No. 19-1008

In the Supreme Court of the United States

JIM C. HODGE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the record evidence of causation in this case was sufficient to sustain the jury's damages verdict under the False Claims Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 933 F.3d 468. The opinion and order of the district court (Pet. App. 25-39) is not published in the Federal Supplement but is available at 2017 WL 4083589.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2019. A petition for rehearing was denied on November 12, 2019 (Pet. App. 46-47). The petition for a writ of certiorari was filed on February 10, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, imposes civil liability for a variety of deceptive practices involving government funds and property.

Among other things, the FCA renders liable any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1)(A); or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," 31 U.S.C. 3729(a)(1)(B). A person who violates the FCA is liable to the United States for civil penalties plus three times "the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. 3729(a)(1).

2. Under the National Housing Act, 12 U.S.C. 1701 *et seq.*, the United States Department of Housing and Urban Development (HUD), through the Federal Housing Administration (FHA), insures participating lenders against losses on mortgage loans to homebuyers, principally first-time buyers. Pet. App. 2; see 24 C.F.R. 201.1 *et seq.*

During the period relevant to this case, "loan correspondent[s]" were entities that originated FHA-insured loans by taking loan applications and gathering other information from borrowers. 24 C.F.R. 202.8(a) (2002); see Pet. App. 2. Loan correspondents were required to obtain HUD approval for each branch office that originated FHA loans. Pet. App. 2-3; see 24 C.F.R. 202.5(k), 202.8(b) (2002). FHA loans that were not originated from registered branch offices were not eligible for FHA insurance. Pet. App. 30; see 24 C.F.R. 202.5(k) (2002). HUD adopted this policy after determining that loans from unauthorized branches posed an increased risk of non-compliance with FHA requirements, and that such loans produced a higher rate of default. Pet. App. 32; see C.A. ROA 13,047-13,048, 17,179-17,182, 28,275-28,276.

Loans were underwritten by lenders that funded the loans. Pet. App. 2; see 24 C.F.R. 202.7(a) (2002). All underwriting lenders were required to submit the loans to HUD to be endorsed for FHA insurance. Pet. App. 3; see 24 C.F.R. 203.255 (2003). "[D]irect endorsement lender[s]," however, were authorized to determine on HUD's behalf that particular loans were eligible for FHA insurance by certifying that the loans met FHA guidelines for underwriting procedures, as set forth in HUD's underwriting handbooks. 24 C.F.R. 203.5 (2003); Pet. App. 3. Such determinations included evaluations of the borrowers' assets, credit, and ability to repay the loan, as well as the value of the property being purchased. 24 C.F.R. 203.5 (2003).

HUD required that each FHA loan file submitted for insurance endorsement be accompanied by FHA Form 92900-A, which requests certain information regarding the origination and underwriting of the loan. Pet. App. 3. Among the requested information, each loan correspondent was asked to list on the form the unique registration number for the branch that had originated the loan. *Ibid.* In addition, lenders certified that their loans were eligible for insurance and complied with HUD underwriting guidelines. *Ibid.*

3. Petitioner Allied Home Mortgage Corporation (Allied)[1] was an FHA direct endorsement lender. Pet. App. 2-3. Petitioner Allied Home Mortgage Capital Corporation (Allied Capital)[2] was an FHA loan correspondent. *Id.* at 2. Petitioner Jim Hodge was the owner and chief executive officer of both companies. *Ibid.* Over the course of a decade, petitioners engaged in a

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[1] Now Allquest Home Mortgage Corporation.

[2] Now Americus Mortgage Corporation.

multi-faceted nationwide scheme to defraud the FHA by submitting false statements to HUD to induce the agency to insure ineligible mortgage loans.

First, Hodge imposed quotas on Allied underwriters that made it impossible for them to underwrite loans in accordance with HUD guidelines. Pet. App. 10. As a result, Allied's underwriting practices systematically failed to comply with HUD guidelines, yet Allied falsely certified as a direct endorsement lender that it had so complied. C.A. ROA 14,916-14,917, 15,223, 27,528-27,655. The government's expert testified at trial that in the sample he examined, more than half of the loans underwritten by Allied were ineligible for FHA insurance. Pet. App. 17. The deficiencies included borrowers significantly exceeding the debt-to-income ratio required for FHA-loan eligibility, insufficient down payments by borrowers, failures to substantiate the borrowers' stated income, reliance upon flawed property appraisals, and failures to investigate suspicious documentation from borrowers. C.A. ROA 14,923-14,952, 27,528-27,655.

