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

REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 STATEMENT

Petitioner Universal Health Services, Inc., has no parent corporation, and no publicly held corporation owns 10% or more, directly or indirectly, of its stock.

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REPLY BRIEF FOR THE PETITIONER

Trying to minimize the far-reaching consequences of the implied-certification theory, relators' brief presents a theory not found in their complaint. For the first time, relators claim (Br. 2, 37) that petitioner's clinic provided "gravely inadequate" and "gravely deficient" care. But relators' complaint alleged only that petitioner's claims for reimbursement impliedly and falsely certified compliance with regulations concerning supervision and staff credentials. See, *e.g.*, 1JA45 (Compl. ¶¶ 205-206); 1JA47 (Compl. ¶¶ 216-217); 1JA58 (Compl. ¶¶ 285-286). The complaint contains no allegation that the counseling services provided to Yarushka Rivera differed in any respect from the services that would have been provided if the clinic had followed those regulations.

In contending that liability may be imposed based on these allegations, relators and the United States read the False Claims Act to establish a species of fraud liability for which there is no historical precedent. In their view, a contractor's request for payment implies compliance with any statutory, regulatory, or contractual requirement that a court or jury may later deem material to the government's payment decision. That position is incompatible with the text of the FCA, which imposes liability only for "false or fraudulent" claims and contains no hint that those words should be stretched beyond their ordinary meanings to impose liability for "implied certifications" of compliance.

Relators and the United States also argue that the atextual implied-certification theory is so broad that it severely punishes noncompliance with re-

quirements not expressly designated as conditions of payment. But contractors have no way to identify which duties, among the thousands they face, will be cited years later to justify calling them fraudsters and imposing liability for treble damages, per-claim penalties, and attorneys' fees. If the Court does not reject the implied-certification theory altogether, it should endorse a modest limiting principle and reverse.

I. Implied Certification Is Not A Valid Basis For Liability Under The FCA

A. Violations Of Statutory, Regulatory, Or Contractual Requirements Do Not Render A Claim "False Or Fraudulent"

The FCA imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). As our opening brief explained (at 29-30), a claim is not "false" if it does not affirmatively misdescribe the goods or services provided to the government. Likewise, here as in other areas of federal law that draw on the common-law terms "fraud" and "fraudulent" (areas the United States tellingly ignores), such a claim cannot be deemed "fraudulent" based on the claimant's failure to disclose its violation of a legal requirement, *unless* the claimant has a duty to disclose its noncompliance. Relators' contrary arguments are unfounded.

1. The core premise of relators' submission is that a contractor's request for payment *necessarily* implies compliance with all material requirements relating to payment. See Resp. Br. 23, 26, 28, 43 n.21. Relying on dictionary definitions, relators

maintain (Br. 23) that a "claim" entails an implicit assertion of a *legal right* to government funds. Relators then conclude (Br. 23-24) that a claim is "false"—which relators equate with "not well founded"—if it requests payment for goods and services that did not comply with material requirements. Relators also argue (Br. 26) that such a claim is "fraudulent" because it rests on an inaccurate implicit representation of compliance.

But the FCA itself supplies a definition of "claim." A "claim" "means *any* request or demand * * * for money or property" with a specified nexus to federal funding. 31 U.S.C. § 3729(b)(2)(A)(ii) (emphasis added). The FCA thus does not define a "claim" as the assertion of a legal right to government funds; the term refers to any request for payment. Because Congress has chosen to define the term by statute, that definition controls here. The dictionary definitions relators cite are irrelevant. "It is axiomatic that that statutory definition of the term excludes unstated meanings of that term." *Meese* v. *Keene*, 481 U.S. 465, 484 (1987); see also, *e.g.*, *Burgess* v. *United States*, 553 U.S. 124, 130 (2008).

