No.

IN THE

Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Participants in many federal programs, including the student financial aid program under Title IV of the Higher Education Act, must satisfy hundreds of regulatory requirements to establish their program eligibility. In direct conflict with the decisions of five other circuits, the Ninth Circuit held that any alleged "course of conduct" that knowingly violates one of these program eligibility requirements is sufficient to render an otherwise truthful claim for payment "false or fraudulent" under the False Claims Act, even if the government has not conditioned payment on compliance with that requirement. The question presented is whether an allegation that a claimant has knowingly violated a regulatory requirement that constitutes a threshold condition of program eligibility—rather than a condition of government payment—is sufficient to state a claim under the False Claims Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that the University of Phoenix, Inc. ("UOP") is a wholly owned subsidiary of Apollo Group, Inc. No other publicly held company owns 10% or more of UOP's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner University of Phoenix, Inc. ("UOP") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 461 F.3d 1166. Pet. App. 1a. The order denying UOP's petition for rehearing and petition for rehearing en banc is unreported. *Id.* at 24a. The opinion of the United States District Court for the Eastern District of California is unpublished but is electronically reported at 2004 WL 3611690. *Id.* at 20a.

JURISDICTION

The district court had jurisdiction over respondents' claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on September 5, 2006. It denied UOP's timely petition for rehearing and petition for rehearing en banc on October 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 31 U.S.C. § 3729 provides, in relevant part:

§ 3729. False claims

(a) Liability for certain acts. Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

> **(2)** knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . .
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

STATEMENT

This case raises several issues of exceptional importance to the administration of federal government programs involving hundreds of billions of dollars and, specifically, to the application of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, to participants in those programs. Notwithstanding this Court's admonition that the FCA "was not designed to reach every kind of fraud practiced on the Government," *United States v. McNinch*, 356 U.S. 595, 599 (1958), the Ninth Circuit has effectively transformed the statute into a general remedy for *any* knowing regulatory violation in connection with *any* federal benefit program—a result that contradicts this Court's teachings and the holdings of several other courts of appeals. The decision below exposes government contractors—including, for example, those in the education, health-care, and defense industries—to the specter of staggering liability and enormous settlement pressure based on FCA claims pursued by private plaintiffs without the supervision of the United States government.

In direct conflict with decisions from other circuits recognizing that a plaintiff seeking recovery under the FCA must allege either that the claimant made a false representation regarding a condition of payment or that the claimant promptly and substantially failed to comply with a promise made to obtain program eligibility, the Ninth Circuit held that *neither* a false statement pertaining to a condition of payment *nor* prompt and substantial noncompliance with a condition of eligibility need be alleged to state an FCA claim.

Under the Ninth Circuit's expansive construction of the FCA, any allegation that a claimant engaged in a knowing "course of conduct" that violated any condition for establishing eligibility to participate in a federal benefit program is sufficient to state a claim under the FCA. Pet. App. 13a. Contrary to the FCA's plain language, which prohibits the use of fraud to "get a . . . claim paid," rather than to obtain program eligibility, 31 U.S.C. § 3729(a)(2), this decision converts an alleged violation of any of the thousands of regulations that govern participation in federal benefit programs into a potential FCA claim, and displaces other statutory and regulatory regimes designed to redress regulatory noncompliance and acts of fraud against the federal government.

Certiorari is warranted to restore the reasonable limitations that Congress imposed on the scope of the FCA and to resolve the lower courts' uncertainty regarding the statute's parameters.

1. The FCA was enacted in 1863 in response to extensive acts of fraud that military contractors perpetrated upon the federal government during the Civil War. As amended, the statute currently provides the federal government with a remedy for the submission of "false or fraudulent claims" for payment. 31 U.S.C. § 3729(a)(1), (a)(2). An FCA action can be initiated either directly by the United States or by a private person—known as a "relator"—asserting a *qui tam* action against the alleged false claimant "in the name of the Government." *Id.* § 3730(b)(1). If an FCA action is commenced by a relator, the complaint must be filed under seal and delivered to the United States, which has 60 days to review the complaint and determine whether to intervene and assume primary responsibility for prosecuting the action. *Id.* § 3730(b)(2). If the United States declines to intervene, then the relator retains the exclusive right to pursue the FCA claim. *Id.* § 3730(b)(4).