Second, at Hodge's direction, Allied Capital originated FHA loans from unregistered "shadow" branches, despite its awareness of HUD's policy prohibiting unregistered branches from originating loans. Pet. App. 4, 6. This fraudulent practice was especially prevalent in North Carolina, where HUD had prohibited Allied Capital from opening new branch offices because of their high default rate in the State. C.A. ROA 16,291-16,299, 16,306-16,307, 16,320, 16,331-16,332, 16,344, 20,710, 26,918-26,943. To conceal from HUD that unauthorized branches had originated the loans, Allied Capital submitted Forms 92900-A that falsely listed the registration numbers and addresses of registered branch offices

as the originating entities and that contained forged signatures of branch managers. Pet. App. 28. When a state audit uncovered the issue, Hodge lied to HUD in an attempt to conceal his fraudulent activity. *Id.* at 6.

4. After a five-week trial, a jury found that Allied and Hodge had violated 31 U.S.C. 3729(a)(1)(A) and (B) by falsely representing to HUD that Allied had complied with HUD underwriting guidelines when it certified that loans were eligible for FHA insurance, Pet. App. 3-4, and that Allied Capital and Hodge had violated Section 3729(a)(1)(B) by falsely claiming that loans originated by unauthorized branches had instead been originated by authorized branch offices, *id.* at 4.

The jury was instructed that, in order to recover damages for an FCA violation, "the United States must show by a preponderance of the evidence that the defendants' conduct was a substantial factor in causing the United States to suffer damages, and that the amount of damages suffered by the United States was a foreseeable consequence of the allegedly false statements, false claims, or fraudulent course of conduct." C.A. ROA 18,633. The jury determined that HUD had suffered $85.6 million in damages as a result of the false representations concerning Allied's compliance with HUD's underwriting guidelines, and $7.4 million in damages as a result of Allied Capital's false representations concerning the originating branch offices. Pet. App. 4.

5. The district court denied petitioners' motion for judgment as a matter of law, rejecting their contention that the government had failed to prove that petitioners' fraudulent conduct caused the government any harm. Pet. App. 25-39. The court observed that, to recover damages under the FCA, "the United States must demonstrate that [petitioners] proximately caused the

loss incurred." *Id.* at 31. Applying that standard, the court found sufficient record evidence of causation to support the jury's verdict. *Id.* at 32.

With respect to the underwriting claims, the district court explained that the government had "introduced evidence that Allied underwriters issued false statements regarding borrowers' creditworthiness; that these false statements increased the risk of default; and that loans underwritten by Allied did in fact default at a high rate." Pet. App. 32. With respect to the unregistered-branch claims, the court stated that the government had "introduced evidence that Allied originated loans from unregistered branches; that HUD required branch registration because of the increased risks of noncompliance; and that loans from these unregistered branches resulted in high default rates." *Ibid.* For each claim, the court reasoned that the evidence "formed a sufficient basis upon which the jury inferred that [petitioners'] malfeasance proximately caused the[] defaults." *Ibid.*

6. The court of appeals affirmed. Pet. App. 1-24. Like the district court, the court of appeals "agree[d] proximate cause is required" in order to prove damages under the FCA. *Id.* at 9. The court observed that proximate cause is a "flexible concept," but that it "is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Ibid.* (citations omitted). The court further explained that the requirement to demonstrate proximate causation serves "to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Ibid.* (citation omitted).

The court of appeals stated that, in a case like this one, where the government had "relie[d] on sampling and extrapolation," "connecting false statements and defaults with specific loans" may not be feasible. Pet. App. 9. The court held, however, that the government had provided sufficient evidence for a jury, "[v]iewing the risks and effects of the false statements in the aggregate," to find a sufficient "relationship between the misconduct and the loss." *Id.* at 10.

