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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, THE PROFESSIONAL SERVICES COUNCIL, AND THE INTERNATIONAL STABILITY OPERATIONS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "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 industry, 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. The Chamber thus regularly files *amicus curiae* briefs in cases raising issues of vital concern to the Nation's business community, including cases involving the False Claims Act.

The National Defense Industrial Association, a non-profit, non-partisan organization, has a membership consisting of nearly 90,000 individuals and more than 1,600 companies, including some of the Nation's largest defense contractors.

The Professional Services Council ("PSC") is the voice of the government professional and technology services industry. PSC's more than 380 member companies represent small, medium, and large businesses that provide federal departments and agencies with a wide range of services, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, and environ-

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, and their counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

mental services. Together, the association's members employ hundreds of thousands of Americans in all 50 states. The federal government relies on PSC's members for many types of essential services. Among other things, PSC member companies directly support the U.S. government through contracts with the Department of Defense and other federal agencies, both domestically and in deployed war-zone environments.

The International Stability Operations Association ("ISOA") is a global partnership of private sector and non-governmental organizations providing critical services in fragile and complex environments worldwide. With over 55 member companies, and 200,000 implementers around the globe, the ISOA works to build, serve, and represent its member organizations by providing diverse member services, publications, and events. Through communication and engagement, ISOA also builds partnerships across sectors to enhance the effectiveness of stability, peace, and development efforts across the globe. Many of ISOA's members have provided, and continue to provide, services under contract to the U.S. government around the globe.

Amici have a strong interest in the questions presented in this case, which are fundamental to the scope of liability under the False Claims Act ("FCA"). *Amici*'s members, many of which are subject to complex and detailed regulatory schemes, have successfully defended scores of FCA cases arising out of government contracts, grants, and program participation in a variety of courts nationwide, including the First Circuit. With increasing frequency in recent years, private relators (only infrequently joined by the government itself) have invoked an "implied certifica-

tion" theory in an attempt to transform minor alleged deviations from obscure or complex contractual terms or background regulations into an FCA violation, triggering that statute's "essentially punitive" regime of treble damages and penalties, *Vermont Agency of Nat. Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 784-785 (2000). That theory improperly elevates what are at *most* breach-of-contract claims (properly raised by the government through any of its numerous other available remedies) into FCA liability (subject to treble damages and suit by legions of private relators).

Allowing FCA liability for implied-certification claims has had far-reaching consequences for *amici*'s membership: not only healthcare providers like petitioner, but also the myriad businesses, non-profit organizations, and even municipalities that perform work for the federal government, or receive funds through a vast range of federal programs, from defense contracting, Medicare, school lunches, and disaster relief services, to software licensing, cigarette manufacturing, crude oil purchasing, student loans, and residential mortgage issuance. The panel's nebulous and expansive standard threatens the *in terrorem* effect of quasi-criminal FCA liability, based on little more than an alleged breach of a contractual term or background regulation—even where the defendant never made any express certification of compliance with those provisions, and the contract and background rules contain no express indication that the requirement was a condition of payment.

SUMMARY OF ARGUMENT

This Court should reject the implied-false-certification theory of FCA liability, not only because

it lacks any basis in the Act's statutory text, structure, or purpose, but also because of its unworkable practical consequences for government contractors, grantees, and program participants operating in countless segments of the U.S. economy.

The panel's expansive implied-false-certification theory invites private plaintiff "relators" to plead claims based on perceived violations of environmental regulations, antidiscrimination statutes, obscure and technical industry standards, procurement manuals, and more—contractual terms and rules that, before the FCA lawsuit, neither the government nor any potential defendant would have viewed as a condition of payment. Cases from jurisdictions that currently allow implied-certification claims demonstrate that relators rely on that theory to allege violations of even ambiguous requirements whose meaning is difficult or impossible to determine *ex ante*, and other provisions in ways that misunderstand and interfere with the normal procedures by which the government administers its contracts.

The implied-certification theory transforms issues properly addressed by the United States itself through administrative or breach-of-contract remedies into punitive FCA liability that can be pursued by legions of bounty-hunting relators. The other remedies available to the United States range from practical steps, such as the adjustment or rejection of an invoice, to administrative remedies such as offsets, corrective action procedures, penalties, or debarment, to common-law claims for breach of contract. Those remedies offer procedures and standards of liability and damages more appropriately tailored to contrac-

tual or regulatory performance than the blunt instrument of FCA treble-damages liability.

The implied-false-certification theory also forces FCA defendants to litigate, at great cost, alleged contractual or regulatory violations that the government itself may have chosen to ignore or waive for good reasons, such as the press of time, exigencies of war, or emergency disaster relief. The theory also invites abuse, by making it far easier for self-interested relators to survive a motion to dismiss. It is often easy for relators to allege a violation of a contractual or regulatory provision; unless the doctrine is limited to express certifications of compliance (or, *at most*, provisions explicitly identified as conditions of payment), the falsity inquiry is unlikely to be resolved on the pleadings. Courts have decried "abuse" of the theory in specific cases, even while finding no alternative to denying a motion to dismiss.

The implied-false-certification theory also deprives defendants of fair notice of what actions might lead to punitive FCA liability, raising serious due process concerns. Absent a requirement that the claim itself be "factually" false (*e.g.*, by misrepresenting the goods or services provided or through a false express certification of compliance), it is difficult, if not impossible, to determine beforehand what provisions may later, with the benefit of hindsight, be deemed a condition of the government's decision to pay. If the theory survives at all, it must be cabined to non-compliance with express conditions of payment to avoid triggering FCA liability by virtually any non-compliance with regulatory or contractual requirements.

The panel's expansive implied-false-certification theory, combined with some courts' approach to the pleading requirements of Federal Rule of Civil Procedure 9(b), may allow relators to survive a motion to dismiss simply by alleging that a defendant violated some contract term, statute, or regulation, and further alleging that the provision was material—whether or not it was designated as a condition of payment. Because some courts view materiality permissively as turning on questions of fact, and because Rule 9(b) states that "knowledge * * * may be alleged generally," defendants may be forced to litigate FCA cases to summary judgment or even trial, incurring significant legal and discovery costs, and subjecting themselves to unpredictable, fact-intensive hindsight judgments about whether a particular provision was material.

