EYE FOR AN EYE? THE SIXTH CIRCUIT LOSES SIGHT OF ANTI-KICKBACK CAUSATION IN *HATHAWAY*

Abstract: In March 2023, the U.S. Court of Appeals for the Sixth Circuit held in *United States* ex rel. *Martin v. Hathaway* that the Anti-Kickback Statute's (AKS) language of "resulting from" requires a but-for causal standard for prosecution through the False Claims Act (FCA). Although courts agree that some causal link is necessary, they disagree on how direct that link must be. The Sixth Circuit, like the Eighth Circuit before it, based its holding on the Supreme Court's prior analysis of "results from" in *Burrage v. United States*, which provided the basis for but-for causation. The Third Circuit's interpretation, however, resulted in a broader reading of the ordinary language of the statute. This Comment argues that the Third Circuit's approach of requiring "some connection" between the AKS violation and FCA prosecution is correct because a broader reading is more consistent with the AKS's purpose and benefits both the government and individual healthcare consumers alike.

INTRODUCTION

A common goal for a visit to a healthcare professional's office is to solve medical problems or receive wellness advice, but modern Americans have lower confidence in those leading the field than Americans in years past.[1] One cause of this distrust is healthcare fraud.[2] Healthcare fraud includes kickbacks to healthcare professionals from medical, life sciences, or pharmaceutical companies.[3] A kickback occurs when private companies offer medical profes-

[1] *See* Robert Blendon, John Benson & Joachim Hero, *Public Trust in Physicians—U.S. Medicine in International Perspective*, 371 N. ENG. J. MED. 1570, 1570–71 (2014) (finding that American consumers have lower trust in medical professionals than they did in 1966). In a study cited by the *New England Journal of Medicine*, in 1966, 73% of Americans reported "great confidence in the leaders of the medical profession," but this number dipped to only 34% in 2012. *Id.*

[2] *See* Katrice Bridges Copeland, *Health Care Fraud and the Erosion of Trust*, 118 NW. U. L. REV. 89, 92 (2023) (noting that instances of healthcare fraud have recently gained more public notoriety and awareness and finding that it is one reason why the general public has lower trust in healthcare companies than in the past).

[3] *See Anti-Kickback Statute and Physician Self-Referral Laws (Stark Laws)*, AM. SOC'Y OF ANESTHESIOLOGISTS, https://www.asahq.org/quality-and-practice-management/managing-your-practice/timely-topics-in-payment-and-practice-management/anti-kickback-statute-and-physician-self-referral-laws-stark-laws [https://perma.cc/KBN6-TKZ5] (highlighting that a kickback could be classified as any item with value, from rent, payment for referrals, and more); *Fraud & Abuse Laws*, OFF. OF THE INSPECTOR GEN., U.S. DEP'T HEALTH & HUMAN SERVS. (Oct. 20, 2023), https://oig.hhs.gov/compliance/physician-education/fraud-abuse-laws/ [https://perma.cc/9XHN-TEY6] (highlighting the various causes of action for healthcare fraud and demonstrating the effect it can have on Americans).

sionals something of value, such as monetary payments or lucrative consulting agreements to drive business to their organizations.[4] Kickbacks not only cause financial harm to the government through fraudulent reimbursement claims, but can also pose physical harm to patients by interfering with their physician's judgment.[5] Moreover, if patients lose trust in their physician, they are less likely to follow medical advice and treatment plans, which can further injure their health.[6] The federal government has a number of tools to combat this fraud, including the Anti-Kickback Statute (AKS) and the False Claims Act (FCA).[7]

Congress first enacted the FCA during the Civil War to ensure that the government did not receive low-quality materials from contractors.[8] The ma-

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Rewards are described as "remuneration" under federal law, and can be anything from direct cash payments to restaurant meals or luxury hotel stays, lucrative consulting agreements, and more. *Id.*

[4] *See* Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Biogen Inc. Agrees to Pay $900 Million to Settle Allegations Related to Improper Physician Payments (Sept. 26, 2022) (on file with author) (alleging that Biogen offered lucrative consulting positions and speaking roles to providers in exchange for increased business); *see also Philips Subsidiary to Pay Over $24 Million for Alleged False Claims Caused by Respironics for Respiratory-Related Medical Equipment*, U.S. ATT'Y'S OFF., U.S. DEP'T OF JUST., D. S.C. (Sept. 2, 2022), https://www.justice.gov/usao-sc/pr/philips-subsidiary-pay-over-24-million-alleged-false-claims-caused-respironics [https://perma.cc/Z7D9-RLZL] [hereinafter *Philips*] (detailing how Philips NA offered "physician data" in exchange for increased business). In 2022, major medical device companies Biogen and Philips subsidiary Philips NA settled with the U.S. government for millions of dollars over allegations that they had offered consulting agreements, insider "physician prescribing data," and more in exchange for increased business. Press Release, Off. Of Pub. Affs., U.S. Dep't of Just., *supra*; *Philips*, *supra*.

[5] *See Why Are Pharmaceutical & Medical Kickbacks Prohibited*, HALUNEN L. (Feb. 3, 2022), https://www.halunenlaw.com/why-are-pharmaceutical-and-medical-kickbacks-prohibited/ [https://perma.cc/7D3G-52NX] (noting that kickbacks harm healthcare consumers because they can interfere with a physician's judgment and increase costs by causing a provider to recommend a product they would not usually recommend based on the personal benefit they will receive from the healthcare company). Medical kickbacks can unfairly increase costs and burden government budgets and individual Americans alike, as the government will be paying reimbursements to healthcare providers based on unnecessary or fraudulent procedures. *See* John Dube, *The Anti-Kickback Statute and the False Claims Act: How Statutory Interpretation Affects Access to, and Protects Against Fraud in, the Public Healthcare Sector*, 19 J. HEALTH & BIOMED. L. 360, 369 (2023) (discussing the policy benefits of the Anti-Kickback Statute (AKS)); *see also* Blendon et al., *supra* note 1, at 1571 (citing one major reason for Americans' distrust in the healthcare system as influence from "various private medical organizations").

[6] *See* Copeland, *supra* note 2, at 91 (stating that if patients have a lack of trust in the healthcare system then they are less likely to follow their doctor's advice, which could negatively impact their health).

[7] *See Fraud & Abuse Laws*, *supra* note 3 (providing context on the False Claims Act (FCA) and the AKS). The government reports that the FCA helps prevent it from being overcharged or defrauded in the healthcare context by deterring fraudulent Medicare or Medicaid reimbursement claims. *Id.* The AKS specifically targets kickbacks to physicians in exchange for increased business to a private company, and carries both criminal and civil penalties. *Id.*

[8] *See The False Claims Act*, CIV. DIV., U.S. DEP'T OF JUST., https://www.justice.gov/civil/false-claims-act [https://perma.cc/P3M5-X7BZ] (Feb. 23, 2024) (providing historical context on the False Claims Act). During this time period, legislators referred to the False Claims Act as the "Informer's Act" due to the private right of action, and the Supreme Court initially thought it was the best way to prevent fraud. Bryan Lemons, *An Overview of "Qui Tam" Actions*, FED. L. ENF'T TRAINING CTRS.,

jority of FCA government enforcement today arises in the healthcare industry.[9] The AKS, passed in 1972, similarly allowed the government to prosecute claims against anyone who had offered or accepted an inducement to unfairly influence healthcare purchasing or prescribing decisions.[10] In 2010, the Affordable Care Act (ACA) tied these two laws together, permitting prosecution of AKS violations under the FCA, so long as a fraudulent claim submitted to the government for reimbursement was "resulting from" the supposed violation.[11] In 2018, Dr. Shannon Martin, a certified ophthalmologist, claimed that her employer violated the FCA by conditioning a continued patient referral relationship to a Michigan hospital on the obligation not to employ her.[12]

Part I of this Comment details the legislative history of the FCA, the AKS, and the "resulting from" causation standard.[13] Part II describes the differing causal standards of the Third Circuit and the Eighth Circuit.[14] Finally, Part III argues that the Third Circuit's approach is correct because it adheres to the legislative intent of the statute and permits greater protection from healthcare fraud.[15]

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND OF *UNITED STATES EX REL. MARTIN V. HATHAWAY*

The FCA and AKS are used in conjunction in the healthcare industry to safeguard against fraudulent medical claims.[16] But courts have utilized differing causal standards after analyzing the language of the AKS, "resulting in" confusion.[17] Part A details the background of the FCA and the AKS, and their

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https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/civil-actions/quitam.pdf [https://perma.cc/RZ8E-HXEC].

