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Civil Law—Circuit Split: Eighth Circuit’s Superior Causation Standard for Anti-Kickback Violations Under the False Claims Act—United States ex rel. Cairns v. D.S. Med. LLC., 42 F.4th 828 (8th Cir. 2022)

Lauren Flynn
Suffolk University

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**CIVIL LAW—CIRCUIT SPLIT: EIGHTH
CIRCUIT’S SUPERIOR CAUSATION STANDARD
FOR ANTI-KICKBACK VIOLATIONS UNDER THE
FALSE CLAIMS ACT—*UNITED STATES EX REL.
CAIRNS V. D.S. MED. LLC.*, 42 F.4TH 828 (8TH CIR.
2022).**

Lauren Flynn

The False Claims Act (“FCA”) imposes liability onto any person who knowingly presents, causes to be presented, or conspires to present a false or fraudulent claim for payment or approval to the United States government, and contains *qui tam* provisions which allow private citizens to sue any violator on the government’s behalf.¹ Similarly, the Anti-Kickback

¹ See 31 U.S.C. § 3729(a)(1)(A) (providing “any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” is liable under FCA). The FCA authorizes the government to bring a civil action against anyone who violates the statute and allows a private party (a “relator”) to bring a *qui tam* action “for the person and for the United States [g]overnment . . . in the name of the [g]overnment.” *Id.* § 3730(b)(1); *see also* Borzilleri v. Bayer Healthcare Pharms., Inc., 24 F.4th 32, 36 (1st Cir. 2022) (explaining when someone may bring FCA actions). *Qui tam* actions, which originated in thirteenth-century England, permit private individuals to sue on behalf of the United States to recover money that was obtained fraudulently by a person or corporation. *See* Charles Doyle, *Qui Tam: The False Claims Act and Related Federal Statutes*, CONG. RSCH. SERV. (April 26, 2021), [<https://perma.cc/PZS7-EKUT>]; *see also* *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932 (2009) (defining *qui tam* suit as private enforcement action under FCA). The phrase “*qui tam*” is an abbreviation for “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,” which means, “he who prosecutes for himself as well as for the King.” *See* Doyle *supra* note 1, at 1. The *qui tam* provision of the FCA provides relators incentives to supplement government enforcement of the statute. *See* *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). The language of the statute provides the relator “an interest in the lawsuit, and not merely the right to retain a fee out of the recovery.” *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). To state an FCA *qui tam* claim, a relator must allege: “(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due.” *See* *United States v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006). Upon bringing the action, the relator must provide the government a copy of the complaint and “written disclosure of substantially all material evidence and information” they possess. *See* CRIMINAL RESOURCE MANUAL § 932. PROVISIONS FOR THE HANDLING OF QUI TAM SUITS FILED UNDER THE FALSE CLAIMS ACT, U.S. DEP’T OF JUST., [<https://perma.cc/3D9H-ELYJ>] (last updated January 21, 2020) (detailing procedure of bringing *qui tam* suit); *see also* § 3730(b)(2) (explaining government may elect to intervene in suit). The complaint must be filed under seal for at least sixty days, unless the government has good cause for an extension, and it may not be served on the defendant until ordered by the court. *See* *Borzilleri*,

Statute (“AKS”) is a criminal law “prohibit[ing] the knowing and willful payment of ‘remuneration’ to induce or reward patient referrals or the generation of business involving any item or service” reimbursable by federal healthcare programs.² In 2010, Congress amended the AKS to state that, “a

24 F.4th at 36 (referring to §§ 3730(b)(2), (3)); *see also* § 3730(b)(2) (describing seal requirements); § 3730(b)(3) (noting government may move for extensions when good cause is shown). Before a complaint is unsealed, the government can: (1) intervene and proceed with the action, or (2) notify the court it declines to “take over the action.” *See Borzilleri*, 24 F.4th at 36. If the government pursues the former option, it will have “the primary responsibility for prosecuting” the action, and the relator will have “the right to continue as a party to the action.” *See id.* If the government pursues the latter option, the relator will “have the right to conduct the action” if he so chooses. *See id.* (allowing relator to continue suit without government). Despite this, the government may still “intervene at a later date upon showing of good cause” even if it initially decides not to proceed with the action. *See* § 3730(c)(3). Additionally, the relator is entitled to a hearing prior to the government’s voluntary dismissal of the action if there is disagreement between the relator and the government about whether, or when, to proceed with an FCA suit. *See id.* (detailing relator’s due process rights); *see also* § 3730(c)(2)(A) (laying out how government may dismiss *qui tam* action despite whistleblower objections); § 3730(a) (outlining responsibilities of Attorney General in action). If an FCA action succeeds, relators are entitled to share in the proceeds of up to thirty percent: twenty five percent to thirty percent if the government did not intervene in the litigation, and fifteen percent to twenty five percent if the government did intervene in the litigation. *See Doyle, supra* note 1, at 28 (listing share of damages to which relators are entitled).

² *See* 42 U.S.C. §§ 1320a-7b(b)(2) (illustrating AKS statute); *see also Fraud and Abuse Laws*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF INSPECTOR GENERAL, [https://perma.cc/8FXV-QKY4] (last visited Nov. 10, 2023) (explaining AKS statute). To state an AKS violation, the plaintiff must plead that the defendant (1) “knowingly and willfully,” (2) offered or paid remuneration, (3) “to induce” the purchase or ordering of products or items for which payment may be made under a federal healthcare program. *See* §§ 1320a-7b(b)(2)(B) (noting plaintiff’s requirements to state claim). The term “remuneration” has been broadly defined by courts to mean “anything of value.” *See United States v. Abbott Lab’s, Inc.*, 622 F. Supp. 3d 920, 930 (S.D. Cal. 2022); *see also United States v. Chang*, No. CIV. 13-3772, 2017 U.S. Dist. LEXIS 226194, at *7 (C.D. Cal. July 25, 2017) (defining “remuneration”). Specifically, the AKS states:

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$100,000 or imprisoned for not more than 10 years, or both.

