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 *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page(s)

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT........................ 2

ARGUMENT.. 4

I. THE TEXT OF THE FALSE CLAIMS ACT UNQUESTIONABLY CONFIRMS THE VALIDITY OF THE FIRST CIRCUIT'S DECISION.. 4

II. THE FIRST CIRCUIT'S ANALYTICAL FRAMEWORK IS CONSISTENT WITH THE ORIGINAL INTENT OF THE DRAFTERS OF THE FALSE CLAIMS ACT 9

A. The False Claims Act was Passed in Response to Rampant Contracting Fraud 9

B. The Drafters of the FCA Rejected the Argument that Existing Laws and Remedies were Sufficient to Combat Fraud 13

C. The First Circuit's Analytical Framework Should Be Adopted by this Court 17

TABLE OF CONTENTS—continued

III. PETITIONER AND SUPPORTING *AMICIS'* ATTACKS ON THE FCA AND RELATORS ARE WHOLLY WITHOUT MERIT 23

A. The *Qui Tam* Provision of the FCA is the Most Powerful Tool the Government Has to Battle Corruption and Fraud 23

B. The FCA Contains Procedural Safeguards Designed to Weed Out Meritless Claims 28

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcroft v. Iqbal,
129 S. Ct. 1937 (2009) 20

Barati v. State,
No. 1D15-213, 2016 Fla. App. LEXIS 2648 (Dist. Ct. App. Feb. 23, 2016)......................................29

Iqbal v. Hasty,
490 F.3d 143 (2d Cir. 2007)...............................20

Kingston v. Preston,
99 Eng. Rep. 437 (K.B. 1773)............................14

Mills v. Wyman,
20 Mass. 207 (1825)...14

New York v. Amgen, Inc.,
652 F.3d 103 (1st Cir. 2011)..............................17

Ridenour v. Kaiser-Hill Co., LLC,
397 F.3d 925 (10th Cir. 2005), *cert. denied*
546 U.S. 816 (2005) 29

Swift v. United States
318 F.3d 250 (D.C. Cir. 2003), *cert. denied*
539 U.S. 944 (2003) 30

TABLE OF AUTHORITIES—continued

United States ex rel. Bogina v. Medline Indus., Inc., ___ F.3d ___, 2016 WL 25611 (7th Cir. Jan 4, 2016) 30

United States ex rel. Escobar v. Universal Health Servs., Inc., 780 F.3d 504 (1st Cir. 2015) 12-13, 18, 19, 21

United States ex rel. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377 (1st Cir. 2011) 4, 22

United States ex rel. Jones v. Brigham & Women's Hosp., 678 F.3d 72 (1st Cir. 2012) 18

United States v. McNinch, 356 U.S. 595 (1958) 10

Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 525 U.S. 765 (2000) 21

STATUTES

Act of March 2, 1863, 12 Stat. 696 (1863) 8

Historical Revision Notes to 31 U.S.C. § 3729. United States Code. Government Printing Office 8

130 MASS. CODE REGS. 429.422, 429.424 13

31 U.S.C. § 3730(b)(3) 29

TABLE OF AUTHORITIES—continued

31 U.S.C. § 3730(b)(4)(A) 29

31 U.S.C. § 3730(c)(2)(A) 29

31 U.S.C. § 3730(c)(2)(B) 29

31 U.S.C. § 3730(d)(4) 30

RULES

Fed. R. Civ. 4(d)(4) 28

Fed. R. Civ. P. 9(b) 30

Fed. R. Civ. P. 11 30

LEGISLATIVE HISTORY

Cong. Globe, 37th Cong., 1st Sess. (1861)............ 5

Cong. Globe, 37th Cong., 2d Sess. (1862).. 2, 11, 15

Cong. Globe, 37th Cong.,
3d Sess. (1863)........... 5, 9, 10, 11, 12, 14, 15, 17

H.R. Rep. No. 2-37 (1861) 11

H.R. Rep. No. 49-37 (1863) 12

TABLE OF AUTHORITIES—continued

National Archives File HR 37A-E21.1, 37th Cong. Select Committee on Government Contracts, File Folder 6, Contracts 3, 6, 7, 8

National Archives File HR 37A-E21.1, 37th Cong. Select Committee on Government Contracts, File Folder 7, Vouchers 3, 6, 7, 8

S. Rep. No. 110-507, 110th Cong., 2d Sess. 20 (2008) 26

OTHER AUTHORITIES

Carl Sandburg, *Abraham Lincoln: The War Years, Vol I* (1939) 9

Centers for Medicare & Medicaid Services, *CMS-Fast-Facts* (December 2015) 31

Centers for Medicare & Medicaid Services, *Physician Service Use and Participation in Medicaid, 2009* (2012).......................................31

Congressional Budget Office, *The U.S. Federal Budget* (2011), *available at* https://www.cbo.gov/sites/default/files/cbofiles/attachments/budgetinfographic.pdf 31

TABLE OF AUTHORITIES—continued

Dep't of Justice, *Fraud Statistics – Overview* (Nov. 23, 2015), *available at* https://www.justice.gov/opa/file/796866/ download 26

Dep't of Justice, *Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015* (Dec. 3, 2015), *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015 ....25, 26

Federal Judicial Caseload Statistics, http://www.uscourts.gov/statistics/table/c-3/federal-judicial-caseload-statistics/2014/03/31 (last visited February 28, 2016) 26

Kesselheim, et al., *Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies*, New Eng. J. Med. (May 13, 2010) 24

Regís de Trobriand, *Four Years with the Army of the Potomac* (George K. Dauchy trans., Ticknor & Co. 1889) (1886) 9, 10

