No. 08-511

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*, RICHARD FEINGOLD,
Petitioner,

v.

PALMETTO GOVERNMENT BENEFITS ADMINISTRATOR, *et al.*,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit correctly concluded that a provision granting immunity to Medicare carriers for "any" payment that is processed on behalf of the government bars Petitioner's *qui tam* suit alleging that the Respondent carrier processed false claims.

CORPORATE DISCLSOURE STATEMENT

Respondent Palmetto Government Benefits Administrator is a wholly-owned subsidiary of Respondent Blue Cross and Blue Shield of South Carolina.

Respondent Blue Cross and Blue Shield of South Carolina has no parent company and there is no publicly traded company that owns 10% or more of its stock.

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INTRODUCTION

Petitioner asks this Court to address the meaning of 42 U.S.C. § 1395u(e) (1999), which provides immunity for Medicare Part B carriers in processing Medicare claims on behalf of the government. This Court should deny the petition. Not only was § 1395u(e) properly interpreted by the courts below as one of alternative grounds mandating dismissal of Petitioner's claims, but the provision was also superseded years ago, thereby resolving the question presented for future claims.

Respondent Palmetto Government Benefits Administrator ("Palmetto") is a Medicare carrier that processes and pays millions of Medicare claims on behalf of the government each year.[1] As with all carriers during the relevant time, Palmetto performed these services on a cost-reimbursement basis; that is, it did not receive any profit or fee but was reimbursed only for the costs of administrative services it performed and reported on government forms. Petitioner brought a federal *qui tam* action alleging that Palmetto had, among other things, processed and paid numerous false claims submitted to it by Medicare suppliers for expensive female urinary collection products that were never provided to beneficiaries. Petitioner made these allegations without any firsthand knowledge of Palmetto's billing or claims practices. Petitioner never worked for Palmetto or any other Medicare carrier, nor did

[1] Palmetto is a wholly-owned subsidiary of Respondent Blue Cross and Blue Shield of South Carolina.

he ever submit any Medicare claims to Palmetto. He never saw, much less identified, a single alleged false claim, document, or other statement of Palmetto. This *qui tam* case was Petitioner's third action making these allegations against Medicare carriers in a 13-month period. The government declined to intervene in each of them, and all three were dismissed by different courts.

Petitioner's district court complaint contained the same allegations that he repeats in the Petition claiming that Palmetto has allowed substantial fraudulent activity to take place. The district court, affirmed by the Court of Appeals, however, correctly found that Petitioner was a "repeat filer" of "parasitic" *qui tam* suits in which he alleged insufficient generalities and was unable to point to "a single fraudulent claim form or report prepared by Palmetto." Pet. App. 27a, 25a, 23a.

The district court also found that under circuit precedent Palmetto had immunity against Petitioner's claims by virtue of 42 U.S.C. § 1395u(e) (1999), which provides that Medicare carriers shall not be liable for "any" claim that they process subject to certain requirements not contested here. It is that determination, affirmed by the Eleventh Circuit, for which Petitioner seeks review in this Court. The petition should be denied.

First, as part of a comprehensive Medicare reform bill that became effective in 2005, § 1395u(e) was superseded by a provision that changes the immunity rules for Medicare carriers going forward.

As Petitioner himself observes, this amendment "eliminated any possible ambiguity contained in the earlier enactment." Pet. at 13. There is little reason for this Court to address a provision to which Congress has subsequently and conclusively spoken. Moreover, the provision in question has hardly been one of exceptional importance to the federal courts. Only two courts of appeals have had occasion to address its meaning in the 43 years it has been on the books, and it is highly unlikely that any appellate court would address it again in light of the superseding provision.

Second, Petitioner's claims are independently barred on other grounds. As noted above, the district court also found that none of Petitioner's claims – including those also covered by immunity – met the particularity requirements of Federal Rule of Procedure 9(b). The Eleventh Circuit, which affirmed the district court in an opinion issued three business days after oral argument, did not have occasion to reach this alternative holding because it relied solely on the immunity grounds for the claims at issue in the petition. But there is little doubt that it, too, would find a Rule 9(b) violation given that it found that Rule 9(b) barred Feingold's other claims of fraud, which were premised on the same factual allegations. In addition, in light of this Court's recent ruling in *Rockwell International Corp. v. United States*, 127 S. Ct. 1397 (2007), this Court would need to address the jurisdictional issue of whether Petitioner's allegations were publicly disclosed. Given that Petitioner's complaint recites that he learned of the allegations underlying his

complaint from newspaper articles and government reports, it is likely that Petitioner would fail to clear the public disclosure bar. Indeed, the Seventh Circuit barred Petitioner from proceeding on a similar lawsuit against another Medicare carrier, after finding that virtually identical allegations to the ones in this case were based on publicly-disclosed information for which he was not the original source. *United States ex rel. Feingold v. AdminaStar Federal, Inc.*, 324 F.3d 492 (7th Cir. 2003).