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

(A) 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, or

claim that includes items or services resulting from a violation of [the AKS] constitutes a false or fraudulent claim for purposes of [the FCA],” and in the Eighth Circuit’s case of first impression, *United States ex rel. Cairns v. D.S. Med. LLC*,³ the court considered the amendment’s causation requirement to determine whether AKS violations are false or fraudulent under the FCA.⁴ Creating a circuit split on the issue, the Eighth Circuit held that “resulting from” in the 2010 AKS amendment is “unambiguously causal” and requires but-for causation analysis.⁵ This decision, although strict, provides unambiguous guidance to courts regarding the correct causation standard to implement for FCA-based AKS claims.⁶

Missouri neurosurgeon Dr. Sonjay Fonn created and controlled a single-member limited liability company in Missouri called Midwest Neurosurgeons, LLC (“MWN”).⁷ MWN submitted claims to Medicare and Medicaid for medical services performed by Dr. Fonn while his fiancée, Deborah Seeger, owned and controlled DS Medical, LLC (“DSM”), a medical device distributorship.⁸ Dr. Fonn ordered spinal implants from DSM to treat degenerative disc-disease patients at his practice.⁹

DSM earned commission from manufacturers for every sale and, in one year, received more than one million dollars in commissions from a single implant manufacturer.¹⁰ Following this lucrative year, Dr. Fonn received a chance to buy stock from that same manufacturer, and after purchasing the

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$100,000 or imprisoned for not more than 10 years, or both.

42 U.S.C. §§ 1320a-7b(b).

³ 42 F.4th 828 (8th Cir. 2022).

⁴ See §§ 1320a-7b(b), (g) (describing 2010 AKS amendment); see also *Cairns*, 42 F.4th at 831 (explaining court needs to determine what phrase “resulting from” means).

⁵ *Cairns*, 42 F.4th at 836 (noting phrase “resulting from” is “unambiguously causal”).

⁶ See *id.* (concluding narrow ruling provides standard of proof to establish falsity or fraud through 2010 amendment).

⁷ *United States ex rel. Cairns v. D.S. Med., LLC*, No. CIV. 1:12-00004, 2017 U.S. Dist. LEXIS 140628, at *2 (E.D. Mo. Aug. 31, 2017) (describing Dr. Fonn’s limited liability company).

⁸ See *id.* (describing Seeger’s company).

⁹ See *Cairns*, 42 F.4th at 831 (explaining defendant purchased implants for his practice distributed by company his fiancée owned). As a neurosurgeon, Dr. Fonn treats degenerative-disc diseases and other spinal disorders using spinal implants. *Id.* These implants are used to stabilize the spine and are made by a variety of manufacturers. *Id.* Implant distributors receive substantial commission with each implant sale. *Id.*

¹⁰ See *id.* (stating Seeger made \$1.3 million in commissions from single manufacturer). While Dr. Fonn was Seeger’s only large customer, the arrangement was extremely profitable. *Id.*

stock, he ordered more implants.¹¹ Physicians in other practices became aware of Dr. Fonn's financial relationship with Seeger as well as his high implant use.¹² The physicians filed complaints against Dr. Fonn, Midwest Neurosurgeons, Seeger, and DS Medical, while the United States also filed its own complaint.¹³

The complaint included five claims: three arose under the False Claims Act alleging "the couple and their businesses submitted false or fraudulent Medicare and Medicaid claims after violating the [AKS]" and the other two alleged unjust enrichment and payment under a mistake of fact.¹⁴ For the first three FCA claims, the district court instructed the jury that "the government could establish falsity or fraud once it proved, by a preponderance of the evidence, 'that the [Medicare or Medicaid] claim failed to disclose the [AKS] violation.'"¹⁵ Adhering to these instructions, the jury found for the government on two of the three claims, and the district court awarded treble damages and statutory penalties.¹⁶ After the verdict, the government's

¹¹ See *id.* (recognizing Dr. Fonn's offer to purchase stock and later purchase of additional implants).

¹² See *id.* (highlighting physicians grew suspicious of Dr. Fonn's implant use and financial relationship with Seeger).

¹³ See *id.* (noting complaints were filed against Dr. Fonn, Midwest Neurosurgeons, Seeger, and DS Medical); see also 31 U.S.C. § 3730(a), (b)(2), (b)(4) (articulating government may intervene and conduct litigation in FCA suits). The government alleged liability under the 2010 AKS amendment that provided submitting a claim to the government that "includes items or services resulting from a violation of [the AKS] constitutes a false or fraudulent claim for purposes of" the FCA. *Cairns*, 42 F.4th at 833.

¹⁴ See *Cairns*, 42 F.4th at 831 (summarizing complaint's five claims). The three that arose under the FCA alleged the couple and their businesses submitted false or fraudulent Medicare and Medicaid claims after violating the AKS. *Id.* Specifically, the three claims were:

- (1) Seeger and D.S. Medical gave kickbacks to Fonn and Midwest in exchange for Fonn and Midwest arranging the purchase of spinal implants (used by Fonn in his surgeries) through D.S. Medical;
- (2) all four Defendants solicited or received kickbacks from two implant manufacturers in exchange for arranging the purchase of the manufacturers' products, with respect to 53 claims for reimbursement; and
- (3) all four Defendants conspired to violate the FCA by entering into an agreement that involved Defendants soliciting or receiving kickbacks from six implant manufacturers . . . in exchange for arranging the purchase of those companies' products, with respect to 223 claims for reimbursement.

See *United States ex rel. Cairns*, No. CIV. 1:12-00004, 2020 U.S. Dist. LEXIS 223063, at *3-4 (E.D. Mo. Nov. 30, 2020).

¹⁵ See *Cairns*, 42 F.4th at 831 (recounting district court's jury instructions).