This Court's adoption of the implied-false-certification theory would increase the costs of virtually all federal programs and services, given the government's pervasive reliance on contractors to provide goods and services—from national defense, healthcare, and medical manufacturing, to software development, waste disposal, telecommunications, mortgage lending, disaster relief, and consulting services. The theory's inherent uncertainty may lead responsible companies to charge higher prices to compensate for the increased costs and risks posed of far-reaching and potentially catastrophic FCA liability, or even decline to bid on contracts. The skyrocketing number of *qui tam* suits in recent years, combined with the low recoveries historically associated with cases in which the government declines to inter-

vene, provide further reason to reject this dramatic expansion of FCA liability.

ARGUMENT

This Court should reject the panel's dangerous and sweeping theory of "implied-false-certification" liability under the False Claims Act, which distorts beyond recognition the statutory text, purpose, and function, and has unfair and unsustainable consequences for government contractors, grant recipients, and program participants. When a contractor, grantee, or participant submits a bill for payment that accurately describes the goods or services provided, and where other representations on the face of the bill are truthful, there is nothing "false" or "fraudulent" about the claim within the ordinary meaning of those terms. This common-sense conclusion disposes of the case.

If this Court were to entertain some version of implied-false-certification liability, it should be limited to alleged violations of contractual or regulatory provisions that are expressly identified, in advance, as conditions of payment. That approach avoids at least some of the doctrine's most perverse and unworkable practical effects. *Amici* endorse petitioner's textual and doctrinal arguments, but focus here on the serious negative consequences for many sectors of the U.S. economy if this Court were to allow implied-false-certification liability under the FCA.

I. The Implied-False-Certification Theory Profoundly Increases Risk And Uncertainty For Government Contractors, Grantees, And Program Participants

A. The Theory Threatens Punitive FCA Liability For Violations Of Obscure Or Unclear Contract Terms Or Rules

The panel's sweeping theory of implied-false-certification liability improperly suspends the sword of punitive FCA treble damages and penalties over federal contractors, grantees, and program participants. Such punitive liability is implicated whenever a self-interested private relator alleges non- (or even partial) compliance with any one of hundreds of contractual or regulatory requirements that may apply in a given case, regardless of whether the parties viewed that provision as a condition of payment. Unless potential FCA defendants can ensure perfect compliance with every requirement conceivably relevant to participation in a federal program—a difficult and often unattainable feat, given the sheer number of rules and regulations governing many complex federal programs—they risk FCA liability every time they submit a claim for payment.

Jurisdictions that have upheld implied-certification liability provide ready examples highlighting the impossible position in which this theory puts government contractors, grantees, and program participants.

To begin with, the theory invites relators to allege "false certification" of compliance with obscure or ambiguous contractual or regulatory requirements, even if—as is commonly the case—they are incorpo-

rated only by reference. Indeed, in this case, the court of appeals condoned imposing treble damages based on a MassHealth regulation sufficiently obscure and unclear that neither the relator, nor the district court, nor even the Commonwealth of Massachusetts as *amicus curiae* had ever suggested it might give rise to fraud liability. Pet. Br. 17.

Other examples abound. The recent Seventh Circuit decision rejecting the implied-certification theory involved an educational institution receiving federal subsidies. See *United States* v. *Sanford-Brown, Ltd.*, 788 F.3d 696, 701 (7th Cir. 2015). The agreement that established up-front conditions of program participation "incorporate[d] by reference thousands of pages of other federal laws and regulations." *Id.* at 707. A *qui tam* relator later alleged violations of several obscure provisions of only indirect relevance to the program as a whole, involving student recruitment practices. None of those regulations expressly stated that they were conditions of payment, and the defendant had never been asked to expressly certify compliance with them to obtain federal funds. Yet under the First Circuit's test here, the relator in *Sanford-Brown* likely would have pleaded a sufficient claim to survive a motion to dismiss.

The implied-certification theory opens the door to liability for implicit certifications of "compliance" with even ambiguous rules whose meaning is difficult or impossible to know in advance. In *U.S. ex rel. Tran* v. *Computer Sci. Corp.*, for instance, the defendant contractor was hired to provide information technology services to a federal agency. See 53 F. Supp. 3d 104 (D.D.C. 2014). In its contract, the defendant simply "promised to make *a good faith ef-*

fort to subcontract a certain percentage of the IT work to be performed under the contract to qualified small businesses." *Id.* at 109 (emphasis added). Interpreting this provision required the contractor to follow a chain of interrelated statutes and regulations. The defendant concluded it could make a "good faith effort" by contracting directly with qualified small businesses, even if those businesses further subcontracted work to some larger, more reliable firms. *Id.* at 119. After the fact, relators argued that this approach was impermissible, and that the defendant's submission of claims for payment constituted an implied certification of compliance with the "good faith" goal. *Id.* at 121. The relator did not allege that the small business provision affected the quality or value of services provided to the government. Nonetheless, the complaint alleged that *every single invoice* the contractor submitted for those services was false. *Id.* at 122.

Despite the ambiguous nature of the contractual obligation, the district court held that the defendant's interpretation required "too many leaps," reasoning that one of the regulations in the chain was a "*general* contracting provision," not a "small business requiremen[t]." *Id.* at 119-121 (emphasis in original). The court declined to dismiss, concluding that the act of submitting a claim for payment implicitly certified compliance with the small-business provision—effectively imposing strict liability on the contractor based on the court's after-the-fact reading of a confusing set of background statutes and regulations. Shortly thereafter, the defendant apparently settled for an undisclosed amount.

