No. 15-7

In the
Supreme Court of the United States

UNIVERSAL HEALTH SERVICES, INC.,
PETITIONER,

v.

UNITED STATES AND COMMONWEALTH OF MASSACHUSETTS EX REL. JULIO ESCOBAR AND CARMEN CORREA,
RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALASKA, CONNECTICUT, HAWAI'I, INDIANA, IOWA, KENTUCKY, MARYLAND, MINNESOTA, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the False Claims Act prohibits a claimant from billing the government for goods or services when the claimant knows (and fails to disclose) that the goods or services fail to comply with material statutory, regulatory, or contractual requirements (a theory described by some circuits as "implied false certification" liability).

2. Whether, under an "implied false certification" theory, the material statutory, regulatory, or contractual requirement must expressly state that it is a condition of payment by the government.

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INTEREST OF THE *AMICI CURIAE*

Illinois and 21 other States submit this brief in support of Respondents to urge affirmance of the judgment of the United States Court of Appeals for the First Circuit in *United States & Massachusetts ex rel. Escobar v. Universal Health Services, Inc.*, 780 F.3d 504 (1st Cir. 2015). The False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*., is intended to punish and deter fraud against the government, including fraud that may be both difficult to detect and damaging to the public interest. This Court has long recognized that the FCA is meant to have a broad reach targeting "all types of fraud, without qualification, that might result in financial loss to the Government." *See United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

The First Circuit's decision gives effect to Congress's intent. The First Circuit held that Respondents stated a claim under the FCA by alleging that Petitioner, a government contractor, requested payments from the government for services despite the fact that the contractor was not in compliance with certain regulations. The court found that Respondents stated a claim even though Petitioner did not expressly certify in the requests for payment that it was in compliance with those regulations.

The *amici* States are as susceptible to unscrupulous government contractors as is the federal government, and most have enacted state false claims statutes or other laws aimed at fraud against them,

many of which closely mirror the FCA and are interpreted in line with judicial interpretations of the FCA. The *amici* States have participated in false claims lawsuits and similar actions that have protected the public by exposing and stopping fraud, including conduct that seriously endangered the health and safety of the public, and have recovered hundreds of millions of dollars.

Because the types of fraud that unscrupulous government contractors undertake vary widely in style and are continually evolving, and due to the risks to the public safety and fisc that fraud creates, the *amici* States believe that to be effective, false claims laws must cast a wide net. And the *amici* States further believe that the delineation of the outer boundaries of FCA liability is best made not by judicially created parameters distinguishing between so-called express certifications — in which the government contractor expressly falsely certifies in its request for payment that it has complied with a contractual provision, statute, or regulation — on the one hand, and implied certifications — in which the contractor submits a claim for payment but does not expressly certify compliance — on the other. Rather, Congress, by imposing scienter and materiality requirements on FCA actions, has set out the breadth of the statute. Those textual requirements prevent abuse of the statutory processes and remedies. At the same time, they serve the compelling interests in remedying and deterring fraud against the government, and do so regardless of whether the contractor expressly

or impliedly certifies that it is in compliance with contractual provisions, statutes, and regulations when it, among other things, seeks payment from the government.

STATEMENT

1. Respondents Julio Escobar and Carmen Correa brought this *qui tam* action under the FCA and Massachusetts's false claims act arising out of the care that their daughter, Yarushka Rivera, received at Arbour Counseling Services, which is owned and operated by Petitioner Universal Health Services, Inc. *Escobar*, 780 F.3d at 507-08. Respondents alleged that Petitioner fraudulently sought payments under the Massachusetts Medicaid program known as MassHealth, which is partially funded by the federal government. Respondents asserted, *inter alia*, that Arbour, when it submitted bills to MassHealth for services rendered by staff members, fraudulently misrepresented that its staff members were properly licensed and/or supervised as required by the MassHealth regulations. Further, Respondents alleged that Arbour engaged in fraudulent billing practices. *Id*. at 511.

2. Arbour participates in MassHealth, and bills MassHealth for services rendered to individuals insured by the program. Massachusetts has promulgated regulations governing the MassHealth program. Those regulations impose requirements on the provision of mental-health services at facilities such as Arbour,

including staff composition, qualification, and supervision requirements. *Id*. at 508.

