No. 15-7

IN THE
Supreme Court of the United States

UNIVERSAL HEALTH SERVICES, INC.,
Petitioner,
v.

UNITED STATES and COMMONWEALTH OF MASSACHUSETTS ex rel. JULIO ESCOBAR and CARMEN CORREA,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the First Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
Washington Legal Foundation
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Date: January 26, 2016

QUESTIONS PRESENTED

1. Whether the "implied certification" theory of legal falsity under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, is viable.

2. If the "implied certification" theory is viable, whether a government contractor's reimbursement claim can be legally false under that theory if the provider failed to comply with a statute, regulation, or contractual provision that does not state that it is a condition of payment; or whether liability for a legally false reimbursement claim requires that the statute, regulation, or contractual provision *expressly* state that it is a condition of payment.

BLANK

TABLE OF CONTENTS

Page

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Regulations:

Page(s)

Miscellaneous:

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.[1] To that end, WLF has frequently appeared in this and other federal courts in cases concerning the appropriate scope and application of the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.* *See, e.g., Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010); *Allison Engine Co. v. United States ex rel. Wilson*, 559 U.S. 280 (2008); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007).

WLF is concerned that in recent decades, excessive FCA liability has spawned abusive litigation against businesses, both large and small, to the detriment of free enterprise, employees, shareholders, and consumers. The proliferation of FCA litigation has been exacerbated by the recognition—by several federal appeals courts—of a new basis for liability, the "implied certification" doctrine. That doctrine lacks support in the FCA's statutory language, and lower courts have not pointed to any FCA amendments as their basis for recognizing a doctrine that was undiscovered for well more than a century following the statute's adoption in 1863. WLF is concerned that

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

unless this Court overturns the decision below, businesses that do not fully comply with the terms of every applicable statute, regulation, or government contract provision will face massive liability that far exceeds both their culpability and any sanctions intended by Congress in adopting the FCA.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the brief of Petitioner. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Petitioner Universal Health Services, Inc. ("UHS") is an indirect parent corporation of Arbor Counseling Services. Arbor operates a mental health clinic in Lawrence, Massachusetts; it receives federal and state reimbursement through the Massachusetts Medicaid program, MassHealth, for services rendered by the clinic.

Respondents Julio Escobar and Carmen Correa filed a lawsuit in the name of the United States and Massachusetts against UHS (under both the FCA and the Massachusetts False Claims Act), alleging that reimbursement claims submitted by UHS to Mass Health were false or fraudulent. The district court found that the suit raises no claims with respect to the quality of medical care provided by the clinic, nor does it assert that Arbor failed to perform any of the services for which reimbursement was sought. Pet. App. 27. Rather, Respondents assert that UHS was not complying with various MassHealth regulations regarding qualifications of personnel, staffing, and

supervision. They assert that, by submitting the claims for payment, UHS *impliedly* certified that it was in compliance with those regulations, and that this implied certification was false.

Respondents do not assert that UHS, in seeking reimbursement, ever *expressly* certified that it had complied with the regulations. Nor do Respondents challenge the district court's conclusion that none of the regulations they cited expressly stated that UHS was not entitled to any payments unless it fully complied with them.

In March 2014, the district court granted UHS's Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Pet. App. 25-53. It held that while "the regulation need not expressly state that [compliance] is a condition of payment in order to lay the foundation for FCA liability, . . . before a regulation can give rise to FCA liability, it must, in fact, be a condition of payment." *Id.* at 38. The court concluded: (1) only one of the cited regulations, 130 C.M.R. § 429.439(B), even arguably made compliance a condition of payment; and (2) that regulation did not apply to the Lawrence facility. *Id.* at 43-44.

The First Circuit reversed. Pet. App. 1-24. The appeals court explained that it takes "a broad view of what may constitute a false or fraudulent statement to avoid foreclosing FCA liability in situations that Congress intended to fall within the Act's scope." *Id.* at 13 (citations omitted). It held that when an applicable government regulation provides that compliance with the regulation is a condition of payment, any entity

submitting a claim for payment is impliedly certifying that it has complied with the regulation. *Id.* at 13-16.

