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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner operated a licensed mental health clinic in Massachusetts which treated Medicaid patients. Petitioner staffed the clinic with unlicensed and unsupervised counselors, unlicensed psychologists and an unqualified psychiatrist in violation of a Massachusetts Medicaid regulation setting forth minimum qualifications and supervision requirements for treating therapists. The questions presented are:

1. Has an appellate court departed from an acceptable and usual course of judicial proceedings when it has decided the issues presented by the parties based on a reading of the relevant state regulations that was not suggested in the parties' briefs?

2. Where a state Medicaid regulation makes it a condition of payment for a mental health clinic's clinical director to be responsible for the overall supervision of the clinic's staff and to employ adequate psychiatric staff, and a mental health clinic has treated Medicaid patients while knowingly failing to comply with Medicaid regulations regarding minimum supervision and qualifications requirements for clinical staff, can the Medicaid claims for reimbursement filed by the operator of the mental health clinic be found to be "false claims" for the purposes of 31 U.S.C. § 3729(a)(1)?

QUESTIONS PRESENTED – Continued

3. When 130 MASS. CODE REGS. § 429.439(C) requires the clinical director of a mental health satellite clinic to meet all of the requirements in 130 MASS. CODE REGS. § 429.423(B), is a satellite clinic in compliance if the clinical director meets the requirements of 130 MASS. CODE REGS. § 429.423(B)(1) but does not meet the requirements of 130 MASS. CODE REGS. § 429.423(B)(2)?

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INTRODUCTION

It is undisputed that a governmental body can condition payments of public monies, such as Medicaid payments, on a recipient's compliance with regulations that establish minimum qualification requirements for the services to be provided. *Cf. Cleland v. Nat'l Coll. of Bus.*, 435 U.S. 213, 219 (1978) (Congress could condition payment of G.I. Bill funds upon institution's compliance with regulations designed to prevent charlatans from grabbing veterans' education money); *see also Hawker v. New York*, 170 U.S. 189, 195 (1898) (holding that the state can enforce laws to prevent quacks and pretenders from attempting to practice medicine on patients). It is also clear that when a recipient falsely claims compliance with a governmental condition of payment, knowing that the government will rely on the claim to make payment, an actionable breach of the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA") has occurred. *See Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008). Thus, when the First Circuit Court of Appeals determined that the Massachusetts Medicaid regulations allegedly violated by Petitioner United Health Services, Inc. were conditions of payment in the case at bar, its conclusion that the Respondents' complaint stated actionable claims under the FCA could not be found to be surprising, much less worthy of certiorari review. *See United States ex rel. Escobar v. Universal Health Servs., Inc.*, 780 F.3d 504 (1st Cir. 2015), Pet. App. 15, 17-22.

Petitioner masks the unsuitability of its petition for discretionary review by dressing it up in the costume of conflict among the Courts of Appeals. It is a poor fit. To the extent there is a meaningful distinction between the analyses employed by the various courts to determine whether a claim presented to the United States is "false" for the purposes of 31 U.S.C. § 3729 – a conflict this Court has failed to recognize on previous occasions when other defendants have made similar assertions – no such distinction played a role in the Court of Appeals decision. Contrary to Petitioner's assertion, the First Circuit did not reverse because it deemed Petitioner to have "implicitly certified" compliance with the Massachusetts Medicaid regulations at issue. Indeed, the Court explicitly disclaimed reliance on the theory. Pet. App. 12. The First Circuit's reversal was premised on its finding that compliance with the relevant regulations were conditions of payment. As demonstrated below, every Circuit that has examined the issue recognizes that a knowing presentation of a claim in violation of a condition of payment states a claim under the FCA.

Once the rhetoric is stripped away, it is evident that the Petitioner has not raised a question worthy of review. Petitioner's real quarrel with the First Circuit, set forth in its petition at 26-29, is that it dislikes the Court of Appeals' resolution of an issue of arcane state law: whether the Medicaid regulations at issue truly prohibit payment of claims when the clinical director of a satellite clinic of a mental health center fails to fulfill his regulatory duty, under 130

MASS. CODE REGS. § 429.423(B), to ensure overall supervision of the staff. Pet. App. 60. The issue is therefore not federal, nor important. And it no longer has any legal significance, even within the Commonwealth of Massachusetts. In 2014, the Massachusetts Division of Medical Assistance, which administers the Commonwealth's Medicaid program, clarified one of the critical regulations at issue. 130 MASS. CODE REGS. § 429.424, which sets forth the qualifications for professional staff at mental health centers, was revised to clarify that only persons with the specified qualifications and supervision were eligible to bill the Commonwealth's Medicaid program for mental health care treatment. No reason exists for this Court to devote resources to a Massachusetts payment regulation which has now been definitively clarified.

Equally vain is Petitioner's effort to convince this Court that an appellate court should not apply independent analysis to the issues brought before it. Petitioner complains that the First Circuit based its reversal on an interpretation of the principal regulations that was not suggested by any of the parties. In other words, Petitioner contends, Pet. 14, that the First Circuit's exercise of independent judgment is a "departure from settled norms of judicial decision-making." No. Independent appellate analysis, unfettered by the limitations of the parties' arguments, is a hallmark of federal judicial review, not an anomaly. This court has never accepted that it is straitjacketed by the arguments formally presented in the parties'

briefs, and it is inconceivable it would apply such restraints on the Courts of Appeals.

The fundamental principles outlined above – that states can properly condition Medicaid reimbursement on a provider's compliance with qualification and supervision requirements, and that the FCA applies to providers who knowingly skirt such regulations but nonetheless present claims to Medicaid officials – inevitably leads to the conclusion that nothing worthy of review has been presented by the Petitioner. Its petition for certiorari should be denied.