3. After Yarushka received mental health treatment at Arbour, Respondents were informed by a social worker there that the counselors who cared for Yarushka were not properly qualified and that the supervision their daughter's counselors received was inadequate. *Id*. at 510. Respondents filed complaints with several Massachusetts agencies, and ultimately brought their second amended complaint in the underlying case alleging violations of the FCA and the Massachusetts false claims statute. *Id*. at 510-11.

4. After the district court dismissed the complaint in its entirety, the First Circuit reversed except with regard to certain minor allegations not relevant here. The court explained that a number of circuit courts divide claims under the FCA into factually false and legally false claims, and subdivide the latter category into whether they proceed on a theory of express or implied certification of compliance with conditions of payment. *Id*. at 512. But the First Circuit "eschew[s] distinctions between factually and legally false claims, and those between implied and express certifications," because those distinctions "create artificial barriers that obscure and distort [the FCA's] requirements." *Ibid*. Rather, the court took "a broad view of what may constitute a false or fraudulent statement" to avoid foreclosing FCA liability "in situations that Congress intended to fall within the Act's scope." *Ibid*. (internal

quotation marks omitted). The court continued that, to establish liability, it asks whether the defendant, in submitting a claim for reimbursement, "knowingly misrepresented compliance with a material precondition of payment." *Ibid*. Preconditions of payment, the court noted, "may be found in sources such as statutes, regulations, and contracts," and "need not be expressly designated." *Ibid*. (internal quotation marks omitted).

5. The First Circuit held that the MassHealth regulations explicitly conditioned the reimbursement of Arbour's claims on adequate supervision of staff, the condition of payment was material as evidenced by the express and absolute language of the regulation imposing the supervision requirement, and Respondents met the scienter requirement by alleging that Arbour acted in reckless disregard or deliberate ignorance of the falsity of the information contained in the claims for payment. *Id*. at 514-15. The court reached similar conclusions regarding Respondents' claims predicated upon Arbour's failure to have adequately qualified staff, *id*. at 515-16, and their allegations that Arbor engaged in fraudulent billing, *id*. at 516-17. This appeal followed.

SUMMARY OF ARGUMENT

The FCA was enacted by Congress to root out and deter fraud against the government. Congress wrote the statute broadly, to reach all types of fraud against the government, and congressional intent to give the statute a wide breadth has repeatedly been made clear through amendments to the law over the last 30 years. Many

States have enacted their own false claims laws and other similar statutes to counteract fraud against the government. The federal and state governments have used these laws, sometimes proceeding under so-called implied certification theories of liability, to expose and recover for fraud in many contexts, including cases in which the public health has been threatened by unscrupulous government contractors.

The basic question presented by Petitioner presents a false choice. The Court need not make a blanket determination whether implied certification theories may ever be used under the FCA. That is because Congress has placed the proper limiting principles on the FCA's scope in the plain text of the statute in the form of scienter and materiality requirements. Those requirements cabin potential liability for contractors to knowing and material violations of contract provisions, statutes, or regulations. Scienter and materiality are directly relevant to whether the contractor has defrauded the government, while the particular form of the fraud (be it through express or implied certification) is not. Furthermore, the federal pleading rules for fraud place a further check on frivolous or abusive lawsuits seeking to impose liability on government contractors. Finally, requiring express certifications in invoices or contracts would not be workable and would leave the government vulnerable to serious fraud.

ARGUMENT

I. The FCA recognizes unique problems associated with fraud against the government and should be broadly interpreted.

In enacting the FCA and through subsequent rounds of amendments, Congress has sought to address the unique problems associated with identifying and prosecuting attempts to defraud the government, and the statute's penalty provisions also serve to deter such fraud. Moreover, the FCA is a congressional recognition that when the government is defrauded, it is the taxpayers who ultimately bear the cost. And as the statute's Civil War origins make clear, the costs borne by the public are not only economic harms, but can include, for example, threats to public health and safety. Accordingly, Congress has created — and refined — the mechanisms by which the public and its treasury may be protected via the FCA.

Originally enacted in 1863, the FCA is sometimes referred to as Lincoln's Law due to its genesis in the Civil War and to President Lincoln's support for the law. At the time of the FCA's enactment, "[t]estimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *United States v. McNinch*, 356 U.S. 595, 599 (1958). Senator Jacob Howard explained that

the law was addressed to the "great evil" of fraud and corruption "in obtaining pay from the Government during the present war." Cong. Globe, 37th Cong., 3d Sess 952. The statute thus "was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War." *United States v. Bornstein*, 423 U.S. 303, 309 (1976). With Lincoln's Law, Congress intended to "stop this plundering of the public treasury." *McNinch*, 356 U.S. at 599 (citing Cong. Globe, 37th Cong., 3d Sess. 952-58); *see id*. at 602 (Congress aimed to stop the "cheating of the United States") (Douglas, J., concurring in part and dissenting in part).