A claimant found liable under the FCA is subject to a civil penalty of between $5,500 and $11,000 per claim, as well as treble damages. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). The relator is entitled to share in any recovery with the United States: if the United States does not intervene, the relator receives between 25 and 30 percent of the recovery; if the United States does intervene, then the relator's share is generally between 15 and 25 percent. 31 U.S.C. § 3730(d)(1)-(2).

The "archetypal" FCA action is premised on a claim for government payment that is expressly false—for example, an invoice submitted to the government for work that the claimant knows was never performed or was performed deficiently. *See, e.g.*, *United States v. Bornstein*, 423 U.S. 303, 307 (1976). With only infrequent guidance from this Court, the lower federal courts have developed several other theories of FCA liability. Under the "false certification" theory, FCA liability may be predicated upon an express false certification of compliance with a statutory or regulatory requirement that is a condition of receiving a government benefit. *See, e.g.*, *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997). In "rare circumstances" (*United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996)), FCA liability may also be based on the so-called "promissory fraud" theory, which applies where a claimant uses fraud to obtain eligibility to participate in a government program—for example, by using a bid-rigging scheme to obtain a government contract. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943).

2. UOP is the largest private university in the United States. It currently enrolls more than 200,000 students at 76 campuses (including its online learning facilities) and 119 educational centers in 37 States. UOP's primary mission is to provide adults with the opportunity to continue their education and develop the skills essential to professional suc-

cess. Both the federal government—including the Army, Navy, Marines, and FBI—and a number of major corporations—including Boeing and Ford Motor Co.—recommend UOP to employees who are required, or who elect, to take continuing education classes, and reimburse employees for their UOP tuition.

UOP participates in the federal financial aid program established under Title IV of the Higher Education Act ("HEA"). UOP must adhere to an extensive set of statutory and regulatory requirements to maintain its eligibility to participate in the Title IV financial aid program—many of which have nothing to do with any claim for payment from the government. *See, e.g.*, 34 C.F.R. § 668.46(b) (requiring participating institutions to prepare an annual campus security report); *id.* § 668.47(c) (requiring institutions to prepare an annual report on athletic program participation). "In order to be an eligible institution for the purposes" of Title IV, UOP is also required to execute a multi-year Program Participation Agreement ("PPA") with the United States Department of Education. 20 U.S.C. § 1094(a). The PPA sets forth additional conditions for establishing eligibility to participate in the Title IV program and reiterates a number of the statutory and regulatory requirements that govern the program. *See id.* (the PPA "shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance" with its terms).

In the PPA, UOP agrees, among other things, that it "will not provide . . . any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments." Pet. App. 34a; *see also* 20 U.S.C. § 1094(a)(20) (codifying this restriction); 34 C.F.R. § 668.14(b)(22)(ii)(A) (authorizing the payment of salaries to recruiters provided that salary adjustments are not "based *solely* on the number of students recruited, admitted, enrolled, or awarded financial aid") (emphasis added). If an institution violates this restriction on so-called "incentive

compensation," it may be liable for civil penalties of up to $27,500 per violation, 20 U.S.C. § 1094(c)(3)(B)(i); 34 C.F.R. § 668.84, temporarily lose its eligibility to participate in the Title IV program, *id.* § 668.85, or be terminated from the program altogether. *Id.* § 668.86.

3. Relators were employed as admissions counselors at UOP at the time they initiated this FCA suit. They alleged that UOP violated the restriction on incentive compensation by paying admissions counselors salaries based solely on the number of students they enrolled. Relators contended that, as a result of this alleged regulatory violation, the Title IV financial aid applications that UOP submitted on behalf of its students constituted "false claims" within the meaning of the FCA. Specifically, relators alleged that UOP falsely certified compliance with the restriction on incentive compensation when it signed the PPA. In the alternative, relators asserted that, even if the PPA did not constitute a "certification" for purposes of the false certification theory of FCA liability, UOP was liable under the promissory fraud theory because it allegedly entered into the PPA without ever intending to comply with the restriction on incentive compensation.

