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Will the Real Mens Rea Please Stand Up: Assessing the Fifth Circuit's Kickback Jurisprudence After United States v. Nora

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ARTICLE

WILL THE REAL *MENS REA* PLEASE STAND UP: ASSESSING THE FIFTH CIRCUIT'S KICKBACK JURISPRUDENCE AFTER *UNITED STATES V. NORA*

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When an appellate court goes out of its way to note, not once but twice, that a defendant convicted of fraud and conspiracy was just twenty-two years old and had only a high school degree when he joined a criminal venture, it is probably a safe bet that a reversal is coming. That is exactly what happened in *United States v. Nora.*[1] The United States Court of Appeals for the Fifth Circuit overturned young Jonathon Nora's conviction for his part in a multi-million-dollar scheme to defraud Medicare. The case is, sadly

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1. United States v. Nora, 988 F.3d 823 (5th Cir. 2021).

enough, nondescript as health care frauds go, except for one issue: *mens rea*. The court's decision muddles the law and has important implications for prosecutors and defendants.

Nora arose from a home health care fraud scheme involving a company called Abide Home Care Services.[2] The scheme had two main components: (1) Abide hired doctors to certify patients for unnecessary home health services that the company then billed to Medicare, and (2) Abide paid doctors and others for referrals to ensure a flow of patients to the company for services, which it once again billed to Medicare.[3] The evidence at trial placed Nora, an Office Manager at Abide, in the middle of the scheme.[4] He funneled patients to his employer's handpicked "house doctors," who approved them for services they did not need and were not eligible to receive; tracked, processed, and delivered kickback payments for patient referrals; and participated in "ghosting," a practice designed to prevent the Medicare program from detecting the fraud.[5]

After a 21-day trial, a jury found Nora guilty of conspiring to commit health care fraud in violation of 18 U.S.C. § 1349, conspiring to pay and receive kickbacks in exchange for patient referrals in violation of the Anti-Kickback Statute (AKS) 42 U.S.C. § 1320a-7b(b)(2), and aiding and abetting health care fraud in violation of 18 U.S.C. § 1347.[6] On appeal, the Fifth Circuit reversed, holding that the evidence did not prove that Nora had acted *willfully*, as the health care fraud and AKS statutes required.[7] Because

2. Medicare's home health benefit covers in-home services, like skilled nursing and physical therapy, for homebound patients. A physician must certify that a patient is eligible to receive home health care. 42 C.F.R. § 424.22(a). To be eligible, a patient must be confined to the home and the services must be reasonable and necessary for the patient's care. 42 U.S.C. § 1395n(a)(2)(A). The process of certifying that a patient is homebound and needs skilled services often begins with a referral from the patient's primary care physician. *See* United States v. Barnes, 979 F.3d 283, 293 (5th Cir. 2020) ("Certifying a patient for home health care begins with an initial referral, which typically originates with the patient's primary care physician."). Upon receiving a referral, a nurse visits the patient's home, completes an assessment, and develops a proposed care plan. United States v. Ganji, 880 F.3d 760, 764 (5th Cir. 2018). A physician must review and approve the plan and submit it along with other documentation to Medicare for a coverage determination. Because home health is supposed to be short-term, Medicare pays for it in 60-day increments. After an initial 60-day period of care, a physician must recertify that a patient needs home health services. 42 C.F.R. § 424.22(b). Recertification is required every 60 days thereafter to extend the benefit. *Id.*

3. *Nora*, 988 F.3d at 825–26.

4. *Id.* at 826.

5. *Id.* at 826–28.

6. *Id.* at 825.

7. *Id.* at 834.

the government failed to meet the statutory *mens rea* elements for the charged offenses, the court overturned Nora's conviction and vacated his sentence.[8]

This Article focuses on *Nora*'s implications for proving willfulness in kickback cases.[9] The court reversed Nora's conviction because the government did not establish that he acted willfully—that is, that he "knew that Abide's referral payments constituted illegal kickbacks."[10] To demonstrate willfulness after *Nora*, the government must show that a defendant knows that referral payments are illegal kickbacks and intends to make them anyway.[11] This holding is problematic for three reasons:

- First, it contradicts Fifth Circuit precedent that held the opposite.[12] The court overlooked *United States v. St. Junius*,[13] which held that willfulness does *not* require the defendant to know that the payments are illegal kickbacks.[14] The panel that decided *Nora* neither cited nor distinguished *St. Junius*.
- Second, the court did not adequately consider the 2010 amendment of the AKS, which provides that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section."[15] By adding this clause, Congress clarified the statute's *mens rea* element.[16] While the Fifth Circuit mentioned the amendment, it did not reconcile its holding with the new statutory language.
- Third, the court articulated a willfulness standard that is more demanding than either *St. Junius* or the amended AKS, leaving

8. *Id.*

9. Although this Article emphasizes kickbacks, the federal health care fraud statute also requires willful conduct. *See* 18 U.S.C. § 1347(a) (criminalizing knowing and willful schemes to defraud federal health care programs). Federal prosecutors often pair kickback and health care fraud charges, so this Article may be pertinent beyond its consideration of the *mens rea* required under the AKS. *See also* Elizabeth R. Sheyn, *Toward a Specific Intent Requirement in White Collar Crime Statutes: How the Patient Protection and Affordable Care Act of 2010 Sheds Light on the "General Intent Revolution"*, 64 FLA. L. REV. 449, 459 (2012) (recognizing that the federal government has several statutory options for prosecuting health care crimes, including the health care fraud statute and the AKS).

10. *Nora*, 988 F.3d at 834.

11. *Id.* at 827.

12. United States v. St. Junius, 739 F.3d 193, 210 (5th Cir. 2013).

13. United States v. St. Junius, 739 F.3d 193 (5th Cir. 2013).

14. *Id.* at 210.

15. 42 U.S.C. § 1320a-7b(h).

16. *Id.*

> prosecutors without clear guidance about the *mens rea* needed to charge and prove kickback offenses. The decision reinvigorates ignorance of the law as a defense to accountability.

Nora represents a missed opportunity. Instead of clarifying the meaning of willfulness, it prolongs uncertainty, at least in the Fifth Circuit. To understand why, one must look to history. Section I of this Article summarizes key willfulness jurisprudence prior to 2010. Three different formulations of willfulness emerged historically, leading to disparate standards for proving whether defendants in kickback cases acted with the requisite criminal intent. In 2010, Congress stepped in to clarify the *mens rea* required under the AKS. Section II explains how Congress modified the statute. Section III focuses on willfulness after the 2010 amendment, primarily by contrasting the decisions in *St. Junius* and *Nora*. Section IV reflects on *Nora*'s implications for proving willfulness in future kickback cases in the Fifth Circuit.[17]

I. THE AKS AND WILLFULNESS PRIOR TO 2010

The AKS prohibits giving and taking payments in exchange for referring patients for services that will be reimbursed by a federal health care program, like Medicare.[18] The statute criminalizes "knowingly and willfully" offering, paying, soliciting, or receiving "any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind"

17. This Article concentrates on *Nora* and its portents in the Fifth Circuit, but the problem it confronts—ambiguity in the meaning and application of the term willfully in criminal statutes, like the AKS—is not confined to a single circuit. This problem is decades-old with a venerable pedigree in the circuits and Supreme Court. It is not peculiar to the Fifth Circuit, nor will it remain confined there. Indeed, advocates have already begun deploying *Nora*'s restrictive holding outside the Fifth Circuit. *See, e.g.*, United States v. Lee, No. 16-cr-10343-ADB, 2021 WL 1210356, at *1–2 (D. Mass. Mar. 3, 2021) (involving a defendant in the District of Massachusetts who relied on *Nora* as the basis for seeking her release pending appeal to the First Circuit).

