Nos. 16-5149/16-5150/16-5151/16-5152/16-5153/
16-5154/16-5155/16-5156/16-5157/16-5158

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HAMILTON COUNTY EMERGENCY COMMUNICATIONS DISTRICT, et al.,
Plaintiffs-Appellants,

v.

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T TENNESSEE,
Defendant-Appellee.

On Appeal from the United States District Court
Eastern District of Tennessee, Chattanooga Division
Case No. 1:11-cv-00330 (*Lead Case*) (The Honorable Curtis L. Collier)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

JONATHAN G. CEDARBAUM
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
jonathan.cedarbaum@wilmerhale.com

BROOK HOPKINS
SAMEER AHMED
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

May 19, 2016

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Cir. R. 26.1, The Chamber of Commerce of the United States of America makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None.

Dated: May 19, 2016

/s/ Jonathan G. Cedarbaum
JONATHAN G. CEDARBAUM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

DOCKETED CASES

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.[1]

This case presents questions of exceptional importance to the Chamber's members. The first question is whether plaintiffs may use common law tort claims to enforce statutory requirements against a business when the statute itself does not confer a right of action. In this case, Plaintiffs-Appellants Emergency Communications Districts ("Districts") allege that Defendant-Appellee BellSouth has violated its obligations under the Tennessee 911 Law, Tenn. Code Ann. §§ 7-86-101 *et seq.*, yet the Districts concede that the statute does not expressly grant them a right of action to enforce the 911 Law against BellSouth. Instead, the

---

[1] In accordance with Federal Rule of Appellate Procedure 29(c)(5), amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

Districts contend their right to sue is either implied under the statute or derived from state common law torts. Implying a cause of action here, whether under the 911 Law or state common law, would be contrary to decades of state and federal jurisprudence and significantly harm businesses that do not reasonably expect to be sued under statutes with no express right of action. If the Court were to allow the Districts' statutory or common law claims to proceed, such an approach could expose any company that assists local governments pursuant to a state statute to costly and unanticipated litigation and create a serious disincentive for companies to conduct business with local governments. The Chamber urges this Court to affirm the district court's holding that the Districts' suit is not authorized under the 911 Law or state common law.

The second question is whether the Tennessee False Claims Act ("TFCA"), which mirrors the federal False Claims Act ("FCA"), imposes liability when the asserted false claim is based on a genuine disagreement over statutory interpretation. This issue is of critical importance to the many sectors of the nation's business community that provide goods and services to the federal government or state governments. Those relationships are governed by statutes, regulations, and contracts that inevitably contain ambiguous provisions that become the source of interpretative disagreements. Certain plaintiffs, like the Districts in this case, have attempted to use such interpretative disagreements as

the basis of FCA claims. Like the district court here, courts have universally held that where the truth of a defendant's statement turns on a reasonable interpretation of the source of the governing legal obligation, no false claims liability may arise. The Chamber urges this Court to affirm that holding and reserve FCA claims for actual fraud, not instances of genuine interpretative disagreement.

SUMMARY OF ARGUMENT

The district court correctly rejected the Districts' claims against BellSouth under the 911 Law, state common law, and the TFCA.

The district court properly declined to imply a right of action against BellSouth under the 911 Law where no express right exists. Courts may only rarely find an implied right of action where the legislature has chosen not to create one expressly, and the Districts offer no sound reason to do so here. An implied right of action against BellSouth would be particularly inappropriate because the text of the 911 Law demonstrates that the legislature knew how to create a right of action, but chose to create one only against telephone customers who fail to pay the required 911 charges, not against telephone companies. The district court was correct not to second-guess the legislature's decision.

The district court also correctly rejected the Districts' attempt to reframe their statutory claims as common law tort claims. Although the Districts only challenge the denial of their breach of fiduciary duty claim, all of their common

law claims represent an attempt to enforce the 911 Law's statutory requirements against BellSouth through alternative means. The 911 Law itself does not provide for a right of action against telephone companies, and the Districts should not be permitted to use the common law as an end run around the statute. To hold otherwise would upset the expectations of companies such as BellSouth that agree to provide important services on behalf of local governments pursuant to state statutes and would discourage those companies from taking part in beneficial public-private relationships.

