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 United States Court of Appeals for the First Circuit

BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

CTIA—The Wireless Association® ("CTIA") respectfully submits this brief as *amicus curiae* in support of Petitioner Universal Health Services, Inc.

CTIA is an international nonprofit organization that represents the wireless communications industry. CTIA's members include wireless carriers, suppliers, manufacturers, providers of data services and products, and countless other contributors to the wireless ecosystem, including providers of telecommunications services. CTIA regularly appears before the Court in cases presenting issues of importance to its members. See, *e.g.*, *T-Mobile S., L.L.C.* v. *City of Roswell*, 135 S. Ct. 808 (2015); *Limelight Networks, Inc.* v. *Akamai Techs., Inc.*, 134 S. Ct. 2111 (2014); *Sprint Commc'ns, Inc.* v. *Jacobs*, 134 S. Ct. 584 (2013); *City of Arlington* v. *FCC*, 133 S. Ct. 1863 (2013); *AT&T Mobility L.L.C.* v. *Concepcion*, 563 U.S. 333 (2011).

The Court's resolution of the question presented—whether a *qui tam* relator's False Claims Act ("FCA") complaint may rely on an "implied certification" theory of liability—will have a significant effect on CTIA's members. The proliferation of FCA lawsuits in recent years affects telecommunications carriers, such as CTIA's members. Like other companies doing business with the Government, telecommunications carriers have a strong interest in ensuring that the pleading rules for FCA lawsuits distinguish

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. The parties' consents to the filing of *amicus* briefs are filed with the Clerk.

between lawsuits prosecuted by individuals with credible knowledge of undisclosed fraud and unfounded cases filed solely for the purpose of extracting large settlements.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly recognized that the False Claims Act does not reach every form of allegedly wrongful conduct by government contractors. Rather, it encompasses only certain, specified conduct—as relevant here, "false or fraudulent claims for payment to the United States." *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 463 (2007). See also 31 U.S.C. § 3729(a)(1)(A) (prohibiting "false or fraudulent claim[s] for payment").

The so-called "implied-certification theory" recognized by certain courts of appeals, including the court below, renders meaningless this Court's admonitions regarding the limits of the FCA. The theory holds that a contractor who has not complied with every condition of participation in a government program is guilty of making a false claim whenever it requests payment for its services—even if it makes no representation about its compliance as part of that request and, according to some courts, even if such compliance is not an express precondition for payment—because a request for payment *impliedly* certifies that the contractor has complied with all program conditions.

That broad theory has no foundation in the text of the FCA. The Act's false-claim provision encompasses only those claims that are "false" or "fraudulent," and a contractor's mere request for payment for goods or services, unaccompanied by any representation regarding its compliance with federal program conditions, fits neither description. Nor is it consistent with the FCA's purpose of safeguarding the government fisc for courts to use the Act as a means of policing compliance with *every* condition of participation in a federal program. Unless a contractor has *expressly* made a false certification of regulatory compliance as part of its request for payment, its failure to comply with a condition of participation should be dealt with through the agency enforcement process, not through an FCA suit for treble damages.

The acceptance of the implied-certification theory by certain courts is especially troubling because many of those courts also fail to hold FCA relators to their burden under Rule 9(b) of pleading the details of defendants' claimed frauds with particularity. Instead of requiring relators to provide the full "who, what, where, when, and how" of the frauds they allege, these courts hold that it is sufficient for a relator to allege a general scheme without any specifics.

Combining this lax interpretation of Rule 9(b) with the implied-certification theory of liability enables almost any relator, no matter how insubstantial his allegations, to survive the pleading stage and obtain discovery. If this Court permits implied-certification claims, therefore, it should at the same time reaffirm the importance of proper application of Rule 9(b)'s particular pleading requirement.

Indeed, allowing lower courts to continue to abdicate their responsibility to apply Rule 9(b) as a check on FCA relators who cannot allege false claims with sufficient detail will open the door wide to abusive litigation. Low-merit FCA suits—already commonplace due to the enticing and enormous bounties that relators can obtain—will multiply, and many will progress past the pleading stage. Contractors targeted by these dubious lawsuits will face intolerable pressure to settle, resulting in *in terrorem* settlements that are a deadweight loss to the economy. Many contractors, moreover, may become more reluctant to do business with the government—thereby undermining the very system of government contracting that the FCA was designed to protect.