¹⁶ See *id.* at 832 (noting district court awarded government \$5,495,931.22 in treble damages and statutory penalties); see also 15 U.S.C.S. § 15 (LexisNexis, Lexis Advance through PL 118-21, approved 11/13/23) (articulating purposes and uses of treble damages). In the United States, treble damages indicate that a statute permits a court to award up to three times the amount of the

successful motion to dismiss the two remaining claims without prejudice led the defendants to appeal, emphasizing the district court's failure to instruct the jury on causation.¹⁷ The Eighth Circuit agreed with the defendants, noting the "resulting from" language of the 2010 AKS amendment required an instruction on actual or but-for causation.¹⁸ Thus, the Eighth Circuit reversed and remanded the cases for further proceedings.¹⁹

In 1863, Congress enacted the False Claims Act ("FCA") due to concerns that Union Army suppliers defrauded the government during the American Civil War.²⁰ In the early 1940s, individuals filed FCA actions based on information revealed in criminal indictments rather than on their own independent knowledge, which led to the 1943 amendments denying jurisdiction over FCA actions filed "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."²¹ In 1986, Congress amended the FCA to not only incentivize private citizens to file lawsuits and prosecute false claims, but also to increase the federal government's discretion in

plaintiff's actual or compensatory damages. Adam Hayes, *Treble Damages: What it is, How it Works, Examples*, INVESTOPEDIA (April 27, 2022), [<https://perma.cc/D2ZB-UDV4>].

¹⁷ See *Cairns*, 42 F.4th at 832-33 (demonstrating government's successful motion to dismiss and defendants' consequential appeal); see also FED. R. CIV. P. 41(a)(2) (providing rules for dismissal of voluntary actions by court order). The government moved to dismiss "on the ground that any recovery would 'be smaller and duplicative of what the [c]ourt ha[d] already awarded.'" *Cairns*, 42 F.4th at 832. Initially, the district court "inadvertently failed to rule on the government's motion" before the defendant's appeal so the Eighth Circuit remanded. *Id.* On remand, the government's motion to dismiss was subsequently granted, leading the defendants to appeal again. *Id.*

¹⁸ See *Cairns*, 42 F.4th at 834 (describing Supreme Court's interpretation of phrase "results from" in Controlled Substances Act). The Eighth Circuit noted the plain language of the 2010 AKS amendments is "unambiguously causal" because it included "resulting from." *Id.* at 836. The Eighth Circuit clarified its holding does not suggest that every case arising under the FCA requires a showing of but-for causation, but rather, only those cases seeking to establish falsity or fraud through the AKS 2010 amendment. *Id.*

¹⁹ See *id.* at 837 (reversing judgment of district court and remanding for further proceedings).

²⁰ See *The False Claims Act*, U.S. DEP'T OF JUST. (April 4, 2023), [<https://perma.cc/Q4FJ-GVR2>] (describing history and general provisions of FCA); see also *A Guide to the Federal False Claims Act*, WHISTLEBLOWER LAW COLLABORATIVE, [<https://perma.cc/UC4B-88MH>] (last visited Aug. 25, 2023) (providing comprehensive information about FCA).

²¹ See 155 CONG. REC. E1295-96 (daily ed. Jun. 3, 2009) (statement of Rep. Berman) (detailing 1943 amendments). In some cases, relators would base their *qui tam* suits on criminal indictments already filed by the federal government due to monetary incentives, thus interfering with the government's mandate to handle criminal and civil actions. See Francis E. Purcell Jr., *Qui Tam Suits Under the False Claims Amendment Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U. L. REV. 935, 935-36 (1993) (explaining motivations behind 1986 FCA amendments). Between 1943 and 1986, the FCA required courts to dismiss any action in which the government had information that the relator used at the time the suit was filed. See *id.* at 950. This prevented many potential *qui tam* relators from filing suit, resulting in reduced actions from qualified relators. See *id.*

handling a relator's *qui tam* claims.²² Additionally, the 1986 amendments imposed an "original source" requirement for *qui tam* suits mandating that the relator have "direct and independent knowledge" of the information underlying the allegations and must willingly disclose this information to the government prior to initiating a suit.²³ The Fraud Enforcement and Recovery Act of 2009 reinforced the 1986 amendments by modifying areas where judicial developments required clarification.²⁴ In 2010, the Affordable Care Act eased the "original source" requirements under the FCA, allowing a relator's allegations to be based on secondhand information as long as they "add to the information already contained in the public sphere."²⁵

Congress initially enacted the AKS in 1972 through the Social Security Amendments to combat fraud and abuse within the Medicare and Medicaid programs.²⁶ It designed the AKS to eliminate kickbacks in healthcare by prohibiting "the use of financial incentives intended to direct patient referrals to particular health care providers and away from other

²² See Benjamin McCoy and Zac Arbitman, *Blowing the Whistle: A Primer on the False Claims Act*, THE TEMPLE 10-Q (2019), [<https://perma.cc/Y5N7-XEGN>] (noting 1986 amendments incentivized whistleblowers to file lawsuits). The government determined that its efforts to combat fraud were not sufficient to contain the increasing amount of fraud. See Purcell Jr., *supra* note 21, at 943-44 (describing why amendments to FCA were necessary). The 1986 amendment allowed the government to seek treble damages and revised the statute's *qui tam* provisions to incentivize whistleblowers to pursue fraud suits. See *Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986*, U.S. DEP'T OF JUST., OFF. OF PUB. AFFS. (Jan. 31, 2012), [<https://perma.cc/GWP5-R5BX>] (detailing 1986 amendments to damages and incentives for private citizens to pursue FCA actions); see also Purcell Jr., *supra* note 21, at 949-50 (explaining 1986 FCA amendments relaxed restrictions on *qui tam* jurisdiction).

²³ See Purcell Jr., *supra* note 21, at n.121, 950 (allowing only individuals with "original source" information to bring *qui tam* actions). The FCA initially defined an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the [g]overnment before filing an action." See Patrick Linehan, et al., *The Original Source Exception*, BL 2 (Apr. 2021), [<https://perma.cc/5DEE-TLJR>] (providing 1986 amendment definition of "original source"); see also *Fraud Statistics – Overview*, U.S. DEP'T OF JUST. (Feb. 1, 2022), [<https://perma.cc/T8MT-RW5V>] (displaying all FCA actions filed between 1987 and 2021) [hereinafter *FCA Fraud Statistics 1987-2021*].

²⁴ See Doyle, *supra* note 1, at 9 (outlining modifications from 2009 amendments).