Relators fail to identify common-law authority treating a request for payment under a contract as an implied assertion that the claimant is entitled to be paid. If relators were correct that a claim for payment asserts a legal right to the payment, one would expect to see many cases grounding liability for fraud on a defendant's requesting payment despite knowledge of a contract breach. Relators' inability to identify common-law decisions relying on their logic confirms that there is no historical basis for treating every request for payment as an implicit

certification of compliance with all material legal requirements.

2. Because relators are wrong about what a request for payment implies, relators' expansive definition of what makes a claim "false" is likewise wrong.

An apt definition of a false claim is provided by *Black's Law Dictionary*, which relators quote but fail to grapple with: "[a]n assertion or statement that is untrue; esp., overbilling." *Black's Law Dictionary* 719 (10th ed. 2014). That formulation corresponds to what many courts have labeled as "factual falsity" under the FCA, where a request for payment incorrectly describes the goods or services provided, or seeks payment for goods or services not actually provided. See Pet. Br. 29. The requirement of an "untrue" "assertion or statement" excludes implied-certification liability.

Relators also suggest (Br. 25 n.11) that "false" can mean "not true, deceitful, and tending to mislead," and that claims may be deceitful or misleading even if they do not contain an express untruth. See also U.S. Br. 13. But, at least in this context, those definitions are not distinct senses of the word "false"; instead, they have a mutually reinforcing nature: "In law, [false] means something *more than* untrue; it means something designedly untrue and deceitful * * *." *Black's Law Dictionary* 474 (1st ed. 1891) (emphasis added). A claim that is arguably misleading, but not untrue, cannot trigger liability under this provision.

3. Relators also contend (Br. 26-31) that Section 3729(a)(1)(A)'s prohibition of "fraudulent" claims

supports the implied-certification theory. As our opening brief explained (at 30-33), however, the common-law principles that inform the FCA's use of the term "fraudulent" foreclose the implied-certification theory.

a. Relators insist (Br. 27) that common-law principles are irrelevant, because the FCA does not embrace every requirement of common-law fraud. This Court, however, rejected that very argument in *Neder* v. *United States*, 527 U.S. 1 (1999). There, the Court acknowledged that the federal mail fraud, wire fraud, and bank fraud statutes "did not incorporate *all* the elements of common-law fraud." *Id.* at 24-25. Because those statutes "prohibit[] the 'scheme to defraud,' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted." *Id.* at 25. But, because the government "failed to show that this language is inconsistent with" the common law's well-settled requirement of materiality, the Court held that materiality is an element of the offenses. *Ibid.* Here, as in *Neder*, there is no textual indication that the FCA departs from the common-law understanding that, "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Chiarella* v. *United States*, 445 U.S. 222, 235 (1980).

b. Relators are likewise mistaken in contending (Br. 28-31) that government contractors are under a duty to disclose every failure to comply with statutory, regulatory, or contractual requirements. Relators point to nothing in the FCA itself imposing such a duty. Their efforts to ground such a duty in

the common law or other background legal principles are unpersuasive.

i. Relators first submit that a duty to disclose noncompliance arises because submitting a request for payment asserts entitlement to the requested funds. But we have explained why the act of submitting a claim does not entail that sort of implicit communication. See pp. 2-4, *supra*.

The United States makes the related argument (Br. 18) that claims for payment often contain factual information about the goods or services provided, and that such information may be misleading if the claimant does not disclose its failure to comply with underlying requirements. But a contractor's simple claim for payment is not a "partial or ambiguous statement of the facts," Restatement (Second) of Torts § 551(2)(b), that may become misleading if the contractor does not disclose known statutory, regulatory, or contractual breaches. The United States offers nothing to suggest that the Restatement principle imposes an affirmative duty to disclose any breach of contract.

The rule that misleading partial disclosures may sometimes constitute fraudulent misrepresentations instead applies narrowly and precisely. The foundational decision of New York's highest court in *Junius Construction Co.* v. *Cohen*, 178 N.E. 672 (1931) (Cardozo, C.J.), cited repeatedly by the United States (Br. 17, 18-19, 29-30), illustrates this point. There, a seller of land warned a purchaser that the city planned to build roads on two sides of the plot (which would have resulted in the city's taking of a portion of the land), but did not warn that the same plans contemplated a third road bisecting the property.