The district court correctly held that the Districts could not establish false claims liability based solely on a reasonable disagreement over the meaning of the 911 Law. Federal courts have uniformly held that reasonable disagreements over the meaning of an ambiguous statute, regulation, or contract may not form the basis of an FCA claim, and the district court's analysis closely tracks those decisions. Contrary to the Districts' assertion, the district court did not apply a heightened standard or add an additional requirement of proof. Permitting the Districts' claims to go forward would contort the TFCA beyond recognition and harm businesses that provide valuable services to the public. False claims statutes are intended to address fraud; they should not be used to resolve technical disputes over ambiguous statutes, as the Districts attempt to do here. If such claims were permitted, businesses who work with governmental entities to provide goods and

services could face false claims liability—including treble damages—in spite of their good faith efforts to comply with the law.

ARGUMENT

I. THE COURT SHOULD NOT RECOGNIZE AN IMPLIED RIGHT OF ACTION UNDER TENNESSEE'S 911 LAW OR STATE COMMON LAW

A. This Court Should Not Imply A Right of Action Against Telephone Companies Under Tennessee's 911 Law

The parties agree that Tennessee's 911 Law does not expressly grant the Districts a right of action to enforce the statute against telephone companies such as BellSouth. *See* Appellants Br. 16; Appellee Br. 19. But the Districts argue that the Court should read an implied right of action into the statute so that they may enforce it against BellSouth. The Districts' argument fails because, as the district court correctly held, long-standing state and federal doctrine counsels against implying a right of action when no right exists under the statute.

The U.S. Supreme Court has repeatedly cautioned against judicial recognition of implied rights of action. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) ("[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit[.]"); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001) ("[W]e have retreated from our previous willingness to imply a cause of action where Congress has not provided one."); *Alexander v. Sandoval*, 532 U.S. 275, 286-287

(2001) ("[P]rivate rights of action to enforce federal law must be created by Congress," even if a right of action might be "desirable … as a policy matter" or "compatible with the statute.").[2] That is because "the Judiciary's recognition of an implied private right of action 'necessarily extends its authority to embrace a dispute [the legislature] has not assigned it to resolve.'" *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008).

State courts, including the Tennessee Supreme Court, have been equally reluctant to read a right of action into a statute that does not expressly provide one. *See, e.g.*, *Premium Fin. Corp. of Am. v. Crump Ins. Servs. of Memphis, Inc.*, 978 S.W.2d 91, 93 (Tenn. 1998) ("Where a right of action is dependent upon the provisions of a statute, our courts are not privileged to create such a right under the guise of liberal interpretation of the statute."); *Hogan v. McDaniel*, 319 S.W.2d 221, 223 (Tenn. 1958) ("Judicial legislation has long been regarded by the legal profession as unwise, if not dangerous business."); *Morrison v. City of Bolivar*, No. W2011-01874-COA-R9-CV, 2012 WL 2151480, at *5 (Tenn. Ct. App. June 14, 2012) ("The authority to create a private right of action pursuant to statute is the province of the legislature."); *see also Best Jewelry Mfg. Co. v. Reed Elsevier Inc.*,

[2] Although the 911 Law is a Tennessee statute, federal court decisions are instructive in this case because, "[t]o determine whether a state statute implies a private right of action, Tennessee courts have utilized the standard created by the United States Supreme Court for locating a private right of action in a federal statute." *Ergon, Inc. v. Amoco Oil Co.*, 966 F. Supp. 577, 583 (W.D. Tenn. 1997).

780 S.E.2d 689, 695-696 (Ga. Ct. App. 2015) ("'[I]t is well settled that violating statutes and regulations does not automatically give rise to a civil cause of action by an individual claiming to have been injured from a violation thereof. Rather, the statutory text must expressly provide a private cause of action.'" (internal citations omitted)).

Courts are especially reluctant to imply a right of action where the statute provides for an alternative remedy. "Where the 'liability is one created by statute, the special remedy provided by the same statute is exclusive.'" *United States v. Bormes*, 133 S. Ct. 12, 18 (2012); *see also Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) (it is an "elemental canon of statutory construction" that, when a statutory scheme "provides a particular remedy or remedies," a court should be "chary of reading others into it"); *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 860 (Tenn. 2010) (same). And a right of action should never be implied where, as here, the legislature explicitly created another right of action in the same statute. *See, e.g., Laborers' Local 265 Pension Fund v. iShares Trust*, 769 F.3d 399, 408 (6th Cir. 2014) (no implied right of action because "[t]he creation of an express private right of action in Section 36(b) [of the Investment Company Act] strongly implies the absence of such a right in Section 36(a)").