Third, the decision below was correct. The Eleventh Circuit gave § 1395u(e) its plain meaning when it held that its immunity for "any" claim applied to the claim here. That reading is also consistent with a statutory framework in which Medicare carriers process enormous numbers of claims on a cost-reimbursement basis. It would be inappropriate and economically infeasible to expose carriers to liability for these claims. Congress has authorized numerous other means of combating fraud, including terminating contracts with carriers, and providing for recoupment from the suppliers who commit the fraud. These are the proper tools – not an implausible reading of § 1395u(e) – by which fraud should be combated.

STATEMENT

A. Medicare And The Durable Medical Equipment Benefit System

Medicare is a federal health insurance program for the aged and disabled. 42 U.S.C. § 1395 *et seq.*; 42 C.F.R. pt. 405. Medicare is administered by the Centers for Medicare & Medicaid Services ("CMS"), formerly known as the Health Care Financing Administration ("HCFA"), and is divided into four parts, depending on the type of benefits offered. *See* Medicare Act, Pub. L. No. 89-97, title 42, ch. 7, subch. XVIII, Parts A, B, C, D. Part B is relevant to this appeal;[2] Part B (1965) provides Medicare benefits for doctors' services and outpatient care, including the provision of durable medical equipment ("DME"). *See* Medicare Act, title 42, ch. 7, subch. XVIII, Part B.

Rather than create an unwieldy and burdensome federal bureaucracy to administer Medicare claims, Congress directed the new Medicare agency to contract with private insurance companies for processing Medicare claims on behalf of the Government. *See* 42 U.S.C. § 1395h(a); *id* § 1395u(a). Respondent Palmetto served as one of

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[2] Medicare Part A provides benefits for "hospital, related post-hospital, home health services, and hospice care." 42 U.S.C. § 1395c. Medicare Part C provides Medicare benefits through private health care plans. *See* Medicare Act, title 42, ch. 7, subch. XVII, Part C. Medicare Part D covers prescription drug benefits for those enrolled in Medicare Part A or B. *See* Medicare Act, title 42, ch. 7, subch. XVII, Part D.

four Durable Medical Equipment Regional Carriers ("DMERCs"), responsible for Medicare DME claims. *See* 42 U.S.C. § 1395m(a)(12); 42 C.F.R. § 421.210. Palmetto was the DMERC for Region C, which encompassed the states of Alabama, Arkansas, Colorado, Florida, Georgia, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas, as well as the territories of Puerto Rico and the Virgin Islands. (Amended Complaint at ¶ 29); *see* 42 C.F.R. § 421.210. During all relevant times Palmetto had processed claims in Region C on behalf of Medicare, and had done so since 1993.[3] Pet. App. at 4a-5a.

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[3] As discussed in more detail below, after the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 ("the Medicare Modernization Act"), DMERCs were re-labeled Durable Medical Equipment Medicare Administrative Contractors ("DME MACs"), and their jurisdictions were realigned. *See* Medicare Program - Revisions to Hospital Outpatient Prospective Payment System, 71 Fed. Reg 67,960 (Nov. 24, 2006) (to be codified at 42 C.F.R. pts. 410, 416 et al.). In recompeting the Region C Contract under the Medicare Modernization Act, CMS originally selected Palmetto as the DME MAC contractor for Region C, which now encompasses 15 states and two territories. After a bid protest, however, the Region C DME MAC contract was ultimately awarded to another company. *See* Centers for Medicare & Medicaid Services, http://www.cms.hhs.gov/MedicareContractingReform/08_DurableMedicalEquipmentMedicareAdministrativeContractor.asp (last visited Dec. 10, 2008). Palmetto still serves as a Medicare Part B carrier for the states of Ohio, South Carolina, and West Virginia, and a Medicare Part A fiscal intermediary for the states of North and South Carolina. *See* Centers for Medicare & Medicaid Services, http://www.cms.hhs.gov/MedicareContractingReform/Downloads/PrimaryABMACJurisdictionFactSheets.pdf (last visited Dec. 10, 2008). Palmetto also has several other Medicare contracts.