Moreover, the appeals court held, "preconditions of payment, which may be found in sources such as statutes, regulations, and contracts, *need not be expressly designated*." *Id.* at 13 (emphasis added). "Rather, the question whether a given requirement constitutes a precondition of payment is a fact-intensive and context-specific inquiry." *Ibid.* The court concluded that the complaint adequately stated a claim upon which relief could be granted because: (1) compliance with MassHealth regulations providing that the responsibilities of the Lawrence facility's clinical director included "overall supervision of staff performance" was a precondition of payment; (2) UHS's submission of claims for payment therefore constituted an implied certification that the clinical director was fulfilling his supervisory responsibilities; and (3) the complaint adequately alleged that the clinical director was not fulfilling those responsibilities and thus that UHS had fraudulently misrepresented its compliance with a condition of payment. *Id.* at 16-17.

The First Circuit established the following standard for evaluating implied certification claims: "We ask simply whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment." *Id.* at 13. It held that the complaint satisfied that standard, finding that compliance with the supervision regulation was, indeed, a "material" precondition of payment and that UHS had impliedly certified that it complied with the regulation despite allegedly knowing that it had not complied, or at least had acted in

reckless disregard of the falsity of its certification. *Id.* at 18.

The appeals court also determined that Respondents adequately alleged that UHS, by submitting claims for payment, impliedly (and falsely) certified compliance with regulations supposedly requiring the Lawrence clinic to employ a board-certified psychiatrist at all times. *Id.* at 20-22.

SUMMARY OF ARGUMENT

The False Claims Act is a Civil War-era statute enacted to punish and prevent frauds against the United States. It imposes civil liability on "any person" who, *inter alia*, "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). Respondents' allegation of fraud is not based on anything UHS actually said in connection with its claims for payments, but rather on what they urge the Court to *imply* that UHS said. Such efforts to manufacture falsity by attributing to a party statements not actually made by the party are wholly inconsistent with common legal understandings of the words "false" and "fraudulent."

Respondents allege that the Lawrence mental health clinic did not comply with all applicable MassHealth regulations and that MassHealth would not have paid UHS's claims for services rendered had UHS informed it of the noncompliance. Even if those allegations were accurate, the common law has never classified as "fraudulent" a failure to disclose the noncompliance when seeking contract payments, in the

absence of a special duty of disclosure toward the other party. In the absence of any showing by Respondents that UHS owed a special duty of disclosure to MassHealth (*e.g.*, a showing that UHS has made ambiguous statements that might affirmatively mislead MassHealth unless the disclosure is made), Respondents have not adequately alleged a "false or fraudulent claim" within the meaning of the FCA.

The 150-year history of enforcement of the FCA confirms that implied-certification liability is inconsistent with the statute's "false or fraudulent claim" requirement. In every one of the FCA cases that has come before the Court, the defendant was alleged to have expressly made a false statement in connection with its claim for payment.

Commentators have long agreed that the FCA also applies to a limited number of cases in which the claim for payment omits information whose absence will affirmatively mislead the Government in light of statements previously made by the claimant. For example, if the Government contracts to pay a company $100,000 following delivery of widgets and the company later submits an invoice for $100,000 without telling the Government that it has decided not to deliver the widgets, it has submitted a fraudulent claim—even if the invoice does not expressly state that the widgets have been delivered. But when the claimant actually provides the contracted goods or services, there is no evidence, at any time during the first 130 years that the FCA was in effect, that the Government ever considered a claim "false or fraudulent" based solely on the claimant's omission of other information that the government might deem

relevant to the contract.

It was not until the 1990s that some lower federal courts began to recognize FCA claims based on an implied-certification theory of liability. Yet courts that recognized such claims never explained why a statute whose relevant language had not changed in 130 years should for the first time be interpreted in a manner that drastically expanded the definition of a "false or fraudulent claim."

Congress significantly amended the FCA in 1986. But those amendments focused primarily on the rights of private persons (relators) to file *qui tam* lawsuits in the name of the Government against alleged false claimants. Nothing in the 1986 amendments purported to expand the definition of "false or fraudulent claims."

Proponents of implied-certification liability often point to several sentences in a Senate committee report that accompanied the 1986 amendments, in which committee members stated *inter alia* that "a false claim may take many forms," including a claim for "goods or services . . . provided in violation of contract terms, specifications, statute, or regulation." S. Rep. No. 99-345, at 9 (1986). Those sentences are invariably taken out of context; read in context, they say no more than that claims can be "false or fraudulent" when they expressly state inaccurate claims regarding compliance with applicable contract terms, specifications, statutes, or regulations. In any event, a 1986 congressional report is a particularly unreliable indicator of the meaning of the FCA's "false or fraudulent claim" provision because the FCA's 1986 amendments did not

address that provision. At best, the committee report represents a rough guess by several members of a Senate committee regarding the intent of the 1863 Congress in adopting the FCA.