The "evident legislative purpose" behind the FCA is to safeguard public funds and property. *Bornstein*, 423 U.S. at 309-10. The FCA does this by making the government whole and deterring fraud. *See United States v. O'Connell*, 890 F.2d 563, 568 (1st Cir. 1989). Indeed, this Court has construed the penalty provisions of FCA in a manner to "maximize[ ] the deterrent impact" of the law. *Bornstein*, 423 U.S. at 316-17. To achieve these goals, the FCA is a "comprehensive" statute to "*broadly* protect the funds and property of the Government from fraudulent claims." *Rainwater v. United States*, 356 U.S. 590, 592 (1958) (emphasis added). For that reason, this Court has recognized that the FCA's original purpose of deterring war profiteering, "in no way . . . affect[s] the fact that Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in

financial loss to the Government.'" *Cook Cty., Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003) (quoting *Neifert-White Co.*, 390 U.S. at 232).

One way the FCA accomplishes its broad aims is through the *qui tam* provisions, which date back to the statute's origins. While the FCA authorizes the Attorney General to investigate violations of the statute and bring a civil action, 31 U.S.C. § 3730(a), it also permits private persons to bring a civil action for statutory violations in the name of the government, 31 U.S.C. § 3730(b)(1). These *qui tam* provisions "provide cash bounties in certain circumstances to private citizens who successfully bring suit against those who defraud the federal government." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

Congress's amendments to the FCA over the last 30 years, including amendments to the *qui tam* provisions, have shown its intent that the FCA continue to be given a broad construction. In 1986, Congress enacted amendments to the FCA "to loosen restrictive judicial interpretation of the Act's liability standard and the burden of proof by defining previously undefined terms, by expanding the *qui tam* jurisdictional provisions, and by increasing civil penalties." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Acc. Ins. Co.*, 721 F. Supp. 1247, 1252 (S.D. Fla. 1989) (citing 132 Cong. Rec. H6479-82). Those amendments raised statutory damages from

double damages to treble damages and raised the civil penalty from $2,000 to a penalty of not less than $5,000 or greater than $10,000. *See Miller v. Fed. Emergency Mgmt. Agency*, 57 F.3d 687, 689 (8th Cir. 1995); 31 U.S.C. § 3729(1) (1982). Additionally, the amendments removed a jurisdictional bar to *qui tam* suits that had prohibited any suit that was based on information in possession of the government at the time the suit was brought. *See United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497-98 (11th Cir. 1991). These amendments "address a paramount national concern in preventing and remedying government fraud." *In re Commonwealth Cos., Inc.*, 913 F.2d 518, 526 (9th Cir. 1990) (internal quotation marks and ellipsis omitted).

Then, in the Deficit Reduction Act of 2005, Congress reemphasized the importance of the FCA when it enacted a provision offering States an increased share of Medicaid fraud recoveries if the States enacted their own false claims statutes modeled on the FCA. *See* Pub. L. No. 109-171; *see also* March 17, 2006 Letter from Sen. Grassley to Inspector General Levinson and Attorney General Gonzales ("The federal FCA has long been recognized as a valuable tool for the government in detecting and preventing fraud, waste, and abuse in government programs.").

More recently, the Fraud Enforcement and Recovery Act of 2009 (FERA) further amended the FCA to "improve[ ] one of the most potent civil tools for rooting out waste and fraud in the Government." S.

Rep. 111-10, 4, 2009 U.S.C.C.A.N. 430, 433. FERA was a congressional response to overly restrictive interpretations of the FCA by the courts. S. Rep. 111-10, 10-11, 2009 U.S.C.C.A.N. 430, 438 (discussing *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), as well as *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004)). FERA amended the FCA to expand liability for making fraudulent claims on the federal government, to expand liability for presenting false or fraudulent claims for payment or approval, and to expand the government's role and obligations in *qui tam* cases. *See* Pub. L. No. 111-21, § 4 (section 4 of FERA entitled "Clarifications to the False Claims Act to Reflect the Original Intent of the Law"). And even after FERA, Congress once again amended the FCA to further strengthen the statute as part of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148.

