15-7

No. ____

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 Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK W. PEARLSTEIN
LAURA MCLANE
EVAN D. PANICH
MCDERMOTT WILL & EMERY LLP
28 State Street
Boston, MA 02109
(617) 535-4000

M. MILLER BAKER
Counsel of Record
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street, NW
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com

Counsel for Petitioner

BLANK PAGE

QUESTIONS PRESENTED

The False Claims Act ("FCA") makes it unlawful to present a "false or fraudulent" claim for government reimbursement. 31 U.S.C. § 3729(a)(1)(A). A claim can be "factually false" because, for example, the contractor has not provided the products or services for which reimbursement is sought. Some courts have held that a claim can be "legally false" for purposes of the FCA because the contractor, while providing the products or services for which reimbursement is sought, did not comply with a condition of payment imposed by statute, regulation, or contract. This latter theory of FCA liability is divided into two categories: "express certification" and "implied certification." The viability and scope of the latter theory is at issue here.

Respondents' complaint alleged that petitioner's reimbursement claims were legally false because petitioner's services did not comply with several specific regulatory provisions with which petitioner impliedly certified compliance. The district court dismissed the complaint pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) because none of the regulatory provisions alleged in respondents' complaint, or otherwise cited by respondents in the proceeding, imposed conditions of payment, except one, and respondents did not plausibly allege any violation of that provision.

The First Circuit below reversed, holding that respondents' complaint (1) alleged conduct that violated a regulation neither pled in respondents' complaint nor cited by respondents at any point in the proceedings below, and that (2) compliance with this unpled and uncited regulation was a condition of payment. According to the First Circuit, respondents thus stated a claim

for legal falsity under the FCA. Although the First Circuit has eschewed labels used by other circuits in describing different types of FCA claims, it applied an "implied certification" theory of legal falsity.

The questions presented are:

1. Whether the First Circuit, by *sua sponte* identifying and relying upon a regulatory provision not invoked by respondents at any point in the proceedings below to reverse the district court's dismissal of respondents' complaint, has so far deviated from the adversary system's party presentation rule "so as to call for an exercise of this Court's supervisory power" under this Court's Rule 10(a).

2. Whether the "implied certification" theory of legal falsity under the FCA—applied by the First Circuit below but recently rejected by the Seventh Circuit—is viable.

3. 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, as held by the First, Fourth, and D.C. Circuits; 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, as held by the Second and Sixth Circuits.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the First Circuit. The petitioner here, and appellee below, is Universal Health Services, Inc. The respondents here, and appellants below, are the United States of America and the Commonwealth of Massachusetts ex rel. Julio Escobar and Carmen Correa.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no corporate parent and that no publicly held company owns ten percent or more of petitioner's stock.

BLANK PAGE

TABLE OF CONTENTS

TABLE OF CONTENTS

(continued)

Page

TABLE OF CONTENTS

(continued)

TABLE OF CONTENTS

(continued)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Universal Health Services, Inc., respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is published as *United States ex rel. Escobar v. Universal Health Services, Inc.*, 780 F.3d 504 (1st Cir. 2015), and is reprinted at Pet. App. 1. The order of the court of appeals denying rehearing is reprinted at Pet. App. 54. The district court's unpublished opinion dismissing respondents' complaint is available on Westlaw at *United States ex rel. Escobar v. Universal Health Services, Inc.*, No. 11-11170-DPW, 2014 WL 1271757 (D. Mass. Mar. 26, 2014), and is reprinted at Pet. App. 25.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the First Circuit entered its opinion and judgment on March 17, 2015. Petitioner filed a petition for rehearing and for rehearing *en banc* on March 30, 2015, which the court of appeals denied on April 14, 2015. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTE AND REGULATIONS

31 U.S.C. § 3729(a)(1) provides in pertinent part:

> [A]ny person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval . . . is liable to the United States

> Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990[1] . . . , plus 3 times the amount of damages which the Government sustains because of the act of that person.

The relevant provisions of the Code of Massachusetts Regulations are reprinted at Pet. App. 52-62.

INTRODUCTION

This case presents three important questions warranting this Court's review.

The first question is whether the First Circuit so far departed from the "ordinary and usual course" of judicial decision-making as to warrant the exercise of this Court's supervisory authority under Rule 10(a). In the decision below, the First Circuit *sua sponte* identified a regulatory provision never previously cited or invoked by respondents, and relied upon that provision to reverse the district court's dismissal of respondent's complaint. The First Circuit's departure from the adversary system's "party presentation rule" warrants summary reversal on that basis alone.

The second and third questions presented concern an issue that the lower courts have repeatedly addressed resulting in inconsistent outcomes for more than two decades: the viability and scope of "implied certification" claims—*i.e.*, claims based upon a statuto-

---

[1] The Federal Civil Penalties Inflation Adjustment Act of 1990 has adjusted the civil penalties to not less than $5,500 and not more than $11,000. 28 C.F.R. § 85.3(a)(9).

ry, regulatory, or contractual violation—under the FCA.