Remarks of Eric Holder, Att'y Gen. of the U.S. (Jan.31, 2012), *available at* https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-25th-anniversary-false-claims-act-amendments-1986 23-24

TABLE OF AUTHORITIES—continued

Remarks of Mary Joe White, Chair of the Sec. Exch. Comm'n (April 30, 2015), *available at* http://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html 26-27

Remarks of Stuart F. Delery, Acting Asst. Att'y Gen. of the U.S. (June 7, 2012), *available at* https://www.justice.gov/opa/speech/acting-assistant-attorney-general-stuart-f-delery-speaks-american-bar-association-s-ninth 24

U.S. Army Center of Military History, *Civil War Timeline* (Sept. 2013), *available at* http://www.history.army.mil/html/bookshelves/resmat/civil_war/cw_timeline.html 9

U.S. Chamber of Commerce, Institute for Legal Reform, *Fixing the False Claims Act*" (Oct.2013)..2

INTEREST OF *AMICUS CURIAE*[1]

The National Whistleblower Center ("NWC") is a nonprofit, non-partisan, tax-exempt, charitable organization dedicated to the protection of employee whistleblowers. Founded in 1988, the NWC is keenly aware of the issues facing employees who report fraud. *See,* NWC Web Site at *www.whistleblowers.org.* The NWC's directors have conducted extensive research into whistleblower policies and legal precedents, and have authored seven books on whistleblower law.

As part of its core mission, the NWC monitors major legal developments, and files amicus briefs in order to assist courts in understanding complex legal issues and important public polices raised in many whistleblower cases. Since 1990, the Center has participated before this Court as *amicus curiae* in cases that directly impact the rights of whistleblowers, including, *English v. General Electric*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*,

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Respondent's written consents to the filing of this brief have been filed with the clerk. *Amicus* received written consent from the Petitioner on March 2, 2016.

529 U.S. 765 (2000); *Beck v. Prupis,* 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S. 614 (2004); *Lawson v. FMR LLC*, 134 S. Ct 1158 (2014); *Lane v. Franks*, 134 S. Ct. 2369 (2014); and *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015).

Persons assisted by the Center have a direct interest in the outcome of this case. The False Claims Act is the government's "most important tool to uncover and punish fraud against the United States."[2] The key enforcement mechanism in the False Claims Act is its reliance upon "insiders" or whistleblowers to provide credible information documenting fraud against the U.S. government. Numerous whistleblowers assisted by the Center have used the False Claims Act to effectively provide information to the government to protect the public trust and hold those who would defraud the government accountable.

SUMMARY OF THE ARGUMENT

When Congress debated reforms to federal contracting law leading to the enactment of the False Claims Act ("FCA"), it was well understood that a contract could "always [be] fair upon [its] face,"[3] yet still result in significant harm to the

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[2] U.S. Chamber, Institute for Legal Reform, *Fixing the False Claims Act*, at p. 1 (October 2013).

[3] Cong. Globe, 37th Cong., 2d Sess. 3306 (1862) (statement of Sen. Grimes).

United States. Members of Congress in both chambers and in the special committee created to investigate government contracting fraud examined a number of abuses, including the sale of defective war materials. A review of the contracts and vouchers paid by the U.S. government at the time and reviewed by Congress when drafting the FCA demonstrates, incontrovertibly, there was no express condition of payment stated in the four corners of the contract. Neither the text of the FCA nor the contracts and vouchers in existence at the time the statute was drafted require an express condition of payment or participation to give rise to liability under the Act. The opposite is true. The contracts for which liability under the FCA was predicated could be as simple as a voucher or a receipt, simply stating the item sold to the government (such as a mule), the date of the sale and the price paid.[4]

The First Circuit's ruling below most closely reflects the true intentions of the FCA's drafters, and offers the best analytical framework consistent with the true purposes of the law: the punishment of fraud against the government and restitution for said fraud. The original drafters of the FCA did not require that express conditions be stated in a contract to impose liability under the Act, and the creation of such "artificial barriers" are contrary to Congress' original

[4] National Archives File HR 37A-E21.1, 37th Congress Select Committee on Government Contracts, File Folders 6 (Vouchers) and 7 (Contracts).

intent, the express terms used in the statute and the statute's purpose.[5]

Additionally, arguments that the FCA has been, and continues to be, abused by self-motivated relators and their attorneys are completely without foundation and are merely a desperate attempt to mislead the Court in its analysis. The False Claims Act has been a phenomenal success, resulting in the discovery of previously concealed fraud and the recovery of billions of dollars from dishonest government contractors.

ARGUMENT

I. THE TEXT OF THE FALSE CLAIMS ACT UNQUESTIONABLY CONFIRMS THE VALIDITY OF THE FIRST CIRCUIT'S DECISION

Petitioner and supporting *amici* argue that in order for any False Claims Act liability to attach, a court must review the four corners of a contract to determine whether an expressly stated condition of payment has been violated.[6] This position is not supported by the text of the statute, which contains no such condition, and it is completely invalidated by reviewing the work performed by the 37th Congress in the years after the onset of the Civil War.

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[5] *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 385 (1st Cir. 2011).
[6] *See* Brief for Petitioner at 41.