The long history of the FCA and Congress's repeated efforts over the last 30 years to strengthen its force and reach strongly counsel against a restrictive reading of the statute. The Senate Report in conjunction with the 1986 amendments explained that the FCA "is intended to reach *all* fraudulent attempts to cause the Government to pay [out] sums of money or to deliver property or services." S. Rep. No. 99-345, 9, 1986 U.S.C.C.A.N. 5266, 5274 (emphasis added). In rejecting a "narrow reading" of the FCA, this Court has held that the statute is "broadly phrased to reach any person who makes or caused to be made 'any claim upon or against'

the United States," and has "consistently refused to accept a rigid, restrictive reading" of the FCA. *Neifert-White Co.*, 390 U.S. at 232. And since *Neifert-White*, Congress has continued to strengthen and broaden the FCA, explicitly countermanding restrictive court interpretations of the statute's reach.

II. Many States have false claims statutes modeled on the FCA and rely on implied certification theories in important cases.

The same problems associated with contractors perpetrating fraud on the federal government are faced by state governments dealing with contractors. The States, therefore, rely on robust and effective false claims laws to protect state funds and property, and that includes reliance on the implied certification theory to recover for frauds against the state governments.

Many States have enacted their own false claims statutes to achieve the same restitution and deterrent goals as the FCA. Illinois, for example, has enacted a false claims act that "closely mirrors" the FCA, and Illinois courts interpret the state statute in line with its federal counterpart. *See, e.g.*, *Scachitti v. UBS Fin. Servs.*, 831 N.E.2d 544, 557-58 (Ill. 2005); *People ex rel. Schad, Diamond & Shedden, P.C. v. QVC, Inc.*, 31 N.E.3d 363, 371-72 (Ill. App. 2015); *see also* 740 ILCS 175/1 - 175/8. Indeed, state false claims statutes that track the FCA typically "are interpreted consistent with the [FCA] in all material respects." *United States v.*

Educ. Mgmt. Corp., 871 F. Supp. 2d 433, 458 (W.D. Pa. 2012) (referring to several state false claims laws). While, to be sure, an interpretation of the FCA that precludes implied certification theories would not bind state courts in their interpretation of similar state statutes, it is nonetheless probable that state courts would continue to interpret their state laws in line with federal court understanding of the FCA, upon which the local laws are modeled.

Furthermore, as noted *supra*, federal law encourages States to implement false claims laws that mirror the FCA. In 2006, Congress enacted 42 U.S.C. § 1396h, which provides for an increased share in state recoveries for fraud claims related to Medicaid for States that enact false claims statutes modeled on the FCA. In particular, the state law must establish liability to the State for false or fraudulent claims described in 31 U.S.C. § 3729 with respect to Medicaid expenditures; contain *qui tam* provisions that "are at least as effective [as the FCA] in rewarding and facilitating *qui tam* actions;" require the filing of an action under seal for 60 days with review by the state Attorney General; and contain a civil penalty not less than the penalty in the FCA. 42 U.S.C. § 1396h. Since the enactment of § 1396h, the number of States with their own false claims acts has doubled.[1]

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[1] California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York,

Proceeding under their own false claims statutes, States have been involved in many significant cases under the implied certification theory. For instance, in *United States ex rel. Tyson v. Amerigroup Illinois, Inc.*, 488 F. Supp. 2d 719 (N.D. Ill. 2007), the federal government and Illinois intervened in an action originally brought by a relator against Amerigroup for engaging in discriminatory marketing practices toward pregnant women and ill persons in conducting a Medicaid HMO. At issue were implied certifications that Amerigroup was not engaging in health-status discrimination that deprived eligible individuals of medical services. A jury awarded plaintiffs $144 million in treble damages and more than $190 million in civil penalties. *Id*. at 739. The parties subsequently settled the matter on appeal for $225 million. *See id*., No. 02-CV-6074 (N.D. Ill.) at Doc. 943.