The Court should thus reject the implied-certification theory and hold that only an *express* certification relating to particular conditions of payment, made in connection with a request for payment, can give rise to FCA liability. If the Court recognizes some aspect of this theory, it should at the same time affirm the responsibility of relators to plead their claims with particularity, including the basic obligation to allege the details—the who, what, where, when—of at least one allegedly fraudulent claim.

The Dispute Over Implied Certification Claims Highlights The Importance Of Properly Applying Rule 9(b)'s Pleading Standard To FCA Claims.

The court of appeals erred by relying on an "implied-certification" theory of FCA liability—that theory is inconsistent with the text and the purpose of the Act and with simple common sense. To the extent that some types of implied-certifications claims might be permissible, however, proper application of Rule 9(b) is essential to prevent abuse of the FCA cause of action through the use of meritless FCA lawsuits to coerce unjustified settlements.

A. The False Claims Act Does Not Provide A Mechanism For Asserting Multiple-Damages Claims For Every Alleged Statutory Or Regulatory Violation By A Federal Contractor.

As petitioner demonstrates in its brief (at pp. 28-41), the broad implied-certification theory of liability adopted by the court of appeals is wholly inconsistent with the FCA and with basic logic and fairness.

1. The FCA prohibits only "false" or "fraudulent" claims

The plain text of the FCA's false-claim provision precludes implied-certification liability. The statute requires a "false" or "fraudulent" claim. 31 U.S.C. § 3729(a)(1)(A) (prohibiting "knowingly present[ing], or caus[ing] to be presented, a *false or fraudulent* claim for payment or approval" (emphasis added)).

A contractor's unadorned request for payment cannot be "false," assuming that it accurately reports the goods and services that the contractor provided. Such a request does not make any factual representation *at all* as to whether the contractor has complied with every one of the program's participation conditions.

Nor is that request "fraudulent": where the terms of a program do not impose any duty of certification or disclosure regarding compliance with program conditions, a mere request for payment at most constitutes nondisclosure, which does not constitute fraud absent a "duty existing between the parties that compels disclosure of the [relevant] facts." See 26 Richard A. Lord, Williston on Contracts § 69:16

(4th ed. 1990).[2] Thus, the implied-certification theory is irreconcilable with the text of the FCA.

2. The FCA does not transform into actionable fraud every failure to comply with every federal statute and regulation.

The implied-certification theory also bears little relation to the statute's purpose. The FCA was originally enacted to "combat rampant fraud in Civil War defense contracts." *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 135 S. Ct. 1970, 1973 (2015) (quotation omitted). Though Congress has amended the Act on several occasions since then, the law's basic purpose remains the same: to prevent "plundering of the public treasury" by ensuring that claims for payment from the government are accurate. *United States* v. *McNinch*, 356 U.S. 595, 599 (1958). See also, *e.g.*, *United States ex rel. Nathan* v. *Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 454 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014) (citation omitted) (explaining that FCA prohibits improper "call[s] upon the government fisc"); *United States ex rel. Conner* v. *Salina Regional Health Ctr., Inc.*, 543 F.3d 1211, 1222 (10th Cir. 2008) (same).

Thus, the FCA was "not designed for use as a blunt instrument to enforce compliance with *all* [federal] regulations." *Mikes* v. *Straus*, 274 F.3d 687, 699 (2d Cir. 2001) (emphasis added). See also, *e.g.*, *Unit-*

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[2] To be sure, if a contractor must certify *expressly* on the request for payment that it has complied with certain conditions and a contractor makes a false certification, that certification constitutes a false claim; it is hornbook law that such an affirmative representation constitutes fraud. See, *e.g.*, 26 Richard A. Lord, Williston on Contracts § 69:2 (4th ed. 1990) (calling misrepresentation a "hallmark[]" of common-law fraud).