The court held that the seller had made a misleading incomplete representation, by warning the purchaser about two of the planned roads but keeping silent about the third, "a risk *like in kind* but vastly greater in degree." 178 N.E. at 674 (emphasis added). Under common-law decisions, then, a partial disclosure of *adverse information* may sometimes imply that the speaker has no further adverse information to disclose on that subject matter. But that does not imply a duty to disclose noncompliance whenever one requests payment.

ii. Relators also argue (Br. 29-30) that, when the FCA was enacted, the common law imposed a general duty on contractors to disclose defects in the goods or services they provided. But the two pre-Civil War cases relators cite establish nothing of the sort.

Relators cite *Paddock* v. *Strobridge*, 29 Vt. (3 Williams) 470 (1857), for the proposition that, "if the seller is aware of the deception and the buyer is ignorant[,] such deceit will form the basis of an action at law [for fraud or deceit], although no representation is made." *Id.* at 480. That quotation, however, omits the critical context provided by the previous sentence, which makes clear the limited form of "deception" to which the court was referring: "[W]e may suppose cases of the sale of spurious articles, as of nutmegs made of wood, or white lead of whiting or ground stone, which is really of no value, or none for the purpose of the purchase." *Ibid.*

The passage quoted by relators thus endorses something much like the "worthless services" theory of liability applied by some courts under the FCA. As its name suggests, that theory holds only that providing worthless goods or services to the govern-

ment may render a request for payment *factually* false. It is as if the contractor provided no goods or services at all, and thus failed to deliver what it said it did. See Pet. Br. 37-38. Indeed, the court in *Paddock* advanced precisely that rationale in concluding that an action for fraud could be based on the defendant's failure to inform a purchaser that his horse suffered from a fatal disease: Because the undisclosed disease rendered the horse "valueless," it was "as if the party had sold a horse which was not present, knowing it to be dead at the time, but without making any false representation in terms; or as if he had sold the mere image of a horse at such a distance as to impose itself upon the senses for a living animal." 29 Vt. (3 Williams) at 480.

Here, by contrast, relators have never contended that the counseling and treatment provided at petitioner's clinic were worthless. Instead, they advance a fundamentally different theory, under which claims would be actionable whenever a plaintiff can allege that the goods or services provided were worth *anything* less than the government had anticipated. Nothing in *Paddock* supports that extraordinary result.

Relators' reliance on *Singleton's Administrator* v. *Kennedy*, 48 Ky. (9 B. Mon.) 222 (1848), is also misplaced. That case involved the sale of cotton bagging that had been "plated"—*i.e.*, packed so that the visible exterior would be of a "superior quality," even though the remainder was "very inferior." *Id.* at 223. The court held that the evidence supported a conclusion that "plating bagging was a deceptive, fraudulent practice, and was not customary." *Id.* at 224. As the court explained, "[t]he practice of so

putting up goods * * * as to present a favorable exterior, not truly representing the interior, is fraudulent." *Id.* at 225. The court's holding thus relied on the uncontroversial proposition that *active concealment* of the truth may be equivalent to an affirmative misrepresentation for purposes of common-law fraud. See Pet. Br. 37. And there is no indication that the court understood the language relators quote—that it is "the duty of a vendor to disclose any defect in the article which he is vending, unless it be palpable to the purchaser," 48 Ky. (9 B. Mon.) at 225—as a broad legal principle applicable beyond the circumstances of that case. Rather, the court's emphasis on the deceptive and fraudulent character of the defendant's plating would have been unnecessary if it believed that sellers must warn purchasers about *any* defect.

iii. Relators are also wrong to contend (Br. 30) that a duty to disclose arises because citizens "must turn square corners when they deal with the Government." *Rock Island A. & L.R. Co.* v. *United States*, 254 U.S. 141, 143 (1920). This Court has never understood that "square corners" principle as a basis to impose "essentially punitive" liability, which is what defendants face under the FCA. *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). In *Rock Island*, for instance, the Court invoked the principle in support of the conclusion that taxpayers must strictly comply with the procedural rules governing tax-refund proceedings. See 254 U.S. at 142. And in *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984), this Court held that inaccurate advice provided by a Medicare fiscal intermediary did not estop the government in a suit challenging the government's

attempted recoupment of overpayments. See *id.* at 63. Neither case deals with fraud, much less imposes a duty of disclosure.