On July 8, 1861, Congress created the Select Committee on Government Contracts ("Committee").[7] The five-member panel was tasked with investigating reports of widespread fraud in procurement contracting. The Committee gathered evidence, examined witnesses, and met continually from 1861 until Congress passed the FCA in March of 1863. The Committee issued three reports—one for each year it was active. Congress and the general public[8] were well aware of contract fraud and the Committee's findings.[9]

Counsel for *amicus* reviewed the original records compiled by the Committee during its three-year investigation, which are located in the National Archives. The records contained two files relevant to the issue before the Court. The first file contained a collection of defense

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[7] *See* Cong. Globe, 37th Cong., 1st Sess. 23 (1861) (resolution of Rep. Van Wyck) ("*Resolved*, That a committee of five members be appointed by the Speaker to ascertain and report what contracts have been made by any of the Departments for provisions, supplies, and transportation; for materials and services; or for any articles furnished for the use of Government...").

[8] *See* Cong. Globe, 37th Cong., 3d Sess. 952 (1863) (statement of Sen. Howard) ("The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the government.").

[9] Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Wilson) ("Investigating committees in both houses of Congress have reported the grossest frauds upon the government.").

procurement contracts,[10] and the second contained a collection of vouchers used to obtain payments from the government.[11]

The contracts that the Committee examined are the actual contracts and vouchers under which the government procured supplies during the War. They were constructed simply, merely stating the type, quantity, and price of good(s) to be delivered. For example, one contract contained in the "voucher" file simply stated that "33 mules" were sold to the government, and set forth the date of sale and the price paid.[12] Another simply noted that "90 tents" were sold, giving the date and price.[13] The contracts were similar. Each set forth the date of the sale, the price of the item, and a simple description of the item sold to the government, such as "horse shoes," "pad locks," "lanterns," and "rifles," along with a copy of the receipt for payment.[14] All of the contracts and vouchers on file with the Committee were constructed with that degree of simplicity, i.e. a

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[10] National Archives File HR 37A-E21.1, 37th Congress Select Committee on Government Contracts, File Folder 7, Contracts.
[11] National Archives File HR 37A-E21.1, 37th Congress Select Committee on Government Contracts, File Folder 6, Vouchers.
[12] *Id.,* File Folder 6, Voucher to J. B Neill, dated August 26, 1861.
[13] *Id.,* File Folder 6, Voucher to M. Molton, dated September 10, 1861.
[14] *Id.,* File Folder 7, Contract with Child, Pratt, and Fox, dated September 26, 1861.

simple description of the item and a receipt.[15] The contracts on file with the Committee did not contain conditions of payment or participation.[16] Perhaps the most detail was a simple certification contained in one of the vouchers that the "above account is correct and just," confirming that the "services were rendered as therein stated and that they were necessary for the public service."[17]

The record of the Committee and the subsequent discussions in Congress demonstrate that the government expected goods of a certain quality, even without the inclusion of express conditions in the contract or voucher. While contractors were delivering goods that were, technically, compliant with the four corners of the procurement contract, their repeated failure to deliver quality goods was a major focal point of the Committee and, ultimately, triggered the FCA's enactment. Congress drafted the FCA to reach all frauds on the government, including the delivery of poor quality goods, without requiring express

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[15] This is not to say the government did not utilize more complex written agreements in some cases; however, the simplicity of the contracts contained in the records compiled by the Committee are demonstrative of the type of agreements under which contractors were supplying poor quality goods. Furthermore, there were no complex contracts in the Committee's records.

[16] National Archives File HR 37A-E21.1, 37th Congress Select Committee on Government Contracts, File Folders 6 and 7.

[17] *Id.,* File Folder 6, voucher from Joueph S. Pease, dated October 8, 1861.

conditions of payment, quality, or participation to be included in the contracts or vouchers.

In fact, Congress originally included the terms "voucher, receipt, or other paper certifying the receipt" in the text of the original FCA signed into law on March 2, 1863.[18] While these terms were later replaced for consistency when the bill was codified, as detailed in the Historical and Revision Notes, the drafter's intent is clear.[19] The contracts reviewed by the Committee were in the form of "receipts."[20] The vouchers reviewed by the Committee were designated as "vouchers."[21] The FCA's drafters contemplated liability against contractors based on simple contracts, vouchers, and receipts containing no explicit condition of participation or payment.

The Committee's work, as well as details on the 37th Congress's debate and passage of the False Claims Act, is discussed in further detail, below.

[18] Act of March 2, 1863, 12 Stat. 696 (1863)

[19] Historical Revision Notes to 31 U.S.C. § 3729. United States Code. Government Printing Office, 291 "The words 'record or statement' are substituted for 'bill, receipt, voucher'… for consistency in the revised title and with other styles of the Code. … In clause (5), the words 'document certifying receipt' are substituted for 'document, voucher, receipt, or other paper certifying the receipt' to eliminate unnecessary words."

[20] *See* note 4, File Folder 7.

[21] *See* note 4, File Folder 6.

II. THE FIRST CIRCUIT'S ANALYTICAL FRAMEWORK IS CONSISTENT WITH THE ORIGINAL INTENT OF THE DRAFTERS OF THE FALSE CLAIMS ACT

A. The False Claims Act was Passed in Response to Rampant Contracting Fraud

The beginning of the Civil War necessitated significant changes in the way the government procured materials and supplies.[22] From the outset of the War, stories of dishonest contractors taking advantage of the government's immense need for supplies and armaments began to emerge. As early as the First Battle of Bull Run,[23] reports trickled in from the front lines of soldiers armed with "muskets not worth shooting" sold to the government by "swindling contractors."[24] Further complaints of shoddily made goods soon surfaced, making it abundantly

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[22] "Men were abundant: but they must be armed and equipped, and, in the absence of armories made ready beforehand, the State had everything to create. Private industry, to which it was necessary to have recourse, sufficed but imperfectly to fill orders." Regís de Trobriand, *Four Years with the Army of the Potomac*, 63 (George K. Dauchy trans., Ticknor and Company 1889) (1886).