ed States ex rel. Steury v. *Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010) ("The FCA is not a general enforcement device for federal statutes, regulations, and contracts." (quotation marks omitted)). Given that many conditions associated with government spending programs are not designated as preconditions for payment, the FCA—which is exclusively concerned with preventing improper government *payments*—"is simply not the proper mechanism for government to enforce violations of" those regulations. *United States* v. *Sanford-Brown, Ltd.*, 788 F.3d 696, 712 (7th Cir. 2015). And even with respect to conditions that *are* prerequisites for payment, enforcement of those conditions through the FCA is neither necessary nor appropriate in the absence of an express certification in connection with the request for payment.

Rather, as many courts have noted, violations of those regulations are best left to the agency enforcement process. See *ibid.* ("[U]nder the FCA, evidence that an entity has violated conditions of participation * * * is for the agency—not a court—to evaluate and adjudicate."). See also, *e.g.*, *Conner*, 543 F.3d at 1220 (noting that program regulations "are enforced through administrative mechanisms").

An agency has a broad array of tools and sanctions at its disposal for dealing with violations of program conditions. By contrast, as the Seventh Circuit observed in rejecting implied-certification liability, enforcing conditions of participation in federal programs through the implied-certification theory would "import[] boundless FCA jurisdiction on any recipient of government subsidies" and make every violation of federal regulations—no matter how trivial—a matter of "strict liability" for treble damages and civil penalties. *Sanford-Brown*, 788 F.3d at 711 & n.6. Given the complexity of many federal regulatory schemes, that result would be both "untenable" and "absurd." *Id.* at 711 (quotation marks omitted).

3. Requiring express certification imposes no burden on the government and provides fair notice to contractors regarding the potential risk of costly private litigation.

The express certification requirement also comports with common sense, for three reasons.

First, to the extent that a government agency wishes to trigger False Claims Act liability, it simply may require express certification relating to conditions of payment in connection with a request for payment. Federal agencies impose such requirements in a variety of contexts. Pet. Br. 36 & n.6. An agency easily may design its payment request forms to include such a payment-related certification, or revise a form to add one.

Second, requiring an express certification forces the government agency to focus on the costs and benefits of subjecting a statutory or regulatory specification to enforcement in FCA actions—in particular, whether the specification is suited to judicial application in the context of a fraud action. And even if the agency does not do so, the process of proposing a new form, or a change to an existing form, triggers notice-and-comment requirements. See, *e.g.*, Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 *et seq.* That allows affected contractors or other recipients of government funds to raise the issue for the agency's consideration.[3]

Third, requiring an express certification ensures that the recipient of government funds will have notice of the scope of the potential risk of False Claims Act litigation. Every government contractor or grant recipient is of course subject to an ordinary enforcement action by the government for failure to comply with any applicable requirement. But FCA claims are different: they threaten liability for multiple damages and civil penalties that can multiply exponentially; they label the defendant a "fraudster"; they may be brought by private parties incentivized by the possibility of recovery bounties rather than motivated by the public interest; and the costs of defending such actions is, for all of these reasons, very substantial. Such claims are thus "punitive" in many senses of that word. *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000); see also pp. 17-20, *infra*.

Basic fairness requires that a recipient of government funds have notice of the potential reach of this punitive liability—his assessment of the risks and rewards of entering into the contract with the government may depend on the extent of the FCA lit-

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[3] Although the government can pretermit an FCA claim after it has been filed, see 31 U.S.C. § 3730(c)(2)(A), it almost never exercises this authority in practice. Once a claim of "fraud" has been lodged, the government is reluctant to prevent it from going forward and risk the chance that there might be some possibility of recovering funds through a settlement. See p. 17, *infra*. And, in any event, the litigation decision is made by the Justice Department, while the decision whether to include an express certification is made by the agency in charge of the program.

igation risk. Leaving that question vague can produce higher prices to the government, as contractors protect themselves against uncertainty; or fewer bidders, as companies refuse to take on unclear litigation exposure; as well as unanticipated losses for contractors.