²⁵ See Stephen G. Sozio and Rachael A. Ream, *Amendments to the False Claims Act Expand Exposure to the Health Care Industry*, CLEVELAND METRO. BAR ASS'N (2013) (defining "original source" per 2010 ACA amendments to FCA).

²⁶ See ERIC D. FADER, ET AL., THE FEDERAL ANTI-KICKBACK STATUTE AND SAFE HARBORS 4 (A.B.A. Book Publ'g 2020) (explaining history of AKS). Due to a rise in healthcare fraud and abuse activities, the AKS was amended in 1977 to classify violations as felonies and expand the statute's reach to cover "any remuneration (including any kickback, bribe, or rebate), directly or indirectly, overtly, or covertly, in cash or kind." See *id.* at 5. In 1997, amendments expanded AKS applicability to all healthcare programs that receive federal funding, not just Medicare and Medicaid. See *id.*

providers rendering the same type of care.”²⁷ The AKS stipulates that anyone who “knowingly and willfully” provides, requests, or receives “any remuneration” in exchange for “items or services” eligible for payment under a federal health care program is subject to felony charges.²⁸ Prior to 2010, it was common for plaintiffs to assert FCA-based AKS violations under a material-falsity theory whereby liability could be proven under the FCA by showing an AKS violation played a substantial role in the government’s payment of a claim.²⁹ Congress’s 2010 AKS amendment eliminated the requirement “to plead that compliance with the AKS was material to the government’s decision to pay any specific claims in an FCA case.”³⁰

While the 2010 amendment notes that a claim “resulting from” an AKS violation is a false claim for purposes of the FCA, federal circuits are split on how to interpret “resulting from.”³¹ The Third Circuit held that to

²⁷ See Fader, *supra* note 26, at 5 (explaining purpose of enacting AKS). The United States Department of Health and Human Services, Office of Inspector General works together with the United States Department of Justice to enforce the AKS and has found that violating the AKS increases risks associated with “overutilization, increased program costs, corruption of medical decision-making, patient steering and unfair competition.” See *id.*

²⁸ See 42 U.S.C. §§ 1320a-7b(b)(1)-(2) (detailing who can be found guilty under AKS). The AKS typically does not require proof of a quid pro quo, or that any payment or referral was made. See *United States ex rel. Gough v. Eastwestproto, Inc.*, No. CIV. 14-465, 2018 U.S. Dist. LEXIS 224953, at *15 (C.D. Cal. Oct. 24, 2018) (indicating AKS alone does not require proof of quid pro quo). However, when there is an FCA-based AKS violation, the claimant must establish a connection between the alleged kickback scheme and actual false claims submitted to the government. See *id.*

²⁹ See *United States ex rel. Fesenmaier v. Cameron-Ehlen Grp.*, No. Civ. 13-3003, 2023 U.S. Dist. LEXIS 788, at *3-4 (D. Minn. Jan. 4, 2023) (noting pre-2010 FCA-based AKS violations were brought under material-falsity theory). Under a material-falsity theory, FCA claims premised on AKS violations are “false or fraudulent because they seek payment for services that are not payable by Medicare because they violate a material condition of reimbursement.” See *id.*; see also *McNutt ex rel. United States v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1260 (11th Cir. 2005) (allowing FCA-based AKS violation claims because AKS compliance is necessary for reimbursement under Medicare); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 565 F. Supp. 2d 153, 159 (D.D.C. 2008) (noting AKS violations may be pursued under FCA because they influence “the Government’s decision of whether to reimburse Medicare claims”). To prevail on an FCA claim under this theory, the plaintiff “must show that the alleged AKS violation was material to the government’s treatment of defendants’ Medicare claims.” See *United States ex rel. Bidani v. Lewis*, 264 F. Supp. 2d 612, 614 (N.D. Ill. 2003) (describing some requirements for FCA claim).

³⁰ See *Fesenmaier*, 2023 U.S. Dist. LEXIS 788, at *4 (describing requirement removed by 2010 AKS amendment); see also 42 U.S.C. §§ 1320a-7b(g) (2010 Amendment) (outlining 2010 AKS amendment); 155 CONG. REC. S10852, S10853-54 (daily ed. Oct. 28, 2009) (statement of Sen. Kaufman) (acknowledging changes made by 2010 AKS amendment); *Guilfoile v. Shields*, 913 F.3d 178, 190 (1st Cir. 2019) (recognizing 2010 AKS amendment removed need for plaintiffs to plead materiality).

³¹ See 42 U.S.C. §§ 1320a-7b(b), (g) (establishing when AKS violations are false claims under FCA).

succeed in an FCA-based AKS violation suit, the relator “must establish a connection between the alleged kickback scheme and actual false claims submitted to the government.”³² While the court noted that under a plain language interpretation “resulting from” requires direct causation, it chose to define the term based on the legislative intent of the 2010 AKS amendment: “to avert ‘legal challenges that sometimes defeat legitimate enforcement efforts.’”³³ This directly contrasts with the Eighth Circuit’s interpretation of “resulting from” which requires a showing of but-for causation to establish falsity or fraud through the 2010 amendment.³⁴ Following suit, the Sixth

³² See *United States ex rel. Greenfield v. Medco Health Sol., Inc.*, 880 F.3d 89, 100 (3d Cir. 2018) (holding “there must be some connection between a kickback and a subsequent reimbursement claim”).