For defense contractors in particular, the implied-certification theory requires essentially perfect compliance with a seemingly boundless range of contractual provisions. For example, the Army has issued four sets of Logistics Civil Augmentation Program ("LOGCAP") contracts in support of military operations overseas, each entailing a wide range of logistical services such as housing, food, and recreation for America's troops. Those contracts are sprawling and complex, containing (or incorporating by reference) literally *thousands* of terms, both in the base contracts and in the hundreds of individual statements of work and task orders implemented under them. The agreements incorporate "a patchwork of other agreements and instruments," including large portions of the two-thousand-page Federal Acquisition Regulation ("FAR"), as well as Army Field Manuals, the Army Facilities Component Systems manual and incorporated drawings, guidelines, and other guidance documents issued by various components of the Department of Defense. See, *e.g.*, *Carmichael* v. *Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1276 n.2 (11th Cir. 2009), cert. denied, 130 S. Ct. 3499 (2010); Complaint ¶ 24, *U.S. ex rel. McLain* v. *Kellogg Brown & Root Servs., Inc.*, No. 1:08-cv-499 (E.D. Va. May 16, 2008), ECF No. 1 (alleging that relevant Statement of Work required that "all Electrical work would conform to Army Facilities Component Systems drawings"); Dep't of the Army, *Army Facilities Components System User Guide*, Tech. Manual TM-5304 (Oct. 1990) (one of several such manuals), available at http://goo.gl/aKxxVa. Such contracts provide relators with a bonanza of contractual and regulatory provisions the purported violation of any of which could threaten punitive FCA liability.

The theory has other unworkable and deeply unfair consequences. One egregious example is the recent cottage industry of FCA claims alleging violations of a common cost-reimbursement principle, used in government contracts nationwide. That provision states simply that an allowable cost (*i.e.*, a cost for which the government will reimburse the contractor) must be "reasonable." 48 C.F.R. § 31.201-2. Reasonableness is determined, however, using a fact-intensive analysis of "a variety of considerations and circumstances," only a few of which are even mentioned in the regulation. 48 C.F.R. § 31.201-3(b). The government typically bears responsibility in the first instance for determining the reasonableness of costs and approving final vouchers, but—critically—does so only *after* the contractor performs the work and submits a bill for payment. 48 C.F.R. § 42.302(a)(7). That approach reflects the pragmatic reality that some factors affecting the reasonableness of costs will be unknown (or unknowable) before performance is complete. For that reason, the government and contractors frequently will negotiate to resolve disputes about what costs are "reasonable" after the goods and services have been provided and billed.

Where reasonableness is determined only after the fact, and is not subject to precise determination in advance, it blinks reality to suggest that a contractor implicitly certifies that costs in its bill are "reasonable" at the time it submits a claim for payment, or that disputes about application of that inherently nebulous standard should subject contractors to an FCA lawsuit, years of discovery, and the prospect of

treble damages.[2] Yet relators deploy the implied-certification theory based on that very rationale.

For instance, the relator in one recent case alleged that a defense contractor submitted implicitly false claims by filing invoices for charter air services. There was no allegation that the services had not been provided as billed. Instead, the relator simply advanced its own (after-the-fact) view that the services could have been provided at lower cost, and therefore that the costs on the bill were unreasonable. See *U.S. ex rel. Watkins* v. *KBR, Inc.*, 106 F. Supp. 3d 946, 953 (C.D. Ill. 2015). The relator did not allege that the contractor ever expressly certified reasonableness when it submitted invoices for payment. *Id.* at 964. Although the *Watkins* court dismissed the case, it did so *not* because it could analyze "reasonableness" on the pleadings, but rather only by rejecting the implied-certification theory altogether. See *id.* at 964-65 (distinguishing prior case in which an invoice "carried with it an *express certification of compliance*").

By contrast, the panel's expansive conception of implied certification in this case could encourage "unreasonable cost" FCA suits—and bolster their chances of surviving a motion to dismiss. The implied-certification theory therefore potentially subjects the many thousands of government contractors, grantees, and program participants operating under cost-

[2] Where the government wishes to impose a "reasonableness" requirement on costs prior to submission of an invoice, it has not hesitated to require contractors *expressly* to certify reasonableness. *E.g.*, *U.S. ex rel. Howard* v. *Lockheed Martin Corp.*, 14 F. Supp. 3d 982 (S.D. Ohio 2014) (defendant expressly certified that all costs on the invoice were reasonable).

reimbursement contracts to routine cost second-guessing by self-interested relators—together with the attendant burdensome discovery, potential fishing expeditions, and ballooning defense costs. See Letter from Daniel I. Gordon, Administrator, Office of Federal Procurement Policy, Office of Management & Budget, to Sen. Joseph I. Lieberman 9 (July 8, 2011), *available at* http://goo.gl/lhKyCp (for FY2010, reporting $162 billion in cost-reimbursement contracts and more than 171,000 "actions," defined to include cost-reimbursement contracts, orders, and modifications).

As these examples suggest, the potential grounds for alleging implied-certification liability are boundless. In *Chesbrough* v. *VPA P.C.*, 655 F.3d 461, 467-468 (6th Cir. 2011), for instance, an FCA relator alleged that certain medical tests did not satisfy a general "standard of care," by reference to an industry standard for certain radiology studies. *U.S. ex rel. Marcy* v. *Rowan Cos.*, 520 F.3d 384, 388 (5th Cir. 2008), involved allegations that a defendant's lease payments implicitly certified compliance with certain background environmental statutes. And the plaintiff in *U.S. ex rel. Willard* v. *Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 380 (5th Cir. 2003), alleged non-compliance with antidiscrimination statutes in connection with claims for payment for medical services. Finally, in *U.S. ex rel. King* v. *F.E. Moran, Inc.*, No. 00-cv-3877, 2002 WL 2003219, at *11-12 (N.D. Ill. Aug. 29, 2002), and *U.S. ex rel. Yannacopoulos* v. *Gen. Dynamics*, No. 03-cv-3012, 2007 WL 495257, at *3 (N.D. Ill. Feb. 13, 2007), relators alleged implied-certification liability for supposed non-compliance with technical requirements buried in procurement manuals and guidelines. Notably, the government

did not intervene in *any* of these cases. Even in those cases where defendants ultimately prevailed, they were subjected to the reputational harm of defending a lawsuit for fraud, in addition to the substantial litigation and discovery expenses. Upholding the panel's theory would threaten FCA liability for government contractors, small businesses, farmers receiving federal subsidies, and school districts nationwide (among scores of others) for non-compliance with these and thousands of other regulatory and contractual provisions.