In sum, the implied-certification theory finds no support in the text or the purpose of the FCA or in common sense. This Court should reject it and hold that the FCA reaches only *express*, false statements of compliance with federal program conditions.

B. Permitting FCA Claims Based On An Alleged Violation Of A Program Condition Alone Elevates The Importance Of Rule 9(b)'s Particular Pleading Requirement.

Many courts that apply the implied-certification theory compound that error by coupling the theory with a particularly lax understanding of Federal Rule of Civil Procedure 9(b)'s pleading requirement. If this Court permits some implied-certification claims to be maintained, it should emphasize that all FCA claims must be pleaded with the particularity required by Rule 9(b): "[t]he complaint must state the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated." *United States ex rel. Grenadyor* v. *Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1106 (7th Cir. 2014), *cert. denied*, 136 S. Ct. 49 (2015) (quotation marks omitted).

1. Combining implied-certification liability with a permissive approach to Rule 9(b) produces exceedingly broad FCA liability.

The district court here dismissed the complaint, concluding that respondents had not plausibly alleged that petitioner had violated any regulations that were preconditions to payment under the Massachusetts Medicaid program. Pet. App. 39-47. On appeal, however, the court of appeals identified a *new* regulation, never mentioned in respondents' complaint, and concluded that the complaint properly stated an FCA claim based on an implied certification of compliance with *that* regulation. Pet. App. 16-17.

The court of appeals thus allowed respondents' claim to go forward—despite their inability even to identify *which* program condition petitioner allegedly violated. That after-the-fact rescue of respondents' suit improperly relieved them of their burden under Rule 9(b) to "state *with particularity* the circumstances constituting fraud." Fed. R. Civ. P. 9(b) (emphasis added).

The D.C. Circuit, which also broadly recognizes implied-certification claims, committed a similar error in *United States ex rel. Heath* v. *AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015), petition for cert. pending, No. 15-363. *Heath* involved the E-rate grant program, which requires telecommunications providers to offer service to schools and libraries at the "lowest corresponding price" offered to other customers, and allowing reimbursement for these services from the FCC's Universal Service Fund. *Id.* at 116-17. A *qui tam* relator alleged that AT&T and its subsidiaries violated the FCA by charging more than the "lowest corresponding price." *Id.* at 117.

The relator in *Heath* did not provide details regarding *any* specific false claim that was submitted for payment as a result of the alleged scheme—he simply claimed that every one of the tens of thousands of requests for payment submitted by AT&T subsidiaries over a period of 12 years were false. The D.C. Circuit held that Rule 9(b) did not require a relator to allege the "precise details of individual claims" as long as his complaint allowed an "inference that claims were actually submitted." *Id.* at 126 (quotation marks omitted). Nor did it matter, in the court's view, that the FCC did not require AT&T to certify that it complied with the lowest-corresponding-price requirement; the mere fact that the requirement was part of the FCC's rules was grounds for finding that the relator had stated an FCA claim, because it established that AT&T had made "implicit certifications" of compliance in *every* program-related form it filed with the FCC during the relevant time period. *Id.* at 124.

The court's lenient approach to Rule 9(b), in conjunction with its use of an implied-certification approach, exposed AT&T to exceptionally expansive FCA liability despite the clear inadequacy of the allegations in the complaint.

These examples are not at all unique, because the First and D.C. Circuits are not alone: Seven circuits take this lax approach, holding that Rule 9(b) does not require a relator to allege that *any* specific false claim was submitted for payment. See, *e.g.*, *Heath*, 791 F.3d at 126; *Foglia* v. *Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156 (3d Cir. 2014); *Ebeid ex rel. United States* v. *Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010); *United States ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th

Cir. 2010); *United States ex rel. Duxbury* v. *Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (1st Cir. 2009); *United States ex rel. Lusby* v. *Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009); *United States ex rel. Grubbs* v. *Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009).

In these circuits, highly generalized allegations regarding the alleged "fraud" are sufficient. The relator need not allege the specific facts of even one allegedly fraudulent claim. Combined with far-reaching implied certification theories of liability, these vague pleading standards permit FCA claims to move forward without any specificity at all.

