note 15, at 742 (summarizing the steps a private person must take to bring an FCA claim on behalf of the government). Relators must file the complaint under seal, and the complaint will remain sealed for sixty days. *See* 31 U.S.C. § 3730(b)(2) (establishing the sixty-day time period). Following an investigation, the government will then notify the court prior to the sixty-day deadline if it wishes to intervene or if it will allow the *qui tam* relator to independently pursue the claim. *See id.* § 3730 (outlining the timeline of a *qui tam* action). Should the government choose to proceed with the action, the private person who brought the suit may continue as a party, but with limited involvement or control. *See id.* § 3730(c) (establishing limitations on a private person's involvement in the case as a party after the government intervenes, including that the government may dismiss or settle the action over the private person's objections). Should the government proceed with the case, the private person shall receive 15–25% of the settlement or recovery amount, depending on the level of that person's involvement in prosecuting the claim. *Id.* § 3730(d). If the government fails to intervene and the *qui tam* relator proceeds with the case, the relator may receive 25–30% of the damages amount, depending on the judgment of the court. *Id.* § 3730(d). In fiscal year 2023 alone, 712 *qui tam* actions were filed. Press Release, *supra* note 1.

[19] *See* 31 U.S.C. § 3729 (a)(1)(A)–(G) (prohibiting certain fraudulent conduct against the government including the making of false statements and failing to comply with proper protocol for making a claim); *see also* United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 94 (3d Cir. 2018) (noting that a plaintiff bringing an FCA claim must prove that the reimbursement at issue was either factually or legally false). The FCA does not require that a plaintiff demonstrate that the alleged fraudster had "specific intent" to defraud—just that they acted with either actual knowledge that their claim was false, or deliberate ignorance or reckless disregard of the truth. 31 U.S.C. § 3729(b).

[20] *Greenfield*, 880 F.3d at 94. Additionally, a claim for reimbursement is factually false if the claimant lies about or mischaracterizes the items or services it sent to the government. *Id.*

[21] *Id.* The plaintiff in *Greenfield* alleged that the defendant falsely certified compliance with the AKS at the time it made a reimbursement claim. *Id.*

[22] 42 U.S.C. § 1320a-7b. Under the AKS, any person who knowingly and willfully misrepresents a material fact to the government to solicit a benefit under, or send payment to, a federal healthcare program, or participates in a kickback or bribery scheme, will face criminal punishment. *Id.* The Department of Health and Human Services' Office of the Inspector General promulgated regulations establishing exceptions to prevent certain common business transactions from being considered illegal kickbacks. 42 C.F.R. § 1001.952 (2022). This includes, among other things, space rentals, sale of practice, and other types of payments so long as specific standards are met. *Id.* In 2022, 431 healthcare fraud offenders received sentences, with the median loss for these offenses amounting to $1,297,560. *See Quick Facts: Health Care Fraud Offenses*, U.S. SENT'G COMM'N (Aug. 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Health_Care_Fraud_FY22.pdf [https://perma.cc/TQ6X-TLX4] (depicting the annual number of offenders involved in health care fraud and the median annual loss from such offenses).

incentives might affect a physician's referrals and thus hinder patient choice and competition in the healthcare sphere.[23] Under the statute, soliciting or receiving illegal kickbacks is a felony offense punishable by a fine of up to $100,000, up to ten years imprisonment, or both.[24] In 2010, the Patient Protection and Affordable Care Act amended the AKS by creating a cause of action under the FCA imposing civil liability for any claims "resulting from" a violation of the AKS.[25] A plaintiff bringing an FCA suit can thus prove that a reimbursement claim made to a federal healthcare program is legally false by demonstrating that the fraudster premised the claim on an illicit referral scheme.[26] The AKS, however, offers neither a definition of the phrase "resulting from" nor any clarification on the requisite causation standard necessary to bring an FCA claim on these grounds.[27]

The U.S. Supreme Court has yet to consider the question of what causal link the AKS creates with the FCA, but ruled on a similar matter in the context of another federal criminal statute.[28] In 2013, in *Burrage v. United States,* the Supreme Court considered the meaning of the phrase "results from" when it

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[23] *See* Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships, 63 Fed. Reg. 1659, 1662 (Jan. 9, 1998) (discussing the purpose of the AKS in preventing physicians from abusing patients by participating in kickback schemes with profit motive).

[24] 42 U.S.C. § 1320a-7(b)(b).

[25] *See id.* § 1320a-7b(g) (providing that any "claim that includes items or services *resulting from* a[n] [anti-kickback] violation constitutes a false or fraudulent claim for purposes of the [FCA]" (emphasis added)). The Patient Protection and Affordable Care Act (ACA) amended the AKS to include this language. Pub. L. No. 111-148, 124 Stat. 119, 759 (2010). The ACA also amended the AKS by revising the statute's intent requirement to provide that the government need not prove that a defendant had knowledge of the AKS or acted with the specific intent to violate it. *Id.* This legislation overturned the Ninth Circuit's prior holding that the prosecution must prove that the defendant had specific knowledge that the AKS criminalizes remuneration schemes and acted with the specific intent to break this law. *See* Hanlester Network v. Shalala, 51 F.3d 1390, 1394, 1400 (9th Cir. 1995) (finding that the prosecution failed to demonstrate that a California-based medical corporation acted with specific intent to violate the AKS when it allegedly paid remuneration to physicians in exchange for their agreement to send their medical tests to the corporation's labs).

[26] 42 U.S.C. § 1320a-7b(g).

[27] *See id.* (failing to define "resulting from"); *see also Result*, BLACK'S, *supra* note 14 (defining "result" as "[t]hat which is achieved, brought about, or obtained, esp. by purposeful action").

