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 LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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QUESTIONS PRESENTED

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

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

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are law professors and senior lecturers whose scholarly writings and interests include tort law – in particular the common law of fraud – breach of contract, and the False Claims Act. Certain amici also have worked as practitioners and have extensive trial experience, offering insight as to practical application of legal constructs and the feasibility of legal models in practice. Amici have an interest in ensuring that the False Claims Act operates fairly and efficiently and captures the type of conduct Congress intended.

Amici believe there is no basis in the text or legislative history of the False Claims Act to limit liability under the Act to situations where a party has expressly certified compliance with a regulatory or contractual requirement. Amici believe that common law fraud principles inform interpretation of the False Claims Act and that an analytical model applying these principles, coupled with the textual limitations of the Act, effectuates Congress' intent and captures the conduct Congress intended to cover. Amici's brief discusses the basis for and operation of such a model.

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[1] All parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief, in whole or in part, and no person other than *amici* or their counsel made any monetary contribution to fund the preparation or submission of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The narrow question before the Court is whether the theory of "implied false certification" recently created by the lower courts is an appropriate analytical framework to determine liability under the False Claims Act ("FCA" or "Act"). Amici agree with the First Circuit's position that a claimant who fails to disclose material noncompliance with Government requirements is liable under the Act, because it is consistent with the Act's text, legislative history, and this Court's earlier holdings. As amici amply demonstrate below, however, "implied false certification" is simply a label courts have applied to describe particular types of fraudulent conduct, and the contested theory is merely one of many valid constructs appropriately used to conceptualize and capture the wide array of fraudulent conduct Congress sought to outlaw in enacting the FCA.

The Government is uniquely situated as a contractual party. As Benjamin Franklin once observed, "[t]here is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government."[2] From its outset, the False Claims Act was animated by recognition of this key point. Indeed, limiting FCA liability with an extra-textual, procedurally-based construct would fly in the face of this Court's seminal holding that the Act must be "construed

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[2] Benjamin Franklin (writing as 'B.F.'), Letter to the Editor, *On Smuggling, And Its Various Species*, London Chronicle (Nov 24, 1767), reprinted in Jared Sparks, 2 The Works of Benjamin Franklin 361 (Hilliard Gray 1836).

broadly" to effectuate Congress' intent to eradicate "all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968).

Significantly, this Court and lower courts have not hesitated to impose FCA liability in the absence of any certification, whether express or implied. *See* Part II.D *infra.* In other words, the presence of a certification is neither necessary nor sufficient to impose FCA liability. Thus, the issue before the Court is best framed as asking whether the type of ***conduct*** currently analyzed under the rubric of implied false certification forms a basis for liability under the Act. Consistent with the Act's statutory text, Congress' historical commentary, and this Court's prior interpretations, principles of common law fraud best inform that determination.

As a threshold matter, and as discussed *infra* Part I, nearly all interpretive guidance suggests that the Act is based on principles of common law fraud. Its plain language, legislative history, and judicial analysis reflect the FCA's common law roots. As such, courts should turn, and correctly have turned, to appropriate principles of common law fraud in determining whether conduct is covered by the Act.[3]

Congress has made abundantly clear, however, that it did not intend to incorporate all requirements of common law fraud liability into the FCA. Thus,

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[3] In some cases, it is not necessary or appropriate for courts to engage in a threshold inquiry to determine whether conduct is fraudulent or within the ambit of the False Claims Act. For example, in passing the Affordable Care Act, Congress made it clear that violations of the Anti-Kickback Statute also violate the False Claims Act. *See* Part II.D *infra.*

while properly utilizing certain common law principles to interpret the FCA, courts have also recognized that common law fraud and FCA liability are not coterminous. For example, courts have recognized that the FCA does not require specific intent to defraud or reliance because Congress specifically included statutory language inconsistent with those doctrines to allow for more expansive liability.[4] Moreover, since its enactment in 1863, Congress has routinely amended the Act to ***expand*** its reach to include ever-evolving means of perpetrating fraud on the Government. This Court has routinely and explicitly recognized Congress' intent that the Act be construed as broadly as fraudulent attempts to claim Government money may creatively extend. *See, e.g.*, *Rainwater v. United States*, 356 U.S. 590, 592 (1958) ("It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made.") In Part II *infra*, amici explain that the conduct comprising actionable fraud at common law is a mere subset of the conduct giving rise to liability under the FCA.

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[4] While it is arguable that the FCA has never required specific intent to defraud, Congress removed all doubt in the 1986 Amendments. *See* H.R. Rep. No. 99-660 (1986); 31 U.S.C. § 3729(b)(1)(A) (defining "knowing" submission of false claims to encompass submission of false claims made with "actual knowledge," "deliberate ignorance," or "reckless disregard"). This was done to address "the problem of 'ostrich-like' refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know." S. Rep. No. 99-345, at 15 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5280.

Finally, contrary to arguments urged by Petitioner, the First Circuit's holding represents nothing new, novel, or extraordinary to FCA jurisprudence. There is likewise no empirical support for Petitioner's argument that adopting the First Circuit's position will somehow encourage meritless litigation. In contrast, there is abundant proof that courts can apply appropriate limiting principles embodied in the common law to accurately distinguish between actionable and non-actionable conduct under the Act. *See infra* Part III.

