No. 17-5826

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA EX REL. MARJORIE PRATHER,
Relator-Appellant,

v.

BROOKDALE SENIOR LIVING COMMUNITIES, INC., et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Tennessee at Nashville
Case No. 3:12-cv-00764 (Hon. Aleta Arthur Trauger)

WASHINGTON LEGAL FOUNDATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING *EN BANC*

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None.

DATE: July 2, 2018

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE*..1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

A. In Considering Whether The Government Might Refuse To Pay A Medicare Claim, The Court Should Consider The Current State Of The Medicare Program..5

B. The Medicare Program Is Facing A Crisis..7

C. Given The State Of The Medicare Program, It Is Not Plausible—Absent Allegations Prather Fails To Provide—That The Government Would Reject The Claims At Issue...........................9

CONCLUSION 12

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES:

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 5, 6

Bell Atlantic Corp. v. Twombly,
550 U.S. 544, 565 (2007) 7

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

REGULATIONS

42 C.F.R. § 424.22(a)(2) 2

OTHER AUTHORITIES:

James C. Capretta, *The Bad News on Entitlements Piles Up*,
AEI, (June 13, 2018) 8

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(Mar. 30, 2017) 8

Robert Holly, *OIG Puts the Pressure on as Hospice Fraud Cases Pile Up*, Home Health Care News (June 24, 2018) 11

Jacqueline LaPointe, *Prices, Administrative Costs Drive Higher US Healthcare Spending*, RevCycle Intelligence (Mar. 14, 2018) 7

Robert E. Moffit, *Medicare Will Be Insolvent by 2026—Can America Fix It in Time?*, The National Interest (June 10, 2018) 7, 8

Kate Rogers, *As the US Population Ages, the Need for Home Health-Care Workers Skyrockets*, CNBC (June 1, 2018) 9

Page(s)

Steffie Woolhandler, Terry Campbell, & David Himmelstein, *Costs of Health Care Administration in the United States and Canada*, 349 N. Engl. J. Med. 768 (2003)..7

INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all fifty states. WLF promotes free enterprise, individual rights, limited government, and the rule of law. In several significant federal cases, WLF has appeared as an *amicus curiae* to argue for a constrained interpretation of the False Claims Act's materiality element. See, e.g., *Univ. Health Servs., Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989 (2016); *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645 (5th Cir. 2017). Only a constrained interpretation—one that reads "material" to mean "material to the government's decision to pay a claim"—adheres to the False Claims Act's words, structure, and history.

The False Claims Act was enacted, long ago, to limit the misbehavior of war profiteers. Equally, however, must we guard against the misbehavior of False Claims Act profiteers. WLF believes that applying the materiality element properly is one of the best ways to ensure that the False Claims Act is used only for its intended purpose—as a curb on those who defraud the United States.

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[*] In accord with Rule 29(a)(4)(E), Federal Rules of Appellate Procedure, WLF affirms that no counsel for a party authored this brief in whole or in part, and that no one, apart from WLF or its counsel, contributed money intended to fund the brief's preparation or submission.

SUMMARY OF ARGUMENT

Majorie Prather worked as an administrative nurse for Brookdale Senior Living, a home-health agency. Acting as a relator for the United States—which declined to join her lawsuit—Prather sued Brookdale and its affiliates under the False Claims Act. Prather alleges that Brookdale defrauded the government by submitting materially false Medicare reimbursement claims.

Prather does not allege that Brookdale submitted claims for care that was not provided. Nor does she allege that it submitted claims for care provided by unqualified individuals. She alleges, rather, that Brookdale violated an indeterminate certification deadline. The pertinent regulation requires a doctor to certify, "at the time [a] plan of care is established or as soon thereafter as possible," that the plan of care is necessary. 42 C.F.R. § 424.22(a)(2). The claims Brookdale submitted included the required certification. Prather alleges merely that Brookdale took too long, between the provision of the home health care and the submission of the claims, to obtain the certification.