With respect to the underwriting claims, the court of appeals observed that the government's expert had "testified explicitly about deficiently underwritten loans that resulted in claims." Pet. App. 11. The court explained that, "[a]t the very least," the jury could have relied on that evidence to find that petitioners' false statements regarding the borrowers' ability to afford housing were a "'major factor for subsequent defaults.'" *Ibid.* (quoting *United States* v. *Miller*, 645 F.2d 473, 476 (5th Cir. 1981)).

With respect to the unregistered-branch claims, the court of appeals explained that "HUD linked unregistered branches to higher risks of default, and that the expert evidence showed those loans, as predicted, defaulted at higher rates." Pet. App. 9. The court concluded that "[i]t then follows that the false statements distorted the risk perceived by HUD, which caused it to insure more loans and incur more losses than it would have otherwise." *Id.* at 9-10.

ARGUMENT

Petitioners urge (Pet. 14-25) the Court to grant certiorari to determine whether the causation standard for obtaining damages under the FCA is but-for causation or the more stringent proximate-causation standard. See Pet. i. Like every other court of appeals to resolve

the question, however, the court below correctly required the government to demonstrate proximate causation, and it properly applied that standard to uphold the jury's verdict in this case. The decision below does not conflict with any decision of this Court or of another court of appeals. And petitioner's factbound challenges to the application of an agreed-upon legal standard do not warrant further review. The petition for a writ of certiorari should be denied.

1. a. The FCA makes any person who violates its prohibitions on fraudulent conduct liable to the United States for three times "the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. 3729(a)(1). The phrase "because of" requires the government to prove some form of causation. See *Gross* v. *FBL Financial Servs., Inc.*, 557 U.S. 167, 176-177 (2009). Although the statute does not specify the appropriate causation standard, "[p]roximate cause is a standard aspect of causation in criminal law and the law of torts." *Paroline* v. *United States*, 572 U.S. 434, 446 (2014). Given that "traditional role in causation analysis, this Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one." *Ibid.* (collecting cases). In keeping with that approach, every court of appeals to resolve the question has held that, in order to recover damages in an FCA case, the government must demonstrate that its losses were proximately caused by the defendant's unlawful conduct. See, *e.g.*, *United States* v. *Luce*, 873 F.3d 999, 1014 (7th Cir. 2017); *United States* v. *Miller*, 645 F.2d 473, 475-476 (5th Cir. 1981); *United States* v. *Hibbs*, 568 F.2d 347, 349 (3d Cir. 1977).

"[T]o say that one event was a proximate cause of another means that it was not just any cause, but one with

a sufficient connection to the result." *Paroline*, 572 U.S. at 444. What constitutes a sufficient connection "defies easy summary." *Ibid.* Proximate cause "is a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case." *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 654 (2008) (citation and internal quotation marks omitted). The concept "is often explicated," however, "in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline*, 572 U.S. at 445. In general, proximate causation requires "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 444 (citation omitted).

b. The court of appeals correctly applied these principles in sustaining the jury's verdict in this case. The court explained that the evidence at trial adequately demonstrated that "deficiently underwritten loans * * * resulted in claims," and that, in particular, the jury could have reasonably found that petitioner's "'false statements regarding the ability of purchasers to afford housing'" were a "'major factor for subsequent defaults.'" Pet. App. 11 (citation omitted). Based on the evidence introduced at trial, the court also observed that petitioners' false statements concerning the originating branches for its loans had "distorted the risk perceived by HUD, which caused it to insure more loans and incur more losses than it would have otherwise." *Id.* at 9-10. The court explained that "[v]iewing the risks and effects of the false statements in the aggregate reveals the relationship between the misconduct and the loss," so that "[e]ven if [petitioners] did not know which specific loans would eventually default, it was foreseeable that a higher percentage of them would result in claims." *Id.* at 10.

Contrary to petitioners' argument below, the government was not required to "connect[] specific false statements to individual defaults," Pet. App. 8-9. See *Bridge*, 553 U.S. at 654 (explaining that proximate cause "does not lend itself to a black-letter rule that will dictate the result in every case") (citation and internal quotation marks omitted). Petitioners' contention (Pet. 22-24) that the ruling below conflicts with the Court's decision in *United Health Services, Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), is likewise misplaced. That case concerned the materiality standard for liability under the FCA, not the proper causation rule for damages. See *id.* at 2001-2004; *Luce*, 873 F.3d at 1011 (*Escobar* "does not address causation.").

c. Contrary to petitioners' assertions (*e.g.*, Pet. 8, 9 n.3, 13, 16), the court of appeals' conclusions were fully supported by the record.