For centuries, our courts have applied the principle of "materiality" to appropriately limit liability for contractual and tortious fraud. As this Court has explained, "[t]he federal courts have long displayed a quite uniform understanding of the 'materiality' concept." *Kungys v. United States*, 485 U.S. 759, 770 (1988) (relying on common law to define "materiality" for purposes of 8 U.S.C. § 1451 and collecting cases). Just last term, this Court expanded liability under the 1933 Securities and Exchange Act using the familiar legal guidepost of the common law materiality standard. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1330 (2015). Coupled with textual limitations such as the Act's expansive approach to mental states and abandonment of traditional reliance principles, courts can effectively capture only that fraudulent conduct Congress intended the FCA to reach by applying appropriate, extra-textual limiting principles. In sum, amici's analytical approach reasonably balances concerns of the Act's over-expansion with its stated purpose to broadly reach all fraudulent and deceitful acts that cause the Government to pay out money.

ARGUMENT

I. COMMON LAW FRAUD INFORMS PROPER INTERPRETATION OF THE FALSE CLAIMS ACT.

As its statutory text, Congressional commentary, and judicial interpretation make plain, the FCA is based on principles of common law fraud. On this ground alone, and as expounded further in this Part, the common law is an appropriate analytical touchstone for determining whether conduct is fraudulent under the FCA.

A. The Plain Language of the FCA Supports Reliance on Common Law Principles, Particularly By Imposing Liability for Material Omissions.

The FCA was enacted in 1863 and signed by President Lincoln "to prevent and punish frauds upon the Government of the United States." Cong. Globe, 37th Cong., 3d Sess. 348 (1863) (statement of Sen. Wilson). Interpreting the Act must begin with the text of the statute itself. *Neder v. United States*, 527 U.S. 1, 21 (1999). By its plain terms, the FCA currently holds liable "any person who . . . (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval[.]" 31 U.S.C. § 3729(a)(1). Although the Act defines the terms "knowingly" and "claim", §§ 3729(b)(1) & (b)(2), respectively, it does not define "false or fraudulent" because such a definition would be unnecessary—"'fraud' ha[s] a well-settled meaning at common law." *Neder*, 527 U.S. at 21.

Specifically, "a necessary second step" of statutory interpretation requires application of the

"well-established rule" that where Congress uses terms that "have accumulated settled meaning under . . . the common law," a court must infer that Congress meant to incorporate the established meaning. *Id.* (internal quotation marks omitted). By imposing liability for "fraudulent" claims, Lincoln's Congress incorporated the "well-settled" meaning of common law fraud at the time.

It is beyond question that both material representations and material omissions give rise to actionable common law fraud. *See* Restatement (Second) of Torts § 525 (fraudulent misrepresentation), § 527 (ambiguous representation), § 529 (representation misleading because incomplete), § 550 (fraudulent concealment), § 551 (nondisclosure) (1979). Indeed, the common law imposes identical liability for material omissions and misrepresentations. *Id.* §§ 550, 551 (person who fraudulently conceals or fails to disclose "is subject to the same liability" as person who makes fraudulent misrepresentation). Current legal trends follow suit, creating liability for omissions that constitute a "half-truth" or conceal a fact essential to the transaction. *See* Restatement (Third) of Torts: Liability for Economic Harm § 9 (actionable "misrepresentation" may arise from conduct rather than words and may be implied rather than explicit), § 13 (actionable omission exists where there is a duty to speak, a prior ambiguous statement requiring clarification, or, "because of the relationship between the [parties], the customs of the trade, or other circumstances, [the other party] would reasonably expect disclosure of what the actor knows.") (2015); *see also Bonilla v. Volvo-Car-Corp.*, 150 F.3d 62, 69-70 (1st Cir. 1998) ("[T]he *locus*

classicus of fraud is a seller's affirmative false statement or a half truth, *i.e.*, a statement that is literally true but is made misleading by a significant omission"); *Emery v. American Gen. Fin., Inc.*, 71 F.3d 1343, 1348 (7th Cir. 1995) (Posner, C.J.).[5]

It is equally clear that material omissions gave rise to actionable fraud at the time of the FCA's enactment. *See Neder*, 527 U.S. at 21 ("[T]he well-settled meaning of 'fraud' [in 1863] required a misrepresentation or concealment of material fact."); 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 195, at 298 (6th ed. 1853) ("[T]he misrepresentation must be of something material, constituting an inducement or motive to the act or omission of the other party."). From 1839 through modern day, this Court has consistently recognized that material omissions create liability for fraud under the common law. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 579 (1996) ("Actionable fraud requires a material misrepresentation or omission."); *Smith v. Richards*, 38 U.S. 26, 36 (1839) ("Where the party intentionally, or by design, misrepresents a material fact, or ***produces a false impression***, in order to mislead another . . . in every such case there is a positive fraud, in the truest sense of the terms.") (emphasis added).

It necessarily follows that Lincoln's Congress intended the FCA to reach conduct that was

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[5] Likewise, omissions of facts when "accompanied by deceptive conduct or suppression of material of facts" were recognized as fraudulent concealment at common law. *Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1086, 702 N.E.2d 265, 273 (Ill. App. 1998) (quoting *Heider v. Leewards Creative Crafts*, 245 Ill. App. 3d 258, 269, 613 N.E.2d 805, 814 (1993)).

rendered "fraudulent" by omission, as well as by affirmative misrepresentation. The plain language of the Act supports such a construction because the Act expressly imposes liability for indirect action that would comprise actionable fraud by omission at common law. Each of the Act's seven liability subsections imposes liability for indirect action (*i.e.*, in the absence of an affirmative misstatement): (A) causing a false claim to be presented; (B) causing a false record or statement to be made or used that is material to a false or fraudulent claim; (C) conspiring to violate the Act; (D) causing less than full money or property owed to be delivered; (E) making or delivering a receipt with incomplete knowledge of its truthfulness; (F) receiving public property unlawfully transferred; and (G) concealing or avoiding a financial obligation to the government. 31 U.S.C. § 3729(a)(1). Indeed, subsections E and G, appear to not only support implied false certification, but to perhaps expressly impose liability for implied false certification. Subsection E imposes liability if a person certifies receipt of goods "without completely knowing" whether the information to which he certified was true, while Subsection G imposes liability when a person knowingly "conceals or avoids" an obligation to pay the government. Under each provision, a person can be liable under the FCA without making an affirmative misrepresentation, let alone an affirmative representation on the face of the instrument in which a claim is presented.