Relators' reliance on the "square corners" principle exposes the root of the implied-certification theory: the notion that the government deserves special treatment. But the FCA's text reaches only falsehoods and actual "fraud," defined the same way that those words would apply to any of us.

Moreover, "vague notions of a statute's 'basic purpose' are * * * inadequate to overcome the words of its text." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261 (1993); see also, *e.g.*, *Montanile* v. *Board of Trustees of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 661 (2016). It would be still more inappropriate to augment the text of Section 3729(a)(1)(A), which imposes no duty of disclosure, with an implied duty derived from intuitions about the standards that should govern those who do business with the government. See *Chiarella*, 445 U.S. at 233 (holding that the "[f]ormulation of * * * a broad duty" for all securities market participants, "which departs radically from the established doctrine that duty arises from a specific relationship between two parties, * * * should not be undertaken absent some explicit evidence of congressional intent").

4. Relators also rely on two examples that, in their view, demonstrate the appropriateness of the implied-certification theory. First, relators posit (Br. 24) a company that has contracted to supply the government with 91-octane gasoline, but knowingly supplies the government with 87-octane gasoline without disclosing the discrepancy, and then requests payment on a form that states only the vol-

ume of gasoline supplied. Second, referring to the facts of *United States* v. *Triple Canopy*, 775 F.3d 628 (4th Cir. 2015), they posit a contractor that has invoiced the government for providing security guards for a military facility without disclosing that the guards failed a contractually mandated marksmanship test. In both instances, relators assert that the contractor has plainly submitted "false or fraudulent" claims for payment. Br. 28.

Both hypothetical examples differ in important respects from this case. In the gasoline example, the contractor has engaged in product substitution, delivering a different product from the one the government ordered. In these circumstances, it may be reasonable for the government to assume that the contractor has delivered the item that was ordered, even if the requests for payment do not state the grade of gasoline delivered. In that case, liability can be imposed based on ordinary factual falsity—the government ordered product A, the contractor delivered product B—without invoking implied certification.

Here, although the complaint alleges inadequate supervision and faulty staff composition, there is no allegation that the counseling services provided by petitioner's clinic were different from those for which payment was sought (or even that they were inadequate). Thus, a more appropriate analogy would be to a contractor that (1) agrees to supervise the employee responsible for filling tanker trucks with the correct grade of gasoline, (2) supplies the correct grade, but then (3) requests payment despite failing to perform the required supervision.

Likewise, in *Triple Canopy* the services provided arguably differed in kind from what were required, making it a poor analogy to this case, whether or not rightly decided on its own facts. Given the close link between marksmanship and guarding a war-zone base, it is possible that liability could appropriately be based on a worthless-services theory.

Even if the services provided by the guards cannot be described as worthless, it is possible that the marksmanship requirement was so critical to the guards' role that one could justify the imposition of liability on the theory that the contractor had failed to disclose "facts basic to the transaction" with the government. Restatement (Second) of Torts § 551(2)(e). By "basic to the transaction," the Restatement means something much more significant than bare materiality:

> A basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence. These facts may be material, but they are not basic.

Id. § 551 cmt. j. Thus, even if appropriate, a conclusion that FCA liability could be imposed in *Triple Canopy* would not validate the sweeping theory of implied certification applied by the court of appeals here, under which submission of a claim is understood to certify compliance with all material requirements.