Four circuits, by contrast, requiring that a relator identify *specific* false claims that were presented to the government for payment. See, *e.g.*, *United States ex rel. Dunn* v. *N. Mem'l Health Care*, 739 F.3d 417, 420 (8th Cir. 2014); *Nathan*, 707 F.3d at 457; *United States ex rel. Bledsoe* v. *Cmty. Health Sys., Inc.*, 501 F.3d 493, 504-05 (6th Cir. 2007); *United States ex rel. Clausen* v. *Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1312-13 (11th Cir. 2002). In these circuits, a relator cannot state a claim simply by alleging a vague, overarching scheme or pattern of improper practices by the defendant; he must provide at least one example of a "representative false claim." *E.g.*, *Chesbrough* v. *VPA, P.C.*, 655 F.3d 461, 470 (6th Cir. 2011).

2. This Court should make clear that Rule 9(b) requires FCA relators to plead with specificity the details of alleged false claims.

If the FCA allows for liability based on an implied certification theory, it is essential that courts hold relators to their obligation under Rule 9(b) of pleading defendants' alleged "implicit certifications" with adequate specificity. When a court neither requires a relator to plead actual false certifications of compliance with program conditions to the government *nor* to allege which specific program conditions that the defendant allegedly violated, even a threadbare complaint can expose a defendant to unpredictable and potentially crippling liability.

The *sine qua non* of an FCA violation is a false or fraudulent *claim*. See *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 283 (2010) (noting that FCA liability lies against "persons who make *false or fraudulent claims for payment* to the United States" (emphasis added)). The FCA "does not create liability merely for a [contractor's] disregard of Government regulations or improper internal policies." *Clausen*, 290 F.3d at 1311. Thus, although general allegations of fraud or illegal behavior may be *part* of a relator's FCA complaint, such general allegations are insufficient to state a claim without "a claim actually presented to the government for payment." *Nathan*, 707 F.3d at 456.

Only by identifying *specific* examples of false claims—and of *specific* regulations with which the defendant falsely certified compliance—can an FCA relator properly allege the "who, what, where, when, and how of the alleged fraud," as Rule 9(b)'s stringent pleading standard requires. See, *e.g.*, *United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006) (quotation marks omitted). Without this level of detail, a court will "be left wondering whether [the] plaintiff has offered mere conjecture or a specifically pleaded allegation on an essential element of [an FCA] lawsuit." *Clausen*, 290 F.3d at 1313. And if a suit lacking this necessary specificity proceeds past the pleading stage, a defendant will be exposed to potentially far-reaching liability, in excess of what any fair reading of the FCA permits.

If this Court recognizes any form of implied-certification theory, it is therefore vital that relators be required to plead alleged violations of program regulations, and defendants' alleged "certifications" regarding those program regulations, with the high degree of particularity that Rule 9(b) demands.

C. Proper Application Of Rule 9(b) Is Essential To Screen Out Low-Merit FCA Claims Brought To Coerce Unjustified Settlements.

If courts fail to apply Rule 9(b) properly in FCA actions, contractors who do business with the government will increasingly find themselves the target of frivolous litigation. The result will be *in terrorem* settlements that impose dead-weight costs on the economy, wasted judicial resources, and greater reluctance on the part of contractors to do business with the government.

1. *The sizable bounties available under the FCA are attracting an ever-increasing number of low-merit FCA suits.*

The number of *qui tam* lawsuits brought under the FCA each year has exploded. In 1987, just 30 private relators filed lawsuits under the FCA. Fraud Statistics—Overview, Civil Div., U.S. Dep't of Justice (Oct. 1, 1987 – Sept. 30, 2014), http://goo.gl/zk6vxD. By 2000, the number of suits had increased *tenfold*, to 363, and in 2013, the number of actions filed doubled again, to 754. *Ibid.* "Qui tam impositions have also risen dramatically, from around $2.3 million in 1998 to nearly $2.8 *billion* in 2011." David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1270 (2012) (emphasis added).