Another example of the use of an implied certification theory to expose fraud against the government is a *qui tam* case filed in Illinois state court, *Illinois ex rel. Raymer & Grosche v. Univ. of Chicago Hosps.*, Cir. Ct. Cook Cty., Ill., No. 06-L-2742, alleging that University of Chicago Hospitals filed fraudulent

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North Carolina, Rhode Island, Tennessee, Virginia, Washington, and the District of Columbia have false claims statutes that mirror the FCA. *See* http://oig.hhs.gov/fraud/state-false-claims-act-reviews/

Other States, such as Vermont, have also enacted false claims legislation. *See* 32 Vt. Stat. Ann. §§ 630-42.

claims for Medicaid reimbursements for services provided to babies who were "double-bunked" at the hospital's neonatal intensive care unit, contrary to Illinois's requirements for neonatal services as set forth in hospital licensure regulations. That matter was settled for $7 million, over $5 million of which was used to provide health care to low-income women and girls at local clinics or hospitals. *See* June 29, 2010 Ill. Attorney General Press Release ("U of C Medical Center to Pay $5.1 Million for Licensing Violations in Neonatal Intensive Care Unit").[2]

Additionally, the implied certification theory has been used to enable the government to recover in multistate Medicaid fraud cases for conduct that presented significant danger to the public. For instance, in *United States ex rel. Eckard v. GlaxoSmithKline*, No. 04-cv-10375 (D. Mass.), the federal government and States contended that four drugs were adulterated as that term is defined in the Food Drug and Cosmetic Act (FDCA). In particular, the drugs were manufactured in a way that the products had no active ingredient; had higher or lower amounts of the active ingredient; were incorrectly labeled as sterile; and had microorganisms in the packaging. The case settled for $600 million. *See* Oct. 26, 2010 Dep't of Justice Press Release ("GlaxoSmithKline to Plead Guilty & Pay $750 Million to Resolve Criminal and Civil Liability Regarding

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[2] available at: ag.state.il.us/pressroom/2010_06/20100629.html

Manufacturing Deficiencies at Puerto Rico Plant").[3] Similarly, *United States ex rel. Thakur v. Ranbaxy USA, Inc.*, No. 07-cv-962 (D. Md.), involved allegations that certain drugs were adulterated under the FDCA in that their strengths were materially different from the manufacturer's representations or were not manufactured according to the approved formulation. That case settled for $350 million. *See* May 13, 2013 Dep't of Justice Press Release ("Generic Drug Manufacturer Ranbaxy Pleads Guilty and Agrees to Pay $500 to Resolve False Claims Allegations, cGMP Violations and False Statements to the FDA").[4] And in *United States v. Vintage Pharmaceuticals, LLC*, No. 13-cv-1506 (S.D. N.Y.), the multi-vitamin tablet at issue contained half of the amount of fluoride listed on the label, in violation of the FDCA. The case settled for $39 million. *See* Dec. 16, 2013 U.S. Attorney - SDNY Press Release ("U.S. Attorney Announces $39 Million Civil Fraud Settlement Against Qualitest Pharmaceuticals for Selling Half-Strength Fluoride Supplements").[5]

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[3] available at: justice.gov/opa/pr/glaxosmithkline-plead-guilty-pay-750-million-resolve-criminal-and-civil-liability-regarding

[4] available at: justice.gov/opa/pr/generic-drug-manufacturer-ranbaxy-pleads-guilty-and-agrees-pay-500-million-resolve-false

[5] available at: justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-39-million-civil-fraud-settlement-against-qualitest

These cases illustrate fraudulent conduct that is well within the scope and intent of the FCA. But in these cases, the implied certification theory was needed to bring the contractor's illegal and dangerous activities to light because they were not the subject of an express certification. Petitioner's reading of the statute would preclude such enforcement of federal law.

III. The implied certification theory is consistent with the FCA's text and purpose.

Nothing in the FCA's text reveals an intent to limit claims to express certifications. The First Circuit thus properly "eschewed distinctions between factually and legally false claims, and those between implied and express certification theories." *Escobar*, 780 F.3d at 512. In so doing, it joined other courts to correctly recognize that "[t]he use of 'judicially created formal categories' for false claims is of 'relatively recent vintage,' and rigid use of such labels can 'do more to obscure than clarify' the scope of the FCA." *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 635 n.3 (4th Cir. 2015) (quoting *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 385 (1st Cir. 2011)).

This Court should likewise refuse to create a restriction on the statute's scope that is not found in the law's plain terms and that would undermine Congress's intent that the FCA reach "all types of fraud," *Cook Cty.*, 538 U.S. at 129. Instead of relying on the artificial distinction between express and implied certifications,

the Court should recognize that the statute itself incorporates other limiting principles. Consistent with the well-settled rule that the interpretation of a statute begins with its text, *see Mississippi ex rel. Hood v. AU Optronics, Corp.*, 134 S. Ct. 736, 741 (2014), the limits of the FCA's reach are drawn by the textual requirements of scienter and materiality, as well as the pleading standards of the Federal Rules of Civil Procedure. Additional limitations would be inconsistent with the FCA's purpose and operation.