Under its DMERC contract with CMS, Palmetto processed more than 30,000,000 claims, totaling more than $4,000,000,000 in 2006 alone. Palmetto performed this work – as did all DMERCS – pursuant to cost-reimbursement contracts, under which the DMERCs agreed to use their "best efforts" to perform within negotiated contract funding limits. *See* Amended Complaint, Ex A. §§ B.1, B.6.e(1), pp. 3, 9. The DMERCs were reimbursed only their allowable costs for administrative services actually performed and reported on CMS forms. *See id.* § B.6, p. 8. The DMERCs received no profit or fee and could not seek reimbursement for costs in excess of the annual amount established by CMS without CMS's prior approval. *See id.* § B.6.a, p. 8. Due to Government funding restraints, the DMERCs did not and could not perform a prepayment medical review (a prepayment "safeguard") on each of the millions of claims they process annually on behalf of the federal government. *See id.* § C.3.d(2)(b).

CMS reviewed the performance of each DMERC annually and was required by law to terminate a DMERC's contract if CMS determined the DMERC had failed to "carry out the contract or is carrying out the contract in a manner inconsistent with the efficient and effective administration of the insurance program." 42 U.S.C. §1395u(b)(5) (1999);

For example, Palmetto serves as the Regional Home Health Intermediary for the Southeast region of the United States, and as the Railroad Retirement Board carrier nationwide. *See* PalmettoGBA, http://www.palmettogba.com (last visited Dec. 10, 2008).

42 C.F.R. §§ 421.201, 421.205. CMS never made such a determination against Palmetto.

B. Petitioner's Litigious Past

This is Petitioner's third suit (all of which have been dismissed) against a DMERC under the False Claims Act – and fifth *qui tam* civil action in total. Petitioner brought his first DMERC suit against AdminaStar Federal ("AdminaStar") (the Region B DMERC) in July 1998. *AdminaStar Federal Inc.*, 324 F.3d at 494. The basis for that case – as well as this one – came from a newspaper article Petitioner had read about the indictment of two individuals who fraudulently billed Medicare in 1994 and 1995. Pet. App. 7a. The fraud was that Medicare supply companies had provided elderly female nursing home residents with relatively inexpensive medical diapers, but billed Medicare for relatively expensive female urinary collection pouches ("FUCPs"). Petitioner was familiar with the fraud because the same scheme had been employed by two medical supply companies with which he had previously been associated, Iliana Medical Supplies, Inc. and Bulldog Medical Corporation, and which he subsequently sued in two successful *qui tam* actions. *Id.* at 6a-7a.

Petitioner's suit against AdminaStar alleged the DMERC had approved false claims for FUCPs. The government declined to intervene and the case was dismissed because Petitioner had relied upon publicly disclosed information for which he was not the original source. *AdminaStar Federal Inc.*, 324 F.3d at 493 (Petitioner's claims were premised on

newspaper stories, public indictments, and government fraud alerts and reports). That judgment was affirmed by the Seventh Circuit. *Id.* In August 1999, Petitioner brought another action raising the same allegations he had made in the *AdminaStar* action against CIGNA Corporation, the Region A DMERC at the time. Complaint, *United States ex rel. Feingold v. Connecticut Gen. Life Ins.*, No. 5A-CV-99-1049 (C.D. Cal. filed August 20, 1999). The government also declined to intervene in that action, and Petitioner voluntarily dismissed his suit. *United States ex rel. Feingold v. Connecticut Gen. Life Ins.*, No. 5A-CV-99-1049, slip op. (C.D. Cal. April 23, 2002).

C. Proceedings Below

Petitioner filed his complaint against Palmetto in March 1999 in the United States District Court for the Southern District of Florida (his third complaint against a DMERC within 13 months). Pet. App. 8a. As with his lawsuits against the other DMERCs, Petitioner alleged that Palmetto had recklessly processed thousands of false FUCP Medicare claims on behalf of the government over a seven-year period. *Id.* at 9a.

The complaint, however, identified only a single claim of less than $50,000 in 1994 that Palmetto approved for payment –- and that specific Medicare claim had been identified in a publicly-filed federal criminal indictment against two owners of a medical supply company. *See* Indictment, *United States v. Pergler and Zarate*, 98 CR 0469 (N.D. Ill. filed June

24, 1998). The complaint did not contain any factual support for or assert first-hand knowledge of Palmetto's ever approving for payment a Medicare claim it knew to be false. Rather, the complaint regurgitated other public information – namely, referring to several medical supply companies that had already been identified in Government civil and criminal enforcement actions, and copying from HCFA reports the number of aggregate FUCP claims each of the four DMERCs approved annually.