[28] *See* Burrage v. United States, 571 U.S. 204, 212 (2014) (holding that the phrase "results from" as used in the Controlled Substances Act requires a but-for causal standard); United States *ex rel.* Cairns v. D.S. Med., LLC, 42 F.4th 828, 836 (8th Cir. 2022) (relying on the U.S. Supreme Court's statutory interpretation of the causal standard in a different, though similarly drafted, criminal statute). The Supreme Court has also held that other similar phrases convey a but-for causal standard. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009) (finding that the phrase "because of" creates a but-for causal standard); Bridge v. Phoenix Bond & Indemn. Co., 553 U.S. 639, 652–55 (2008) (finding that the phrase "by reason of" creates a but-for causal standard); Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63–64 (2007) (finding that the phrase "based on" creates a but-for causal standard). The Supreme Court held that "but-for" cause is the "default" or "background" rule that guides Congress's legislation. Comcast Corp. v. Nat'l Ass'n of Afr. Am. Owned Media, 140 S. Ct. 1009, 1014 (2020).

interpreted the causal standard of the Controlled Substances Act (CSA).[29] The CSA mandates that defendants face a twenty year mandatory minimum sentence for unlawfully distributing an illicit drug to a person whose death or serious injury "results from" use of the substance.[30] The Court rejected the government's argument that the statute only required a showing that the drug distributed by the defendant was a *contributing cause* of the victim's harm.[31] Instead, the Court held that, without textual or contextual indication to the contrary, the phrase "results from" should be read to require but-for causality.[32]

B. Factual History of United States ex rel. Martin v. Hathaway

The Sixth Circuit sought to clarify the causal standard for bringing FCA claims under the AKS in *Martin*, where it considered the following facts.[33] In 2018, if a patient at Oaklawn Hospital (Oaklawn) in Marshall, Michigan needed surgical eye care, the hospital referred them to the only local ophthalmology practice: South Michigan Ophthalmology, P.C. (South Michigan).[34] The two

[29] 571 U.S. at 212.

[30] *Id.* at 206; 21 U.S.C. § 814(b). In 1970, President Richard Nixon signed the Controlled Substances Act (CSA)—a federal law that sought to regulate and restrict the manufacture, possession, distribution, and usage of drugs in the United States. Stephanie Holmes Didwania, *Mandatory Minimum Entrenchment and the Controlled Substances Act at 50 Years,* 18 OHIO ST. J. CRIM. L. 28, 28 (2020); Joseph Hartunian, *Getting Back on Schedule: Fixing the Controlled Substances Act*, 12 ALB. GOV'T L. REV. 199, 199–200 (2019). The CSA classifies drugs into one of five "schedules," or levels of regulation. 21 U.S.C. § 812. Schedule I drugs are prohibited as they pose the highest potential for abuse; Schedule V drugs pose the lowest risk and so are the least restricted. 21 U.S.C. § 812(b)(1)–(5). The CSA imposes mandatory minimum sentences for violations based on the type and quantity of the drug, as well as any bodily injury resulting from use of the drug. Didwania, *supra*, at 28. In *Burrage*, the Supreme Court considered whether the mandatory minimum sentence applies to instances where a defendant provides a Schedule I or II drug to a user and the drug plays some part in the victim's death or injury. 571 U.S. at 206. On April 14, 2010, Joshua Banka smoked marijuana and ingested oxycodone before purchasing and injecting one gram of heroin provided to him by the defendant, Marcus Burrage. *Id.* Just hours later, Banka's wife found Banka dead on their bathroom floor. *Id.* Burrage was charged under the CSA for distributing heroin, the use of which "result[ed]" in Banka's death. *Id.* at 207.

[31] *Burrage*, 571 U.S. at 208. The district court instructed the jury that the government need only prove that the heroin the defendant sold to Banka was a "contributing cause" of Banka's death. *Id.* Writing for the majority, Justice Scalia explained that when a crime requires a specific result of conduct, that conduct must be both "(1) the actual cause and (2) the legal cause . . . of the result." *Id.* at 210. A finding of actual cause requires proof of but-for causation. *Id.* at 210, 214.

[32] *Id.* at 212.

[33] 63 F.4th 1043, 1047 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 224 (Oct. 2, 2023) (mem.).

[34] *Id.* Ophthalmology is "a branch of medical science dealing with the structure, functions, and diseases of the eye." *Ophthalmology*, MERRIAM WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003). Ophthalmologists differ from optometrists in that they are medical doctors able to perform surgery and diagnose and treat a wider range of conditions. Jennifer Churchill & Dan T. Gudgel, *What Is an Ophthalmologist vs Optometrist?*, AM. ACAD. OF OPHTHALMOLOGY (Dec. 8, 2022), https://www.aao.org/eye-health/tips-prevention/what-is-ophthalmologist#optometrists [https://perma.cc/6GUA-AC54]. At the time of filing, Oaklawn Hospital had not moved forward with establishing an internal ophthal-

private physicians at the practice were Dr. Darren Hathaway—the owner of South Michigan—and his employee, Dr. Shannon Martin.[35]

Oaklawn and South Michigan referred patients to each other until 2018, when Dr. Hathaway began negotiating plans to merge with another private ophthalmology practice without Dr. Martin.[36] At the same time, Dr. Martin began negotiations with Oaklawn about working as an internal ophthalmologist at the hospital.[37] Upon learning that Dr. Martin's employment at Oaklawn was pending approval, Dr. Hathaway contacted the hospital's Board of Directors.[38] He indicated that if Dr. Martin was hired as an internal ophthalmologist, he would have no choice but to bring his cases elsewhere.[39] The Board subsequently voted not to hire Dr. Martin.[40]

In response, Dr. Martin brought a *qui tam* action against Dr. Hathaway, South Michigan, and Oaklawn Hospital under the FCA and Michigan's Medicaid False Claims Act.[41] She alleged that the defendants violated the AKS by

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mology service line. Brief of Defendant-Appellee Ella E.M. Brown Charitable Circle D/B/A Oaklawn Hospital (Oaklawn) at 7, *Martin*, 63 F.4th 1043 (No. 22-1463).

[35] *Martin*, 63 F.4th at 1046.

[36] Brief of Appellant-Plaintiff Request for Oral Argument at 13, *Martin*, 63 F.4th 1043 (No. 22-1463). Dr. Hathaway entered into negotiations to sell South Michigan to Lansing Ophthalmology, P.C. (LO Eye). *Martin*, 63 F.4th at 1046. Dr. Martin attempted, unsuccessfully, to negotiate a continued employment contract with LO Eye after the anticipated merger. *Id.* The potential merger of the two private ophthalmology practices never occurred. Brief of Defendant-Appellee Oaklawn at 8, *Martin*, 63 F.4th 1043 (No. 22-1463); *see also id.* (finding that the merger negotiations fell through).