This dizzying array of regulations and rules that could be subject to FCA enforcement underscores the vast disconnect between the implied-certification theory and what the statute's Civil War-era drafters ever contemplated by authorizing *qui tam* liability (in language that survives essentially unchanged) for making a "false, fictitious, or fraudulent" claim. See Act of Mar. 2, 1863, 12 Stat. 696. As many scholars have noted, the United States experienced its first "dramati[c]" growth in the "scale and scope of government regulations [of U.S. economic activity]" in the Progressive Era, 1880-1920, with further explosive regulatory growth during the New Deal and Great Society Eras. See Marc T. Law & Sukkoo Kim, *The Rise of the American Regulatory State: A View from the Progressive Era*, *in Handbook on the Politics of Regulation* 113 (David Levi-Faur ed., 2011); *The Rise and Fall of the New Deal Order, 1930-1980* (Steve Fraser & Gary Gerstle eds., 1989); Julian E. Zelizer, *The Fierce Urgency of Now: Lyndon Johnson, Congress, and the Battle for the Great Society* (2015); cf. *Molzof* v. *United States*, 502 U.S. 301, 307 (1992) (looking to meaning of text "when the [statute] was drafted and

enacted"); *Am. Cas. Co. of Reading, Pa.* v. *Nordic Leasing, Inc.*, 42 F.3d 725, 732 n.7 (2d Cir. 1994) ("Where sections of a statute have been amended but certain provisions have been left unchanged, we must generally assume that the legislature intended to leave the untouched provisions' original meaning intact."). Reading "false" or "fraudulent" as implicitly transforming the FCA into an omnibus enforcement tool for today's vast regulatory state would be a startling departure from the statute's origins and history.

B. The Implied-Certification Theory Invites Abuse By Bounty-Hunting Relators

It is no answer to suggest, as some courts have, that the dangers of the implied-certification theory can be policed on a case-by-case basis. In the short time since a handful of circuits accepted the theory, cases have proliferated that confirm the abuse and wasteful litigation that will inevitably result. For example, one defense contractor hired to draft government technical manuals was forced to defend FCA claims through discovery and summary judgment, even though the district court ultimately criticized the suit as an "abuse" of the doctrine. There, relators alleged that the contractor improperly prepared the technical manuals without the benefit of a "technical data package" that the government had intended to—but never did—provide. See *U.S. ex rel. Searle* v. *DRS Servs., Inc.*, No. 14-cv-402, 2015 WL 6691973 (E.D. Va. Nov. 2, 2015), appeal docketed, No. 15-2442 (4th Cir. Nov. 17, 2015). The relator also alleged that certain portions of the manual deviated slightly from Army regulations. *Id.* at *9.

The district court summarily denied a motion to dismiss without even perceiving the need for a writ-

ten opinion. See Order, *U.S. ex rel. Searle* v. *DRS Servs., Inc.*, No. 14-cv-402 (E.D. Va. June 19, 2015), ECF No. 65. Yet after costly discovery and fact development, the court granted summary judgment for the defense, decrying the case as "exemplif[ying] the abuse forewarned by the Fourth Circuit [associated with implied-certification claims]." 2015 WL 6691973 at *9, *12. Put simply, the government "knew that it did not [provide the technical data], and still instructed the contractors to proceed with performance." "[A]ny deviations with military standards and/or Army regulations were approved by or done at the direction of the Army." *Id.* at *1, *5.

Yet because the case was brought in a circuit that had adopted a broad implied-false-certification theory, the district court labored to identify any defect in the relator's claim. The court noted that the contractor had never certified—nor had it ever been required to certify—compliance with contractual or regulatory provisions. *Id.* at *6, *8. But in the Fourth Circuit, no express certification was required. The district court criticized the doctrine as "prone to abuse by parties seeking to turn the violation of minor contractual provisions into an FCA action." *Id.* at *8 (quoting *U.S. ex rel. Badr* v. *Triple Canopy, Inc.*, 775 F.3d 628, 637 (4th Cir. 2015)). "[T]he purposes of the FCA," the court emphasized, "[are] not served by imposing liability on honest disagreements, routine adjustments and corrections, and sincere and comparatively minor oversights, particularly when the party invoking [the FCA] is an uninjured third party." *Id.* at *10 (quoting *Triple Canopy*, 775 F.3d at 635).

In attempting to cabin the possibility of abuse, the district court suggested that a plaintiff must also

show "facts related to a fraudulent scheme, a cover up, or falsified records." *Id.* at *9; see also *ibid.* (requiring proof that contractor "withheld information about its noncompliance"). Because the defendant happened to have evidence that each aspect of "alleged noncompliance was known to the government" and that variances from regulations "were approved and often directed by [the government]," the contractor was granted summary judgment. *Id.* at *9.

In the run of cases, however, the government may not know about every possible discrepancy. Indeed, even the *contractor itself*, acting in good faith, may not know about deviations at the time it submits a bill. Many programs involve hundreds or thousands of contractual or regulatory provisions. Some of those may be ambiguous, "compliance" with others may be determined only after the fact, and evidence of the government's knowledge may be unavailable. In any event, as *Searle* shows, knowledge is typically a fact question unsuitable for resolution on a motion to dismiss. The doctrinal lengths to which the *Searle* court went to reach its result—and the fact that the court had summarily denied a motion to dismiss—shows the theory's broader difficulties.[3]

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[3] The *Searle* court separately concluded that the relator had not shown materiality or scienter, two other elements of FCA liability. But the materiality requirement is scant comfort, because materiality is easily pleaded, often a fact question, and vulnerable to self-interested representations after the fact. Tellingly, the *Searle* court did *not* hold that the alleged noncompliance lacked the statutorily required "natural tendency to influence, or capab[i]l[ity] of influencing," government decisionmaking. See 31 U.S.C. § 3729(b)(4). Rather, the court reasoned that the government actually knew of the discrepancies and instructed the contractor to proceed. 2015 WL 6691973, at

The implied-false-certification theory allows relators to threaten punitive liability for performance they perceive (in hindsight) to be less than perfect, even if the government itself sought (or knowingly accepted) performance that deviated from the original contract. In *Searle*, the defendant endured 18 months of litigation, discovery, and fact development for alleged minor deviations from a contract and regulations—of which the government was explicitly aware and condoned. In this manner, the implied-false-certification theory casts the shadow of FCA liability over the kind of pragmatic give-and-take that often occurs under government contracts or in the context of complex federal programs.