In January 2006, Petitioner filed an Amended Complaint repeating the contentions that Palmetto recklessly processed Medicare claims on behalf of the government (Counts III and IV of the Amended Complaint). He also alleged that Palmetto had falsely represented to the government that it had complied with administrative obligations under the DMERC contract, and had thus been paid for work it allegedly had not done (Counts I and II of the Amended Complaint). Pet. App. at 9a. Petitioner's argument was that although Palmetto was paid for its work, Palmetto could not have complied with its obligations because otherwise it would have caught the FUCP fraud. Petitioner, however, did not identify a single actual claim, document, or report submitted by Palmetto. Nor did he cite a single specific instance of an administrative service for which Palmetto claimed payment but had failed to perform.

Instead, Petitioner's 116-page amended complaint was filled with lengthy descriptions of his prior experiences with FUCP fraud and how DMERCs

generally process claims, as well as substantial excerpts from a government manual (which is publicly accessible from CMS's website) specifying the information that DMERCs must submit on reports to the government. In particular, although Petitioner alleged Palmetto submitted several false HCFA forms, he attached to the complaint as support only blank sample forms taken from the manual available online from CMS's website. No actual form prepared by Palmetto was ever identified or referenced.[4]

Palmetto filed a motion to dismiss the suit in its entirety, which the district court granted. The district court found that Palmetto had absolute statutory immunity for Counts III and IV.[5] The district court looked to two earlier Eleventh Circuit

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[4] The amended complaint also referred to unrelated unfounded accusations against Palmetto in the public domain that are repeated in the Petition. Pet. at 9-10. Specifically, Petitioner referred to an affidavit dated over five years ago that had been posted on a now defunct website (www.fixmedicare.com). In 2004, the Office of Inspector General of the Department of Health and Human Services reviewed the allegations made in the affidavit at the request of a member of Congress, and concluded the allegations had no merit. The Petitioner also referred to a comment from a federal judge in a court proceeding relating to Medicare claims for artificial limbs in which the same judge later dismissed a complaint filed against Palmetto.

[5] The district court found that Petitioner faced an "uphill struggle" in arguing that Counts I and II were not also subject to statutory immunity, but declined to dismiss them on a motion to dismiss. Pet. App. 11a n.6. Instead, the district court ruled that those Counts (as well as Counts III and IV) did not satisfy Rule 9(b)'s particularity requirement. *See infra.*

cases that had construed an analogous immunity provision for Medicare Part A intermediaries. 42 U.S.C. § 1395h(i) (1999). This provision states:

> (1) No individual designated pursuant to an agreement under this section as a certifying officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payments certified by him under this section.
>
> (2) No disbursing officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payment by him under this section if it was based upon a voucher signed by a certifying officer designated as provided in paragraph (1) of this subsection.
>
> (3) No such agency or organization shall be liable to the United States for any payments referred to in paragraph (1) or (2).

The district court recounted that the Eleventh Circuit had twice construed § 1395h(i) to afford absolute immunity to Part A intermediaries. Pet. App. 13a - 14a. Specifically, in *United States ex rel. Body v. Blue Cross and Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998), the Eleventh Circuit concluded that "subsection 1395h(i)(3) broadly states that the fiscal intermediaries themselves will not be liable to the Government for *any* of the payments referred to in paragraphs (1) and (2)," and that intermediaries therefore had absolute immunity for

those payments. *Id.* at 1111 (emphasis in original). And in *United States ex rel. Sarasola v. Aetna Life Insurance Co.*, 319 F.3d 1292 (11th Cir. 2003), the Eleventh Circuit reaffirmed the "absolute immunity" rule of *Body* and held it was a result of the "recognition of the unique administrative function that fiscal intermediaries play in the operation of the Medicare system and Congress's unwillingness to impose liability for the vast amount of federal money that they disburse." *Id.* at 1302.

Having found that 42 U.S.C. § 1395h(i) provided absolute immunity to Medicare Part A intermediaries, the district court considered the meaning of 42 U.S.C. § 1395u(e), the immunity provision governing Medicare Part B carriers, like Palmetto. It noted

> [t]he language in the immunity provisions ... is virtually identical. The *only* difference in the two sections is that the Part A immunity provisions provides [sic] that "[n]o such *agency or organization* shall be liable" whereas the Part B immunity provision provides that "no such *carrier* shall be liable."

Pet. App. 16a (emphasis in original) (quoting 42 U.S.C. § 1395h(i) and 42 U.S.C. § 1395u(e)). The district court further noted that "courts have consistently treated Part A and Part B carriers in the same fashion." Pet. App. 16a (citing *Body*, 156 F.3d at 1106 n.17 and *United States ex rel. Rahman v. Oncology Associates, P.C.*, 198 F.3d 502, 512 n.2 (4th Cir. 1999). It therefore concluded that "[g]iven

the unambiguous, identical language of the immunity provisions and the comparable treatment of Part A and Part B carriers by the courts, there is no reason to believe that ... *Body* and *Sarasola* are not applicable in this case." Pet. App. 17a. The district court consequently dismissed Counts III and IV on the ground that Palmetto was protected by statutory immunity.