[37] Brief of Appellant-Plaintiff Request for Oral Argument, *supra* note 36, at 13–14. Dr. Martin's husband, co-relator/appellant Douglas Martin, is the Director of Finance at Oaklawn Hospital, the group that originally submitted a proposal to Oaklawn's Board of Directors for a new ophthalmology service line with Dr. Martin as the sole physician. Brief of Defendant-Appellee Oaklawn, *supra* note 34, at 6; *see also Martin*, 63 F.4th at 1046 (noting that Dr. Martin's employment discussions with Oaklawn were perhaps initiated by her husband).

[38] Brief of Appellant-Plaintiff, *supra* note 36, at 16–17. In addition to contacting members of the Board individually, including arranging an emergency meeting with Oaklawn's President and CEO Greg Beeg just days after learning of Dr. Martin's pending employment, Dr. Hathaway also drafted a letter to the Board stating that, if Oaklawn hired Dr. Martin for a new ophthalmology department, "I would be forced, against my will . . . to pull out my cases and take them elsewhere and the hospital would lose 60% or more of its ophthalmology revenue . . . ." *Id.* at 20.

[39] *Id.* at 20.

[40] Brief of Defendant-Appellee Oaklawn, *supra* note 34, at 7. Oaklawn contends that its decision not to hire Dr. Martin and establish a new ophthalmology service line was based on financial considerations. *Id.* at 8. According to Oaklawn's calculations, the total cost of setting up the new internal practice would be approximately $1.9 million. *See id.* (listing the required expenses that totaled $1.9 million).

[41] Brief of Appellant-Plaintiff Request for Oral Argument *supra* note 36, at 31. Appellants Dr. Martin and her husband, Douglas Martin, filed an initial *Qui Tam* Complaint on October 30, 2019, followed by a First Amended Complaint on November 12, 2019. *Id.* After the United States declined to intervene, the plaintiffs served the First Amended Complaint on the defendants. *Id.* On July 6, 2021, the district court dismissed the First Amended Complaint in part and granted the Martins' motion for leave to amend their complaint. *Id.* at 32. The Martins filed their Second Amended Complaint on July 20, 2021, that was followed by a motion for leave to file a Third Amended Complaint on September 10, 2021. *Id.* The Martins sought the opportunity to file a Third Amended Complaint to add

ensuring that Dr. Hathaway would continue to make patient referrals to Oaklawn in exchange for the hospital's refusal to hire Dr. Martin.[42] Accordingly, she further contended that all claims for Medicare and Medicaid reimbursement submitted after the Board's decision not to hire her violated the FCA.[43]

The district court granted Dr. Hathaway and Oaklawn Hospital's motion to dismiss, holding that Dr. Martin's claim did not establish a cognizable kickback scheme.[44] On appeal, the Sixth Circuit considered whether Oaklawn's claims for reimbursement "result[ed] from" the alleged illegal kickbacks such that Dr. Martin could bring a claim under the FCA.[45] The court held that AKS violations must be but-for causes of the allegedly fraudulent reimbursement claims to be actionable under the FCA.[46] That is, the plaintiff must demonstrate that the physician's request for reimbursement from a federal healthcare program would not have occurred without the existence of an illicit kickback scheme.[47] The Sixth Circuit thus affirmed the district court's dismissal of Dr. Martin's action for fail-

claims of the defendant's retaliation against Mr. Martin, as Oaklawn had begun investigating him for alleged HIPAA violations. *Id.* The district court dismissed the Second Amended Complaint and denied Plaintiffs' Motion for Leave to File a Third Amended Complaint. *Id.* at 33–34. Appellant-Plaintiffs appealed. *Id.* at 34.

[42] *See* Martin, 63 F.4th at 1046 (summarizing arguments presented by Appellant-Plaintiffs).

[43] *Id.* at 1047.

[44] *See id.* at 1048 (noting the district court's finding that the Second Amended Complaint does not allege facts sufficient to support plausible claims under the AKS and the FCA).

[45] *Id.* at 1046 (summarizing the key issues on appeal). The Sixth Circuit also considered whether Oaklawn's rejection of Dr. Martin constituted the type of transaction of value covered by the AKS. *Id.* Though the Sixth Circuit's discussion of remuneration does not fall within the scope of this Comment, it is independently noteworthy. *See id.* at 1048–52 (conducting a statutory interpretation of the term "remuneration" in the context of the AKS). The statute does not define the term "remuneration," although Congress empowered the Office of the Inspector General (OIG) to promulgate formal guidance clarifying certain provisions of the AKS, including the definition of remuneration. *See id.* at 1048 (finding that the AKS is silent as to whether remuneration includes just payments, or other items of value); *see also* The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, 2001 (1996) (permitting the OIG to issue advisory opinions clarifying what constitutes "remuneration" within the context of the AKS). On this issue, the court held that the word "remuneration" as used in the AKS refers only to payments and other transfers of value and not to any *act* that one might find valuable—a finding consistent with the OIG's advisory opinions. *See* Martin, 63 F.4th at 1048, 1050. This interpretation effectively narrows the range of activity that is criminalized under the AKS. *See id.* (limiting the scope of activities covered by the AKS).

[46] *See* Martin, 63 F.4th at 1052. In 2022, in *United States* ex rel. *Cairns v. D.S. Med., LLC*, the U.S. Court of Appeals for the Eighth Circuit held that the term "resulting from" is "unambiguously causal" and that Congress could have used different language to signify a more relaxed causal standard if that was its intent. 42 F.4th 828, 836 (8th Cir. 2022). The Sixth Circuit adopted this reasoning applied by the Eighth Circuit. *Martin*, 63 F.4th at 1053 (quoting *Cairns*, 42 F.4th at 836).