³³ See *id.* at 96 (indicating Congressional Record enacted 2010 amendment “to avert ‘legal challenges that sometimes defeat legitimate enforcement efforts’” (quoting 155 CONG. REC. at S10853 (2009))); see also B. Scott McBride, et. al., *Eighth Circuit Decision on Anti-Kickback Statute Offers False Claims Act Defendants Additional Tool in Their Arsenal*, MORGAN LEWIS (August 9, 2022), [https://perma.cc/Z8T7-QGDM] (noting Eighth Circuit’s emphasis on legislative intent of 2010 amendment). But see *United States v. R.L.C.*, 503 U.S. 291, 308 (1992) (Scalia, J., concurring) (noting that “even [where] the statutory language . . . [is] ambiguous, longstanding principles of lenity . . . preclude our resolution of the ambiguity against [the criminal defendant] on the basis of general declarations of policy in the statute and legislative history.” (quoting *Hughey v. United States*, 495 U.S. 411, 422 (1990))); *King v. Burwell*, 576 U.S. 473, 497-98 (2015) (“Reliance on context and structure in statutory interpretation is a ‘subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.’” (quoting *Palmer v. Mass.*, 308 U.S. 79, 83 (1939))); *Russello v. United States*, 464 U.S. 16, 23 (1983) (noting “it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))). According to the Third Circuit, reading “resulting from” to require direct causation would frustrate legislative intent because Congress intended the amendment to expand enforcement. See *Greenfield*, 880 F.3d at 96; see also 155 CONG. REC. at S10853 (2009) (illustrating congressional intent was to prevent legal dispute that could hinder valid enforcement initiatives). *Greenfield* explains that the FCA’s legislative history supports this interpretation referencing Congress’s statement that “[the FCA] is intended to reach *all* fraudulent attempts to cause the Government to pay ou[t] sums of money or to deliver property or services,” and “[a] false claim for reimbursement under Medicare, Medicaid, or similar program . . . may be false even though the services are provided as claimed.” *Id.* (quoting S. REP. NO. 99-345, at 9 (1986)). Therefore, the *Greenfield* court concluded that Congress intended both statutes to “reach a broad swath of ‘fraud and abuse’ in the federal healthcare system.” *Id.* (quoting H. R. REP. NO. 95-393 at 47 (1977)). The court explained the plaintiff must simply demonstrate that at least one of the defendant’s claims sought reimbursement for medical care that was provided in violation of the AKS. See *id.* at 98.

³⁴ See *United States ex rel. Cairns v. D.S. Med. LLC.*, 42 F.4th 828, 836 (8th Cir. 2022) (noting plaintiffs “must prove that a defendant would not have included particular ‘items or services’ but for the illegal kickbacks”); see also *Litigation Quarterly Advisor*, BRACH EICHLER LLC 1 (Fall 2022), [https://perma.cc/Z96C-PCZP] (summarizing Eighth Circuit’s decision in *Cairns*). The Eighth Circuit’s interpretation of “resulting from” narrows the types of kickback cases that may result in false claims. See *Litigation Quarterly Advisor*, *supra*, at 1; see also David Glaser, *Is the False Claims Act Heading to the Supreme Court?*, MEDLEARN PUBLISHING (Aug. 3, 2022), [https://perma.cc/B5ES-ZASP] (describing potential types of kickbacks that may result in false

Circuit adopted the *Cairns* approach and required but-for causation in a claim brought under the 2010 amendment.³⁵ Apart from the Third, Sixth, and Eighth Circuits, no other circuit court has defined “resulting from,” however, district courts in the Fourth and Ninth Circuits have expressly rejected the Eighth Circuit’s approach in interpreting the 2010 amendment.³⁶

claims). “When a statute is unambiguous, interpretation both begins and ends with the text.” *Cairns*, 42 F.4th at 834 (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (U.S. 2019)). Since there is no statutory definition of “resulting from” available, the court “turn[s] to the phrase’s plain meaning at the time of enactment.” *Id.* at 834 (quoting *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (U.S. 2020)); *see also* *Scheidler v. NOW, Inc.*, 537 U.S. 393, 402 (2003) (“Absent contrary direction from Congress, we begin our interpretation of statutory language with the general presumption that a statutory term has its common-law meaning.”). The Eighth Circuit followed the Supreme Court’s interpretation of the nearly identical phrase, “results from,” in the Controlled Substances Act to require but-for causation. *See Cairns*, 42 F.4th at 834; *see also* *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (U.S. 2020) (presuming causation standards are “but for” unless specified otherwise in statute). The Eighth Circuit attached minimal importance to the government’s argument about Congress’s intent in enacting the 2010 amendment, emphasizing that a court’s duty is to “‘interpret laws,’ not ‘reconstruct legislators’ intentions.” *See Cairns*, 42 F.4th at 836 (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring); *see also* Scott Stein, et al., *Eighth Circuit Holds that AKS Violations Do Not “Taint” All Claims*, SIDLEY (Aug. 1, 2022), [<https://perma.cc/4LDF-YMYX>] (explaining why Eighth Circuit “soundly rejected” government’s position in *Cairns*). The Eighth Circuit’s strict ruling is narrow and does not suggest that every FCA case requires a showing of but-for causation, but rather requires but-for causation only for suits arising out of the 2010 amendment. *See* *United States ex rel. Huesman v. Prof’l Compounding Ctrs. Of Am., Inc.*, No. CIV. 14-00212, 2023 U.S. Dist. LEXIS 52467, at *29 n.4 (W.D. Tex. Mar. 27, 2023) (describing scope of Eighth Circuit’s decision).

³⁵ *See* *United States ex rel. Martin v. Hathaway*, 63 F.4th 1043, 1054 (6th Cir. 2023) (rejecting Third Circuit’s approach of relying on legislative history to construe 2010 amendment). The Sixth Circuit’s interpretation of a statute with criminal applications rejected the government’s reliance on legislative history because “no one should be imprisoned based on a document or statement that never received the full support of Congress and was presented to the President for signature.” *Id.* Further, while the government argued that “because Congress did not require but-for causation in the Anti-Kickback Statute, there’s no reason why it would have done the same for a corresponding claim under the False Claims Act,” the Sixth Circuit emphasized that the “‘resulting from’ language applies to all kinds of fraud claims without regard to whether the underlying claim has a causation component.” *Id.*

³⁶ *See* *United States ex rel. Fitzer v. Allergan, Inc.*, No. CIV. 1:17-00668, 2022 U.S. Dist. LEXIS 190010, at *3-4 (D. Md. Oct. 17, 2022) (declining to adopt Eighth Circuit’s “but-for” causation standard). A district court in the Fourth Circuit disagreed with the Eighth Circuit’s decision, noting Congress’s intent in enacting the 2010 amendment was to simplify filing FCA-based AKS violation claims. *Id.* The court acknowledged the *Burrage* Court’s reasoning that absent any textual or contextual indications suggesting otherwise, courts commonly “read phrases like ‘results from’ to require but-for causality.” *United States ex rel. Fitzer v. Allergan, Inc.*, No. CIV. 1:17-00668, 2022 U.S. Dist. LEXIS 152099, at *29 (D. Md. Aug. 23, 2022) (quoting *Burrage v. United States*, 571 U.S. 204, 212 (2014)). Here, the court explained there are contextual indications to support that Congress intended to make it easier to bring and prove FCA-based AKS violation claims. *See id.* at *29-30. A district court in the Ninth Circuit also adopted the Third Circuit’s approach holding that the relator adequately established a “link” between the kickback and claim for reimbursement. *See* *United States v. Abbott Lab’ys, Inc.*, No. CIV. 3:20-286, 2022 U.S. Dist.