A. The FCA incorporates explicit scienter and materiality requirements.

1. Scienter

The FCA expressly limits liability to persons who "*knowingly* present[], or cause[] to be presented, a false or fraudulent claim for payment or approval" or who "*knowingly* make[], use[], or cause[] to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. §§ 3729(a)(1)(A), (B) (emphasis added). The FCA defines "knowing" and "knowingly" to mean that the person has actual knowledge of the false information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth of falsity of the information. 31 U.S.C. § 3729(b)(1); *see United States v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013)

(describing FCA's scienter requirement as "actually quite nuanced").

This scienter requirement is of "central importance" to FCA liability, *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1171-72 (9th Cir. 2006), and removes innocent mistakes or simple negligence from the reach of the FCA, *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1058 (11th Cir. 2015); *see United States ex rel. Longhi v. United States*, 575 F.3d 458, 468 (5th Cir. 2009). Thus, short of actual knowledge or intentional disregard of truth or falsity, "gross negligence," or an "extreme version of ordinary negligence" is required. *Urquilla-Diaz*, 780 F.3d at 1058. The statute therefore does not impose a "'burdensome obligation'" on government contractors, but rather creates a "'limited duty to inquire.'" *United States v. Sci. Applications Int'l Corp.* (*SAIC*), 626 F.3d 1257, 1274 (D.C. Cir. 2010) (quoting S. Rep. 99-345, at 6, 19; 1986 U.S.C.C.A.N. 5266, 5271, 5284).

And courts regularly apply this scienter requirement to limit claims under the FCA. For instance, in *SAIC*, the D.C. Circuit rejected a claim that would have imposed liability for "a type of loose constructive knowledge." *Ibid*. In *United States ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008), the court found that plaintiffs failed to establish a FCA claim because they did not produce evidence establishing the requisite intent to defraud despite evidence that the claims were false. In *United States ex*

rel. Costner v. United States, 317 F.3d 883, 887-88 (8th Cir. 2003), the court used the scienter requirement to distinguish between an ordinary breach of contract claim and an FCA violation. And in *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 283-84 (D.C. Cir. 2015), the court held that a reasonable interpretation of ambiguous legal requirements or contractual specifications could not meet the scienter requirement. *See also United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 531 (6th Cir. 2012) (applying "reckless disregard" prong and finding absence of scienter). As these cases illustrate, the FCA's explicit scienter requirement serves as a significant limiting principle on liability under that statute.

This regularly enforced statutory requirement thus rebuts the Seventh Circuit's conclusion that the implied certification theory "lacks a discerning limiting principle" and "would have the potential to impose strict liability [for violating any requirement] . . . under the FCA," *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 711 (7th Cir. 2015). A government contractor cannot be liable under the FCA for noncompliance with statutory and regulatory requirements if it does not know that it was not in compliance, if it does not act in deliberate ignorance of whether it was in compliance, or if it does not act with reckless disregard of its compliance or non-compliance. *See* 31 U.S.C. § 3729(b)(1). The Seventh Circuit's concern that the implied certification theory would create strict liability for a contractor who is out of compliance with any

particular aspect of "the thousands of pages of federal statutes and regulations incorporated by reference into" a government contract, 788 F.3d at 711, is thus refuted by the plain terms of the FCA.

The scienter requirement, unlike a judge-made line between express and implied certifications, is an appropriate limiting principle on FCA claims. Not only is the scienter requirement actually found in the statutory text, but intent to defraud is more closely related to the purposes of the FCA than is a distinction between whether a false certification is express or implied. If a contractor knowingly submits a false certification to the government, the fraud occurs because of the guilty knowledge, not the form of the certification.

2. Materiality

The FCA also contains an explicit requirement, added by the FERA amendments, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621-25, that any false record or statement be "material to a false or fraudulent claim," 31 U.S.C. § 3729(a)(1)(B). A false statement is "material" if it has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). This materiality requirement, like the scienter requirement, expressly "cabin[s]" the breadth of the FCA, *Hutcheson*, 647 F.3d at 388, and it does so in a manner explicitly set out by Congress.