[47] *See Martin*, 63 F.4th at 1053 (holding that plaintiffs did not demonstrate that any of the reimbursement claims would not have occurred in the absence of an illicit referral scheme); *see also Cause*, BLACK'S, *supra* note 14 (defining "but-for cause" as "[t]he cause without which the event could not have occurred").

ing to demonstrate that the allegedly fraudulent claims for reimbursement would not have occurred absent an illegal kickback scheme.[48]

II. Conflicting Approaches to Interpreting Causation in the 2010 Amendment to the Anti-Kickback Statute

In 2023, in *United States* ex. rel. *Martin v. Hathaway*, the U.S. Court of Appeals for the Sixth Circuit relied on a prior holding of the Eighth Circuit when it held that the plain meaning of the AKS required but-for causation.[49] By adopting this standard, the Sixth Circuit explicitly rejected the Third Circuit's approach that arrived at a more relaxed interpretation of causation by considering the legislative history of the FCA and AKS.[50] Section A of this Part analyzes the Third Circuit's reliance on legislative history as a tool of statutory interpretation.[51] Section B discusses the Eighth Circuit's narrower,

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[48] *Martin*, 63 F.4th at 1047, 1053. In their Second Amended Complaint, the Martins identified fourteen surgeries following the Board's decision for which Oaklawn submitted reimbursement claims to Medicaid or Medicare. *Id.* at 1053. Of those fourteen surgeries, eleven were performed by Dr. Martin herself. *Id.* Dr. Hathaway performed only three of the surgeries for which the hospital sought reimbursement, two of which were originally referred to Dr. Martin. *Id.* The court found insufficient facts to establish causation because a seven-month period passed between the Board's decision and the only surgery Oaklawn referred to Dr. Hathaway. *Id.*

[49] 63 F.4th 1043, 1047 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 224 (Oct. 2, 2023) (mem.) (discussing the Eighth Circuit's holding in *United States* ex rel. *Cairns v. D.S. Med., LLC*, 42 F.4th 828 (8th Cir. 2022), and adopting the Eighth Circuit's plain meaning test to interpret the causation standard in the AKS). The Eighth Circuit determined that the dictionary definition of "results," in addition to the similar statutory analysis conducted by the Supreme Court in *Burrage*, supports a finding that the phrase "results from" conveys a plain meaning of but-for causation. *See* Burrage v. United States, 571 U.S. 204, 212 (2014) (finding that "results from" requires but-for causality in the absence of any indication to the contrary); *Cairns*, 42 F.4th at 834 (holding that but-for is the proper causation standard for FCA claims arising from AKS violations.

[50] *Compare Martin*, 63 F.4th at 1054 (finding that the AKS's causation language requires but-for causation) *with* United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 98 (3d Cir. 2018) (finding that the congressional intent behind the AKS suggests that only a "link," and not but-for causation, is required to bring an FCA claim). In *United States* ex rel. *Greenfield v. Medco Health Sols, Inc.*, Accredo Pharmaceutical Group, Inc. (Accredo), a company that distributed blood clotting medication, was accused of participating in an illegal kickback scheme. 880 F.3d at 91–92. As part of this scheme, Accredo donated to charities that raised money for people with blood diseases, such as HIS/HANJ, in exchange for advertisements on the charities' websites. *Id.* The *qui tam* relator in the case alleged that these advertisements resulted in improper referrals to Medicare beneficiaries. *Id.* at 92. The relator further alleged that Accredo violated the AKS and consequently the FCA by certifying compliance with the statute at the time it submitted claims to federal healthcare programs on behalf of patients. *Id.* The district court granted Accredo's motion for summary judgment on the grounds that the *qui tam* relator failed to establish causation between Accredo's donations to the charities and any patient's decision to purchase Accredo's medication. *Id.* at 93. On appeal, the Third Circuit affirmed, finding that the district court wrongly construed the causation standard for basing an FCA claim on an AKS violation and holding that only a "link" between the donations and the patient referrals need be established, rather than proof of but-for causation. *Id.* at 98. The Third Circuit's reasoning relied heavily on an analysis of the legislative history of the 2010 amendment to the AKS. *Id.* at 96–97.

[51] *See infra* notes 54–60 and accompanying text.

text-based approach.[52] Section C explores the Sixth Circuit's holding in *Martin* that adopts the rationale of the Eighth Circuit.[53]

A. The Third Circuit's Legislative History Approach

In 2018, in *United States* ex rel. *Greenfield v. Medco Health Solutions, Inc.*, the U.S. Court of Appeals for the Third Circuit determined that the language of the AKS causation standard is ambiguous.[54] The court then looked to legislative records for assistance in navigating the interplay between the FCA and the AKS.[55] A dive into the Congressional Record convinced the Third Circuit that the legislature understood the difficulties in identifying abuse of federal medical programs and so passed the AKS to enhance the government's ability to pursue fraudulent claims.[56] The Third Circuit reasoned that adopting a strict but-for causal standard for bringing FCA claims based in AKS violations would frustrate the legislation's purpose of combatting healthcare fraud as the higher standard of proof would make lawsuits more difficult for plaintiffs.[57] The Third Circuit also worried that adopting a but-for causal standard could create a puzzling incongruence wherein a defendant may be held crimi-

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[52] *See infra* notes 61–67 and accompanying text.

[53] *See infra* notes 68–72 and accompanying text.

[54] *See* 880 F.3d at 95–96 (proceeding with an analysis of legislative history to determine the definition of "resulting from"). In cases of statutory interpretation, the Third Circuit will first consider whether a reasonably plain meaning may be attributed to the statute's language. *Id.* at 95. Where the meaning is arguably ambiguous, the Third Circuit will look to the context of the language within the statute and the structure of the statute itself. *Id.* This broader analysis may include an examination of legislative history. *Id.* This approach is distinct from a textualist analysis that is typically confined to the statutory text. *See* George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 327 (1995) (noting that textualism is more concerned with the words on the page than the mindset of the author who wrote them). Here, the Third Circuit proceeded with a legislative history analysis in light of the Government's argument that Accredo's interpretation of the AKS as requiring actual causality would produce incongruous results with other federal legislation, namely the FCA. *Greenfield*, 880 F.3d at 96.

[55] *See Greenfield*, 880 F.3d at 96 (analyzing committee reports and the Congressional Record to determine the intent of the drafters of the FCA and AKS). The Third Circuit considered the legislative history of the original passage of the AKS, H.R. REP. NO. 95-393 at 1, 47 (1977), the passage of the FCA, S. REP. NO. 99-345 at 9 (1986), and amendment of the AKS to include the language at issue, 155 CONG. REC. S10852, S10853–54 (daily ed. Oct. 28, 2009) (Sen. Kaufman). *Id.*

[56] *See Greenfield*, 880 F.3d at 96 (analyzing and crediting statements made by congressmen and senators regarding the purposes of the AKS and the FCA). The Third Circuit, however, does not point to any specific statement as clearly articulating the meaning of the causation standard or expressing an intent for the FCA and the AKS to be congruent. *See id.* (failing to identify any statements directly addressing the requisite causation standard).