Moreover, this Court has not hesitated to impute the common law "materiality" standard to fraud statutes. *Neder*, 527 U.S. at 21 (noting that "the common law could not have conceived of 'fraud' without proof of materiality."); *see also United States*

ex rel. Wilkins v. North Am. Constr. Corp., 173 F. Supp. 2d 601, 618-20, 622-30 (W.D. Tex. 2001) (applying *Neder* to conclude that the FCA imports a materiality requirement and focusing on the meaning of "false" and "fraudulent claims" at common law in its analysis). In 2009, the common law materiality standard became a textual requirement when Congress deliberately codified the standard in the Act. *See* 31 U.S.C. § 3729(b)(4) (defining "material"); S. Rep. 111-10, 111th Cong., 1st Sess. (2009), at 11, 2009 U.S.C.C.A.N. at 439.

In sum, the presence of either an express or implied certification does not reasonably inform whether particular conduct gives rise to FCA liability because it does not resolve the seminal question of whether that conduct is fraudulent. Rather, in deference to the common law principles underlying its terms, FCA liability is appropriately imposed for a "false or fraudulent claim" upon determining that the defendant requested payment from the Government to which he or she was not entitled. *See, e.g.*, *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1172 (9th Cir. 2006) ("So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach."); *see also Hobbs v. McLean*, 117 U.S. 567, 575 (1886) (relying on common law definition of "claim" as "right to demand money from the United States"); 31 U.S.C. § 3729(b)(2)(A)(i) (codifying common law definition of "claim" to impose FCA liability). In contrast to a "certification" requirement—untethered from the FCA's purpose, text and history, or indeed any basis in law, fact or logic—common law

principles provide the appropriate starting point for determining whether particular conduct violated the FCA.

B. The Legislative History of the FCA Supports Reliance on Common Law Principles.

Congress actively debated the incorporation of common law fraud principles into the FCA. Cong. Globe, 37th Cong., 3d Sess. 954-55 (discussing common law fraud principles and lack of scienter in the proposed statute). Indeed, Senator Cowan expressed concern that "[t]here is no scienter here in this criminal act" and that a man could be convicted "without having known that he committed any offense whatsoever", including by "aid in procuring the payment of a claim which is false, fraudulent from the beginning, and yet he may not be aware of it." *Id.* at 954. Senator Cowan likewise spoke against the need for a False Claims Act on the grounds that fraud was already cognizable at common law and under existing state statutes. *Id.* at 954 ('These frauds all fall within a great class. I suppose they are classified in almost every State in the Union. I believe now in addition to the remedies provided by the common law, there is a statute in almost every State in the union which makes the procurement of money or any valuable thing by means of false misrepresentation of an existing fact, a criminal offense").

In response to Senator Cowan, Senator Howard – who moved the original False Claims Act bill for Senate discussion – conceded that there was "nothing said about 'guilty knowledge'" but focused on the importance of the bill and massive fraud

being wrought on the Government. *Id.* at 955-56. Senator Wilson emphasized that, despite the Government's best efforts, existing laws were simply insufficient to combat the massive frauds. *Id.* at 956.

Ultimately, the Legislature dismissed Senator Cowan's concerns, drafting an expansive statutory scheme that incorporated common law concepts of fraud and misrepresentation but rejected certain limiting principles of common law fraud – such as scienter. Instead, the Act encompassed all fraudulent misconduct on the Government that was not otherwise actionable at common law. *Id.* at 956 ("[T]here is now no law adequate to meet these cases of fraud upon the Government."). Indeed, this Court has recognized that the contemporaneous Congressional debates "suggest that the Act was intended to reach ***all types of fraud, without qualification***, that might result in financial loss to the Government." *Neifert-White Co.*, 390 U.S. at 232 (emphasis added).

C. This Court Has Consistently Relied on Common Law Principles in Determining Liability under "Fraud" Based Statutes.

Regardless of the ultimate disposition of individual cases, this Court has correctly and consistently turned to common law fraud principles to determine liability under the FCA, as well as other federal fraud statutes. Rather than rely on the newly-invented certification doctrine, this Court should follow its own mandate to use the common law's familiar legal principles as guideposts in determining FCA liability. *Omnicare,* 135 S. Ct. at 1330.

Significantly, this Court has expressly found FCA liability arising from actionable material omissions (discussed *supra* Part I.A), the same common law principle supporting the implied false certification doctrine. For example, in *United States ex rel. Marcus v. Hess*, public works contractors engaged in a bid-rigging scheme to defraud the Government. 317 U.S. 537, 539 (1943). Even where contractors did not "certif[y] that their bids were 'genuine and not sham or collusive,'" this Court readily found FCA liability based on the Government's fraudulent inducement to pay inflated contract prices. *Id.* at 543; *accord* G. Klass & M. Holt, *Implied Certification Under the False Claims Act*, 41 PUB. CONT. L. J. 1, 18 (2011) (noting that FCA liability via "[f]raud in the inducement can take any number of forms"). Likewise, in *United States v. Bornstein*, a Government subcontractor mislabeled radio parts as complying with Government specifications and the general contractor submitted a claim for payment without disclosing the noncompliance. 423 U.S. 303, 309 (1976). This Court held that the subcontractor was liable under the FCA for "causing" the contractor to submit a "false claim," although there was no affirmative false statement in the contractor's claim for payment. *Id.* at 311.