The disagreement among the circuits exists at two different levels. As an initial matter, the circuits disagree on whether "implied certification" claims may be brought at all under the FCA. The Seventh Circuit recently answered this question with a resounding "no." *United States v. Sanford-Brown, Ltd.*, No. 14-2506, 2015 WL 3541422, at *12 (7th Cir. June 8, 2015) ("Although a number of other circuits have adopted the so-called doctrine of implied false certification . . . we decline to join them. . . ."). The Seventh Circuit held that the implied certification theory of liability advocated by the relator and the government "lack[ed] a discerning limiting principle." *Id.* It further reasoned that the FCA "is simply not the proper mechanism" to enforce compliance with statutes, regulations, and contractual provisions applicable to a contractor by virtue of that contractor's agreement to participate in an agency program, and that compliance with an agency's requirements is best left to the agency to adjudicate. *Id.*

Other circuits (including the First Circuit, as in this case) allow FCA claims to go forward based on violations of statutes, regulations, and contractual provisions, even where the services for which the contractor sought reimbursement were provided, and even where the contractor, in submitting a claim for reimbursement, did not expressly certify compliance with the statute, regulation, or contractual provision. These circuits recognize the implied certification theory and in doing so have opened the door to potentially limitless liability under the FCA, far beyond its intended purposes and scope. The circuits have also engineered dramatically divergent interpretations of the "implied

certification" theory, leading to inconsistent results across jurisdictions.

Indeed, the circuits that recognize the implied certification theory apply the theory in inconsistent ways. While every such circuit requires that compliance with the statute, regulation, or provision allegedly transgressed be a condition of payment by the government payor, these circuits differ on whether a condition of payment must be expressly identified as such, or whether a statute, regulation, or contractual provision can be a "condition of payment" even if it does not state that payment is conditioned on compliance.

The Second and Sixth Circuits fall into the former category, recognizing that a contractor impliedly certifies compliance with a statute, regulation, or contractual provision for purposes of FCA liability only if the government expressly conditions payment on compliance; the legal obligation in question must be explicitly designated a condition of payment. *Mikes v. Strauss*, 274 F.3d 687, 700-02 (2d Cir. 2001); *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011).

While the First, Fourth, and D.C. Circuits recognize the condition of payment requirement, these circuits do not require a legal obligation to be expressly and clearly identified as a condition of payment; instead, courts in these circuits may find "implied conditions of payment" without any basis in the text of the relevant statute, regulation, or contract. *U.S. ex rel. Hutcheson v. Blackstone*, 647 F.3d 377, 386-88 (1st Cir. 2011); Pet. App. 13 (following *Hutcheson*); *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 636 (4th Cir. 2015); *United States v. Sci. Apps. Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010) [hereinafter

SAIC]. None of these circuits has articulated a clear standard for determining when a statute, regulation, or contractual provision is a condition of payment in the absence of express language.

The First Circuit's decision below cemented the hopeless divide among the circuits in two ways. As an initial matter, the decision below is directly at odds with the Seventh Circuit's recent rejection of the implied certification theory of FCA liability. While the First Circuit purports to reject the label "implied certification," there is no uncertainty about the fact that it allowed an FCA claim to proceed based upon petitioner's alleged noncompliance with a state Medicaid regulation.[2]

Moreover, the First Circuit's decision is at odds with the Second and Sixth Circuits, in that it allowed an implied certification claim to proceed in the absence of an express condition of payment: the Massachusetts Medicaid agency, MassHealth, has not expressly stated that compliance with the regulation at issue, which sets forth a nonexhaustive list of job responsibilities for a mental health center's clinical director, is a condition of payment. By nonetheless holding that the regulation is a condition of payment, the First Circuit has converted the FCA into the bluntest of instruments that goes far beyond Congress's intent to create a means to recover damages caused by fraud against the government.

If this Court does not summarily reverse or otherwise grant certiorari on the first question presented,

---

[2] Respondents never alleged that petitioner expressly certified compliance with that regulation.

the Court should at least grant certiorari on the second and third questions presented to resolve the two splits among the circuits implicated here. First, it should, consistent with the Seventh Circuit, reject the implied certification theory of FCA liability because it is inconsistent with the statute's purpose. Second, even if this Court recognizes the implied certification theory or declines to address that issue, it should, at a minimum, require that in an implied certification case, the underlying statute, regulation, or contract must expressly state that the government payor conditions payment on compliance.

STATEMENT

A. Factual Background

Petitioner's subsidiary operates a mental health clinic in Lawrence, Massachusetts (the "Lawrence clinic"), which receives federal and state reimbursement through the state Medicaid program, MassHealth. Pet. App. 3-4. The Lawrence clinic is a "satellite" of a parent center located in Malden, Massachusetts. Pet. App. 3.

Respondents Julio Escobar and Carmen Correa are the step-father and mother of Yarushka Rivera, a patient at the clinic who died of a seizure in 2009. Pet. App. 26. Respondents thereafter filed several complaints with state agencies concerning alleged deficiencies in the quality of service provided at the Lawrence clinic. Pet. App. 7-8.

B. Proceedings Below

1. Respondents brought this action in 2011 as relators under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b), in the United States District

Court for the District of Massachusetts.[3] Both the United States and Commonwealth of Massachusetts declined to intervene.

Respondents then filed a first amended complaint, which petitioners moved to dismiss. After briefing and argument, the district court granted respondents leave to file a second amended complaint "on the understanding that Plaintiffs must be willing to rise or fall on their new [c]omplaint." Pet. App. 32.