If the implied-certification theory is to be recognized at all, it should be limited to FCA cases in which the statutory, regulatory, or contractual provision allegedly violated states expressly that claims will not be paid unless the claimant has complied with the provision. Only in such cases can the claimant be deemed to have received fair notice that he might be charged with fraud if he seeks payment without disclosing his noncompliance.

Indeed, claimants cannot logically be deemed to have fraudulently withheld information in the absence of an expressly stated condition of payment. The FCA limits liability to claimants who "knowingly" present a false or fraudulent claim for payment. 31 U.S.C. § 3729(a)(1)(A). If the Government has failed to state expressly that compliance with a statute, regulation, or contractual provision is a condition of payment, a claimant cannot have "knowingly" presented a false or fraudulent claim because he cannot have known that his failure to disclose noncompliance would be considered by the Government to constitute an implied certification of compliance.

The First Circuit has rejected efforts to limit FCA implied-certification liability to cases involving expressly stated conditions of payment, reasoning that such a limitation has no grounding in the statutory language. That reasoning gets the argument backward: it is the implied-certification theory itself

that lacks a statutory basis. Thus, if this atextual theory is nonetheless adopted, it should be adopted in a form that avoids unfairness by limiting its application to instances in which claimants are provided fair notice that they could face FCA liability—including hefty fines and treble damages— if they fail to disclose their non-compliance with the provision at issue.

Adopting a standard that fails to provide fair warning is particularly unwarranted given that violations of the civil FCA will almost always also violate the FCA's companion criminal statute, 18 U.S.C. § 287. When Congress first adopted the FCA in 1863, it provided for both civil and criminal liability. It later separated the civil and criminal provisions into two statutes, but the conduct prohibited by the two statutes has remained largely identical. It is highly likely that Congress intended the scope of "false" and "fraudulent" claim liability to be identical under both statutes.

The Rule of Lenity requires any ambiguity concerning the scope of a criminal statute, including § 287, to be resolved in favor of lenity to the accused. To avoid a situation in which two virtually identical statutes with common origin—the FCA and § 287—are assigned conflicting interpretations, the Rule of Lenity should be applied to the FCA as well. Thus, to the extent that the Court concludes that the language of the FCA is ambiguous with respect to the second Question Presented, the Rule of Lenity requires the Court to adopt a construction that limits implied-certification liability to instances in which the provision at issue states expressly that compliance is a

condition of payment.

UHS is entitled to judgment if either of the two questions presented is decided in its favor. It is undisputed that MassHealth never asked UHS to expressly certify its compliance with applicable regulations, and that UHS never provided any such express certification. Thus, if the Court resolves Question One by rejecting the implied certification theory, there can be no basis for concluding that UHS presented a "false or fraudulent claim." Nor can UHS be held liable if the Court resolves Question Two by limiting implied-certification liability to instances in which the statute, regulation, or contractual provision at issue states expressly that compliance is a condition of payment. None of the regulations at issue in this case expressly conditions payment on compliance with the regulation.

ARGUMENT

I. The False Claims Act Imposes Liability Based on Claims Affirmatively Made, Not by Inferring Certifications Not Actually Made

The implied-certification theory of liability is a recently developed, judge-made theory of liability that derives from a perceived need to further the FCA's statutory purposes by providing the Government with stronger tools to combat alleged contractor fraud. But as the Court reminded yet again last week, "Vague notions of a statute's basic purpose are inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Montanile v. Bd. of*

Trustees, ___ U.S. ___, 2016 WL 228344 (Jan. 20, 2016) (emphasis in original) (citations omitted). The text of the FCA imposes liability for actual "false or fraudulent claim[s]." It does not impose liability for hypothetical implied claims that the contractor did not make and that there is no evidence that he intended to convey. The desire of some lower courts to further their conceptions of the purposes of the FCA by creating new theories of liability should not be permitted to trump the statute's text.

A. The False Claims Act Is Designed to Combat Fraud, a Term with a Well-Understood Common-Law Meaning

In determining whether Respondents' implied certification theory states a claim against UHS under the False Claims Act, "[w]e start, as always, with the language of the statute." *Allison Engine*, 553 U.S. at 668. Section 3729(a) imposes civil liability on "any person" who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." Respondents contend, and the First Circuit held, that the reimbursement claims that UHS submitted to MassHealth were "false or fraudulent," even though: (1) there is no allegation that UHS did not perform the work for which it sought payment; (2) there is no allegation that UHS's claim stated expressly that it had complied with any of the regulations at issue here; and (3) there is no allegation that Massachusetts officials ever conveyed to UHS that it was not entitled to *any* payments unless it complied with all of the regulations at issue. The First Circuit's holding cannot be squared with commonly accepted definitions of the terms "false" and "fraudulent."