Relators filed their complaint under seal, and the United States declined to intervene. After the complaint was filed, the Department of Education began a program review of UOP's recruiting practices. That review culminated in a settlement agreement in which UOP did not admit any liability. The agreement did not require UOP to repay any of the financial aid received by its students, change any of its practices for compensating admissions counselors, or discipline any of its employees. This result is consistent with a Department of Education memorandum concluding, notably, that violations of the restriction on incentive compensation do not cause the government monetary loss and do not necessarily preclude an educational institution from participating in the Title IV HEA program. Pet. App. 52a.

4. UOP moved to dismiss the relators' complaint on the ground that they had failed to state a claim under either the false certification or promissory fraud theories of FCA liability. The district court granted UOP's motion to dismiss because it concluded that relators had "not identified any certification which is a prerequisite for UOP to receive federal funds." Pet. App. 22a.

The Ninth Circuit reversed. The court of appeals concluded that relators had stated a claim under the false certification theory because, according to the court, the certification requirement can be satisfied either through a "false statement" or through a "fraudulent *course of conduct*" that violates a statutory or regulatory requirement. Pet. App. 13a (emphasis added). Contending that there "is no reason to innoculate [sic] institutions of higher education from [FCA] liability when they *knowingly* violate a regulatory condition," *id.* at 14a, the court of appeals held that relators' false certification claim can proceed based on their allegation that UOP knowingly paid its admissions counselors enrollment-based salaries proscribed by the restriction on incentive compensation. *Id*. The court reached this conclusion even though it recognized that "compliance with the incentive compensation ban is a necessary condition of continued *eligibility* and *participation*" in the Title IV program, *id.* at 16a (emphases added), rather than an express condition of receiving and retaining financial aid payments under Title IV once threshold eligibility has been established. The court of appeals expressed concern that if this condition of eligibility were not deemed sufficient to support an FCA claim, UOP "would be virtually unfettered in its ability to receive funds from the government while flouting the law." *Id.* at 17a.

The Ninth Circuit further concluded that relators had stated a claim under the promissory fraud theory of FCA liability. According to the court of appeals, to survive a motion to dismiss a promissory fraud claim, a complaint need allege only a "false or fraudulent course of conduct, made

with scienter" (Pet. App. 13a), and, here, relators had adequately alleged that UOP never intended to comply with its representation in the PPA that it would adhere to the restriction on incentive compensation. *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

This Court has only infrequently provided the lower courts with authoritative guidance regarding the scope of the FCA. Indeed, the false certification and promissory fraud theories of FCA liability, upon which the decision below rests, were developed by the lower federal courts without any meaningful instruction from this Court. As a result, the circuits are now sharply divided regarding the elements necessary to state a claim under these theories of FCA liability. The Ninth Circuit's expansive reading of the FCA—which essentially transforms the statute into a general remedy for any knowing violation of a federal program's regulatory requirements—exacerbates this circuit split and directly conflicts in a number of significant respects with other circuits' narrower interpretations of the FCA. This Court's review is warranted to reconcile these sharply divergent readings of the FCA and to ensure that—consistent with this Court's teachings—litigants and lower courts do not distort the statute in an effort "to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958).

The circuits are starkly divided on the question whether a false certification claim under the FCA can be premised on fraud in connection with a threshold condition of program eligibility or must instead be based upon fraud that relates to a condition of receiving payment from the government. The Ninth Circuit's holding that relators can proceed on their false certification claim based simply on UOP's alleged fraudulent violations of the restriction on incentive compensation—a condition to which UOP must adhere to establish eligibility to participate in the Title IV financial aid pro-

gram—cannot be reconciled with decisions from the Second, Fourth, and Fifth Circuits holding that an allegation of fraud in connection with a condition of payment is a prerequisite to a false certification claim.

The Ninth Circuit's expansive reading of the FCA disregards the statute's plain language, which is directed toward fraud used to "get a . . . claim paid," rather than to obtain program eligibility. 31 U.S.C. § 3729(a)(2). As the Second Circuit has explained, and this statutory language confirms, the "False Claims Act was not designed for use as a blunt instrument to enforce compliance with all . . . regulations—but rather only those regulations that are a precondition to payment." *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001). Moreover, by extending the FCA to encompass fraudulent conduct in connection with any of the extensive regulations that typically govern participation in federal benefit programs, the Ninth Circuit's decision renders superfluous other statutory and regulatory regimes that address fraudulent activity in specific federal programs. As a result, contractors that do business with the federal government are now confronted with the alarming prospect of potentially bankrupting FCA liability premised on allegations of fraud pertaining to obscure regulatory and contractual provisions unrelated to their right to receive payment from the government. *See, e.g.*, 34 C.F.R. §§ 668.46(b), 668.47(c) (requiring institutions participating in the Title IV program to prepare annual campus security and athletic program participation reports); Pet. App. 45a (requiring institutions to operate a drug abuse prevention program). To avoid the possible assessment of civil penalties of up to $11,000 per claim, as well as treble damages, defendants will face intense pressure to settle even the flimsiest of these false certification claims.