18. Commentators sometimes call the AKS the "Medicare" anti-kickback statute. *See, e.g.*, Andrea Tuwiner Vavonese, *The Medicare Anti-Kickback Provision of the Social Security Act—Is Ignorance of the Law an Excuse for Fraudulent and Abusive Use of the System?*, 45 CATH. UNIV. L. REV. 943, 944 n.4 (1996) (referencing "the Medicare anti-kickback statute"). That moniker is no longer apt. The AKS applies to all "[f]ederal health care programs," a term that, in addition to Medicare, includes Medicaid, which covers children, pregnant women, elderly and low-income adults, and people with disabilities; TRICARE, which covers uniformed service members, retirees, and their families; the Federal Employees' Compensation Act program, which covers injured federal workers; and other federally funded and designated initiatives. *See* 42 U.S.C. § 1320a-7b(f) (defining federal health care program).

to induce patient referrals or in exchange for making them.[19] A person who violates the AKS commits a felony punishable by up to 10 years in prison, a fine up to $100,000, or both.[20] The statute's criminal penalties are stiff because kickbacks have a pernicious impact on health care.[21]

"Kickbacks can distort medical decision-making" and impair physician judgment.[22] They transform patients into revenue-generating opportunities and drive overutilization that depletes limited health care resources.[23] When money dictates medical care, patients may suffer.[24] A physician who allows bribes and pecuniary inducements to control a patient's course of care tramples the patient's dignity and may expose the patient to the risk of unnecessary treatment.[25] Whether a patient needs a test, procedure, or medication should be determined by unconflicted clinical judgment, not by the fact that the referring physician receives cash under the table, a trip to Las Vegas, or in-kind perks. The AKS tries to purge this sort of financial

19. 42 U.S.C. § 1320a-7b(b)(1)–(2).

20. *Id.*

21. Kickbacks are actionable civilly and administratively as well. A claim submitted to a federal health care program for reimbursement that is tainted by a kickback is considered false or fraudulent under the False Claims Act, which provides for treble damages and civil penalties. *See* 42 U.S.C. § 1320a-7b(g) (confirming that claims arising from kickbacks constitute false or fraudulent claims under the False Claims Act); 31 U.S.C. § 3729(a)(1) (imposing on persons who violate the False Claims Act a "civil penalty . . . plus 3 times the amount of damages which the Government sustains . . . ."). Violating the AKS is also a basis for permissive administrative exclusion from federal health care programs. *See* 42 U.S.C. § 1320a-7(b)(7) (specifying the grounds on which the Secretary may exclude individuals and entities from participation in federal health care programs).

22. Publication of OIG Special Fraud Alert on Rental of Space in Physician Offices by Persons or Entities to Which Physicians Refer, 65 Fed. Reg. 9,274, 9,275 (Feb. 24, 2000).

23. *Id.*

24. *Id.* ("Kickbacks can also adversely affect the quality of patient care by encouraging physicians to order services or recommend supplies based on profit rather than the patients' best medical interests.").

25. Dr. Farid Fata is an extreme example of a physician who demeaned patients by reducing them to revenue generators. In September 2014, he pled guilty to perpetrating a massive health care fraud in which he intentionally misdiagnosed and treated patients for cancers they did not have. *Detroit Area Doctor Sentenced to 45 Years in Prison for Providing Medically Unnecessary Chemotherapy to Patients*, U.S. DEP'T OF JUST. (July 10, 2015), https://www.justice.gov/opa/pr/detroit-area-doctor-sentenced-45-years-prison-providing-medically-unnecessary-chemotherapy [https://perma.cc/33KR-UABS]. After needlessly poisoning more than 500 people, Dr. Fata referred some of them to hospice and home health programs that paid him kickbacks. United States' Sentencing Memorandum, United States v. Fata, No. 13-cr-20600, 2015 WL 4160325, at *3, *30, *60, *75 (6th Cir. May 28, 2015). *See generally* U.S. Att'ys Off. for the E.D. of Mich., *U.S. v. Farid Fata: Court Docket 13-CR-20600*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-edmi/us-v-farid-fata-court-docket-13-cr-20600 [https://perma.cc/Y5GH-YCNL] (providing factual details and subsequent procedural history following Dr. Fata's guilty plea).

self-interest from medicine. The statute is a staple of health care fraud enforcement.[26] Thus, it is important to the government, health care providers, and the entire medical field that the law's prohibitions and boundaries are as clear as possible.

Clarity is especially important for the statute's intent element. To violate the AKS, a defendant must act "knowingly and willfully."[27] Despite its pervasive use in federal criminal laws,[28] the term *willfully* is something of a chameleon. The Supreme Court dubbed it "a word of many meanings."[29] The United States Court of Appeals for the Seventh Circuit called it "notoriously slippery."[30] And lower federal courts put their own spin on the term.[31] Before 2010, when Congress amended the AKS, willfully had at least three possible meanings in kickback cases.[32]

The first and broadest interpretation is that willfully means knowingly, purposefully, deliberately, consciously, or intentionally.[33] Willful conduct contrasts with conduct that is ignorant, inadvertent, accidental, careless, or unintentional.[34] What matters under this interpretation is that the defendant purposefully does the act that the law forbids, as opposed to committing the act by mistake or neglect, under duress, or through coercion. To prove a violation of the AKS using this broad willfulness standard, the prosecution must show that the defendant deliberately offers or provides

26. *See Fraud & Abuse Laws*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., https://oig.hhs.gov/compliance/physician-education/fraud-abuse-laws/ [https://perma.cc/C36P-GYF2] (identifying the AKS as one of the five most important health care fraud and abuse laws).

27. 42 U.S.C. § 1320a-7b(b).

28. Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 414–27 (1998) (cataloging more than 160 federal statutes requiring some form of willfulness).

29. Bryan v. United States, 524 U.S. 184, 191 (1998) (quoting Spies v. United States, 317 U.S. 492, 497 (1943)).

30. United States v. Ladish Malting Co., 135 F.3d 484, 487 (7th Cir. 1998).

31. One observer suggests that federal courts have invented subjective ways of construing the term willfully, producing "poorly reasoned" and "haphazard" jurisprudence in the process. Davies, *supra* note 28, at 396.

32. Robb DeGraw, Note, *Defining "Willful" Remuneration: How* Bryan v. United States *Affects the Scienter Requirement of the Medicare/Medicaid Anti-Kickback Statute*, 14 J.L. & HEALTH 271, 279–80 (2000).

33. *Id.*; *see also* United States v. Jain, 93 F.3d 436, 440 (8th Cir. 1996) (noting the traditional definition of willfully is "consciousness of the act"); MODEL PENAL CODE § 2.02(2), (8) (stating "[a] requirement that an offense be committed [willfully] is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears").

34. Vavonese, *supra* note 18, at 956–57; *see also Jain*, 93 F.3d at 440 (observing Congress added "knowingly and willfully" to the AKS to prevent criminal sanctions from being imposed on a person whose conduct was "inadvertent").

payments to induce patient referrals or intentionally requests or accepts payments in return for referrals.[35] Knowledge that the remuneration is illegal, or that the AKS exists and proscribes pay-for-referral arrangements, is immaterial.[36] If the defendant deliberately makes or takes a bribe, willfulness is satisfied.[37] This interpretation precludes ignorance of the law as a defense to criminal culpability.[38]

The second or intermediate interpretation requires more than deliberateness or intentionality but less than actual knowledge of the AKS and a specific intent to violate it.[39] Under this interpretation, willfulness refers to a "culpable state of mind."[40] A person must have a bad purpose or act "with knowledge that his conduct was unlawful."[41] While a person must know that paying for referrals is improper, the person need not know that doing so violates the AKS.[42] Proof of "knowledge of *general* illegality"

35. DeGraw, *supra* note 32, at 279 (explaining that, under the broadest reading, willfully means "that the actions are intentional rather than accidental").

36. *Cf.* Cheek v. United States, 498 U.S. 192, 209 (1991) (Scalia, J., concurring) (observing that the law provides, "in many contexts, that 'willfully' refers to consciousness of the act but not to consciousness that the act is unlawful").

37. *See* Vavonese, *supra* note 18, at 957 (noting that "courts have interpreted the term knowingly and willfully to mean only that one must intend his act and that knowledge of the illegality of the act is not required").

38. *Id.* (relating broad definitions of willfulness "support the well-founded maxim that ignorance of the law is no excuse"); *see also* Davies, *supra* note 28, at 348–49 (discussing the expansion of ignorance as a defense to crimes requiring willfulness).