UHS's brief explains at length the widely-accepted common law meaning of the word "fraudulent." WLF will not repeat that explanation here, except to note that an essential element of any fraud is an intent to deceive. *See, e.g., Black's Law Dictionary* (4th ed. 1968) (defining fraud as "a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another"). Respondents and the First Circuit have provided no argument suggesting that Congress intended to assign the words "false" and "fraudulent" meanings other than their common-law meanings.

Importantly, while the common law acknowledges that the failure to disclose can under proper circumstances constitute fraud, there is no general duty to disclose information to another unless one owes some special duty to the other. Restatement (Second) of Torts § 551(1) (1977); *Chiarella v. United States*, 445 U.S. 222, 235 (1980) ("When an allegation of fraud is based upon non-disclosure, there can be no fraud absent a duty to speak."). The duty to speak can arise in several ways in connection with a business transaction, including when one party to the transaction has made a partial or ambiguous statement of the facts, and he possesses information whose disclosure is necessary to prevent the previous disclosure from misleading the other party. Restatement (Second) of Torts § 551(2)(b) (1977). *See also, Omnicare, Inc. v. Laborers Dist. Council*, 135 S. Ct. 1318, 1327-1330 (2015) (an issuer of securities has a duty under federal securities law to disclose factual information in a registration statement if omission of

the fact would render misleading a statement of opinion included in the registration statement).

The First Circuit made no effort to apply common-law understandings of fraud in determining whether Respondents stated a cause of action under the FCA. It did not assert that UHS said anything untrue to MassHealth. Nor did it examine whether the relationship between the parties was such that the common law would impose a duty on UHS to affirmatively disclose its (alleged) noncompliance with MassHealth regulations. Instead, it justified its adoption of implied-certification liability based primarily on its conclusion that a "broad view of what constitutes a false or fraudulent statement" was required to effectuate Congress's intent that the FCA be employed to combat all types of fraud. That stacked approach to statutory analysis, which discounts the words of the statute, is precisely the sort of analysis *Montanile* condemned.

The Court on several occasions has stated that the FCA "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 961 (1968); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003). But the First Circuit has misread those statements when it concludes that this Court is endorsing an expanded definition of fraud in FCA cases. *Neifert-White* and *Cook County* expanded FCA coverage to new subject matters (the former held that the FCA covers false statements made in connection with government loan applications, the latter held that the FCA covers false statements made by local

governments). The Court's statement that the FCA reaches "all types of fraud, without exception" indicates that the FCA's anti-fraud provisions apply in a virtually limitless variety of factual situations, not that Congress intended to alter common-law definitions of fraud.

WLF does not suggest that the FCA only imposes liability for affirmatively untrue statements. There are a number of scenarios under which a contractor's omissions could be actionable under the FCA. Indeed, Congress apparently had such scenarios directly in mind when it adopted the FCA in 1863. Congress adopted the FCA "after disclosure of widespread fraud against the Government" during the Civil War. *Rainwater v. United States*, 356 U.S. 590, 592 (1958). A frequently cited example: businesses would enter into a contract to provide goods at a specified price, then submit a claim for payment without ever delivering the goods. If the invoice submitted by the business expressly (and falsely) stated that the goods were actually delivered, then the fraud would be obvious.

But what happens when (as often was the case) the invoice did not explicitly state the quantity of goods shipped but rather stated "for services rendered" (or the equivalent) and then listed an amount due that was identical to the purchase price under the initial contract? Under those circumstances, the contractor could still be held liable under the FCA because his prior actions and statements would lead a reasonable person to believe that the goods had been delivered—and thus the contractor has breached his duty to disclose that arose because his past actions,

along with his submission of the invoice, would likely cause the Government to conclude that he had delivered the goods.[2] In sum, the most plausible interpretation of the FCA's "false or fraudulent claim" language is one that adopts existing common-law understandings of fraud, not an implied-certification approach that bears no relationship to the statutory language.

