

1 as to our views on the legal theory. If we felt that we
2 would be made to seem skeptical of the implied
3 certification by not intervening, we'd feel pressured to
4 do it.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Eight minutes, Mr. Englert.

7 MR. ENGLERT: Thank you, Mr. Chief Justice.

8 REBUTTAL ARGUMENT OF ROY T. ENGLERT, JR.

9 ON BEHALF OF THE PETITIONER

10 MR. ENGLERT: The False Claims Act uses
11 words drawn from the common law of torts, not words
12 drawn from the common law of contracts. This is
13 Henry Steiner and Duncan Kennedy, not Charles Fried.

14 The test, as stated by my friends on the
15 other side, is the core test is whether the State could
16 reject the claim for reimbursement. That is a contract
17 standard; that is not a tort standard. And if this
18 Court accepts that version of the implied-certification
19 theory, it will be much broader than anything the lower
20 courts have ever done, and a parade of horrors in the
21 light green amicus briefs would cite many horrible
22 cases. Mr. Frederick says they cite none. They cite
23 many real-world horrible cases. That would be the tip
24 of the iceberg if this Court accepts their theory.

25 It has been suggested that everyone knows

1 that it's common sense and that it's obvious that people
2 who provide counseling services to teenagers must be
3 licensed. Well, apparently, the Commonwealth of
4 Massachusetts doesn't find it obvious. Section
5 429.424(E) (1), quoted on page 8 of our opening brief,
6 states the standards in which "counselors and unlicensed
7 staff may provide counseling services."

8 If it's so obvious, why did the First
9 Circuit have to rely on a regulation that applies only
10 to satellite facilities? When the First Circuit found a
11 regulation that no one had cited in all of this
12 litigation, it didn't cite one that applies to every
13 facility. It cited one that applies only to satellite
14 facilities. And yet, we're told it's so obvious that my
15 clients should have known that, and that there is
16 materiality and scienter in this case.

17 Volume II of the Joint Appendix contains
18 seven complaints to State agencies, four reports by
19 State agencies, two consent decrees, and four other
20 documents. They cite many, many, many, many
21 regulations. This morass of regulations, bluntly, is
22 worse than the Internal Revenue Code. It's full of
23 cross-references; it's full of contradictions, as the
24 First Circuit itself acknowledged in footnote 15.

25 The way the First Circuit resolved the

1 contradiction was to refer to the nonpromulgating
2 agency; so it's Chevron on steroids. These things are
3 not obvious. These regulations are not obvious.

4 Now, Mr. Frederick and Mr. Stewart, and in
5 particular Mr. Frederick, may seem to have scored a blow
6 when he put -- said fraudster shouldn't get to pick and
7 choose which regulations they comply.

8 Well, if you assume fraud, if you put the
9 rabbit in the hat, you can take the rabbit out of the
10 hat. People should pick and choose which regulations
11 they comply with. Why? Because there's so many and
12 confusing. And who holds the keys to telling them which
13 regulations to comply with? The regulating agency or
14 the contracting agency.

15 If the contracting agency or the regulating
16 agency says, please focus on this regulation because it
17 really matters, guess what? People will focus on the
18 regulation because they know it really matters. If
19 relators come in after the fact, not the Commonwealth of
20 Massachusetts, not the United States, but relators come
21 in after the fact and say, this was so critical that you
22 should have known and you acted -- it was material, it
23 was essential, and you acted with scienter, and they get
24 treble damages, attorney's fees, \$5500 or more, \$5500
25 minimum per claim civil penalties, and the opprobrium of

1 calling someone a fraudster, that's not the system in
2 which the regulators have control. That is not the
3 administrative state we know. That is a game of
4 got-you, after-the-fact got-you.

5 JUSTICE BREYER: How does it differ, what
6 you just said, from this thing in the Restatement where
7 you say it would be fraud, facts basic to the
8 transaction or matters known, that he knows to prevent
9 his statement from being misleading? The statement is,
10 implicitly, I did the work. And this kind of problem,
11 is it or is it not, basic to the transaction that the
12 doctor be certified, is the kind of thing that I think
13 you and other lawyers argue very well on opposite sides,
14 as you just did.

