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 OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT.................................. 3

ARGUMENT 5

I. Courts Applying The "Implied Certification" Theory To Impose Liability Under The FCA Erroneously Construe The Statute's Text, Purpose, And Legislative History 5

II. Under The FCA, Any Nondisclosure Theory Of Liability Can Only Be Invoked If There Is An Independent Legal Duty To Disclose Contractual, Regulatory, Or Statutory Noncompliance 11

III. "Implied Certification," Without Proper Constraints, Is A Misnomer; Those Who Contract With The Government Do Not Have An Independent Duty To Disclose Their Contractual, Regulatory, Or Statutory Noncompliance............................ 16

A. The relationship between private contractors and government program participants and the government does not impose any disclosure duty.................................. 17

B. The FCA does not create a duty on the part of private contractors or government program participants to disclose noncompliance 19

IV. Any Independent Duty To Disclose That Might Be Deemed To Exist For FCA Purposes Is Limited To Those Instances Where Compliance Is Expressly Required As A Precondition To Payment... 24

CONCLUSION.. 30

TABLE OF AUTHORITIES

Page(s)

Cases

Ab-Tech-Constr., Inc. v. United States,
31 Fed. Cl. 429 (1994) 6, 10

Ayres v. Gen. Motors Corp.,
234 F.3d 514 (11th Cir. 2000)............................14

Bruesewitz v. Wyeth LLC,
562 U.S. 223 (2011)...8

Chesbrough v. VPA, P.C.,
655 F.3d 461 (6th Cir. 2011)..................................6

Chiarella v. United States,
445 U.S. 222 (1980).....................................*passim*

Clark v. Martinez,
543 U.S. 371 (2005)...23

Comm'r v. Acker,
361 U.S. 87 (1959)...22

Cook County v. United States ex rel. Chandler,
538 U.S. 119 (2003)...9

Daewoo Eng'g & Const. Co. v. United States,
557 F.3d 1332 (Fed. Cir. 2009)...........................23

FCC v. Fox Television Stations, Inc.,
132 S. Ct. 2307 (2012)..25

Fed. Crop Ins. Corp. v. Merrill,
332 U.S. 380 (1947)..19

Harrison v. Westinghouse Savannah River Co.,
176 F.3d 776 (4th Cir. 1999)................................15

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987)..20

Jones v. United States,
526 U.S. 227 (1999)..8

Kloeckner v. Solis,
133 S. Ct. 596 (2012)..11

Leocal v. Ashcroft,
543 U.S. 1 (2004)..24

Mertens v. Hewitt Associates,
508 U.S. 248 (1993)..11

Meyer Group, Ltd. v. United States,
115 Fed. Cl. 645 (2014)..................................17, 18

Mikes v. Straus,
274 F.3d 687 (2d Cir. 2001) 5, 10, 12, 27

Montanile v. Board of Trustees,
577 U.S. __, 84 U.S.L.W. 4046, 2016 WL 228344 (U.S. S. Ct. Jan. 20, 2016)..10

N. Shore Med. Ctr., Ltd. v. Evanston Hosp. Corp.,
No. 92 C 6533, 1996 WL 435192 (N.D. Ill. July 31, 1996) 17

Neder v. United States,
527 U.S. 1 (1999)..13

Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.,
614 F.2d 832 (2d Cir. 1980) 18

Nken v. Holder,
556 U.S. 418 (2009)...20

Northeast Hosp. Corp. v. Sebelius,
657 F.3d 1 (D.C. Cir. 2011).................................26

Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.,
970 F.2d 273 (7th Cir. 1992)...............................18

Pierce v. Underwood,
487 U.S. 552 (1988)...8

Reed v. Prudential Sec. Inc.,
87 F.3d 1311 (5th Cir. 1996)...............................18

Rock Island A. & L.R. Co. v. United States,
254 U.S. 141 (1920)...19

United States v. Science Applications Int'l Corp.,
626 F.3d 1257 (D.C. Cir. 2010).............................8

Shaw v. AAA Eng'g & Drafting, Inc.,
213 F.3d 519 (10th Cir. 2000) 7, 8

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 20

Staub v. Proctor Hosp.,
562 U.S. 411 (2011) 14

Thulin v. Shopko Stores Operating Co., LCC,
No. 10-CV-196-WMC, 2013 WL 5946503 (W.D. Wis. Nov. 5, 2013) 15

Thulin v. Shopko Stores Operating Co., LLC,
771 F.3d 994 (7th Cir. 2014) 15

United States v. Blanchard,
618 F.3d 562 (6th Cir. 2010) 23

United States v. Kurlemann,
736 F.3d 439 (6th Cir. 2013) 13

United States v. Mackby,
261 F.3d 821 (9th Cir. 2001) 21

United States v. Neifert-White Co.,
390 U.S. 228 (1968) 10

United States v. Sanford-Brown, Ltd.,
788 F.3d 696 (7th Cir. 2015) 26

Skilling v. United States,
561 U.S. 358 (2010) 27

United States v. Thompson/Ctr. Arms Co.,
504 U.S. 505 (1992)..24

United States v. Triple Canopy, Inc.,
775 F.3d 628 (4th Cir. 2015)...............................10

U.S. ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc.,
400 F.3d 428 (6th Cir. 2005)...............................14

U.S. ex rel. Atkins v. McInteer,
470 F.3d 1350 (11th Cir. 2006)............................21

U.S. ex rel. Augustine v. Century Health Servs., Inc.,
289 F.3d 409 (6th Cir. 2002)...............................19

U.S. ex rel. Berge v. Bd. of Trustees of the Univ. of Alabama,
104 F.3d 1453 (4th Cir. 1997).............................15