The need for this Court's review is compounded by the Ninth Circuit's holding that an alleged fraudulent "course of conduct" is sufficient to state a false certification claim—a conclusion that conflicts with decisions from the Second and

Third Circuits holding that a false representation is required—and by its rejection of the stringent pleading requirements that other circuits have imposed on promissory fraud claims under the FCA. These features of the Ninth Circuit's decision further extend the FCA into areas of conduct that are properly within the ambit of other statutory and regulatory regimes, and increase the likelihood that government contractors will be compelled to pay extortionate settlements to relators pursuing FCA claims that Congress never intended to authorize.

It is well-established that "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fid. Fed. Bank & Trust v. Kehoe*, 126 S. Ct. 1612, 1612 (2006) (Scalia, J., concurring in denial of certiorari). Because the question presented by this case has profound financial ramifications for *all* entities that contract with, or receive funds from, the federal government, the petition for a writ of certiorari should be granted.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE SECOND, FOURTH, AND FIFTH CIRCUITS HOLDING THAT FRAUD IN CONNECTION WITH A CONDITION OF PAYMENT IS A PREREQUISITE TO A FALSE CERTIFICATION CLAIM.

This Court has never considered the parameters of the false certification theory of FCA liability. As a result, a sharp disagreement has emerged among the circuits regarding whether a false certification claim must be premised on fraud that pertains to a condition of receiving payment from the government, or whether it is sufficient to plead fraud in connection with a condition for establishing threshold eligibility to participate in a federal program. The Ninth Circuit's rejection of the legal distinction between conditions of pay-

ment and conditions of eligibility conflicts with decisions from *three* other circuits.

1. The Ninth Circuit held below that the restriction on incentive compensation could serve as the basis for a false certification claim, even though the statutes and regulations governing the Title IV program confirm that compliance with the restriction is a threshold condition of eligibility to participate in the Title IV program, rather than a condition of payment. *See* 20 U.S.C. § 1094(a) (listing the restriction on incentive compensation as a "condition" to the "initial and continuing eligibility of an institution to participate in a program" under Title IV of the HEA); 34 C.F.R. § 668.14(a)(1) ("initial and continued participation" in the Title IV program is "condition[ed]" on the requirements set forth in the PPA). The Ninth Circuit opined that separating conditions of threshold eligibility from conditions of payment "is a distinction without a difference." Pet. App. 16a.

The Seventh Circuit reached a similar conclusion in *United States ex rel. Main v. Oakland City University*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1786 (2006), where the court explicitly rejected the distinction between conditions of eligibility and conditions of payment in the Title IV context and reinstated an FCA promissory fraud claim premised on alleged violations of the restriction on incentive compensation. *Id.* at 916. In explaining its refusal to recognize a legally meaningful difference between threshold conditions of program eligibility and those conditions on which payment is expressly conditioned, the Seventh Circuit asserted that, as long as "a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." *Id.*

These cases directly conflict with decisions from the Second, Fourth, and Fifth Circuits holding that, in order to state a claim under the false certification theory of FCA li-

ability, a plaintiff must allege that the claimant falsely certified compliance with a requirement that is a condition of receiving payment from the federal government.