The 911 Law grants the Districts an express right of action against telephone customers who fail to pay the 911 service charge. *See* Tenn. Code Ann. § 7-86-

110(c) (Districts are "authorized to demand payment from any service user who fails to pay any proper service charge, and *may take legal action, if necessary, to collect the service charge from such service user*" (emphasis added)). The statute has no corresponding provision granting the Districts a right to sue telephone companies for failing to remit 911 service charges. Courts have consistently held that an implied right of action does not exist where the statute expressly provides for an alternative remedy. *See, e.g.*, *Gonzaga*, 536 U.S. at 289-290 (refusing to recognize "individually enforceable private rights" in light of other "mechanism[s] that Congress chose to provide for enforcing" the statutory obligations at issue); *Mik v. Federal Home Loan Mortg. Corp.*, 743 F.3d 149, 160 (6th Cir. 2014) (no implied right of action under statute because "'[t]he express provision of one method of enforcing a substantive rule suggests that [the legislature] intended to preclude others'" (quoting *Sandoval*, 532 U.S. at 290)); *Traverse Bay Area Intermediate Sch. Dist. v. Michigan Dep't of Educ.*, 615 F.3d 622, 629 (6th Cir. 2010) (holding that the Individuals with Disabilities Education Act did not provide an implied right of action in favor of local educational agencies where the statute expressly delegated enforcement authority to the Secretary of Education).

In defense of their approach, the Districts argue that recognition of a right of action here would be "consistent with the underlying purposes of the legislation." Appellants Br. 24. Even if that were so—which it is not—it would not suffice to

justify recognition of an implied right of action. The Supreme Court long ago "abandoned" the notion that courts should "'provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute." *Sandoval*, 532 U.S. at 287; *see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) ("Policy considerations cannot override our interpretation of the text and structure of [a statute.]"), *superseded by statute*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

In any event, recognition of a right of action here would not advance the statute's objectives. As the district court found, the Districts are not intended beneficiaries of the 911 Law; the intended beneficiary of the statute is the public, whose access to critical emergency services is the 911 Law's focus. MTD Opinion, R.38, PageID # 1004-1005; *see, e.g.*, Tenn. Code Ann. § 7-86-102(b)(1) ("[T]he continued viability of the lifesaving 911 emergency communications service is of the highest priority for the health and safety of the citizens of Tennessee."). Implying a right of action against BellSouth would actually undermine the statute's goal of establishing a uniform 911 number to ensure efficient provision of emergency services. District-by-district enforcement would result in piecemeal litigation and potentially conflicting interpretations of the 911 Law. When the Tennessee legislature amended the statute in 2014, it created a

statewide "emergency communications board" to avoid this piecemeal approach and instead ensure uniform enforcement. *See* Tenn. Code Ann. § 7-86-302(a) (2015) (creating the board); *id.* § 7-86-110(a) (2015) ("The board shall have the duty to ensure that dealers of retail communications service are in compliance for 911 surcharge collections and remittance."). Permitting the Districts to pursue independent litigation would disrupt the legislature's goal of facilitating uniform application of the 911 Law.

B. Common Law Claims Cannot Be Used To Enforce The 911 Law In The Absence Of A Statutory Right Of Action

The Districts also attempt to get around the lack of a right of action under the 911 Law by recasting their statutory claims as common law tort claims. Although the Districts only appeal the district court's rejection of their common law breach of fiduciary duty claim, they had also raised fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, negligence, and negligence *per se* claims in the district court. *See* Compl. ¶¶ 102-136, R.1, PageID # 23-30. In dozens of similar lawsuits across the country, governmental entities have also brought various common law tort claims against telephone companies in an attempt to enforce state 911 statutes. *See, e.g.*, Compl., *Cobb Cty. v. Peerless Network of Ga., LLC*, No. 1:16-CV-297-AT (N.D. Ga. Feb. 1, 2016), ECF No. 1-2.

These common law tort claims must fail because the common law cannot be used as a means of enforcing statutory requirements where no right of action exists. *See, e.g.*, *Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110, 118 (2011) (plaintiff county cannot use federal common law to enforce § 340B of the Public Health Services Act where no right of action exists); *MM&S Fin., Inc. v. National Ass'n of Sec. Dealers, Inc.*, 364 F.3d 908, 912 (8th Cir. 2004) ("Any attempt by MM&S to bypass the [statute] by asserting a [common law] claim for violations of [the statute] is fruitless."); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) ("Since in this case, ... no private right of action exists under the relevant statute, the plaintiffs['] efforts to bring their claims as state common-law claims are clearly an impermissible 'end run' around the [statute]."); *Fossen v. Caring for Montanans, Inc.*, 993 F. Supp. 2d 1254, 1265-1266 (D. Mont. 2014), *aff'd*, 617 F. App'x 737 (9th Cir. 2015) (dismissing plaintiffs' common law claim as "merely another backdoor method of presenting an alleged violation of a statute that they have no right to enforce"); *Martinez v. Capital One, N.A.*, 863 F. Supp. 2d 256, 268 (S.D.N.Y. 2012), *aff'd sub nom. Cruz v. TD Bank, N.A.*, 742 F.3d 520 (2d Cir. 2013) (dismissing common law claim where "plaintiff possesses no private right of action under a statute, and alleges no wrongs independent of the requirements of that statute"); *Schlessigner v. Valspar Corp.*, 817 F. Supp. 2d 100, 108 (E.D.N.Y. 2011), *aff'd*, 723 F.3d 396 (2d Cir. 2013) ("Where a common law claim would not