5. Finally, relators suggest (Br. 31-32) that the FCA's structure supports the implied-certification theory. See also U.S. Br. 14. According to relators, the FCA's separate prohibition on making or using a "false record or statement" that is "material to a false or fraudulent claim," 31 U.S.C. § 3729(a)(1)(B), implies that liability under Section 3729(a)(1)(A) may be imposed even when the defendant has not made an affirmatively false statement, because that provision does not similarly require a "false record or statement." That conclusion does not follow.

Critically, both Section 3729(a)(1)(A) and Section 3729(a)(1)(B) require a "false or fraudulent claim," and differ only with respect to the type of *additional* conduct by the defendant that triggers liability. Subsection (1)(A) imposes liability for presenting the claim for payment or causing its presentation, whereas subsection (1)(B) serves as a "safety net" to ensure that a defendant who falsifies a record that is material to a claim will face liability even if he plays no role in presenting it. 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 2.01[C] (4th ed. 2016). That "safety net" role makes sense even if the underlying claim must contain an affirmative falsehood to be actionable; thus, the existence of subsection (1)(B) does not inform the proper interpretation of the FCA's "false or fraudulent claim" requirement.

B. Relators' Appeals To Statutory Purpose And Legislative History Are Unpersuasive

1. Relators contend (Br. 33-34) that implied-certification liability would further the policies behind the FCA because the FCA was intended to

reach "all types of fraud, without qualification, that might result in financial loss to the Government." *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232 (1968). But that observation supports petitioner's position, not relators', because it makes clear that the FCA reaches only conduct that would be recognized as "fraud" at common law. The implied-certification theory fails that test.

Relators also contend (Br. 33) that the implied-certification theory is necessary to ensure that the notorious examples that led to the passage of the FCA—such as "decrepit" horses and "rancid" rations sold to the government during the Civil War—are actionable. But it is unclear what work the implied-certification theory would do in those contexts. Relators do not suggest that Civil War procurement contracts contained detailed quality standards, with which a contractor could have been in material noncompliance. Liability in these notorious examples of procurement fraud is more naturally established by the worthless-services doctrine, which would allow a court to conclude, for example, that inedible food is not "food" at all (just as the assistance of an ineffective lawyer is not "the assistance of counsel" at all for Sixth Amendment purposes).

Relators are also incorrect that the results in *United States* v. *Bornstein*, 423 U.S. 303 (1976), and *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), can be justified only by an implied-certification theory. As explained in our opening brief (at 37), in *Bornstein* the defendant subcontractor actively concealed its delivery of substandard parts, by misbranding them. Likewise, *Hess* stands for the proposition that fraud in obtaining a contract

may render claims under the contract fraudulent, a theory that does not rely on implied certification. See 317 U.S. at 543.

2. Relators argue (Br. 35-38) that the legislative history surrounding Congress's 1986 amendments to the FCA compels acceptance of the implied-certification theory. But legislative history cannot justify a departure from plain statutory text. And that is particularly true with respect to the 1986 FCA amendments, which did not alter the "false or fraudulent claim" language. See *Vermont Agency*, 529 U.S. at 783 (rejecting reliance on legislative history of 1986 amendments in construing unamended statutory language).

In any event, relators' account of the legislative history is not persuasive. The *1986 Senate Report* is fully consistent with a much narrower reading than relators acknowledge, under which the FCA was intended to reach only *certain* instances of non-compliance—such as when active concealment occurs, or when the product or services provided is worthless. See Pet. Br. 35-38.

3. Relators also understate the serious costs imposed by implied-certification liability. They argue (Br. 38) that express certifications still have practical significance, even if the submission of a claim automatically certifies compliance with all material conditions, because they ease the government's burden in proving *materiality*. But a forgiving legal standard already governs materiality in FCA cases. See 31 U.S.C. § 3729(b)(4). Given that standard, relators' approach denies practical legal significance to express certification (a common government-contracting practice).