[23] The First Battle of Bull Run, or First Manassas, a Confederate victory, occurred on July 21, 1861. U.S. Army Center of Military History, *Civil War Timeline* (Sept. 2013), *available at* http://www.history.army.mil/html/bookshelves/resmat/civil_war/cw_timeline.html.

[24] Carl Sandburg, *Abraham Lincoln: The War Years, Vol. I*, 305 (1939).

clear that the War effort was being hampered by the government's inability to procure the quality and quantity of supplies necessary to fight the War. Troops were marching on shoes made from inferior leather that lasted only twenty to thirty days before falling apart, and sleeping underneath blankets made from light, flimsy fabric that failed to protect them from the elements.[25]

As part of its multiyear investigation, the Select Committee on Government Contracts interviewed hundreds of witnesses, collected thousands of pages of exhibits, and uncovered stunning examples of grossly fraudulent activity that shocked the nation, all of which "painted a sordid picture of how the United States had been billed for nonexistent or worthless goods…and generally robbed in purchasing the necessities of war."[26]

The Committee diligently documented its findings. Among the frauds investigated by the Committee:

- Of 411 horses sold to the government that arrived in St. Louis, a mere seventy-six (76) were found fit for service; five were

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[25] *See* Trobriand, *supra* note 15, at 136.

[26] *United States v. McNinch*, 356 U.S. 595, 599 (1958); *see also* Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Wilson) ("Investigating committees in both Houses of Congress have reported the *grossest frauds* upon the Government.") (emphasis added).

dead upon arrival; and 330 were deemed "undersized, under and over aged, stifled, ringboned, blind, spavined or incurably unfit for any public service."[27]

- 12,000-14,000 blankets sold to the government were found to be rotten upon arrival in St. Louis; the blankets were all deemed "unfit for issue to the troops, being of a quality inferior in strength, warmth, and durability to the blankets usually issued to soldiers."[28]
- One million pairs of poorly made shoes that had quickly worn out, and an additional million pairs of poor quality shoes, already purchased and in the hands of the quartermasters awaiting delivery. The government spent $1.5 million for these shoes, an expenditure that was deemed "worse than wasted."[29]
- One thousand cavalry horses deemed "utterly worthless" by an examiner who found the horses to have every disease to which horses are susceptible; the horses cost the government $58,200 before they were transported from Pennsylvania to Louisville, at which time they were "condemned and cast off."[30]
- Contractors hired to furnish artillery shells to the Army provided shells filled, not with

[27] H.R. Rep. No 2-37, at 98-99 (1861).
[28] *Id*. at 120-121.
[29] Cong. Globe, 37th Cong., 2d Sess. 298 (1862) (statement of Sen. Dawes).
[30] *Id*.

gunpowder or other explosives, but with sawdust, thus rendering them "of no utility whatever."[31]

- Overcoats manufactured of a flimsy, unidentifiable fabric. Which were deemed as being of not much "practical value" by a tailor called to testify about their quality. A deputy quartermaster questioned about the coats called them "worthless" when compared to regular coats used by the army.[32]

While the Committee examined several different types of fraud, the examples above clearly demonstrate that the type of fraud the FCA sought to eliminate were substantially similar to accusations of contracting fraud that would arise in modern FCA claims under an implied certification theory of false claims. Much like the gunsmith who entered into an agreement to provide artillery shells, or the cobbler who contracted to provide one million pairs of shoes, a medical facility that agrees to provide mental health services from licensed, qualified physicians[33] does so with the knowledge that

[31] Cong. Globe, 37th Cong., 3rd Sess. 955 (1863) (statement of Sen. Howard).

[32] *See* Testimony of Wm. T. Duvall, H.R. Rep. No. 49-37, at 136-40 (1863).

[33] This appeal arises from an FCA claim filed because of Petitioner's failure to adhere to Massachusetts' regulations pertaining to the staffing of mental health centers. *See*, *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 780 F.3d 504, 508 ("The regulations contemplate that mental health centers will employ qualified 'core' staff

attached to that agreement is the *implicit understanding* that the goods to be delivered satisfied basic standards of quality and integrity.

B. The Drafters of the FCA Rejected the Argument that Existing Laws and Remedies Were Sufficient to Combat Fraud

Petitioner contends that the implied certification theory should be rejected because it interferes and/or is redundant with other remedies the federal government has at its disposal to address this type of fraud.[34] Petitioner would have this Court believe that the mere existence of other remedies to punish fraud somehow completely obviates the need for FCA litigation. This argument is repeated throughout the various *amici curiae* briefs filed in support of the Petitioner;[35] it can be easily be disposed of.

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members engaged in disciplines such as psychiatry, psychology, social work, and psychiatric nursing…Noncore counselors and unlicensed staff in particular 'must be under the direct and continuous supervision of a dully qualified professional staff member trained in one of the core disciplines'") (*quoting* 130 MASS. CODE REGS. 429.422, 429.424).

[34] Petitioner and *amici* consistently argue that the FCA was not the proper remedy for this action. *See* Pet. Br. at 51.

[35] *See*, *e.g.*, Brief for Chamber of Commerce as *Amicus Curiae* Supporting Petitioner at 3 ("[The implied certification theory] improperly elevates what are *at most* breach-of-contract claims (properly raised by the government through any of its numerous other available remedies) into FCA liability…").