In their second amended complaint, respondents alleged that: (1) named and unnamed caregivers at the Lawrence clinic were not properly supervised in violation of MassHealth regulations; and (2) the Lawrence clinic violated the staff composition requirements contained in those regulations because it did not employ a board certified or board eligible psychiatrist and a licensed psychologist. Pet. App. 29. Respondents alleged that petitioner violated the following MassHealth regulations: 130 Mass. Code Regs. §§ 429.408, 429.422, 429.423(D), 429.424(A), 429.424(B), 429.424(E), 429.437, 429.439. Second Amended Complaint, Dist. Ct. Dkt. No. 50. Respondents alleged that compliance with each of these regulations is a condition of payment by MassHealth.

Petitioner then moved to dismiss the second amended complaint pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), which the district court

---

[3] Respondents also brought identical claims under the *qui tam* provisions of Massachusetts False Claims Act, Mass. Gen. Laws ch. 12, § 5C(2). Because the federal False Claims Act and its Massachusetts counterpart are very similar, "the state statute may be construed consistently with the federal act." Pet. App. 17 n.13 (citation and internal quotation marks omitted).

granted. Pet. App. 53. Of the regulations identified by respondents in the second amended complaint, as well as four additional regulations cited by respondents in their briefing, *see* Pet. App. 39, the district court concluded that only one, 130 Mass. Code Regs. § 429.439, was a condition of payment.[4]

Respondents alleged that under section 429.439 "some supervision requirements are pre-conditions to payment," Pet. App. 38 (citing Second Amended Complaint ¶ 12), but the district court concluded that respondents had not plausibly alleged that the petitioner had violated that provision because none of the supervisory "standards [contained in section 429.439] can form the foundation for a regulatory violation relevant to the claims in this case." Pet. App. 44.

2. On appeal, the First Circuit did not reject the district court's conclusion that, except for section 429.439, none of the regulatory provisions invoked by respondents in their second amended complaint and briefing imposed compliance as a condition of payment. Pet. App. 15. Nor did the First Circuit disagree with the district court's conclusion that respondents did not allege any plausible violation of section 429.439's supervisory standards.

Instead, the First Circuit faulted the district court for "overlook[ing]," Pet. App. 16, another regulation that respondents *never* invoked (either in the district court or on appeal): 130 Mass. Code Regs. § 429.423(B)(2), which is referenced in section 429.439.

---

[4] Section 429.439 provides "[s]ervices provided by a satellite program are reimbursable only if the program meets the standards described below." 130 Mass. Code Regs. § 429.439.

Specifically, section 429.439(C) provides that"[t]he clinical director must be employed on a full-time basis and meet all of the *requirements* in 130 [Mass. Code Regs. §] 429.423(B)." 130 Mass. Code Regs. § 429.439(C) (emphasis added).

Section 429.423(B) contains two paragraphs. Paragraph (1) provides the "requirements" that a satellite facility's clinical director must meet:

> The clinical director must be licensed, certified, or registered to practice in one of the core disciplines listed in 130 [Mass. Code Regs. §] 429.424, and must have had at least five years of full time, supervised clinical experience subsequent to obtaining a master's degree, two years of which must have been in an administrative capacity. The clinical director must be employed on a full-time basis.

130 Mass. Code Regs. § 429.423(B)(1).

Respondents did not allege, and the First Circuit did not conclude, that the clinical director of the Lawrence clinic failed to meet any of the *requirements* identified in paragraph (1). Instead, the court of appeals relied on paragraph (2), which provides that the "specific *responsibilities* of the clinical director include"

> (a) selection of clinical staff and maintenance of a complete staffing schedule;
>
> (b) establishment of job descriptions and assignment of staff;
>
> (c) overall supervision of staff performance;
>
> (d) accountability for adequacy and appropriateness of patient care;
>
> (e) in conjunction with the medical director, accountability for employing adequate psychiatric

> staff to meet the psychopharmalogical needs of clients;
>
> (f) establishment of policies and procedures for patient care;
>
> (g) program evaluation;
>
> (h) provision of some direct patient care in circumstances where the clinical director is one of the three minimum full-time equivalent staff members of the center;
>
> (i) development of in service training for professional staff; and
>
> (j) establishment of a quality management program.

130 Mass. Code Regs. § 429.423(B)(2) (emphasis added).

The First Circuit held that (1) because section 429.439 conditions payment on compliance with "the standards described below," and (2) because section 429.439(C) states that a clinical director must satisfy "all of the *requirements* in [section] 429.423(B)," then, by extension, (3) every part of section 429.423(B) is a material condition of payment. Pet. App. 16 (emphasis added). Thus, as section 429.423(B)(2)(c) states that a clinic director is responsible for "overall supervision of staff performance," then "[i]nsofar as [respondents] have alleged noncompliance with regulations pertaining to supervision, they have provided sufficient allegations of falsity to survive a motion to dismiss." Pet. App. 16.

The First Circuit reached this conclusion even though nothing in section 429.423 conditions payment on the nonexhaustive list of "specific responsibilities" of

the clinical director listed in subsection (B)(2). (Instead, subsection (B)(1)—not (B)(2)—lists the "requirements" of the clinical director contemplated by section 429.439(C).) Moreover, respondents did not generally allege violation of "regulations pertaining to supervision." Instead, respondents alleged violations of specific regulations, including section 429.439, but *not* section 429.423(B).