STATEMENT

A. Factual Background.

Shortly after their teenage daughter, Yarushka Rivera, died of a seizure in October 2009, Julio Escobar and Carmen Correa ("the Relators") initiated an investigation of the treatment Yarushka had received at Arbour Counseling Services ("Arbour"), a mental health care provider owned and operated by the Petitioner. From 2007 through 2009 Yarushka had received mental health counseling, psychological counseling and psychiatric services from Arbour at its clinic in Lawrence, Massachusetts. Pet. App. 4-6. The Lawrence clinic was not separately licensed by the Commonwealth of Massachusetts; it was considered a satellite clinic of another, larger, facility that Arbour

operated in Malden, Massachusetts.[1] 130 MASS. CODE REGS. § 429.402. Pet. App. 4. Yarushka's mental healthcare was covered by the Massachusetts Medicaid program, MassHealth. *Id.*

Yarushka received mental health care services for two years from numerous Arbour employees at the Lawrence clinic, but almost all of the practitioners had insufficient qualifications to provide services to MassHealth members. Among the ersatz therapists who treated her were the following:

- Two mental health counselors who had no professional licenses to provide mental health therapy. Neither of these counselors were supervised as required by Massachusetts law. Pet. App. 5.
- A "psychologist" who held herself out as holding a Ph.D. Her degree, however, was from an unaccredited online school, and her application for a professional license had been rejected. Pet. App. 5.
- A therapist who held herself out as a psychiatrist and who prescribed psychiatric drugs. This "doctor" was in fact a nurse, and she was not supervised by a psychiatrist – a

[1] Under the Massachusetts licensing regulations, a satellite facility is a "mental health center program at a different location from the parent center that operates under the license of and falls under the fiscal, administrative, and personnel management of the parent center."

> prerequisite for any nurse practitioner to prescribe medication. Pet. App. 5-6.

Even if Yarushka's "doctor" had been supervised, nurse practitioners may only prescribe psychiatric medication under Massachusetts law if they are supervised by a staff psychiatrist who is board certified or eligible for board certification. 130 MASS. CODE REGS. § 429.424(A)(1). The staff psychiatrist at the Lawrence clinic had failed her clinical board examination years ago and had no intention of reapplying. Pet. App. 6.

After Yarushka's death, one of the social workers at the Lawrence clinic informed Yarushka's stepfather that many of the therapists who had treated Yarushka were not licensed or sufficiently supervised to provide the services she had received. Pet. App. 6-7. The Relators followed up on this information and identified 23 unlicensed counselors at Petitioner's Lawrence clinic. They turned their information over to various state agencies and a number of investigations were undertaken. Ultimately, the Massachusetts Department of Public Health (DPH) determined that Petitioner, through Arbour, had violated fourteen different regulations relating to staff supervision and licensure, including failing to retain a sufficiently qualified psychiatrist to supervise nurses prescribing psychiatric medication, failing to supervise mental health counselors, and retaining "23 therapists [who] were not licensed for independent practice and also . . . were not licensed in their discipline." Pet. App. 7-8. DPH found no evidence that the unlicensed

counselors were supervised. *Id.* Indeed the Lawrence Clinic's clinical director admitted that he was "unaware that supervision was required to be provided on a regular and ongoing bases [sic]." Pet. App. 18. In a separate disciplinary proceeding, the clinical director admitted that he had authorized one of Yarushka's counselors to engage in the unlicensed practice of social work. In a different disciplinary proceeding, the unqualified psychologist admitted that she improperly claimed to be a psychologist despite the lack of a license. Pet. App. 8.

B. Proceedings Below.

Based on these facts, the Relators filed a complaint under the FCA and Massachusetts False Claims Act, alleging that Petitioner had presented false claims to Medicaid, a joint federal-state program, by seeking payments for mental health care services provided by unlicensed and unsupervised Arbour employees. In particular, the Relators alleged that Petitioner violated the MassHealth regulations that define the minimum qualifications for persons billing for mental health care services. The lowest level of providers, mental health counselors, may be unlicensed; but such staff "must be under the direct and continuous supervision of a fully qualified professional staff member trained in one of the core disciplines." 130 MASS. CODE REGS. § 429.424(F).

Additionally, the Relators alleged that Petitioner violated federal and state false claims acts

by misrepresenting its compliance with regulations that required mental health clinics to employ at least one board-certified psychiatrist at all times. 130 MASS. CODE REGS. § 429.424(A)(1) requires every mental health clinic to have a staff psychiatrist who is either board-certified or is eligible and applying for such certification. The Relators alleged that numerous Medicaid claims filed by the Petitioner for services rendered by unlicensed, unsupervised counselors, and any claims which required the supervision of a qualified staff psychiatrist were false claims because Medicaid did not pay for mental health services delivered by persons without the minimum qualifications set forth in the regulations.

Petitioner moved to dismiss the Relators' Second Amended Complaint on the ground that the Relators had not sufficiently pled the falsity of the claims submitted by Arbour, and that the Relators' complaint did not allege its claims in sufficient detail to comply with FED. R. CIV. P. 9(b). The District Court granted the motion, finding that none of the regulations relied upon by the Relators were conditions of payment; they only constituted conditions of participation. *United States ex rel. Escobar v. Universal Health Servs., Inc.*, No. 11-11170-DPW, 2014 WL 1271757 (D. Mass. Mar. 26, 2014), Pet. App. 39-43.