[57] *See id.* at 96–97 (reasoning that the legislative history reflects Congress's intent to reject a but-for causal standard because it would be contrary to the purpose of the anti-fraud statutes to combat fraudulent schemes); *see also* 155 CONG. REC. S10852, S10853 (daily ed. Oct. 28, 2009) (Sen. Kaufman) (noting that the intent of the False Claims Act is to "strengthen[] whistleblower actions based on medical care kickbacks, which tempt by healthcare providers to churn unnecessary medical care at great risk to patients and great cost to the tax payer").

nally but not civilly liable for the same kickback scheme.[58] Accordingly, the Third Circuit declined to interpret the phrase "results from" as requiring but-for causation.[59] The court held that, to prevail on summary judgment, the plaintiff must demonstrate that the physician made at least one reimbursement claim "connected to" the illicit kickback scheme.[60]

B. The Eighth Circuit's Textualist Approach

In 2022, in *United States* ex rel. *Cairns v. D.S. Med., LLC*, the U.S. Court of Appeals for the Eighth Circuit rejected the Third Circuit's legislative history approach when it held that to find the proper definition of "resulting from," one need look no further than the Supreme Court's ruling in *Burrage v. United States*.[61] The Eighth Circuit first noted that the statute does not contain an explicit definition of the causal standard.[62] Yet, instead of searching the statute's legislative history for clarification, the Eighth Circuit considered past usages of

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[58] *Greenfield*, 880 F.3d at 96–97 (positing that, under Accredo's proposed standard, direct causation would be required to bring an FCA claim but would not be required to bring an AKS claim for the same conduct).

[59] *Id.* at 97.

[60] *Id.* at 100. The Third Circuit declined to adopt either Greenfield's or Accredo's argued interpretations in full. *Id.* Instead, it identified the requisite causation standard as existing somewhere in between; that is, to bring an FCA claim for an illegal kickback scheme, Greenfield was not required to show that any of the federally insured patients for whom reimbursements were submitted would not have chosen Accredo *but for* HIS/HANJ's recommendation; rather, Greenfield was required to demonstrate that at least one patient at minimum was exposed to such a recommendation. *Id.* Because all that Greenfield argued was temporal proximity between the federal reimbursements and the alleged illegal kickback scheme, the Third Circuit ruled that he did not meet the standard and so affirmed the holding of the district court granting Accredo's motion for summary judgment. *Id.*

[61] *See* 571 U.S. 204, 212 (2014) (finding that the language "resulting from" imparts a but-for causal standard); United States *ex rel.* Cairns v. D.S. Med., LLC, 42 F.4th 828, 834, 836 (8th Cir. 2022) (relying on the Supreme Court's analysis of the similar phrase "results from" in *Burrage* to support its interpretation of the causal standard in the FCA). A jury found Dr. Sonjay Fonn, a neurosurgeon in Missouri, liable under the FCA for participating in an illegal kickback scheme in which he selectively purchased medical supplies from his wife's company, earning her $1.3 million in commission in a single year. *Cairns*, 42 F.4th at 831. Fonn and his wife appealed, arguing, among other things, that the trial judge had failed to instruct the jury properly on the requisite causation standard established by the AKS for imposing civil liability through the FCA. *Id.* at 833. The Eighth Circuit considered the plain meaning of the phrase "resulting from" in the AKS and found that it requires a "but-for" causal standard. *Id.* at 834. The court explicitly rejected the Third Circuit's contrary holding in *Greenfield* because of its reliance on legislative history. *Id.* at 836.

[62] *Cairns*, 42 F.4th at 834. The Eighth Circuit began its analysis with the same inquiry as the Third Circuit as to whether the text of the AKS was unambiguous. *Id.* Statutory interpretation always begins with the text at issue—where the meaning of a statute is clear, a court will look no further than the words on the page. Food Mktg. Inst. v. Argus Leader Media*,* 139 S. Ct. 2356, 2364 (2019). The court in *Cairns* noted that the AKS did not include a statutory definition of "resulting from," but ultimately had "little trouble concluding that, in common and ordinary usage, the participle phrase 'resulting from'… expresses a 'but-for causal relationship.'" *Cairns*, 42 F.4th at 834. *But cf. Greenfield*, 880 F.3d at 96 (interpreting the legislative history of the statute to find a relaxed causation standard).

similar language in other statutory texts, specifically the CSA.[63] The Court in *Burrage* found that the ordinary meaning of "results from" in the CSA conveyed a but-for causal standard.[64] The Eighth Circuit thus held that the plain meaning of the AKS's similar phrase "resulting from" should also call for but-for causation, meaning that a plaintiff must demonstrate that a physician would not have made a reimbursement claim for certain items or services in the absence of an illicit kickback scheme.[65] The Eighth Circuit rejected the government's argument that the phrase could reasonably be interpreted to mean something less exacting after finding no textual or contextual support for an alternative standard.[66] In finding that the plain meaning of the AKS mirrored that of the CSA, the Eighth Circuit relied on statutory language rather than legislative history to derive the drafters' intent.[67]

C. The Sixth Circuit Finds a Strict Causal Standard in Martin

In 2023, in *Martin*, the Sixth Circuit also held that the language of the AKS requires a but-for causal standard to bring an FCA claim.[68] The Sixth

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[63] *Cairns*, 42 F.4th at 834.

[64] *See Burrage*, 571 U.S. at 212 (holding that the phrase "results from" conveys but-for causation); *see also Cairns*, 42 F.4th at 834 (relying on the Court's textual analysis in *Burrage* to determine the meaning of "resulting from" in the AKS).