The Supreme Court has also relied on common law fraud to interpret statutory terminology incorporated into the FCA. In *Hobbs v. McLean*, 117 U.S. 567 (1886), the Court construed what constitutes a "false claim." The Court analyzed and ultimately adopted the common law definition of the word "claim" as a "right to demand money" for purposes of liability. *Id.* at 575. Notably, Congress codified this common law definition of "claim" in

amendments to the FCA. *See* 31 U.S.C. § 3729(b)(2)(A)(i).

The Court has consistently applied common law principles to determine what type of conduct is covered by other federal statutes rooted in fraud. Just last term—and relying on common law fraud precepts—this Court expanded liability under the Securities Act of 1933 by outlawing not only expressly false opinions, but omissions of material fact that would make an otherwise truthful opinion misleading. *Omnicare,* 135 S. Ct. at 1330; *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988) (collecting cases in which it has addressed common-law requirements of securities fraud action); *see also Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (relying on common law to define "extortion" under Hobbs Act); *Neder*, 527 U.S. at 1 (relying on common law fraud to determine liability under federal mail fraud statute); *Field v Mans*, 516 U.S. 59, 69-76 (1995) (relying on common law fraud to determine liability under federal bankruptcy fraud statute); *Kungys v. United States*, 485 U.S. 759, 770 (1988) (relying on common law to define "materiality" for purposes of liability under 8 U.S.C. § 1451 and collecting cases).

In sum, this Court's prior holdings mandate judicial consideration of applicable common law principles in determining whether conduct is fraudulent under the FCA.

II. ALTHOUGH THE FCA IS GROUNDED IN COMMON LAW, FCA LIABILITY AND ACTIONABLE COMMON LAW FRAUD ARE NOT COTERMINOUS.

Although squarely grounded in the common law, it is clear from the statutory text and legislative record that Congress intended the FCA to impose liability for deceitful acts that went beyond cognizable common law fraud. This is most apparent through Congress' express rejection of traditional scienter and reliance principles. Yet Congress has also routinely amended the Act to expand its reach to additional and novel means of perpetrating fraud on the Government. In short, conduct comprising actionable fraud at common law is a mere subset of the conduct giving rise to liability under the FCA.

A. FCA Liability Is Imposed in the Absence of Specific Intent to Defraud.

As an initial matter, it is well settled that, unlike common law fraud, the FCA does not require specific intent to defraud for liability to attach. Since its enactment, the FCA has employed a "knowing" standard of intent, imposing liability on a defendant who made false claims or statements "knowing" that the information in the claim or statement was false. *See* 31 U.S.C. §§ 3729(a)(1)(A), (B); *see also* John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS, § 2.06[A] (4th ed. 2010).

Before it was amended in 1986, the FCA did not define "knowingly," and Courts were split on whether the "knowing" standard required proof of specific intent to defraud. *Compare United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 59-60

(8th Cir 1973) ("knowing" standard satisfied where defendant acted with extreme carelessness) and *United States v. Hughes*, 585 F.2d 284, 287-88 (7th Cir. 1978) (holding that the FCA does not require proof of specific intent to defraud), with *United States v. Mead*, 426 F.2d 118, 122-23 (9th Cir. 1970) (proof of intent to defraud is required), and *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972) ("guilty knowledge of a purpose on the part of [the defendant] to cheat the Government" is required for FCA liability).

In response to this Circuit split, as part of the 1986 Amendments to the FCA, Congress specifically defined the "knowing" intent requirement, to make clear that that the FCA does not require proof of specific intent, that is, intent to defraud the government. 31 U.S.C. § 3729(b) (1986) ("no proof of specific intent to defraud is required"). Instead, Congress defined "knowing" and "knowingly" to mean: actual knowledge, deliberate ignorance or reckless disregard of the truth or falsity of the information contained in the false claim or statement. 31 U.S.C. §§ 3729(a)(1), (b) (1986).

This was done because Congress viewed the standard of actual knowledge of fraud, and even…specific intent" to defraud as "inappropriate" for a civil remedy designed to make the Government whole for its losses from fraud. *See* S. Rep. No. 99-345, at 17. In addition, by defining the "knowing" standard to include deliberate ignorance and reckless disregard of the truth or falsity, Congress sought to address "the problem of the 'ostrich-like' refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to

know." *Id.* at 15. Congress adopted this standard to make clear that "individuals and contractors receiving public funds have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek." *Id.* at 20.

Since enactment of the 1986 Amendments, it is well established that, unlike common law fraud, specific intent to defraud is not required for FCA liability. *See, e.g., Horn & Assocs. v. United States*, 123 Fed. Cl. 728, 763 (Fed. Cl. 2015)) ("Congress rejected requiring a specific intent to defraud under the False Claims Act."); *United States v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013) (noting that "the statute does not require a 'specific intent to defraud'") (internal quotation omitted); *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1274 (D.C. Cir. 2010) (explaining that 1986 Amendments made clear that specific intent to defraud was not required); *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 (4th Cir. 2010) (stating that the FCA "does not demand specific intent to defraud and can be satisfied by proving only reckless disregard of the truth or falsity of the information") (internal quotation omitted); *United States v. Bourseau*, 531 F.3d 1159, 1167 (9th Cir. 2008) (stating that "no proof of specific intent to defraud is required" under the FCA) (internal quotations omitted).