lie but for the existence of a cited requirement in the [statute], such a claim may not proceed."); *Jim Mazz Auto, Inc. v. Progressive Cas. Ins. Co.*, No. 08-CV-00494, 2009 WL 891837, at *9 (W.D.N.Y. Feb. 5, 2009) ("If the statute does not permit a private right of action in favor of an insured, a fortiori, it cannot be construed to impose a [common law] tort duty of care flowing to the insured[.]"); *In re Series 7 Broker Qualification Exam Scoring Litigation*, 510 F. Supp. 2d 35, 48 (D.D.C. 2007), *aff'd*, 548 F.3d 110 (D.C. Cir. 2008) (dismissing state common law claims where "the crux of all of [the] claims is that [defendant] breached its duty, which exists solely by virtue of the [statute]"); *U.S. Bank, N.A. v. Phillips*, 734 S.E.2d 799, 803 (Ga. Ct. App. 2012) ("Since [plaintiff] did not have a private right of action [under the statute], his [common law] claim should have been dismissed.").

This rule rests on the common-sense proposition that a claim by a plaintiff seeking to enforce a statutory requirement using common law claims is simply an implied right of action by another name. And a right of action can be implied—if ever—only from interpreting the statute itself, not from the common law. *See, e.g.*, *Sandoval*, 532 U.S. at 286 (noting that a right of action to enforce a statutory requirement must be derived by "interpret[ing] the statute Congress has passed"); *Brown*, 328 S.W.3d at 856.

The Districts acknowledge that their common law breach of fiduciary duty claim is simply another attempt to enforce the 911 Law against BellSouth. *See, e.g.*, Appellants Br. 29 ("BellSouth owed the Districts a fiduciary duty to accurately bill, collect, and remit all 911 Charges to the Districts *as required by the 911 Law*." (emphasis added)). The district court properly rejected that claim, recognizing that, while it "may be within the power of the state legislature" to "establish a strict-liability cause of action" against telephone companies who collect 911 charges, no common-law fiduciary relationship exists between the Districts and the telephone companies. SJ Opinion, R.326, PageID # 20811. Similarly, when granting BellSouth's motion to dismiss the Districts' negligence claim, the district court recognized that there is no common-law duty to bill, collect, or remit 911 taxes. *See* MTD Opinion, R.38, PageID # 1015-1016. Accordingly, to allow a common law claim here would permit the Districts to evade the legislature's decision not to create a right of action in the 911 Law. This Court should affirm the district court's refusal to permit the Districts to make an end run around the statute in this way.

In *Astra*, the U.S. Supreme Court unanimously rejected a similar attempt by a plaintiff county to bring suit under the guise of federal common law in order to enforce a federal statutory requirement. *See* 563 U.S. at 118. Santa Clara County admitted that it had no express right of action under § 340B of the Public Health

Services Act. *See id.* at 113. The county argued, however, that it had a right to enforce the statute's requirements against drug manufacturers because, under federal common law, the county was a third-party beneficiary of a contract between drug manufacturers and the federal government that included the statutory obligations. *See id.* at 118. The Court rejected the county's argument, holding that "[t]he absence of a private right to enforce the statutory [requirements] would be rendered meaningless if [the county] could overcome that obstacle by suing to enforce the contract's … obligations instead." *Id.* In other words, the common law cannot confer a right of action where a statute does not.

To allow the Districts to use state common law tort claims to circumvent the 911 Law would be particularly unjustifiable because the Law already expressly provides an alternative mechanism for its enforcement. The Tennessee legislature chose to provide the Districts with a right of action against telephone customers, not telephone companies. *See* Tenn. Code Ann. § 7-86-110(c). This Court should not sanction creation of a common law right of action when the statute expressly provides for an alternative remedy. *See, e.g.*, *Bormes*, 133 S. Ct. at 18 (a "'precisely drawn, detailed statute pre-empts more general remedies'"); *Hathaway v. First Family Fin. Servs., Inc.*, 1 S.W.3d 634, 641 (Tenn. 1999) ("'[I]f a statute creates a new right and prescribes a remedy for its enforcement, then the prescribed remedy is exclusive.'"). As the Supreme Court has recognized,

disrupting carefully calibrated statutory schemes such as the 911 Law would raise serious separation-of-powers concerns. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.").