This staggering boom in the number of FCA lawsuits reflects the fact that the "potential for astronomical profits, as well as the ever-expanding theories of liability" adopted by some courts, are increasingly inducing opportunistic would-be relators to bring suit. Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 844 (2012). A relator who brings a suit in which the government decides to intervene is entitled to 15-25% of the ultimate recovery. 31 U.S.C. § 3730(d)(1). And in cases where the government does not intervene, a relator receives 25-30% of the recovery. *Id.* § 3730(d)(2). These sizable shares mean that even a relatively modest case can produce a handsome payday for a relator: as of 2012, the "median relator recovery" was $3 *million*. Elameto, *supra*, at 843.

Due to this significant potential for profit, FCA litigation has begun to attract a number of "serial whistleblowers"; "at least 25 people or groups have filed *five or more*" FCA suits since Congress amended the FCA in 1986 to allow for greater bounties. Peter Loftus, *Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich*, Wall St. J., July 24, 2014, http://on.wsj.-com/1PtsGb3 (emphasis added). And the increasingly large rewards that these litigants reap from FCA suits only "serve[] to encourage additional would-be whistleblowers, many of whom are looking to get rich quick." Elameto, *supra*, at 843-844.

There is little evidence that this dramatic increase in FCA litigation has produced any real social benefit. On the contrary, the track record of relators in FCA litigation is downright dismal. The Justice Department only intervenes in roughly 25% of FCA cases. See U.S. Chamber Inst. for Legal Reform, *The New Lawsuit Ecosystem*, at 63 (Oct. 2013), http://bit.ly/1Vm4xrc. And in those where the government does not intervene, relators are successful only *6%* of the time. *Ibid.* A simple back-of-the-envelope calculation, therefore, suggests that perhaps ***70%*** of all FCA cases that are filed lack merit.

In theory, the Justice Department has the ability to prevent meritless FCA lawsuits from going forward: the Act permits the Department to "dismiss [an FCA] action notwithstanding the objections of the" relator if it believes the case should not proceed. 31 U.S.C. § 3730(c)(2)(A). But in practice, the government rarely makes use of this authority. See Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264 (2008). Because "the government does not dismiss, * * * relators are permitted to proceed with[] thousands of non-meritorious qui tam suits." *Id.* at 1264-1265. That number will only continue to increase if this Court blesses the implied-certification theory.

2. Allowing weak FCA suits to survive dismissal results in significant adverse consequences.

Low-merit FCA suits impose substantial burdens on the justice system and on society. In particular, contractors sued under the FCA face enormous pressure to settle even unmeritorious claims.

That is so, first and foremost, because of the sheer amount of money at stake: the FCA authorizes treble damages, in addition to a civil penalty of $5,000 to $10,000 *per violation*. 31 U.S.C. § 3729(a)(1). The Act also requires defendants to pay relators' expenses and attorneys' fees. *Id.* § 3730(d)(1)-(2). In light of these massive potential remedies, defendants are frequently induced "to settle otherwise unmeritorious suits to avoid risking financial ruin caused by an adverse ruling." Malcolm J. Harkins III, *The Ubiquitous False Claims Act: The Incongruous Relationship Between a Civil War Era Fraud Statute and the Modern Administrative State*, 1 St. Louis U.J. Health L. & Pol'y 131, 174 (2007).

The settlement pressure on defendants is further exacerbated by the enormous potential litigation costs in FCA suits. As this Court observed just last year, "the costs of litigation, including expenses of discovery and experts, may 'push cost-conscious defendants to settle even anemic cases.'" *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2550 (2015) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007)). That is especially true in FCA litigation. "[D]iscovery in qui tam suits is particularly vitriolic," often leading to "years of expensive disputes over document production and depositions." Mathew Andrews, Note, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 Yale L.J. 2422, 2434 (2014). Massive discovery expenses, along with other litigation costs, require FCA defendants to spend "hundreds of thousands of dollars, if not millions," to defend themselves, on top of a "tremendous expenditure of time and energy." Todd J. Canni, *Who's Making False Claims, the Qui Tam Plaintiff or the Government Contractor?*, 37 Pub.