It is no answer to suggest that the government can police potential abuse by exercising its discretion to decline intervention or to intervene and dismiss. The government has repeatedly stated that its decision to decline intervention should not be interpreted to express its views on the merits, and that it does not routinely devote resources to determining whether suits are meritless and should be dismissed on that ground; as a result, the government only extraordinarily rarely intervenes to dismiss. Most often, the government is only too happy to "wait it out," reaping the bounty if a defendant elects to settle or the relator is ultimately successful. See Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control* Qui Tam *Litigation*

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*1, *5. When analyzed from an *ex ante* perspective, as many courts do, the materiality inquiry is significantly more nebulous. And the court's *scienter* analysis overlapped almost completely with its discussion of whether the government had actual knowledge of the discrepancies. *Id.* at *11-12.

Under the Civil False Claims Act, 76 U. Cin. L. Rev. 1233, 1264-1265 (2008); David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from* Qui Tam *Litigation*, 114 Colum. L. Rev. 1913, 1992 (2014) ("[T]he data confirm critics' complaints that the DOJ only rarely deploys its authority to terminate qui tam cases outright, thus virtually ignoring the most direct means of policing undesirable private [actions]").[4] The government's unused discretion to dismiss meritless cases thus cannot substitute for a rigorous judicial definition of falsity.

Limiting FCA "certification" liability to express certifications of compliance on claims submitted for payment (or if implied, to alleged violations of provisions that are explicitly identified as a condition of payment) would provide assurance to potential FCA defendants that a motion to dismiss will be a meaningful check. Such a rule is necessary to counteract the strong chilling effect on contractors—particularly small businesses—from even a small risk of incurring crippling FCA liability.

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[4] See also David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of* Qui Tam *Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1717 (2013) (noting that 460-case subsample of *qui tam* actions "revealed exactly none in which DOJ exercised its termination authority," and concluding that "[o]ne interpretation is that DOJ is unconcerned with screening meritless cases or has concluded that doing so does not warrant expenditure of scarce public enforcement resources over other uses, such as affirmative enforcement efforts"); *id.* at 1712 n.70 (quoting Congressional testimony by head of DOJ Civil Division that "[w]e do not routinely devote the additional resources that would be needed to determine that a qui tam action is frivolous or to move to dismiss on those grounds").

C. The Implied-Certification Theory Deprives Defendants Of Fair Notice About What Actions May Lead To FCA Liability

The implied-certification theory also deprives government contractors, grantees, and program participants of fair notice about the scope of their future liability. Unlike a theory limited to express certifications of compliance, implied false certification rests on the legal fiction that a contractor can be deemed after-the-fact to have made implicit certifications about compliance with potentially esoteric requirements which had not been designated conditions of payment at the time of billing.

To ensure constitutionally fair notice of "essentially punitive" liability, *Vermont Agency*, 529 U.S. at 784-785, FCA certification liability should be limited to circumstances in which a contractor has made an express (and untruthful) certification of compliance with specific contract clauses, regulations, or statutes—in statements found on the face of the bill itself. *E.g.*, *Chesbrough*, 655 F.3d 461. As courts have recognized, and experience confirms, an implied-certification theory is not necessary to protect the government's interests, because the government (as a contracting party) may require express certification of compliance with the regulatory and contractual requirements of its choosing. See *Watkins*, 106 F. Supp. 3d at 965 ("It can hardly be argued with a straight face that the Government deemed something it did not even require to be submitted [with an invoice] to be influential in its decision-making process."). Such a requirement has the additional benefit of allowing the contractor to know *before* deciding whether to participate in a program or execute a con-

tract what it will be required to certify at the time of billing.

Rather than relying on a contractor's actual statements, the implied-certification theory effectively puts words in a contractor's mouth, deeming it to have made assurances of compliance with particular regulatory or contractual provisions, even where a contractor has made no such express statement. This concern exists even if implied-certification liability is limited to provisions identified as an express condition of payment. Conditions of payment may be buried among hundreds or thousands of background regulatory terms that are incorporated *en masse* into a government contract. *E.g.*, 42 C.F.R. § 424.5(a).

The panel's broad theory of liability—which does not even require that a provision be expressly identified as a condition of payment—deprives defendants of due process of law and fair notice about which among many hundreds or thousands of contract provisions, rules, regulations, or program requirements might be deemed after the fact to be preconditions to payment. "'[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *FCC* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)) (alteration in original).

Implied-certification liability under the FCA flunks that basic test, because courts have not articulated, and *cannot* articulate, a workable principle to distinguish which terms, conditions, and obligations will be deemed after the fact to be conditions of pay-

ment, if they are not explicitly identified as such. Cf. *U.S. ex rel. Bidani* v. *Lewis*, 264 F. Supp. 2d 612, 615 (N.D. Ill. 2003) (relying on government statement of interest asserting that specific federal law "is a critical provision of the Medicare statute" and thus that "compliance with it is material to the government's treatment of claims for reimbursement," even without any such statement in the Medicare program itself); *U.S. ex rel. Thompson* v. *Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1046 (S.D. Tex. 1998) (relying on government's after-the-fact declaration that payment was conditioned on defendant's certification that the Medicare services identified in annual hospital cost reports complied with laws and regulations governing provision of healthcare services). Absent a legal standard based on something a defendant expressly certified, or to which it expressly agreed in advance, defendants are left to guess what conditions they may later be found to have "impliedly certified" compliance with by submitting a claim for payment.