C. Implying A Right Of Action Would Have Significant Negative Consequences For American Companies

Permitting private plaintiffs to bring suit to enforce statutory requirements through an implied right of action or under the common law would have harmful consequences for the thousands of American companies that do business with state and local agencies. If adopted by this Court, the Districts' approach threatens not only to impose substantial costs on those companies, but also to harm the interests of millions of Americans who benefit from public-private relationships of the type at issue here. For these reasons, too, the Districts' arguments should be rejected.

Courts have long warned of the baleful consequences of expanding private enforcement of statutes through judicial fiat. When a statute does not expressly confer a right of action, the judicial recognition of such a right disrupts the expectations of would-be defendants, who are suddenly forced to grapple with "extensive discovery," "the potential for uncertainty and disruption," and other litigation-related burdens that substantially raise the "costs of doing business."

Stoneridge, 552 U.S. at 163-164. In many cases, these burdens will be sufficiently onerous as to "allow plaintiffs with weak claims to extort settlements from innocent [defendants]." *Id.* at 163; *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (referring to litigation tactics that "'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value'"). When the defendant is a business, moreover, the costs of defending against such litigation will be either absorbed (and thus borne by investors and employees) or passed on to consumers. *See Central Bank*, 511 U.S. at 189.

This case amply demonstrates the dangers of permitting plaintiffs to use the common law to enforce statutes containing no right of action. Although the district court granted BellSouth's motion to dismiss the Districts' statutory claims, it permitted their common-law and False Claims Act claims to proceed until summary judgment. In the ensuing 18 months, the parties conducted 52 depositions and produced over 300,000 pages of documents, along with hundreds of gigabytes of data. *See* Appellee Br. 9. This litigation progressed despite the fact that BellSouth never contemplated that the Districts would be able to sue to enforce BellSouth's statutory obligation of transmitting telephone customers' 911 charge payments to the Districts. The Districts' approach thus upended BellSouth's reasonable expectations and disrupted the carefully calibrated

framework that the Tennessee legislature established for the administration and enforcement of the 911 Law.

The harmful consequences of recognizing a cause of action in the circumstances presented here reach beyond the immediate context of this case. This lawsuit is one of dozens filed by or on behalf of local government entities across the United States accusing telephone companies of failing to bill, collect, report, and remit the proper amount of 911 charges from their customers. In virtually all of these cases, the telephone companies never expected to be sued because the governing statutes never provided for a right of action against them.

Beyond the 911 context, local governments frequently turn to private companies to provide necessary goods and services in a cost-effective, high-quality, and reliable manner. Private companies, for example, manage public schools, run prisons, oversee welfare programs, provide drug-abuse counseling, and offer employment training. *See generally* Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 Harv. L. Rev. 1229, 1231-1232, 1267 (2003). A rule that would permit plaintiffs to bring suit under the common law to enforce statutory obligations could apply whenever a statute requires a private company to assist local governments in performing an important task on behalf of the public. The practical effect of such an approach would be to expose any company that assists local governments pursuant to a statute to costly

and unanticipated litigation. This would create a serious disincentive for companies to engage in business with local governments in the first place, to the detriment of municipalities and their residents.

Permitting this litigation to go forward would disrupt the public-private relationships that have long contributed to the well-being of the country and its citizens. To be sure, it is well-established that private entities that do business with local governments may not act with impunity. But it is up to the political branches to decide what enforcement mechanisms to provide and who may invoke them. It is not the role of the judiciary to substitute its judgment for that of the political branches and to create a common law right of action that does not exist as a matter of statute. This Court should reject the Districts' arguments to the contrary.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE TFCA CLAIMS

The Districts attempt to bring the full force of the TFCA to bear in what amounts to a dispute over an ambiguous provision in the 911 Law. Such claims are not cognizable under false claims statutes, which are designed to address fraud, not differences of opinion regarding the meaning of ambiguous legal obligations. Courts nationwide have uniformly held that when an FCA claim rests on an alleged violation of an ambiguous provision, such ambiguity precludes a finding that the defendant knowingly submitted a false claim. Courts regularly grant summary judgment for defendants, and even dismissal under Federal Rule of Civil Procedure

12(b)(6), on that ground. The district court's holding is consistent with that great weight of authority and should be affirmed.