[9] *See* S. REP. NO. 110-507, at 3 (2008) (highlighting how the FCA has been particularly used to target healthcare fraud and that over half of the qui tam suits filed have been related to healthcare fraud); *see also* Dube, *supra* note 5, at 367–68 (noting that the FCA is the government's main vehicle to prosecute healthcare fraud).

[10] *See Fraud & Abuse Laws*, *supra* note 3 (offering insight into the purposes behind the AKS); *see also* 42 U.S.C. § 1320a-7b(g) (introducing the provisions of the AKS). Inducement is defined as "the act or process of enticing or persuading another person to take a certain course of action." *Inducement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[11] *See* Dube, *supra* note 5, at 370–71 (providing contextual detail about the connection between the FCA and the AKS); *see also* 42 U.S.C. § 1320(a)-7b(g) (stating the specific language required to link the FCA and AKS). The FCA's *qui tam* provision has been specifically used to target prescription drug cost schemes and fraudulent Medicare billing practices, as very few people are able to see the fraud firsthand, so relators are essential to successful prosecution. S. REP. NO. 110-507, at 3.

[12] *See* United States *ex rel.* Martin v. Hathaway, 63 F.4th 1043, 1047 (offering the alleged FCA violation presented by Dr. Martin in the case).

[13] *See infra* notes 20–55 and accompanying text.

[14] *See infra* notes 56–77 and accompanying text.

[15] *See infra* notes 78–103 and accompanying text.

[16] *See supra* note 11 and accompanying text (connecting the FCA and AKS, and detailing how these two laws are used together to target healthcare fraud).

[17] *See infra* notes 56–77 and accompanying text.

causal standards.[18] Part B provides the facts of *United States* ex rel. *Martin v. Hathaway*.[19]

A. The False Claims Act, the Anti-Kickback Statute, and the "Resulting From" Causation Standard

The FCA is designed to protect the government from fraudulent claims and sales.[20] Under the FCA, it is illegal for any person to knowingly submit a false claim for reimbursement by the government.[21] Uniquely, the FCA contains a *qui tam* provision that permits private individuals, called relators, to initiate FCA prosecution.[22] A relator who witnessed or has knowledge of a false claim can file an initial complaint in which the government may choose whether to intervene.[23]

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[18] *See infra* notes 20–36 and accompanying text.

[19] *See infra* notes 37–55 and accompanying text.

[20] *See* Dube, *supra* note 5, at 367 (discussing the history and purpose of the FCA). Although passed during the Civil War to prosecute defense contractor fraud, the government frequently uses the FCA to prosecute healthcare fraud today. *Id.* In the 2022 Fiscal Year, the federal government reported over $2.2 billion recovered in FCA settlements and judgments. *See* Press Release, Off. of Pub. Affs., U.S. Dep't of Just., False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022 (Feb. 7, 2023), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022 [https://perma.cc/A2M3-BTUM] (detailing how the government's focus on the FCA has recovered more than $72 billion since 1986 and stating how healthcare fraud prosecution is a major priority for the Department of Justice).

[21] Dube, *supra* note 5, at 368. Submitting a claim, making a false statement for the purpose of submitting a claim, or conspiring to submit a false claim all constitute violations of the FCA. 31 U.S.C. § 3729a(1). The government can simultaneously bring civil and criminal actions against offenders to enhance recovery. *See* Matthew Larson et al., *Health Care Fraud*, 58 AM. CRIM. L. REV. 1073, 1127 (2021) (highlighting the enforcement mechanisms that the government may use, including civil and criminal actions); 31 U.S.C. § 3729a(1) (providing the requirements for an FCA violation for illegal remuneration).

[22] Larson et al., *supra* note 21, at 1145–46. *Qui tam action* is defined as "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Qui Tam Action*, BLACK'S LAW DICTIONARY, *supra* note 10.

[23] Larson et al., *supra* note 21, at 1145–46. In 2023, the federal government declined to intervene in thirty-five percent of all FCA *qui tam* lawsuits. *See Fraud Statistics—Overview, October 1, 1986–September 30, 2023*, U.S. DEP'T OF JUST. (Feb. 22, 2024), https://www.justice.gov/opa/media/1339306/dl?inline= [https://perma.cc/FB38-33HX] (providing the total number of *qui tam* lawsuits, including the number the U.S. decided to intervene in, and those the government declined). The DOJ can decline based on a number of factors, that include: 1) curbing claims that are lacking in merit, 2) preventing duplicate cases or cases that provide an unwarranted benefit to the relator at the expense of the public, 3) disrupting a government agency's individual priorities, 4) limiting litigation based on the Department's priorities, 5) protecting sensitive information, 6) maintaining government budgetary requirements, and 7) mitigating procedural errors that limit the government's investigation. *See* Michael D. Granston, Memorandum: Factors of Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (Jan. 10, 2018) (providing reasoning into why the government chooses not to intervene in particular cases). If the government does decide to intervene, it then takes over the investigation and usually files a new complaint with additional claims. *See False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits*, U.S. DEP'T OF JUST., https://www.justice.gov/sites/default/files/usao-edpa/legacy/2012/06/13/InternetWhistleblower%20update.pdf [https://perma.cc/TNH3-CP3E], (detailing

The relator stands to benefit financially from a successful FCA prosecution and the government similarly benefits from those recoveries.[24] This relator provision is what makes the FCA a useful vehicle to root out healthcare fraud, as this type of fraud can be a complicated scheme only insiders can detect.[25] To bring a successful FCA claim, the plaintiff must prove that the defendant supplied a claim for reimbursement that was legally or actually false.[26]

One way to prove a claim is false under the FCA is through a violation of the AKS.[27] The AKS is a federal criminal law that punishes any individual who knowingly offers or accepts any remuneration as inducement to purchase medical supplies or services that are reimbursable under a federal healthcare program.[28] This statute not only protects taxpayers by ensuring medical care remains safe, but also ensures that state and local governments are not defrauded by inappropriate reimbursement requests.[29] A violation of the AKS may establish

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the process the government takes to determine if it will intervene in a suit and the choices it makes along the way, along with potential outcomes).

[24] *See* Larson et al., *supra* note 21, at 1146–47 (detailing the percentage of the total recovery that the relator stands to obtain, whereas the government financially recovers the remainder). For a successful claim in which the government intervenes, relators receive fifteen to twenty-five percent of the recovery, and on a claim in which the government does not intervene, relators receive twenty-five to thirty percent of the recovery collected. *Id.* at 1145–46. The Affordable Care Act (ACA) contains provisions that lowered the bar for a relator to bring a *qui tam* action, and as a result the number of suits significantly increased. *Id.* at 1146–47. Violations of the FCA carry significant financial penalties because of the opportunity for treble damages. Nicholas Goldin, *Wrongly "Identified": Why an Actual Knowledge Standard Should Govern Healthcare Providers' False Claims Act Obligations to Report and Return Medicare and Medicaid Overpayments*, 94 WASH. U. L. REV. 1295, 1297 (2017). *Qui tam* actions for healthcare fraud recovered $2.6 billion in 2019. Larson et al., *supra* note 21, at 1147.