Numerous commentators have recognized what the facts of these cases demonstrate: the implied-certification theory is marred by a "high degree of uncertainty," Marcia G. Madsen, *False Claims Act: What Government Contractors Should Know About the Implied Certification Theory of Liability*, Government Contracts, 2011, at 481 (PLI Corporate & Sec., Mun. Law Practice, No. 28982), and "little predictability," Richard J. Webber, *Exploring the Outer Boundaries of False Claims Act Liability: Implied Certifications and Materiality*, 36 WTR Procurement Law 14, Winter 2001, at 14. In other words, businesses must either guess which requirements will later be deemed a condition of payment or assume

that every one could support FCA liability. See Engstrom, *Private Enforcement's Pathways*, *supra*, 114 Colum. L. Rev. at 1935 n.68 (surveying literature concluding that "legal uncertainty" is likely to "induce overcompliance" by potential defendants "relative to the social optimum").

The implied-false-certification theory is at odds with the need for clear, predictable, and well-defined standards of liability, particularly given the "quasi-criminal nature of FCA violations," *U.S. ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006), involving treble damages, penalties, and the opprobrium of being deemed to have defrauded the government. See, *e.g.*, *Town of Concord* v. *Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.) (legal rules "must be clear enough for lawyers to explain them to clients," "must be administratively workable," and "must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings"). Yet the decision here creates an unclear and unpredictable standard of liability under which companies cannot meaningfully ensure their compliance with the FCA or rationally assess the costs and risks of doing business with the government.

D. The Implied-Certification Theory, Combined With Some Courts' Permissive Reading Of Rule 9(b), Could Effectively Immunize Complaints From Motions To Dismiss

The panel's implied-certification theory, combined with some recent decisions taking an undemanding approach to Rule 9(b)'s pleading requirements, pro-

vides plaintiffs a roadmap to frame even weak FCA claims in a manner sufficient to survive a motion to dismiss. It is often easy for a relator to allege that a defendant violated some contractual term, statute, or regulation, allege knowledge generally, and further allege that the provision in question was material—even absent any explicit certification of compliance, or statement expressly identifying the provision as a condition of payment. Moreover, some courts have (improperly) construed Rule 9(b) to allow claims to survive a motion to dismiss without the kind of "identifying details" that Rule 9(b) requires for "common law or securities fraud claims." *E.g.*, *U.S. ex rel. Heath* v. *AT&T, Inc.*, 791 F.3d 112, 125 (D.C. Cir. 2015), pet. for cert. filed, No. 15-363 (Sept. 21, 2015).

The notion that materiality adequately screens meritless cases from proceeding towards discovery is cold comfort to defendants, particularly in Circuits that have diluted Rule 9(b). See *Heath*, 791 F.3d at 125. Materiality under the FCA is defined as "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). That definition encompasses violations that might merely lead the government to adjust the *amount* of payment, not to treat an invoice as categorically ineligible for payment. Thus, even if this Court were to accept an implied-false-certification theory, it should not hold that merely determining that a contractual or regulatory provision is material means a claim is "false" or "fraudulent." Moreover, because materiality often turns on questions of fact, defendants frequently will be forced to litigate FCA cases well past the pleading stage, incurring significant legal and discovery costs, and sub-

jecting themselves to unpredictable, fact-intensive, *hindsight* judgments about materiality.

One recent case arising from the D.C. Circuit, which broadly accepted the implied-certification theory in *United States* v. *Science Applications Int'l Corp.*, 626 F.3d 1257, 1271 (2010) ("*SAIC*"), illustrates this point. In *United States* v. *Honeywell Int'l Inc.*, 798 F. Supp. 2d 12 (D.D.C. 2011), the government alleged that certain goods it purchased from the defendant failed to meet an industry standard five-year warranty. The complaint conceded that the contract did not explicitly condition payment on such a warranty, but alleged that the government "understood [the warranty] to be a condition of payment." *Id.* at 20. The court found that allegation, among others, sufficient to survive a motion to dismiss, even though "the government d[id] not state directly in its complaint that [the defendant] also understood such requirements to be conditions of payment." *Ibid.* The defendant had argued that the government had simply misconstrued the warranty; but in the court's view, that argument "raise[d] questions of fact that are more appropriately resolved after discovery closes." *Id.* at 21.

The interplay of implied certification and relaxed 9(b) standards could effectively eliminate the motion to dismiss as a mechanism for screening out unmeritorious claims, forcing some defendants to settle even spurious claims to avoid burdensome discovery and avoid even a small risk of treble damages and penalties. Not all defendants have the resolve and litigation budget of those in *Searle*, where the court summarily denied a motion to dismiss without any indication that it would later deem the relator's suit an abuse of the FCA. See *Searle*, 2015 WL 6691973, at

*9, *12. Discovery costs alone in "complex litigation can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak." *Smith* v. *Duffey*, 576 F.3d 336, 340 (7th Cir. 2009).

The pressure to settle even weak claims can be overwhelming in the face of potential treble damages. As one of the FCA's leading commentators observed, the statute's treble damages and penalty structure "places great pressure on defendants to settle even meritless suits." John T. Boese & Beth C. McClain, *Why* Thompson *Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 Ala. L. Rev. 1, 18 (1999); accord Robert Salcido, *DOJ Must Reevaluate Use of False Claims Act in Medicare Disputes*, Wash. Legal Found. Legal Backgrounder 4 (Jan. 7, 2000), http://goo.gl/YyZTdS ("dirty little secret" of FCA litigation is that "given the civil penalty provision and the costs and risks associated with litigation, the rational move for [FCA defendants] * * * is to settle the action even if the [plaintiff's] likelihood of success is incredibly small"); see also *Int'l Data Bank, Ltd.* v. *Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987) (treble damages provisions increase danger of defendants settling nuisance suits). Moreover, relators often aggressively measure damages (subject to trebling) as the *entire amount* billed or the entire value of a contract, arguing that every invoice a contractor submits while in alleged violation of a contractual or regulatory provision is "false"—a sharp departure from the traditional measure of the harm caused by alleged fraud. Compare *U.S. ex rel. Vosika* v. *Starkey Labs., Inc.*, No. 01-cv-709, 2004 WL 2065127, at *1 (D. Minn. Sept. 8, 2004) (alleged fail-

ure to give price discount; seeking damages as "entire amount of each invoice submitted"), and *Tran*, 53 F. Supp. 3d at 122 (alleging that every invoice was a false claim), with *SAIC*, 626 F.3d at 1278-79 (adopting "benefit-of-the-bargain" test and rejecting damages theory based on entire value of "tainted" subcontracts). A finding of liability could further result in the contractor's suspension or debarment, which only increases the pressures to settle. See 2 C.F.R. § 180.800 ("[a] Federal agency may debar a person for * * * [a] civil judgment for * * * making false claims").