In *Cairns*, the Eighth Circuit established a causation standard to determine if a claim is “false or fraudulent” under the FCA.³⁷ The court explained that the district court misinterpreted the 2010 amendment of the AKS by disregarding the causation requirement when it instructed the jury that “it is enough for the United States to show that the claim failed to disclose the [AKS] violation.”³⁸ The Eighth Circuit looked to the Supreme Court’s interpretation of “results from” in the Controlled Substances Act, wherein the Supreme Court concluded that the dictionary definition, or ordinary meaning, of the phrase imposes “a requirement of actual causality.”³⁹ While the Eighth Circuit acknowledged that the context in *Cairns* may be different than that in *Burrage*, “resulting” still has the same meaning as “results.”⁴⁰ The court rejected the government’s “alternative causal standard” which is satisfied merely if the illegal kickback influences, or “taints,” the claim, or if the “[AKS] violation itself *may* have been a contributing factor.”⁴¹ The Eighth Circuit, instead, reasoned that a paltry “taint” could exist without the motivation of kickbacks, that the jury’s instruction did not establish anything

LEXIS 148602, at *14 (S.D. Cal. Aug. 18, 2022). The court noted that to proceed on a claim “resulting from” a violation of the AKS, the relator “must establish a connection between the alleged kickback scheme and actual false claims submitted to the government.” *Id.* (quoting *United States ex rel. Gough v. Eastwestproto, Inc.*, No. CIV. 14-465, 2018 U.S. Dist. LEXIS 224953, at *15 (C.D. Cal. Oct. 24, 2018)).

³⁷ See *Cairns*, 42 F.4th at 831 (concluding “the words ‘resulting from’ creates a but-for causal requirement between an anti-kickback violation and the ‘items or services’ included in the claim” (quoting *Burrage*, 571 U.S. at 204)).

³⁸ See *id.* at 833-34 (noting district court erred in its causation instructions to jury).

³⁹ See *id.* at 834 (citing *Burrage*, 571 U.S. at 210-11) (referring to Supreme Court’s interpretation of “results from” in Controlled Substances Act). The statute necessitated an “enhanced sentence whenever ‘death or serious bodily injury *results from* the use of [a distributed controlled] substance.’” *Id.* (quoting *Burrage*, 571 U.S. at 209); see also 21 U.S.C.S. §§ 841(b)(1)(A)-(C) (LexisNexis, Lexis Advance through PL 118-21, approved 11/13/23) (describing penalties for certain prohibited acts under Controlled Substances Act). The Supreme Court ruled that the ordinary meaning of “results from” requires a showing of actual causality. See *Cairns*, 42 F.4th at 834 (quoting *Burrage*, 571 U.S. at 210-11). The Court noted that “the use of drugs had to be a ‘but-for cause of the death.’” *Id.* (quoting *Burrage*, 571 U.S. at 210-211, 219) (describing causation standard in *Burrage*).

⁴⁰ See *id.* (“‘Resulting,’ which is the present-participle form of the verb, has the same meaning as its present-tense cousin, ‘results.’”). The Eighth Circuit cites two different dictionaries which both define “resulting” and “results” the same. *Id.*

⁴¹ See *id.* at 835 (citing Brief for Appellee at 29, *Cairns*, 42 F.4th 828 (No. 20-2445)) (describing government’s alternative causal standard). The government argued that the legislative history of the 2010 amendment “shows that the ‘resulting from’ language serves to expand—not narrow—the universe of claims rendered false or fraudulent by an AKS violation.” See Brief for Appellee, *supra*, at 28-29. The Eighth Circuit rejected this standard because it is not causal. See *Cairns*, 42 F.4th at 835.

more than inconsequential possibility, and concluded that “causation must be proven, not presumed.”⁴²

While the court acknowledged its departure from *Greenfield*, it rejected the Third Circuit’s reliance on “legislative history and ‘the drafters’ intentions’ to interpret the statute” at the expense of the plain meaning of the statutory text.⁴³ The Eighth Circuit clarified that the text of the 2010 amendment provides no indication that “resulting from” should require anything other than but-for causation.⁴⁴ The court did, however, emphasize the ruling’s narrow scope by noting that not every case arising under the FCA requires demonstrating but-for causation.⁴⁵ Rather, when plaintiffs seek to establish falsity or fraud under the 2010 amendment, they must prove that a defendant would not have included specific “items or services” but-for the illegal kickbacks.⁴⁶

Cairns reinterpreted the causation standard to establish falsity or fraud under the 2010 amendment of the AKS.⁴⁷ The Eighth Circuit correctly construed “resulting from” to require a “but for” causation standard.⁴⁸ If

⁴² See *Cairns*, 42 F.4th at 835 (rejecting government’s alternative standards).

⁴³ See *id.* at 836 (declining to adopt Third Circuit’s approach).

⁴⁴ See *id.* at 835-36 (“Where there is no textual or contextual indication to the contrary, courts regularly read phrases like ‘results from’ to require but-for causality” (quoting *Burrage v. United States*, 571 U.S. 204, 212 (2014))).

⁴⁵ See *id.* at 836 (noting ruling is narrow).

⁴⁶ See *id.* at 834-37 (requiring showing of but-for causation for cases arising under 2010 amendment of FCA).