In *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999), for example, the Fourth Circuit rejected a false certification claim that alleged that the defendant fraudulently failed to disclose conflicts of interest that purportedly arose after it entered into a government contract that required it to certify the absence of conflicts. *Id.* at 793. The court concluded that the conflict certification was merely a threshold requirement for demonstrating contracting eligibility and that such certifications were not "in any way related to, let alone prerequisites for, receiving continued funding." *Id.*

Similarly, in *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, the Fifth Circuit remanded a false certification case for further proceedings where it was "unable to determine from the record" whether the federal government's reimbursement of Medicare services was "conditioned on defendants' certifications of compliance" with health-care laws, which were submitted as part of the annual cost reports that the defendants filed with the federal government. 125 F.3d at 902, 903. The defendants argued that they could not be held liable under the false certification theory because the certification was a condition of establishing continuing eligibility to participate in the Medicare program, rather than a condition of receiving payments. Agreeing with the defendants that a false certification claim could not be premised on a condition of program eligibility, the Fifth Circuit directed the district court to determine on remand whether the requirement in question was indeed a con-

dition of eligibility or whether it was a condition of payment adequate to sustain a false certification claim. *Id.* at 903.[1]

Moreover, in a case factually and legally indistinguishable from the decision below, the Fifth Circuit relied upon the distinction between conditions of eligibility and conditions of payment to dismiss an FCA claim premised on an educational institution's alleged failure to comply with the same restriction on incentive compensation at issue here. In *United States ex rel. Graves v. ITT Educational Services, Inc.*, 284 F. Supp. 2d 487 (S.D. Tex. 2003), *aff'd*, 111 F. App'x 296 (5th Cir. 2004), the district court explained that there is "a distinction between generally certifying compliance with applicable regulations and statutes governing *participation* in a program"—which it deemed insufficient to support a false certification claim—and "certifying compliance with a particular requirement that is a prerequisite to receiving or retaining *payment* under that program"—which the court deemed an appropriate basis for proceeding under the false certification theory. *Id.* at 501 (emphases added). Because Title IV of the HEA "do[es] not expressly condition payment or retention of the student loans . . . on the submission of certification of compliance with" the restriction on incentive compensation, the district court concluded that the restriction is merely "a condition of eligibility to participate in the program, not an express condition of payment of specific claims," and that the restriction thus could not support

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[1] On remand, the district court described its task as "determin[ing] whether the government's payments for the services identified in those annual cost reports were conditioned on the truthfulness of [the] certifications" included in those reports. *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1020 (S.D. Tex. 1998). The district court concluded that the relator had stated a valid false certification claim because he "provided evidence . . . that [the federal government] relied on the certifications in determining the issues of *payment* and *retention of payment* as well as continued eligibility for participation in the Medicare program." *Id.* at 1046 (emphases added).

the relators' false certification cause of action. *Id.* at 502. The Fifth Circuit affirmed the dismissal "essentially for the reasons stated in" the district court's opinion. *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 111 F. App'x 296, 297 (5th Cir. 2004), *cert. denied*, 544 U.S. 978 (2005); *see also United States ex rel. Gay v. Lincoln Technical Inst., Inc.*, 111 F. App'x 286 (5th Cir. 2004) (affirming the dismissal of a false certification claim that alleged violations of the restriction on incentive compensation, where the district court had concluded that the defendant did not make a false certification of compliance on which payment was conditioned), *aff'g* 2003 U.S. Dist. LEXIS 25968 (N.D. Tex. Sept. 3, 2003). *Graves* therefore bars a litigant in the Fifth Circuit from bringing an FCA claim that, under the decision below, would be viable in the Ninth Circuit.

The Second Circuit has also recognized the legal significance of the distinction between conditions of payment and threshold eligibility conditions. In *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), the court dismissed an FCA claim that was premised upon the defendants' certification of compliance with a condition of eligibility to participate in the Medicare program, while recognizing that the relator could have pled a valid FCA claim based upon a certification of compliance with a requirement that was a condition of receiving Medicare payments. *Id.* at 702. The court explained that "[s]ince the [FCA] is restitutionary and aimed at retrieving ill-begotten funds, it would be anomalous to find liability when the alleged noncompliance would not have influenced the government's decision to pay" and that the false certification theory can therefore be applied only "where a party certifies compliance with a statute or regulation as a condition to governmental payment." *Id.* at 697. The court concluded that a false certification claim could be predicated upon a Medicare form that required the claimant to certify that "the services shown . . . were medically indicated and necessary" and that provided that "[n]o . . . Medicare benefits *may be*

paid unless this form is received," because, the court explained, "compliance [with the terms on the form] was a precondition of governmental payment." *Id.* at 698 (emphasis added; internal quotation marks omitted).