E. The Implied-Certification Theory Short-Circuits More Tailored Government Remedies

Wholly apart from the blunt instrument of FCA treble damages and penalties, the government has a broad range of more tailored remedies to address concerns about performance or compliance with contractual or regulatory obligations, including simple refusal to pay (or reductions in payment), administrative remedies, breach of contract actions, suits under other fraud statutes such as the Anti-Kickback Act, and even criminal prosecution. The implied-false-certification theory, however, distorts this remedial scheme in several ways.

As a general matter, it blurs the line between FCA and other remedies, by allowing relators to bootstrap FCA liability based on contractors' implicit certifications of compliance with background statutes or contractual obligations. The theory invites relators to short-circuit and displace the government's other, more calibrated remedies. As numerous courts have recognized, the FCA is not "a general 'enforcement device' for federal statutes, regulations, and con-

tracts." *U.S. ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010); accord *Mikes* v. *Straus*, 274 F.3d 687, 699 (2d Cir. 2001) (FCA "not designed for use as a blunt instrument to enforce compliance").

Even a brief discussion of the government's other available remedies shows that there is no reason to stretch the FCA to encompass implied-false-certification liability. To begin with, the government has a broad range of administrative and practical remedies that can be employed without litigation. The government may, for instance, reject or adjust an invoice prior to payment. Indeed, this is how the government handles cost-reimbursement reasonableness review. Rejecting or adjusting an invoice does not necessarily indicate fraud or implicate the FCA. *See U.S. ex rel. Owens* v. *First Kuwaiti Gen. Trading and Contracting Co.*, 612 F.3d 724, 733 (4th Cir. 2010) (in granting summary judgment for defendant, observing that "[t]he fact that [the government] later revised some of the invoices downward is hardly dispositive * * * * [I]t is not surprising that there would be some billing disagreements, particularly in a project of this magnitude."). Yet the implied-false-certification theory would sweep into the FCA scores of claims appropriately handled through the administrative process. More troubling still, it creates the prospect of FCA liability even when the government elects to rely on (or even *refrain from* pursuing) its administrative remedies.

Regulatory schemes often contain remedies tailored to the particular context. If the government has concerns about compliance with contractual or regulatory requirements, for instance, it can demand in-

formation, certification of compliance, exercise inspection rights, or order corrective measures. *E.g.,* 42 U.S.C. § 1437f(o)(8)(C)-(G) (providing for regular inspections of public housing to ensure continued eligibility for subsidy). Through these approaches, the government has ample power to police noncompliance. There is no need to invite self-interested third parties to insert themselves into the process. *E.g.*, *Owens*, 612 F.3d at 733 ("A contractor's estimate of his workmanship may indeed differ in its particulars from that of the party that hired him. But the inspection process provides an opportunity for the parties to sort their differences out.").

The government can also issue notices of required corrective action to contractors or grantees, addressing the issue without resorting to extreme measures that could negatively affect continued performance, such as suing for treble damages. See, *e.g., Howard*, 14 F. Supp. 3d 982 (government issued Correction Action Requests upon discovering contractual noncompliance). By piggybacking an FCA lawsuit on the government's administrative remedies (or a decision not to pursue the same), a relator effectively nullifies the government's decision to *correct* errors, rather than penalize them with treble damages and severe civil penalties.

Because many government contractors are repeat players, the government also has the powerful "hammer" of choosing not to issue a new contract or to extend or renew existing contracts. In more serious cases, contractors may be subject to administrative penalties or even debarment, see 48 C.F.R. subpart 9.4, the threat of which serves as a powerful incentive to address the government's concerns.

If these remedies prove insufficient, the government may sue for breach of contract or other common-law remedies. Courts can craft relief appropriate to the particular claim and theory of liability. Notably, a claim for breach of contract can, in some circumstances, be based on the kind of implicit promise that underlies the implied-certification theory. See 23 Richard A. Lord, *Williston on Contracts* § 63:14 (4th ed. 2003).

In addition to offering legal standards and remedies more appropriately tailored to the contractual or regulatory context, these remedies all share another key characteristic: only the United States may assert them. There are sound reasons for this separation of remedies between mere noncompliance, on the one hand, and actual fraud, on the other. Among other things, the government often prefers to have work performed under a contract or benefit program, even if performance differs in some respects from what was originally contemplated. *E.g.,* 48 C.F.R. § 31.205-26(a) (authorizing contractor to bill for material costs of spoilage or defective work); see also *Howard*, 14 F. Supp. 3d at 1010 ("Lockheed was permitted to bill the Government for nonconforming tools as long as the costs incurred were reasonable."). The constant overhang of punitive FCA liability may chill performance that the government would affirmatively want.

In this context, the blunt threat of quasi-criminal FCA liability does not advance, and may hinder, the government's interests. Indeed, the only parties to benefit consistently from such suits are *relators*, whose alternative remedies are typically less attractive than the FCA's promise of a percentage of treble

damages. Thus, relators who otherwise might be relegated to traditional remedies such as suits for wrongful termination, products liability, or personal injury, have a powerful incentive to plead ever-more-creative theories of implied certification, even where the government itself elected to pursue, and was satisfied with, administrative or contractual remedies.