[25] *See* S. REP. NO. 110-507, at 3 (2008) (highlighting how the FCA is an essential tool to fight healthcare fraud because certain fraudulent schemes are impossible to identify from the outside and considering how complicated healthcare programs can be).

[26] *See* Dube, *supra* note 5, at 368 (presenting the process by which an individual would submit a false claim, which requires a claim for reimbursement from the government, and that the claim must include misrepresentations or falsehoods).

[27] *See id.* at 371 (detailing the link between the AKS and FCA). The majority of the Anti-Kickback Statute was initially included in the Social Security Amendments of 1972, with the word "remuneration" added in the 1977 amendment. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972); Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952-01, 35958 (July 29, 1991).

[28] *See* Dube, *supra* note 5, at 361–62 (discussing the history and purpose of the Anti-Kickback Statute); 42 U.S.C. § 1320a-7b(g). The intent of the government was to protect taxpayers and government budgets against fraud in healthcare and to recover funds from a "publicly-funded healthcare program." Dube, *supra* note 5, at 369; 42 U.S.C. § 1320a-7b(g).

[29] *See* Dube, *supra* note 5, at 368–69 (emphasizing the policies considered when creating the AKS, including: tackling rampant healthcare fraud; protecting federal and state governments; and ensuring that any resulting increased costs would not fall on the consumer). Healthcare fraud is a major loss of revenue for the federal government, and in 2022, the U.S. Sentencing Commission reported 431 convicted healthcare fraud offenders with a median loss of $1,297,560 per offense. *See Quick Facts: Health Care Fraud Offenses*, U.S. SENT'G COMM'N (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Health_Care_Fraud_FY22.pdf [https://perma.

a cause of action under the FCA if a healthcare provider files a reimbursement claim for federal funds based on an inappropriate inducement.[30] The specific language in the 2010 amendments to the AKS regarding this mutual violation states that a claim "resulting from" an AKS violation can be considered a false claim under the FCA.[31] In 2014, in *Burrage v. United States*, the Supreme Court held that the language in the Controlled Substances Act (CSA) "results from" should be read in plain language, which is therefore synonymous with "but-for" causation.[32] The Court in *Burrage* emphasized the historical understanding of language like "resulting from" as requiring proof of causation.[33] Notably, the

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cc/HVT7-97ZU] (highlighting the steep cost of healthcare fraud and assessing the effects this would have on government budgets). Penalties are steep and help the government recover these lost funds. *Fraud & Abuse Laws*, *supra* note 3. Beyond criminal penalties, individuals can face monetary penalties of "up to $50,000 per kickback, plus three times the amount of the remuneration." *Id.*

[30] *See* Robert Rabecs, *Kickbacks as False Claims: The Use of the Civil False Claims Act to Prosecute Violations of the Federal Health Care Program's Anti-Kickback Statute*, 2001 LAW REV. M.S.U.-D.C.L. 1, 3–4 (outlining the connection between the Anti-Kickback Statute and the False Claims Act); *see also* Dube, supra note 5, at 371 (referencing the AKS amendment in the ACA that formally codified the practice of using an AKS violation as a cause of action under the FCA). Initially, parties had to demonstrate AKS causation to establish a FCA violation, as the reimbursement had to be directly linked to some sort of inducement. *See* Rabecs, *supra* (highlighting how the process of linking an AKS violation to an FCA violation worked before the 2010 amendments). With the ACA amendment in 2010, any AKS violation is now an automatic FCA violation. Dube, *supra* note 5, at 371.

[31] *See* Dube, *supra* note 5, at 376 (detailing the specific language of the AKS from the amendment of the ACA that included the issue in question). Although the phrase "resulting from" is not defined in the FCA, the phrase "results from" has been analyzed in *Burrage v. United States*. *See* 571 U.S. 204, 211–12 (2014) (determining through statutory analysis that the phrase "results from" requires but-for causation).

[32] *See* 571 U.S. at 211–12 (holding that the phrase "results from" should be understood under its ordinary meaning, or but-for causation). Marcus Andrew Burrage sold the decedent Joshua Banka heroin the same night that he overdosed, but officials found multiple other substances in his system as well. *See id.* at 206–07 (stating the facts underlying the indictment); Benjamin Ernst, Comment, *A Simple Concept in a Complicated World: Actual Causation, Mixed-Drug Deaths and the Eighth Circuit's Opinion in* United States v. Burrage, 55 B.C. L. REV. 1, 3–4 (2014) (providing the factual background of *Burrage* and the government's argument in the Eighth Circuit case). The government initially intended to prove that although none of the medical experts could testify that heroin caused the decedent's death alone, a contributing cause standard was sufficient. Ernst, *supra*, at 3. The case went up to the Supreme Court, however, where the justices disagreed. *Burrage*, 571 U.S. at 216. In analyzing the language in the Controlled Substances Act (CSA) of "results from," the Supreme Court reiterated that its role is to apply the statutes as they are written, and it is unquestionable that the Controlled Substances Act was written to require but-for causation. *Id.* Unlike the AKS or FCA, the Controlled Substances Act regulates drugs "deemed to pose a risk of abuse and dependence," and therefore the *Burrage* Court analyzed this statute from a different angle. *See* JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 118TH CONGRESS (2023) (detailing the purpose and legal background behind the CSA); *see also Burrage*, 571 U.S. at 212–13 (analyzing causation under a law regulating potentially dangerous drugs that leave more significant physical evidence, such as the drugs found within the defendant's car, or those found within the victim's system).

[33] 571 U.S. at 212–13. The Court specifically highlighted Title VII's language stating that discrimination "because" an individual resisted an unfair employment practice requires but-for causation. *Id.*; 42 U.S.C. § 2000e-3(A). Similarly, the Age Discrimination in Employment Act also features the

government argued that requiring but-for causation would limit liability and burden the government with a higher standard of proof.[34] The government's argument did not ultimately convince the Court as they deemed the plain language clear.[35] Nevertheless, federal circuit courts diverge on whether this general interpretation that requires but-for causation extends to the AKS language.[36]

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

In 2023, in *United States* ex rel. *Martin v. Hathaway*, the Sixth Circuit held that but-for causation is required to prove an AKS violation through the FCA.[37] Two ophthalmologists, Dr. Martin and Dr. Hathaway, were colleagues at South Michigan Ophthalmology, P.C., a practice Dr. Hathaway owned.[38] South Michigan had a mutual referring relationship with a nearby hospital, Oaklawn Hospital.[39] Dr. Hathaway made plans to merge with another larger ophthalmology practice without Dr. Martin, so she reached out to Oaklawn to

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"because of" language, which the Court has historically understood to mean but-for causation. 29 U.S.C. § 623(A)(1); *Burrage*, 571 U.S. at 212–13.

[34] *See Burrage*, 571 U.S. at 215–16 (asserting that considering substantial factor causation would permit the government to prosecute more aggressively drug-related crime). The government marked their anxiety regarding the policy implications of requiring but-for causation, as this is a far higher burden than demonstrating that a drug contributed to death or serious bodily injury. *Id.* at 217–18.

[35] *See id.* at 216 (holding that the meaning of "results from" is clear and therefore the Court declined to allow substantial factor causation for the CSA).

[36] *See* United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 96–98 (3d Cir. 2018) (reasoning that as Congress has passed numerous laws with the intent to enable the government to penalize healthcare fraud, requiring but-for causation for the two major laws targeting this type of fraud would go against the intent of the legislature, as a stricter causal standard makes fraud much more difficult to prove). *But see* United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 834–35 (8th Cir. 2022) (holding that the language of the AKS requires but-for causation as stated in the Supreme Court's holding in *Burrage*).

