

No. 14-1080

---

---

**In The  
Supreme Court of the United States**

---

**P. VICTOR GONZALEZ, QUI TAM PLAINTIFF, ON  
BEHALF OF HIMSELF, THE UNITED STATES OF  
AMERICA, & THE STATE OF CALIFORNIA,**

*Petitioner,*

v.

**PLANNED PARENTHOOD LOS ANGELES,  
ET AL.,**

*Respondents.*

---

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

---

**REPLY TO BRIEF IN OPPOSITION**

**JACK M. SCHULER  
SCHULER & BROWN**

[REDACTED]

**JAY ALAN SEKULOW**  
*Counsel of Record*

**STUART J. ROTH  
WALTER M. WEBER  
JORDAN A. SEKULOW  
TIFFANY N. BARRANS  
AMERICAN CENTER FOR  
LAW & JUSTICE**

[REDACTED]

*Counsel for Petitioner*

---

---

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... ii

**INTRODUCTION** ..... 1

**ARGUMENT IN REPLY** ..... 3

**I. CIRCUIT CONFLICT OVER  
    APPLYING THE GOVERNMENT  
    KNOWLEDGE DEFENSE AT THE  
    PLEADINGS STAGE** ..... 3

**II. CIRCUIT CONFLICT OVER  
    APPLYING THE GOVERNMENT  
    KNOWLEDGE DEFENSE TO  
    STATE KNOWLEDGE OF  
    FEDERAL LAW VIOLATIONS** ..... 5

**III. CIRCUIT CONFLICT OVER  
    APPLYING THE GOVERNMENT  
    KNOWLEDGE DEFENSE BASED  
    UPON INFERRED ACQUIE-  
    SCENCE RATHER THAN  
    KNOWLEDGE AND APPROVAL** ..... 6

**IV. INVERSION OF *IQBAL*** ..... 8

**CONCLUSION** ..... 11

## TABLE OF AUTHORITIES

<b>CASES</b>	<b>Page</b>
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009) . . . . .	1, 3, 8, 10, 11
<i>Bollinger Shipyards, Inc.</i> , 775 F.3d 255 (5th Cir. 2014) . . . . .	3, 4, 7
<i>U.S. DOT ex rel. Arnold v. CMC Eng'g</i> , 567 Fed. App'x 166 (3d Cir. 2014) . . . . .	5
<i>U.S. ex rel. Costner v. United States</i> , 317 F.3d 883 (8th Cir. 2003) . . . . .	7
<i>U.S. ex rel. Owens v. First Kuwaiti Gen.            Trading &amp; Contr. Co.</i> , 612 F.3d 724 (4th Cir. 2010) . . . . .	1
<b>STATUTES AND RULES</b>	
Fed. R. App. P. 32.1 . . . . .	5
31 U.S.C. § 3729(b) . . . . .	2

## INTRODUCTION

The Ninth Circuit has rendered a decision that creates multiple circuit conflicts, and creates a significant enforcement obstacle, regarding the federal False Claims Act (FCA). The Ninth Circuit has also essentially inverted the *Iqbal* test for examining the factual sufficiency of pleadings, exalting counterfactual speculation over documented evidence. In their Brief in Opposition, respondents Planned Parenthood Los Angeles et al. (PP), rather than dispute all this, essentially engage in misdirection and present a woefully incomplete (and ultimately irrelevant) factual picture of the case.<sup>1</sup> This Court should grant review.

This case turns on the legal significance of alleged government awareness of the misconduct at issue in an FCA case, a matter often (but not universally) analyzed under the rubric of the “government knowledge defense.”<sup>2</sup> The federal circuits have

---

<sup>1</sup>The Questions Presented turn on matters of law, not fact. Thus, even under the very distorted portrait of the facts which PP offers, this Court should grant review because of the conflicts in the circuits on important questions of law.