A. The District Court Applied The Correct Legal Standard To The Districts' TFCA Claims

The TFCA provision at issue in this case is nearly identical to the corresponding one in the federal FCA. It imposes liability when a defendant "[k]nowingly makes, uses, or causes to be made or used a false record or statement." Tenn. Code Ann. § 4-18-103(a)(7). Like the federal FCA, the TFCA defines "knowingly" as actual knowledge, deliberate ignorance, or reckless disregard for the truth. *Id*. § 4-18-102(2). Both parties acknowledge, as they must, that federal court interpretations of the FCA are relevant to the construction of the TFCA. *See* Appellants Br. 31 n.17; Appellee Br. 35 n.17; *State ex rel. Landenberger v. Project Return, Inc.*, No. M200702859COAR3CV, 2009 WL 637122, at *4 (Tenn. Ct. App. Mar. 11, 2009).

The federal courts of appeals have uniformly held that "the FCA does not reach an innocent, good-faith mistake about the meaning of an applicable rule or regulation. Nor does it reach those claims made based on reasonable but erroneous interpretations of a defendant's legal obligations." *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287-288 (D.C. Cir. 2015); *see United States ex rel. Ketroser v. Mayo Found.*, 729 F.3d 825, 831-832 (8th Cir. 2013) (defendant's "reasonable interpretation of any ambiguity inherent in the regulations belies the

scienter necessary to establish a claim of fraud under the FCA"); *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376-377 (4th Cir. 2008) ("the question of whether [defendant] performed sufficient maintenance under the contract represents, at the very least, 'a disputed legal question' about … [one's] contractual duties," which is "precisely the sort of claim that courts have determined not to be a false statement under the FCA"); *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 445 (3d Cir. 2004) ("[I]n light of the absence of a clear obligation to credit Medicaid and the absence of any Medicaid or other regulation requiring provider pharmacies to credit at a specific rate, we cannot impose FCA liability on [defendant]."); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[D]ifferences in interpretation growing out of a disputed legal question are … not false under the FCA."); *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1478-1479 (9th Cir. 1996) (questions of "[h]ow precise and how current ... cost allocation[s] needed to be in light of the [governing] statute's imprecise and discretionary language" constitute "only a disputed legal issue," which does not establish FCA liability).

Many district courts have held the same. *See, e.g., United States ex rel. Grupp v. DHL Exp. (USA), Inc.*, 47 F. Supp. 3d 171, 178-179 (W.D.N.Y. 2014) (disputed interpretation of "ambiguous contract language" insufficient to establish that defendant "knowingly" submitted false claims), *aff'd*, 604 F. App'x 40 (2d Cir.

2015); *United States ex rel. Colucci v. Beth Israel Med. Ctr.*, 785 F. Supp. 2d 303, 316 (S.D.N.Y. 2011), *aff'd sub nom. Colucci v. Beth Israel Med. Ctr.*, 531 F. App'x 118 (2d Cir. 2013) (dismissing FCA claim where "defendants' interpretation of the Medicare regulations was not unreasonable" and "given the lack of clarity in the law, it cannot be said that the defendants 'knew' the claims were false").

The Districts do not (and cannot) point to any decisions permitting FCA liability. Instead, they take issue with the legal standard that the district court applied. All of their arguments lack merit.

First, the Districts claim that the district court "engrafted a new … extremely heightened standard" onto the TFCA because it required proof "that BellSouth acted in bad faith." Appellants Br. 30-32. As a threshold matter, the district court did not require the Districts to separately establish that BellSouth acted in bad faith. Instead, the court's articulation of the standard merely notes that, when a defendant's interpretation is sufficiently unreasonable, it gives rise to the inference that the interpretation was made in bad faith. *See* SJ Opinion, R.326, PageID # 20825 ("The Districts' evidence must at least show that BellSouth's reading is so unreasonable that the arguments could not have been made in good faith and thus no 'legitimate grounds for disagreement' existed."). The district court's analysis bears this out. As to each disputed interpretation, the court examined whether BellSouth's interpretation was reasonable; it did not undertake a separate analysis

of whether the interpretation was held in bad faith. *See id*. at 20826 ("In light of the ambiguities identified above, such an interpretation was not unreasonable."); *id*. at 20827 ("[I]t is clear that BellSouth's interpretation is not so unreasonable as to give rise to an inference of bad faith."); *id*. at 20830 ("The above undisputed facts tell a familiar story of an interpretive dispute and simply do not show that BellSouth acted unreasonably or in bad faith."); *id*. at 20831 ("Siding with the Comptroller General of the United States in a dispute regarding the taxation of federal entities may not *always* be correct, but at least in this context, it cannot be said to be in bad faith or illegitimate.").