Relators also blink reality in attempting to deny (Br. 39) the mind-boggling array of regulations that govern federal contractors and program participants. See Am. Hosp. Ass'n Br. 6-8 (describing volume of regulations governing health-care providers); Ass'n of Private Sector Colls. & Univs. Br. 12-16 (for-profit educational institutions). Nor do they have any adequate response to the very real threat, catalogued in the amicus filings submitted in support of petitioner, that subjecting contractors to suit (and potentially ruinous liability) based on "implied certifications" of compliance with this vast web of legal rules will not comport with considerations of basic fairness. See Ass'n of Private Sector Colls. & Univs. Br. 18-21; Chamber of Commerce Br. 21-24; Generic Pharm. Ass'n Br. 13-15; Pharm. Research & Mfrs. Ass'n Br. 20-26.

Finally, relators' assurances (Br. 39-40) that the FCA's scienter requirement will guard against abuses are scant comfort. As this case demonstrates, contractors may be deemed to have the statutorily required knowledge precisely because they did *not* know of the relevant regulatory requirement. See Pet. App. 18; see also Generic Pharm. Ass'n Br. 12-15 (describing how implied-certification claims have proceeded based on vague and highly technical regulatory standards).

II. Any Theory Of Implied Certification Must Rest On Noncompliance With An Expressly Stated Condition Of Payment

A. Payment Must Be Expressly Conditioned On Compliance

As our opening brief explained (at 41-56), if the implied-certification theory is not rejected altogether, it should be limited to situations in which a defendant has requested payment despite having violated a provision expressly designated—in advance—as a condition of payment.

1. Relators claim (Br. 41) that this question is not properly presented, because the court of appeals held that relators' complaint alleges violations of expressly designated conditions of payment. But relators raised that argument in their brief in opposition (at 29-30), and this Court necessarily rejected it in granting review. Cf. *United States* v. *Williams*, 504 U.S. 36, 40 (1992). In any event, relators' reading of the court of appeals' opinion is mistaken, see Pet. Br. 59, and the regulations relators invoke do not state express payment conditions. See Pet. Br. 56-59; pp. 21-24, *infra*. The question is properly presented.

Relators also dispute (Br. 42) the basic distinction between conditions of payment and conditions of participation in federal programs. That distinction, however, is widely accepted in the lower courts, see Pet. Br. 42-43, and it reflects the basic premise of the implied-certification theory—namely, that the submission of a claim for payment can imply compliance with requirements governing reimbursement. Relators appear to object that a condition of payment will

sometimes also be a condition of participation in the program, but that point does not diminish the utility of the distinction.

2. Relators deny (Br. 43) that the notice afforded by an expressly stated payment condition is necessary to make a claim "false or fraudulent" under the implied-certification theory, arguing that notice goes only to the separate question of scienter. In the context of an implied-certification claim, however, a contractor's notice of payment conditions determines the content of whatever representation is to be inferred from the submission of a claim. Without clear notice that compliance with a given rule is a condition of payment, there is no basis to conclude that the act of submitting a claim says anything about the condition. See *United States ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 269 (5th Cir. 2010).

3. Contrary to relators' argument (Br. 43-44), the FCA's scienter element reinforces the conclusion that any theory of implied certification must rest on the violation of an expressly designated payment condition. In an implied-certification case, scienter turns on whether it is "objectively unreasonable," *Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 70 (2007), to conclude that the legal requirement is not a precondition of payment. See also *United States ex rel. Purcell* v. *MWI Corp.*, 807 F.3d 281, 287-288 (D.C. Cir. 2015). That inquiry necessarily focuses on the pertinent legal texts—contracts, regulations, and statutes—and thus demands an expressly stated condition of payment to impose liability.