U.S. ex rel. Carter v. Halliburton Co.,
No. 1:08CV1162 (JCC), 2009 WL 2240331 (E.D. Va. July 23, 2009).......................15

U.S. ex rel. Conner v. Salina Reg'l Health Ctr., Inc.,
543 F.3d 1211 (10th Cir. 2008)............................29

U.S. ex rel. Fallon v. Accudyne Corp.,
921 F. Supp. 611 (W.D. Wis. 1995) 7

U.S. ex rel. Haight v. Catholic Healthcare West,
No. CV–01–2253–PHX–FJM, 2007 WL 2330790 (D. Ariz. Aug. 14, 2007)..................15

U.S. ex rel. Hutcheson v. Blackstone,
647 F.3d 377 (1st Cir. 2011) 6

U.S. ex rel. Lamers v. City of Green Bay,
168 F.3d 1013 (7th Cir. 1999)........................12, 29

U.S. ex rel. Milam v. Regents of Univ. of Cal.,
912 F. Supp. 868 (D. Md. 1995).....................15, 20

U.S. ex rel. Purcell v. MWI Corp.,
807 F.3d 281 (D.C. Cir. 2015)..............................26

U.S. ex rel. Rostholder v. Omnicare, Inc.,
745 F.3d 694 (4th Cir. 2014)................................28

U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield,
472 F.3d 702 (10th Cir. 2006).............2, 22, 23, 24

U.S. ex rel. Steury v. Cardinal Health, Inc.,
735 F.3d 202 (5th Cir. 2013)................................13

U.S. ex rel. Wilkins v. United Health Grp., Inc.,
659 F.3d 295 (3d Cir. 2011) ....*passim*

Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 529 U.S. 765 (2000) 9

Statutes

15 U.S.C. § 78m 21

18 U.S.C. § 287 .... 2, 3, 9, 22

18 U.S.C. § 1001 .... 2, 3

26 U.S.C. § 7207 22

31 U.S.C. § 3729 22

31 U.S.C. § 3729(a) 7

31 U.S.C. § 3729(a)(1) 7

31 U.S.C. § 3729(a)(1)(A) .... *passim*

31 U.S.C. § 3729(a)(1)(B) 7

31 U.S.C. § 3729(a)(1)(G) 20

31 U.S.C. § 3729(b)(3) 20

31 U.S.C. §§ 3729-3733 .... 2, 9

Act of March 2, 1863, Chapter 67, 12 Stat. 696 .... 2, 9

Act of September 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 877 9

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, *codified at* 31 U.S.C. § 3730(h) 9

False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 9

Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, *codified at* 31 U.S.C. § 3729(a)(1)(A)) 9

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104, 124 Stat. 119, *codified at* 42 U.S.C. § 18033) 9

Regulations

12 C.F.R. § 1026.37 21

Other Authorities

1 John T. Boese, *Civil False Claims and* Qui Tam *Actions* (July 2015)......................*passim*

H.R. Rep. No. 97-651 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895 9

Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. Rev. 159 (2008)..17

Restatement (Second) of Torts § 551
(1977)...14

Restatement (Second) of Torts
§ 551(2)(a) (1977) 17

S.Rep. No. 99-345 (1986), *reprinted in*
1986 U.S.C.C.A.N 5266. 8

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this brief as *amicus curiae* in support of the petitioner in *Universal Health Services, Inc. v. United States and Massachusetts, ex rel. Julio Escobar and Carmen Correa*, on writ of certiorari.[1]

NACDL is a nonprofit voluntary professional bar association working on behalf of criminal defense attorneys to promote justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has approximately 9,200 direct members in 28 countries, and its 90 affiliated state, provincial, and local organizations consist of up to 40,000 attorneys, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous *amicus* briefs each year in this Court, the federal courts of appeals, and state high courts. NACDL's mission is to provide *amicus* assistance in cases that present issues of broad importance to criminal and civil defendants, as well as the justice system as a whole.

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amicus* notified counsel of record for all parties of its intent to file this brief, and all parties have consented to the filing of this brief.

Of particular relevance here, NACDL's members frequently defend individuals and companies against claims and charges under the federal civil False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), the federal criminal False Claims Act, 18 U.S.C. § 287 (prohibiting making of "false, fictitious, or fraudulent" claims on the government), and other federal criminal statutes that prohibit false or fraudulent statements and conduct, *see, e.g.,* 18 U.S.C. § 1001 (prohibiting making of "false, fictitious, or fraudulent" statements or representations to the government). The criminal FCA provision imposes a higher standard of proof than the civil FCA and is not directly implicated here, but the criminal FCA provision and related federal criminal statutes contain the same "false or fraudulent" statutory terms that are stage center in the questions before the Court.

Indeed, "the criminal and civil false claims laws were originally a single statute with one standard of liability" for those who made "false, fictitious, or fraudulent" claims on the government. 1 John T. Boese, *Civil False Claims and* Qui Tam *Actions* § 2.05[B] (July 2015) (citing Act of March 2, 1863, ch. 67, 12 Stat. 696, 696-698); *see also U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702, 733-34 (10th Cir. 2006) (Hartz, J., concurring) (detailing the close historical connection between the civil and criminal false claims statutes). Thus, how the Court interprets "false" and "fraudulent" under the civil FCA provision conceivably will influence how courts construe those terms under the criminal FCA provision and related statutes. *See* 1 Boese, *supra*, § 2.03 ("In defining [false or fraudulent],

courts will be guided by the interpretation and construction of the terms in other statutes—most notably in criminal cases brought under 18 U.S.C. §§ 287 and 1001"). And, just as conceivably, a court could embrace the rationale that a "false or fraudulent" claim that can support civil liability under the civil FCA likewise could be deemed to support criminal liability under the comparable criminal provision.