39. DeGraw, *supra* note 32, at 288. DeGraw refers to the "middle" *mens rea* standard, whereas this Article uses the term "intermediate." *Id.* at 283. Middle can mean *between*, as in the *mens rea* standard that is between a liberal reading and a heightened one; or it can mean *mid-point*, as in the standard that is equidistant from the liberal and heightened standards. In either case, middle implies a singular standard. Intermediate, in contrast, encompasses a range of things that exist between two ends. This Article uses the term intermediate to clarify that the intermediate willfulness standard is not monolithic but encompasses a range of comparable formulations and applications that are neither broad nor stringent.

40. Bryan v. United States, 524 U.S. 184, 191 (1998). *Bryan* involved a prosecution for dealing firearms without a license. Even so, federal courts quickly began looking to the Supreme Court's construction of willfully in *Bryan* for guidance in evaluating the *mens rea* required under the AKS. *See, e.g.*, United States v. Starks, 157 F.3d 833, 838 (11th Cir. 1998) ("[C]ompared to the licensing provisions that the *Bryan* Court considered, such kickbacks are more clearly *malum in se*, rather than *malum prohibitum*.").

41. *Bryan*, 524 U.S. at 192 (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994)). In a footnote, the Supreme Court collected different formulations of willfully in criminal cases, including "stubbornly, obstinately, perversely," for a "bad purpose," "without justifiable excuse," and "conduct marked by careless disregard" for its propriety. *Id.* at 191 n.12.

42. *See, e.g.*, United States v. Davis, 132 F.3d 1092, 1094 (5th Cir. 1998) (approving jury instructions that did not require defendant to have knowledge of the specific law that criminalized his conduct).

suffices.[43] Federal courts developed several formulations of this intermediate standard. In *United States v. Jain*,[44] for example, the United States Court of Appeals for the Eighth Circuit held that willfulness requires evidence that a defendant "knew that his conduct was wrongful, rather than proof that he knew it violated 'a known legal duty.'"[45] Thus, to prove willfulness using the intermediate standard, the prosecution must show that the defendant intentionally gives or takes kickbacks in exchange for patient referrals and knows that doing so is unlawful.[46]

In *United States v. Davis*,[47] the Fifth Circuit accepted the intermediate willfulness standard for kickback cases.[48] A jury convicted the defendant of, among other things, two counts of offering and paying kickbacks.[49] On appeal, the defendant challenged the district court's jury instructions, arguing that the court erred by refusing to instruct the jury on his good faith

43. Davies, *supra* note 28, at 386.

44. United States v. Jain, 93 F.3d 436 (8th Cir. 1996).

45. *Id.* at 441; *see* United States v. Bay State Ambulance and Hosp. Rental Serv., Inc., 874 F.2d 20, 33 (1st Cir. 1989) (approving a jury instruction that defined willfully as doing "something purposely, with the intent to violate the law, to do something purposely that law forbids"). One district court held that bribery "is not an innocent endeavor" but an "inherently wrongful activity," implying that taking bribes in return for patient referrals *per se* meets the willfulness element of the AKS. *See* United States v. Neufeld, 908 F. Supp. 491, 496 (S.D. Ohio 1995) (noting the wrongfulness of taking bribes in exchange for referrals); DeGraw, *supra* note 32, at 285–87 (discussing *Neufeld*); *see also* United States v. Starks, 157 F.3d 833, 838 (11th Cir. 1998) (characterizing kickbacks as more *malum in se* than *malum prohibitum* and observing that "giving or taking of kickbacks for medical referrals is hardly the sort of activity a person might expect to be legal").

46. The intermediate standard has its critics, including the late Justice Antonin Scalia. In his dissent in *Bryan*, Justice Scalia pointed out the awkwardness of requiring general intent to do something the law prohibits while not requiring knowledge of and specific intent to violate the criminal law at issue. *Bryan*, 524 U.S. at 202–03 (Scalia, J., dissenting). The defendant in *Bryan*, Justice Scalia noted, had to act with a bad purpose when he dealt firearms without a federal license, but did not have to know of the licensing requirement or the law that made it a crime to sell guns without a license. 18 U.S.C. § 922. Justice Scalia, in effect, asked a basic question: what does the defendant have to know generally to willfully violate a law? Would the defendant have acted willfully if he sold weapons without a license knowing "that the car out of which he sold the guns was illegally double-parked"? *Bryan*, 524 U.S. at 202 (Scalia, J., dissenting). This would ostensibly involve a bad purpose (breaking the parking laws to facilitate the sales). Would the knowledge that he was violating *a* law (instead of *the* federal licensing law) be enough to establish willfulness? Justice Scalia's dissent has at its core concern about the ambiguous meaning of the term willfully. That ambiguity may be resolved either by adopting a broad reading (i.e., willfulness requires deliberate action, as opposed to mistake or inadvertence; knowledge of illegality is not necessary and ignorance is no defense) or a stringent reading (i.e., willfulness requires knowledge of and specific intent to violate the law; ignorance is a defense). The intermediate standard perpetuates ambiguity on Justice Scalia's account.

47. United States v. Davis, 132 F.3d 1092 (5th Cir. 1998).

48. *Id.* at 1094.

49. *Id.*

defense (he presumably wanted the court to tell the jury that his conduct could not be knowing and willful under the AKS if the jury found that he acted in good faith).[50] The district court rejected the proposed instruction and charged the jury that willfully "means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law."[51] The Fifth Circuit approved the district court's definition and affirmed the defendant's conviction.[52] Significantly, while the Fifth Circuit required the defendant to know that his actions were wrongful, it did not mandate that the defendant know of or specifically intend to violate the AKS.[53] This is what puts *Davis* in the intermediate camp.

The panel that decided *Davis* relied on *United States v. Garcia*.[54] *Garcia* was not a kickback case. It involved a prosecution based on a defendant's knowing and willful filing of false federal income tax returns.[55] Even so, the decision encapsulates the circuit's thinking on willfulness and influenced its later kickback jurisprudence. The district judge in *Garcia* charged the jury as follows:

> The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law. Mere negligence, even gross negligence, is not sufficient to establish willfulness.[56]

This formulation cuts a middle path between general intent (intent to do the act) and specific intent (knowledge of the law and intent to violate it). The Fifth Circuit's kickback jurisprudence followed this intermediate approach for years.[57]

The third and most stringent interpretation of willfulness requires that the defendant know of the AKS and intend to violate it.[58] This

50. *Id.*
51. *Id.* (quoting United States v. Garcia, 762 F.2d, 1222, 1224 (5th Cir. 1985)).
52. *Id.*
53. *Id.*
54. *Id.* (citing United States v. Garcia, 762 F.2d 1222, 1224 (5th Cir. 1985)).
55. United States v. Garcia, 762 F.2d 1222, 1224 (5th Cir. 1985).
56. *Id.*
57. *See, e.g.*, United States v. Njoku, 737 F.3d 55, 64 (5th Cir. 2013) (proposing a defendant must intend "to do something the law forbids" (quoting United States v. Garcia, 762 F.2d 1222, 1224 (5th Cir. 1985))).
58. Hanlester Network v. Shalala, 51 F.3d 1390, 1400 (9th Cir. 1995).

interpretation is an outlier that derives from a decision of the United States Court of Appeals for the Ninth Circuit. In *Hanlester Network v. Shalala*,[59] the Ninth Circuit held a defendant must know that the AKS "prohibits offering or paying remuneration to induce referrals" and must "engage in prohibited conduct with the specific intent to disobey the law."[60] Willfulness does not exist absent actual knowledge and specific criminal intent. Under this stringent *mens rea* requirement, ignorance of the law is a complete defense to criminal culpability.[61] To prove willfulness using this standard, the prosecution, in effect, must (1) show a defendant knows that the AKS criminalizes kickbacks and acts with specific intent to violate the statute, and (2) overcome the defense that a defendant is ignorant of the law, mistaken about what the law proscribes, or acts in good faith.[62]

These three standards—broad, intermediate, and stringent—represent the variable approaches to construing the term willfully in the AKS that emerged over the years. In 2010, however, Congress passed the Patient Protection and Affordable Care Act (ACA) and, with it, made several changes to the laws governing health care fraud and abuse, including the AKS.[63] One of those changes clarified the statute's *mens rea* element.