[37] *See* 63 F.4th 1043, 1054–55 (6th Cir. 2023) (holding that the AKS requires but-for causation based on the Supreme Court's holding in *Burrage* because the language of the statute is unambiguous).

[38] *Id.* at 1046. Ophthalmology is "the branch of medical science dealing with the anatomy, functions, and diseases of the eye." *Ophthalmology*, DICTIONARY.COM, https://www.dictionary.com/browse/ophthalmology [https://perma.cc/U9R2-R72G]. In the town of Marshall, Michigan, South Michigan Ophthalmology was the only local option for patients. *Hathaway*, 63 F.4th at 1046.

[39] *Hathaway*, 63 F.4th at 1046. For "many years," Oaklawn referred patients to South Michigan for eye care and South Michigan did the same if any patients needed more serious surgical procedures. *Id.* This is not only a common practice between hospitals and referring physicians, but also a beneficial one. *See* Leila Agha, Keith Marzilli Ericson, Kimberley H. Geissler & James B. Rebitzer, *Team Relationships and Performance: Evidence from Healthcare Referral Networks*, 68 MGMT. SCI. 3735, 3737–38 (2022) (demonstrating that patients whose physicians use a referral network experience better teamwork and communication than those without). Patients had fewer visits with a referral network than without but did not experience any drop in care quality. *Id.*

pursue a position there.[40] After negotiations, Dr. Martin received a tentative offer to join Oaklawn, pending board approval.[41]

When Dr. Hathaway discovered that Dr. Martin was planning to join Oaklawn as an internal physician, he met with the hospital's interim CEO and asserted that his business would suffer if Oaklawn hired Dr. Martin, as the hospital would no longer have a need to refer patients externally.[42] After Dr. Hathaway's discouragement to the CEO and other board members, the board took his recommendation and did not hire Dr. Martin.[43]

Dr. Martin alleged that this decision regarding her hiring constituted fraud under the FCA.[44] She claimed that Dr. Hathaway induced Oaklawn Hospital to withdraw her offer of employment with promises of continued and increased surgical referrals from South Michigan Ophthalmology, violating the AKS.[45] Conse-

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[40] *Hathaway*, 63 F.4th at 1046. Dr. Hathaway made plans to merge with Lansing Ophthalmology, P.C. (LO Eye). *Id.* Dr. Martin did not have an opportunity to join the merged office and therefore pursued employment at the hospital instead. *Id.*

[41] *Id.* The *Hathaway* court suggested that Dr. Martin's outreach to the hospital to pursue a full-time position began positively due to the contributions of her husband, who worked as Oaklawn's Director of Finance. *Id.* Douglas Martin became the Director of Finance of Oaklawn Hospital in June 2017, and has worked there for thirteen years. LinkedIn, *Doug Martin*, https://www.linkedin.com/in/doug-martin-51256518/ [https://perma.cc/6QW7-EBYP]. The successful negotiations may also be attributed to the hospital board hearing a rumor that Dr. Hathaway would no longer be referring his surgical cases to Oaklawn after the merger. *Hathaway*, 63 F.4th at 1046.

[42] *Hathaway*, 63 F.4th at 1046–47. Dr. Hathaway shared his concerns with the hospital's CEO, Gregg Beeg, and stated that hiring Dr. Martin would be the "death knell" of his practice. *Id.* He also quashed the rumor that he would no longer be referring patients to Oaklawn and in fact promised increased referrals in the future. *Id.* Dr. Hathaway then met with several other members of the board to dissuade them from approving Dr. Martin's hire and continued to promise increased business. *Id.* Moreover, Dr. Hathaway stated that he would be "forced" to move his business and no longer refer patients to Oaklawn. *Id.* at 1047.

[43] *Id.*at 1047. The Board specifically referenced the potential loss of business from Dr. Hathaway when making its decision not to hire Dr. Martin. *Id.* Maintaining a patient base, or reducing "patient leakage," which occurs when a patient exits a hospital system, is a priority for many healthcare professionals. *See Patient Leakage & Keepage Report 2021-22: State of the Industry*, ABOUT HEALTHCARE, https://www.abouthealthcare.com/wp-content/uploads/2022/03/Patient-Leakage-and-Keepage_State-of-the-Industry.pdf [https://perma.cc/5QNP-WS7M] (showing that in a survey 45% of healthcare professionals surveyed reported competition as a top challenge with patient leakage). Members of the board also directly reached out to Dr. Hathaway once the decision had been made and stated that the hospital was enthused about the prospect of additional surgeries. *Hathaway*, 63 F.4th at 1047. Despite this back and forth, Dr. Hathaway's practice did not merge with LO Eye, though he continued to work with Oaklawn Hospital. *Id.*

[44] *Hathaway*, 63 F.4th at 1047. Although Dr. Martin alleged the conversation that blocked her hiring was an inducement given by Dr. Hathaway to Oaklawn Hospital, she sued under the FCA through the 2010 ACA amendment that allows an AKS violation to be considered an FCA cause of action. *Id.*; Dube, *supra* note 5, at 371; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 759 (2010).

[45] *Hathaway*, 63 F.4th at 1047. The claim alleges that Dr. Hathaway's promises for surgical referrals in exchange for a refusal to hire Dr. Martin was a violation of the AKS. *Id.* Specifically, this would refer to the statutory language of:

> Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in case or in kind to

quently, Dr. Martin and her husband filed suit in a *qui tam* action against Dr. Hathaway and Oaklawn Hospital under the FCA in the Western District of Michigan.[46] The United States declined to intervene in the suit.[47] The initial complaint did not provide allegations of any specific false claims made by Dr. Hathaway or Oaklawn, and was therefore dismissed with the ability to amend.[48] Thereafter, the plaintiffs amended and alleged that Dr. Hathaway and Oaklawn submitted twenty-two false claims for reimbursement based on the quid pro quo referrals.[49]

Again, the district court dismissed the case as a matter of law, and Dr. Martin appealed.[50] The Sixth Circuit Court of Appeals affirmed the district court's ruling on the grounds that the plaintiffs did not prove that the fraudulent claims "result[ed] from" the AKS violation under but-for causation.[51] Instead, the *Hathaway* court reasoned that there were other contributing factors that could have caused the claims, including geographical proximity and Dr. Hathaway and Oaklawn's prior referring relationship.[52] The court specified

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> 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(g).

[46] *Hathaway*, 63 F.4th at 1047. The government amended the FCA in 1986 to provide financial incentives to citizens who witnessed wrongdoing in their workplaces or communities. Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUPREME COURT ECON. REV. 135, 140 (2006). If the government chooses to intervene, a whistleblower will retain between fifteen and twenty percent of the financial recovery. *Id.*

[47] *Hathaway*, 63 F.4th at 1047. Under the FCA, a whistleblower first presents a *qui tam* action to the government, who has the right to determine if they would like to intervene within sixty days. Depoorter & De Mot, *supra* note 46, at 139. If, as in *Hathaway*, the government does not intervene, the whistleblower can choose to proceed with the litigation of their own accord and will retain between twenty-five and thirty percent of the recovery. *Id.* at 139–40; *Hathaway*, 63 F.4th at 1047.

[48] *Hathaway*, 63 F.4th at 1047. In accordance with Rule 15 of the Federal Rules of Civil Procedure, a party may amend its claim if the court has given it leave to do so, which it should do "when justice so requires." FED. R. CIV. P. 15(a)(2).

[49] *Hathaway*, 63 F.4th at 1047. The amended complaint alleges fourteen surgeries submitted for reimbursement by Oaklawn Hospital and eight claims submitted for reimbursement by Dr. Hathaway. *Id.* at 1053–54.

[50] *Id.* at 1047. The district court once again granted defendants' motion to dismiss. *See id.* (holding that even after plaintiffs added twenty-two allegedly fraudulent claims to the complaint there was insufficient evidence of wrongdoing). The district court specifically noted the complaint "fail[ed] to establish causation," and it therefore granted the motion to dismiss. *Id.* at 1048.