In any event, there is nothing new or unusual about incorporating the notion of bad faith into the FCA's scienter requirement. As the Seventh Circuit reasoned in *Lamers*, "the FCA should not be hauled out in an effort to punish" the defendant, when "the fact of the matter is that the [defendant] did not act in bad faith." 168 F.3d at 1020; *see also United States v. Southland Mgmt. Corp*., 326 F.3d 669, 684 (5th Cir. 2003) (Jones, J. specially concurring) ("Where there are legitimate grounds for disagreement over the scope of a … regulatory provision, and the claimant's actions are in *good faith*, the claimant cannot be said to have knowingly presented a false claim." (emphasis added)).[3] Indeed, the very decision the Districts put forward

[3] *Purcell* is not to the contrary. There the court held that evidence that defendant held an asserted *reasonable* interpretation in bad faith was insufficient to establish knowledge under the FCA. *Purcell*, 807 F.3d at 290. It did not address

(at 31) as articulating the correct standard—whether "the defendant's interpretation of a regulation … is unreasonable"—contains an extended discussion finding that the defendants did not hold a good faith belief in their asserted interpretation of the Medicare regulations governing the dispute. *See United States ex rel. Augustine v. Century Health Servs., Inc.*, 136 F. Supp. 2d 876, 892-894 (M.D. Tenn. 2000) (holding that based on their actions, "Defendants could not reasonably believe" their asserted interpretation, that they could not "assert good faith reliance on expert advice," that they made "misrepresent[ations]" to their auditor, that it was "questionable" whether they ever intended to take certain actions consistent with their asserted interpretation, and that they "cover[ed] up" certain conduct).

Next, the Districts contend that the district court erred when it analyzed the issue of falsity together with the issue of knowledge. But, as the Seventh Circuit has noted, "it is impossible to meaningfully discuss falsity without implicating the knowledge requirement." *Lamers*, 168 F.3d at 1018; *see also Augustine*, 136 F. Supp. 2d at 889 ("[T]he issues of scienter and falsity in an FCA action are closely related."). That is because falsity alone without the requisite scienter is not sufficient to give rise to FCA liability. Thus, there is no need to separately determine the truth or falsity of the records at issue if, as here, the requisite knowledge cannot be established.

---

the district court's holding here that an *unreasonable* interpretation gives rise to an inference of bad faith, which in turn indicates fraudulent conduct.

Finally, the Districts suggest that resolution of this issue is inappropriate for summary judgment. To the contrary, many courts have granted summary judgment to false claims defendants on the ground that disagreement over ambiguous statues, regulations, or contract terms does not give rise to FCA liability. *See, e.g.*, *United States Dep't of Transp. ex rel. Arnold v. CMC Eng'g*, 567 F. App'x 166, 171 (3d Cir. 2014) (affirming summary judgment for defendant when FCA claims were based on ambiguous contract provisions); *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 446-447 (3d Cir. 2004) (affirming summary judgment for failure to show knowing falsity with respect to ambiguous regulation); *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000) (affirming summary judgment when alleged knowledge of falsity was based on uncertain legal argumentation); *Lamers*, 168 F.3d at 1020 (affirming summary judgment for failure to show the knowing falsity element). Indeed, courts regularly dismiss FCA cases on this ground even at the Rule 12(b)(6) stage. *See, e.g.*, *Wilson*, 525 F.3d at 378 (affirming Rule 12(b)(6) dismissal for failure to plead falsity); *Colucci*, 785 F. Supp. 2d at 316 (granting dismissal for failure to plead scienter); *Grupp*, 47 F. Supp. 3d at 178-179 (same); *United States ex rel. Streck v. Allergan, Inc.*, 894 F. Supp. 2d 584, 596 (E.D. Pa. 2012) (same).

None of the decisions the Districts cite undermines the district court's analysis or conclusion. The Districts cite (at 40-41) *United States ex rel. Williams*

v. Renal Care Group, Inc., 696 F.3d 518, 530 (6th Cir. 2012), for the proposition that a defendant may be liable for acting in "reckless disregard" of the truth, without explaining how the "reckless disregard" standard pertains to this case. If anything, *Williams* supports the district court's analysis here because it emphasizes that the reckless disregard prong imposes only "'a *limited duty to inquire as opposed to a burdensome obligation*.'" *Id*. (quoting S. Rep. No. 99-345, at 21 (1986), 1986 U.S.C.C.A.N. 5366, 5285). The Court in *Williams* held that the defendants did not act in reckless disregard of "ambiguous regulations," because they "sought clarification," "followed industry practice," and "were forthright with government officials." *Id*. The district court below held BellSouth to no lower bar, and the Districts make no argument as to why *Williams* compels reversal here.