B. Unlike Common Law Fraud, Reliance Is Not An Element of an FCA Claim.

Similarly, while reliance is a required element under common law fraud, FCA liability does not require proof the Government relied on the

defendant's false statement in paying the false claim.

Under the FCA, liability attaches on the ***presentment*** of a false or fraudulent claim for payment or approval, rather than the actual payment of the claim. 31 U.S.C. § 3729(a)(1)(A). In fact, not only is there no reference to reliance in the text of the statute, its legislative history and remedial purpose support that actual reliance is not required for liability under the FCA. In passing the 1986 Amendments to strengthen the FCA, Congress reiterated the importance of penalties as a deterrent effect (*see* 132 Cong. Rec. H6479 (1986) (statements of Reps. Glickman and Brooks)) and stated it was "reaffirm[ing] the apparent belief of the [A]ct's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments." S. Rep. No. 99-345 at 17. Importantly, Congress stressed that the FCA allows the United States to recover a forfeiture for each false claim submitted "solely upon proof that false claims were made, without any proof of damages." *See id.* at 48. The inclusion of statutory penalties in addition to damages provisions in the FCA, evidences Congress' intent not to limit the reach of the statute to situations in which the Government could prove that it actually relied on and suffered damages as a result of a defendant's false claims.

Likewise, circuit courts recognize that a defendant can still be held liable for violating the FCA regardless of whether the Government actually paid the defendant's false claim or relied upon the

false information in the defendant's claim when it decided to pay. *See United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 189 (5th Cir. 2009) (stating that "a complaint need not allege that the Government relied on or was damaged by the false claim" and that "a person that presented fraudulent claims that were never paid remains liable for the Act's civil penalty"); *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc.*, 400 F.3d 428, 445-46 (6th Cir. 2005) (adopting "natural tendency" test, which focuses on potential, rather than actual effect); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 917 (4th Cir. 2003) ("Courts give effect to the FCA by holding a party liable if the false statement it makes in an attempt to obtain government funding has a natural tendency to influence or is capable of influencing the government's funding decision, not whether it actually influenced the government not to pay a particular claim.").

In *Grubbs*, the Court of Appeals for the Fifth Circuit explained that, in contrast to common-law fraud, reliance is not a required element under the FCA because the FCA was designed to "protect[ ] the Treasury from monetary injury." 565 F.3d at 189. While common law fraud requires a plaintiff to show that that he or she actually relied and suffered injury from a defendant's false representation, the FCA "is remedial and exposes even unsuccessful false claims to liability." *Id.*

Thus, not only is reliance not an element of liability under the FCA, but it also is not necessary to prove actual reliance to prove materiality. *See United States v. Triple Canopy, Inc.*, 775 F.3d 628,

639 (4th Cir. 2015) (holding that materiality in FCA context does not require proof of "actual effect"); *United States ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 96 (2d Cir. 2012); *United States ex rel. Longhi v. United States*, 575 F.3d 458, 469 (5th Cir. 2009) (finding that the FCA only requires proof that a false statement "could have influenced" the Government's decision to pay the claim to satisfy materiality standard, and does not require proof that the false statement actually influenced the Government's decision to pay). Whereas materiality focuses on whether a defendant's false statement or omission "has a natural tendency to influence" the government's decision to pay the claim, reliance focuses on whether the government was aware of and actually relied on the false statement or omission at issue when paying the defendant's claim. *See Triple Canopy*, 775 F.3d at 639; *Harrison*, 352 F.3d at 916-17. In other words, the standard for materiality is objective, while reliance is subjective. *Van Gorp*., 697 at 96.

In *Triple Canopy*, the Court of Appeals for the Fourth Circuit, in the analyzing the issue of materiality, explained there is no "actual reliance" requirement in the FCA – a government employee or official need not have actually seen the falsity of a claim or relied upon it. *See* 775 F.3d at 639, ("Materiality focuses on the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered.") (internal quotation marks omitted); *see also Van Gorp*, 697 F.3d at 96 (holding materiality "does not require evidence that a program officer relied upon the specific falsehoods proven").

Finally, the fact that proof of actual reliance is not necessary to prove materiality is further demonstrated by Congress' definition of "material" in the Fraud Enforcement and Recovery Act of 2009 ("FERA") amendments. *See* S. Rep. 111-10, 111th Cong., 1st Sess. (2009), at 2009 U.S.C.C.A.N. at 439. As part of these amendments, Congress defined "material" as: having "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. 3729(b)(4). In codifying this standard of materiality, Congress rejected the minority approach to materiality adopted by several courts, which had required proof that the false or fraudulent claim actually changed the government's payment decision. *See* S. Rep. 111-10, 111th Cong., 1st Sess. (2009), at 2009 U.S.C.C.A.N. at 439.

Thus, in importing common law fraud principles to assist in a threshold determination of whether conduct is fraudulent, the Court should not import specific liability requirements Congress expressly rejected and supplemented by statute.

C. By Continuing to Amend the FCA to Expand its Reach, Congress Has Made Clear it Intends that the FCA Cover Conduct Well Beyond Common Law Fraud.

In addition to rejecting traditional scienter and reliance principles necessary for liability under common law fraud, the breadth of the FCA's intended scope is also clear from Congress' continuous broadening of the Act's reach through legislative amendments. Indeed, nearly all interpretive guidance suggests Congress intended

the FCA to reach as broadly as deceitful acts against the Government may creatively extend.

First, it is not the "fraud act," but the "false claims" act; and the original Act focused on submission of fraudulent *claims* to the government. Congress enacted the original statute to allow the FCA to reach fraudulent conduct not actionable at common law. Cong. Globe, 37th Cong., 3rd Sess. 956 (1863) ("The Government is doing what it can to stop these frauds . . . [but the] War Department says there is now no law adequate to meet these cases of fraud upon the Government.").