The False Claims Act is harsh: it subjects a party that defrauds the government to treble damages and a civil penalty of up to $10,000 per false claim. No surprise therefore that only genuine fraud triggers liability. To be actionable, a misrepresentation "must be material to the Government's payment decision." *Escobar*, 136 S.Ct. at 1996. Not every regulatory infraction meets this standard.

Nor does every failure to complete a task that the government simply *says* is required for payment. "A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment." *Id.* at 2003.

The district court dismissed Prather's complaint. The panel, however, reversed. It concluded that Prather plausibly alleged materiality (1) because the certification timing requirement is meant to prevent Medicare fraud and (2) because some government memoranda say it is "not acceptable" to violate the timing requirement. As Judge McKeague explained in dissent, however, these justifications are illusory. Labeling the timing requirement an antifraud regulation means little, because not every antifraud regulation is "material to the Government's payment decision." *Escobar*, 136 S.Ct. at 1996. The government's memoranda, meanwhile, amount to no more than government "designat[ions]" that "compliance with a particular . . . regulatory . . . requirement" is a "condition of payment." *Id.* at 2003. The government's stressing the importance of regulatory compliance does not, by itself, reveal which regulatory violations will in fact trigger government nonpayment. *Id.* at 2004.

This brief offers further support for the conclusion that, absent additional allegations from Prather, it is not plausible to assume that compliance with the

timing requirement was material to the government's decision to pay Brookdale's claims.

Contrary to the United States' suggestion before the panel (see Dkt 18 at CM/ECF p. 26), the dispositive question, for the element of materiality, is whether a fact if disclosed would affect the government's decision to pay a claim. *Escobar*, 136 S.Ct. at 1996, 2001. If the government would, had it known the undisclosed fact, still have paid the claim, then Congress likely does not want the claimant subject to treble damages and penalties under the False Claims Act. After all, if the government pays for widgets in spite of a widget maker's regulatory infraction, the government must really need the widgets. The government's need for the widgets is defeated if relators may burden and bankrupt widget makers.

At the heart of this case is the nation's Medicare program. Absent drastic action, that program will in the coming years go bankrupt in two ways—gradually and then suddenly. Meanwhile, the hypertrophic growth of healthcare administration continues unchecked. Ever-lower Medicare reimbursements and ever-higher administrative costs will make caring for the nation's fast-growing senior population an increasingly unappealing economic proposition. We should not lightly assume that the government would go out of its way to make this crisis worse than it already is. The government literally cannot afford to regulate legitimate home healthcare providers into the dust.

This brief contains three parts. First, it confirms that the Court should, in an appeal from a motion to dismiss, consider the state of the Medicare program. Second, it discusses the growing Medicare crisis. Finally, it explains why, given the state of the Medicare program, it is implausible to assume that the government, even if armed with full knowledge of any timing defect, would have declined to pay Brookdale's claims.

Prather has failed to allege facts that, if true, plausibly establish materiality. The full Court should rehear the case and reject the panel's contrary conclusion.

ARGUMENT

A. In Considering Whether The Government Might Refuse To Pay A Medicare Claim, The Court Should Consider The Current State Of The Medicare Program.

A party opposing a motion to dismiss often says that a court may not consider material "outside the pleadings," as if that rule is absolute. It is not. A court may consider real-world context as part of its assessment of whether the pleadings' allegations are plausible.

A look back at *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), illustrates the point. In the wake of the September 11 terrorist attacks, Iqbal was arrested and detained by federal agents. After his release, he sued several federal officials, including former Attorney General John Ashcroft and former FBI Director Robert Mueller.

Iqbal accused Ashcroft and Mueller of conspiring to have Iqbal abused because of his Muslim faith.