More broadly, whether and to what extent one who contracts with the government, or participates in a government program such as Medicare, must disclose purported noncompliance with contractual, regulatory, or statutory obligations on pain of FCA penalties—an issue that is central to the Court's resolution of this case—implicates important and fundamental questions of fairness and due process. Most simply put, this Court's ruling will guide the conduct of those who must navigate civil or criminal exposure under the FCA. NACDL has a keen interest in ensuring that its members' clients can predict with some certainty when the FCA's draconian penalties might apply and conform their conduct accordingly.

SUMMARY OF ARGUMENT

The first question presented here is whether the so-called "implied certification" theory—which imposes liability for fraud under the FCA based on words neither written nor uttered by the target defendant—is valid under § 3729(a)(1)(A) of the FCA. *See* Pet. Br. at 28-41.

Many lower courts have adopted the theory and imposed the FCA's punitive remedies on government contractors and program participants for their failure to disclose contractual, regulatory, and statutory violations of every conceivable sort. But in taking this step, these courts largely have failed to anchor the theory in the FCA's text, and their use of legislative history is flawed and acontextual. The difficulty in finding a basis for the theory in the text of the FCA is, in fact, a product of the "implied certification" label itself—statutory violations, where penal consequences are concerned, cannot be "implied."

Indeed, the "implied certification" theory, as it has been developed in the lower courts, finds no home in the FCA's text, purpose, or legislative history. Rather, a faithful interpretive analysis reveals that the statute's proscription of "false or fraudulent" claims applies to undisclosed violations of contractual, regulatory, or statutory obligations only where there is an independent legal duty to disclose those violations to the government as an express precondition to payment. That construction comports with the settled meaning of "false," as well as the established common-law understanding of "fraudulent."

With respect to the existence of any broader disclosure mandate, no such duty can be found in the FCA itself or the nature of the relationship that contractors or government program participants have with the government. Fundamental due process principles of fairness and notice also confirm this narrower reading of the FCA. Those principles

require that the scope of any such duty must be clearly ascertainable *ex ante* by contractors or program participants. And such clarity can only exist where a contract, regulation, or statute expressly provides that compliance with underlying legal obligations is a precondition to payment from the government. Only in those limited circumstances can the FCA's civil or criminal penalties lawfully be imposed—if imposed at all—for undisclosed noncompliance.

ARGUMENT

I. Courts Applying The "Implied Certification" Theory To Impose Liability Under The FCA Erroneously Construe The Statute's Text, Purpose, And Legislative History.

As petitioner's brief explains, what lower courts euphemistically have called the "implied certification" theory under the FCA is a construct of "legal falsity"—that is, it provides for FCA liability where one "certifies" to the government, falsely or fraudulently, its compliance with a legal requirement in a contract, regulation, or statute. *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001); *see also* 1 Boese, *supra*, § 2.03[G]. As these decisions portray it, the "implied" form of the theory is distinct from the "express" form, which applies where a contractor expressly represents to the government that it is in compliance with law.

An "implied" certification, however, involves no explicit representation to the government at all—it

is, instead, deemed to be an unspoken representation that courts divine from the express communication itself, despite the communication's silence with respect to compliance. Given its amorphous foundation, it is hardly surprising that "implied certification" has become one of the most frequently invoked FCA liability theories.

In the more than two decades since the theory first was adopted in an FCA case,[2] however, there is no precedent providing a sound textual or legal basis for the implied certification construct—and very few decisions lay out any foundation for the theory at all. In fact, the lower courts' "implied certification" jurisprudence routinely assumes the validity of the theory or ignores the question of validity altogether. *See, e.g., Chesbrough v. VPA, P.C.*, 655 F.3d 461, 467-68 (6th Cir. 2011); *U.S. ex rel. Hutcheson v. Blackstone*, 647 F.3d 377, 386-88 (1st Cir. 2011). Given the high stakes and extraordinary penalties invoked under the FCA, this is a deeply troubling reality. And it underscores the legitimacy of the question this Court has accepted for review here—

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[2] Most courts and commentators trace the "implied certification" theory to the Court of Federal Claims' decision in *Ab-Tech-Constr., Inc. v. United States*, 31 Fed. Cl. 429, 434 (1994) (holding that the failure to disclose "information critical to the [government's] decision to pay … is the essence of a false claim"). *See, e.g.*, *U.S. ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 305 (3d Cir. 2011) ("The United States Court of Federal Claims seems to have been the first court to recognize that there can be implied false certification liability under the FCA.").

whether the "implied certification" theory is even valid in the first instance.

Some courts that have adopted the "implied certification" theory have concluded that "the language and structure of the FCA itself supports the conclusion that … a false implied certification may constitute a 'false or fraudulent claim.'" *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531 (10th Cir. 2000); *see also U.S. ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 306-07 (3d Cir. 2011); *U.S. ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611, 627 (W.D. Wis. 1995). In *Shaw*, for example, the Tenth Circuit reached this conclusion based on one textual difference between § 3729(a)(1)(A) (formerly (a)(1))—which applies to "claims"—and § 3729(a)(1)(B) (formerly (a)(2))—which applies to "statements and records." 213 F.3d at 531-32. This distinction, coupled with the Tenth Circuit's apparent (but unexplained) view that a "statement or record" extends only to an "affirmative or express false statement," led the court to rule that "liability under § 3729(a)(1) [for a "false or fraudulent *claim*" therefore] may arise even absent an affirmative or express false statement by the government contractor." *Id.*

But the Tenth Circuit's analysis does not withstand scrutiny. The difference between "claims" and "statements or records" is inconsequential for purposes of determining whether the FCA permits "implied certification" liability. Under § 3729(a), "claims," "statements," and "records" each must be "false or fraudulent" to be actionable. And it is the meaning of the terms "false or fraudulent"—not

"claim," "statement," or "record"—that is determinative of the "implied certification" theory's validity.