The materiality requirement is an objective standard, *United States ex rel. Feldman v. van Gorp*, 697 F.3d 78, 95 (2d Cir. 2012), which protects government contractors from unforeseen liability because it removes from the FCA's purview violations of "'minor contractual provisions that are merely ancillary to the parties' bargain,'" *Triple Canopy*, 775 F.3d at 637 (quoting *SAIC*, 626 F.3d at 1271). As the Sixth Circuit held in *Williams*, the FCA "is not a vehicle to police technical compliance with complex federal regulations." 696 F.3d at 532. The Seventh Circuit's concern that contractors might be liable for failure to comply with any one of "thousands of pages of statutes and regulations," *Sanford-Brown*, 788 F.3d at 711, is thus misplaced for this reason as well, as is its conclusion that the materiality requirement does not provide a limiting principle for FCA liability, *id*. at 711 n.6. As with the scienter requirement, the Seventh Circuit ignored the plain statutory language.

And materiality can be crucial to establishing liability in cases involving implied certification. In *Triple Canopy,* for example, the government contractor agreed to provide security services for bases in an active combat zone. 775 F.3d at 632. The contractor created false marksmanship scorecards for its employees because they did not meet the requirements set by the government, and submitted invoices to the government for payment for security services. *Id*. at 632-33. As the Fourth Circuit explained, "common sense strongly suggests that the Government's decision to pay a

contractor for providing base security in an active combat zone would be influenced by knowledge that the guards could not, for lack of a better term, shoot straight." *Id*. at 637-38. Furthermore, the fact that the contractor took steps to cover up the guards' poor marksmanship "suggests its materiality." *Id*. at 638.

Even though the contractor did not expressly certify that its guards met the marksmanship standard when it submitted the requests for payment, its failure to provide guards who could "shoot straight" obviously was material to the government contracting for combat zone security. Indeed, this type of fraud harkens to the war profiteering that gave rise to the FCA 150 years ago, and is at the core of the types of fraud on the government Congress has sought to alleviate. Imposing an artificial limit on implied certifications would remove from the FCA's reach claims of the sort that Congress clearly intended to reach.

* * *

The statutory materiality and scienter requirements provide Congress's intended limit on the scope of FCA actions. Many of the objections Petitioners and their *amici* raise to implied certification cases are really complaints about the application of the materiality and scienter standards in specific cases. For instance, the Catholic Charities *amicus* brief discusses extensively a lawsuit pending in Illinois state court, *State of Illinois ex rel. Ballard v. Catholic Charities of the Diocese of Ill., et al.*, No. 12-L-753 (Cir. Ct. of

DuPage Cty., Ill.). Catholic Charities Br. at 12-16. But Catholic Charities' true objection to *Ballard* is not whether the certification was express or implied, but rather that it may be held liable for violating "highly discretionary" or "subjective" laws after certifying generically that it complied with all laws, regulations, and standards. Whether those allegations are actionable can be resolved by applying the scienter and materiality requirements. There is no need to differentiate between express or implied certifications, when the statute instructs the courts to consider the contractor's knowledge and the significance of the alleged violations to the government's payments.

B. The Federal Rules of Civil Procedure provide limitations on what FCA claims can be brought.

In addition to the boundary-defining terms in the text of the FCA itself, Federal Rule of Civil Procedure 9(b) places an important limit on the actions brought under the FCA. Rule 9(b) states that when alleging fraud, "a party must state with particularity the circumstances" constituting the fraud. Fed. R. Civ. P. 9(b). Because FCA actions are fraud claims, the heightened pleading standard for such claims applies. *See, e.g.*, *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185-86 (5th Cir. 2009); *see also Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566-67 (11th Cir. 1994). The "multiple purposes of Rule 9(b), namely, of providing notice to a defendant of its alleged

misconduct, of preventing frivolous suits, of eliminating fraud actions in which all the facts are learned after discovery, and of protecting defendants from harm to their goodwill and reputation" are served by applying the standard to FCA claims. *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456 (4th Cir. 2013) (internal quotation marks omitted); *see also Grubbs*, 565 F.3d at 185 ("Rule 9(b) has long played that screening function, standing as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner than later."). Furthermore, the general pleading standard of Federal Rule of Civil Procedure 8, as explained in this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and explaining that Rule 8 requires a complaint to state a claim of relief plausible on its face), further reduces the risk of abuse of the FCA by frivolous lawsuits.

And courts in fact rely on Rules 8 and 9(b) to serve as a check on potential abuse of the FCA. *See, e.g.*, *United States ex rel. Gage v. Davis S.R. Aviation, L.L.C.*, 623 F. App'x 622, 627-28 (5th Cir. 2015), *cert. denied*, 2016 WL 280848 (U.S. Jan. 25, 2016); *Takeda Pharm.*, 707 F.3d at 457-58; *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010). These pleading standards, thus, provide additional limitations on FCA actions, further obviating the need to create a line between express and implied certifications that is found nowhere in the statute.