C. Decision Below.

The First Circuit reversed, finding that the District Court had not sufficiently analyzed the

Massachusetts regulatory scheme. The District Court did recognize that one of the regulations cited by the Relators, 130 MASS. CODE REGS. § 429.439, set forth a condition of payment for mental health centers, like the Lawrence clinic, that were satellites of independent mental health clinics.[2] Pet. App. 43, 56. The District Court, however, found that none of the practices complained of by the Relators fell within the four subsections of § 429.439. It read subsection (C) of the regulation, which concerns the satellite clinic's clinical director, to only require the parent center to designate a clinical director for the satellite clinic who had certain qualifications and responsibilities. Pet. App. 44. Since the Relators made no claims regarding the designation of the clinical director, the court ruled, there were no alleged violations of the only regulation cited by the Relators that imposed a condition of payment. *Id.*

The First Circuit examined § 429.439 more closely. It recognized that subsection (C) did not just require a parent clinic to designate a clinical director whose resume contained the minimum qualifications and who was given certain responsibilities – it required the clinical director to "meet all of the requirements of 130 CMR 429.423(B)." Pet. App. 57. The District Court never examined what the clinical

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[2] The relevant portion of 130 MASS. CODE REGS. § 429.439 states: "[s]ervices provided by a satellite program are reimbursable only if the program meets the standards described below." Pet. App. 56.

director was required to do under § 429.423(B), but the Court of Appeals did. It observed that the regulation made the clinical director responsible for "overall supervision of staff performance." Pet. App. 16. Thus "the MassHealth regulations explicitly condition the reimbursement of satellites' claims on the clinical director's fulfillment of his or her regulatory duties," one of which was the duty of ensuring appropriate supervision. *Id.* Given that the crux of most of the Relators' claims was that "supervision at Arbour was either grossly inadequate or entirely lacking," the First Circuit found that "[i]nsofar as Relators have alleged noncompliance with regulations pertaining to supervision, they have provided sufficient allegations of falsity to survive a motion to dismiss." *Id.*[3]

In its discussion of whether the Relators' complaint sufficiently alleged the falsity of the claims, the First Circuit acknowledged that other courts had distinguished between factually false claims and legally false claims, as well as theories of express or implied certification of compliance with conditions of payment. Consistent with its earlier precedent, the Court declined to make use of such categories in its analysis, finding that such extra-statutory terms created

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[3] The First Circuit performed separate analyses as to whether the false claims alleged by the Relators were material and whether the allegation set forth the fraudulent conduct in sufficient detail to comply with the requirements of FED. R. CIV. P. 9(b). The Court found the allegations in the Relators' complaint sufficient to meet these requirements as well. Pet. App. 17-23. Petitioner does not seek review of these findings by the First Circuit.

unnecessary and artificial barriers. Pet. App. 12-13. Moreover, it ultimately determined that such abstract analysis was unnecessary; when the regulations at issue were properly examined they "clearly" imposed conditions of payment. Pet. App. 15.

Petitioner sought *en banc* review of the First Circuit panel decision on the ground that the panel's interpretation of § 429.439 was not raised in the briefs filed by the Relators or the Commonwealth of Massachusetts, which had filed an amicus brief and had been permitted to present oral argument. The First Circuit declined to grant *en banc* review. Pet. App. 54-55.

REASONS FOR DENYING THE PETITION

I. THIS COURT'S SUPERVISORY AUTHORITY SHOULD NOT BE INVOKED TO LIMIT HOW COURTS OF APPEALS DECIDE THE CONTROVERSIES BEFORE THEM

The first question for review presented by Petitioner is extraordinary – it asks this Court to invoke its supervisory authority to require Courts of Appeals to only decide cases on the grounds presented by the parties in their briefs. Essentially it asks this Court to explicitly limit how federal appellate courts reach their decisions, precluding them from arriving at a correct answer if the appellant lacked the reviewing court's breadth of experience or wisdom. Moreover, Petitioner makes such a request without reviewing

the proper use (and limits) of this Court's invocation of supervisory authority, particularly in civil actions, or whether the practice of deciding cases on grounds not explicitly argued by the parties is desirable or problematic. All appellate courts, including this Court, periodically decide cases on grounds not raised by the parties. That federal appellate courts independently analyze the legal issues brought before them, unconstrained by the parties' theories of the case, is a virtue of our legal system; one that makes it more likely, not less likely, that justice will be served.

A. This Case Does Not Present One of the Rare Occasions Meriting the Court's Use of Its Supervisory Powers in a Civil Action

Petitioner asks this Court to invoke its supervisory powers without discussing what those powers entail and when it is appropriate to exercise them. In fact, this Court's jurisprudence defines the scope of federal courts' supervisory powers as well as the rare occasions such powers should be exercised. Guided by "considerations of justice," federal courts may exercise supervisory powers to review or formulate procedural rules not specifically required by the Constitution or the Congress. *United States v. Hasting*, 461 U.S. 499, 505 (1983) (*citing McNabb v. United States*, 318 U.S. 332, 341 (1943)). Supervisory powers are invoked for three purposes: to implement a remedy for recognized rights; to preserve judicial integrity in criminal cases by ensuring that convictions

rest on appropriate considerations validly placed before a jury; and as a remedy designed to deter illegal conduct. *Hasting*, 461 U.S. at 505.

Two of the reasons for exercise of this Court's supervisory powers only arise in criminal cases. This certainly explains why, in modern times, the Court has rarely considered its exercise of supervisory power in non-criminal cases.[4] Certainly, Petitioner does not cite to any instances.[5]

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[4] The Relators' research has only uncovered one instance where this Court invoked its supervisory powers in a non-criminal matter in the last forty years, *Frazier v. Heebe*, 482 U.S. 641, 646-50 (1987), which struck down a local rule of the United States District Court for the Eastern District of Louisiana that limited bar admission to residents of Louisiana.