⁴⁷ See *Cairns*, 42 F.4th at 831 (holding “resulting from” creates but-for causal requirement). To prove a claim is “false or fraudulent” under the 2010 amendment, the Eighth Circuit requires a plaintiff to show but-for causation between the AKS violation and the “items or services” included in the claim. See *id.*; see also 31 U.S.C. § 3729(a)(1)(A) (noting FCA liability attaches to any person who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval”); 42 U.S.C. §§ 1320a-7b(g) (describing criminal penalties for acts involving federal health care programs).

⁴⁸ See *Burrage*, 571 U.S. at 210-11 (giving “results from” its ordinary meaning because statute does not define it otherwise). The Supreme Court explained that because the Controlled Substances Act did not expressly define “results from,” its ordinary or plain meaning should be applied. *Id.* Further, the plain meaning definition of “results from” imposes “a requirement of actual causality.” See *id.* at 211. The court analogized the but-for requirement to a baseball game. See *id.* If Team A hits a home run, scoring one point, and no other points were scored throughout the game, Team A would win by a score of one to zero. See *id.*

[E]very person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run It is beside the point that the victory also resulted from a host of other necessary causes, such as skillful pitching, the coach’s decision to put the leadoff batter in the lineup, and the league’s decision to schedule the game If [Team A] wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter’s early, non-dispositive home run.

Congress did not intend to mandate a causal connection between the kickback and the claim presented, it could have used terms such as “tainted by” or “provided in violation of” to establish an alternative causal standard.⁴⁹ Congress instead chose to use the unambiguous causal standard: “resulting from.”⁵⁰ Further, courts generally avoid considering legislative history when interpreting criminally applicable statutes because defendants should not be incarcerated based on an ambiguous congressional definition.⁵¹

The Eighth Circuit’s decision provides clear instruction to courts on the causation standard, which is crucial because relator-driven FCA *qui tam* actions have increased over the years.⁵² Requiring a plain language reading of the statute narrows the types of kickback cases that result in false claims and may deter some whistleblowers, thus reducing burden on the courts.⁵³ If

Id. at 211-12. “Where there is no textual or contextual indication to the contrary, courts regularly read phrases like ‘results from’ to require but-for causality.” *Id.* at 212. To satisfy the but-for causation standard, proof must exist “that the referrals would not have been made without the [kickback], and that claims would not have been submitted to the government without those referrals.” *See* United States *ex rel.* Martin v. Hathaway, 63 F.4th 1043, 1055 (6th Cir. 2023).

⁴⁹ *See Cairns*, 42 F.4th at 836 (noting Congress’s “resulted from” word choice prevents distinct interpretation alternatives (citing *Burrage*, 571 U.S. at 216)); *see also Martin*, 63 F.4th at 1053-54 (agreeing with Eighth Circuit “that context could not overcome the ordinary meaning of the text—that ‘resulting from’ means but-for causation”). Some courts argue the legislative history of the 2010 AKS amendments indicates “Congress intended to make it easier, not harder, to bring (and ultimately prove) FCA claims predicated on violations of the AKS.” United States *ex rel.* Fitzer v. Allergan, Inc., No. CIV. 1:17-00668, 2022 U.S. Dist. LEXIS 152099, at *29-30 (D. Md. Aug. 23, 2022); *see also* United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 96-97 (3d Cir. 2018) (adhering to legislative history to interpret “resulting from” in 2010 amendment). These courts fail to recognize, however, that Congress added the “resulting from” language in the 2010 amendment “against the backdrop of a handful of cases that observed similar language as requiring but-for causation.” *Martin*, 63 F.4th at 1052.

⁵⁰ *See* 42 U.S.C. §§ 1320a-7b(b), (g) (presenting AKS statute including 2010 amendment). The unambiguous casual standard means that “a claim that includes items or services *resulting from* a violation of this section constitutes a false or fraudulent claim for purposes of [the FCA].” 42 U.S.C. §§ 1320a-7b(g) (emphasis added).

⁵¹ *See Martin*, 63 F.4th at 1054 (explaining why courts do not typically consider legislative history when interpreting criminal statutes). As a dual-application statute that may establish both civil and criminal liability, the AKS is subject to the rule of lenity which prevents a court from assigning “text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.” *See Burrage*, 571 U.S. at 216 (justifying usage of ordinary meaning for “results from”); *see also Martin*, 63 F.4th at 1050 (favoring narrower definition of word if ambiguity exists).

⁵² *See FCA Fraud Statistics 1987-2021*, *supra* note 23 (noting 598 *qui tam* actions were brought in 2021 versus 83 in 1990); McCoy, *supra* note 22 (highlighting FCA cases dependence on relators); *see also* Doyle, *supra* note 1, at 19-20 (enumerating causation as one of four elements in FCA claim).

⁵³ *See* Glaser, *supra* note 34 (explaining consequences of plain meaning interpretation of 2010 amendment). A plain meaning reading limits pursuing an FCA claim through the 2010 amendment in cases where a kickback may have influenced a physician’s treatment choice, but there was no over-utilization of services. *Id.* This interpretation aligns with main objective of the FCA which

a kickback leads a physician to select a specific product included in the overall cost of a procedure he was already planning to perform, no false claim exists.⁵⁴ This does not, however, imply immunity for the physician as he may still face criminal liability for his actions.⁵⁵ A plain language reading of the statute is appropriate when considering the extreme financial penalties and consequences associated with FCA violations.⁵⁶

Under the Eighth Circuit's stricter standard, defendants may avoid FCA liability through the 2010 amendment by showing any legitimate reason, other than the alleged kickback, to justify their claim for reimbursement.⁵⁷ Allowing the government to prevail in false claims cases using a

is to enable the government to recover financial damages triggered by fraudulent activities. *See A Guide To The Federal False Claims Act*, *supra* note 20 (describing primary purpose of FCA).