The relators in *Mikes* also sought to premise a false certification claim upon the defendants' alleged violation of a regulation establishing standards of care for Medicare providers. The Second Circuit dismissed that claim, however, because the standard-of-care provision did not "explicitly condition payment upon compliance," but rather set forth eligibility requirements for Medicare participation. 274 F.3d at 701. The court reasoned that the "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." *Id.* at 699.

2. This Court's review is warranted to resolve the circuits' pervasive disagreement on the question whether an FCA false certification claim can be premised upon a violation of a threshold condition of program eligibility or must instead be predicated on a condition of payment. In the absence of this Court's authoritative construction of the FCA, the tens of thousands of businesses that regularly contract with the federal government—including those in the education, health-care, and defense industries—will be confronted with substantial uncertainty regarding the parameters of the FCA and the extent of the liability risk to which they may be exposed under its provisions.

Moreover, the Ninth Circuit's holding that a false certification claim can be premised on alleged noncompliance with a threshold condition of program eligibility is deeply flawed as a legal matter—a fact that compounds the urgent need for this Court's review. This Court has long recognized (*McNinch*, 356 U.S. at 599), and the Second Circuit has recently reiterated, that "not all instances of regulatory noncompliance will cause a claim to become false" for purposes

of the FCA. *Mikes*, 274 F.3d at 697. The FCA's scope is circumscribed by its statutory language, which proscribes the use of a "false . . . statement to get a false or fraudulent claim *paid* or *approved* by the Government," 31 U.S.C. § 3729(a)(2) (emphases added), not the use of a false statement to obtain eligibility to participate in a government benefit program. Although false statements at the eligibility stage may be prohibited by federal law, *see, e.g.*, 18 U.S.C. § 1001, they do not fall within the ambit of the FCA's plain language and its peculiar enforcement mechanisms. Indeed, contrary to the Ninth Circuit's concern that recognizing the distinction between conditions of eligibility and conditions of payment would afford government contractors free rein to "flout" the law, Pet. App. 16a, the FCA is supplemented by numerous specific provisions that provide a remedy for fraudulent conduct by government contractors, including in the Title IV context. *See, e.g.*, 20 U.S.C. § 1094(c)(3)(B)(i) (providing for a civil penalty of up to $27,500 for each violation of a Title IV requirement); 41 C.F.R. § 105-68.800(b)(3) (providing for the debarment from future contracting opportunities of a federal contractor that is in "willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction"). Significantly, these remedies, unlike the FCA, are subject to the federal government's direct and exclusive control.

The Ninth Circuit's refusal to distinguish between conditions of eligibility and conditions of payment for purposes of FCA liability will compel educational institutions to defend themselves against potentially devastating FCA liability based upon noncompliance with any of the extensive regulations that govern participation in the federal financial aid program. Indeed, the PPA to which institutions must agree in order to establish eligibility to participate in the Title IV program sets forth pages of detailed regulatory requirements, ranging from the operation of a drug-abuse prevention program to limitations on the use of job-placement statistics.

Pet. App. 27a-46a. Hundreds of additional requirements are found in the pages of the Code of Federal Regulations. 34 C.F.R. pt. 668; *see, e.g.*, *id.* § 668.24 (establishing record retention requirements for participating institutions, including the number of years that financial aid paperwork must be retained); *id.* § 668.25 (imposing restrictions on an institution's contracts with third parties to administer the Title IV program); *id.* § 668.45(a)(5) (requiring an institution to publish its graduation statistics annually by July 1).

The financial implications of the Ninth Circuit's expansive notion of FCA liability are staggering. Relators contend that, because UOP is purportedly ineligible to participate in the Title IV financial aid program due to its alleged violation of the restriction on incentive compensation, each financial aid application submitted by the school or its students constitutes a separate false claim. If relators prevail, UOP may potentially be liable for a civil penalty of between $5,500 and $11,000 for each of the hundreds of thousands of financial aid applications submitted on behalf of UOP students in the years preceding the initiation of relators' suit—the civil penalty alone could total well more than a *billion* dollars. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9).[2] This amount would be augmented by a treble damages assessment, which relators allege the district court should calculate based upon the billions of dollars in financial aid payments that UOP received in the years preceding this suit. UOP faces this risk of overwhelming liability even though it is undisputed that each

[2] Unlike the civil penalty provision of the HEA, which provides for a $27,500 penalty per statutory or regulatory *violation*, 20 U.S.C. § 1094(c)(3)(B)(i); 34 C.F.R. § 668.84, the FCA provides for a fine of between $5,500 and $11,000 for each false or fraudulent *claim* submitted to the federal government. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). Under the Ninth Circuit's reasoning, a single statutory or regulatory violation—subject to a $27,500 fine under the HEA—arguably could give rise to thousands of false or fraudulent claims and a multimillion-dollar penalty under the FCA.

financial aid application it submitted to the federal government was completely accurate and truthful.