II. THE AKS, WILLFULNESS, AND THE ACA

To grasp how and why Congress amended the AKS in 2010, some more history is in order. Congress passed the AKS in 1972 and has amended the law several times since then. As first adopted, the AKS did not require intent for kickback offenses.[64] The statute simply made it a misdemeanor, punishable by up to a year in prison and a fine not to exceed $10,000, to solicit, offer, or receive a kickback, bribe, or rebate in connection with services covered by Medicare or Medicaid.[65] Congress fixed this omission in 1980 when it modified the law to require knowing and willful conduct.[66] After the 1980 amendment, the government had to prove that a defendant

59. Hanlester Network v. Shalala, 51 F.3d 1390 (9th Cir. 1995).

60. *Id.* at 1400.

61. Vavonese, *supra* note 18, at 975 (explaining that a stringent formulation of willfulness allows for defenses based on ignorance, mistake, and good faith).

62. *Hanlester*, 51 F.3d at 1400; Vavonese, *supra* note 18, at 975 & n.171.

63. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6402(f), 124 Stat. 119, 759 (2010) (codified at 42 U.S.C. § 1320a-7b(h)).

64. An Act to Amend the Social Security Act, Pub. L. No. 92-603, § 242(b), 86 Stat. 1329, 1419–20 (1972).

65. *Id.*

66. Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, § 917, 94 Stat. 2599, 2625 (1980).

acted knowingly and willfully to secure a conviction for offering, paying, soliciting, or receiving kickbacks.[67]

The legislative history underlying the 1980 amendment provides a glimpse into the law's *mens rea* requirement. Because the statute lacked an intent element, some in Congress were "concerned that criminal penalties may be imposed under current law to an individual whose conduct, while improper, was inadvertent."[68] Congress specified the requisite *mens rea* so that "only persons who knowingly and willfully engage[d] in the proscribed conduct could be subject to criminal sanctions."[69] This focus on preventing inadvertent violations implies that a broad reading of willfulness is what Congress envisioned when it amended the AKS in 1980. That is, Congress arguably required willful conduct to ensure that a kickback defendant would be convicted for deliberately, purposefully, or intentionally giving or taking payments in exchange for patient referrals, not for inadvertent, coerced, or non-volitional conduct that might unintentionally advance a kickback scheme.[70]

Viewed against this historical backdrop, the interpretation of willfulness that the Ninth Circuit adopted in *Hanlester* in 1995 frustrated the purpose and constrained the reach of the AKS. By requiring the government to prove that the defendant (1) knew that the AKS criminalized paying or receiving kickbacks for referrals, and (2) specifically intended to violate the statute by engaging in illegal conduct, the Ninth Circuit increased the prosecutorial burden, solidified ignorance of the law as a defense in criminal cases, and allowed actors who deliberately gave and took bribes to escape

67. *Id.*

68. H.R. Rep. No. 1167, 96th Cong., 2d Sess. 59 (1980), reprinted in 1980 U.S.C.C.A.N. 5526, 5572.

69. *Id.*

70. An example may illuminate. Suppose employee D_1 tracks the patient referrals to her employer, calculates the amount due to each referral source, obtains the necessary cash, and hands the cash out when referrers come around to collect. Under the broad standard described in the text, D_1 acts willfully because she purposefully and of her own volition pays remuneration to induce and sustain patient referrals. It does not matter whether D_1 knows her conduct is illegal, as ignorance of the law is no excuse. Contrast D_1 with employee D_2, who performs none of the activities described, except that each week he receives from his boss envelopes to deliver to designated individuals. From D_2's vantage, the individuals who receive the envelopes have a legitimate business relationship with his employer and are due whatever they receive. Unless D_2 has reason to know that the envelopes contain payments as part of a cash-for-referral arrangement, his role in the scheme is at most inadvertent or unconscious, and he does not behave willfully under the AKS. This example at least arguably embodies the distinction that Congress drew in 1980 when it added knowingly and willfully to the AKS. It wanted the law to capture D_1's conduct and insulate D_2's.

accountability. The *Hanlester* formulation of willfulness did more than prevent conviction of persons who mistakenly violated the AKS; it sheltered wrongdoers. It also caused a rift within the federal courts about how to interpret the term "willfully" in kickback cases.

While the Supreme Court often resolves circuit splits, in this instance, Congress took control. In 2010, as part of the sprawling ACA legislation, Congress amended the AKS by adding a new subsection, which reads:

> **(h) Actual knowledge or specific intent not required**
>
> With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.[71]

New subsection (h) legislatively nullified *Hanlester* and clarified the statute's *mens rea*.[72] The legislative history supports congressional intent to override *Hanlester*. During the debate around the ACA's health care fraud enforcement provisions, Senator Ted Kaufman announced the following on behalf of a cadre of Senators:

> The bill also addresses confusion in the case law over the appropriate meaning of "willful" conduct in health care fraud. Both the anti-kickback statute and the health care fraud statute include the term "willfully." In both contexts, the Ninth Circuit Court of Appeals has read the term to require proof that the defendant not only intended to engage in unlawful conduct, but also knew of the particular law in question and intended to violate that particular law.
>
> This heightened mental state requirement may be appropriate for criminal violations of hyper-technical regulations, but it is inappropriate for these crimes, which punish simple fraud. The Finance Committee health care reform bill, America's Healthy Future Act, addresses this problem for the anti-kickback statute, but not for the general health care fraud offense. Accordingly, the Health Care Fraud Enforcement Act tracks the Finance bill and clarifies that "willful conduct" in this context does not require proof that the defendant had actual knowledge of the law in question or specific intent

71. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6402(f), 124 Stat. 119, 759 (codified at 42 U.S.C. § 1320a-7b(h)).

72. Cameron T. Norris, *Reviving* Hanlester Network*: A Safe Harbor for Harmless Remunerations Under the Anti-Kickback Statute*, 67 VAND. L. REV. EN BANC 137, 146–47 (2014) (observing how "even if the Ninth Circuit's interpretation was correct at the time, it is certainly untenable today. The Patient Protection and Affordable Care Act of 2010 ('PPACA') amended the AKS to overrule *Hanlester Network*").

> to violate that law. As a result, health care fraudsters will not receive special protection that they don't deserve.[73]

Thus, after 2010, to prove that a defendant acts willfully, a prosecutor does not have to show that a defendant knows that the AKS forbids kickbacks or specifically intends to violate the statute.[74] But the question remains: what must a prosecutor prove to establish willfulness? The next section takes up this question.[75]

III. THE AKS AND WILLFULNESS IN THE FIFTH CIRCUIT AFTER 2010

The Fifth Circuit embraced the intermediate standard of willfulness in *Davis* years before Congress amended the AKS in 2010 and nominally followed that standard afterwards, with two important exceptions. While the specific wording and application varied case-to-case, courts more or less construed willfully to mean "the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law."[76] The two exceptions to this trend occurred in *St. Junius*, which moved the law toward a broad interpretation of willfulness,[77] and *Nora*, which swung the law in

73. 155 CONG. REC. S10852-01, S10853 (2009) (statement of Sen. Kaufman for himself and Sens. Leahy, Specter, Kohl, Schumer, and Klobuchar). Because the AKS and health care fraud statute each require willfulness, Senator Kaufman addressed his comments to both laws. *Id.*

74. Patient Protection and Affordable Care Act, § 6402(f), 124 Stat. at 759 (codified at 42 U.S.C. § 1320a-7b(h)).

75. Several courts outside the Fifth Circuit addressed the impact of the 2010 amendment, holding that it codifies the "majority view" of willfulness—what this Article calls the intermediate interpretation. *See* United States v. Patel, 17 F. Supp. 3d 814, 824 (N.D. Ill. 2014) (observing the addition of subsection (h) to the AKS codifies the formulation of willfulness adopted by most federal circuit courts prior to 2010); United States v. Ferrell, No. 11 CR 595, 2013 WL 2636108, at *3 (N.D. Ill. June 12, 2013) (opining "[w]hen Congress amended the health care fraud and anti-kickback statutes in 2010, it codified the majority view and rejected the Ninth Circuit's position with respect to what is required to prove a violation of § 1347 and the Anti-Kickback Statute"); *see also* United States v. Elhorr, No. 13–20158, 2014 WL5666213, at *3 (E.D. Mich. Nov. 3, 2014) (concluding Congress sought to minimize confusion about the meaning of "knowingly and willfully"); United States v. Mathur, No. 2:11–cr–00312–MMD–PAL, 2012 WL 4742833, at *14–15 (D. Nev. Sept. 13, 2012).