At trial, HUD witnesses explained why misstatements about matters such as a borrower's credit history or capacity to repay, the source of the funds for a down payment, or indications that the borrower may have engaged in fraud all bore upon the likelihood that the buyers would be unable or unwilling to make their mortgage payments. C.A. ROA 12,973-12,974, 12,991, 12,998-12,999, 13,002, 13,007-13,011, 13,017-13,018, 17,211-17,219. The government's underwriting expert then testified that many of the loans underwritten by Allied contained the very types of misstatements that HUD witnesses had explained would make default more likely. *Id.* at 14,861-14,868, 14,907, 14,916, 14,923-14,952. Finally, the evidence showed that, for much of the relevant period, the percentage of Allied's FHA-insured mortgages that defaulted significantly exceeded—at times, doubled—

the national average. *Id.* at 10,435-10,436, 12,957, 18,443-18,444, 18,447-18,448, 20,562-20,564, 27,656-27,714.

HUD witnesses likewise testified that, during the relevant period, loans from unregistered branches were not eligible for FHA insurance. C.A. ROA 12,964-12,968, 17,179-17,180. The trial record further demonstrated that HUD's ban on the origination of loans from unregistered branches was based on its determination that, "when non FHA-approved entities perform origination functions and services on FHA-insured loans, the instances of serious compliance problems increase[,] as do the associated risks," including the risk of default. *Id.* at 28,275-28,276; see *id.* at 13,047-13,048, 17,179-17,182. The evidence showed that the majority of the loans Allied Capital had originated from unregistered branches were from branches in North Carolina, where HUD had prohibited Allied Capital from registering new branches in light of its high default rates in that State. *Id.* at 16,306-16,307, 16,320. Finally, the evidence demonstrated that, for large percentages of the loans originated by individual unregistered branches, the borrowers had defaulted, resulting in insurance claims to HUD. *Id.* at 16,210-16,213.

In any event, the Court "do[es] not grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."). Petitioners offer no sound reason to depart from that practice here.

2. Petitioners acknowledge (Pet. 20) that the court below properly stated the legal standard adopted by its

sister circuits and established by its own precedent. Petitioners argue, however, that in substance the court required only "but for" causation. See, *e.g.*, Pet. 4, 20. Petitioners contend (Pet. 20) that, by "requiring only foreseeability to satisfy the FCA's causation element, the Fifth Circuit changed the definition of proximate cause, abrogated [its earlier decision in] *Miller*, and created a conflict with the other circuits." Those arguments lack merit.

a. Petitioners' claim of a circuit conflict rests on a misunderstanding of proximate cause. "[T]o say one event proximately caused another is a way of making two separate but related assertions." *Paroline*, 572 U.S. at 444. The first is that the former event was the "actual cause or cause in fact" of the latter. *Ibid.* The "traditional way to prove" that first assertion "is to show that the latter would not have occurred 'but for' the former." *Id.* at 449-450. The second assertion is that "one event * * * was not just any cause, but one with a sufficient connection to the result." *Id.* at 444. As noted, that component of proximate cause is "often explicated in terms of foreseeability." *Id.* at 445.

This Court's decisions have often emphasized the foreseeability of the harm as a consideration in determining proximate, not but-for, causation. See, *e.g.*, *Husted* v. *A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1843 (2018) (explaining that proximate causation includes "the direct, foreseeable, and closely connected consequence[s]" of a person's actions); *County of Los Angeles* v. *Mendez*, 137 S. Ct. 1539, 1548-1549 (2017) (noting that a "[p]roper analysis" of proximate cause "require[s] consideration of the 'foreseeability or the scope of the risk created by the predicate conduct'") (citation omitted); *Paroline*, 572 U.S. at 444; see also *CSX*

Transp., Inc. v. *McBride*, 564 U.S. 685, 717 (2011) (Roberts, C.J., dissenting) ("[F]oreseeability has, after all, long been an aspect of proximate cause.").