Confronted with this alarming prospect, UOP and other FCA defendants with viable factual defenses against the alleged statutory or regulatory violations of which they stand accused will nevertheless be under tremendous pressure to settle. The Ninth Circuit's broad reading of the FCA thus effectively transforms the FCA from a means of remedying fraud against the federal government into a mechanism for extorting settlements from defendants unable to sustain the severe risks of going to trial. The inevitable result will be a proliferation of meritless but financially successful suits, simultaneously causing higher tuition rates for students, denying funds for classroom resources and student services, and producing undeserved financial windfalls for relators—and their counsel. Indeed, the Ninth Circuit's decision has profound ramifications not only for proprietary institutions like UOP, but also for traditional, not-for-profit higher education institutions. *See United States v. Chapman Univ.*, 2006 WL 1562231, at *3 (C.D. Cal. May 23, 2006) (denying a motion to dismiss an FCA claim that alleged that a traditional, not-for-profit university had falsely certified its eligibility to participate in the federal financial aid program by knowingly failing to provide the number of classroom hours mandated by a private accrediting association). And, outside of the education context, the notion that FCA false certification claims can be premised on threshold eligibility conditions has equally far-reaching consequences for health-care providers, defense contractors, and other industries that frequently conduct business with the federal government pursuant to highly detailed regulatory and contractual regimes.

The significant financial repercussions of the Ninth Circuit's expansive (and patently erroneous) interpretation of the FCA—together with the circuit split exacerbated by the Ninth Circuit's decision—make this case eminently worthy of this Court's consideration.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE SECOND AND THIRD CIRCUITS HOLDING THAT A FALSE REPRESENTATION IS A PREREQUISITE TO A FALSE CERTIFICATION CLAIM.

The extensive disagreement among the circuits regarding the viability of an FCA false certification claim premised on a violation of a condition of program eligibility is a sufficient reason, in and of itself, for this Court to grant certiorari. The pressing need for this Court's review is reinforced by the fact that the Ninth Circuit's reading of the FCA conflicts with other circuits' decisions in several other significant respects. For example, the circuits are sharply divided over whether a false representation of compliance is necessary to state a false certification claim or whether a knowing course of conduct that violates a statutory, regulatory, or contractual condition is sufficient. This case provides the Court with the opportunity to resolve this additional area of uncertainty surrounding the FCA.

1. The Second and Third Circuits have both held that an explicit representation of compliance with a statutory or regulatory requirement on which payment is conditioned is an essential element of a false certification claim under the FCA. As the Second Circuit explained in *Mikes v. Straus*, "the 'certification theory' of liability . . . is predicated upon a false *representation* of compliance with a federal statute or regulation" on which payment of a claim is conditioned. 274 F.3d at 696 (emphasis added). The court concluded that the representation requirement was satisfied by a Medicare reimbursement form that required the claimant to certify that the services for which reimbursement was being sought were "medically indicated and necessary." *Id.* at 698.

In *United States ex rel. Quinn v. OmniCare Inc.*, 382 F.3d 432 (3d Cir. 2004), the Third Circuit similarly emphasized that the "'certification theory' of FCA liability is based

on a false representation of compliance with a contract term, statute, or regulation." *Id.* at 441. The court determined that this requirement was met by a reimbursement form that required a claimant to certify that the services in question were rendered "in accordance with . . . [Medicaid] regulations." *Id.* (alterations in original; internal quotation marks omitted); *see also United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 679 (5th Cir. 2003) (en banc) (Jones, J., concurring) ("a false certification must be a 'false *statement*' made 'to get' a false claim paid") (emphasis added).