Iqbal holds that the district court should have granted a motion to dismiss. In doing so, *Iqbal* considers information "outside the pleadings." It discusses the findings of a Justice Department report on the government's investigation of the September 11 attacks. 556 U.S. at 667. And, after noting that the September 11 attacks "were perpetrated by 19 Arab Muslim hijackers," it says: "It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims." *Id.* at 682. "As between" this "alternative explanation for the arrests" and the "invidious discrimination" Iqbal asked the Court to infer, discrimination, the Court decided, was "not a plausible conclusion." *Id.*

Iqbal uses the context of the September 11 attacks as part of its inquiry into the plausibility of Iqbal's allegation that the government abused him out of religious animus. Likewise, this Court should consider the context of the Medicare crisis as part of its inquiry into the plausibility of Prather's allegation that the government, if fully informed, would not have paid Brookdale's claims. Such context is part of the "experience and common sense" upon which a court is to draw in assessing the plausibility of a complaint's allegations. *Id.* at 679; see also

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 565 (2007) (directing courts to consider the plausibility of the allegations in an antitrust complaint "in light of common economic experience").

B. The Medicare Program Is Facing A Crisis.

Complying with the Medicare program's certification timing regulation is an administrative cost. Administrative costs have become an American health hazard. Between 1969 and 1999, administrators grew from 18.2 percent to 27.3 percent of the American healthcare labor force. Steffie Woolhandler, Terry Campbell, & David Himmelstein, *Costs of Health Care Administration in the United States and Canada*, 349 N. Engl. J. Med. 768 (2003). The United States spends far more on healthcare administration than any other developed country. Jacqueline LaPointe, *Prices, Administrative Costs Drive Higher US Healthcare Spending*, RevCycle Intelligence, https://perma.cc/CS4F-NQPC (Mar. 14, 2018). These administrative costs are a major reason why, compared to other developed nations, the United States spends about twice as much on roughly the same amount and quality of health care. *Id.*

The nation's inability to control costs is imperiling the entire Medicare program. Last year the nation spent $708 billion on Medicare. Robert E. Moffit, *Medicare Will Be Insolvent by 2026—Can America Fix It in Time?*, The National Interest, https://perma.cc/YD9Z-X3UL (June 10, 2018). The Congressional Budget

Office expects that total to double, to around $1.4 trillion, by 2027. *Id.* Medicare spending is projected to grow from 3.7 percent of GDP today to around 6 percent by 2042. *Id.* "Medicare's overall unfunded liability over 75 years is more than $37 trillion." James C. Capretta, *The Bad News on Entitlements Piles Up*, AEI, https://www.aei.org/publication/the-bad-news-on-entitlements-piles-up/ (June 13, 2018). The hole is probably even deeper than that. Our pay-as-you-go entitlement regime relies on future Americans to pay our medical bills, yet the government's projections do not account for the fact that the nation's fertility rate has dropped to 1.76—far below replacement. *Id.*

Mandatory-spending programs such as Medicare are the major driver of our national debt. "If current laws generally remain unchanged," the CBO writes, this debt will grow "sharply" over the next three decades, reaching 150 percent of GDP by 2047. Congressional Budget Office, *The 2017 Long-Term Budget Outlook*, https://www. cbo.gov/publication/52480 (Mar. 30, 2017).

It gets worse. The dire figures above *assume* major Medicare cost cuts! Hundreds of billions of dollars' worth of reimbursement reductions are scheduled for hospitals, nursing homes, and home-healthcare providers. Moffit, *supra*. The Medicare trustees "warn that these low payment rates could lead to facility closures and harm access to care for the elderly." Capretta, *supra*. The cuts will come just as the decline of the Baby Boomers generates immense new demand for

quality home health care. See, e.g., Kate Rogers, *As the US Population Ages, the Need for Home Health-Care Workers Skyrockets*, CNBC, https://perma.cc/2FY2-RYS9 (June 1, 2018).