[51] *Id.* at 1052–55. The *Hathaway* court found that neither the claims submitted by the hospital or by Dr. Hathaway were "resulting from" the alleged AKS violation. *Id.* at 1052. The court asserted its view that "resulting from" indicated but-for causation and cited the previous decision in United States *ex rel.* Cairns v. D.S. Medical LLC to confirm the language of the law was "unambiguously causal." *Id.* at 1052–53; *see also* United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 833–34 (8th Cir. 2022) (stating that the court should not interpret the statute themselves as Congress purposely utilized specific language in the law).

[52] 63 F.4th at 1053. The geographic proximity of Oaklawn Hospital and South Michigan Ophthalmology and the lack of other options in the area provided a far less nefarious reason for the patient referrals, rather than inducement amounting to an AKS violation. *See id.* (offering other factors as the

that rather than providing a new benefit to Dr. Hathaway or Oaklawn as a result of the alleged AKS violation, the parties returned to the status quo of their previous mutual referring arrangement.[53] As a result, the Sixth Circuit joined the Eighth Circuit in holding that the "resulting from" language in the AKS requires but-for causation.[54] In this case, Dr. Martin did not provide the court with evidence of falsified Medicare reimbursement claims "resulting from" this referral relationship and denial of employment.[55]

II. The Circuit Split on Determining Causation Requirements in the Anti-kickback Statute

Two federal circuit courts previously analyzed whether a claim "resulting from" an AKS violation can be considered a false claim under the FCA, with differing answers.[56] In 2018, in *United States* ex rel. *Greenfield v. Medco Health*, the U.S. Court of Appeals for the Third Circuit broke from custom when it held that the language in the AKS did not require but-for causation.[57] The

potential reason behind the referrals rather than an AKS violation). Similarly, the referring relationship existed far before Dr. Martin considered a change of employment. *See id.* (demonstrating that the referring relationship between Oaklawn Hospital and Dr. Hathaway had existed for years and continued after Dr. Martin no longer worked with Dr. Hathaway).

[53] *Id.* The court examined the specific claims Dr. Martin had suggested Dr. Hathaway submitted for reimbursement due to the inducement. *Id.* Dr. Martin was the one to perform these surgeries, however, not Dr. Hathaway. *Id.* Although proving a violation of the AKS would require evidence that remuneration was provided in exchange for a service, here Dr. Martin, not Dr. Hathaway, performed the alleged services. *See* 42 U.S.C. § 1320a-7b(1)(A) (providing the standard for an AKS violation as remuneration accepted "in return for referring an individual to a person"); *see also Hathaway*, 63 F.4th at 1053 (asserting that in the alleged violations submitted by Dr. Hathaway, Dr. Martin was actually the one performing the services). In addition to the causation requirement, the *Hathaway* court also defined remuneration, but that is beyond the scope of this Comment. *See Hathaway*, 63 F.4th at 1048–52 (holding that "remuneration" under the AKS would require a payment or transfer of some value).

[54] *See Hathaway*, 63 F.4th at 1054–55 (requiring that Dr. Martin prove that Dr. Hathaway would not have submitted the claims for reimbursement but-for the AKS violation). The *Cairns* court similarly referenced the ordinary meaning of the text, highlighting Congress's authority in drafting statutes and the judiciary's role in enacting them. 42 F.4th at 835. This aligns with the *Burrage* holding and directly conflicts with the earlier ruling of United States *ex rel.* Greenfield v. Medco Health in the Third Circuit. *See Burrage*, 571 U.S. 212–13 (holding that "results from" should be analyzed under its ordinary meaning, and should be read as requiring but-for causation); 880 F.3d 89, 96–98 (3d Cir. 2018) (permitting a standard looser than but-for causation for an AKS violation).

[55] *See Hathaway*, 63 F.4th at 1052 (holding that because claims must "result from" the illegal kickback and remuneration, plaintiffs would need to explicitly demonstrate the claims that resulted from the violation, which they failed to do).

[56] *See* Greenfield, 880 F.3d at 96–98 (finding that but-for causation is not required and thus the plaintiffs did not need to prove with certainty that patients selected their physicians because of the fraudulent referrals to violate the AKS through the FCA). *But see Cairns*, 42 F.4th at 834–35 (holding that the language of the AKS requires but-for causation due to the ordinary meaning of the language and due to the Supreme Court's prior ruling in *Burrage*).

[57] *See* 880 F.3d at 100 (allowing for a looser connection between the alleged kickback and the reimbursement claim so long as the claim did have some actual evidence).

Greenfield court allowed for a looser connection between the alleged kickback and the reimbursement claim.[58] In contrast, in 2022, in *United States* ex rel. *Cairns v. D.S. Medical LLC*, the U.S. Court of Appeals for the Eight Circuit reiterated the holding of *Burrage v. United States*, asserting that the but-for causation requirement established in *Burrage* should apply to the AKS based on the CSA's similar language.[59] Section A of this Part discusses the Third Circuit's novel approach switching to an evidentiary-based causation standard.[60] Section B addresses the Eighth Circuit's familiar reliance on but-for causation.[61]

A. Substantial Factor Causation

In 2018, in *Greenfield*, the Third Circuit held that the "resulting from" language in the AKS did not require but-for causation, and instead suggested a requirement more akin to substantial factor causation.[62] The plaintiff asserted that the district court had erred in stating his burden in requiring that he demonstrate but-for causation in an alleged AKS violation and the resulting false claims.[63] Although the Third Circuit ultimately affirmed the district court's grant of summary judgment against the plaintiff, it disagreed on the causation needed to prove an FCA violation based on an AKS violation.[64] Based on the statute's ambiguous language, the court analyzed the drafters' original intentions and found

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[58] *See id.* at 97–98 (asserting that the stricter but-for standard would hinder the act's purpose of lowering barriers to prosecute healthcare fraud).

[59] *See Burrage*, 571 U.S. at 212 (requiring but-for causation for the language of "resulting from"); *Cairns*, 42 F.4th at 834–35 (holding that based on the plain meaning of the language and the previous analysis by the Supreme Court in *Burrage* but-for causation is required).

[60] *See infra* notes 62–68 and accompanying text.

[61] *See infra* notes 69–75 and accompanying text.

[62] *See* 880 F.3d at 98 (noting that rather than but-for causation, the moving party must show at least one fraudulent claim inappropriately linked to the AKS violation—for example, an inducement or kickback—that the government then reimbursed). The court seems to suggest that this link does not need to be "direct." *See id.* at 94 (noting that the district court had mistakenly required a direct link between the alleged AKS violation of a large donation by defendant Accredo, a healthcare organization that delivers clotting medication and plaintiff's former employer, and the reimbursed claim by the federal government).

[63] *Id.* at 93. The plaintiff initially filed a *qui tam* suit against Accredo for donating funds to the Hemophilia Association of New Jersey and Hemophilia Services, Inc., in exchange for an "approved provider" status. *Id.* at 92. Hemophilia is defined as a medical condition in which excessive bleeding occurs because the blood does not clot normally. *Hemophilia*, OXFORD LEARNER'S DICTIONARIES, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/hemophilia#:~:text=%2F,himəˈfiliə%2F,be%20passed%20on%20by%20women [https://perma.cc/LT3P-ZUVZ]. To prosecute the alleged AKS violation, the district court required proof that this exchange of donations for approved provider status caused patients to utilize Accredo. *Greenfield*, 880 F.3d at 98.