The First Circuit further concluded that respondents plausibly alleged that the Lawrence clinical director failed to employ "adequate" psychiatric staff, *see* 130 Mass. Code Regs. § 429.423(B)(2)(e), by alleging that the Lawrence clinic's psychiatrist was not board certified, Pet. App. 20-22. Although the regulation does not define "adequate," the court concluded that respondents sufficiently alleged a violation of this regulation. The court reached this conclusion by relying on another, unrelated regulation issued by a different agency, the Massachusetts Department of Public Health ("DPH"): 105 Mass. Code Regs. § 140.530, which requires mental health centers to have a board certified psychiatrist on staff. But this DPH regulation is tethered to neither section 429.423(B)(2) nor section 429.439. In addition, no statute, regulation, or contractual provision suggests that compliance with section 140.530 is a condition of MassHealth reimbursement.

Because respondents did not argue at any point during the proceedings before the district court or the First Circuit that petitioner had either failed to comply with section 429.423(B)(2) or that this regulation was a condition of payment, petitioner moved for rehearing on this basis. The First Circuit denied rehearing.

REASONS FOR GRANTING THE PETITION

I. The First Circuit's Departure from the Party Presentation Rule Warrants Exercise of This Court's Supervisory Authority

"In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Under that principle, courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* Accordingly, "the legal parameters of a given dispute are framed by the positions advanced by the adversaries, and may not be expanded *sua sponte* by the [court]." *GJR Invs., Inc. v. Cnty. of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir. 1998) (quoting *Doubleday & Co. v. Curtis*, 763 F.2d 495, 502 (2d Cir. 1985)) (internal quotation marks omitted), *overruled on other grounds as recognized in Randall v. Scott*, 610 F.3d 701, 709 (11th Cir. 2010).

Here, the First Circuit *sua sponte* expanded the legal parameters beyond respondents' second amended complaint by first identifying, and then relying upon, 130 Mass. Code Regs. § 429.423(B), a regulatory provision never once invoked by respondents in their complaint, briefing, or oral arguments in the proceedings below. The First Circuit's "depart[ure] from the ordinary and usual course of judicial proceedings," Sup. Ct. R. 10(a), is all the more stark given the issue before it: whether respondents' second amended complaint alleged with sufficient "particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b).

In this context of alleged "legal falsity" under the FCA, respondents were required to allege, *with particu-*

larity, the regulatory provisions allegedly violated by petitioners for which compliance is a condition of payment. *See Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885, 1898 (2011) (recognizing that the particularity requirement applies to FCA claims); *U.S. ex rel. Ge v. Takeda Pharm. Co.*, 737 F.3d 116, 125 (1st Cir. 2013) (dismissing FCA claims and holding that "courts should not be asked to guess the contents of a theory of liability"), *cert. denied*, 135 S. Ct. 53 (2014). The district court determined that none of the regulatory provisions actually alleged or otherwise cited by respondents imposed compliance as a condition of payment, save one: 130 Mass. Code Regs. § 429.439. Pet. App. 16, 43. As to that regulation's standards, the district court concluded that respondents did not plausibly allege any violation. Pet. App. 44.

The First Circuit did not disagree with the district court's analysis, insofar as it went. Rather than affirm the district court, however, the First Circuit *sua sponte* identified 130 Mass. Code Regs. § 429.423(B) as imposing a condition of reimbursement by operation of section 429.439(C). Pet. App. 16. The court held that respondents' second amended complaint sufficiently alleged a violation of the "overall supervision of staff performance" job function of a clinical director set forth in section 429.423(B)(2), Pet. App. 16,[5] even though respondents never alleged a violation of sec-

[5] Specifically, the First Circuit referenced section 429.423(B) as "mak[ing] plain that one of [the clinical director's] duties is ensuring appropriate supervision." Pet. App. 16. As discussed above, paragraph (1) of section 429.423(B) sets forth the requirements of a clinical director, whereas paragraph (2) sets forth a nonexhaustive list of a clinical director's job functions, including "overall supervision of staff performance."

tion 429.423(B)(2) in their second amended complaint or otherwise cited that provision at any time in the proceedings below.

Because the First Circuit's decision below "departed from the ordinary and usual course of judicial proceedings," Sup. Ct. R. 10(a), by violating the principle that courts "normally decide only questions *presented by the parties*," *Greenlaw*, 554 U.S. at 244 (emphasis added) (citation and internal quotation marks omitted), this Court should exercise its supervisory authority and grant certiorari on the first question presented. Indeed, the First Circuit's departure from settled norms of judicial decision-making is so stark as to make summary reversal on this ground appropriate.[6]

II. The First Circuit's Decision Conflicts with the Seventh Circuit's Recent Rejection of the Implied Certification Theory of Liability

On June 8, 2015, the Seventh Circuit issued a decision in which it definitively rejected the relator's and the government's reliance on the implied certification theory of liability. *United States v. Sanford-Brown, Ltd.*, No. 14-2506, 2015 WL 3541422, at *12 (7th Cir. June 8, 2015). In *Sanford-Brown*, the relator argued that Sanford-Brown college violated the FCA when it received federal subsidies from the U.S. Department of Education while allegedly in violation of a variety of federal regulations. *Id.* at *2. The relator contended that such regulatory violations gave rise to false claims

---

[6] If this Court declines to either summarily reverse or grant plenary review of the first question presented, petitioners waive that non-jurisdictional issue and urge this Court to grant certiorari limited to the second and third questions presented.

by virtue of a program participation agreement ("PPA") into which the college was required to enter into in order to take part in the subsidy program. *Id.* The PPA required the college "to abide by a panoply of statutory, regulatory, and contractual requirements." *Id.*

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of the college. *Id.* at *1. In analyzing the relator's theory of FCA liability under 31 U.S.C. § 3729(a)(1)(A), the Seventh Circuit held,