F. Accepting The Implied-Certification Theory Would Increase The Government's Costs

The uncertainty and vast expansion of FCA liability that would result from accepting an implied-certification theory would increase the costs of doing business for broad sectors of the U.S. economy—not only for contractors, grantees, and program participants, but also for the government, and ultimately the American taxpayer. FCA liability potentially affects any entity or person, public or private, that receives federal funds in various forms. See, *e.g.*, *Mikes*, 274 F.3d 687 (healthcare services); *U.S. ex rel. Steury* v. *Cardinal Health, Inc.*, 735 F.3d 202 (5th Cir. 2013) (medical manufacturing); *U.S. ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163 (10th Cir. 2010) (waste disposal); *SAIC*, 626 F.3d 1257 (consulting services); *Sanford-Brown*, 788 F.3d 696 (higher education); *U.S. ex rel. Shemesh* v. *CA, Inc.*, No. 09-cv-1600, 2015 WL 1446547 (D.D.C. Mar. 31, 2015) (software development); *U.S. ex rel. Bilotta* v. *Novartis Pharm. Corp.*, 50 F. Supp. 3d 497 (S.D.N.Y. 2014) (pharmaceutical manufacturing); *United States* v. *Americus Mortg. Corp.*, No. 12-cv-02676, 2014 WL 4273884 (S.D. Tex. Aug. 29, 2014) (mortgage lending); *U.S. ex rel. McLain* v. *Fluor Enters., Inc.*, 60 F. Supp. 3d 705 (E.D. La. 2014) (disas-

ter relief construction services); *U.S. ex rel. Oliver* v. *Philip Morris USA, Inc.*, 101 F. Supp. 3d 111 (D.D.C. 2015), appeal argued (D.C. Cir. Jan. 15, 2016) (cigarette manufacturing); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (defense support services), cert. denied, 135 S. Ct. 1163 (2015); *U.S. ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9 (D.D.C. 2014) (athletic sponsorship); *U.S. ex rel. Koch* v. *Koch Indus., Inc.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999) (crude oil purchasing); *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.* v. *Westchester Cnty.*, 712 F.3d 761 (2d Cir. 2013) (low-income housing); *U.S. ex rel. Bias* v. *Tangipahoa Parish Sch. Bd.*, 86 F. Supp. 3d 535 (E.D. La. 2015) (public school Junior ROTC program); *U.S. ex rel. Pritzker* v. *Sodexho, Inc.*, 364 F. App'x 787 (3d Cir.), (public school lunch services), cert. denied, 562 U.S. 838 (2010); *Grand Union Co.* v. *United States*, 696 F.2d 888 (11th Cir. 1983) (food stamp program).

Threatening treble damages and penalties against such a broad range of contractors, grantees, and program participants will have a real, and predictable, chilling effect. Fear of implied-certification liability may lead contractors to shy away from bidding on federal contracts, or cause them to raise prices to account for the inevitable costs of defending even non-meritorious suits. Cf. *Tozer* v. *LTV Corp.*, 792 F.2d 403, 407 (4th Cir. 1986) ("Without the [government-contractor] defense [to design-defect claims], military contractors would be discouraged from bidding on essential military projects." (internal quotation marks omitted)). Doctors have exited Medicare in droves, due in part to concerns about "fraud" liability based on an auditor's subjective assessment of "deviations"

from program requirements. See David Hogberg, *The Next Exodus: Primary-Care Physicians and Medicare*, Nat'l Policy Analysis (Aug. 2012), http://goo.gl/9uLxe. Another recent article cautions about the risk of FCA liability due to forthcoming cyber-protection guidance from the federal government. See Brian D. Miller, *The Hidden Cybersecurity Risk for Federal Contractors*, FCW (Jan. 12, 2016), https://goo.gl/bbHIZA. Given the ever-tightening nature of the regulations and breadth of the implied-certification theory, the article warns, "[i]t could be almost reckless for a firm to agree" to provide cyber security that meets "all" of the cyber protection requirements. "The dilemma for the contractor," the article explained, "is whether to agree [to such compliance], while uncertain, or to forgo the chance to bid," given the risk of "contractor gotchas" and overzealous enforcement through implied-certification suits. *Ibid*.

The skyrocketing number of FCA lawsuits in recent years underscores the need to reject (or at least constrain) the implied-certification theory. Since the 1986 amendments to the FCA, an "army of whistleblowers, consultants, and, of course, lawyers" have been released onto the landscape of American business. 1 John T. Boese, *Civil False Claims and* Qui Tam *Actions*, at xxi (4th ed. 2011) ; see also Peter Loftus, *Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich*, Wall Street J., July 24, 2014 (discussing recent growth in *qui tam* suits, including by "serial whistleblower[s]"). In the last few years alone, the number of *qui tam* actions increased from roughly 400 per year to nearly double that figure—700 in each of 2013 and 2014 and over 630 in 2015. U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1,*

1987–Sept. 30, 2015, at 1-2 (2015) ("*Fraud Statistics*"), https://goo.gl/bbHIZA. At least some of this uptick likely follows from several important jurisdictions accepting the implied-false-certification theory, including the Fourth and D.C. Circuits, in which most government and defense contractors are subject to suit. Historically, *qui tam* actions in which the government declined to intervene have accounted for a tiny percentage (less than 5%) of total FCA monetary settlements and judgments. *Ibid.*[5] The panel's expansive conception of implied-false-certification FCA liability encourages relators to seek large settlements from defendants, given the ease with which they can allege a violation of contractual or regulatory obligation. And because such claims are difficult to resolve on the pleadings, contractors may have little choice but to settle even weak claims rather than endure discovery in the face of potentially crippling treble damages.

* * *

This Court should reject outright the implied-false-certification theory of liability, not only because it lacks sound footing in the text, structure, or pur-

[5] In 2015, the percentage of recoveries attributable to non-intervened cases increased materially. *Fraud Statistics, supra* However, that increase appears to be due, in significant part, to a small number of large settlements, including a single settlement greater than the total *qui tam* recoveries for the preceding *four years*. *E.g.*, Press Release, U.S. Dep't of Justice, Office of Public Affairs, *DaVita to Pay $450 Million to Resolve Allegations That it Sought Reimbursement for Unnecessary Drug Wastage* (June 24, 2015), http://goo.gl/vxQytz. Over the long term, historical data suggests that non-intervened *qui tam* suits serve primarily to inflict large litigation costs on defendants, not to protect the public fisc.

pose of the False Claims Act, but also because it has unworkable practical consequences for government contractors, grantees, and program participants across broad sectors of the U.S. economy. If the Court concludes otherwise, it should at a minimum limit the doctrine to alleged violations of contractual or regulatory obligations that are expressly identified, in advance, as conditions of payment.

CONCLUSION

For these reasons, and those in petitioner's brief, the judgment below should be reversed.

Respectfully submitted.

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