<sup>2</sup>PP notes that the Ninth Circuit “never uttered the phrase ‘government knowledge,’” Opp. 2, but as the petition noted, Pet. 19 n.12, courts do not always use that particular label. *See, e.g., U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contr. Co.*, 612 F.3d 724, 729 (4th Cir. 2010) (discussing government knowledge defense without naming it). What matters is the substance – the relevance of government knowledge of defendants’ conduct to the scienter element of an FCA action. PP admits the Ninth Circuit’s “consideration of government knowledge” in assessing the scienter element, Opp. 2; *see also* Opp. 17. Indeed, the Ninth Circuit offered no basis for its decision other than the knowledge of state officials of PP’s billing practices, and the response of the state

generally held that government knowledge of the misconduct can be relevant to, and possibly help disprove, the scienter – the mental state element, which under the FCA need only be “reckless disregard.” 31 U.S.C. § 3729(b). However, the circuits, with the strong support of the federal Department of Justice, have also recognized important legal limitations to the availability of this defense, viz., that (1) the government knowledge defense, being fact-dependent, applies only at summary judgment or at trial, not at the pleadings stage; (2) the defense only applies where the government “knows and approves” of the misconduct, not merely had some awareness of it and failed to act; and (3) the defense, being a defense to federal liability, only applies to the knowledge of the relevant *federal* officials. *See* Pet. § I(B)(1). And while divided on the issue, the majority of circuits have also held that (4) the defense, because relevant to defendant’s scienter, requires a showing, not just that the *government* knew of the misconduct, but that the *defendant* knew of and relied upon the government’s knowledge and approval. *See* Pet. § I(B)(1)(e).

The decision of the Ninth Circuit in this case breaches these limitations, creating circuit splits. The Ninth Circuit here gave conclusive defensive effect, *at the pleadings stage*, to *state* government officials’ *factually disputed* knowledge, *partial inaction*, and *inferred, implicit acquiescence* (despite express, repeated, official state disapproval). As shown in the petition, this decision directly conflicts with square holdings of the Third and Fifth Circuits, dramatically departs from the consistent practice of seven other circuits, flies in the face of the DOJ’s repeated

---

officials thereto. Pet. App. 7a-8a, 9a n.3.

insistence upon the proper limits of the government knowledge defense, and in the process turns this Court's *Iqbal* standard upside down. This Court should grant review.

### ARGUMENT IN REPLY

The Ninth Circuit ruling here undeniably creates circuit conflicts over the “government knowledge defense” to the scienter element<sup>3</sup> of an FCA action.<sup>4</sup>

#### I. CIRCUIT CONFLICT OVER APPLYING THE GOVERNMENT KNOWLEDGE DEFENSE AT THE PLEADINGS STAGE.

First, the Ninth Circuit affirmed dismissal of this case *at the pleadings stage* on the theory that the state was aware of and implicitly approved PP's unlawful overbilling. But the Fifth Circuit squarely held that the government knowledge defense is “not appropriate at the motion to dismiss stage[; i]t is more proper at the summary judgment or trial stage,” *Bollinger Shipyards, Inc.*, 775 F.3d 255, 264 (5th Cir. 2014), and

---

<sup>3</sup>At times PP seems to shade off into a discussion of the “falsity” element of an FCA claim, *e.g.*, Opp. 16. While the district court ruled on the basis of falsity, the Ninth Circuit did not reach that issue, Pet. 15-16, and thus the falsity element is not before this Court. For the record, however, the complaint, by alleging that PP sought funds it was not legally entitled to, aims at archetypal “false” claims. Pet. 15 (citing cases).