Second, Congress has expressly and repeatedly stated its intent that the FCA be broadly applied. Even in its first permutation, the FCA was unequivocally intended to reach beyond the limits of actionable common law fraud. With its 1986 Amendments, however, Congress removed all doubt of its intent to distinguish FCA liability from common law fraud. Indeed, when the judiciary attempted to limit the FCA's reach in the mid-Twentieth Century, *see, e.g.*, *United States ex rel. Wisconsin v. Dean,* 729 F.2d 1100 (7th Cir. 1984) (holding that FCA cases involving information already known to the Government were precluded), the 1986 Amendments expressly clarified Congress' intent for the FCA's especially broad application:

> [The FCA] is intended to reach *all fraudulent attempts* to cause the Government to pay ou[t] sums of money or to deliver property or services. Accordingly, a false claim *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. 99-345 at 9 (emphasis added).

The 1986 Congress sought to ease certain hurdles of proof required by common law fraud, specifically, intent to defraud and actual reliance, to both strengthen the Government's ability to recover losses resulting from fraud and to deter future fraud against the Government. *See* S. Rep. No. 99-345, at 1-2; S. Rep. No. 111-10, 111th Cong., 1st Sess. (2009), at 12, 2009 U.S.C.C.A.N. at 439 (adopting "natural tendency" materiality definition). The 1986 Congress expanded on common law principles by clarifying lower burden of proof on the mental state required to impose FCA liability; it defined "knowingly" under the Act as including those who act with actual knowledge of the truth, act in deliberate ignorance of the truth, or act with reckless disregard for the truth. 31 U.S.C. § 3729(b). The amendments were in reaction to cases where liability was avoided simply because a contractor "buried his head in the sand and failed to make simple inquiries which would alert him that false claims are being submitted." S. Rep. No. 99-345 at 21.

Congress again made its intent plain in the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617 (2009). FERA was enacted specifically to "strengthen the provisions of . . . the federal False Claims Act" and to ensure "that all government funds [] be protected from fraud." 155 Cong. Rec. E1295-03 (emphasis added). Through FERA, Congress reemphasized the broad reach of the FCA to the judiciary, who had "limited the reach of the False Claims Act,"

"derail[ed] meritorious actions," and thus "jeopardiz[ed] billions in Federal funds." H.R. Rep. 111-97, 111th Cong., 1st Sess., at 5 (2009); S. Rep. 111-10 at 10, 2009 U.S.C.C.A.N. at 437-38. Congress described the Courts' limited application of the FCA as "confusion":

> The False Claims Act amendments included in S. 386, [FERA], remove some of the confusion that is currently undermining the Act's ability to fully reach those who target the American tax dollar. S. 386 clarifies a number of key provisions and reaffirms that *the False Claims Act is intended to protect all Government funds, without qualification or limitation, from the predation of those who would avail themselves of taxpayer money without the right to do s*o. This legislation is the first step in correcting the erosion of the effectiveness of the False Claims Act that has resulted from court decisions contrary to the intent of Congress. This mounting confusion occurs at a time when the country can least afford weakened antifraud legislation. Particularly now, at a time of dramatically-increased reliance on private contractors to perform what have traditionally been viewed as governmental functions, clarity of purpose and effect must be the hallmarks of the False Claims Act.

155 Cong. Rec. E1297 (emphasis added).

The specific amendments made to the FCA through FERA evince Congress' renewed commitment to the FCA's wide reach. For example, FERA removed language from Section 3729(a)(1)

that could be narrowly read to limit liability to persons who present false claims directly "to an officer or employee of the Government, or to a member of the Armed Forces." *See* 155 Cong. Rec. E1295-03; *see also* S. Rep. No. 111-10 at 11. This amendment clarifies Congress' intention to ensure the FCA reaches all false claims, when it defined actionable "claims" to include "any request or demand . . . for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c); *see also* 155 Cong. Rec. E1295-03; S. Rep. 111-10 at 11, 2009 U.S.C.C.A.N. at 439. The sole intent of FERA was to "broaden the coverage of" the FCA by revising the Act so that it reflected the original intent of the law. S. Rep. 111-10 at 16, 2009 U.S.C.C.A.N. 430.

With fraudulent schemes constantly evolving, it is increasingly important that the judiciary realize Congress' intention that the FCA have a broad reach. In the healthcare arena specifically, "10 percent of the federal health care budget" is "lost to fraud" yearly. Joan H. Krause, *A Conceptual Model of Health Care Fraud Enforcement*, 12 J.L. & POL'Y 55, 55 (2003). While the monetary loss as a result of false or fraudulent claims against the Government is exorbitant, the non-monetary losses may be even greater. The non-monetary losses include "loss in confidence in Government programs, Government benefits not going to intended recipients, and harm to public health and safety." 155 Cong. Rec. E1295-

03. In sum, the FCA's legislative history shows a statutory scheme that has continually expanded to encompass more fraudulent conduct beyond that originally contemplated in 1863. In order to properly remedy the Government's losses at the hands of ever-evolving fraudsters, this Court must adhere to the Congressional intent that the FCA reach as broadly as fraudulent conduct may extend.

D. This Court and Other Courts Have Consistently Recognized FCA Liability In the Absence of Either an Express or Implied Certification.