76. United States v. Ricard, 922 F.3d 639, 648 (5th Cir. 2019) (quoting United States v. Davis, 132 F.3d 1092, 1094 (5th Cir. 1998)); *see* United States v. Njoku, 737 F.3d 55, 64 (5th Cir. 2013) (stating that a willful act is one committed "with the specific intent to do something the law forbids" (quoting United States v. Garcia, 762 F.2d 1222, 1224 (5th Cir. 1985))); s*ee also* United States v. Martinez, 921 F.3d 452, 467 (5th Cir. 2019); United States v. Cath. Health Initiatives, 312 F. Supp. 3d 584, 594 (S.D. Tex. 2018); *cf.* United States v. St. John, 625. F. App'x 661, 666 (5th Cir. 2015) (per curiam) (reciting the same willfulness test in a health care fraud case under 18 U.S.C. § 1347).

77. United States v. St. Junius, 739 F.3d 193, 210−11 (5th Cir. 2013).

the opposite direction toward a stringent formulation.[78] The consequence of these diverging precedents, coupled with the ambiguity inherent in the term willfulness itself, is that willfully remains "a word of many meanings,"[79] as dependent on the outcome a court wants to reach as the written formulation of *mens rea* that the court articulates and professes to follow.

A. *Willfulness According to* St. Junius

The *St. Junius* case arose out of a durable medical equipment (DME) scam.[80] Unable to enroll in Medicare as a DME provider due to his criminal past, James Reese enlisted his stepdaughter, Lia Samira St. Junius, to serve as his front.[81] Together they opened a company called The Mobility Store (TMS) under St. Junius's name and enrolled the company as a Medicare DME supplier.[82] TMS embarked on a false billing scheme—e.g., billing for items that patients did not request, need, or receive; billing for items that a doctor did not prescribe; inflating prices—that cost Medicare and Medicaid over $14 million.[83] As part of the scheme, TMS used recruiters to steer patients to the company.[84] The recruiters worked at or had an affiliation with third-party health care providers, which gave them access to patient information that had value to TMS.[85] In exchange for the patient referrals, Reese, through his affiliated entities TMS and TRG,[86] paid recruiters commissions equal to "10% of the amount Medicare paid" TMS for items provided to (or allegedly provided to) the patients that they had referred.[87]

78. United States v. Nora, 988 F.3d 823, 831 (5th Cir. 2021).

79. Bryan v. United States, 524 U.S. 184, 191 (1998) (quoting Spies v. United States, 317 U.S. 492, 497 (1943)).

80. DME refers to reusable equipment that beneficiaries need for a medical reason. *See* 42 C.F.R. § 414.202 (defining durable medical equipment as equipment that "[c]an withstand repeated use" and "[i]s primarily and customarily used to serve a medical purpose"). The term includes everything from crutches to infusion pumps. *Durable Medical Equipment (DME) Coverage*, MEDICARE.GOV, https://www.medicare.gov/coverage/durable-medical-equipment-dme-coverage [https://perma.cc/E7E2-MR5J].

81. *St. Junius*, 739 F.3d at 198.

82. *Id.*

83. *Id.* at 200.

84. *Id.* at 199.

85. *Id.*

86. "TRG and TMS ostensibly operated as the same entity, sharing employees and the same office space in Houston, Texas." *Id.* at 198.

87. *Id.* at 199.

The commissions were kickbacks, and the government charged, tried, and convicted two recruiters on multiple counts of violating the AKS.[88]

One of the recruiters, Martha Ramos, appealed and challenged her conviction on the ground that the government did not establish that she willfully violated the AKS.[89] She argued that "she could not have willfully violated the Anti-Kickback Statute because she did not know that engaging in a commission-based pay arrangement with a Medicare provider was a violation of the law," and that the government failed to introduce "proof beyond a reasonable doubt that she knew that being paid on commission was illegal."[90] In other words, she contended that the government did not meet the Fifth Circuit's intermediate formulation of willfulness because it could not prove that she acted with a bad purpose to commit acts she knew to be unlawful.

The Fifth Circuit rejected her argument on the law at least three times.[91] First, citing new subsection (h) of the AKS, the court held that the government did not have to prove that Ramos knew of the AKS or intended to violate it, but instead that she "willfully committed an *act* that violated the [AKS]."[92] The government's burden was to show that Ramos willfully solicited or received money in exchange for referring patients, not that she knew that doing so was illegal.[93] The court held that the government met this burden.[94]

Second, the court acknowledged that the government introduced evidence that Ramos was, in fact, aware of the AKS and knew taking payments for patient referrals was illegal.[95] Tellingly, however, the court held "such proof was not required" and it was "unnecessary to sustain a conviction."[96] All that mattered was that Ramos willfully referred patients to TMS in exchange for commissions based on her referral volume and the

88. *Id.* at 200.

89. *Id.* at 209–10.

90. *Id.*

91. *Id.* at 210–12.

92. *Id.* at 210 (emphasis added).

93. *Id.*

94. Ramos urged the Fifth Circuit to adopt the Ninth Circuit's stringent construction of willfulness in *United States v. Dearing*, 504 F.3d 897 (9th Cir. 2007), a case involving the federal health care fraud statute, not the AKS. *St. Junius*, 739 F.3d at 210 n.19. The court declined her invitation and once again rejected her argument that the government had to prove that she knew her conduct was unlawful when she accepted commissions for referrals. *Id.*

95. *St. Junius*, 739 F.3d at 211.

96. *Id.*

revenue it generated.[97] Her awareness of the AKS and intent to violate it were surplus.[98]

Third, at the close of trial, the prosecutor argued to the jury that "the Government did not have to prove that Ramos knew that receiving commission payments was illegal. Rather, the prosecutor argued, the Government need only prove that Ramos knowingly received commission payments."[99] Ramos challenged these remarks on appeal, asserting the AKS "requires that the Government prove that she knew that receiving commissions for referring patients was illegal."[100] The Fifth Circuit rejected her argument for the third time.[101] Calling Ramos's interpretation of willfulness "erroneous," the court held the prosecutor had correctly stated that law.[102] The AKS, according to the Fifth Circuit, required a knowing and willful *act* rather than knowledge that referrals for commission payments were illegal.[103]

St. Junius is significant because it drifts away from the intermediate standard of willfulness that the Fifth Circuit adopted in *Davis* and continued to use in kickback cases thereafter. Instead of requiring "specific intent to do something the law forbids"[104]—a formulation that presupposes some awareness of the law and what it forbids—the court eased what it means to act willfully in kickback cases. Knowledge and intention to do the *act* satisfy the statute's *mens rea*.[105] Put differently, the court moved toward the broad construction of willfulness sketched in Section I of this Article, which holds that acting willfully means performing an action with purpose, deliberateness, and consciously, rather than ignorantly, inadvertently,

97. *Id.*

98. Relatedly, Ramos argued that the trial court erred in admitting her personnel file, which contained records reflecting her familiarity with the AKS. *Id.* at 211–12. The Fifth Circuit rebuffed her argument as immaterial because the government did not need the evidence in her personnel file to prevail, as it "was not required to prove that Ramos had actual knowledge of or a specific intent to violate the Anti-Kickback Statute." *Id.* at 212.

99. *Id.* at 211.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 210–11.