B. The Court's Focus on "False or Fraudulent Claim[s]" Has Not Changed Since the FCA's Enactment in 1863

The FCA's statutory language has changed very little during its 150-year history. Accordingly, if the implied certification theory of liability were a plausible interpretation of the statute, one would expect it to have gained traction at various points in the statute's history. Remarkably, however, WLF's search of older FCA cases has turned up not a single instance in which this Court adopted anything even remotely akin to implied-certification liability. Nor, apparently, did government attorneys ever press the Court to adopt

---

[2] Some courts have adopted similar reasoning to conclude that a contractor who supplies totally worthless goods (*e.g.*, boxes filled with Civil War rifles that are incapable of firing) are also subject to FCA liability even if their invoices include no affirmative falsehoods. *See, e.g., Mikes v. Straus*, 274 F.3d 687, 702-04 (2d Cir. 2001). Those courts have concluded that a "worthless services claim" should be treated the same as a claim against a contractor who has not performed at all, because "performance of the service is so deficient that for all practical purposes it is the equivalent of no performance at all." *Id.* at 703; *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048 (9th Cir. 2001).

that theory of liability. That uniform history provides strong support for rejecting novel implied-certification liability.

The False Claims Act as initially enacted in 1863 (and re-enacted in 1874) contained both civil and criminal aspects. The criminal portion provided for up to five years' imprisonment for, *inter alia*, presenting a claim upon the Government "knowing such claim to be false, fictitious, or fraudulent." Rev. Stat. § 5438 (1874). The civil portion directly referenced the criminal portion; it provided that anyone who violated § 5438 was subject to civil liability consisting of a $2,000 fine and double the amount of damages suffered by the Government. Rev. Stat. § 3490 (1874).

The criminal portion was later broken off and divided into two separate criminal statutes. The operative language of the current "false, fictitious or fraudulent" claims criminal statute is identical to the 1863 version. It provides for up to five years' imprisonment for presenting a claim upon the Government, "knowing such claim to be false, fictitious, or fraudulent." 18 U.S.C. § 287.

The civil portion continued to define prohibited conduct by explicit reference to the 1874 criminal statute until 1982. Congress re-codified the FCA in 1982 and, at the same time, eliminated the word "fictitious" from the 1863 proscription of "false, fictitious, or fraudulent" claims. Pub. L. No. 97-258, § 3729, 96 Stat. 877, 978. The House report explained, however, that the minor textual change was not intended to be substantive but rather was designed only to "eliminate unnecessary words." H.R. Rep. No.

97-651, at 143 (1982). The FCA has been amended several more times since 1982, but the wording of the principal operative language—the imposition of liability for knowingly presenting a "false or fraudulent claim"—has not changed.

In sum, the statutory language establishing the standard for imposing liability under the FCA (both civilly and criminally) has been essentially unchanged throughout the FCA's history. The standard which the First Circuit interpreted as authorizing implied-certification liability is the same standard that the Court has addressed throughout its 150-year experience in addressing claims arising under the FCA. If implied-certification liability were a plausible outcome of cases decided under the "false or fraudulent claim" standard, one would expect the Court to have at least considered such outcomes in its prior decisions. The absence of such case law speaks volumes about the plausibility of relying on the "false or fraudulent claim" standard as the basis for the implied-certification doctrine.

Indeed, in every FCA decision reviewed by WLF over the past century (both civil and criminal), the Court addressed an allegation that the defendant made an *express* claim alleged to be false or fraudulent. *See, e.g., Ingraham v. United States,* 155 U.S. 434 (1894) (defendant presented claim for reimbursement based on false and fraudulent assertions that he had paid money for his mother's health care and funeral); *United States v. Bowman*, 260 U.S. 94 (1922) (defendant presented claim for reimbursement based on falsified invoice showing purchase of 1,000 tons of oil, when in fact only 600 tons had been delivered;

United States v. Kapp, 302 U.S. 214 (1937) (defendant sought benefit payments under the Agricultural Adjustment Act by making a false "representation" regarding the source of the pigs he sold to the Government); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (defendants obtained excess profits from Government by rigging bids for construction contracts, then expressly (and falsely) certifying to the Government that their bids were "genuine and not sham or collusive"); *Rainwater v. United States*, 356 U.S. 590 (1958) (obtaining crop loans by falsifying loan applications); *United States v. Neifert-White Co.*, 390 U.S. 228 (1968) (same); *United States v. Bornstein*, 423 U.S. 303 (1976) (defendant subcontractor falsely labeled electron tubes for purpose of deceiving government into believing that they were of superior quality).