C. Given The State Of The Medicare Program, It Is Not Plausible—Absent Allegations Prather Fails To Provide—That The Government Would Reject The Claims At Issue.

As Judge McKeague noted in his panel dissent, Prather does not allege that the claims at issue were unsigned, backdated, or otherwise falsified. (Dkt 31-2 at 24.) She alleges merely that Brookdale submitted claims containing physician signatures that should have been obtained earlier.

"The fundamental question here," Judge McKeague observed, "is whether the government agents on the ground would have acted differently if they knew of the omitted fact"—that is, the delay in obtaining the physician signatures. (Dkt 31-2 at 26.) How the "agents on the ground" would have acted depends on circumstance. And as we have just seen, the circumstances here are dire. The administrative cost of providing home health care is high and rising. The reimbursements paid by Medicare are low and, given the state of the national debt, likely to drop. If the cost of a service rises while the reimbursement for the service drops, less of the service will be supplied.

In this context, it is not plausible, absent additional allegations, that the government would refuse to pay Brookdale's claims. The nation needs more, not

less, home health care provided at Medicare's reimbursement rates. It would be folly, therefore, to withhold payment from a home-healthcare provider because of the regulatory infractions that are inevitable as the provider tries to comply with the developed world's most demanding healthcare administrative regime. Insisting on paying a provider, not fair value for service rendered, but less-than-fair value for service rendered plus perfect administrative compliance, would reduce the amount of health care Americans receive. Bearing the massive cost of perfect administrative compliance, while bearing the risk of not getting paid *at all* in the event of a slip up, is simply not a winning business model.

"The False Claims Act is not . . . a vehicle for punishing garden-variety . . . regulatory violations." *Escobar*, 136 S.Ct. at 2003. Its origin reflects this. It was passed in reaction to contractors who, during the Civil War, caused the United States to be "billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *Id.* at 1996. Accordingly, the statute imposes "treble damages plus civil penalties of up to $10,000 per false claim." *Id.* The strictness of this punishment confirms that the False Claims Act is meant to punish conduct equivalent to robbing the government in a fashion that saps its ability to fight a war.

Imagine that, during a war, someone sues an ammunition manufacturer under the False Claims Act, not because it sold fake bullets or no bullets, but

because it obtained an arms inspector's certification later than a regulation says it should have. It would be absurd for the government to hobble its war effort by refusing to pay the ammunition manufacturer for the functional bullets. The present situation is similar. The Medicare crisis is not on a par with the Civil War—but it *is* a crisis. It would be absurd for the government to hobble its Medicare program by refusing to pay a healthcare provider for functional home health care.

Medicare faces a growing threat from real fraudsters—providers that charge for patients ineligible for care, that mischaracterize the care they provide, that pay kickbacks for referrals, and so on. See, e.g., Robert Holly, *OIG Puts the Pressure on as Hospice Fraud Cases Pile Up*, Home Health Care News, https://perma.cc/V2EQ-3B6D (June 24, 2018). These are the people doing the equivalent of selling the government fake bullets. They are the False Claims Act's proper focus. The perpetrators of the "paperwork backlog" (Dkt 31-2 at 39) at issue in this case are not.

CONCLUSION

The Court should grant the petition for rehearing *en banc*.

Dated: July 2, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure, I certify that this brief complies with the type-volume limit of Rules 32(a)(7)(B) and 29(b)(4).

1. In accord with Rules 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft Word 2010.

2. Excluding the exempted portions of the brief, as provided in Rule 32(a)(7)(B) and Sixth Circuit Rule 32(b)(1), the brief contains 2,403 words. As permitted by Rule 32(a)(7)(C), I have relied on the word count feature of Microsoft Word 2010 in preparing this certificate.

Dated: July 2, 2018

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CERTIFICATE OF SERVICE

I certify that on this 2nd day of July, 2018, I electronically filed the foregoing Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Defendants-Appellees' Petition for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case will be served by the appellate CM/ECF system.

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