Cont. L.J. 1, 11 & n.66 (2007). It can often be more attractive for defendants to settle even frivolous cases than to incur large expenses defending an FCA suit on the merits.

Finally, the threat that FCA litigation poses to a government contractor's business provides yet another powerful incentive to settle. For many contractors, a finding of FCA liability is a "corporate death sentence," because "agency officials have broad discretion to temporarily debar or permanently suspend" a contractor found to have violated the Act. Michael Lockman, Note, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev. 1559, 1571 (2015). "Many FCA defendants in the defense and health-care sectors almost certainly could not exist without the government as a contractual partner" and thus cannot risk the possibility of such sanctions. *Ibid.*

Indeed, even the mere *pendency* of FCA litigation can be an existential threat to government contractors. The "potential for a large damages verdict, however remote, may cause financial institutions to decline a government contractor's request for a business loan." Canni, *supra*, at 11 n.65. And agency officials, who are commanded by regulation to consider a contractor's "record of integrity and business ethics" before doing business with it (48 C.F.R. § 9.104-1(d)), may "question the contractor's business practices" based on the "mere presence of *allegations* of fraud." Canni, *supra*, at 11 (emphasis added). Many contractors can ill afford these disruptions to their business and thus are strongly pressured to settle any FCA claim that survives a motion to dismiss.

In short, "most non-intervened [FCA] suits"—which make up the lion's share of FCA litigation as a whole—"exact a net cost on the public." Rich, *supra*, at 1264. They consume judicial resources and make it harder for the government to focus its attention on the cases that are truly meritorious. They coerce *in terrorem* settlements from contractors who cannot run even a small risk of an adverse judgment and whose businesses cannot survive a protracted period of litigation and uncertainty. And by raising legal costs for even the most scrupulous of contractors, they may cause job losses, force contractors to increase prices, and discourage companies from doing business with the government. Canni, *supra*, at 12. "In all cases, the taxpayers lose out." *Ibid.*

3. Proper application of Rule 9(b) is essential to screen out meritless FCA litigation.

If these harmful consequences of unjustified litigation are to be averted, courts must properly apply Rule 9(b). One of Rule 9(b)'s most important functions is to "protect[] defendants from frivolous suits, or spurious charges of immoral and fraudulent behavior." *Clausen*, 290 F.3d at 1313 n.24 (quotation marks omitted).

An overly permissive interpretation of Rule 9(b) enables private relators to "needlessly harm a defendant[']s[] goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, are [sic] baseless allegations used to extract settlements." *Ibid.* A properly strict approach, by contrast, would do much to "deter[] the use of complaints as a pretext for fishing expeditions." *Streambend Props. II, LLC* v. *Ivy Tower Minneapolis, LLC*, 781 F.3d 1003, 1010-1011 (8th Cir. 2015) (quotation marks omitted).

Moreover, proper application of Rule 9(b) would have little or no effect on the deterrence of fraud through *qui tam* litigation. As explained above (at p. 17), the vast majority of successful *qui tam* suits are those in which the government intervenes. And the government's ability to prosecute FCA suits would not be the least bit impeded by a proper application of Rule 9(b). The government "already possesses the claims—false or otherwise—a potential defendant has submitted for payment." *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006). It therefore can "access those claims on its own and evaluate any FCA liability that it believes should attach *before* determining whether to bring suit or intervene in a relator's *qui tam* action." *Ibid.* Given its access to information, the government should have no trouble pleading FCA claims with the specificity that Rule 9(b) requires.

Indeed, the only parties who will be impeded by courts' following the correct approach to Rule 9(b) are improper relators—those who lack personal, nonpublic knowledge of alleged fraud. Lax applications of Rule 9(b) allow such would-be relators to allege a highly general at the pleading stage and then seek to "rest [their claims] primarily on facts learned through the costly process of discovery." See, *e.g.*, *United States ex rel. Wilson* v. *Kellogg Brown & Root, Inc.*, 525 F.3d 370, 380 (4th Cir. 2008). That sort of tactic is "precisely what Rule 9(b) seeks to prevent," and courts should have no qualms about forbidding its use. *Ibid.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2016