Admittedly, one likely reason for the absence of implied certification claims in the first 130 years of FCA litigation is that the filing of *qui tam* lawsuits was significantly restricted, and the Government chose not to pursue such claims. But the failure of the federal government to pursue such claims is highly significant, given that the Government would have had a major financial interest in pursuing such claims if it thought they were viable. A reasonable conclusion to be drawn from the absence of such claims is that the federal government determined—at least until very recently—that implied-certification claims are inconsistent with the FCA's requirement that liability be based on the knowing presentment of false or fraudulent claims.

C. When Amending the False Claims Act, Congress Never Indicated an Intent to Expand the Definition of Fraud

Implied-certification liability first began to gain a foothold in the lower federal courts in the years following the 1986 amendments to the FCA. Those amendments eased federal court access for *qui tam* suits and led to a considerable uptick in filings. Some courts have cited the 1986 amendments as a rationale for expanding the FCA's definition of "false or fraudulent claims" beyond its common-law roots. Such reliance is unwarranted. Nothing in the 1986 amendments purported to expand the definition of "false or fraudulent claims."

Before 1943, the FCA's *qui tam* provisions permitted virtually any private citizen to serve as an FCA relator—albeit, not many individuals knew enough about the statute to take advantage of the opportunities. The *qui tam* provisions fell into disfavor among senior government officials following the Court's 1943 *Hess* decision. In that case, the Court upheld a relator's right to receive 50% of any civil judgment obtained against antitrust conspirators who had been indicted for antitrust violations. The relator did not provide the Government with any information that assisted the antitrust investigation; indeed, everything he knew about the case he learned by reading a copy of the indictment. Senior Justice Department officials, incensed by having to share their civil recovery with the relator, persuaded Congress to amend the statute to make it much more difficult for relators to pursue *qui tam* suits.

A 1984 Seventh Circuit decision persuaded some that the pendulum had swung too far in the other direction. In *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), the appeals court refused to permit Wisconsin to maintain a *qui tam* suit on the ground that the federal government already knew about the alleged Medicaid fraud—even though an investigation conducted by Wisconsin itself was the source of the federal government's information. Largely in response to *Dean*, Congress amended the FCA to loosen the standards governing who is entitled to file *qui tam* actions under the FCA.

Also as part of its 1986 amendments, Congress adopted several other measures designed to encourage the filing of *qui tam* actions. Those changes included: (1) reducing a relator's burden of proof to preponderance of the evidence; (2) relaxing the scienter requirement somewhat (some courts had been requiring evidence of a specific intent to defraud); and (3) increasing damages and penalties recoverable under the FCA. James B. Helmer, Jr., *et al., War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act*, 18 Ohio N. U. L. Rev. 35, 44-45 (1991). As noted above, the amendments did not change the basic requirement for establishing liability; the FCA continued to require relators to demonstrate knowing presentment of a "false or fraudulent claim." 31 U.S.C. § 3729(a)(1).

Appeals courts that have endorsed implied-certification liability often point to the Senate Report that accompanied the 1986 amendments as evidence that the existence of a "false or fraudulent claim" can

be proven by demonstrating that a contractor presented a claim for payment while not in compliance with an applicable statute, regulation, or contract term. S. Rep. No. 99-345, at 9 (1986). Reliance on the Senate Report for this purpose is not well founded; its meaning is far from clear. More importantly, a 1986 congressional report is a particularly unreliable indicator of the meaning of the FCA's "false or fraudulent claim" provision because the FCA's 1986 amendments did not address that provision. At best, the committee report represents a rough guess by several members of a Senate committee regarding the intent of the 1863 Congress in adopting the FCA. And, of course, a congressional report is entitled to *no* weight to the extent that it contradicts clear statutory language.

The oft-cited passage from the Senate Report reads as follows:

> The False Claims Act is intended to reach all fraudulent attempts to cause the government to pay out sums of money or to deliver property or services. Accordingly, a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation.

Ibid.

The first sentence strongly supports WLF's view of the FCA; it reinforces our view that the FCA only reaches fraudulent conduct, not mere breaches of contract. Supporters of implied-certification liability

interpret the second sentence as suggesting that any claim for payment based on the provision of goods or services in violation of any contract term, specification, statute or regulation constitutes a "false claim." That meaning is far from clear. An equally plausible interpretation is that *some* claims for payment can be false or fraudulent if the claimant has not complied with all applicable contract terms, specifications, statutes, and regulations. For example, all would agree with the unremarkable proposition that a claim for payment is a false or fraudulent claim if the claim expressly (and falsely) certifies compliance with a contract term, statute, or regulation.