This exception illustrates why supervisory powers cannot be appropriately exercised here. In *Frazier*, the infirmity of the challenged rule was evident – this Court had found comparable state bar restrictions to be unconstitutional under the Privileges and Immunities Clause. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *see also Barnard v. Thorstenn*, 489 U.S. 546, 551-52, 553-58 (1989) (holding Virgin Island bar residency requirement unconstitutional and inappropriate to review under Court's supervisory powers). Unlike *Frazier*, here there is no body of law or precedent that establishes that the practice which is the subject of Petitioner's complaint – independent analysis of the relevant legal issues – is a clear abuse of Petitioner's rights.

[5] *Greenlaw v. United States*, 554 U.S. 237 (2008) is the only authority from this Court cited by Petitioner in support of its argument that the First Circuit's independent analysis of the legal issues was such a fundamental violation of its procedural rights that it merits an exercise of the Court's supervisory powers. Not only is *Greenlaw* a criminal case, but this Court never considered

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Nor does the third possible ground for the exercise of supervisory power – implementing a remedy for a recognized right – apply here. If one of Petitioner's recognized rights was imperiled, a sufficient remedy already exists and was indeed utilized by Petitioner: *en banc* review by the full First Circuit. *En banc* review provided Petitioner two important procedural safeguards. First, it allowed the entire Court of Appeals to determine whether Petitioner's rights were infringed by the panel's decision to resolve the case on a basis Petitioner allegedly had no prior ability to refute. Second, it also allowed Petitioner to describe why the panel's reasoning was incorrect and to provide a rebuttal to the panel's allegedly erroneous analysis. The *en banc* review process gave Petitioner the forum which it claims it was denied, as well as the ability to correct any departure by the panel from the "accepted and usual course of judicial proceedings." SUP. CT. R. 10. There is no reason to provide yet another forum when Petitioner's claim was already rejected by the persons best situated to determine if there was indeed a serious departure from the norm.

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employing its supervisory powers in that action. The case was taken because of a split between the Courts of Appeals as to whether an appellate court could increase a criminal sentence in the absence of a government appeal from a sentencing decision.

B. The First Circuit's Independent Analysis of the MassHealth Regulations Was Not a Departure from Accepted and Usual Judicial Practice

There is no reason to even consider exercising supervisory powers if the practice at issue is not a departure from conventional judicial practice. SUP. CT. R. 10. Here, the alleged offense was the First Circuit's finding that the supervision requirements contained in a MassHealth regulation that the Relators had not expressly identified, 130 MASS. CODE REGS. § 429.423(B), was a condition of payment, which was enforceable through the FCA if violated.[6] Pet. 13-14. Petitioner argues that the First Circuit's independent review of relevant regulations is an improper expansion of the issues the parties had selected for judicial review.

To claim an appellate court's independent analysis of the relevant arguments and regulations is an abusive practice is wholly at odds with this Court's jurisprudence. The Court has repeatedly found that when an issue is properly before it, an appellate court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper

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[6] There is no question that the regulation that expressly incorporated § 429.423(B) by reference, 130 MASS. CODE REGS. § 429.439(C) was put before the lower courts. In its decision, the District Court specifically considered the possibility that it was a condition of payment. Pet. App. 44.

construction of governing law. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (*citing Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)); *see also Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy.").

To the extent that the Court is disinclined to decide a case on a ground not argued by the parties, such a rule is prudential, not mandatory, and there are times when prudence dictates that this custom not be observed in order to dispense justice. *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring). Indeed, apparently some of this Court's most important precedents were derived when the Court decided a case on grounds not urged by either party in their briefs. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *see also Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 320 (1971) (discussing how this Court overturned years of precedent in *Erie* although neither party's briefs sought such a result). Such practice is also appropriate when the reviewing court is a Court of Appeals. *See U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993).

While it is often desirable for a court to consider each party's views on the arguments it ultimately

finds determinative, no appellate court can be strait-jacketed into only considering the specific grounds brought forward by the parties. As this Court has recognized, such a rule could result in the issuance of advisory opinions if the parties colluded to restrict the arguments before the Court. *See id.* at 447. Moreover, while the parties' advocates may have mastery over the specific issues surrounding their controversy, the appellate court will frequently have a breadth of knowledge and a base of experience unmatched by the parties' advocates. In short, the appellate judges may view the relevant issues through a different perspective, which allows them to recognize that the best resolution is one unanticipated by the litigants. The independent review undertaken in such cases does not deter justice, but facilitates it.

The only precedent from this Court which Petitioner cites in support of its position is *Greenlaw v. United States*, 554 U.S. 237 (2008). *Greenlaw* concerns whether an appellate court can increase a criminal defendant's sentence on its own initiative, when the government has not cross appealed or otherwise sought an increase. Thus, the issue before the Court was not whether a reviewing court can correct a legal error properly brought before it on a different ground than the one suggested by the appellant, but whether an appellate court can grant relief to a party which it never sought. *Greenlaw* and the other cases cited by Petitioner concern the propriety of a court attempting to decide issues that were never brought to its attention. But nothing in those cases

contradict the principles of *Kamen* and *U.S. National Bank of Oregon* that once an issue has been properly brought to the court's attention, it can analyze the issue in the manner it sees fit.

Here, there is no question that the Relators properly appealed the District Court's determination that the MassHealth regulations did not set forth conditions of payment. Nor can there be any doubt that the Relators identified the specific regulation that made the condition of payment express, 130 MASS. CODE REGS. § 429.439, and argued that the District Court had misinterpreted the regulation. Pet. App. at 43-44. At that point, the First Circuit was entitled to view the regulatory scheme for itself and correct all parties' misconceptions about how the regulatory scheme worked.

II. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

In addition to seeking to invoke this Court's supervisory powers, Petitioner seeks to place before the Court two asserted conflicts between the First Circuit and other Courts of Appeals. First, it claims that the First Circuit's decision conflicts with a recent Seventh Circuit decision, *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015), where the Seventh Circuit refused to apply the "so-called doctrine of implied false certification" to find that the claims filed by the defendants in that action were false. Given

that the First Circuit also expressly declined to apply the same doctrine, Pet. App. 12-13, no conflict exists.

Second, and more generally, while Petitioner agrees that a violation of a condition of payment is an appropriate basis for FCA liability, it claims there is disagreement between the various Courts of Appeals as to whether such a condition must be expressly identified as such. The Petitioner points to language in other cases which may be inconsistent with each other. But if a conflict exists on this point that is worthy of review, that dispute is not presented by the case at bar. Here, the First Circuit determined that the conditions of payment were express, ruling that: "the provisions at issue in this case clearly impose conditions of payment." Pet. App. 15. Any discussion of whether conditions of payment suffice to give rise to an FCA violation if they are not expressly stated would be an advisory opinion.

A. The First Circuit's Ruling Conforms to Well-Established Principles of FCA Law

To determine whether this case actually presents the conflicts identified by Petitioner, it is important to review how the case was framed and what the First Circuit actually decided. The Relators' complaint assembled extensive evidence that the Petitioner's mental health clinic routinely and regularly violated MassHealth and Department of Public Health staffing and supervision regulations relating to persons who could provide mental health counseling to

MassHealth members and the public at large. The allegations were supported by an independent state investigation that found that at least 23 unlicensed "therapists" provided mental health therapy without proper supervision. Pet. App. 7-8, 24. The Relators asserted that all claims submitted by Petitioner for the services of the unlicensed and improperly supervised therapists were false claims because Petitioner knew those persons should not have treated MassHealth members or billed for their services.

Petitioner claimed that any regulatory violations were irrelevant. It asserted that the regulations relied upon by the Relators were conditions of participation, as opposed to conditions of payment, and that only violations of the latter could be actionable under the FCA. Pet. App. 35. The Relators responded that violations of conditions of participation could be actionable if compliance could be deemed material to MassHealth's decision to pay. *Id.* The District Court rejected this ground. Pet. App. 36-38. The Relators also argued that that one of the relevant MassHealth regulations, 130 MASS. CODE REGS. § 429.439, established a condition of payment for satellite mental health programs, such as Petitioner's Lawrence clinic, by requiring the clinic to meet the standards set out in the regulation's four subsections. Pet. App. 43. The District Court acknowledged that the regulation was a condition of payment, but found that the violations alleged by the Relators did not fall within the regulation's four subsections. Pet. App. 43-44.

Before the First Circuit, the Relators raised the same two arguments: (1) that some conditions of participation may be the basis of FCA liability, and (2) that the conduct they faulted fell within the parameters of the regulation which contained the express condition of payment, 130 MASS. CODE REGS. § 429.439. In its decision, the Court of Appeals only examined the second ground. It agreed that the regulation was a condition of payment, but it disagreed with the District Court (and Petitioner) that the supervision and qualifications violations identified by the Relators did not fall within the regulation's four subsections. Pet. App. 15-16. To make that determination, the First Circuit relied exclusively on state law. *Id.* It is telling that in this part of its opinion, the First Circuit did not cite a single federal citation or statute. Nor did the First Circuit suggest that its analysis conflicted with any other court ruling, federal or state. *Id.*

Thus, the First Circuit decided the case on a well-established axiom of FCA jurisprudence: that a claim can be found to be "false" for the purpose of 31 U.S.C. § 3729(a)(1) if the claimant at the time of presentation was not in compliance with an expressly stated condition of payment. Virtually every Court of Appeals that has had this theory of liability before it has recognized it. *See Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001) (holding that FCA liability may exist where a party falsely "certifies compliance with a statute or regulation that is a condition to governmental payment"); *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 307 (3d Cir.

2011) (holding that FCA liability arises where a plaintiff shows that "if the Government had been aware of the defendant's violations of the Medicare laws and regulations that are the bases of a plaintiff's FCA claims, it would not have paid the defendant's claims"); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002) (holding that FCA "liability can attach if the claimant violates its continuing duty to comply with the regulations on which payment is conditioned"); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (holding that "[i]mplied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment"); *United States ex rel. Conner v. Salina Reg'l Health Ctr.*, 543 F.3d 1211, 1217 (10th Cir. 2008) (holding that FCA liability arises where the relator has demonstrated that the defendant has "certifie[d] compliance with a statute or regulation *as a condition* to government payment, yet knowingly failed to comply with such statute or regulation") (emphasis in original) (quoting *Mikes*, 274 F.3d at 697); *see also United States v. Triple Canopy, Inc.*, 775 F.3d 628, 636 (4th Cir. 2015) (holding that a contractual requirement may be material to the government's decision to pay even if it is not explicitly a condition of payment); *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1261 (D.C. Cir. 2010) (holding that payment requests may be false under the FCA "when submitted by a contractor that has violated contractual requirements

material to the government's decision to pay regardless of whether the contract expressly designates those requirements as conditions of payment").

Indeed, Petitioner concedes "there is universal recognition of the condition of payment requirement." Pet. at 18. Given this admission, and the fact that the doctrine is the basis of the First Circuit decision, any conflict with decisions from other Courts of Appeals is difficult to imagine.