[65] *See Cairns*, 42 F.4th at 834, 836 (determining that the phrase "resulting from" in its ordinary usage establishes a but-for causal standard). Without a statutory definition, the Eighth Circuit considered the plain meaning of the text, as informed by the Supreme Court's interpretation of "results from" in the CSA. *Id.* The Eighth Circuit found that, whether in its present-participle or present-tense form, the phrase conveyed the same standard: a but-for causal relationship. *Id.* In support of this conclusion, the Eighth Circuit consulted numerous dictionary entries for the term "result" in its various forms, each of which delivered the same meaning of "[s]omething that follows naturally from a particular action, operation, or course." *See id.* (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1497 (5th ed. 2016)). Recall that the Third Circuit was unpersuaded by Accredo's argument that the issue in *Burrage* was sufficiently analogous to the question of interpreting the FCA. *See supra* notes 54–60 and accompanying text (discussing the Third Circuit's rejection of a textual analysis in favor of a legislative history approach to analyzing the causation standard for bringing FCA claims for AKS violations).

[66] *Cairns*, 42 F.4th at 835. The Eighth Circuit considered but-for causality to be the default standard in legislation. *See id.* (quoting *Burrage*, 571 U.S. at 212) (finding but-for causality in the absence of any indication from the text or context of the statute that a different causal standard is required). The lack of textual evidence to support an alternative causation standard is apparent from the absence of a statutory definition of "results from." *Id.* As for contextual evidence to the contrary, the Eighth Circuit first considered that the Third and Eleventh Circuits previously ruled in pre-2010 cases that the mere non-disclosure of a kickback on a reimbursement claim for a federal health care program was sufficient to bring an FCA case. *Id.* at 835–36. The Eighth Circuit declined to adopt this definition as an interpretation of the amended AKS, on the simple grounds that, if Congress intended to codify this more relaxed causation standard, it would have explicitly done so. *Id.* Further, the Eighth Circuit scoffed at the idea of analyzing legislative history as an interpretive tool, curtly stating that this approach is "no way to read a statute." *Id.* at 836.

[67] *See id.* at 836 (rejecting the Third Circuit's holding in *Greenfield* on the grounds that legislative history is a flawed analytical approach).

[68] 63 F.4th 1043, 1047 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 224 (Oct. 2, 2023) (mem.).

Circuit echoed the Eighth Circuit's reasoning that *Burrage* strongly suggests that the phrase "resulting from" means "but-for."[69] In so doing, the Sixth Circuit declined to consider the legislative history of the AKS, citing concerns with relying on the Congressional Record to clarify the meaning of a criminal statute.[70] Specifically, the court noted the dangers of imprisoning a defendant based on statements within the legislative history that were not clearly incorporated into the text of the resulting statute.[71] This explicit rejection of the Third Circuit's approach to the causation standard question deepened the divide in judicial interpretations of the AKS.[72]

III. PLAIN MEANING: THE PROPER PRESCRIPTION FOR CAUSATION CONFUSION

In 2023, in *U.S.* ex. rel. *Martin v. Hathaway,* the United States Court of Appeals for the Sixth Circuit correctly held that to bring a claim under the FCA for an AKS violation, a plaintiff must sufficiently plead that a doctor or hospital would not have made a request for reimbursement from a federal healthcare program but-for their participation in an illegal kickback scheme.[73] An attempt to resolve the disparate holdings of the Third Circuit and the Sixth Circuit turns on the question of which method of statutory interpretation is most appropriate for clarifying this causal standard.[74] Underpinning statutory interpretation is the principle that the judiciary must act as the "faithful agents"

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[69] *Id.* The Sixth Circuit found no textual or contextual evidence that would suggest an alternative causation standard. *Id.* Where a statute clearly articulates a plain meaning, statutory interpretation must stop. *Id.* at 1053.

[70] *Id.* at 1054.

[71] *Id.*; *see also* United States v. R.L.C., 503 U.S. 291, 308–09 (1992) (Scalia, J., concurring in part) (arguing that the rule of lenity requires a textual analysis of the statute, and not its legislative history, as any reference to statements made beyond the plain language of the statute is mere speculation).

[72] *Martin*, 63 F.4th at 1054. Like the Eighth Circuit in *Cairns*, the Sixth Circuit explicitly rejects the Third Circuit's conclusion that the AKS conveys a more relaxed causal standard for the sole reason that the Third Circuit's analysis adopted a legislative history approach. *Id.*

[73] 63 F.4th 1043, 1047 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 224 (Oct. 2, 2023) (mem.).

[74] *See* Michael Francus, *Digital Realty, Legislative History, and Textualism After Scalia*, 46 PEPP. L. REV. 511, 516–17 (2019) (outlining the warring approaches of textualists and non-textualists—those who rely more heavily on context than the plain meaning of the text—with regard to statutory interpretation). The role, if any, of legislative history in interpreting a statute has long been, and remains, a subject of debate among judicial scholars and political pundits alike. *See id.* (outlining differing approaches to utilizing legislative history as a method of statutory interpretation); *see also* Chase Wathen, *Textualism Today: Scalia's Legacy and His Lasting Philosophy*, 76 U. MIA. L. REV. 864, 867–68 (2022) (noting the rise of mainstream media and op-eds arguing for or against textualism in the Supreme Court). The conflict between the holdings in *Greenfield* and *Martin* illustrates both sides of what Professor Manning calls the "unhappy choice" facing judges when the plain text of a law seems to be inconsistent with its intended purpose; in these instances, a judge may prioritize the text at the risk of subverting the spirit of the law, or may rely on legislative history and so ignore the demand of the law itself. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5–6 (2001) [hereinafter Manning, *Textualism*].

of the legislature by understanding the will of Congress in enacting a statute.[75] Prior to the 1980s, the dominant means of statutory interpretation was purposivism, an interpretative approach that finds that, where the spirit of a law conflicts with its actual text, congressional intent (typically deduced from legislative history) will control.[76] The "New Textualism" movement, that is mainly attributed to the judicial philosophy of U.S. Supreme Court Justice Antonin Scalia, offered a new type of "faithful agency" that confines statutory interpretation to the plain meaning of the language written by Congress.[77] The textualist approach criticizes reliance on legislative history because congressional intent is not law, is never unanimous, is not voted on, and is too easily misapplied by judges in support of their preferred outcome in a case.[78]

The Third Circuit's method of utilizing legislative history is far from novel, as much of American jurisprudence has relied on this approach throughout the twentieth century.[79] In the 1980s, however, the Court began to disfavor the

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[75] *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. R. 113, 119–21 (2012) [hereinafter Manning, *New Purposivism*] (explaining the roots of the "faithful agents" theory). The "faithful agents" theory recognizes legislative supremacy by charging the courts with implementing the will of Congress in the reading of legislation. *Id.* Former U.S. Supreme Court Justice Oliver Wendell Holmes succinctly captured the idea that the judiciary serves as the faithful agent of the legislature and should not impose its own policy prescriptions when he said "if my fellow citizens want to go to Hell, I will help them. It's my job." *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (quoting Justice Holmes, HOLMES-LASKI LETTERS 249 (M. Howe ed., 1953).