Breach of contract is a cause of action almost as old as the legal profession itself dating back centuries.[36] At the time the 37th Congress was investigating military procurement fraud, the government was using every tool at its disposal in an attempt to punish corrupt contractors and limit its exposure to future fraudulent activity, but the tools in its arsenal were simply not enough.[37]

Furthermore, this argument has its roots in floor statements made during the debate over how to best counter the appalling level of fraud the government was falling victim during the War. The members of Congress debating the bill that would become the FCA were certainly aware of the myriad remedies the government had at its disposal for dealing with fraud.[38] It was soon

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[36] *See*, *e.g.*, *Kingston v. Preston*, 99 Eng. Rep. 437 (K.B. 1773) (action for breach of contract arising out of a defendant's alleged refusal to honor an agreement to sell his silk business to the plaintiff); *Mills v. Wyman*, 20 Mass. 207 (1825) (action for breach of contract discussing whether a moral obligation is sufficient consideration for an express promise).

[37] Members stringently debated the need for additional legislation to target unchecked fraud. *See*, *e.g.*, Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Wilson) ("The Government is doing what it can to stop these frauds and punish the persons who commit them. The Government finds, however, that it has no law adequate to punish them.").

[38] *See* Cong. Globe, 37th Cong., 3d Sess. 954 (1863) (statement of Sen. Cowen) ("[T]here are now on the statute-book laws ample to provide for the complete punishment

agreed upon, however, that "further legislation [was] pressingly necessary to prevent this great evil."[39]

Not only did the drafters of the FCA recognize that a new, broad piece of legislation was needed if the government had any chance of preventing wide-scale contracting fraud from continuing, they also recognized the need for a provision that would serve to incentivize people to blow the whistle on this activity. Thus, the FCA's "*qui tam*" provision was born out of the "old fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way…of bringing rogues to justice."[40]

The necessity of the *qui tam* provision of the FCA is obvious. The contracts and vouchers being investigated during this timeframe were "always fair upon their face."[41] Many of the advertisements placed for goods did not specify that the goods had to be of a certain quality; based on the face of the actual contracts reviewed

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and prevention of these frauds, but nobody does it…I have no doubt that if the officers of the Government would do their duty when a man is caught procuring money by these pretenses, and false and forged claims in any of the thousand modes by which it may be done, he could be punished. He could be now if the proper precautions were taken to enforce the laws we now have.").

[39] *Id*. at 952 (statement of Sen. Howard).

[40] *Id*. at 956 (statement of Sen. Howard).

[41] Cong. Globe, 37th Cong., 2d Sess. 3306 (1862) (statement of Sen. Grimes).

by the Committee, *see* footnote 4, it was assumed that a "shoe" would serve the needs of a member of the Army who needed to wear a shoe. And while it may have been easy for a quartermaster to spot a horse stricken with glanders, it was vastly more difficult to determine whether a million pairs of shoes were up to army standards of suitability; 14,000 blankets were made of the right materials and would not crumble when used; or if a shipment of artillery shells contained gunpowder and not sawdust.

Based on the actual contracts, receipts and vouchers in use during the Civil War, copies of which are on file with the Select Committee on Government Contracts (*see* footnote 4), it is absolutely clear what Congress meant when it used the terms "receipt" and "voucher" in the original FCA. It is equally absolutely clear that there was no requirement for any detailed description of the item sold, and no requirement for any conditions of payment or participation, required in the contracts used during the Civil War.

The utility of the *qui tam* provision was readily apparent to Congress and its inclusion was noncontroversial. Thus, the *qui tam* provision was added to incentivize those with knowledge of dishonest practices—which may appear fair on the face of the contract or voucher, but clearly defy the intent underlying the government's acceptance of the contract—to come

forward and "betray his coconspirator, and bring him to justice."[42]

It is clear from the statements of the drafters that Congress closely scrutinized the need for additional legislation to combat fraud, resolving that question in the affirmative through the passage of the FCA in March, 1863. Therefore, the arguments of Petitioner and *amici* that the existence of other judicial and extrajudicial remedies somehow forecloses FCA liability are unsound when compared with the original intent of the statute's creators.

C. The First Circuit's Analytical Framework Should be Adopted by this Court

The First Circuit's implied certification rule "eschew[ing] distinctions between factually and legally false claims, and those between implied and express certification theories"[43] most closely follows the original intent of the FCA's drafters. The First Circuit takes a view of what may constitute a false or fraudulent statement consistent with the FCA's legislative history, in which liability was not tied to the "express" four

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[42] Cong. Globe, 37th Cong., 3d Sess. 955 (1863) (statement of Sen. Howard).

[43] *New York v. Amgen Inc.*, 652 F.3d 103, 110 (1st Cir. 2011) ("We ask simply whether the defendant in submitting a claim for reimbursement, knowingly misrepresented compliance with a *material* precondition of payment.") (emphasis added).

corners of contracts. Instead, the First Circuit created a rule that sought to "avoid foreclo[sing] FCA liability in situations that Congress intended to fall within the Act's scope."[44]

The First Circuit's analysis is the only methodology consistent with the original intent of the drafters of the FCA. Determining whether a given contractual requirement is a condition of payment should be a case-by-case, fact-intensive analysis that examines underlying foundational documents of the contract.[45] This approach mirrors the approach taken by the Committee and the 37th Congress. For example, a contract examined by the Committee may have called for a supplier to provide the Union Army with 10,000 pairs of shoes. The contract would have simply stated that the government agreed to purchase 10,000 pairs of shoes at a certain price. *See* footnote 4. There would have been no further mention of item specifications. It simply was not deemed necessary. Both the contractor and government officials would have understood that by cheating on quality, the contractor would have been stealing from the taxpayers and harming the war effort.