To be sure, in its discussion of falsity under the FCA, the Court observed that the FCA does not define what constitutes a false claim, and that different Courts of Appeals had applied different types of analysis to make that determination. It also acknowledged in prior decisions it had eschewed distinctions that some of its sister courts had considered in their decisions. Pet. App. 13. But these comments were made in a paragraph summarizing how the court had examined falsity in its earlier precedents, *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377 (1st Cir. 2011), *United States ex rel. Jones v. Brigham & Women's Hospital*, 678 F.3d 72 (1st Cir. 2012), and *New York v. Amgen, Inc.*, 652 F.3d 103 (1st Cir. 2011).[7] The First Circuit did not propose any new modes of falsity analysis in its opinion here.

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[7] This Court had the opportunity to review two of those cases, *Hutcheson* and *Amgen*, but elected to not do so. *See Blackstone Medical, Inc. v. U.S. ex rel. Hutcheson*, ___ U.S. ___, 132 S. Ct. 815 (2011) (denial of certiorari); *Amgen, Inc. v. New York*, ___ U.S. ___, 132 S. Ct. 993 (2011) (denial of certiorari).

Theoretical differences in analysis that might result in a conflict in a different case at a different time are not a basis for granting certiorari.

B. The First and Seventh Circuits' Decisions Do Not Conflict

Petitioner asserts a conflict with *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015). Pet. 14-17. *Sanford-Brown* is not a Medicaid case; it involves a completely different regulatory scheme. The defendants were private colleges which received federal education subsidies. Unlike the specific regulation at issue here, which expressly conditioned payment for services on compliance, in *Sanford-Brown*, a panoply of rules, statutes, regulations and contractual requirements were incorporated by reference in the program's Program Participation Agreement which every participant had to execute. 788 F.3d at 701. The participation agreement referenced "thousands of pages of federal statutes and regulations." 788 F.3d at 711.

The Seventh Circuit affirmed the grant of summary judgment for the defendants because the United States and the Relators could not articulate which of the multitude of regulations, statutory references and rules referenced in the Program Participation Agreement were mandatory prerequisites for payment. *Id.* In other words, the Title IV restrictions sought to be enforced were conditions of participation, not

conditions of payment. The FCA, the Court ruled, was not the proper mechanism to enforce conditions of participation, because under the statute, "evidence that an entity has violated conditions of participation after good-faith entry into its agreement with the agency is for the agency – not a court – to evaluate and adjudicate." *Id.* at 712.

There is no basis to Petitioner's speculation that the result here would have been different under the Seventh Circuit's analysis. The *Sanford-Brown* court distinguished its result from a situation where a defendant had violated a condition of payment. It found the plethora of regulations and statutes incorporated by reference in the participation agreement could not reasonably be construed as "conditions of payment." *Id.* at 711. And it concluded its analysis by noting that it had before it a "Program *Participation* Agreement," not a "Program *Payment* Agreement," highlighting that the agreement "memorializes conditions of participation (not conditions of payment)." *Id.* at 712 (emphases in original).

Sanford-Brown does include dicta[8] that the Seventh Circuit declines to adopt the "so-called doctrine

[8] The court did not need to disclaim the possibility of FCA falsity due to a violation of an implied certification to reach its result. Its determination that the Title IV restrictions were conditions of participation, unenforceable through the FCA, rather than conditions of payment was sufficient to affirm the District Court. Moreover, the decision includes no analysis at all of the reasons why every other Court of Appeals has recognized violations of implied certification as a basis for FCA liability, *see cases*

(Continued on following page)

of implied false certification." *Id.* at 711-12. But so does the First Circuit's decision, which specifically states: "[t]his circuit recently has eschewed distinctions between factually and legally false claims, and those between implied and express certification theories, reasoning that they 'create artificial barriers that obscure and distort [the statute's] requirements.'" Pet. App. 12-13 (citations omitted, brackets in original). More important is the fact that their conclusions – that express conditions of payment can be the basis of successful FCA causes of action – are completely consistent.

Petitioner suggests that a conflict exists because it never expressly certified compliance with the MassHealth regulations identified by the First Circuit, but *Sanford-Brown* purportedly limits liability under the FCA to false express certifications. Pet. 17. The Seventh Circuit, however, did not expressly announce any such limitation of FCA liability in *Sanford-Brown*. Indeed, what it meant when it stated in dicta that it was declining to apply "the so-called doctrine of implied certification" is unclear. The Seventh Circuit stated that it intended to join the Fifth Circuit, 788 F.3d at 712, but as Petitioner concedes, Pet. 15, n.7, the Fifth Circuit has not

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set forth in footnote 10, infra, or in the case of the Fifth Circuit, has refused to reject the theory, *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 207 (5th Cir. 2013) (acknowledging that the Fifth Circuit has not ruled on whether implied certification claims will be recognized).

rejected liability premised on implied certifications, refusing to rule either way. *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 207 (5th Cir. 2013); *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010). Given that no Court of Appeals has outright refused to consider implied certification liability under the FCA, and that *Sanford-Brown* itself recognizes that violations of statutory or regulatory conditions of payment can be actionable, the Seventh Circuit may have only intended to reject the doctrine in the case before it.[9] Otherwise, the Court's position is impossible to square with this Court's pronouncement that 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). The Seventh Circuit's obscure intent and holding is not a reason to issue a writ of certiorari to the First Circuit in the pending case.

Indisputably, *Sanford-Brown* conflicts with many decisions of the various Courts of Appeals. The Seventh Circuit acknowledged conflicts with the Ninth Circuit's decision in *United States ex rel. Hendow v. Univ. of Phx.*, 461 F.3d 1166 (9th Cir. 2006) and the seven decisions (from seven different circuits) set forth in footnote 13 of its prior decision in *United*

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[9] It also explains why, at 788 F.3d 712, the court favorably cited *Mikes*, 274 F.3d at 699 and *Conner*, 543 F.3d at 1220, two cases which recognize FCA liability premised on implied certification.