104. United States v. Davis, 132 F.3d 1092, 1094 (5th Cir. 1998).

105. *St. Junius*, 739 F.3d at 210 (stating "the Government is not required to prove actual knowledge of the Anti-Kickback Statute or specific intent to violate it. Instead, the Government must prove that the defendant willfully committed *an act* that violated the Anti-Kickback Statute") (emphasis added).

accidentally, or under coercion or duress.[106] At the very least, *St. Junius* articulates an expansive interpretation of willfulness that tempers the amount or type of knowledge that the government must evince in order to prove that a defendant acts with the requisite *mens rea*. The case also negates the ubiquitous defense among kickback defendants that they did not know it was a crime to give or take remuneration for patient referrals.

B. *Willfulness According to* Nora

The jurisprudential pendulum swung in the other direction in *Nora*.[107] In that case, the Fifth Circuit enunciated a stringent willfulness standard that is more demanding than either *St. Junius* or the AKS itself.[108]

The fraud at issue in *Nora* emanated from Abide Home Care Services, a Medicare home health agency.[109] The company employed a handful of physicians, called "house doctors," who authorized and referred patients to receive home health services at Abide.[110] Abide, in turn, billed its services to Medicare.[111] This simple business arrangement belied a scheme to bilk the Medicare program. Instead of certifying legitimate care plans for Abide's patients, the company's house doctors authorized medically unnecessary services to net Abide greater profit.[112] Patients who did not need skilled services and were not eligible for Medicare's home health benefit were approved for both because that is how Abide made money.[113] When care plans were too simple and would not churn enough revenue, Abide reworked them to increase the services or diagnostic complexity and raise the anticipated reimbursement the company would reap.[114]

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106. The Fifth Circuit has not advanced or developed this reading of *St. Junius*, nor has it broadly construed willfulness in its wake. The decisions that cite *St. Junius* still hew to the intermediate standard. *See*, *e.g.*, United States v. Ricard, 922 F.3d 639, 647–48 (5th Cir. 2019) (citing *St. Junius* but still requiring proof of specific intent to do something the law forbids, in accordance with *Davis*). *St. Junius* is thus, in some ways, an aberration. Even so, it remains good law and continues to be cited, within and without the Fifth Circuit. *See, e.g.*, United States v. Mallory, 988 F.3d 730, 738 (4th Cir. 2021) (citing *St. Junius* for the proposition that commission payments to third parties may violate the AKS).

107. United States v. Nora, 988 F.3d 823, 831 (5th Cir. 2021) (agreeing with Nora that the government did not prove Nora *knew* the payments were unlawful kickback payments) (emphasis added).

108. *Id.* at 834.

109. *Id.* at 825.

110. *Id.*

111. *Id.* at 825–26.

112. *Id.*

113. *Id.* at 826.

114. *Id.*

In addition to these billing frauds, Abide doled out kickbacks to its house doctors and others to maintain steady patient flow.[115] The company disguised the sums it paid to house doctors (or, in one case, the spouse of a house doctor) as compensation but, in actuality, the payments constituted fees for patient referrals that violated the AKS.[116] Abide also paid third parties for referrals, including outside doctors, recruiters, and group home operators.[117] The company relied on this pay-for-referral system to find new patients.[118]

Finally, Abide used a practice called "ghosting" to prevent Medicare from detecting the scheme.[119] Home health is a short-term benefit.[120] Extended periods of enrollment may attract regulatory attention from Medicare or federal law enforcement.[121] To avoid this, Abide "ghosted" its patients. The Fifth Circuit's decision thoroughly described this practice:

> Here's how ghosting worked: once a patient had been in Abide's system for "a couple of years," Abide would officially discharge the patient but informally hold onto them, with the assigned nurses continuing to make home visits. From the patient's perspective, nothing had changed and thus the patient had no incentive to leave Abide and seek home health services elsewhere. But from Medicare's perspective, this patient was no longer receiving services from Abide. While a patient was being ghosted, Abide would not bill that patient or charge Medicare. When Abide's nurses would visit a ghosted patient, instead of entering the visit data into Abide's electronic record system as was done for formal visits, the nurses submitted a paper note to record the visit. After [sixty] days, the ghosted patient would be re-enrolled as an official patient and Abide would resume billing Medicare.[122]

Ghosting kept Medicare's regulatory gaze off Abide and prevented lengthy periods of care from acting like red flags that might attract attention and unravel the fraud.

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115. *Id.*

116. *Id.*; *see also* United States v. Barnes, 979 F.3d 283, 296, 303 (5th Cir. 2020) (resolving the appeals of Nora's co-defendants and describing how the company (1) used an employment agreement to create a "paper trail" that hid kickbacks to a physician, and (2) increased the salary of a staff person as recompense for the patient referrals her physician-husband made to Abide).

117. *Nora*, 988 F.3d at 826–27.

118. *Id.* at 827.

119. *Id.* at 828.

120. *Id.*

121. *Id.* at 826.

122. *Id.* at 828.

The United States indicted twenty-three individuals, including Jonathon Nora, in connection with Abide's scheme.[123] Those indicted included Abide's owner, house doctors, billing staff, and others.[124] Following several guilty pleas, Nora and five co-defendants (four physicians and one biller) proceeded to trial, which spanned twenty-one days.[125] The jury convicted Nora for conspiring to commit health care fraud, conspiring to pay and receive kickbacks in exchange for patient referrals in violation of the AKS, and aiding and abetting health care fraud.[126] The trial court sentenced him to serve three concurrent forty-month prison terms, followed by a year of supervised release, and ordered him to pay Medicare almost $13 million in restitution.[127] Nora appealed his conviction.

On appeal, the Fifth Circuit twice described Nora as just twenty-two years old with a high school diploma when he joined Abide in 2009.[128] He began full-time employment as a data-entry clerk earning $13 per hour.[129] By 2012, however, Nora had worked his way up to Office Manager earning $60,000 per year.[130] He continued working at Abide as a salaried employee until late March 2014, when the government investigation went overt.[131]

In his role as Office Manager, Nora performed several functions that perpetuated the fraud. First, he handled patient intake.[132] Nora obtained Medicare coverage information, coordinated patient assessments, and directed patients to Abide's house doctors to approve home health services.[133] According to the court:

> [W]hen a potential patient had her own doctor, but the doctor did not think home health care was appropriate for that patient, Nora would follow up with the patient to inform her of her doctor's recommendation. Nora would also tell these patients that they might still be eligible for home health care, but that they would need to be evaluated by a different doctor. . . . Nora would

123. *Id.* at 826.
124. *Id.* at 825.
125. *Id.* at 826.
126. *Id.* at 825.
127. *Id.* at 829.
128. *Id.* at 826, 833. This description distinguished Nora from his more sophisticated co-defendants, who had greater education, earned more than he did, and profited from the fraud. In the court's telling, Nora was the proverbial little fish in a big pond. *Id.*
129. *Id.* at 826.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 826–27.

> offer to assign the patient to one of Abide's house doctors for a separate evaluation of her eligibility.[134]

Steering patients to house doctors guaranteed approval and, with it, more revenue.

Second, Nora tracked patient referrals.[135] He logged where referrals came from and "would inform the referrers that their referred patient had been admitted and that they could thus receive compensation in return."[136] Nora also processed and delivered payments to referrers, including a group home operator who testified when "she went to Abide to pick up her referral payments, Nora would usually be the one to hand her the checks."[137]

Third, Nora participated in ghosting.[138] When Abide's owner determined that patients needed to disappear from Medicare's rolls for a while, she sent a list of those patients to Nora, who in turn "helped make scheduling changes to facilitate the practice."[139] Nora acted like a clearinghouse, notifying the assigned nurses that their patients had been ghosted and that visits should continue but with paper documentation rather than electronic notations, presumably to avoid creating a digital trail or mistakenly billing Medicare.[140]

Nora was, in short, situated at the administrative center of Abide's home health care fraud scheme, performing inherently suspect tasks.[141] Even so, the Fifth Circuit reversed his conviction for conspiring to pay kickbacks and vacated his sentence because it determined that the evidence did not establish that he acted willfully.[142] The court's decision is surprising on the facts, but that is not why it is noteworthy.[143] The decision is remarkable

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134. *Id.* at 827.

135. *Id.* at 828.

136. *Id.* at 827.