[64] *Greenfield*, 880 F.3d at 100. The district court initially granted summary judgment for Accredo as the plaintiff did not show that defendants received reimbursement from the government as a result of an AKS violation. *Id.* at 93. The summary judgment standard is as follows: summary judgment is granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

that the legislature's goal was to decrease healthcare fraud through lowered prosecution standards.[65] Therefore, the *Greenfield* court instead utilized a causation requirement more similar to substantial factor causation, suggesting that some sort of link is required, but it need not be direct.[66] Rather than requiring a plaintiff to show that the kickback caused healthcare consumers to undergo the medical care submitted for reimbursement, the court required proof that the defendant submitted at least one reimbursement claim based on inappropriate remuneration.[67] This lower standard would arguably permit the government to prevail without but-for causation to the alleged AKS violation.[68]

B. But-for Causation

In contrast, in 2022, in *Cairns*, the Eighth Circuit returned to a but-for causation standard.[69] The *Cairns* court applied the same logic established in *Burrage* to the causation requirement of the AKS.[70] In *Burrage*, the Court held that the language of "results from" required but-for causation.[71] Analyzing the plain language of the AKS, the *Cairns* court held that "resulting from" also requires but-for causation based on the similarity of the language scrutinized in *Burrage*.[72] Moreover, the *Cairns* court directly addressed and rejected the

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[65] *See Greenfield*, 880 F.3d at 96 (quoting H.R. REP. NO. 95-393, at 1 (1977)). *Greenfield* suggested that a claim requires something less than proof of but-for causation for the government to prevail. *Id.* As referenced in the 2009 Congressional Reports, legislators noted how difficult healthcare fraud was to prove, and they sought to strengthen the ability to prosecute fraud when ensuring all AKS violations could be prosecuted under the FCA. *See* 155 CONG. REC. S10852, S10853–54 (Oct. 28, 2009) (detailing the issues in the U.S. with healthcare fraud and demonstrating Congress's intent).

[66] *See* 880 F.3d at 97–98 (providing reasoning and background of legislative intent for an updated causation standard). Substantial factor causation is defined as "[t]he principle that causation exists when the defendant's conduct is an important or significant contributor to the plaintiff's injuries." *Substantial-Cause Test*, BLACK'S LAW DICTIONARY, *supra* note 10.

[67] *See Greenfield*, 880 F.3d at 98 (holding if the plaintiff could demonstrate a single claim that Accredo submitted for reimbursement was due to the alleged AKS violation, it would be sufficient). Rather than but-for causation, which requires the singular or sole cause of an individual seeking healthcare, substantial factor causation requires the fraudulent reimbursement claim to be a factor in deciding to get the procedure. *See id.* (requiring evidence of a fraudulent claim, but not requiring actual proof that the kickback caused a patient to receive a healthcare procedure).

[68] *See id.* at 97–98 (asserting that a lower standard would allow the government to prosecute additional AKS cases and prioritize a reduction in healthcare fraud).

[69] *See* 42 F.4th at 834–35 (finding that based on the plain language alone, and despite any suggested contextual indication, the language of "resulting from" requires the but-for causation standard). The *Cairns* court also reiterated the standard established in *Burrage*, noting that the crux of but-for causation is that "an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" *Id.* at 835 (quoting Burrage v. United States, 571 U.S. 204, 211–12 (2014)).

[70] *See id.* at 834 (using the plain language analysis of "results from" in the CSA in *Burrage* to establish that the language of "resulting from" in the AKS should be held to require but-for causation).

[71] *See Burrage*, 571 U.S. at 211–12 (holding that the plain meaning of the statute is clear, and that the ordinary meaning of "results from" should be read to require but-for causation for the CSA).

[72] *See* 42 F.4th at 834 (using the similarity of "results from," which had previously been analyzed by the Court in *Burrage*, and "resulting from," the language from the AKS at issue, to demonstrate the

Third Circuit's approach in *Greenfield*.[73] The Eighth Circuit asserted that because the statute is unambiguous in meaning, relying on legislative intent and history would be inappropriate.[74] Therefore, the Eighth Circuit held that the "resulting from" language in the AKS requires a plaintiff to show that a reimbursement was the direct cause of the alleged kickback to succeed on a FCA claim.[75] In 2023, the U.S. Court of Appeals for the Sixth Circuit sided with the Eighth Circuit's approach.[76] Notably, the Sixth Circuit referenced the Eighth Circuit's reasoning and emphasized the importance of analyzing the language Congress actually used to establish a causal standard.[77]

III. The Third Circuit's Interpretation Appropriately Allows for Analysis of the Statute's Plain Language, Adheres to Legislative Intent, and Allows for a Greater Focus on Healthcare Fraud

The U.S. Court of Appeals for the Sixth Circuit asserted in *United States* ex rel. *Martin v. Hathaway* that the language of the AKS requires but-for cau-

similar need for but-for causation). As "results" and "resulting" stem from the same verb, the *Cairns* court asserted that the language has the same meaning, and therefore the Supreme Court already provided a ruling on the meaning of the language. *Id.* Moreover, the Eighth Circuit in *Cairns* rejected looking into alternative meanings of the wording because, in their view, the role of judicial interpretation should end when a clear answer appears. *Id.* at 836; *see also* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) (holding that once there is a clear answer determined from statutory interpretation, "judges must stop").

[73] *Cairns*, 42 F.4th at 836. Although the court's decision relies on its understanding of the statute's plain meaning, the court's rejection of an analysis based on the drafters' intentions more thoroughly explains its disagreement with the *Greenfield* court. *See id.* (describing the issues with relying on legislative history).

[74] *Id.* at 836–37. The court explicitly pointed to alternative language that Congress could have placed in AKS or the 2010 amendments, such as "tainted by" or "provided in violation of," to evidence a different standard. *Id.* at 836. The court also alluded to *Epic Systems Corp. v. Lewis*, in which the Supreme Court firmly stated that "legislative history is not the law." *See Cairns*, 42 F.4th at 836 (noting how the *Cairns* court could not rely on legislative history as Congress had multiple different ways of phrasing the law, and chose to use the "resulting from" language); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (emphasizing the role of the judiciary in statutory interpretation should be to solely interpret the law and not guess as to the intentions of the drafters).

[75] *Cairns*, 42 F.4th at 836–37. In closing, the court emphasized that it had split from the previous Third Circuit decision in *Greenfield*, and noted that its ruling was narrow and even left the door open for an alternative causal standard for FCA claims. *See id.* (touching on the *Greenfield* decision and rejecting it, and asserting the narrowness of the ruling).

[76] *See Hathaway*, 63 F.4th at 1053 (citing *Cairns*, 42 F.4th at 834–36) (highlighting the similarities between the Eighth Circuit's argument in *Cairns* and the Sixth Circuit's argument in *Hathaway*).

[77] *See id.* (asserting that the *Cairns* court analyzed the language of "resulting from" that Congress actually chose to use in the statute, not the language it could have used that would suggest a looser causation standard than but-for causation, like "tainted by").

sation.[78] Nonetheless, the Third Circuit's evidentiary analysis is more appropriate because the statute's ambiguous plain language necessitates an interpretation based on legislative intent, which furthers the government's goal of prosecuting healthcare fraud.[79]

Although the Sixth and Eighth Circuits strongly asserted that the plain meaning of "resulting from" establishes but-for causation, which in turn requires a direct link from the violation to a fraudulent claim, the Third Circuit correctly explored alternative meanings.[80] The *Hathaway* and *United States* ex rel. *Cairns v. D.S. Medical LLC* courts base their rulings mainly on the Supreme Court's holding in *Burrage v. United States* that the Court could not deviate from the language's ordinary, accepted meaning.[81] Yet the plain meaning of "results from" is more ambiguous than the Court suggested, and but-for causation can carry multiple meanings.[82] Ordinary Americans have actually conflated but-for causation with "substantial factor" causation, wherein a factor must be a substantial reason that an outcome came to be, but not the only reason.[83] Moreover, even within but-for causation, different legislative and judicial bodies have interpreted the standard in varying ways.[84]

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[78] *See* 63 F.4th 1043, 1053 (6th Cir. 2023); *see also* United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 836 (8th Cir. 2022) (holding that the "resulting from" language of the AKS requires but-for causation).