<sup>4</sup>PP notes correctly that the circuits are not in conflict over the broader proposition that government knowledge can be relevant to scienter. Opp. 18; Pet. 20-21. But *contra* Opp. 19-20, the petition does not assert a conflict over this broader proposition.

the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits each apply the government knowledge defense, if at all, only at the summary judgment or trial stages, Pet. 21. Moreover, the Department of Justice (DOJ) has repeatedly insisted that this defense, being fact-dependent, can apply only at summary judgment or trial; applying the defense at the pleadings stage is “wrong and premature.” Pet. 30 (quoting DOJ brief). The Ninth Circuit has opened a circuit conflict and created an obstacle to FCA enforcement across the board, for both private relators and the DOJ. Pet. 19 (noting that, as a defense to an element of an FCA violation, the government knowledge defense is not limited to private *qui tam* suits).

PP’s only response to *Bollinger Shipyards* is to ignore what it said – that the government knowledge defense is “not appropriate” at the pleadings stage. As for the cases in the other circuits following the same rule, Pet. 21, PP seems to regard the fact that they uniformly only allow the government knowledge defense at summary judgment or trial as some sort of inexplicable coincidence, Opp. 23-24, rather than a reflection of the nature of the government knowledge defense to scienter as a fact-based, affirmative defense (as the DOJ insists, Pet. 30)<sup>5</sup> not amenable to resolution on the pleadings.

---

<sup>5</sup>That the government knowledge defense is an affirmative defense, rather than a mere absence of allegations to support an element, appears in the very language both PP and the Ninth Circuit use in this case: such knowledge supposedly “undercut” and “contradicted” the scienter element. Opp. 1, 11, 14; Pet. App. 7a, 8a.

## II. CIRCUIT CONFLICT OVER APPLYING THE GOVERNMENT KNOWLEDGE DEFENSE TO STATE KNOWLEDGE OF FEDERAL LAW VIOLATIONS.

Second, the Ninth Circuit embraced the government knowledge defense to FCA claims predicated upon cheating the *federal* government in violation of (*inter alia*) *federal* regulations, where only state, not federal officials, supposedly had knowledge of and supposedly acquiesced in the illegal overbilling. But the Third Circuit expressly ruled that “[b]ecause the FCA applies to false claims submitted to the federal government, the [government knowledge] inference would seem to be inapplicable to this case, where there may be evidence of [the state agency’s] knowledge of the accuracy of [defendants’] submissions, but no evidence in the record concerning the federal government’s knowledge.” *U.S. DOT ex rel. Arnold v. CMC Eng’g*, 567 Fed. App’x 166, 170 n.9 (3d Cir. 2014). The First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits likewise only apply the defense when the government knowledge is the knowledge of the *pertinent federal agency*. Pet. 22-23. DOJ briefing is consistent with this norm. Pet. 31. The Ninth Circuit has therefore opened a circuit split on this point as well, and simultaneously erected an additional barrier to FCA enforcement in situations where state officials are lax, ignorant, “in cahoots,” or just too busy to pursue every violation in a federal program.

PP responds that the Third Circuit’s directly contrary opinion in *Arnold* is unpublished. Opp. 25 n.11. But unpublished decisions after 2007 (like *Arnold*) are available for citation, Fed. R. App. P. 32.1,



and the Third Circuit's ruling simply states an obvious logical position the Ninth Circuit bungled: state officials have no authority to waive federal liability. *See also* Hesch Amicus 15-17. What is extreme is PP's position: "It matters not what [the relevant] federal agency . . . 'knew,'" Opp. 26, even though it was the federal agency that ended up footing 90% of the unlawful charges, Pet. 6 n.5.

### **III. CIRCUIT CONFLICT OVER APPLYING THE GOVERNMENT KNOWLEDGE DEFENSE BASED UPON INFERRED ACQUIESCENCE RATHER THAN KNOWLEDGE AND APPROVAL**

Third, the Ninth Circuit affirmed dismissal of this FCA claim based upon inferences and surmises of "tacit" government "approv[al]," Pet. App. 9a n.3, despite extensive documentary evidence of express *disapproval* of the overbilling (in correspondence, personal communications, the fact of an audit for such overbilling, and the finding in the audit report that such overbilling was unlawful), Pet. 7-11, all of which is inconsistent with some secret approval of PP's exorbitant mark-ups. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth circuits apply the defense only where the government "*knows and approves*" of the conduct in question, Pet. 21-22; the DOJ concurs, Pet. 30-31. The Ninth Circuit has therefore opened a circuit split on the necessity for clear government knowledge and approval. PP does not attempt to square the Ninth Circuit's ruling with the "know and approve" standard, relying instead upon the Ninth Circuit's resort to counterfactual inferences from partial silence and partial inaction.