15 But the standard you advocate is, according
16 to the Restatement, misleading statement about a fact
17 basic to the transaction, misleading, implicitly, I did
18 it. Truth? I didn't. You see, I'm saying your
19 standard gives rise to the same problem, doesn't it?

20 MR. ENGLERT: No.

21 JUSTICE BREYER: Why?

22 MR. ENGLERT: Because the common law has
23 worked through these problems, Justice Breyer. The
24 common law of torts, not the common law of contracts.
25 Look at illustrations 3 through 8 of the -- of the

1 Restatement.

2 But if that doesn't do it for you, think
3 about the dog that didn't bark in the room. Look for
4 common-law fraud cases that state their theory. You
5 won't find them. You won't find them. They don't
6 exist. This is a theory made up by the plaintiffs' bar
7 in the last 22 years, and it has run amok.

8 There is a parade of horribles in the light
9 green amicus briefs. There is a parade of horribles in
10 the red -- in the dark green amicus briefs. Their
11 parade of horribles is that it would be A-OK to do these
12 things. It's not A-OK to do these things. There are
13 calibrated remedies administered by the government for
14 breach of contract, for violating regulations.

15 The Massachusetts authorities had calibrated
16 remedies in this case: Two years of suspension and a
17 \$1,000 fine. They didn't ask for any money back. They
18 didn't ask for any money back. They didn't say, this is
19 the kind of thing that is so basic that you should give
20 us our money back. They said, we need some corrective
21 measures. These are services for poor people. These
22 are --

23 JUSTICE SOTOMAYOR: Let's not forget
24 something. Money came from the Federal government. It
25 may be a system in this cooperative program that's

1 flawed, but Massachusetts Health has no incentive to
2 seek the money back because they're not paying it.

3 The people with the incentive are the
4 Federal government, and that's why we have the False
5 Claims Act, because the Federal government can't enforce
6 all seeking of money back in these cooperative programs.

7 MR. ENGLERT: Okay. But it has to be a
8 false or fraudulent claim, which are terms derived from
9 the common law, construed in this Court's cases,
10 elaborated through the common law --

11 JUSTICE SOTOMAYOR: I have a very hard time
12 accepting that if you provide -- if you claim money for
13 a service that you don't render, not a qualified
14 individual, unsupervised by a qualified individual,
15 which is a requirement specifically in the regulations,
16 I'm having a hard time understanding how you have not
17 committed a fraud --

18 MR. ENGLERT: Your Honor, all the --

19 JUSTICE SOTOMAYOR: -- if you knew what you
20 were doing.

21 MR. ENGLERT: All that was submitted was a
22 request for payment. The government controls what it
23 will require in a request for payment. There is no
24 allegation of a false statement in the request for
25 payment. The only allegation is that every jot and

1 tittle of every MassHealth regulation is incorporated as
2 long as it's approved --

3 JUSTICE SOTOMAYOR: I don't think that it's
4 every --

5 MR. ENGLERT: -- under scienter.

6 JUSTICE SOTOMAYOR: -- provision.

7 MR. ENGLERT: Well, Your Honor, it's --

8 JUSTICE SOTOMAYOR: But I think it's a very
9 basic provision --

10 MR. ENGLERT: Your Honor, with respect --

11 JUSTICE SOTOMAYOR: -- when you say, I
12 performed this service, that you performed a service in
13 accordance with the contract.

14 MR. ENGLERT: And in seven complaints to
15 administrative agencies, in the -- in the operative
16 complaint in this case, amended many times, why is not
17 the regulation the First Circuit relied on even cited?
18 Why is the regulation Mr. Frederick says he would have
19 used if he had been litigating this case in the district
20 court even cited?

21 It proves my point, Your Honor, that this is
22 a morass. And for one to think, after the fact, this is
23 basic and central and this is fraud, is a plaintiff's
24 lawyer's game.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 12:01 p.m., the case in the
4 above-entitled matter was submitted.)

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