Mindful of this Court's tradition of judicial restraint, amici reiterate that certification is but one among many recognized bases for imposing liability under the FCA. Indeed, this Court has recognized that a claim becomes "false" even if it is literally true if the claimant previously made misrepresentations or omissions or committed misconduct to induce the Government to enter into the contract in the first place. *Hess*, 317 U.S. at 537 (finding contractors liable under the FCA for claims submitted under contracts which defendants obtained through collusive bidding).

Lower courts also have recognized many bases for FCA liability that do not depend on certification. The clearest example of this is the "worthless services" theory. *See, e.g.*, *United States ex rel. Lee v. Smithkline Beecham, Inc.*, 245 F.3d 1048, 1053 (9th Cir. 2001) ("[I]n an appropriate case, knowingly billing for worthless services or recklessly doing so with deliberate ignorance may be actionable under § 3729 [of the FCA], regardless of any false certification conduct."); *United States ex rel. Mikes v.*

Strauss, 274 F.3d 687, 703 (2d Cir. 2001) (agreeing with the Ninth Circuit "that a worthless services claim is a distinct claim under the Act" that is not predicated on certification). Even the first iteration of the FCA imposed liability for worthless services regardless of the means or method by which those services were presented for payment. *See* Cong. Globe, 37th Cong., 3d Sess. 955 (1863) (Congress enacted the False Claims Act "to assist in ferreting out unscrupulous defense contractors who committed fraud against the Union Army by delivering bullets loaded with sawdust.").

Courts have also recognized that violations of the Anti-Kickback Statute can form a basis for False Claims Act liability even if the implied certification doctrine is not viable. *See, e.g., United States ex rel. Kroening v. Forest Pharms., Inc.*, 2016 U.S. Dist. LEXIS 3509, at *10-11, *14-19 (E.D. Wis. Jan. 6, 2016) (acknowledging the Seventh Circuit's dicta in *Sanford-Brown,* in which it "explicitly declined to adopt the implied certification doctrine in an FCA case" but finding that violations of the Anti-Kickback Statute still form the basis of a false claim pursuant to Congress' enactment of the Patient Protection and Affordable Care Act, in which it expressly stated that that violations of the Anti-Kickback Statute violate the False Claims Act) (citing *United States v. Sanford-Brown, Ltd.,* 788 F.3d 696, 711-12 (7th Cir. 2015)).

Likewise, some courts have correctly found that a pharmaceutical manufacturer's off-label promotion can form the basis of a false or fraudulent claim without reference to the implied certification doctrine. *See, e.g.*, *Strom ex rel. United States v.*

Scios, Inc., 676 F. Supp. 884, 891-92 (N.D. Cal. 2009) (recognizing that Medicare only permits reimbursement for "reasonable and necessary" treatments, that prescription of a drug in a context where it is not reasonable or necessary is statutorily ineligible for reimbursement, and thus that knowing promotion of off-label use that is not reasonable or necessary constitutes an FCA violation).[6]

Finally, amici remind the Court that it has previously and expressly imposed FCA liability in the absence of any affirmative misrepresentations, let alone false certifications. *See, e.g.*, *Hess*, 317 U.S. at 539; *Bornstein*, 423 U.S.at 309.

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[6] Indeed, the United States Government has consistently taken the position that off-label promotion is a predicate for FCA liability independent from the concept of certification. As a general matter, amici disagree with the position in the amicus brief of the Pharmaceutical Research and Manufacturers of America. There are compelling reasons why a prohibition on all off-label promotion by pharmaceutical companies is both valid and constitutionally appropriate, notwithstanding the fact that off-label use by physicians is permitted. The best analysis on this issue can be found in Judge Livingston's dissent in the case of *United States v. Caronia*, 703 F.3d 149, 169-182 (2d Cir. 2012). Amici, however, respectfully submit that this Court's consideration of off-label promotion is best left to a fully developed factual record where such conduct is at issue, particularly because the circumstances and elements that render off-label promotion fraudulent and subject to liability under the FCA are not best construed under an implied false certification theory.

III. COURTS HAVE FOR DECADES ACCURATELY DISTINGUISHED BETWEEN ACTIONABLE AND NON-ACTIONABLE CONDUCT UNDER THE FCA BY APPLYING APPROPRIATE LIMITING PRINCIPLES EMBODIED IN THE COMMON LAW.

While Congress has made plain its intent that the FCA be broadly construed to reach all fraudulent claims for Government funds, by no means do amici urge a limitless application of the Act. Instead, amici suggest that the Court apply the appropriate and long-established limiting principles of the common law to weed out cases in which the alleged misconduct does not rise to the level of FCA liability.

As a threshold issue, this Court has already looked to common law to apply limiting principles to the False Claims Act. For example, this Court has applied the common law definition of claim to limit FCA liability. *United States v. McNinch*, 356 U.S. 595, 598-99 (1958) (holding that an FHA credit loan application is not a "claim" because it is not a demand for money or property based on the Government's liability). Other common law concepts also provide appropriate limiting principles.

A. Materiality Is a Familiar Legal Principle That Courts Routinely Apply to Appropriately Limit Liability for Potential Fraud.

Application of the common law materiality standard properly limits liability under the FCA. Prior to the 2009 FERA amendments, this Court had imputed a materiality standard to similar fraud

statutes. *Neder*, 527 U.S. at 21 (noting that "the common law could not have conceived of 'fraud' without proof of materiality."); *see also Wilkins*, 173 F. Supp. 2d at 618-20, 622-30 (holding the FCA imputes a materiality standard by reference to common law and applying the analytical framework set forth in *Neder*). After 2009, however, materiality became a textual requirement when Congress deliberately codified the materiality standard. *See* 31 U.S.C. § 3729(b)(4) (defining "material"); S. Rep. 111-10, 111th Cong., 1st Sess. (2009), at 11, 2009 U.S.C.C.A.N. at 439.