There is one other strong reason not to place any weight on the Senate Report: this Court has previously declined to credit the same report under analogous circumstances. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the relator sought to rely on the 1986 Senate Report in support of its claim that States should be subject to FCA suits. The Court concluded that the Report was of no value in discerning whether a State was a "person" within the meaning of the FCA, in part because the 1986 amendments had not addressed the meaning of that term. *Vermont Agency*, 529 U.S. at 782-83 & n.12. Similarly, because the 1986 FCA amendments did not revise the "false and fraudulent claim" requirement, any discussion of that term by the Senate report amounts to nothing more than speculation regarding the intent of prior Congresses.

In sum, recent amendments to the FCA are irrelevant to the issues raised by this case. The implied-certification theory of liability was inconsistent

with the FCA in 1863, was inconsistent with the FCA in 1963, and is inconsistent with the FCA today.

II. At a Minimum, Any Relator Alleging Implied Certification Must Demonstrate Noncompliance with an Expressly Stated Condition of Payment

If the implied-certification theory is to be recognized at all, it should be limited to FCA cases in which the statutory, regulatory, or contractual provision allegedly violated states expressly that claims will not be paid unless the claimant has complied with the provision. Only in such cases can the claimant be deemed to have received fair notice that he might be charged with fraud if he seeks payment without disclosing his noncompliance.

A. Claimants Cannot Logically Be Deemed to Have Fraudulently Withheld Information in the Absence of an Expressly Stated Condition of Payment

In the modern legislative state, a company seeking payments from the federal government will likely be subject to hundreds if not thousands of statutory, regulatory, and contractual requirements. No company can reasonably hope to stay in compliance with all of those requirements at all times. More importantly, government regulators almost surely deem compliance with some of their requirements to be considerably more important than compliance with others. Under those circumstances, it makes sense to place the onus on regulators to identify those

regulations on which they place highest priority, by designating which regulations must be complied with if the company hopes to be paid.

Indeed, claimants cannot logically be deemed to have fraudulently withheld information in the absence of an expressly stated condition of payment. The FCA limits liability to claimants who "knowingly" present a false or fraudulent claim for payment. 31 U.S.C. § 3729(a)(1)(A). If the Government has failed to state expressly that compliance with a statute, regulation, or contractual provision is a condition of payment, a claimant cannot have "knowingly" presented a false or fraudulent claim because he cannot have known that his failure to disclose noncompliance would be considered by the Government to constitute an implied certification of compliance.

Moreover, the First Circuit does not permit a regulator simply to announce that a claim for payment is fraudulent unless the contractor complies with *all* regulations. Rather, it requires the regulator to demonstrate that the requirement at issue is a "material" precondition of payment. Pet. App. 13. Under those circumstances, a requirement that regulators expressly identify in advance which of their regulations are preconditions for payment will likely be of substantial benefit to regulators because courts may well conclude that they should defer to a government's establishment of a priority list among its regulations.

B. The First Circuit's Standard Lacks Any Statutory Basis or Support from this Court's Case Law

The First Circuit has rejected efforts to limit FCA implied-certification liability to cases involving expressly stated conditions of payment, reasoning that such a limitation has no grounding in the statutory language. *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377, 388 (1st Cir. 2011) ("the rule advanced by [the defendant] that only express statements in statutes and regulations can establish preconditions of payment is not set forth in the text of the FCA."). That reasoning gets the argument backward: it is the implied-certification theory itself that lacks a statutory basis. Thus, if this atextual theory is nonetheless adopted, it should be adopted in a form that avoids unfairness by limiting its application to instances in which claimants are provided fair notice that they could face FCA liability—including hefty fines and treble damages— if they fail to disclose their non-compliance with the provision at issue.

The First Circuit described its standard of review as follows: "We ask simply whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment." Pet. App. 13. Thus, the only two hurdles faced by a First Circuit relator seeking to survive a motion to dismiss are adequately alleging that the defendant violated a regulation, and demonstrating that the regulation was "a material

precondition to payment."[3] Those requirements provide scant protection for companies seeking to avoid costly litigation.

As the First Circuit concedes, "the question whether a given requirement constitutes a precondition to payment is a fact-intensive and context-specific inquiry, involving a close reading of the foundational documents, or statutes and regulations." *Ibid.* The appeals court provided no guidance for determining which facts and what contexts are relevant in determining which of the thousands of applicable statutes and regulations should be deemed "material." Faced with an amorphous standard, district courts considering motions to dismiss would be extremely hard-pressed to determine that a relator had not adequately pleaded that compliance with a specific regulation was a material condition of payment. Courts could easily avoid this morass by requiring governments to complete a simple task: expressly designate which of the thousands of applicable statutes and regulations they deem most important—and state that claims will not be paid unless the claimant has complied with those provisions.