States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc., 764 F.3d 699, 711, n.13 (7th Cir. 2014).[10] *Sanford-Brown*, 788 F.3d at 711 and n.5. But although *Sanford-Brown* was decided after the case under review was released, the Seventh Circuit does not express any disagreement with the First Circuit's opinion here. While *Sanford-Brown*'s conflict with the opinions of almost all of its sister Courts of Appeals may be an excellent reason to grant review in that case, it is not a reason to grant review here, where no conflict has been identified.

C. This Case Presents No Conflict Between Courts of Appeals Regarding Any Requirement That a Condition of Payment Be Expressly Stated

Petitioner also seeks to have this Court review an asserted conflict among the Courts of Appeals regarding how conditions of payment are identified. Petitioner asserts that some courts only recognize compliance requirements expressly identified in statutes or regulations as conditions of payment. *See Mikes*, 274 F.3d at 700-02; *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011). Others are more flexible. *See Sci. Applications*, 626 F.3d at 1268-69

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[10] The seven decisions are *Wilkins*, 659 F.3d 295; *Hutcheson*, 647 F.3d 377; *Sci. Applications*, 626 F.3d 1257; *Ebeid*, 616 F.3d 993; *Conner*, 543 F.3d 1211; *Augustine*, 289 F.3d 409; *Mikes*, 274 F.3d 687. Curiously, after declining to follow *Conner* and *Mikes*, the Seventh Circuit in *Sanford-Brown* cites those decisions favorably in the very next paragraph of its opinion.

(limiting conditions of payment to those expressly designated as preconditions of payment is not consistent with statute's language and would foreclose FCA liability in situations Congress intended to fall within the statute's scope); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1170 (10th Cir. 2010) (holding that relator was not required to establish that state or federal regulations expressly conditioned payment on compliance when demonstrating that government would not have paid had it known of defendants' regulatory violations). In earlier decisions, the First Circuit has indicated its agreement with the latter approach. *See Hutcheson*, 647 F.3d at 388. At the same time it has also taken pains to explain its belief that the Second Circuit's rule is not as rigid as claimed by the Petitioner. *Id.* at 388 and n.11.[11]

Yet the academic dispute as to whether conditions of payment should be recognized which are not explicitly expressed as such in a statute or regulation is not in issue in this case. In a passage from the opinion the Petitioner declined to quote in its brief,

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[11] Petitioner contends that in footnote 11 of its opinion, the First Circuit expressly acknowledged a conflict between its position and those of the Second and Sixth Circuits. Pet. 20. That is not a fair characterization. In its discussion of its analysis of falsity disputes under the FCA, it cites to *Mikes*, 274 F.3d 687 with a "but see" citation, but notes no express disagreement or any difference of opinion with the Sixth Circuit. Further in *Hutcheson*, as described above, the court examined *Mikes* in depth and concluded there likely was not a conflict between the courts' analyses. 647 F.3d at 388.

the First Circuit stated: "[T]he provisions at issue in this case clearly imposed conditions of payment." Pet. App. 15.

The First Circuit's conclusion is irrefutable. The relevant regulation, 130 MASS. CODE REGS. § 429.439, expressly provides that "[s]ervices provided by a satellite program are reimbursable only if the program meets the standards described below." Pet. App. 56. A plainer statement that the subsections of that regulation are prerequisites to payment is hard to imagine. One of those subsections, (C), establishes the requirements of each mental health center's clinical director. "The clinical director must be employed on a full-time basis and meet all of the requirements in 130 [MASS. CODE REGS.] 429.423(B)." Pet. App. 57.

Thus, by reference the Massachusetts regulatory scheme also made compliance with § 429.423(B) a condition of payment. And within the latter regulation, the First Circuit observed, are requirements of "overall supervision of staff performance" and "employing adequate psychiatric staff to meet the psychopharmacological needs of clients." Pet. App. 16, 21, 60; 130 MASS. CODE REGS. § 429.423(B)(2)(b) and (e). The First Circuit also recognized that the duties of supervision and employing adequate psychiatric staff were the precise violations described at length in the Relators' complaint. Accordingly, "[i]nsofar as Relators have alleged noncompliance with regulations pertaining to supervision, they have provided sufficient allegations of falsity to survive a motion to dismiss." Pet. App. 16.

Contrary to Petitioner's assertions, this is not a case where the defendant did not get advance notice of the conduct it was expected to maintain in order to avoid FCA liability. At all relevant times, the responsibilities it was required to meet were set out in the MassHealth regulations and they were identified as conditions of payment. Thus, the policy issues which Petitioner seeks to place before the Court, Pet. 20-25, are irrelevant. Petitioner got all of the protection it claims it was entitled to receive, yet still engaged in a comprehensive scheme to treat mentally ill Medicaid patients with unlicensed, unqualified, uncredentialed and unsupervised counselors.

As with Petitioner's prior claim of conflict, there is no basis for any assertion that the result would have been different if the case was heard in a different Court of Appeals. In the two cases cited by Petitioner, *Mikes* and *Chesbrough*, Pet. 25-26, the statutes and regulations at issue plainly failed to include language conditioning payment on compliance. In contrast, such language is plainly present here – Petitioner merely disagrees with the scope of regulations as construed by the First Circuit. Whether the First Circuit interpreted Massachusetts Medicaid regulations correctly or not is an issue of state law, and not a basis for granting a petition for certiorari.