137. *Id.* at 828.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See* United States v. Neufeld, 908 F. Supp. 491, 496 (S.D. Ohio 1995) (noting how "[t]aking bribes for referrals is not an innocent endeavor"); United States v. Starks, 157 F.3d 833, 838 (11th Cir. 1998); DeGraw, *supra* note 32, at 287; *see also Nora*, 988 F.3d at 832 (conceding "[a]rguably, the 'ghosting' practice is inherently suspicious").

142. The court reversed Nora's convictions for health care fraud and conspiracy to commit health care fraud for the same reason. *Nora*, 988 F.3d at 834.

143. Appellate courts review a "cold appellate record." *Nora*, 988 F.3d at 829 (quoting United States v. Nicholson, 961 F.3d 328, 338 (5th Cir. 2020)). Juries benefit from hearing, seeing, and

because of how the court formulated and applied the term willfully. The Fifth Circuit did not mention *St. Junius*, barely mentioned the 2010 statutory amendment of the AKS, and articulated a stringent account of willfulness that confounds the law in kickback cases.

The Fifth Circuit began its analysis of willfulness by quoting the circuit's traditional intermediate formulation: "Willfulness in the Medicare kickback statute means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law."[144] The court ratcheted up from there. It required the government to prove not just that Nora had purposefully made payments for referrals (as *St. Junius* requires), but that he knew the payments were illegal kickbacks.[145] On appeal, Nora argued that he did not act willfully because "while he may have understood that Abide was making referral payments for new patients, there was no evidence at trial that proved that he *knew* these payments constituted unlawful kickbacks."[146] The Fifth Circuit agreed.[147] After cataloging the evidence

contextualizing the evidence and testimony. For this reason, appellate courts typically defer to jury verdicts, as a jury is best positioned to weigh the evidence, assess witness credibility, and resolve questions of fact. The Fifth Circuit's decision to take Nora's case from the jury on evidentiary grounds—i.e., that the evidence was insufficient to establish willfulness—is peculiar. *See* United States v. Sanjar, 876 F.3d 725, 747 (5th Cir. 2017) (concluding a rational juror could find that defendants who monitored referrals, tracked patients and billings, and paid referral fees had acted willfully under the AKS). The factual gymnastics the court performed, coupled with its reformulation of willfulness, suggests that the result in *Nora* is perhaps best explained by the court's desire to reach what it felt would be a fair outcome. As the court noted, Nora was just twenty-two when he got mixed up in the scheme; he had limited formal education; and he did not draw an exorbitant salary. Nor did he profit or benefit from the fraud, other than perhaps retaining his job. His situation contrasts with Abide's owner and the company's physicians, each of whom had strong financial incentives to maximize the fraud. Thus, one way to read *Nora* is as an attempt to do rough justice by preventing a hapless participant who got little out of the scheme from being held accountable alongside and to the same extent as those who conceived, drove, and profited from it. Indeed, that the Fifth Circuit severed Nora's appeal and considered his case on its own, rather than alongside his co-defendants' appeals, lends credence to the conclusion that the court viewed Nora differently and wanted to distinguish his case from others involved in the conspiracy. United States v. Barnes, 979 F.3d 283 (5th Cir. 2020) (No. 18-31074), ECF No. 00515119965 (severing Nora's case, No. 18-31078, from his co-defendants in *Barnes*).

144. *Nora*, 988 F.3d at 830 (quoting United States v. Ricard, 922 F.3d 639, 648 (5th Cir. 2019)). The quoted language once again refers to the *Medicare* kickback statute, which, as noted, is a misnomer. The AKS applies to federal health care programs; it is not limited to Medicare. *See supra* note 18 and accompanying text.

145. *Nora*, 988 F.3d at 831.

146. *Id.*

147. *Id.*

against *Nora*—his referral payments, proximity to the fraud, and contributions to ghosting, a practice the court tacitly conceded was "inherently suspicious"—the court determined that the government had not proven willfulness.[148] It concluded that the evidence against Nora was insufficient to prove "that Nora knew that Abide's referral payments constituted illegal kickbacks."[149]

This conclusion puts *Nora* at odds with *St. Junius*, which held that willfulness does *not* require the government to prove that the defendant knows that referral payments (commissions in that case) are illegal.[150] Without citing or distinguishing its own precedent, the Fifth Circuit increased the showing required to establish *mens rea* under the AKS. To prove that a defendant acts willfully after *Nora*, the government must demonstrate that a defendant purposefully pays for referrals knowing that such payments are illegal kickbacks.[151] This showing not only ignores *St. Junius* but arguably exceeds the requirements of the AKS.[152]

The amended AKS provides that "[w]ith respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section."[153] The Fifth Circuit referenced this statutory language in a single footnote, suggesting that its holding did not run afoul of the AKS because it did not require Nora to know of the *specific* law he had broken.[154] The court implied that a defendant must be aware that his conduct violates *a* law prohibiting kickbacks, not necessarily *the* law that proscribes them.

This distinction is illusory and leads to absurd results if taken literally. Imagine that a defendant, D_3, is an experienced financial fraudster who decides to look for new moneymaking opportunities. He finds the health care market attractive, opens a clinic, and promptly enrolls in federal health care programs. D_3 hires a few down-on-their-luck doctors, pays them well, and instructs them to inflate their bills with extra services they did not render. The clinic is operating in no time, billing Medicare, Medicaid, and other federal programs. To gin up more business, D_3 electronically transfers money to third parties in exchange for patient referrals to his new venture.

148. *Id.* at 832.
149. *Id.* at 834.
150. United States v. St. Junius, 739 F.3d 193, 210–11 (5th Cir. 2013).
151. *Nora*, 988 F.3d at 830.
152. *Id.*
153. 42 U.S.C. § 1320a-7b(h).
154. *Nora*, 988 F.3d at 830 n.3.

He believes that the referral payments are illegal because they constitute felony wire fraud transactions but is ignorant of the prohibition against kickbacks, as he is brand new to health care scams. Using the logic that the Fifth Circuit applied in *Nora*, D_3 cannot be convicted of violating the AKS because he did not know that the "referral payments constituted illegal kickbacks,"[155] which is the level of *mens rea* that the court demanded that the government attain. This cannot be what Congress intended when it modified the AKS in 2010, and it is surely more than the Fifth Circuit required in *St. Junius*.[156]

To show that a defendant knows "referral payments constituted illegal kickbacks,"[157] as *Nora* demands, the government must now prove (1) a defendant is aware that it is illegal to give or take remuneration in exchange for patient referrals, and (2) intentionally makes or accepts the payments despite that knowledge.[158] This formulation presupposes that a defendant knows what kickbacks are, knows they are illegal, and intends to violate whatever law prohibits them. About the only things that the government does not have to prove after *Nora* is that the defendant knows that the law criminalizing kickbacks is codified at 42 U.S.C. § 1320a-7b or that it is referred to as the AKS. If this is now the state of the Fifth Circuit's willfulness jurisprudence, how is this any different in substance from requiring the government to prove knowledge of the AKS and intent to violate it—the very same showing that Congress rejected when it amended the AKS in 2010? The Fifth Circuit could and should have devoted more than two sentences in a passing footnote to reconcile its holding with subsection (h) of the AKS.

IV. THE AKS AND WILLFULNESS GOING FORWARD

What does it take to violate the AKS in the Fifth Circuit? The answer depends on which appellate panel one asks. The court has articulated at least three different standards of willfulness in AKS cases, leaving trial judges, prosecutors, defense attorneys, juries, regulators, health care

155. *Id.* at 834.

156. As an aside, if either the broad willfulness standard articulated in *St. Junius* or the intermediate standard embraced in *Davis* applied, D_3 could be convicted of violating the AKS because he purposefully paid for patient referrals, which satisfies the former standard, and he acted with a bad purpose to violate the law, which meets the latter (it just happens that he thought he was violating a different law). *See* cases cited *infra* notes 160, 163.

157. *Nora*, 988 F.3d at 834.