⁵⁴ *See* Glaser, *supra* note 34 (explaining when false claim would not occur according to plain meaning of 2010 amendment). It is common to have situations in which physicians must perform a procedure, a knee replacement, for example, and must decide between several different products to use. *Id.* If "Knees R Us" has paid the physician a kickback, and the physician uses their implant rather than one by a different vendor, the bill to Medicare will be the same The Eighth Circuit is saying that with those facts, there is no liability under the FCA. *Id.*

⁵⁵ *See id.* at 34 (clarifying kickbacks are not legalized because physicians may still be criminally prosecuted).

[The Eighth Circuit holding] does *not* legalize kickbacks [because] the physician could still be criminally prosecuted. But the court is making an important distinction between criminal cases and false claims act cases, noting that if the government didn't pay more money than it would have absent the kickback, there should not be liability under the FCA.

Id.

⁵⁶ *See id.* (acknowledging financial penalties for FCA violations further justify plain meaning interpretation of "resulting from"). Some courts prioritized Congress's intent in enacting the 2010 amendment in their interpretation of "results from," but failed to acknowledge that if Congress intended a meaning other than "but for" causation, it could have used more appropriate language. *See United States ex rel. Greenfield v. Medco Health Sol., Inc.*, 880 F.3d 89, 96-97 (3d Cir. 2018) (disregarding plain language of statute to interpret based on legislative intent); *United States ex rel. Fitzer v. Allergan, Inc.*, No. CIV. 1:17-00668, 2022 U.S. Dist. LEXIS 152099, at *30 (D. Md. Aug. 23, 2022) (following Third Circuit's interpretation of "results from"); *United States v. Abbott Lab'ys, Inc.*, No. CIV. 3:20-286, 2022 U.S. Dist. LEXIS 148602, at *14 (S.D. Cal. Aug. 18, 2022) (adopting Third Circuit's approach). *But see Burrage*, 571 U.S. at 216 (adhering to plain language of statute); *United States ex rel. Cairns v. D.S. Med. LLC.*, 42 F.4th 828, 836 (8th Cir. 2022) (recognizing "results from" requires but-for causation); *Martin*, 63 F.4th at 1052-53 (adopting Eighth Circuit's approach in defining "results from").

⁵⁷ *See* Litigation Quarterly Advisor, *supra* note 34, at 1 (describing hypothetical scenario involving alleged kickbacks-for-referrals arrangement under *Cairns* standard). Under the Eighth Circuit's standard, a plaintiff may struggle to prove an FCA-based AKS violation if the referral or the patient's choice of treatment is independent of the kickback. *Id.* By contrast, under the Third Circuit standard, it may be sufficient to establish such a violation if a patient is referred for treatment by an entity that received kickbacks from the defendant, even if there is no causal link between the kickbacks and patient referral. *See id.* Despite this, the FCA's primary purpose is to allow the government to recover monetary losses caused by fraud. *See A Guide To The Federal False Claims*

“taint” theory whereby it need only demonstrate that claims are influenced by kickbacks or that kickbacks “may” have played a role is at odds with the plain language of the statute.⁵⁸ A “taint” is overly broad, encompassing situations in which a kickback does not directly cause the inclusion of a particular item or service in a claim.⁵⁹ Further, instructing a jury to determine if a violation “may have been a contributing factor” only insinuates the possibility of such a “taint.”⁶⁰ The *Cairns* ruling is appropriately narrow considering the statute, and may encourage both plaintiffs and the government to explore alternative means of proving that a claim is “false or fraudulent” under the FCA.⁶¹

In the Eighth Circuit’s case of first impression, *United States ex rel. Cairns v. D.S. Med. LLC*, the court assessed the causation standard required by the 2010 amendment to determine whether AKS violations are false or fraudulent under the FCA. The Court of Appeals overturned the district court’s decision which had disregarded the causation standard implied by “resulting from.” In its holding, the Eighth Circuit confirmed “resulting from” was unambiguously causal and demanded a “but for” causation showing. Merely demonstrating a “taint” or “link” between the alleged kickbacks and the referrals does not prove that the illegal kickbacks were the sole reason for the referrals, and therefore fails to establish anything more than scant possibility. Ultimately, the Eighth Circuit’s decision provides clear guidance to other courts regarding the causation standard for AKS-based FCA violations arising out of the 2010 amendment. To successfully establish falsity or

Act, *supra* note 20 (describing main purpose of FCA). Thus, FCA liability is not warranted when a kickback results in an identical Medicare or Medicaid bill compared to a situation without a kickback. See Glaser, *supra* note 34 (emphasizing distinction between criminal and FCA cases).

⁵⁸ See *Martin*, 63 F.4th at 1053-54 (“Where a statute ‘yields a clear answer, judges must stop.’” (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (U.S. 2019))). Congress could have set out a different causal standard by using alternative language such as “tainted by” or “provided in violation of.” See *id.* at 1053; see also *Burrage*, 571 U.S. at 214 (noting “a phrase such as ‘results from’ imposes a requirement of but-for causation”).

⁵⁹ See Stein, *supra* note 34 (explaining “taint” could exist without kickback); see also Glaser, *supra* note 34 (justifying causal standard requirement for FCA-based AKS violations).

⁶⁰ See Stein, *supra* note 34 (emphasizing “taint” theory is not causal); see also *Martin*, 63 F.4th at 1054 (“[R]esulting from’ language applies to all kinds of fraud claims without regard to whether the underlying claim has a causation component.”).

⁶¹ See Glaser, *supra* note 34 (describing narrow ruling of *Cairns*); *Cairns*, 42 F.4th at 836 (clarifying not all FCA cases require but-for causation). The Eighth Circuit’s holding is restricted only to plaintiffs seeking to establish falsity or fraud through the 2010 amendment. See *Cairns*, 42 F.4th at 836. The court in *Huesman* refused to apply *Cairns* because the *Cairns* causation standard only applies to claims asserted under the 2010 amendment of the FCA. See *United States ex rel. Huesman v. Prof'l Compounding Ctrs. of Am., Inc.*, No. CIV. 14-00212, 2023 U.S. Dist. LEXIS 52467, at *30 n.4 (W.D. Tex. Mar. 27, 2023).

fraud through this amendment, a plaintiff must prove that a defendant would not have included particular “items or services” but-for the illegal kickbacks.