III. THE PETITION PRESENTS AN ISSUE OF STATE LAW, NOT FEDERAL LAW, FOR REVIEW

A. This Court Should Not Devote Its Resources to an Issue of State Law

More than 25 pages into its petition, Petitioner sets out its analysis of why the First Circuit erred. According to Petitioner, when the First Circuit examined 130 MASS. CODE REGS. § 429.423(B) to determine the extent of the condition of payment established by 130 MASS. CODE REGS. § 429.439, the court should have only considered the provisions under § 429.423(B)(1) and ignored the provisions of § 429.423(B)(2) because the responsibilities identified in § 429.423(B)(2) are not "requirements" for the purposes of § 429.439(C). Pet. 26.

Regardless of the merits of this argument,[12] it is clear this is an issue of state law. Petitioner's disagreement is with the First Circuit's interpretation of a state Medicaid regulation. This Court does not sit to determine matters of state law. *Dixon v. Duffy*, 344 U.S. 143, 144 (1952). Such a matter is not proper for

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[12] The merits, however, appear dubious. When the Commonwealth stated that as a condition of payment a clinical director "must meet all the requirements in" § 429.423(B), it has to be assumed that the Commonwealth intended to refer to the entire regulation and not a single subsection. If the Commonwealth only intended subsection (1) to constitute the condition of payment, § 429.439(C) would have likely only referenced § 429.423(B)(1) instead of the broader regulation.

this Court's review. *See Wolf v. Weinstein*, 372 U.S. 633, 636 (1963) (dismissing writ of certiorari as improvidently granted where controversy primarily implicated questions of state law and presented no federal question of substance).

Although this Court is not jurisdictionally barred from reviewing a Court of Appeals decision that interprets state law, such cases are only taken in extraordinary circumstances. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). For example, in *Steele v. General Mills, Inc.*, 329 U.S. 433, 438 (1947), this Court granted certiorari because the lower court's judgment "undermine[d] the transportation policy of Texas" and thus created a question of great importance. Almost half a century passed before this Court concluded that another state law case met this standard. In *Leavitt*, this Court granted a petition for certiorari in an abortion case because "the alternative [wa]s allowing the blatant federal-court nullification of state law" where the underlying substantive issue was controversial. *Leavitt*, 518 U.S. at 144-45.

No such issues are present here. The Court has before it a matter requiring analysis and interpretation of an arcane state regulation. It is not a controversial matter and does not appear to raise issues that would be of concern anywhere but Massachusetts. The Massachusetts Medicaid regulations here are merely an example of the routine regulations that each of the fifty states promulgate to administer the Medicaid program as partners to the federal government. This is not a court of error correction. *City &*

Cnty. of San Francisco, Calif. v. Sheehan, ___ U.S. ___, 135 S. Ct. 1765, 1779-80 (2015) (Scalia, J., concurring in part and dissenting in part). It is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law. *Anderson v. Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting).

B. Recent Revisions of the Relevant Massachusetts Regulations Confirm That the Case was Correctly Decided and Leave No Question of Significance for the Court to Review

Moreover, to the extent that there is some controversy as to whether MassHealth can condition reimbursement to a mental health clinic on the facility's compliance with regulations relating to minimum qualifications and supervision, that question has been definitively answered. At the time the underlying action was instituted, the Medicaid regulation that set minimum qualifications for therapists in mental health facilities, 130 MASS. CODE REGS. § 429.424, was entitled "Qualifications of Staff by Core Discipline." In 2014, Massachusetts clarified the regulation to make it evident that compliance with the minimum qualifications requirements was a condition of payment. The title of the regulation was changed to "Qualifications of Professional Staff *Authorized to Render Billable Mental Health Center*

Services by Core Discipline." 130 MASS. CODE REGS. § 429.424 (2014) (emphasis added). As the Massachusetts Medicaid Director explained in her transmittal letter to mental health centers participating in MassHealth, "[t]hese changes include clarification . . . and specifying the types of staff members . . . who are authorized to provide mental health services for which mental health centers may bill." MassHealth Transmittal Letter MHC-47, April 2014.[13]

Although the title of 130 MASS. CODE REGS § 429.424 was revised, the content of the relevant regulations was not. The regulation still states "[a]ll counselors and unlicensed staff included in the center must be under the direct and continuous supervision of a fully qualified professional staff member trained in one of the core disciplines" and "[a]t least one staff psychiatrist must either currently be certified by the American Board of Psychiatry and Neurology, or be eligible and applying for such certification." 130 MASS. CODE REGS. §§ 429.424(A)(1), 429.424(F)(1) (2014); *cf.* 130 MASS. CODE REGS. §§ 429.424(A)(1), 429.424(E)(1) (2011).

The 2014 revisions put to bed any question as to whether the failure to comply with the regulatory qualification and supervision requirements for mental health therapists are conditions of payment – only persons meeting the criteria in the regulations may

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[13] A copy of this letter may be found at http://www.mass.gov/eohhs/docs/masshealth/transletters-2014/mhc-47.pdf.

bill for their services. Indeed, the fact that the Commonwealth changed only the title of the regulation but did not change its substance indicates that the 2014 revisions were not amendments that took effect upon promulgation, but clarifications of MassHealth's existing rules. Under Massachusetts law, remedial changes to a state regulation that are intended to clarify rather than change the law have retroactive effect. *Town of Canton v. Bruno*, 282 N.E.2d 87, 94 (Mass. 1972); *Figueroa v. Dir. of Dep't of Labor & Workforce Dev.*, 763 N.E.2d 537, 541-42 (Mass. App. Ct. 2002). The revisions confirm that the First Circuit correctly decided the action – the minimum qualification and supervision regulations were always intended to be conditions of payment. Nothing of substance remains for this Court to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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