[79] *See* United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 95–96 (3d Cir. 2018) (discussing that the AKS does not specifically define the term "resulting from," and although previous courts have taken this to mean but-for causation, it would directly contradict the government's purpose in enacting the AKS).

[80] *Compare Hathaway*, 63 F.4th at 1053 (assessing a judge's role in statutory interpretation as solely a textual approach and asserting that there is a plain language meaning for "resulting from" as established in *Burrage*), *and Cairns*, 42 F.4th at 836 (same), *with Greenfield*, 880 F.3d at 95–96 (suggesting that based on both the textual interpretation and the legislative intent behind the AKS, "something less than" but-for causation is more appropriate).

[81] *See* Burrage v. United States, 571 U.S. 204, 216 (2014) (holding that when the plain language of a statute is unambiguous, the judiciary cannot introduce a new meaning); *Cairns*, 42 F.4th at 835 (stating that the court is "follow[ing] *Burrage's* example"); *see also Hathaway*, 63 F.4th at 1052 (stating that according to the Supreme Court in *Burrage*, "the ordinary meaning of 'resulting from' is but-for causation"). The *Burrage* Court specifically discounted other "permissive" interpretations, and instead retained its understanding of what but-for causation means. 571 U.S. at 216.

[82] *See infra* notes 83–87 and accompanying text (providing numerous examples of situations where the causation requirement has not been clear and has in fact caused significant confusion in the Americans with Disabilities Act, employment retaliation claims, and a number of statutory interpretation cases in various courts).

[83] *See* James Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 962 (2019) (analyzing the "ordinary meaning" of causal standards as Americans actually understand them). A study of approximately 1500 laypeople in the U.S. found that most did not associate the plain or commonly understood meaning of "resulting from" with the law's definition of but-for causation. *Id.* In fact, when analyzing the meaning of "resulted from," these individuals found that although the happening in question had to be a factor in an outcome, it did not have to be the only factor. *Id.* Similarly, in an employment discrimination situation, if an employee was fired for several reasons, one of which that was impermissible by law, an ordinary American would say that the employee was fired due to the illegal factor. *Id.* Rather than but-for causation, this equates more to the

In 2015, in *King v. Burwell*, the Court set a standard on statutory ambiguity and held that if a statute's plain meaning is ambiguous, judges should look to the legislative intent and context around the law in question.[85] Ambiguity in this case was considered to be specifically included by Congress to allow the agency in question—here the IRS—to input its own judgment.[86] In determining the correct application of the Affordable Care Act, the Court first determined that the statute was ambiguous and asserted that doing so required placing the language in context.[87] Then, the Court considered the legislative intent and context surrounding the need for the law within the U.S. healthcare system before determining the language's meaning.[88] Under the *Burwell* standard, a

"substantial factor" standard. *See id.* (highlighting the disconnect between the understanding of an average American and a judge regarding causation).

[84] *See* Siring v. Or. State Bd. of Higher Educ., 977 F. Supp. 2d 1058, 1062 (D. Or. 2013) (highlighting the confusion caused by the ADA amendment that changed the causation requirement of the ADA from but-for causation to motivating or substantial factor causation and reviewing the continued debate over what causation requirement is valid); *see also Enforcement Guidance on Retaliation and Related Issues*, EEOC (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues [https://perma.cc/3TK4-4A7F] [hereinafter *Guidance on Retaliation*] (explaining that but-for causation need not be the only cause and stating that there can be various but-for causes for a retaliation claim). The Eighth Circuit in *Cairns* and Sixth Circuit in *Hathaway* seem to read but-for causation as closer to a "sole factor" causation. *See Hathaway*, 63 F.4th at 1052 (arguing that there must be no other reason for requested reimbursement than the kickback); *Cairns*, 42 F.4th at 835 (requiring the plaintiff to prove that the sole reason a physician used a specific type of spinal disc was because his significant other owned the business and he would therefore benefit). Although the *Hathaway* court alleges that it is searching for merely a causal relationship, it instead explores all the other factors that could have caused the claim submission and patient referring relationship between Dr. Hathaway and Oaklawn other than the AKS violation. *See* 63 F.4th at 1054 (suggesting a longstanding professional relationship and geographic proximity as potential reasons for the claims). This approach is more suggestive of a sole factor causal analysis. *See id.* at 1053 (finding that requiring proof that "the referrals would not have been made without the remuneration" rather than because of the remuneration is more like sole factor causation than but-for causation). Similarly, the *Cairns* court quoted tort law in stating that but-for causation does not exist if "the particular event would have occurred without it," and that the government's burden is to prove "that the defendants would not have included 'particular items or services' absent the illegal kickbacks." *See* 42 F.4th at 835 (first quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013); and then quoting 42 U.S.C. § 1320a-7b(g)) (highlighting instances when the court's reasoning was more akin to sole factor causation).

[85] *See* 576 U.S. 473, 492 (2015) (detailing that a court's task when there is an ambiguous statute is to analyze both the context and place in the statutory scheme).

[86] *See id.* at 485 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)) (noting that when a statute regulates an agency and the agency thereby interprets and applies the statute that ambiguity "'constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps'").

[87] *See id.* at 486–89, 490 (examining the Affordable Care Act to determine if the language is ambiguous, doing so by first examining the ordinary or plain meaning of the language, then placing the specific wording in context of the law, ultimately holding the statutory language ambiguous).

[88] *See id.* at 494–95 (holding that Congress would never have intended the law in question to operate as designed by the petitioner's explanation, and therefore establishing the meaning of the statute). The Court considered the purpose of the law and how it would reasonably be applied in practice and how this compared to Congress's intention when drafting. *Id.* at 492–94.

court must first establish if a statute is ambiguous by considering its plain language, the language's context, and then consider legislative intent to determine the statute's meaning.[89]

Based on the plain language of the AKS when read in context, the phrase "resulting from" is ambiguous.[90] Not only have circuits interpreted the phrase to require different causal standards, but when examining the context of the law, it is clear that a but-for standard would make it very challenging for the government to prosecute fraudulent claims, which negates the purpose of the statute itself.[91] The *Greenfield* court's looser standard, which still requires proof of a connection to a false claim, more closely aligns with both the ordinary meaning of the language and the statute's context and purpose.[92] Comparatively, the courts in *Cairns* and *Hathaway* did not abide by the *Burwell* standard because they failed to consider the law's plain language in the appropriate context to determine ambiguity, thereby refusing to acknowledge the important role that legislative history plays in statutory interpretation.[93]

Although the Eighth and Sixth Circuits claim that interpreting legislative intent is not the role of the judiciary, but-for causation requires even more speculation under the AKS.[94] The *Cairns* and *Hathaway* courts required evi-

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[89] *See id.* at 485–86, 492 (closely following the steps of statutory interpretation by first looking at the plain language of the statute and then by examining the legislative history).

[90] *See* 42 U.S.C. § 1320a-7b(g) (stating that under the AKS "a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim" under the False Claims Act); *see also* United States *ex rel.* Martin v. Hathaway, 63 F.4th 1043, 1053 (6th Cir. 2023); United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 836 (8th Cir. 2022); United States *ex rel.* Greenfield v. Medco Health, 880 F.3d 89, 95–96 (3d Cir. 2018) (highlighting the circuit split on this issue, demonstrating the confusion surrounding this language that suggests the statute is ambiguous).

[91] *See Greenfield* 880 F.3d at 96 (highlighting that although the phrase "resulting from" was never defined, legislative history indicates it was added to remove a challenge to enforcing legitimate fraudulent claims); *supra* notes 56–77 and accompanying text (detailing the circuit split regarding causation).