Thus, under the common law, "[l]egal cause * * * is essentially a question of foreseeability." *Luce*, 873 F.3d at 1012 (citation and internal quotation marks omitted). Nothing in the "statutory language of the FCA * * * suggest[s] that Congress sought to depart from th[at] established common-law understanding." *Ibid.* Accordingly, "each of the[] four circuits" on whose decisions petitioners rely "has adopted the common-law understanding of foreseeable, or proximate, causation with respect to the imposition of liability and damages under the FCA." *Id.* at 1014.

b. In any event, the courts below did not "limit[] their proximate cause analysis to foreseeability alone." Pet. 22. The court of appeals acknowledged its prior suggestion in *Miller* that, in this context, the government must also show that a defendant's false statements were a "major factor for subsequent defaults." Pet. App. 8 (quoting *Miller*, 645 F.2d at 476). The court found that requirement met here with respect to the damages awarded for each aspect of the fraudulent scheme. See *id.* at 11 (concluding that the jury could have found that petitioners' false statement concerning its underwriting was a "major factor for subsequent defaults") (citation omitted); *id.* at 10 (finding that "the risks and effects of the false statements" concerning the originating branch, viewed "in the aggregate," demonstrated the necessary "relationship between the misconduct and the loss"); see also C.A. ROA 18,633 (instructing the jury that, in order to prove damages, "the

United States must show by a preponderance of the evidence that the defendants' conduct was a substantial factor in causing the United States to suffer damages").

The court of appeals' approach does not conflict with the approach taken by any other circuit. Cf. Pet. 20-22. The decisions on which petitioners rely hold that FCA damages may not be based on "but for" causation alone. See *Luce*, 873 F.3d at 1013-1014 (concluding that "'but for' does not fulfill adequately the causation requirement"); *Hibbs*, 568 F.2d at 351 (refusing to "disregard[] completely * * * the relationship" between the defendant's false statements and the harm caused by defaulted mortgages); *United States ex rel. Schwedt* v. *Planning Research Corp.*, 59 F.3d 196, 200 (D.C. Cir. 1995) ("[T]he Act does not contemplate liability for all damages that would not have arisen 'but for' the false statement."), cert. denied, 516 U.S. 1068 (1996); cf. *United States ex rel. Sikkenga* v. *Regence Bluecross Blueshield*, 472 F.3d 702, 714 (10th Cir. 2006) (adopting proximate-cause standard to determine whether, for purposes of liability, there is a "sufficient nexus between the conduct of the [defendant] and the ultimate presentation of the false claim"). While those decisions hold that but-for causation standing alone is insufficient, they do not otherwise dictate any particular approach to the proximate-cause inquiry in this context.

Other courts of appeals have addressed losses for defaulted FHA loans in a similar manner. Those courts have held that false statements that bear on the ultimate risk of default satisfy the proximate-causation standard. See *United States* v. *Eghbal*, 548 F.3d 1281, 1284 (9th Cir. 2008) ("false statements regarding the credit worthiness of purchasers to afford housing estab-

lish the required causal connection" to sustain FCA damages verdict), cert. denied, 558 U.S. 825 (2009); *United States* v. *Spicer*, 57 F.3d 1152, 1159 (D.C. Cir. 1995) (real estate broker's "misrepresentations" concerning buyer's down payment "proximately caused HUD's losses"), cert. denied, 516 U.S. 1043 (1996); see also *United States* v. *Peterson*, 538 F.3d 1064, 1074-1077 (9th Cir. 2008) (holding that the proximate-cause requirement of Mandatory Victims Restitution Act was satisfied where the defendants' false statements regarding the source of down payments for FHA loans exposed HUD to a "higher risk" of default).[3]

Petitioner has not identified any court of appeals decision finding evidence similar to that presented here insufficient to support a damages award under the FCA. In the absence of such a conflict, further review of the court of appeals' evaluation of the trial record is not warranted.

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[3] For the reasons the court of appeals provided, its approach in this case also does not conflict with its own precedent in *Miller*, *supra*. See Pet. App. 8-9. In any event, such an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a [c]ourt of [a]ppeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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