Still other circuits have concluded that the "implied certification" theory follows from the legislative history of Congress's 1986 amendments to the FCA. *See, e.g.*, *Wilkins*, 659 F.3d at 306-07; *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010); *Shaw*, 213 F.3d at 531. These courts point specifically to the Senate Judiciary Committee's observation, in connection with the 1986 amendments, that a false claim under the FCA "may take many forms, the most common being a claim for goods or services not provided, *or provided in violation of contract terms, specification, statute, or regulation*." S.Rep. No. 99-345 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 (emphasis added).

Yet, this reasoning is flawed as well. It improperly overlooks the fact that the FCA language that Congress actually enacted in 1986 did not change the key terms—"false or fraudulent"—that are at issue here, or have any bearing on the proper construction of those terms, which had been part of the statute since it was enacted in 1863. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (noting that "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation") (citing *Jones v. United States,* 526 U.S. 227, 238 (1999)); *Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988) (declining to consider a House Committee Report from 1985 that

discussed the meaning of language enacted in 1980 but proposed no amendment to that language).

Indeed, just as this Court, in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000), rejected reliance on the 1986 Senate Committee Report in construing the FCA term "person"—which had existed intact since Congress first passed the FCA in 1863—there is no reason or basis to rely on that same Report in construing "false or fraudulent"—which likewise has remained substantively unchanged in the FCA since its 1863 enactment.[3] *See Stevens*, 529 U.S. at 783 n.12 (criticizing dissent's reliance on "Committee's (erroneous) understanding of the meaning of the statutory term ["person"] enacted some 123 years earlier"); *Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 132-33 (2003) (refusing to infer that the

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[3] As originally enacted, the FCA prohibited "false, fictitious, or fraudulent" claims. *See* Act of March 2, 1863, ch. 67, § 1, 12 Stat. 696. In 1982, Congress eliminated the term "fictitious," *see* Act of September 13, 1982, Pub. L. No. 97-258, 96 Stat. 877, 978, but only to "eliminate unnecessary words[,]" H.R. Rep. No. 97-651, at 143 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 2037. And in its 1986, 2009, and two 2010 amendments to the FCA, Congress did nothing to alter or change "false or fraudulent." *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, §§ 2-7, 100 Stat. 3153, 3153-3169, *codified at* 31 U.S.C. §§ 3729-3733 & 18 U.S.C. § 287; Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1621, *codified at* 31 U.S.C. § 3729(a)(1)(A); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104, 124 Stat. 119, 902, *codified at* 42 U.S.C. § 18033; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, 2079, *codified at* 31 U.S.C. § 3730(h).

1986 amendments to the FCA silently redefined an unchanged statutory term). And, in any case, nothing in the Report's general observation regarding FCA liability for providing goods in violation of a contract, regulation, or statute necessitates creation of the "*implied* certification" theory.

Beyond that, numerous other courts have elected to elevate broad judicial statements of the FCA's purpose into a basis for the "implied certification" theory. *See, e.g., United States v. Triple Canopy, Inc.*, 775 F.3d 628, 634, 636, 638 (4th Cir. 2015); *Wilkins*, 659 F.3d at 306; *Mikes*, 274 F.3d at 697; *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 433 (1994). These courts have relied on the statement in *United States v. Neifert-White Co.* that the FCA "extends 'to all fraudulent attempts to cause the Government to pay out sums of money.'" 390 U.S. 228, 233 (1968).

But flaws persist here, too. This broad statement of purpose, however, should not and cannot be read to support FCA liability that is not tethered to the statute's text. The Court's statement in *Neifert-White* simply emphasizes that all "false or fraudulent" claims are covered by the statute; not that *non*-"false or fraudulent" claims support FCA liability. And, as this Court just recently reinforced, broad statements of a statute's purpose cannot be leveraged by courts to change the language Congress enacted. *See Montanile v. Board of Trustees*, 577 U.S. __, 84 U.S.L.W. 4046, 2016 WL 228344, at *9 (U.S. S. Ct. Jan. 20, 2016) ("'[V]ague notions of a statute's 'basic purpose' are ... inadequate to

overcome the words of its text regarding the specific issue under consideration.'") (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993)); *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012) (noting that "even the most formidable argument concerning the statute's purposes could not overcome" the text's plain meaning).

Statutory construction, at its conceptual core, applies to language that is *in* a statute. *See Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668 (2008). It is not an invitation to expand a statute's scope through some judicially-described legislative policy. That sort of expansion must be left to actual legislative action, not court-divined implication. Notably absent from the above cases relating to the FCA's purpose, however, is any rigorous analysis of the specific FCA text that forms the foundation for the "implied certification" theory; that is, the phrase "false or fraudulent." And those words, as petitioner's brief demonstrates and the discussion which follows highlights, do not support the "implied certification" construct adopted by the lower courts.

II. Under The FCA, Any Nondisclosure Theory Of Liability Can Only Be Invoked If There Is An Independent Legal Duty To Disclose Contractual, Regulatory, Or Statutory Noncompliance.

Any declaration of liability under the FCA must meet the statute's express requirement for the submission of a "false or fraudulent" claim. Pet. Br. at 29-33; 31 U.S.C. § 3729(a)(1)(A) (providing that it

is unlawful for a person to "knowingly present[], or cause[] to be presented, a false or fraudulent claim for payment or approval").