[92] *See Greenfield* 880 F.3d at 98 (holding that a plaintiff must provide "evidence of the actual submission of a false claim" in order to prevail in an FCA prosecution under an AKS violation and that although a link is required, it need not be direct); *see also* 155 CONG. REC. S10852, S10853–54 (Oct. 28, 2009) (demonstrating Congress's intent when enacting the AKS). The Third Circuit's approach in *Greenfield* also aligns with the prior examples of statutory interpretation and causation. *See* Macleod *supra* note 83, at 962 (asserting that the average American understands "results from" to be more like substantial factor causation); *see also* Siring v. Or. State Bd. of Higher Educ., 977 F. Supp. 2d 1058, 1062 (D. Or. 2013); *Guidance on Retaliation*, *supra* note 84 (demonstrating that but-for causation has been upheld in different ways and has changed over time).

[93] *See Hathaway*, 63 F.4th at 1052, 1054 (noting only that a few recent cases utilized similar language of the AKS and analyzing the plain meaning of the language through reliance on the *Burrage* and *Cairns* holdings but failing to consider what "resulting from" meant within the AKS itself and legislative history); *Cairns*, 42 F.4th at 836 (basing the causal standard analysis mainly on *Burrage's* holding but admitting that "the context was different" and decrying the analysis of legislative history).

[94] *See Hathaway*, 63 F.4th at 1053 (requiring subjective proof that Dr. Hathaway's Medicare or Medicaid claim was solely submitted—and therefore that an ophthalmology procedure was only performed—because of the inappropriate referral relationship); *Cairns*, 42 F.4th at 836 (requiring subjec-

dence that a claim would not have been submitted—and thus a medical procedure would not have occurred—without the inappropriate kickback, but this decision ultimately rests with the patient, not the provider.[95] Therefore, to prove that a defendant's AKS violation resulted in a fraudulent claim, the judiciary would need to know a patient's intentions for having a procedure or selecting a provider.[96] The Third Circuit rejected this approach, instead choosing to interpret the legislative intent rather than the patient's intent.[97] Although courts must still play an interpretive role, they interpret the intent of the legislature, which is clearly documented, rather than that of a patient.[98]

Finally, the Third Circuit's approach enhances the government's ability to prosecute healthcare fraud and protect U.S. healthcare consumers.[99] The policy

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tive intent of the defendant by demonstrating that they would not have submitted a service for reimbursement but for the kickback).

[95] *See Hathaway*, 63 F.4th at 1053 (noting that Dr. Martin did not succeed in her claim because she failed to prove that the alleged claims would not have been submitted if not for the inappropriate patient referral network); *Cairns*, 42 F.4th at 836 (requiring evidence that a physician would not have selected a particular spinal disc implant if his partner had not owned the company). *But see Greenfield*, 880 F.3d at 95–96 (finding that a but-for causal standard for the AKS would "require plaintiffs to delve into patients' intent"). For example, in *Greenfield*, the plaintiff would have been required to prove that without Accredo's donation to acquire the "approved provider" designation, patients would not have utilized Accredo and Accredo would not have submitted the services rendered for reimbursement. *See* 880 F.3d at 91–92 (demonstrating but-for causation and subjective intent using the facts of the case).

[96] *See Greenfield*, 880 F.3d at 95 (finding that in order to determine if a defendant submitted a claim for reimbursement because of an AKS violation a court would need to infer an outcome based on "patients' subjective medical decisions"). The plaintiff's argument in *Greenfield* disagreed with this sentiment, and instead suggested that Congress enacted the FCA and AKS specifically to impose this liability without the subjectivity required in looking into the state of mind of a third party. *Id.* Without this third-party perspective, a court will not be able to determine why a defendant took a particular action, meaning it would require some conjecture. *See id.* at 97 (suggesting that to successfully prove but-for causation, a plaintiff would have to subjectively assert that a specific kickback "actually influenced a patient's judgment"). A but-for causal standard makes more sense given the context of *Burrage* because determining a defendant's choice to deal drugs is far less subjective than the facts of an AKS violation. *See* Burrage v. United States, 571 U.S. 204, 214 (2014) (finding that in but-for causation in the Controlled Substances Act the government must prove that the serious harm or death in question was caused by the specific drug distributed by the defendant). In *Burrage*, the Court could rely on the fairly objective testimony of the medical examiner and physical results of drug testing, which left less opportunity for subjectivity. *See id.* at 207–08 (demonstrating that there was ample physical evidence such as drugs found in the defendant's home and car, drugs present in the victim's system, and testimony from expert physicians and pathologists that the court could consider).

[97] *See Greenfield*, 880 F.3d at 95, 97 (analyzing "the will of Congress" to determine the meaning of the applicable statute and causal standard rather than attempting to discern the subjective intent of the defendant).

[98] *See id.* (discussing the best way to discern Congress's intent, from analyzing legislative history to considering the drafters' intentions). The court found that neither the FCA nor the AKS required evidence that a specific AKS violation or kickback "directly influenced" an individual's decision to use that particular provider. *Id.* at 97.

[99] *See id.* at 97 (stating that Congress enacted the FCA to "strengthen whistleblower actions based on medical care kickbacks"); *see also* Dube, *supra* note 5, at 368–69 (noting that Congress specifical-

behind the FCA and AKS, including amendments, has always been to protect federal and state governments and individual Americans from fraud.[100] But-for causation weakens the government's ability to prosecute FCA cases through the AKS.[101] In contrast, a lower causation standard like substantial factor will allow the government to prosecute all legitimate FCA violations, deterring future fraud and protecting consumers.[102] To ensure the government is able to prosecute FCA claims fully, courts should utilize the causal standard set in *Greenfield* requiring a causal link more akin to substantial factor causation.[103]

Conclusion

In 2023, in *United States* ex rel. *Martin v. Hathaway*, the Sixth Circuit held that the "resulting from" language in the AKS requires but-for causation, joining the Eighth Circuit and splitting from the Third Circuit. Each decision weighed the value of plain language and the role of legislative intent, though ultimately disagreed on the outcome. The Third Circuit's approach is correct because its substantial factor causal standard allows for a true plain meaning reading of the language, considers legislative intent, and honors policy considerations. By adhering to the drafters' intentions, this approach lowers the government's burden to fight the battle against healthcare fraud. Instead of defaulting to the judicial understanding of ordinary meaning, other circuits should utilize this case-by-case approach of substantial factor causation when evaluating lower court decisions to better align with original legislative intent.

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ly intended the AKS to prosecute fraud in the healthcare space to protect both the government and vulnerable healthcare consumers).

[100] Dube, *supra* note 5, at 369. After the 2010 ACA amendment that linked the FCA and the AKS together, the government had a stronger way to prosecute AKS violations and specifically take on the aspect of fraud relating to physician kickbacks. *Id.* at 371.

[101] *See Greenfield*, 880 F.3d at 97 (detailing how if but-for causation is required to prosecute an AKS violation through the FCA then the causal requirements for these two statutes would differ and the government would more easily be able to prosecute through the AKS). As the AKS is a criminal statute, the penalties differ, and with the FCA's possibility for treble penalties, the government's potential recovery would be significantly lowered. *See* Larson et al., *supra* note 21, at 1127 (highlighting the issues with different causation standards for these two statutes that are frequently utilized together and noting the discrepancy would significantly reduce the government's potential for recovery without the FCA's treble damages).

[102] *See Greenfield*, 880 F.3d at 97–98 (referencing Congress's notions that because healthcare fraud is complicated it can be challenging to prove and noting that to ensure the government is only reimbursing legitimate medical costs, a looser causal standard would be more appropriate).

[103] *See id.* (demonstrating that substantial factor causation is more appropriate than but-for causation to achieve legislative goals).