Whether extra-textual or expressly required, it is beyond question that (1) the common law materiality standard is appropriate and effective at distinguishing liable and non-liable conduct, and (2) courts have had literally centuries of experience in applying it to sundry alleged fraudulent conduct. As this Court expressed just last term, those centuries of experience justify using the common law materiality standard to limit liability under fraud-based federal statutes. *Omnicare*, 135 S. Ct. at 1330. Contrary to arguments urged by Petitioner, there is simply no basis in fact or law to suggest the judiciary cannot apply these familiar legal principles to determine FCA liability. *See also United States ex rel. Weinstein v. Bressler*, 160 F.2d 403, 405 (2d Cir. 1947) (To prevail on an FCA claim, "the United States must prove fraud of some sort. Fraud implies a misrepresentation of material fact, either express or implied."); *United States v. Gaudin*, 515 U.S. 506 (1995) (relying on common law to interpret issues relating to "materiality"); *Durland v. United States*, 161 U.S. 306 (1896).

It is also worth noting that materiality is a context-specific inquiry, such that conditions that may not be material in the private context could be highly material to the government. The *SAIC* case, discussed at length by Petitioner, Respondent and amici, provides a good example. As the district court's decision makes clear, "[a]t trial, the government presented sufficient evidence to support the jury's finding that SAIC's OCI representation were critical to the government's decision to pay." *United States v. Sci. Applications Int'l Corp.*, 653 F. Supp. 2d 87, 103 (D.D.C. 2009). Trial evidence established SAIC was placed in a conflicting role where its judgment may be biased in relation to its work for the Nuclear Regulatory Commission ("NRC"). That is because its contract with NRC charged it with the responsibility to "assess the health and safety impacts of the potential large scale reuse and recycle of contaminated nuclear material," including by "outlining the possible approaches to rulemaking for the release of these materials," and yet it was doing business with and sought to do future business with entities governed by NRC regulations. *Id.* at 92, 100-102. In essence, SAIC functioned as the proverbial "fox guarding the henhouse," and the jury credited NRC testimony that it found SAIC's violation of disclosure requirements material and would not have paid for the service had it realized SAIC had a financial relationship with the entities the regulations it was assisting NRC draft would govern. Although conflicts of interest provisions may not be significant in private arrangements, they matter greatly to the Government, which acts as lawmaker and enters

into contracts amidst a larger backdrop of policy objectives.

Likewise, one can imagine a company's knowing failure to comply with requirements in Government contracts that create set-asides for small, minority-owned or female-owned businesses. In the private sector, violation of such a requirement may be immaterial so long as the products for which a party contracted were delivered. But when a company fraudulently misrepresents that it fits the parameters of a set-aside and fraudulently wins a contract, it has contravened the Government's policy goals even if goods or services are delivered. The case of *Longhi v. Lithium Power Techs* recognizes this concept. In this case, Lithium Power Technologies made false statements regarding the company's facilities and industry connections in applications to receive grants from the Small Business Innovation Research ("SBIR") program. *Longhi*, 575 F.3d at 458. The Fifth Circuit ruled that the full amount of grants should be recovered as FCA damages because the company's misrepresentations prevented the Government's policy goals from being achieved, notwithstanding the fact that the company performed viable and useful research under the contract. *Id.* at 473.

On the other hand, requiring the Government to identify every provision it considers material (*i.e.*, is a "condition of payment") in all of its contracts is a nearly impossible burden, rendered wholly unnecessary by the proper application of the common law materiality standard.

B. Congress and the Courts Have Made Clear that Conduct Must Surpass Mere Breach of Contract to Constitute an FCA Violation.

Two principal distinctions demonstrate that mere breach of contract does not automatically implicate a violation of the FCA. First, FCA liability can attach even in the absence of contractual privity between the Government and the defendant. Second, showing an FCA violation requires proving the defendant had sufficient "knowledge" of the breach prior to presenting a claim for payment. Among others, these distinctions are paramount in defining the contours of conduct giving rise to FCA liability.

Moreover, it is noteworthy that the Government is uniquely situated as a contractual party. Courts consistently recognize that the Government is unique to the extent that the integrity of its public programs far exceed its purely economic interests. While ordinary business contracts are governed by purely economic concerns, the United States has important institutional reasons for requiring particular contractual terms. *See, e.g.*, *United States ex rel. Holder v. Special Devices, Inc.*, 296 F. Supp. 2d 1167, 1177 (C.D. Cal. 2003) (discussing materiality of compliance with environmental and labor regulations in government contract); *accord* Christopher M. McCrudden, Buying Social Justice: Equality, Government Procurement, and Legal Change 3, 20 (2007) (discussing how governments use purchasing power to achieve socioeconomic goals like affirmative action and fair wages); Klass, *supra* at 13 (describing "special needs" of government as contractual party).

For example, FCA liability is properly imposed even where the Government does not suffer pecuniary loss, but receives something other than (1) what it contracted for, or (2) what the claimant certified it provided. *See Varljen v. Cleveland Gear Co.*, 250 F.3d 426, 429-30 (6th Cir. 2001) ("[T]he failure to comply with government contract specifications can result in an FCA 'injury' to the government, even if the supplied product is as good as the specified product."); *Minn. Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2002) (holding that provision of substandard services did not bar or limit FCA liability because defendants knowingly billed the United States for services that did not comply with those contracted for).

By imposing liability whenever a claimant knowingly seeks payment for materially noncompliant goods or services, this Court best effectuates Congress' intent to eradicate fraud on the Government through the False Claims Act.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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