The district court then proceeded to dismiss all four counts in the complaint on the ground that they were not pleaded with specificity in violation of Federal Rule of Civil Procedure 9(b). Pet. App. 17a - 25a. After an extensive review of the case law governing fraud pleadings, the district court concluded

> Feingold here has no firsthand knowledge of any fraudulent conduct on the part of Palmetto. Feingold never worked for or with Palmetto, nor did he ever submit any false claims to Palmetto which were subsequently approved by Palmetto. Feingold argues that he embarked upon an investigation by which he uncovered Palmetto's fraudulent scheme, but he is able to demonstrate only generalities. Pet. App. 21a-22a.

The district court went on to address the allegations in Petitioner's complaint, finding despite its length, it "fails ... to point to specific examples of fraudulent claims approved or submitted by Palmetto." *Id.* at 22a. The district court also contrasted Petitioner's success in the Iliana *qui tam*

lawsuit – a company with which he was personally familiar – with the allegation in the current lawsuit. "Feingold was in a position to bring the initial suit against Illiana ... as an appropriate relator [given that] he had specific factual evidence of the fraud and was an original source of the information." *Id.* at 25a. In contrast, "when a relator seeks to repeat earlier financial success by filing an action based simply on a supposition that other entities are involved in similar fraudulent activities, that is the sort of parasitic lawsuit which the False Claims Act is designed to prohibit." *Id.*

The district court accordingly dismissed all counts for failure to plead with particularity. It also denied leave to replead, because Petitioner was a "repeat filer" who had "initiated at least three *qui tam* suits alleging facts of which he has had no personal knowledge." Pet. App. 27a. Given that Petitioner had "no personal knowledge of Palmetto's claim procedures, there are no circumstances under which Feingold could his amend his Complaint to cure the deficiencies therein." *Id.*

The Eleventh Circuit affirmed in an unpublished, five-sentence, per curiam opinion. It concluded as to Counts III and IV, "we are bound by our prior panel opinion in [*Body*]. *Pet. App. 2a.* And it found with respect to Counts I and II that the district court "committed no reversible error in dismissing those counts for failure to comply with [Rule 9b]." *Id.* Petitioner then sought rehearing of the Circuit's *Body* precedent. No member of the Court voted in favor of rehearing. *Id.* at 30a.

REASONS FOR DENYING THE WRIT

I. The Statute At Issue Has Been Superseded.

This Court should deny the Petition because the statutory provision it implicates was superseded by provisions that became effective more than three years ago, thereby obviating the question presented. The courts below ruled on Respondent's immunity defense under § 1395u(e), a provision that was in effect at the time of Petitioner's complaint in 1998. The statute then provided:

> (1) No individual designated pursuant to a contract under this section as a certifying officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payments certified by him under this section.
>
> (2) No disbursing officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payment by him under this section if it was based upon a voucher signed by a certifying officer designated as provided in paragraph (1) of this subsection.
>
> (3) No such carrier shall be liable to the United States for any payments referred to in paragraph (1) or (2).

42 U.S.C. § 1395u(e)(1)-(3) (1999).

The courts below, following Eleventh Circuit precedent, concluded that paragraph (3) provided absolute immunity to carriers like Palmetto for payments presented to the United States. In contrast to paragraphs (1) and (2), which permitted certifying and disbursing officers to be held liable for grossly negligent or intentionally fraudulent acts, paragraph (3) contained no such qualifying language for carriers. Pet. App. 13a (quoting *Body*, 156 F.3d at 1111 (paragraph (3) "broadly states that the [carriers] themselves will not be liable to the government for *any* of the payments referred to in paragraphs (1) and (2) – that is, payments certified by certified by certifying officers and disbursed by disbursing officers").[6]

In 2003, Congress overhauled the statutory framework governing Medicare by enacting the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2006 ("the Medicare Modernization Act"). Among many other changes, the Medicare Modernization Act replaced the concepts of "carriers" and "intermediaries" with the unitary concept of "Medicare administrative contractors," and changed the immunity rules governing such entities.

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[6] As explained *supra*, prior Eleventh Circuit precedent had construed the materially identical statute governing immunity for Part A carriers. The courts below concluded that construction also governed 42 U.S.C. § 1395u(e)'s immunity for Part B carriers and that point is not disputed in the Petition. Pet. at 10-11.