Petitioner and *amici* have intentionally misconstrued the ruling of the First Circuit and its consequences. This First Circuit's rule does not leave government contractors open to sham

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[44] *United States ex rel. Jones v. Brigham & Women's Hosp.*, 678 F.3d 72, 85 (1st Cir. 2012).
[45] *See Escobar,* 780 F.3d at 707 (2015).

qui tam lawsuits in which relators plead "claims based on perceived violations of technical and obscure industry standards, environmental regulations, procurement manuals, and contractual terms."[46] There is nothing in the opinion of the First Circuit that would allow a relator to bring a successful FCA action on the basis of noncompliance with an obscure, immaterial rule, requirement, or provision.

The First Circuit's requirement is to simply ask whether a defendant has knowingly misrepresented compliance with a ***material*** precondition of payment—not ***any*** precondition of payment.[47] This is precisely the issue the drafters tackled when debating and enacting the FCA. Yet, Petitioner and *amici* would have the Court believe that a decision in favor of the Respondents would send every government contractor scrambling to its attorneys to check whether it was in compliance with any and every provision governing its participation in a federal program.

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[46] Pet. Br. at 50. *See also* Chamber Br. at 4 ("The panel's expansive implied-false-certification theory invites private plaintiff 'relators' to plead claims based on perceived violations of environmental regulations, antidiscrimination statutes, obscure and technical industry standards, procurement manuals and more…); Brief for The Association of Private sector College and Universities as *Amicus Curiae* Supporting Petitioners at 7-8 (decrying "professional relators" who "exploit[] the implied false certification theory" in lawsuits that lead to "undeserved financial windfalls" for the relators and their counsel).
[47] *See Escobar*, 780 F.3d at 512.

As previously discussed, the 37th Congress created the Committee to investigate claims of the "grossest frauds" against the government. The evidence accumulated by the Committee makes it abundantly clear that they were not investigating frauds arising out of unimportant, technical violations of procurement manuals or regulations. The Committee was tasked with preventing the government from paying for thousands of blind or dead horses, not thousands of horses with manes two inches longer than specified. It is doubtful that Congress was motivated to take the extraordinary step of creating a new law as a result of reports of blankets that were the wrong shade of Union Army blue or shoes with laces that were less than a quarter-of-an-inch too narrow.

The panel's common sense[48] reasoning is consistent with the facts underlying the appeal. Much like the examples of fraud during the Civil War cited earlier, the frauds perpetrated by the Petitioner run so blatantly afoul of the rules governing participation in the program that it must necessarily trigger FCA liability.

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[48] *Cf. Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("Determining whether a complaint states a plausible claim of relief will, as the Courts of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense) (*quoting Iqbal v. Hasty*, 490 F.3d 143, 149-50) (2d Cir. 2007)).

A decision for the Petitioner would distort the purpose and function of the FCA[49] by allowing a contractor who perpetrated flagrant and egregious frauds against the government that apparently resulted in (or contributed to) the death of a young girl.

The case before the Court serves as a perfect example of what happens when businesses feel free to disregard the laws they agreed to abide by when they began accepting monies from the federal government. Contrary to what Petitioner and supporting *amici* would have the Court believe, this case is not about a violation of some vague, technical violation of a little-known provision buried deep within the Medicaid regulations book. Rather, this case involves a Medicaid provider trying to dupe the government by offering substandard medical care from unlicensed staff to the poor, and billing it as coming from licensed, professional staff.[50] As a

[49] The False Claims Act is "essentially punitive in nature." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 525 U.S. 765, 784 (2000).

[50] *See*, *e.g.*, *Escobar*, 780 F. 3d at 509. Petitioner owns Arbour Counseling Services, a provider of mental health services in Lawrence, Massachusetts. Arbour failed to adequately staff its facility as required by Massachusetts' state-run Medicaid program, MassHealth. Respondents sought treatment for their daughter, Yarushka. Two unlicensed therapists and a psychologist who possessed a Ph.D. from an unaccredited online school and whose application for professional licensure had been rejected treated Yarushka. After her behavioral problems ceased to abate, Yarushka's care was transferred to a nurse practitioner that the Respondents believed was a doctor.

direct result of the Petitioner's callous disregard for important regulatory requirements, the Respondents lost their daughter. Petitioner and supporting *amici* gloss over this fact, treating Petitioner's fraud as if it merely ignored an obscure section of a compliance handbook and not a core component of its entire business model. The impact of Petitioner's conduct had very real and very serious consequences for the Respondents.

Petitioner and supporting *amici* argue for a broad, sweeping standard that would reduce the analysis of whether a given requirement constitutes a material precondition for payment to a simple examination of whether said requirement is *expressly* noted as such.[51] The 37th Congress did not contemplate this restriction, as it would place "artificial barriers that obscure and distort [the statute's] requirements."[52]

Not only was this staff member not a physician, she also did not practice under supervision of the staff psychiatrist, who herself was not board-certified or eligible for board certification.

[51] Pet. Br. at 24.

[52] *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 385 (1st Cir. 2011).

III. PETITIONER AND SUPPORTING *AMICIS'* ATTACKS ON THE FCA AND ITS *QUI TAM* PROVISION ARE WITHOUT MERIT

A. The *Qui Tam* Provision of the FCA is the Most Powerful Tool the Government Has to Battle Corruption and Fraud

Petitioner and *amici* submit that upholding the First Circuit's ruling *could* render the entire FCA scheme susceptible to being hijacked and serially abused by "self-interested" relators and greedy plaintiff's attorneys.[53] This argument is repeated throughout the various briefs, and yet they cite to no empirical data to support their hyperbolic rhetoric and unfair attacks on the *qui tam* provision of the FCA. This lack of empirical evidence not only betrays the weakness of their argument, it completely undermines it.