PP claims this was merely a situation where the recipient of government funding “engaged in a cooperative effort with the government to find a solution” to some logistical problem, Opp. 19-20 (citing, *inter alia*, *U.S. ex rel. Costner v. United States*, 317 F.3d 883 (8th Cir. 2003)). But this is not such a case. PP did not agree to manufacture boats (as in *Bollinger Shipyards*) or clean up a toxic site (as in *Costner*), encounter difficulties, and then receive instructions from the contracting officers on how to proceed. Here, PP simply wanted to charge more than was allowed. PP was told in no uncertain terms it could not mark up charges, but went ahead and did so anyway. That state officials did not immediately pounce upon PP with an audit did not mean the officials approved. (If they did, the audit that eventually followed would make no sense.) Nor did the *post hoc* decision of one state official not to recoup the overcharges amount to retroactive “knowledge and approval.” As FCA expert and veteran FCA litigator Prof. Joel Hesch put it, a defendant’s knowledge (or reckless disregard) of illegality “is not erased merely because some state employee lacking authority to waive a regulation is willing to look the other way.” Hesch Amicus 3. *See also id.* at 11 (government knowledge defense “clearly is inapplicable in the context of billing more than the amount allotted in an unambiguous federal regulation”). To rule otherwise would be to empower state officials to bind the federal government by their unauthorized indifference to, inaction regarding, or even collusion with, raids on the federal fisc.

#### IV. INVERSION OF *IQBAL*

Moreover, by holding that a complaint is not factually plausible, despite hard documentary evidence sufficient to survive an adverse motion for summary judgment, and indeed sufficient to support a jury verdict of “reckless disregard” on the scienter issue, and by choosing instead to rest upon speculative (and counterfactual) inferences that favor the defense, the Ninth Circuit has turned *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), upside down.

To recap the facts: Federal and state law (not just state law, *contra* Opp. 3, 12 n.9, 25) provided that, when seeking reimbursement for birth control drugs and devices distributed to low-income recipients, PP affiliates could lawfully bill the state, and through it, the federal government, only at acquisition cost, not at marked up rates. Pet. 5-6. Moreover, state officials explicitly instructed PP that it must bill at acquisition cost, not at “usual and customary” or some other marked up rate. Pet. 7-9. State officials reiterated the “at cost” limit after PP told them that it was billing at marked up rates, and after PP told them why PP thought it was entitled to mark up the charges. Pet. 7-9. PP nevertheless continued billing the state and federal government at exorbitantly marked up rates, Pet. 6-7, 9. Finally, the state caught the overbilling with an audit. Pet. 10.<sup>6</sup> This obviously suffices to allege

---

<sup>6</sup>While this history “span[s] from 1997 through 2004,” Opp. 4, there were three distinct subperiods.

First, in correspondence in 1997-98 state officials repeatedly told PP it could not overbill, never said the overbilling was permissible, and, *contra* Opp. 11-12, maintained this position after learning both the nature of PP’s billing practice (to mark up charges to “usual and customary” levels) and PP’s rationale for

at least recklessness on PP's part. Yet the Ninth Circuit held the complaint insufficient, as a matter of law, because the (non-)response of some state officials supposedly conclusively rebutted scienter.

Nonsense.