C. Implied certification *qui tam* cases do not conflict with the government's administrative enforcement mechanisms.

In *Sanford-Brown*, the Seventh Circuit expressed concern that its imagined strict liability even for minor or technical violations would "undermine [the government's] existing administrative enforcement powers." 788 F.3d at 711 n.6 (citing *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 799 (8th Cir. 2011)). But this conclusion is dubious. Neither the federal government nor the States have the resources to fully investigate and monitor every potential material violation of contract provisions, statutes, and regulations that govern government contractors. Rather than "undermining" administrative enforcement, the FCA is an important supplement to it, both because it relieves the government of pursuing some violators and because it creates a powerful incentive to comply in the first place — which is, after all, the government's ultimate interest.

Moreover, this concern over the relationship between implied certification theories and alternate enforcement mechanisms ignores the plain language and operation of the FCA. Under the FCA, the federal government retains control over all civil actions for false claims. The Attorney General is authorized to investigate violations of § 3729, 31 U.S.C. § 3730(a), and the government has the authority to conduct an action

originally brought by a relator, 31 U.S.C. § 3730(b)(4). Additionally, the government may dismiss an action brought by a relator over the relator's objections, 31 U.S.C. § 3730(c)(2)(A), settle an action notwithstanding the relator's objections, 31 U.S.C. § 3730(c)(2)(B), or restrict the participation of a relator in a proceeding, 31 U.S.C. § 3730(c)(2)(C). Furthermore, the FCA provides that the government "may elect to pursue its claim through any alternate remedy available . . . including any administrative proceeding to determine a civil penalty." 31 U.S.C. § 3730(c)(5); *see also, e.g.*, 740 ILCS 175/4(c)(5) (Illinois false claims act's analogous alternate remedy provision).

These provisions allow the government to rely on the FCA to enhance other remedies, such as administrative fines or licensing suspension, and the government retains control to exercise whichever remedies it sees fit. As the Eighth Circuit has explained, "Congress intended to allow the government to choose among a variety of remedies, both statutory and administrative, to combat fraud." *United States ex rel. Onnen v. Sioux Falls Indep. Sch. Dist. No. 495*, 688 F.3d 410, 415 (8th Cir. 2012) (internal quotation marks omitted); *see also United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1012-13 (9th Cir. 2001) (discussing alternate remedies under FCA). The FCA is part of "an integrated scheme of civil and criminal law enforcement." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 472 (1983) (Burger, J., dissenting). The government's control over that integrated scheme is not

weakened by *qui tam* claims proceeding on implied certification theories. To the contrary, it is strengthened.

D. Requiring express certification is often unworkable and is unnecessary.

Express certifications that identify every single legal obligation are often infeasible, and requiring them would unduly constrain the government's ability to pursue contractors who are not in compliance. Limiting the FCA to only such express certifications would thus open the door to significant unpunished fraud.

More specifically, it may often be impractical for the government to list, either in a contract or on an invoice, every single provision of every statute or regulation with which it expects a contractor to be in compliance, in part because laws and regulations are constantly evolving. As a result, such certifications could easily and frequently become outdated. At a minimum, then, requiring detailed express certifications would add unnecessary bureaucracy.

Moreover, government contractors are well-protected by the scienter requirement: they can be liable only for material changes in the law that they knowingly violate. For this reason, any suggestion that implied certification effectively requires contractors to have detailed knowledge of the current status of every possibly relevant legal provision, on pain of FCA liability, is wrong.

And express certification runs the risk of under-inclusiveness, which would leave the government vulnerable to fraud. By articulating express requirements, the government would be essentially acknowledging that there are other requirements an unscrupulous contractor could violate with impunity. Excluding implied-certification theories from the FCA would therefore hamper the government's ability to prevent and pursue fraud.

Finally, requiring contractors to expressly certify in broad, general terms that they are in compliance with all laws and regulations — an alternative that Petitioner discusses but considers insufficient — would be redundant. The government already expects that its contractors comply with the law. Moreover, contractors who do not comply would inevitably argue that such a broad certification is insufficient to trigger FCA liability, as *amicus* Catholic Charities suggests, *see* Catholic Charities Br. at 12-16. Thus, requiring express certifications would, at a minimum, lead to increased litigation and uncertainty about the scope of the FCA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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