Specifically, the Act repealed the old 42 U.S.C. § 1395u(e), and enacted a new immunity provision, codified today at 42 U.S.C. § 1395kk-1(d)(3)(A). This new provision states that

> no Medicare administrative contractor shall be liable to the United States for a payment by a certifying or disbursing officer *unless, in connection with such payment, the medicare administrative contractor acted with reckless disregard of its obligations under its medicare administrative contract or with intent to defraud the United States.*

42 U.S.C. § 1395kk-1 (emphasis added).

This new provision plainly limits contractors' immunity by explicitly permitting liability where contractors carry out their obligations with "reckless disregard" or with "intent to defraud." The new immunity provisions, which have been in effect since October 2005, apply to payments made by contractors pursuant to a contract under the new statutory framework. Pub. L. No. 108-173, § 911(d)(1), 117 Stat. at 2385. Thus, while § 1395kk-1 does not apply to the payments at issue here (all of which were made before the amendment took effect), the amendment will resolve the immunity question going forward. As Petitioner himself put it, the 2003 Act "eliminated any possible ambiguity contained in the earlier enactment." Pet. at 13.

Certiorari is unwarranted where, as here, the statutory provision at issue has been superseded in a

way that will likely prevent the question presented from arising again in the future. *See generally* Eugene Gressman, *et al.*, *Supreme Court Practice* ch. 4.4(c), at 247 (9th ed. 2007). There is no reason for this Court to decide a question of statutory interpretation that Congress has since addressed through additional legislation. And even if this Court concluded that the subsequent amendment of § 1395u(e) did not itself preclude review, the question presented still would not merit this Court's consideration. Section 1395u(e)'s immunity language dates back to the inception of Medicare itself in 1965. *See* Social Security Amendments of 1965, Pub. L. No. 89-97, § 1842, 79 Stat. 286, 311. During the intervening 43 years, only *two* courts of appeal – the Eleventh and the Tenth Circuits – have had occasion to address the meaning of the immunity provision.[7] An interpretative question taken up by just one other appellate court in 43 years is self-evidently not a question of importance. Nor is it a question for which this Court would have the benefit of sustained consideration by the courts of appeals. And of course, future appellate consideration of § 1395u(e) is highly unlikely given that the 2003 Act has now "eliminated any possible ambiguity contained in the earlier enactment." Pet. at 13.[8]

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[7] The Tenth Circuit decision is *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702 (10th Cir. 2006), As explained below, *infra* at 24-25, *Sikkenga* was wrongly decided.

[8] Petitioner quotes the amicus brief of the United States in *Sikkenga* filed in July 2005, more than three years ago, for the proposition that the question of § 1395u(e)'s proper interpretation remains one of "significance" even after it was

II. Granting The Petition Would Not Change The Result Below Because Petitioner's Claims Are Barred On Multiple, Independent Grounds.

The immunity question raised by Petitioner is not properly presented because Petitioner's qui tam action fails on two additional independent grounds. First, the courts below found that Petitioner's claims did not satisfy Federal Rule of Civil Procedure 9(b). Second, Petitioner's claims are jurisdictionally barred under this Court's recent decision in *Rockwell International Corp. v. United States* because they are based upon public disclosures.

Rule 9(b). The district court concluded that in addition to being barred by § 1395u(e), Petitioner's claims were not pleaded with specificity under Federal Rule of Procedure 9(b). In an extensive discussion of the Rule 9(b) issue, Pet. App. 17a - 27a, the district court found that Petitioner was "able to demonstrate only generalities" and that he had failed to "identify or produce a single fraudulent claim form or report prepared by Palmetto." *Id.* at 22a, 23a. Using strong language, the district court denied leave to replead because Petitioner was a "repeat filer" who has "initiated at least three *qui tam* suits alleging facts of which he had no personal knowledge." *Id.* at 27a. The district court then dismissed all four Counts in Petitioner's complaint

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superseded. Pet. at 11. Tellingly, the United States has declined to intervene at any stage of Petitioner's suit.

under Rule 9(b) (in addition to dismissing Counts III and IV on immunity grounds).

Petitioner does not raise the propriety of the Rule 9(b) dismissal in his petition, and there is every reason to think that even if this Court were to find in his favor on the immunity question (which it should not), his claims would still be barred by Rule 9(b)'s particularity requirements. Although the court of appeals had no occasion to reach the Rule 9(b) question with respect to Counts III and IV, it is clear that it would dismiss those claims under Rule 9(b) in the absence of immunity considerations. The court of appeals affirmed the dismissal of Counts I and II (alleging that Palmetto had falsely submitted claims for compensation) on Rule 9(b) grounds, and the considerations under the Rule are identical for Counts III and IV (alleging that Palmetto had presented false Medicare claims for FUCPs to the government). As the district court found with respect to all counts – and it did not distinguish among them in its ruling – Petitioner had no knowledge of any false claim of any sort that Palmetto allegedly presented to the government. Petitioner's status as an outsider presents the same impediment to Counts III and IV of his complaint as it did to Counts I and II. In light of the fatal Rule 9(b) flaw underlying Petitioner's claims, this Court should not decide what would effectively be the academic question of whether Petitioner's claims also fail on immunity grounds.