> [W]e conclude that it would be equally unreasonable for us to hold that an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference into the PPA are conditions of payment for purposes of liability under the FCA. *Although a number of other circuits have adopted this so-called doctrine of implied false certification, we decline to join them* and instead join the Fifth Circuit.[7]

Id. at *12 (emphasis added).[8] The court further noted that "before today, this doctrine was 'unsettled' in this

---

[7] The Fifth Circuit has not explicitly rejected the implied certification theory, but has not adopted it either. *U.S. ex rel. Steury v. Cardinal Health, Inc.* (*Steury II*), 735 F.3d 202, 207 (5th Cir. 2013) (per curiam) (affirming dismissal and noting that "this court has not definitively ruled on the cognizability of implied false certification claims . . . ."); *U.S. ex rel. Steury v. Cardinal Health, Inc.* (*Steury I*), 625 F.3d 262, 268 (5th Cir. 2010) (affirming dismissal and noting that "[t]his Court has not yet recognized the implied-certification theory. . . . The FCA is not a general 'enforcement device' for federal statutes, regulations, and contracts." (citation omitted)).

[8] The "implied certification" theory has been questioned by leading commentators. *See* John T. Boese, *Civil False Claims and Qui*

circuit." *Id.* at *12 n.7 (citing *U.S. ex rel. Grenadyor v. Ukranian Village Pharmacy, Inc.*, 772 F.3d 1102, 1106 (7th Cir. 2014) (further citation omitted)). In rejecting "implied certification" under the FCA, the court reasoned that a violation of a regulation applicable to a government contractor "is for the agency—not the court—to evaluate and adjudicate." *Id.* at *12. Indeed,

> [l]est there be any doubt about the U.S. Department of Education's ability to enforce the PPA through administrative mechanisms here, its regulations are clear that at all times it possessed the authority up to and including the power to terminate SBC from its subsidy program. However, in this case, the subsidizing agency—as well as other federal agencies—have already examined SBC multiple times over and concluded that neither administrative penalties nor termination was warranted.

Id. (citations omitted).

The Seventh Circuit's reasoning for rejecting "implied certification" was sound, and stands in stark contrast to the result in the instant case. MassHealth—

Tam Actions § 2.03[G], at 2-190 (4th ed. 2011) ("There are a number of critical flaws in the [implied certification] theory, both as a matter of purely legal theory and also as it has been applied in actual cases. Most important, allowing liability to be imposed because of false implied certifications has the practical effect of eliminating the government's burden of proving that a defendant knowingly submitted a false claim to the government. Instead, such cases are based on the allegation that a defendant knowingly and falsely implied that it never fell out of compliance with certain laws, regulations, or contract terms. This remarkable leap in reasoning [is] one that is contrary to the clear language of the statute . . . .").

the payor here[9]—has numerous remedies available to it to address violations of its regulations, ranging from administrative fines to suspension from the program. 130 Mass. Code Regs. §§ 450.238-.249. Respondents have not alleged that MassHealth ever availed itself of any such remedies. Application of the implied certification theory of liability, particularly in circumstances such as this, usurps the agency's role in evaluating and adjudicating violations of its regulations.

Although the First Circuit below purported to eschew the "distinctions . . . between implied and express certification theories," Pet. App. 12, it effectively applied the "implied certification" theory rejected by the Seventh Circuit, as it did not find—and the record would not support—a determination that respondents alleged that petitioner expressly certified compliance with the applicable MassHealth regulations. Instead, the theory of liability the First Circuit endorsed is that, regardless of what its claims said, petitioner violated the FCA by submitting claims for reimbursement while allegedly in violation of a regulation. Accordingly, despite its rejection of "labels," the First Circuit applied the implied certification theory of liability.

This Court should grant certiorari, adopt the Seventh Circuit's reasoning, and reverse the First Circuit's decision in this matter because petitioner never expressly certified compliance with section 429.423(B)(2) in connection with its claims for reimbursement.

---

[9] MassHealth's use of federal Medicaid dollars to pay petitioner's reimbursement claims implicates potential FCA liability. *See* 42 U.S.C. § 1396b (providing for federal funding to state Medicaid programs); *see also* Second Amended Complaint, Dist. Ct. Dkt. No. 50, ¶ 1.

III. The Circuits Are Intractably Divided on the Scope of the Implied Certification Theory of FCA Liability

In circuits that recognize implied certification FCA claims, courts require that the underlying regulation (or statute or contractual provision) be a condition of payment by the government payor. The condition of payment requirement "ultimately has to do with whether it is fair to find a false certification or false claim for payment in the first place." *U.S. ex rel. Steury v. Cardinal Health, Inc.* (*Steury I*), 625 F.3d 262, 269 (5th Cir. 2010). This is because a claim for payment can only conceivably be "false" where it seeks money or property "to which a defendant is not entitled." *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 674-75 (5th Cir. 2003) (en banc).

Despite universal recognition of the condition of payment requirement, the circuits disagree about whether a condition of payment must be expressly identified as such.