[76] *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71 (2006) [hereinafter Manning, *Dividing*] (noting that purposivism holds that the "letter" of the law must yield to its "spirit" when the two interpretations conflict); *see also* Francus, *supra* note 74, at 517–18 (describing the tendency of judges to rely primarily on intent to determine the meaning of a statute, sometimes even considering legislative history before analyzing the text of a statute). Purposivists argue that the true intent of the legislature cannot always be reduced to or adequately captured within the plain text of a statute, thus necessitating a legislative history analysis to fully understand the purpose of the law. *See* Manning, *Textualism*, *supra* note 74, at 10–11 (discussing the history of purposivism).

[77] Francus, *supra* note 74, at 518. Justice Scalia's appointment to the Supreme Court is conventionally used as a benchmark to signify the growth of the New Textualist movement, given that he championed the approach. *Id.* In 1987, in *Immigration and Naturalization Service v. Cardoza-Fonseca*, Justice Scalia wrote a concurrence in which he agreed with the holding of the majority but criticized its reliance on legislative history as "an ill-advised deviation from the venerable principle that if the language of a statute is clear, the language must be given effect." 480 U.S. 421, 452 (1987) (Scalia, J., concurring). Textualism fits the "faithful agency" model by respecting that the text of a statute is the product of a legislative process that courts should not interfere with. Manning, *Dividing*, *supra* note 76, at 73.

[78] *See* Francus, *supra* note 74, at 519–20 (sampling Justice Scalia's main criticisms of considering legislative history to determine the meaning of a statute); *see also* Wathen, *supra* note 74, at 873–75 (explaining Justice Scalia's argument that relying on legislative history is unconstitutional because Article III does not expressly permit the Court to do so).

[79] *See* Manning, *New Purposivism*, *supra* note 75, at 113 (detailing a trend in which the Supreme Court has moved away from reliance on legislative history for statutory interpretation). The idea that statutory interpretation may be derived from congressional intent originated in *Church of the Holy Trinity v. United States*, in which the Court reasoned that the spirit of the law, although not always

use of legislative history in support of the textualist approach.[80] The Sixth Circuit's refusal to consider legislative history marks this trend towards textualism and stronger judicial restraint.[81] This Part discusses the influence of "New Textualism" on statutory interpretation and argues that the Sixth Circuit's textualist approach in *Martin* is preferable to the Third Circuit's legislative history analysis in the 2018 case *United States* ex rel. *Greenfield v. Medco Health Solutions, Inc.* because it refrains from engaging in judicial policymaking and respects Congress's role in resolving incongruous legislation.[82]

The Third Circuit erred when it relied on purposivism to extrapolate a causation standard that members of Congress never explicitly adopted, an analysis that essentially amounted to judicial policymaking.[83] In so doing, the Third Circuit deviated from the strong precedent set by the U.S. Supreme Court in *Burrage*, due to its weakly supported assumption that an infallible Congress could not possibly have meant to set the causation standard quite so

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conveyed within the text of a statute, may still be controlling. 143 U.S. 457, 459 (1892)*; see also* Manning, *New Purposivism*, *supra* note 75, at 122–23 (detailing *Holy Trinity* as precedent for use of legislative history in statutory interpretation).

[80] Manning, *New Purposivism*, *supra* note 75 at 113. The Supreme Court began to reject the legislative history approach around the 1980s as President Reagan-appointed justices catalyzed a wave of textualism as the predominant method of statutory interpretation. Wathen, *supra* note 74, at 866. Proponents of textualism reject the idea that Congress, a group of representatives, can have a collective intent that is evidenced in the legislative history and so confine their analysis to the text. Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613–14 (2014).

[81] *See* Manning, *New Purposivism*, *supra* note 75, at 123 (describing textualism as a response to purposivism); *see also* Wathen, *supra* note 74, at 868 (noting that Justice Scalia described textualism as a form of judicial restraint).

[82] *See infra* notes 83–95 and accompanying text (arguing for a textualist approach similar to the Sixth Circuit's analysis in *Martin*).

[83] *See* United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 96–97 (3d Cir. 2018) (synthesizing statements made by congressmen regarding the intent of the AKS to infer the purpose of the 2010 amendment at issue). None of the sources referred to by the Third Circuit in its legislative history analysis offer an explicit definition of "resulting from" or otherwise identify with particularity the requisite causal standard for bringing FCA claims from AKS violations. *See id.* at 96 (acknowledging that the legislative history of the 2010 amendment to the AKS does not provide any clear definition of the phrase "resulting from"). The Third Circuit instead makes its finding regarding legislative intent based on the aggregate of the statements it chose to include in its opinion. *Id.* at 96–97. Indeed, certain statements upon which the Third Circuit based its holding may strike some readers as conclusory, such as one quote where a senator characterizes the purpose of the AKS as "ensur[ing] that all claims resulting from illegal kickbacks are considered false claims for the purpose of civil action[s] under the False Claims Act"—an assertion that simply restates, rather than clarifies, the exact language at issue. *Id.* at 96 (quoting 155 CONG. REC. S10852, S10853–54 (daily ed. Oct. 28, 2009) (Sen. Kaufman)). In fact, the Third Circuit acknowledged that the legislative history is void of an explanation of the term "resulting from," besides an "indicat[ion]" from the Congressional Record that the AKS was meant to overcome legal challenges that defeated claims of fraud in the past. *Id.* In holding that the statute requires "some connection between a kickback and a subsequent reimbursement claim," the Third Circuit substituted its own reasoning to derive a causal standard not expressly adopted by Congress. *Id.* at 100.