The *qui tam* provision "has provided ordinary Americans with essential tools to combat fraud, to help recover damages, and to bring accountability to those who would take advantage of the United States government – and of the American taxpayers."[54] Contrary to the assertions of *amici*

[53] *See*, *e.g.*, Pet. Br. at 26 ("Leaving that crucial distinction [between conditions of payment and conditions of participation] to after-the-fact advocacy by self-interested actors will threaten boundless liability for healthcare providers like petitioner, and others involved in federal programs and contracts.").
[54] Remarks of Eric Holder, Att'y Gen. of the U.S.

supporting the Petitioner, *qui tam* relators are not "motivated primarily by prospects of monetary reward rather than public good."[55] In a study on whistleblower behavior, the *New England Journal of Medicine* found that whistleblowers were motivated by factors including "integrity," "strong ethical standards," and concerns for public health and safety and not strictly financial incentives or a need to "protect themselves."[56]

The Department of Justice's data on fraud recovery provides undeniable proof of the effectiveness of the *qui tam* provision of the FCA. It has been called "the government's most potent civil weapon in addressing fraud against…taxpayers."[57] In fact, recoveries in lawsuits initiated by whistleblowers account for a significant percentage of the government's overall FCA recovery.

(Jan. 31, 2012), *available at* https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-25th-anniversary-false-claims-act-amendments-1986.

[55] Generic Pharma Br. at 20 (citation omitted).

[56] Kesselheim, et al, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, New Eng. J. Med. (May 13, 2010).

[57] Remarks of Stuart F. Delery, Acting Asst. Att'y Gen. of the U.S. (June 7, 2012), *available at* https://www.justice.gov/opa/speech/acting-assistant-attorney-general-stuart-f-delery-speaks-american-bar-association-s-ninth.

In Fiscal Year 2015, the Department of Justice obtained more than $3.5 billion in settlements and judgments from civil fraud and false claims cases.[58] Of this amount, a staggering **$2.8 billion** was recovered from lawsuits filed under the *qui tam* provision of the FCA.[59] **Eighty percent** of all FCA recovery in FY 2015 was a direct result of whistleblowers risking their professional lives by filing *qui tam* lawsuits. These figures indicate the massive scale on which contractors attempt to defraud the taxpayers on a yearly basis. With these recovery rates, it should come as little surprise that Benjamin Mizer, the head of the Department of Justice's Civil Division, stated that the FCA had once again "proven to be the government's most effective civil tool to ferret out fraud and return billions to taxpayer-funded programs," adding that these recoveries "help preserve the integrity of vital government programs..."[60]

Petitioner and supporting *amici* consistently argue there is a proliferation of FCA filings, which leave government contractors at the mercy of relators and their attorneys. There is no evidence whatsoever to support this claim. During the 12-month period ending on March 31,

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[58]*See* United States Department of Justice, *Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015* (Dec. 3, 2015), *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015
[59] *Id.*
[60] *Id.*

2014, there were 303,280 civil cases commenced in U.S. District Courts.[61] For Fiscal Year 2014, there were 714 *qui tam* actions initiated.[62] In fact, the number of *qui tam* FCA filings has declined by approximately 15 percent over the past three years.[63] Six hundred and forty-two (642) *qui tam* lawsuits were filed in FY 2015, leading to $597 million in rewards paid to relators.[64]

Because of the tremendous success of the False Claims Act,[65] Congress inserted similar whistleblower reward provisions into the Dodd-Frank Act. Four years after the Dodd-Frank whistleblower provisions took effect, the Chair of the SEC, Mary Joe White, praised their effectiveness.[66] White noted the existence of

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[61] *Federal Judicial Caseload Statistics*, http://www.uscourts.gov/statistics/table/c-3/federal-judicial-caseload-statistics/2014/03/31 (last visited February 28, 2016).

[62] *See* United States Department of Justice, *Fraud Statistics – Overview* (Nov. 23, 2015), *available at https://www.justice.gov/opa/file/796866/ download*. Counsel for *amicus* recognizes the discrepancy between the reporting periods, however, the number illustrate that *qui tam* actions comprise an infinitesimally small percentage of civil actions initiated each year.

[63] *See id*. There were 754 such filings in 2013, 714 in 2014, and 642 in 2015.

[64] *See* Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015, *supra*.

[65] *See* S. Rep. No. 110-507, 110th Cong., 2d Sess. 20 (Sept. 17, 2008) (citations omitted).

[66] *See* Remarks of Mary Joe White, Chair of the Sec.

"mixed feelings about whistleblowers,"[67] lamenting that they were often "tolerate[d], at best…because the law requires it."[68] She went on to say that whistleblowers provide "an invaluable public service, and they should be supported."[69] In assessing the effectiveness of Dodd-Frank's whistleblower provisions, White pointed to a "greater and higher quality" of tips coupled with increased efficiency and a conservation of agency resources.[70] When whistleblowers are encouraged to come forward, it creates a "powerful incentive for companies to self-report wrongdoing to the SEC," which enables the Commission to "stop fraud schemes before investor losses mount…"[71] Since Dodd-Frank's implementation, companies have "taken fresh looks at their internal compliance functions and made enhancements to further encourage their employees to view internal reporting as an effective means to address potential wrongdoing."[72]

Petitioner and *amici* have launched baseless attacks on the utility of the *qui tam* provision of the FCA, centered on nothing more than rank speculation, hyperbole, and an unwillingness to recognize that *qui tam* relators play an invaluable

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Exch. Comm'n (April 30, 2015), *available at* http://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*

role in the government's fight against corruption and fraud. The opportunities for whistleblowers to come forward and report fraud should be greatly expanded. A decision for Petitioner would have a detrimental effect on these opportunities.