The "knowingly" requirement is similarly ineffective in weeding out insubstantial claims. If a *qui tam* relator can adequately allege noncompliance with a regulation, he will always be able to allege that the defendant had knowledge of the noncompliance.

---

[3] As explained above, "misrepresentation" is not a separate requirement, because the implied-certification theory presumes that a contractor certifies compliance with all material regulations when it presents a claim for payment.

Federal appeals courts have justified their application of implied-certification liability, even in the absence of an express-designation requirement, by arguing that any other rule would create "a counter-intuitive gap in the FCA." *United States v. Science Applications Int'l Corp.* [*SAIC*], 626 F.2d 1257 (D.C. Cir. 2010). The court below justified its decision to "take a broad view of what may constitute a false or fraudulent statement" in order to "avoid foreclosing FCA liability in situations that Congress intended to fall within the Act's scope." Pet. App. 13. But that form of argumentation assumes the answer to the question that courts should be asking: what is the proper scope of the FCA? If a claim presented to the Government does not constitute a "false or fraudulent claim," then judges should not invent new theories of liability simply because they have a gut feeling that Congress must have intended claims of that sort "to fall within the Act's scope."

Moreover, while a finding that certain categories of cases do not fall within the scope of the FCA may be bad for plaintiffs' lawyers' business, it hardly leaves the Government without remedies. In addition to the numerous administrative remedies available to the Government when a contractor violates statutes, regulations, or contractual terms, it may also file a breach of contract action. WLF notes, for example, that in *SAIC*, the Government sued for breach of contract as well as for violations of the FCA. While government attorneys will always be tempted to add an FCA count to their lawsuits because of the FCA's attractive provisions authorizing civil penalties and treble damages, a ruling from this Court that the FCA should be interpreted in accordance with its statutory

provisions would still leave the Government with numerous powerful tools to ensure adequate performance from companies that receive federal funds.

C. In Light of the False Claims Act's Criminal-Law Applications, the Rule of Lenity Requires Rejection of the First Circuit's Standard

As noted above, the civil and criminal FCA statutes (which at one time were both part of a single statute) contain virtually identical language. *Compare* 31 U.S.C. § 3729(a); 18 U.S.C. § 287. Both statutes prohibit submission of "false" or "fraudulent" claims and have done so since 1863. Accordingly, it has highly likely that the 1863 Congress intended the scope of "false" and "fraudulent" claim liability to be identical under both statutes.

The Rule of Lenity requires any ambiguity concerning the scope of a criminal statute, including § 287, to be resolved in favor of lenity to the accused. *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"). Given the even split—among those federal appeals courts that accept the validity of the implied-certification doctrine—regarding whether to impose an "express designation" requirement, the only reasonable conclusion is that the FCA is ambiguous on that issue. Accordingly, a court would likely interpret § 287 as barring criminal prosecution of someone who presents a claim to the Government while not in compliance with an applicable regulation, unless the regulation

states expressly that compliance with the regulation is a condition of payment.

Unless the Court applies the Rule of Lenity in this case, it risks creating conflicting interpretations for closely related statutes that employ identical language. The Court has routinely applied the Rule of Lenity in civil cases in order to avoid just such a conflict. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380 (2005) ("[I]f a statute has criminal applications, 'the rule of lenity applies' to the Court's interpretation of the statute even in immigration cases '[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.'") (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004)); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 & n.10 (1992)(plurality opinion) (applying Rule of Lenity to interpret a tax statute in a civil setting "because the statute has criminal applications"); *id.* at 519 (Scalia, J., concurring in judgment) (also invoking the Rule of Lenity).

For all the reasons explained above, the FCA is best interpreted as: (1) not incorporating the implied-certification theory; and (2) alternatively, limiting recognition of the implied-certification theory to cases in which the statutory, regulatory, or contractual provision allegedly violated states expressly that claims will not be paid unless the claimant has complied with the provision. But to the extent that the Court concludes that the FCA is ambiguous with respect to those two issues, the Rule of Lenity should be applied to arrive at that same result.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court reverse the decision of the court of appeals.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
Washington Legal
Foundation
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Dated: January 26, 2016