A. There Is a Circuit Split Regarding Whether a Condition of Payment Must Be Expressly Identified

The Second and Sixth Circuits recognize that a contractor impliedly certifies compliance with a statute, regulation, or contractual provision for purposes of FCA "falsity" only if the government expressly conditions payment on compliance; the legal obligation in question must be explicitly designated a condition of payment. *Mikes v. Strauss*, 274 F.3d 687, 702 (2d Cir. 2001) (rejecting implied certification claim where statute invoked by relator "does not *expressly* condition payment on compliance with its terms" (emphasis add-

ed)); *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011) (rejecting implied certification claim where the relator did not allege that the defendant "was *expressly* required to comply with those standards as a prerequisite to payment of claims (emphasis added)).

By contrast, the First, Fourth, and D.C. Circuits do not require a condition of payment to be expressly and clearly identified. Instead, courts in these circuits may find "implied conditions of payment" without any basis in the text of the relevant statute, regulation, or contract. *See U.S. ex rel. Hutcheson v. Blackstone*, 647 F.3d 377, 386-88 (1st Cir. 2011) (rejecting a "categorical rule" that "a claim can be false or fraudulent for impliedly misrepresenting compliance with a legal condition of payment if that condition is found expressly stated in the relevant statute or regulations" and acknowledging disagreement with the Second Circuit in *Mikes* (citation and internal quotation marks omitted)); Pet. App. 13 & n.11 (holding that "[p]reconditions of payment . . . need not be 'expressly designated'" and acknowledging disagreement with the Second Circuit in *Mikes* (quoting *Hutcheson*, 647 F.3d at 387)); *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 636 (4th Cir. 2015) (holding that an FCA plaintiff pleads a false claim when it alleges that a defendant "withheld information about its noncompliance with material contractual requirements" and evaluating whether the plaintiff met this standard by applying "common sense"); *SAIC*, 626 F.3d 1257, 1269-70 (D.C. Cir. 2010) (holding that "[t]he existence of express contractual language specifically linking compliance to eligibility for payment may well constitute dispositive evidence of materiality, but it is not . . . a necessary condition," and noting disagreement with the Second Circuit in *Mikes*).

Moreover, none of these circuits has articulated a clear standard for determining when a statute, regulation, or contractual provision is a condition of payment in the absence of express language.

As the First Circuit below expressly acknowledged, *see* Pet. App. 13 n.11, its decision stands in conflict with the rule followed in the Second and Sixth Circuits. The First Circuit found a condition of payment in section 429.423(B)(2) even though MassHealth has not expressly identified this regulation as a condition of payment. For the reasons discussed above and below, the Second and Sixth Circuits would have affirmed, rather than reversed, the district court in this case.

B. Requiring Express Conditions of Payment Is Consistent with the Purpose of the Statute, Principles of Fair Notice, and Judicial Economy

1. *The FCA Is Not a Blunt Instrument to Enforce Compliance with Every Legal Obligation of a Government Contractor*

Limiting the implied certification theory to cases where the plaintiff has pled a violation of an express condition of payment appropriately limits the FCA's scope in a manner consistent with the statute's purpose. In passing the FCA, Congress intended to provide a means to combat fraud on the government, which causes the government to lose money:

> PURPOSE OF THE BILL. The False Claims Act is the principal litigative tool employed by the Government to *recover losses sustained as a result of fraud and corruption.*

S. Rep. No. 96-615, at 1 (1980) (emphasis added); *see also Mikes*, 274 F.3d at 699 ("[T]he False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations—but rather only those regulations that are a precondition to payment.").

A contractor does not defraud the government where it is unclear what the contractor is certifying when it submits a claim for payment. *See Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 671 (2008) (noting that the FCA "demands . . . that the defendant made a false record or statement for the purpose of getting a false or fraudulent claim paid or approved by the Government"). Indeed, the notion that a contractor commits fraud on the government when it seeks payment while committing a minor infraction of a regulation that is not identified as a condition of payment, but which may later be deemed as such by a court, is untenable. Requiring that conditions of payment be expressly and clearly stated ensures that the district courts can consistently determine when defendants have actually submitted "false" claims.

This consistency is crucial to limiting the FCA to its intended role in combating fraudulent claims, and preventing it from becoming a punitive sanction for use against minor regulatory or contractual violations.

2. *Requiring Express Conditions of Payment Provides Notice to Government Contractors of What Conduct Gives Rise to FCA Liability*

Properly limiting the implied certification theory to cases in which plaintiffs allege violations of express conditions of payment will ameliorate the burdens of

compliance for contractors, by providing notice of what conduct will expose them to liability under the FCA. This Court has stressed the importance of providing fair notice of conduct that will result in a punitive sanction. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

Particularly in the health care context, government contractors operate in a "complex" web of regulations. *U.S. ex rel. Hobbs v. MedQuest Assocs., Inc.*, 711 F.3d 707, 715 (6th Cir. 2013). As the law of implied certification under the FCA currently stands, whether a statute, regulation, or contractual provision is a condition of payment such that it can give rise to FCA liability is very much dependent on the circuit in which the case is brought. In the circuits that allow claims to proceed based on conditions of payment that are not express, there is no clear, much less uniform, standard used for identifying whether a legal obligation is a purported "implied" condition of payment. *See, e.g.*, *Triple Canopy*, 775 F.3d at 636-37 (holding that an FCA plaintiff pleads a false claim when it alleges that a defendant "withheld information about its noncompliance with material contractual requirements" and evaluating whether the plaintiff met this standard by applying "common sense").