But a look at how lower courts have developed the "implied certification" construct underscores how the theory perverts the statutory scheme's requirement for the submission of a "false or fraudulent" claim. As noted above, the "implied certification" theory is one of "legal falsity" that provides for FCA liability where one "impliedly certifies" its contractual, regulatory, or statutory compliance. An "implied certification" of compliance, however, is nothing more than a failure to disclose noncompliance—it would be illogical to find that a claim for payment that says nothing about compliance should be read to imply an affirmative representation of compliance.

The operative inquiry, then, is whether a failure to disclose contractual, regulatory, or statutory noncompliance when one makes a claim for payment on the government constitutes a "false or fraudulent claim" under § 3729(a)(1)(A). Because the FCA itself does not define the terms "false or fraudulent[,]" *Mikes*, 274 F.3d at 696; *U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999), other sources—including case law construing the same terms in similar settings, and applicable background principles of construction—must be consulted.

"False." A claim for payment cannot be "false" under § 3729(a)(1)(A) because of what it might fail to disclose. That is because a "false" claim requires a

"factual assertion capable of confirmation or contradiction." *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 209 (5th Cir. 2013) (Higginson, J., concurring) (citation and internal quotation marks omitted). "An omission, concealment or the silent part of a half-truth, is not an assertion. Quite the opposite." *United States v. Kurlemann*, 736 F.3d 439, 446 (6th Cir. 2013) (explaining that the term "false statements" as used in federal criminal banking statutes does not include omissions). Thus, as petitioner demonstrates, the essence of "falsity" is whether a statement actually made is incorrect, not whether a statement that was *not* made would have been incorrect. Pet. Br. at 30.

"Fraudulent." A claim for payment that fails to disclose certain contractual, regulatory, or statutory noncompliance conceivably can be "fraudulent" under § 3729(a)(1)(A), but only if the maker of the claim has a duty to disclose that noncompliance to the government. Pet. Br. at 30-33.

The statutory term "fraudulent" has accumulated a settled common-law meaning, and the Court therefore should look to the common law of fraud to ascertain its meaning. *See Neder v. United States*, 527 U.S. 1, 23 (1999). "It is a well-established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under … the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Id.* (citation omitted); *Chiarella v. United States*, 445 U.S. 222, 227-28 (1980). In fact, this Court has already recognized the relevance of the common law

to construing the FCA. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 418 (2011) (referring to the FCA as a "federal tort law" and stating that "general principles of law ... form the background against which federal tort laws are enacted"); *see also U.S. ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc.*, 400 F.3d 428, 442-43 (6th Cir. 2005) (interpreting FCA terms according to the terms' "common-law meaning") (citation omitted).

Under the common law, a failure to disclose certain facts can constitute actionable fraud, but nondisclosure theories are strictly confined. They exist only where one has an independent legal duty to disclose those facts to the allegedly aggrieved party. *See* Restatement (Second) of Torts § 551 (1977) ("One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, *but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question*.") (emphasis added); *see also Chiarella*, 445 U.S. at 227-28 (holding that, consistent with the common-law understanding of fraud by nondisclosure, the Securities Exchange Act of 1934 and Rule 10b-5's prohibition on "fraud" applies to nondisclosures "only when [defendant] is under a duty" to disclose); *Ayres v. Gen. Motors Corp.*, 234 F.3d 514, 521 n.15 (11th Cir. 2000) (interpreting the federal mail and wire fraud statutes and stating that "[a]n examination of the common law with respect to when a failure to disclose is fraudulent also supports the proposition

that a nondisclosure of material information can constitute fraud *when there is a duty to disclose*") (emphasis added).

Thus, as numerous courts have found, a claim for payment that is silent about contractual, regulatory, or statutory compliance can only be "fraudulent" under the FCA if it satisfies the requirements of fraud by omission—namely, where there is an independent legal duty to disclose. *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 n.8 (4th Cir. 1999) ("[T]here can be no False Claims Act liability for an omission without an obligation to disclose.") (citing *U.S. ex rel. Berge v. Bd. of Tr. of Univ. of Ala.*, 104 F.3d 1453, 1461 (4th Cir. 1997)); *Thulin v. Shopko Stores Operating Co., LCC*, No. 10-CV-196-WMC, 2013 WL 5946503, at *5 (W.D. Wis. Nov. 5, 2013) ("Absent an obligation to disclose this information, however, the omission of this information cannot be false or fraudulent" under the FCA) (citations omitted), *aff'd sub nom. Thulin v. Shopko Stores Operating Co., LLC*, 771 F.3d 994 (7th Cir. 2014); *U.S. ex rel. Carter v. Halliburton Co.*, No. 1:08CV1162 (JCC), 2009 WL 2240331, at *10 (E.D. Va. July 23, 2009) (same); *U.S. ex rel. Haight v. Catholic Healthcare West*, No. CV–01–2253–PHX–FJM, 2007 WL 2330790, at *5 (D. Ariz. Aug. 14, 2007) (same); *U.S. ex rel. Milam v. Regents of Univ. of Cal.*, 912 F. Supp. 868, 883 (D. Md. 1995) (same).

The need for an independent duty to disclose exposes the fundamental flaw in the notion of "implied certification" under the FCA. The theory hinges on an implied duty to disclose but, as discussed in the following section, the statute does

not create any such duty. Nor does one arise from any special or fiduciary relationship contractors and government program participants have with the government. Simply put, it is a construct without a home in the statute or governing law.

III. "Implied Certification," Without Proper Constraints, Is A Misnomer; Those Who Contract With The Government Do Not Have An Independent Duty To Disclose Their Contractual, Regulatory, Or Statutory Noncompliance.