B. Relators' Policy Arguments Lack Merit

1. Relators argue (Br. 46-49) that requiring an express payment condition could exclude liability in cases that, on relators' view, should be actionable. That argument is flawed on two grounds. First, no doubt causing Ronald Coase to turn over in his grave, it ignores the possibility that agencies would adapt to the liability rule by expressly designating relevant conditions of payment. Second, by focusing only on the FCA, it ignores the vital role played by other judicial and administrative remedies in policing compliance with federal program standards. Although relators studiously ignore remedies outside the FCA, the absence of an FCA remedy generally does not leave the responsible agency without remedies (many of them!). But the imposition of treble damages and statutory penalties at the instance of bounty-hunting relators can disrupt carefully calibrated administrative regimes. See Pet. Br. 51-53; Ass'n of Private Sector Colls. & Univs. Br. 21-25; Chamber of Commerce Br. 28-32; Pharm. Research & Mfrs. Ass'n Br. 16-19; Generic Pharm. Ass'n Br. 16-22.

Relators' argument (Br. 47-48) about the importance of supervision to the MassHealth program is also misdirected. If the Court were to adopt petitioner's position on the second question presented, and if supervision is as critical to the MassHealth program as relators maintain, then MassHealth may decide to condition payment on adequate supervision. But the purpose of requiring an express payment condition is to avoid imposing massive punitive liability on the basis of an *after-the-fact* judgment—informed by hindsight bias—about

the importance of one among the thousands of legal duties a contractor faced at the time it submitted a claim.

2. Relators assert (Br. 51-52) that the elements of scienter and materiality ensure dismissal of meritless FCA cases, pointing out that courts have sometimes dismissed cases on these grounds. That is true, of course. But materiality and scienter are usually very fact-bound elements. They will not be amenable to a motion to dismiss in a great many cases—particularly if the materiality inquiry does not focus on the text of the relevant legal documents. Pet. Br. 53-54; Chamber of Commerce Br. 24-28.

Relators also observe (Br. 52) that, when the government concludes that a *qui tam* case lacks merit, it may intervene and cause the claims to be dismissed. But that exceedingly uncommon practice does not provide a realistic check on meritless FCA litigation. See David Freeman Engstrom, *Public Regulation of Private Enforcement*, 107 Nw. U.L. Rev. 1689, 1717 (2013). As Judge Posner has observed for a unanimous Seventh Circuit panel, all relators are "bounty hunter[s], and federal law places some obstacles in the path of its bounty hunters." *United States ex rel. Bogina* v. *Medline Indus.*, 809 F.3d 365, 367 (2016). The possibility of government intervention to seek dismissal is no reason to fail to enforce statutory text.

III. The Decision Below Should Be Reversed

A. Relators do not dispute our showing that the judgment below must be reversed if the Court rejects the implied-certification theory. Pet. Br. 56-57.

B. The judgment also must be reversed if the Court adopts petitioner's position on the second question presented.

1. Contrary to relators' argument (Br. 55-56), this Court should not defer to the court of appeals' description of the Massachusetts regulatory regime. In this case, unlike the two decisions relators invoke, there was no "construction of state law agreed upon by the two lower federal courts." *Stenberg* v. *Carhart*, 530 U.S. 914, 940 (2000); see also *McMillian* v. *Monroe Cnty.*, 520 U.S. 781, 784 (1997). Here, the district court held that relators' complaint does *not* allege violations of conditions of payment under the MassHealth program. See Pet. App. 43-49.

Furthermore, the issue here is not the proper construction of the regulations governing the MassHealth program, but whether those regulations establish conditions of payment with the degree of clarity necessary for liability under a federal statute. That is a question of federal law calling for this Court's independent judgment.

2. Relators are also wrong in contending (Br. 56-58) that the MassHealth regulations on which they rely create express preconditions to payment.

a. Section 429.439(C) of Title 130 of the Massachusetts Code of Regulations does not expressly condition reimbursement on adequate supervision. That provision conditions reimbursement for services provided in satellite mental health clinics on the facility's employment of a clinical director who "meet[s] all of the requirements in 130 [Mass. Code Regs. §] 429.423(B)." The referenced "requirements" are

naturally understood to encompass the specific qualifications set forth in Section 429.423(B)(1), but not the illustrative set of job "responsibilities" set forth in Section 429.423(B)(2). See Pet. Br. 57-58.