PP can *argue* that the state implicitly approved PP's overbilling – though that argument strains credulity. But that *factual* argument provides no help to PP *here, at the pleadings stage*, where the allegations and documentary facts (as opposed to the Ninth Circuit's speculative inferences) all show express state (and federal regulatory) *disapproval* of the overbilling. Pet. 5, 7-11, 26 & n.15, 27 n.16. The question of government approval – the linchpin of the “government knowledge defense” and the basis of the Ninth Circuit's ruling – is at best a potential *factual* affirmative defense, and a hotly disputed one at that. The state's repeated, express instructions to bill only

---

this practice. Pet. 7-9. PP notes that it “received no response” to PP's final (repetitive) letter. Opp. 5. But the absence of a fourth letter repeating what the state had already said three times (namely, that billing must be “at cost”) is, *contra* Opp. 15, by no means an unequivocal or even implicit state approval of the mark-ups.

Second, from 1998 through 2004 PP engaged in the illegal mark-ups, with no indication of either state approval or even state knowledge that this was going on. PP's claim that it “did nothing to conceal” the overbilling, Opp. 4, and that the state “continued to pay” PP's claims, Opp. 5, is quite misleading. PP had voiced no desire or intent to defy the express state directives, and the billing documents contained raw numbers with no “red flags” to reveal the behind-the-scenes mark-up practice. Pet. 9 & n.8. The state never condoned PP's mark-ups.

Third, in 2004 the state audited PP over the billing mark-ups, caught PP in millions of dollars of overbilling (saying the mark-ups “did not comply” with the billing requirements, TAC Ex. 6), but declined to require repayment. Pet. 10-11.

at cost directly contradict PP's claim of unspoken state approval. Moreover, *the very fact that the state audited PP for the mark-ups* likewise contradicts PP's claim of government approval. State officials also *reiterated the unlawfulness* of PP's billing during the audit process, Pet. at 10, and in the audit report, Pet. 11, which likewise contradicts a claim of state approval. And the supposedly crucial Rosenstein letter (“[c]hief among those documents,” Opp. 1, according to PP), that declined to insist upon recouping the overbilled funds, *issued in 2004*, Pet. 11, *at the tail end of the entire overbilling period*, and *did not purport to claim the overbilling was lawful*; hence, PP could not have relied upon that letter in all its prior years of illegal overbilling, or even going forward.<sup>7</sup>

The decision below thus stands for the proposition that a complaint is insufficient if there is an *arguably plausible factual defense*, even if that defense is at best strained and contradicted by hard evidence attached to the complaint. But *Iqbal* required a plausible complaint, not the absolute exclusion of any plausible defense. PP does not even attempt to explain how

---

<sup>7</sup>PP claims the state legislature “codified” PP’s mark-ups in a 2004 bill. Opp. 6. This is neither relevant nor accurate. It is irrelevant because the 2004 bill could not retroactively sanitize PP’s previous knowing or reckless disregard of the billing rules. It is inaccurate because the bill sought to change, not codify, the billing rules. PP admitted as much, TAC Ex. 10 (forwarded Kneer email: hoping for “bill language” which would “change” the law “to allow clinics to bill at usual and customary” rates), and the state senate committee considering the bill agreed that “[e]xisting regulations . . . [p]rovide that reimbursement of licensed community clinics and free clinics under the Medi-Cal program for take-home drugs shall not exceed the amounts payable for drug ingredient costs established by DHS” and allow “no dispensing fee or markup,” Doc. 34-3, Ex. 5.

preferring inferences from partial silence and partial inaction over express allegations and supporting documentary exhibits can be reconciled with any sensible reading of *Iqbal*.

This Court should grant review to correct the Ninth Circuit's outlandish distortion of the *Iqbal* standard. In the alternative, this Court should summarily reverse.

### CONCLUSION

This Court should grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

Jack M. Schuler  
Schuler & Brown



Jay Alan Sekulow  
*Counsel of Record*  
Stuart J. Roth  
Walter M. Weber  
Jordan A. Sekulow  
Tiffany N. Barrans  
American Center for  
Law & Justice



*Counsel for Petitioner*

April 20, 2015