Independent legal duties to disclose under federal law arise only when there is a special or fiduciary relationship or Congress explicitly provides for such duties by statute. *See Chiarella*, 445 U.S. at 232-34 (refusing to recognize a duty to disclose to support a finding of "fraud" in violation of the federal securities laws where there was no "special relationship" and no "explicit evidence" that Congress intended to create a duty). Contractors or program participants who deal with the government have no cognizable "special" or fiduciary relationship with the government that could, without more, give rise to such a duty. More fundamentally, there is no "explicit evidence" that Congress intended to create such an omnibus disclosure duty.

A. The relationship between private contractors and government program participants and the government does not impose any disclosure duty.

A duty to disclose can arise "when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'" *Chiarella*, 445 U.S. at 227 (quoting Restatement (Second) of Torts § 551(2)(a)). But private contractors and government program participants do not have any fiduciary or similar relationship with the government that might impose on them a duty to disclose. *See* Pet. Br. at 31 (quoting Restatement (Second) of Torts § 551(2)(a)); *Meyer Group, Ltd. v. United States*, 115 Fed. Cl. 645, 650-51 (2014) (rejecting government's claim that contracting counterparty had a fiduciary duty to disclose to the government); *N. Shore Med. Ctr., Ltd. v. Evanston Hosp. Corp.*, No. 92 C 6533, 1996 WL 435192, at *6 n.1 (N.D. Ill. July 31, 1996) (holding that defendants did not owe the government a fiduciary duty with respect to Medicare claims). Nor, given the unique powers and sophistication of the federal government, is there any basis on which to create such a duty. *See Meyer Group*, 115 Fed. Cl. at 652 (no fiduciary duty where contractor dealt with "an establishment of the executive branch of the United States Government[,]" a "sophisticated party"); Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. Rev. 159, 187 (2008) ("[T]he government is a

sophisticated party with vast financial and human resources.").

Contractors and program participants likewise do not assume any special fiduciary disclosure duty simply by virtue of submitting claims for payment under an arms-length contract with the government, which, as noted, is the quintessential "sophisticated" counterparty. *See Meyer Group*, 115 Fed. Cl. at 650-52; *see also Reed v. Prudential Sec. Inc.*, 87 F.3d 1311 (5th Cir. 1996) (holding that "arms-length transactions by a sophisticated purchaser" do not "sustain a finding of a fiduciary relationship"); *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 280 (7th Cir. 1992) ("Contract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother's keeper. That philosophy may animate the law of fiduciary obligations but parties to a contract are not each other's fiduciaries"); *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 838 (2d Cir. 1980) ("Parties dealing at arm's length, each seeking for himself the best advantage to be derived from a transaction, are not in [a] confidential relationship.") (quotation marks and citation omitted). This is equally true for government program participants, who often have no contract with the government at all.

Separately, some lower courts adopting the "implied certification" construct have relied on this Court's reference, in a few non-FCA cases, to some duty to "turn square corners" in their dealings with the government. *See, e.g., Wilkins*, 659 F.3d at 314;

U.S. ex rel. Augustine v. Century Health Servs., Inc., 289 F.3d 409, 413-14 (6th Cir. 2002). This Court has not framed the so-called "square corners" duty as a disclosure duty, however, nor is the legal provenance of any such duty apparent. *See Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947); *see also Rock Island A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920).[4] And, as this Court made clear, the "square corners" duty "merely expresses the duty of all courts to observe the conditions *defined by Congress* for charging the public treasury" (*Fed. Crop Ins. Corp.*, 332 U.S. at 385) (emphasis added)—here, as noted, Congress has prescribed no duty to disclose under the FCA.

B. The FCA does not create a duty on the part of private contractors or government program participants to disclose noncompliance.

In the absence of any special or fiduciary relationship that could support a disclosure duty on the part of contractors or program participants, *Chiarella* instructs that such a duty can only be imposed if there is "explicit evidence" that Congress intended to create one. *Chiarella*, 445 U.S. at 233. No case has found that the FCA itself creates a duty to disclose, and the reason is clear: Neither the text nor the legislative history of the FCA reflects any

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[4] The Court did not suggest in either case that any "square corners" duty arises automatically under a statute or regulation that governs one's dealings with the government. Nor did the Court indicate any independent source of law that might give rise to such a duty.

intent on the part of Congress to impose on contractors or government program participants an unstated duty to disclose contractual, regulatory, or statutory noncompliance. *See Milam*, 912 F. Supp. at 883 ("The False Claims Act includes no duty to disclose certain information."); *supra* at p. 15 (citing cases holding that FCA does not impose liability for nondisclosure absent a duty to disclose, dismissing FCA claims for failure to identify a duty, and not finding such a duty in the FCA itself).

First, § 3729(a)(1)(A)—the FCA liability provision at issue—does not mention "duty" or any variant of that term to suggest that the provision creates a disclosure duty. At the same time, § 3729(b)(3) of the FCA, which defines the meaning of "obligation" for purposes of the FCA's "reverse false claims" provision, § 3729(a)(1)(G), does use the term "duty"—thus showing that Congress knows how to use the word "duty" when it wishes to import the concept in defining FCA liability. *See Nken v. Holder*, 556 U.S. 418, 430 (2009) ("'Where Congress includes particular language in one section of statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *INS v. Cardozo-Fonseca*, 480 U.S. 421, 432 (1987)); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (same).

Second, over the more than 150 years of the FCA's existence, Congress and federal agencies have created numerous disclosure duties, and have used clear language nowhere located in the relevant provisions of the FCA. *See, e.g.*, Securities Exchange

Act of 1934, 15 U.S.C. § 78m ("Each issuer ... *shall disclose* to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer") (emphasis added); Truth in Lending regulations, 12 C.F.R. § 1026.37 ("For each transaction … the creditor *shall disclose* the information in this section") (emphasis added). Again, when Congress wishes to create disclosure duties, it knows how to and uses terms not found in the relevant provision of the FCA.