It is no answer that notice exists by virtue of the underlying legal obligation. It is one thing to say that a contractor is required to comply with, for example, applicable regulations and will be subject to administrative sanctions for regulatory violations. It is another

thing entirely to say that such regulations may also give rise to treble damages and penalties under the FCA. This latter result should be occasioned only when clear and fair notice has been given. That notice is accomplished, as the Second and Sixth Circuits have held, through requiring that a regulatory (or statutory or contractual) condition of payment be expressly identified.

Indeed, allowing FCA claims to proceed based on unidentified "conditions of payment" leaves the question of whether a claim is false to a wholly subjective determination that is both *ad hoc* and *post hoc*. A contractor's expectation about what legal obligations are conditions of payment might reasonably be at odds with a court's conclusion about exactly what is "implied." Moreover, determinations about whether a particular statute, regulation, or contractual obligation is a condition of payment may be different in different courts. Exposing providers and contractors to punitive FCA liability in the face of such inconsistencies is improper and unfair. *See Mikes*, 274 F.3d at 700 ("Liability under the Act may properly be found therefore when a defendant submits a claim for reimbursement while knowing . . . that payment expressly is precluded because of some noncompliance by the defendant.").

3. *Clarifying the Pleading Burden for FCA Plaintiffs Will Curtail Meritless Suits*

Given that courts that allow implied certification FCA claims universally recognize the condition of payment requirement (but differ on how to analyze it), requiring that conditions of payment be express will curtail meritless FCA claims. In an implied certification case, courts are called upon to evaluate whether a legal

obligation is a condition of payment at the pleading stage, in order to determine whether a plaintiff has alleged that a claim for payment was "false." *Steury I*, 625 F.3d at 269 (noting that the condition of payment requirement "ultimately has to do with whether it is fair to find a false certification or false claim for payment in the first place"). In the absence of a clear standard to make this determination, some courts have effectively abdicated their role in assessing whether falsity has been pled, instead stating that they can curtail meritless suits at the pleading stage by "strict enforcement of the Act's materiality and scienter requirements." *SAIC*, 626 F.3d at 1270.

This is not an adequate answer: materiality and scienter are elements of an FCA claim that are separate and independent of falsity. *Sanford-Brown*, 2015 WL 3541422, at *12 n.6 (observing that "[w]hether a violation is material or not has no impact on" whether a claim is false).[10]

---

[10] Moreover, while materiality and scienter may be subject to resolution on the pleadings in some cases, in many cases courts find that, because these elements are highly dependent on the facts, they often cannot be dealt with on the pleadings. *See U.S. ex rel. Loughren v. Unum Grp.*, 613 F.3d 300, 308 (1st Cir. 2010) (noting that "materiality in the FCA context involves a factual determination of the weight that the decisionmaker would have given particular information"); *U.S. ex rel. Farmer v. City of Hous.*, 523 F.3d 333, 346 (5th Cir. 2008) (Jones, J., concurring in part) (noting that "the scienter finding in this [an FCA] case turns on a morass of factual distinctions"); *see also Page v. Postmaster Gen. & Chief Exec. Officer of U.S. Postal Serv.*, 493 F. App'x 994, 995 (11th Cir. 2012) ("In adjudicating a motion to dismiss, the district court may not resolve factual disputes." (citations omitted)).

It is improper for courts to relieve an FCA plaintiff from pleading falsity simply because the court lacks a coherent standard to address the issue. Allowing FCA plaintiffs to proceed to discovery based upon allegations that the defendant violated a legal obligation without any meaningful analysis as to whether payment by the government was conditioned upon compliance with that obligation will permit plaintiffs to exercise the significant leverage of the discovery process to obtain settlements based upon the avoidance of legal costs. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (recognizing the massive costs of discovery and that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"); *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983) (noting that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed"). Requiring that conditions of payment be expressly stated will ensure that courts engage in a proper analysis of falsity at the pleading stage to weed out meritless claims.

C. The Decision Below Is Erroneous under the Legal Standard Applied by the Second and Sixth Circuits

Under the rule followed by the Second and Sixth Circuits, a contractor impliedly certifies compliance with a statute, regulation, or contractual provision for purposes of FCA "falsity" only if the government expressly conditions payment on compliance. *See Mikes*, 274 F.3d at 702; *Chesbrough*, 655 F.3d at 468. Under that standard, the First Circuit would have affirmed,

rather than reversed, the district court's dismissal of respondents' second amended complaint.

The First Circuit held that "insofar as Relators have alleged noncompliance with regulations pertaining to supervision, they have provided sufficient allegations of falsity to survive a motion to dismiss." Pet. App. 16. This was because 130 Mass. Code Regs. § 429.423(B)(2) "delineates the clinical director's responsibilities, including, *inter alia*, "overall supervision of staff performance." *Id.*[11]

According to the First Circuit, compliance with section 429.423(B)(2) was a condition of payment because the preamble to section 429.439 states that "[s]ervices provided by a satellite program are reimbursable only if the program meets the standards described below." Subsection (C) of section 429.439 in turn provides that a clinical director must "meet all of the requirements in 130 [Mass. Code Regs. §] 429.423(B)."

The only "requirements" in section 429.423(B) are contained in paragraph (1), which states that "[t]he clinical director *must* be licensed," "*must* have had at least five years of full-time supervised clinical experience," and "*must* be employed on a full-time basis." 130 Mass. Code Regs. § 429.423(B)(1) (emphasis added). These are clearly "requirements," as they describe things that the clinic director "must" or "shall" do. *See, e.g.*, *Flora v. United States*, 357 U.S. 63, 68 (1958) ("If the compliance with this condition . . . *requires* the party aggrieved to pay the money, he *must* do it." (empha-

---

[11] As noted above in Part I, respondents never invoked 130 Mass. Code Regs. § 429.423(B) at any point in the district court or First Circuit proceedings below.

sis added)). Respondents did not allege, and the First Circuit did not hold, that petitioner violated any of these requirements, which are expressly made a condition of payment by operation of section 429.439(C).