Public Disclosure. Petitioner's claims are equally doomed because they fail to satisfy the *qui tam* law's

public disclosure provisions. Under the False Claims Act, "[n]o court shall have jurisdiction over [a *qui tam* action] based upon the public disclosure of allegations or transactions ... unless the ... person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A).

Here, Petitioner's own complaint explains that he learned of the information underlying his claims when he read a newspaper article about the indictment of two people who fraudulently billed Medicare for diapers in 1994 and 1995. Pet. App. 7a. Petitioner further alleges he learned of additional information underlying his complaint from fraud alerts and reports issued by HCFA, an administrative agency. *Id.* at 7a, 8a. All of these sources constitute public disclosures under the plain text of the *qui tam* statute. *See* 31 U.S.C. § 3170(e)(4)(A) (barring actions where allegations are based on public disclosures in "the news media" and "administrative ... report[s]"). Notably, Petitioner's *AdminaStar* action, in which he pursued the same allegations based on the same public disclosures against another DMERC, was dismissed on public disclosure grounds. *See AdminaStar*, 324 F.3d at 496-97 ("[A]ll of the information upon which this suit could have been based was publicly disclosed.").

Although the district court did not reach the public disclosure issue because it found it was "more properly addressed in a motion for summary judgment," Pet. App. 11a, this Court has since held that the question of public disclosure is jurisdictional in a *qui tam* action. *Rockwell International Corp.*,

127 S. Ct. at 1405-06. Consequently, this Court would also need to address the jurisdictional issue of whether Petitioner's allegations were publicly disclosed. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-94 (1998) (courts must resolve jurisdictional questions prior to determining whether allegations state a claim). This public disclosure question presents yet another reason why this Court should decline to hear the petition.

III. In All Events, The Decision Below Was Correct.

The Eleventh Circuit properly construed § 1395u(e) in concluding that it provided immunity for Respondent. Because the decision below was correct, this Court should decline to review it.

The plain meaning of § 1395u(e) unambiguously supports immunity for Respondent here. Section 1395u(e)(3) provides that carriers shall not be liable for "any" of the payments referred to in paragraphs (1) and (2). That is, if a payment is referred in to paragraphs (1) or (2), then "[n]o carrier shall be liable" for that payment. A simple syllogism follows: Paragraphs (1) and (2) refer to payments certified by certifying officers and disbursed by disbursing officers. The payments in question in this case were certified and disbursed. Therefore Palmetto is not liable for them. *See* Pet App. 13a ("[S]ubsection [1395u] broadly states that the [carriers] themselves will not be liable to the Government for *any* of the payments referred to in paragraphs (1) and (2) — that is, payments certified by certifying officers and

disbursed by disbursing officers.") (quoting *Body*, 156 F.3d at 1111) (emphasis in original).

The fact that paragraphs (1) and (2) impose special immunity rules for individuals who engage in gross negligence or fraud in their certification or disbursal is irrelevant to the question of carrier immunity. Claims implicating gross negligence and fraud are only a subset of those claims certified or disbursed, and paragraph (3) provides immunity for all claims. As the *Body* Court has observed, "a clause limiting immunity to payments not involving gross negligence or fraud is conspicuously absent" from paragraph (3). *Body*, 156 F.3d at 1111.

Petitioner argues that the text of § 1395u is at least ambiguous under the reasoning of the *Sikkenga* decision, which held that § 1395u(e) did not provide immunity to carriers for payments made under circumstances of gross negligence or fraud. *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah,* 472 F.3d 702 (10th Cir. 2006). But *Sikkenga*'s textual analysis is erroneous. According to the Tenth Circuit, the statute as written suffered from "the egregious use of the split infinitive." *Id.* at 710. The Tenth Circuit then "restat[ed]" § 1395u(e) "to avoid" this problem so that it read:

> (1) In the absence of gross negligence or intent to defraud the United States, no individual designated pursuant to a contract under this section as a certifying officer shall be liable

> with respect to any payments certified by him under this section.
>
> (2) In the absence of gross negligence or intent to defraud the United States, no disbursing officer shall be liable with respect to any payment by him under this section if it was based upon a voucher signed by a certifying officer designated as provided in paragraph (1) of this subsection.
>
> (3) No such carrier shall be liable to the United States for any payments referred to in paragraph (1) or (2).
>
> *Id.*

Even assuming it were proper for a court to "restate" a statute to avoid a split infinitive, the Tenth Circuit's reading does not change the statute's unambiguous grant of absolute immunity to carriers. As with the actual statute, restated paragraph (3) still provides that carriers shall not be liable for "any" payments referred to in paragraphs (1) or (2). And restated paragraphs (1) and (2) still refer to payments certified and disbursed by officers, including but not limited to payments involving gross negligence or fraud. Therefore, even under *Sikkenga's* logic, carriers should have immunity for any such payments, and *Sikkenga* was incorrect to hold otherwise.