Third, as detailed above (*supra* at pp. 8-10), the FCA's legislative history contains no evidence—much less "explicit evidence"—that Congress intended to create a disclosure duty that would support FCA liability for undisclosed contractual, regulatory, or statutory noncompliance. Indeed, although Congress, in considering amendments to the FCA in 1986, made reference to FCA liability connected to such noncompliance, it did not enact any language that would expressly extend that liability to failures to disclose noncompliance—much less language creating a disclosure duty that would support such a liability theory.

Fourth, reading disclosure duty-creating language into the FCA that is not already there contravenes the narrowing construction that should be applied to the statute. The civil FCA is a punitive statute. *See Stevens*, 529 U.S. at 784 ("[T]he FCA imposes damages that are essentially punitive in nature[.]"); *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006) (referencing the "quasi-criminal nature of FCA violations"); *United States v.*

Mackby, 261 F.3d 821, 830 (9th Cir. 2001) (stating that the FCA's "sanction clearly has a punitive purpose"). And such "civil punitive statutes, like criminal statutes, are to be construed strictly." *Sikkenga*, 472 F.3d at 734 (Hartz, J., concurring) ("[T]he False Claims Act is a punitive statute, and civil punitive statutes, like criminal statutes, are to be construed strictly.") (citing *Comm'r v. Acker*, 361 U.S. 87, 91 (1959)).

The need for such a careful and strict construction is all the more critical given the possible implications of the Court's interpretation for future criminal cases under analogous federal statutes—including the criminal version of the FCA itself.[5] As noted, the civil FCA provision at issue in this case—31 U.S.C. § 3729—has a criminal analog—18 U.S.C. § 287—which imposes criminal liability for the same "false or fraudulent" conduct covered by the civil FCA. *Supra* at p. 2. In fact, the original FCA was a single criminal statute that included a provision for civil claims and "applied one standard of liability on individuals who presented or caused false claims to be presented 'upon or against' the United States." 1 Boese, *supra*, § 2.03[B][1]; *Sikkenga*, 472 F.3d at 733-34 (Hartz, J., concurring). Then, for 108 years, the civil FCA cross-referenced

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[5] Other federal statutes criminalize "false" or "fraudulent" conduct as well. *See, e.g.,* Internal Revenue Code, 26 U.S.C. § 7207 ("Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be *fraudulent* or to be *false* as to any material matter, shall be fined not more than $10,000") (emphasis added).

the FCA's criminal provisions. *Sikkenga*, 472 F.3d at 733-34.

Of course, that does not mean that the same "false or fraudulent" conduct, involving the same facts regarding one's state of mind and the same proof, would support both civil and criminal FCA liability—civil liability could be imposed on proof by a preponderance of the evidence and where one's state of mind was reckless, while criminal liability could only be imposed on proof beyond a reasonable doubt and where one acted with a specific intent to defraud. *Compare Daewoo Eng'g & Const. Co. v. United States*, 557 F.3d 1332, 1340 (Fed. Cir. 2009) (assessing civil FCA liability and concluding that the government must prove "reckless disregard of the truth or falsity" of information by a "preponderance of the evidence") *with United States v. Blanchard*, 618 F.3d 562, 573 (6th Cir. 2010) (assessing criminal FCA liability and agreeing that "[t]he Government has the burden of proving … beyond a reasonable doubt that the Defendant acted willfully").

Nevertheless, the same "false or fraudulent" claim could meet that same definition under both statutes. 1 Boese, *supra*, § 2.05[B] ("Where, as here, the civil and criminal provisions have been technically separated but not materially altered, similar language in the provisions should be interpreted similarly."). For this reason, even if the punitive nature of the civil FCA provision did not alone dictate a strict construction, its close similarity to, and historical connection with, the criminal FCA provision, supports that approach under the rule of lenity. *See Clark v. Martinez*, 543 U.S. 371, 380

(2005) ("[I]f a statute has criminal applications, the rule of lenity applies to the Court's interpretation of the statute even in [civil] cases because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.") (citation and internal quotation marks omitted); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992) (applying rule of lenity in civil setting where conduct at issue could "be subject to criminal sanction" under statute); *Sikkenga*, 472 F.3d at 734 (Hartz, J., concurring) (rule of lenity applies "even when the [statutory] language is applied in a civil context").

The relationship between private contractors and government program participants and the government does not impliedly impose a special disclosure duty, and there is no "explicit evidence" that Congress intended the FCA to create such a duty. Accordingly, contractors and program participants subject to the FCA do not have a duty to disclose their noncompliance with a contractual, regulatory, or statutory obligation.

IV. Any Independent Duty To Disclose That Might Be Deemed To Exist For FCA Purposes Is Limited To Those Instances Where Compliance Is Expressly Required As A Precondition To Payment.

Even if the Court finds some independent legal source for a contractor or government program participant's duty to disclose its contractual, regulatory, or statutory noncompliance to the

government, such a duty can only be found where the contractor knows—*ex ante* and based on a clear and express statement in an existing contract, regulation, or statute—that compliance is a condition of getting paid.

As petitioner correctly explains, it is a fundamental prerequisite of due process that one have fair notice of conduct that might be unlawful—whether under the civil or the criminal law. Pet. Br. at 44-45; *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required") (citation omitted). Imposing a broad duty to disclose noncompliance with a contractual, regulatory, or statutory obligation that the government might later deem, for litigation purposes, to be "material"—and then imposing the FCA's draconian penalties for the failure to disclose such noncompliance—does not come close to providing the sort of fair notice the Constitution requires. Such a standard, which the First Circuit effectively applied below, leaves contractors or program participants to guess at what violations might, or might not, affect the government's decision to pay a claim—and, thus, what they might or might not have to disclose to foreclose FCA punishment.