The First Circuit relied instead on the "responsibilities" in section 429.423(B)(2). The court's reliance is misplaced because the "condition of payment" language in section 429.439, on which the First Circuit's decision hinges, does not expressly extend to section 429.423(B)(2). Rather, section 429.423(B)(2) enumerates a nonexhaustive list of a clinic director's job functions. Unlike subsection (B)(1), the enumerated "responsibilities" in subsection (B)(2) do not state that the clinic director "must" or is "required" to do anything. Instead, this subsection simply provides a job description for a satellite facility's clinical director, including (but not defining) "overall supervision" of staff. These "responsibilities," including "overall supervision" are not the "requirements" referenced in section 429.439(C), and hence are not expressly made a condition of payment.

In sum, while section 429.439—compliance with which is a condition of payment—requires that a "clinical director must be employed on a full-time basis and meet all of the requirements in [section] 429.423(B)," such requirements are contained in section 429.423(B)(1). The nonexhaustive list of "responsibilities" listed in section 429.423(B)(2) are not the "requirements" contemplated by section 429.439, and section 429.423(B)(2) does not otherwise explicitly state that it is a condition of payment by MassHealth.

Accordingly, by concluding that subsection (B)(2) of section 429.423 is a condition of payment, the First

Circuit determined that this subsection was an *implied* condition of payment. Under the standard followed by the Second and Sixth Circuits, this is not sufficient to state a violation of the FCA. Indeed, this approach would lead to potentially absurd results. For example, the "responsibilities" enumerated in section 429.423(B)(2) include items such as "establishment of job descriptions and assignment of staff . . . [and] maint[aining] a complete staffing schedule." 130 Mass. Code Regs. § 429.423(B)(2). If, as the First Circuit found, MassHealth conditions payment on compliance with section 429.423(B)(2), this creates potential FCA liability for failing to establish a job description for a staff member or failing to maintain a schedule even for a short period of time. This absurd result cannot be the law.

For the same reasons, the First Circuit's reliance on a reference to "adequate" psychiatric staff in concluding that respondents plausibly alleged a separate violation of section 429.423(B)(2) is equally misplaced. That the clinic director is responsible for employing "adequate" psychiatric staff is not a "requirement," but is merely a "responsibility," as discussed above. In addition, the First Circuit concluded that Arbour's psychiatrist was not "adequate" only based upon separate regulations requiring that a psychiatrist be board certified. *See* Pet. App. 21 (citing 130 Mass. Code Regs. § 429.422(A); 105 Mass. Code Regs. § 140.530(C)(1)(a)). The actual condition of payment, section 429.439, does not even reference any of these regulations, and does not otherwise define what qualifications a psychiatrist must have to be "adequate."

In short, the First Circuit engaged in a cut-and-paste approach, "weav[ing] together" isolated phrases

of separate regulations to find that respondents had alleged violations of conditions of payment. *Hobbs*, 711 F.3d at 714. Because MassHealth has not expressly identified section 429.423(B)(2) as a condition of payment, the Court should grant certiorari and reverse the First Circuit's decision.

IV. The Viability and Scope of "Implied Certification" FCA Liability Present Important and Recurring Questions of Federal Law That This Court Should Decide

The courts of appeals are frequently confronted with FCA claims premised on implied certification theories of liability. While courts of appeals address such claims in wildly inconsistent ways, this Court has yet to address (1) the viability of such claims; or (2) whether the condition of payment prerequisite to pleading such claims must be expressly stated.

This Court should grant certiorari because this case presents important questions of federal law. New FCA complaints have increased substantially in the past thirty years. In particular, actions commenced by whistleblowers have increased dramatically. In fiscal year 1987, relators commenced 30 *qui tam* actions, while in fiscal year 2014, relators commenced 713 *qui tam* actions. U.S. Dep't of Justice, *Fraud Statistics—Overview* (Nov. 20, 2014), http://www.justice.gov/civil/pages/attachments/2014/11/21/fcastats.pdf. These cases implicate millions and sometimes billions of dollars in potential recoveries. *Id.*

Moreover, FCA cases of this type—alleging "legally false" claims based on an "implied certification" theory, rather than "factually false" claims based on actual false statements on claim forms—are rising. *See* W.

Jay DeVecchio, *The False Claims Act and Data Rights: What Plaintiffs' Lawyers Need to Know but Do Not Want to Hear*, 43 Pub. Cont. L.J. 467, 470 (2014). The Court should therefore (1) address whether implied certification claims are viable, and hold that they are not; or, alternatively (2) establish a uniform standard for when implied certification cases may be brought and hold that to defeat a motion to dismiss, an FCA plaintiff must plausibly allege that the defendant violated an express condition of payment.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

June 2015

Respectfully submitted,

MARK W. PEARLSTEIN
LAURA MCLANE
EVAN D. PANICH
MCDERMOTT WILL & EMERY LLP
28 State Street
Boston, MA 02109
(617) 535-4000

M. MILLER BAKER
Counsel of Record
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street, NW
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com

Counsel for Petitioner