158. *Id.* at 831, 834.

providers, and the entire medical field without firm guidance about the level of intent required to violate the law. The court's latest foray into willfulness, a "notoriously malleable word"[159] to be sure, does not help matters any. The law is as disarrayed as ever. The following summarizes potentially viable formulations of willfulness and the pros and cons of each:

The broad standard. The broad standard, embodied in *St. Junius*, focuses on whether the defendant knowingly and willfully pays or receives remuneration to induce or in return for patient referrals.[160] The emphasis is on whether the act is deliberate, purposeful, or intentional, as opposed to involuntary, inadvertent, or unconscious. It is immaterial whether a defendant knows that a referral payment is illegal.[161] "All that is required for criminal liability is proof that the alleged wrongdoer knew what he or she was doing and was acting on his or her own volition."[162] The primary virtue of this approach is that it is easy to articulate, understand, and administer. It reduces complexity in kickback cases by eliminating intractable inquiries into the state of a defendant's knowledge of the law and intent to violate it. Also, it precludes ignorance of the law as a defense to prosecution. The downside, and it is considerable, is the risk that innocent actors may run afoul of the AKS given the nuances of modern health care economics, transactions, relationships, and regulations. While prosecutorial discretion still exists to differentiate inadvertent violations from culpable transgressions warranting prosecution, this safeguard is at best cold comfort to those who are subject to the AKS and its strictures.

The intermediate standard. The intermediate standard reflected in *Davis* and its progeny requires general knowledge of illegality and intent to do something unlawful but does not demand express awareness of the law or a specific intent to violate it.[163] The advantage of this standard is that it reflects the majority approach in the circuit courts and has a developed body of caselaw standing behind it.[164] Decisions like *St. Junius* and *Nora* are, at

159. United States v. Bryan, 524 U.S. 184, 202 (1998) (Scalia, J., dissenting).

160. United States v. St. Junius, 739 F.3d 193, 211 (5th Cir. 2013).

161. *Id.* at 210.

162. Davies, *supra* note 28, at 406–07 n.254 (quoting 132 CONG. REC. S16307-01 (1986)). Davies quotes Senator Carl Levin's statements about the Anti-Kickback Act of 1986, a distinct kickback law related to federal government contracting. 132 CONG. REC. S16307-01 (1986). While Senator Levin's comments address kickbacks in a different statutory context, his formulation of the willfulness standard aptly describes the broad formulation articulated in *St. Junius*. *St. Junius*, 739 F.3d at 210–11.

163. United States v. Davis, 132 F.3d 1092, 1094 (5th Cir. 1998).

164. DeGraw, *supra* note 32, at 279–80, 287.

least in the Fifth Circuit, outliers. This standard also offers some protection against innocent violations of the AKS that a prosecutor might not screen out under the broad standard. While the intermediate formulation may be rhetorically familiar, its application is anything but uniform. This Article suggests that, at least in some instances, how courts articulate and apply willfulness depends as much on the outcome judges desire as the precise wording of either the AKS or the cases construing it. In addition, as Justice Scalia sketched in his *Bryan* dissent, it is difficult to ascertain what general knowledge of illegality means.[165] Does a defendant who bribes doctors for referrals act willfully if, although ignorant of the AKS, she knowingly uses embezzled funds to pay the kickbacks? What if, as Justice Scalia posited, she illegally double-parks her car while delivering the illicit payments? Suppose instead of paying bribes she accepts them knowing that she will not report her ill-gotten gains on her federal income tax return. Is her knowing receipt of cash and intent to flout the internal revenue laws enough general knowledge and criminal intent to establish willfulness under the AKS? The intermediate standard does not answer these questions, leaving judges with "no principled way to determine *what* law the defendant must be conscious of violating."[166]

The stringent standard. The stringent standard announced in *Hanlester* and rekindled in *Nora* sets the highest bar for the government. It requires proof that a defendant knows that referral payments are illegal kickbacks and intends to make or receive them anyway.[167] This standard maximizes protection for innocent defendants, negating the government's ability to prove willfulness based on generalized evidence that "everybody knows" misconduct is occurring.[168] The government must instead elicit particularized evidence of knowledge and intent even if, as the Fifth Circuit suggests, it need not show literal awareness of the AKS and specific intention to violate it.[169] This is, as noted, a questionable assertion. The upshot of *Nora* is that the government must prove that a defendant knows referral payments are illegal kickbacks and means to pay them; realistically, this is tantamount to requiring the government to establish specific knowledge and criminal intent. Compelling the government to prove that the defendant intends to make referral payments knowing that they are

165. *See supra* note 46 and accompanying text.
166. United States v. Bryan, 524 U.S. 184, 203 (Scalia, J., dissenting).
167. Hanlester Network v. Shalala, 51 F.3d 1390, 1400 (9th Cir. 1995).
168. United States v. Nora, 988 F.3d 823, 832 (5th Cir. 2021).
169. *Id.*

illegal kickbacks is, in substance, no different than requiring it to show that the defendant knows of the AKS and intends to violate it. The Fifth Circuit's parsing of willfulness looks suspiciously like the Ninth Circuit's formulation in *Hanlester*. This conclusion points to the downside of the stringent standard, which is that it puts many culpable kickback defendants beyond prosecutorial reach and sanctions ignorance of the law as a defense to accountability.[170]

For all the uncertainty *Nora* engenders, the decision does make one thing certain: the government and defendants will continue to tussle over the meaning of willfully in kickback cases. Rather than move the law toward a clearer, firmer exposition of what it means to "knowingly and willfully" offer, pay, solicit, or receive kickbacks to induce or in return for patient referrals, the Fifth Circuit has made the law even more opaque. The court ignored circuit precedent, failed to reckon with relevant statutory language, and announced a more demanding *mens rea* than law or precedent justify. This contributes to "wide uncertainty about the law's commands. It is now harder than ever to know whether knowledge of the law will or will not be an element, and if it will, precisely what the prosecutor's burden as to that element will be."[171]

This is a regrettable outcome, particularly in the Fifth Circuit. Texas, Louisiana, and Mississippi—the three states that comprise the Fifth Circuit—are home to three Health Care Fraud Strike Forces, situated in Dallas, Houston, and along the Gulf Coast.[172] Strike Forces are interagency teams that concentrate the federal government's law enforcement assets—prosecutors, agents, auditors, and others—where health care fraud, waste, and abuse are rampant.[173] The AKS is among their most important and effective tools. The decision in *Nora* makes the struggle against health care fraud that much more difficult for these elite enforcement units by perpetuating ambiguity and raising the government's burden in kickback cases beyond what the AKS and precedent require. The decision also

170. *See* Davies, *supra* note 28, at 346–47 (observing that "ignorance or mistake of law has already become an acceptable excuse in a number of regulatory and nonregulatory settings, particularly in prosecutions brought under statutes requiring proof of 'willful' conduct on the part of the accused").

171. *Id.* at 413.

172. *Strike Force Operations*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-fraud/strike-force-operations [https://perma.cc/X3DZ-V2HL] (EP).

173. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM REPORT FOR FISCAL YEAR 2019, at 1, 8, 10 (2020), https://oig.hhs.gov/publications/docs/hcfac/FY2019-hcfac.pdf [https://perma.cc/U8GW-8AD2].

revitalizes ignorance of the law as a defense and emboldens fraudsters. If someone who shunts patients to "friendly" doctors after their own doctors have said they do not need services, who tracks referrals and pays kickbacks to keep them coming, and who helps obscure the fraud scheme from detection by arranging for patients to disappear from Medicare's payrolls can get off for lack of willfulness because he does not *know* his conduct is illegal, then anybody can. That is the unfortunate message that *Nora* sends to parties within and without the Fifth Circuit.

Congress ideally should rectify this problem by clarifying once more what, if any, knowledge and intent prosecutors must prove to establish willfulness in AKS cases. A legislative fix is a pipedream at present. It thus falls to the Fifth Circuit itself to clean up the jurisprudential mess by selecting one willfulness standard, articulating it with as much precision as possible, and policing adherence through careful and consistent appellate review. In some ways, the selection and coherent use of a single standard—any standard—will be better than the judicial clutter that currently exists. While the broad and intermediate formulations of willfulness discussed in this Article are more consonant with the text and history of the AKS than the stringent formulation approximated in *Nora*, what is most important is that the court picks an interpretive lane and stays in it.