In that decidedly unpredictable environment, where the government is incentivized in litigation to elevate any instance of noncompliance to a "material" one that can support FCA liability, only perfect compliance—or complete disclosure of all

noncompliance—can ensure against a potentially annihilating FCA award of civil penalties and treble damages. But in the present regulatory climate, perfect compliance is a virtual impossibility for most contractors—the scope and complexity of one's legal obligations are often both expansive and inscrutable. Pet. Br. at 50; *see also United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 711 (7th Cir. 2015) ("[I]t would be equally unreasonable for us to hold that an institution's continued compliance with the thousands of pages of federal statutes and regulations … are conditions of payment for purposes of liability under the FCA."); *Wilkins*, 659 F.3d at 310 ("anyone examining Medicare regulations would conclude that they are so complicated that the best intentioned plan participant could make errors in attempting to comply with them"); *Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 17 (D.C. Cir. 2011) ("lamenting the complexity of" the "regulatory behemoth" that is the Medicare Act). And, for those same reasons, often unattainable, too, is perfect knowledge of compliance—which is necessary to provide the type of disclosure that would be required under the expansive standard adopted by the First Circuit below.

A nondisclosure liability theory that imposes liability for less than perfect compliance, or less than complete disclosure of all noncompliance, thus falls well short of the notice and clarity the law constitutionally must provide. *See U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287-88 (D.C. Cir. 2015) (in FCA case, noting "the potential due process problems posed by penalizing a private party for

violating a rule without first providing adequate notice of the substance of the rule") (internal quotation marks omitted). Thus, a construction of the FCA to allow for such a theory should be rejected. *See Skilling v. United States*, 561 U.S. 358, 412 (2010) ("We have instructed 'the federal courts ... to avoid constitutional difficulties by [adopting a limiting interpretation] if such a construction is fairly possible.") (citations and internal quotation marks omitted); *Chiarella*, 445 U.S. at 235 n.20 (rejecting a "judicial holding that certain undefined activities generally are prohibited by § 10(b)" because it "would raise questions whether either criminal or civil defendants would be given fair notice that they have engaged in illegal activity").

Instead, contractors and program participants must be able to discern with certainty, and *ex ante*, what they must disclose, and thus what they might face liability for if they do not disclose it. The "express precondition to payment" requirement advocated by petitioner, and adopted by several circuits, ensures that contractors and program participants can determine the scope of any disclosure duty they owe to the government. Pet. Br. at 43-45; *see also Mikes*, 274 F.3d at 700 (observing that a mere claim for payment does not suggest fraud unless it can be said that the defendant submitted the claim "while knowing ... that payment expressly is precluded because of some noncompliance by the defendant").

At the same time, the expansive version of the "implied certification" theory adopted below, and repeatedly advanced in litigation by the government,

is in no way necessary to deter regulatory noncompliance and protect the government fisc. That is because there are myriad remedies for noncompliance that are available to—and routinely pursued by—the government, including breach of contract remedies, regulatory enforcement actions, and civil suits seeking equitable or monetary awards for statutory violations. *See, e.g., U.S. ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 702 (4th Cir. 2014) (noting, in FCA case based on nondisclosure of drug repackaging regulations, that the FDA "has broad powers to enforce its own regulations"); *Wilkins*, 659 F.3d at 310 ("Federal agencies are unquestionably better suited than federal courts to ensure compliance with Medicare marketing regulations."). Thus, while contractors and program participants reasonably should expect the risk of facing certain of these legal actions in the event of legal noncompliance, they should not bear the risk of facing the draconian penalties the FCA provides simply for failing to disclose that noncompliance, where the statute imposes no such disclosure duty on them.

Finally, using the FCA and its punitive sanctions as a blunt instrument to enforce the legal duties of contractors and program participants threatens improper judicial intrusion into matters far better left to the government agencies that specialize in administering and enforcing them. *See, e.g., Rostholder*, 745 F.3d at 702 (observing that where federal agency "has broad powers to enforce its own regulations, … allowing FCA liability based on regulatory non-compliance could 'short-circuit the very remedial process the Government has

established to address non-compliance with those regulations'") (quoting *Wilkins*, 659 F.3d at 310); *U.S. ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1221 (10th Cir. 2008) (under the FCA, "[a]n individual private litigant ostensibly acting on behalf of the United States could prevent the government from proceeding deliberately through the carefully crafted remedial process and could demand damages far in excess of the entire value of Medicare services performed by a hospital."); *Lamers*, 168 F.3d at 1020 ("[The plaintiff], it seems, wants to use the FCA to preempt the FTA's discretionary decision not to pursue regulatory penalties against the City. But the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations.").

This threat is heightened in *qui tam* suits by relators because there is no assurance—as there might be in cases brought directly by government—that the government already has considered, but declined, to pursue regulatory remedies and made a reasoned decision to file an FCA suit instead.

As a result, if the Court adopts the "implied certification" theory—whether based on the independent legal duty to disclose rationale discussed in this brief, or on the erroneous rationale that "certifications" of compliance are implicit in claims for payment—it should limit the theory to apply only where the contractual, regulatory, or statutory compliance at issue is expressly stated as a condition of payment.

CONCLUSION

For the foregoing reasons and those advanced by the petitioner, this Court should reverse the decision of the court of appeals. In so doing, the Court should reject the implied certification theory in its entirety absent the existence of a defined and legally cognizable duty to disclose noncompliance that is expressly stated, in a contract, regulation, or statute, as a precondition to payment from the government.

Respectfully submitted,

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