Relators' contrary reading is incompatible with the language of the text cross-referencing the two provisions. It would be unnatural to speak of the clinical director "meet[ing]" a number of the job responsibilities set forth in Section 429.423(B)(2), such as "accountability for adequacy and appropriateness of patient care," "accountability for employing adequate psychiatric staff," and "program evaluation." 130 Mass. Code Regs. § 429.423(B)(2)(d), (e), (g). These provisions impose no ascertainable standard of conduct that the clinical director can "meet"; they instead make the clinical director responsible for the specified subject matter areas. Accordingly, the only plausible referents for the "requirements" mentioned in Section 429.439(C) are the qualifications set forth in Section 429.423(B)(1), which include licensure, years of experience, and educational attainment.

Relators suggest (Br. 56) that it is "implausible" that MassHealth would not condition payment on the fulfillment of the clinical director's job responsibilities. But there is nothing remotely odd about MassHealth's choice to condition reimbursement on compliance with the position's objectively verifiable qualifications, while policing the clinical director's job performance through other means. Relators' reading produces a far more unlikely result. Under their reading, Section 429.439(C) would make adequate supervision a condition of payment, but *only* with respect to services provided in a satellite clinic; services provided in parent facilities are not ad-

dressed by Section 429.439 at all. That postulated difference in treatment makes no sense.

Relators' reliance (Br. 56-57) on 130 Mass. Code Regs. § 429.441(A) is also misplaced. That provision—which neither relators nor the courts below have previously cited in this litigation—states that MassHealth will pay for diagnostic and treatment services "only when a professional staff member, as defined by 130 [Mass. Code Regs. §] 429.424, personally provides these services to the member or the member's family, or personally consults with a professional outside of the center." Relators urge that, because Section 429.424(F)(1) requires unlicensed counselors to "be under the direct and continuous supervision of a fully qualified professional staff member," the effect of Section 429.441(A) is to make supervision a condition of payment.

But Section 429.441(A) does not expressly state that the supervision obligation imposed by Section 429.424(F)(1) "define[s]" an unlicensed counselor. To the contrary, Section 429.441(A) refers to the *qualifications* for unlicensed counselors set forth in Section 429.424(F)(2) and Section 429.424(F)(3), which include educational restrictions, experience, and a specified certification for those who counsel minors. See 130 Mass. Code Regs. § 429.424(F)(1), (2). Although supervision is required for unlicensed counselors, there is no indication that it is part of the *definition* of the position. In any event, it is telling that relators are citing this provision for the first time; a provision that goes unnoticed throughout years of litigation is unlikely to be "express" in the necessary sense. But the ability of clever lawyers to

come up with ever-shifting theories of punitive liability speaks volumes about the soundness and constitutionality of both the entire implied-certification theory and its narrower variants.

b. There is no express connection between the "requirements" mentioned in Section 429.439(C) and the clinical director's job "responsibilities" set forth in Section 429.423(B)(2). The court of appeals thus erred in concluding that the clinical director's "employ[ment] of adequate psychiatric staff," 130 Mass. Code Regs. § 429.423(B)(2)(e), is a condition of payment under the MassHealth program. Besides its incompatibility with the statutory text, this position would produce the same incongruous result discussed above: "adequate psychiatric staff" would be a condition of payment for services provided in satellite facilities, but not at the parent clinic itself.

Relators attempt (Br. 57-58) to justify the court of appeals' decision to privilege Department of Public Health regulations over MassHealth's own regulations (which allow the parent center's psychiatrist to cover an associated satellite clinic). See Pet. Br. 21-23. As relators acknowledge (Br. 57), however, the court of appeals found the conflicting regulations ambiguous, and it deferred to the State's construction of the DPH regulation in the investigation of petitioner's clinic spurred by relators' allegations. Nothing in MassHealth's regulations suggests that the DPH regulations should be incorporated by reference, and those regulations are not themselves labeled as conditions of payment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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