high.[84] In *Martin*, the Sixth Circuit acknowledged the dangers of this approach particularly when construing a criminal statute, where the rule of lenity instructs that, when a statute is unclear, the more lenient interpretation (and not necessarily the interpretation most in line with congressional intent) must prevail.[85] In the context of the AKS, a more lenient interpretation requires a but-for causal standard.[86] As such, in its attempt to resolve a noted incongruence in the AKS, the holding in *Greenfield* is arguably contradictory with other deeply rooted judicial doctrines.[87]

The Sixth Circuit's textualist approach in *Martin* is consistent with the current Supreme Court's favored method of confining statutory interpretation to the plain meaning of the statute.[88] This approach avoids the pitfalls of relying on legislative history to speculate about congressional intent and emphasizes a policy of judicial restraint.[89] The Sixth Circuit also properly reasoned that attempting to glean such intent from debates about the AKS, a criminal

[84] *See id.* at 96 (arguing that Congress must have intended to expand liability for fraudulent acts). The Third Circuit notes that Accredo's argument relies on the Supreme Court's interpretation of "results from" in *Burrage*, but does so only in passing, and does not actually engage in an analysis of whether *Burrage* should be applied here—nor does the Third Circuit explain why it chose not to include that discussion in its opinion. *Id.* (quoting Burrage v. United States, 571 U.S. 204, 212 (2014)). Confusingly, the Third Circuit does not explain why it found the language of the FCA to be ambiguous, other than that the court felt compelled to explore the government's argument that adopting the plain meaning would produce incongruous results with the causal standard set in the AKS. *Id.*

[85] *See* United States *ex rel.* Martin v. Hathaway, 63 F.4th 1043, 1047 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 224 (Oct. 2, 2023) (mem.) (explaining that legislative history should never be relied on when construing a criminal statute on the principle that defendants should not be imprisoned for reasons that were articulated during the drafting process but were never actually adopted into law). Though the Sixth Circuit does not use the exact phrase "rule of lenity" in its explanation, it explains the same concept in its reasoning and cites to Justice Scalia's discussion of the rule of lenity in his concurrence in *United States v. R.L.C*, 503 U.S. 291, 307–10 (1992) (Scalia, J., concurring). *Id.* The rule of lenity holds that, where there is ambiguity in a criminal statute, a court should adopt the interpretation that is more lenient to the defendant. United States v. Bass, 404 U.S. 336, 347–48 (1971). The policy of the rule responds to "the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." *See id.* at 348 (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 209 (1967)).

[86] *See Martin*, 63 F.4th at 1054 (rejecting the Third Circuit finding that the AKS requires a more relaxed causation standard because the court relied on a legislative history approach to interpreting the criminal statute). A finding that the AKS requires a but-for causal standard for resulting FCA claims reflects the rule of lenity by heightening the burden of proof prosecutors must meet to succeed on their claim. *See id.* (refusing to consider the government's argument that Congress intended for the AKS amendment to overrule a district court case that the judge dismissed on the grounds that the prosecutor did not prove but-for causation).

[87] *See id.* (noting that the Third Circuit employed a legislative history analysis to the AKS, a law with criminal applications, thus contradicting the principles of the rule of lenity).

[88] *See* Manning, *New Purposivism*, *supra* note 75 at 113–14 (noting the trend in the Supreme Court to predominantly apply a textualist approach to statutory interpretation).

[89] *See* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 748 (2017) (discussing Justice Scalia's belief in judicial restraint as a theory of adjudication because it is most consistent with the democratic process).

statute, is contrary to the rule of lenity as defendants must have fair notice of the law.[90]

Despite its flawed approach to dictating what the law *is*, the Third Circuit in *Greenfield* does raise some prudent questions regarding what the law *should be*.[91] In support of its reasoning, the Third Circuit noted that it is quite difficult for plaintiffs to prove that an illegal kickback was the driving force behind a patient's decision to seek certain medical care, or a medical provider's submission of reimbursement claims.[92] Alternatively, the Sixth Circuit in *Martin* noted that adopting a less exacting causal standard could put well-intending doctors at the center of FCA claims.[93] Arguments for the merits and shortcomings of the amended AKS are compelling, but ultimately should be made by members of Congress, not the courts.[94] The Sixth Circuit's holding in *Martin* leaves it to the legislature to clarify or amend the causal standard, should it choose to do so.[95]

CONCLUSION

In 2023, in *U.S.* ex rel. *Martin v. Hathaway*, the U.S. Court of Appeals for the Sixth Circuit held that, to bring a claim under the FCA for an AKS violation, a plaintiff must sufficiently plead that a request for reimbursement from a federal healthcare program would not have been made but-for an illegal kickback scheme. To arrive at this conclusion, the Sixth Circuit adopted a textualist approach that mirrored the U.S. Supreme Court's interpretation of similar statutory text in *United States v. Burrage*. In so doing, the Sixth Circuit further entrenched a split with the Third Circuit's approach favoring a less stringent standard of causation by relying on an analysis of legislative history that ultimately resulted in an errant form of judicial policymaking. When analyzing similar FCA claims, lower courts should follow the textualist approach of the Sixth Circuit and thus exercise judicial restraint, leaving the legislating to lawmakers in Congress.

JESSICA L. PARILLO

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[90] *Martin*, 63 F.4th at 1054; *see also Bass*, 404 U.S. at 347–48 (finding that the rule of lenity is premised on two strong policy goals, including fair warning to the public and the idea that legislatures, and not courts, should be tasked with determining what punishment should be).

[91] *See* United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 96–97 (3d Cir. 2018) (recognizing the challenges in delving into the mindset of a patient or medical provider to prove they acted primarily on the influence of an illegal kickback scheme).

[92] *Id.*

[93] *See Martin*, 63 F.4th at 1054 (considering the potential impacts of a more relaxed causation standard, including that such a standard may too easily expose medical providers to civil liability by "sweeping in the vice-ridden and virtuous alike").

[94] *See* Wathen, *supra* note 74, at 868 (noting Justice Scalia's argument that the goal of textualism is judicial restraint).

[95] *See Martin*, 63 F.4th at 1053 (acknowledging that if Congress intends to codify a certain causal standard, it may do so).