The Districts also cite *Minnesota Association of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1053 (8th Cir. 2002), for the proposition that "[w]here authoritative interpretations existed," BellSouth "could not assert that the [911] Law was ambiguous." Appellants Br. 32. The only interpretations that the District identifies as "authoritative" are a policy statement issued by the Tennessee Emergency Communications Board and an opinion by the Tennessee Attorney General pertaining to multiplex lines. *Id*. at 52-53. But neither of those interpretations of the 911 Law is binding. *See* SJ Opinion, R.326, PageID # 20830; Appellee Br. 44-45. By contrast, the interpretative disagreement in *Minnesota*

Association of Nurse Anesthetists involved an agency's interpretation of its *own regulations*. 276 F.3d at 1053. An agency's interpretation of its own regulations carries far more weight than the nonbinding interpretations of the statute at issue here. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency interpretation of its "own regulations" is "controlling 'unless plainly erroneous or inconsistent with the regulation'").

B. The District Court's Approach Protects The Good Faith Efforts Of Businesses To Comply With Ambiguous Statutes, Regulations, And Contractual Terms

As this case and the decisions cited above demonstrate, businesses that provide crucial services to local, state, and federal governments frequently must determine their obligations based on ambiguous contracts, statutes, and regulations. Businesses use a variety of methods to faithfully interpret these ambiguous provisions, including seeking the advice of counsel, relying on standard industry practice, and maintaining open communication with governmental partners. Nevertheless, there are inevitably disagreements over the scope and content of those legal obligations. *See, e.g.*, *Siewick*, 214 F.3d at 1378 ("Disputes arise between the government and its contractors every day.").

The Districts seek to use the TFCA to resolve such disagreements with telephone companies like BellSouth and, in doing so, to transform the TFCA from a tool for addressing fraud to an arbiter of technical disputes over ambiguous legal

provisions contained in the 911 Law. Not only would such a transformation undermine the purpose of false claims statutes—"[t]he FCA is a fraud prevention statute," *Lamers*, 168 F.3d at 1020—but it would also expose businesses that provide services to the government to *treble damages* for genuinely held but mistaken interpretations of their legal obligations. As this Court recently held, "the 'blunt[ness]' of the FCA's hefty fines and penalties makes them an inappropriate tool for ensuring compliance with technical and local program requirements[.]" *United States ex rel. Hobbs v. MedQuest Assocs., Inc.*, 711 F.3d 707, 717 (6th Cir. 2013); *see Lamers*, 168 F.3d at 1020 (FCA "not an appropriate vehicle for policing technical compliance with administrative regulations"). Doing so would create potential "due process problems posed by 'penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.'" *Purcell*, 807 F.3d at 287 (quoting *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)).

This Court and others have sensibly refused to extend FCA liability that far. As this Court explained in *Williams*, the "reckless disregard" prong is targeted at those who "bur[y] [their] head[s] in the sand"; it is not intended to impose a "burdensome obligation" on businesses that have good faith disagreements with government entities regarding their statutory, regulatory, or contractual duties. 696 F.3d at 530. Consistent with that interpretation, in *United States ex rel. Estate of*

Donegan v. Anesthesia Associates of Kansas City, the court rejected the federal government's attempt to impose an obligation on businesses that contract with the government to perform crucial services to "verify that their interpretation of a regulation is correct before submitting claims for payment." No. 4:12-CV-0876, 2015 WL 3616640, at *9-10 (W.D. Mo. June 9, 2015). This Court should continue this sound approach and affirm the district court's holding that no FCA liability may attach when the truth of defendants' statements rely on a reasonable interpretation of the relevant legal obligations.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's entry of judgment in favor of BellSouth.

Respectfully submitted,

/s/ Jonathan G. Cedarbaum

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

JONATHAN G. CEDARBAUM
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
jonathan.cedarbaum@wilmerhale.com

BROOK HOPKINS
SAMEER AHMED
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

Dated: May 19, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft Word 2010.

2. Excluding the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B) and Sixth Circuit Rule 32(b)(1), the brief contains 6,763 words. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of Microsoft Word 2010 in preparing this certificate.

/s/ Jonathan G. Cedarbaum
JONATHAN G. CEDARBAUM

Dated: May 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2016, I electronically filed the foregoing Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendant-Appellee and Affirmance with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case will be served by the appellate CM/ECF system.

/s/ Jonathan G. Cedarbaum
JONATHAN G. CEDARBAUM