B. The FCA Contains Procedural Safeguards Designed to Weed Out Meritless Claims

Not only is the *qui tam* provision of the FCA among the most powerful fraud prevention and remediation tool available to the government, the statute itself included several built-in procedural safeguards to ensure that meritless lawsuits can never progress to a stage at which a defendant would be forced to settle or face public humiliation.

Qui tam relators are forced through procedural hoops that plaintiffs in regular civil cases simply are not, as demonstrated by the following provisions:

- The relator must submit a copy of the complaint with a written disclosure of substantially all material evidence and information to the Attorney General pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. Thus, unlike a typical civil lawsuit, the whistleblower must assemble substantial facts and documentation supporting his or her claim, before a case is filed.

- The defendant named in the complaint is not required to respond until 20 days after the complaint is unsealed and served upon the defendant.[73] Thus, if the government declines to intervene in a case, and the whistleblower thereafter drops the claim (which occurs in the vast majority of declined actions), a defendant is never required to publicly defend against the lawsuit.
- The government has the option to take over the litigation, at which point the relator's role largely ends, or is substantially controlled by the government.[74] Thus, if the government intervenes in the case, the risk that a plaintiff-whistleblower can abuse the litigation process is tempered or completely negated.
- The government can unilaterally dismiss the action or settle with the defendant notwithstanding the objections of the relator.[75]

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[73] *Id.* § 3730(b)(3).
[74] *Id.* § 3730(b)(4)(A).
[75] *Id.* §§ 3730(c)(2)(A), (B). *Amici* supporting the Petitioner argue that this provision, while available to the government, is not utilized. *See* Brief for CTIA – The Wireless Association as *Amicus Curiae* Supporting Petitioner at 17. The idea that government rarely makes use of this provision is exaggerated. *See*, *e.g.*, *Barati v. State*, No. 1D15-213, 2016 Fla. App. LEXIS 2648 (Dist. Ct. App. Feb. 23, 2016) (upholding the state attorney general's dismissal of a *qui tam* action); *Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925 (10th Cir. 2005), *cert. denied*, 546 U.S.

- In addition to FRCP 11 protections against frivolous lawsuits, the FCA has a special provision that permits defendants to obtain attorney fees from whistleblowers, if the whistleblower files the claim "for purposes of harassment" or otherwise files an abusive lawsuit. [76]

These are examples of unique procedures *qui tam* relators must navigate in order to successfully *initiate* an FCA claim, which is to say nothing of the requirement that FCA complaints must meet the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure.[77]

Additionally, there is no evidence that federal and state courts are being flooded with meritless *qui tam* FCA lawsuits by relators targeting

816 (2005) (upholding the federal government's dismissal of a *qui tam* action); *Swift v. United States*, 318 F.3d 250 (2003), *cert. denied*, 539 U.S. 944 (2003) (same). *United States ex rel. Bogina v. Medline Indus., Inc.*, ___ F.3d ___, 2016 WL 25611, at *2 (7th Cir. Jan. 4, 2016). But regardless of whether or not the Department of Justice takes advantage of this provision is a political question. Congress gave the Justice Department the tools to completely prohibit and prevent any abusive use of the FCA. If the Petitioner or the *Amici* have an issue with the lax use of this provision, their complaint should be raised with the Justice Department, not with this Court.

[76] *Id.* § 3730(d)(4).

[77] "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

health care providers. According to the Center for Medicare & Medicaid Services, every year more than a quarter of a million physicians service Medicaid enrollees.[78] Additionally, over 6,000 hospitals and nearly 1.2 million non-institutional providers participated in Medicare in 2014.[79] Health care is this nation's single largest expense, with Medicaid and Medicare combining to equal five percent of total GDP spending, a staggering $755 billion.[80] Given the large number of providers, and the massive amount of government spending at issue, the miniscule number of FCA cases filed per/year does not support a finding that whistleblowers are somehow flooding the court with meritless lawsuits.

Contrary to the lazy speculation in the arguments put forth by Petitioner and supporting *amici*, there has not been an increase in the proliferation of FCA claims, nor will there be if the First Circuit is upheld. The procedural safeguards inserted into the FCA make it extremely difficult for relators to even get past the complaint stage with meritless lawsuits. At every step in the FCA litigation process there is, for lack of a better term, a kill switch designed to halt meritless litigation in its tracks.

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[78] Centers for Medicare & Medicaid Services, *Physician Service Use and Participation in Medicaid, 2009* (2014).

[79] Centers for Medicare & Medicaid Services, *CMS-Fast-Facts* (December 2015).

[80] Congressional Budget Office, *The U.S. Federal Budget* (2011), *available at* https://www.cbo.gov/sites/default/files/cbofiles/attachments/budgetinfographic.pdf.

CONCLUSION

The False Claims Act is an incredibly effective tool for exposing fraud. Without it, the government's ability to recover money lost dishonest contractors would be severely hampered. Today, nearly 153 years to the day after its passage, the FCA remains a testament to the vision of the leadership of the men who fought to save the Union from annihilation. For the foregoing reasons, the judgment of the First Circuit should be affirmed.

Respectfully submitted,

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