The rest of Petitioner's statutory argument boils down to a reliance on a few snippets of legislative

history and a policy argument that it would be preferable to hold carriers liable for having processed false claims. Pet. at 12-17. Neither argument calls into doubt the decision below. With respect to legislative history, it is hornbook law that this Court will not advert to legislative history where, as here, the statute's meaning is otherwise clear. *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 132-33 (2002).

In any case, the single statement of contemporaneous legislative history that Petitioner points to cannot support his argument. That passing reference to granting carriers the same immunity as certifying and disbursing agents is "brief and inconclusive" and "insufficient to overcome the clear language of the subsection." *Body*, 156 F.3d at 1111 n.24. Instead, if there is any supratextual insight to be had concerning § 1395u(e)'s meaning, it comes from the fact that Congress replaced the provision with § 1395kk-1, thereby creating the immunity scheme that Petitioner claims that § 1395u(e) already provided. That amendment would have been unnecessary had § 1395u(e) contained the immunity exceptions in the first place.

As for Petitioner's vociferous claims that construing § 1395u(e) to provide absolute immunity to carriers would permit rampant fraud, several observations are in order. First, such unsubstantiated allegations should not be credited given that Petitioner was found to have failed to identify a "specific examples of fraudulent claims approved or submitted by Palmetto" and was found

by the lower court to be a "parasitic" "repeat filer" who has "initiated at least three *qui tam* suits alleging facts of which he had no personal knowledge." Pet. App. 22a, 23a, 24a. The federal government has reviewed all three of Petitioner's complaints against DMERCs, and it has intervened in none of them. The equities here favor Respondent, and not a Petitioner who has repeatedly brought meritless lawsuits.

Second, the absolute immunity provided by § 1395u(e) makes perfect sense in the context of the carrier's role in the Medicare system. Carriers like Respondent certify and disburse "vast amounts of federal money" on an annual basis. *Body*, 156 F.3d at 1112; *Sarasola*, 319 F.3d at 1302. In effect, they "function much like an administrative agency" and "'act on behalf of the Secretary, carrying on for [her] the governmental administrative responsibilities imposed by the [Medicare Act].'" *Body*, 156 F.3d at 1112 (brackets in original). Given their arm-of-the-state status, it is appropriate that they be given immunity for carrying out the government's business. Moreover, carriers have historically operated under no profit/no loss reimbursement contracts. *See* 42 U.S.C. § 1395 (1999). Because carriers have no direct financial stake in the claims that they pay (or do not pay) on behalf of CMS, it would be inappropriate to hold them liable for the certification and disbursal of those "vast amounts of federal money." Making carriers subject to suit every time a qui tam plaintiff believed that a carrier had recklessly approved a claim would make it

economically infeasible for carriers to take on such contracts on a no profit/no loss basis.

Tellingly, the 2003 Act's changes to carrier immunity were accompanied by corresponding changes requiring Medicare contracts to be bid competitively and allowing MACs to earn a profit on those contracts. *See generally* U.S. Gov't Accountability Office, GAO-05-873, *Medicare Contracting Reform* 6 (2005), *available at* http://www.gao.gov/new.items/d05873.pdf (last visited Dec. 10, 2008). Section § 1395kk-1's reduced immunity provisions are consistent with a for-profit, competitive bid regime, but they would be inconsistent with the no profit/no loss contract under which Respondent operated.

Third, to the extent that conduct still governed by § 1395u(e) is at issue – itself a dwindling category – the government has numerous other means of preventing fraud. Most obviously, the government may terminate a contract with a carrier it finds to have to paid false claims. 42 U.S.C. § 1395h(g). But the government also has the power to recoup any overpayment from the actual recipients of the funds, 42 U.S.C. § 1395gg, and to bring criminal prosecutions against those recipients. 42 U.S.C. § 1320a-7b(a) (making it a felony to knowingly submit an inflated claim to the government). Congress made a choice not to "impose liability on fiscal intermediaries for the vast amounts of federal money their agents certify and disburse," and to create instead "provisions providing for recoupment

of overpayments from the actual recipients of the funds." *Body* at 156 F.3d at 1112.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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