In direct conflict with the requirements for stating a false certification claim in the Second and Third Circuits—but in accord with a decision from the Fourth Circuit—the Ninth Circuit held below that a "fraudulent course of conduct" is sufficient to state a false certification claim. Pet. App. 13a; *see also Harrison*, 176 F.3d at 788 ("The test for False Claims Act liability . . . is . . . whether there was a false statement or fraudulent course of conduct . . . that caused the government to pay out money"). The Ninth Circuit concluded that relators had therefore pled a viable FCA claim under the false certification theory because they alleged that UOP knowingly violated the restriction on incentive compensation by paying its admissions counselors enrollment-based compensation. Pet. App. 14a. This holding is directly at odds with the Second and Third Circuits' conclusion that a "false representation" of statutory or regulatory compliance—rather than a mere course of conduct—is a necessary element of a false certification claim.

2. This Court should grant certiorari to address this additional area of lower-court disagreement regarding the FCA and to reject the far-reaching and erroneous conclusion that an alleged fraudulent course of conduct suffices to state a false certification claim. Under the Ninth Circuit's broad reading of the FCA, *any* knowing violation of the extensive regulatory provisions that govern participation in a federal benefit program is adequate to state an FCA claim, entitles a

relator to discovery, and can culminate in FCA liability. Indeed, there are 162 pages of regulations that govern participation in the Title IV HEA program (34 C.F.R. pt. 668)—in the Ninth Circuit, a knowing violation of any of these provisions is sufficient to state a claim under the FCA.

As with the Ninth Circuit's conclusion that a false certification claim can be premised on a condition of program eligibility, this holding represents a radical extension of the FCA's scope that—contrary to Congress's intentions and this Court's teachings—transforms the statute into a remedy for virtually all fraudulent conduct against the federal government and displaces other remedial measures designed to encompass such fraudulent activities. Indeed, as the Ninth Circuit itself recognized in a case that it overruled *sub silentio* in the decision below, "There are administrative and other remedies for regulatory violations. . . . However, absent actionable false certifications upon which funding is conditioned, the False Claims Act does not provide such a remedy." *Hopper*, 91 F.3d at 1267. The statutes and regulations governing the Title IV program provide a number of remedial mechanisms for addressing fraudulent violations of the restriction on incentive compensation. *See, e.g.*, 20 U.S.C. § 1094(c)(3)(B)(i). Reliance upon the "blunt instrument" of the FCA to remedy fraudulent conduct in connection with the Title IV program is not only wholly unnecessary (*Mikes*, 274 F.3d at 699), but also potentially disruptive of the carefully calibrated remedial regime established by Congress and the Department of Education.

Moreover, if left undisturbed, the decision below could be read as eviscerating the distinction between the widely accepted express false certification theory and the often-criticized implied false certification theory—an expansive approach to FCA liability, adopted by several circuits, that is premised on the notion that a claimant impliedly certifies its eligibility to receive payment whenever it submits a claim for payment to the government. *Compare Shaw v. AAA Eng'g &*

Drafting, Inc., 213 F.3d 519, 532 (10th Cir. 2000) (recognizing an FCA cause of action based on "implied" certification of statutory or regulatory compliance), *with Harrison*, 176 F.3d at 786 n.8 (labeling the implied certification theory "questionable"). Although the Ninth Circuit purported not to resolve the viability of the implied false certification theory (Pet. App. 9a n.1), its rejection of the false representation requirement effectively nullified the distinction between the express and implied theories of false certification. If a false representation is no longer an element of an express false certification claim, and a "course of conduct" can constitute the requisite certification, then any distinction between the express and implied theories of liability is meaningless.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE FIFTH AND D.C. CIRCUITS IMPOSING A STRICT PLEADING THRESHOLD ON PROMISSORY FRAUD CLAIMS.

The Ninth Circuit's decision also dramatically lowers the threshold for pleading a promissory fraud claim under the FCA, in direct conflict with the stringent pleading requirements endorsed by at least two other circuits.

Promissory fraud may be actionable under the FCA where a claimant uses fraud to obtain eligibility to participate in a government benefit program. Although the origins of this theory of liability are generally traced to this Court's decision in *United States ex rel. Marcus v. Hess*—which held that a defendant's use of an illegal bid-rigging scheme to obtain a government contract rendered its ensuing claims for payment fraudulent for purposes of the FCA (317 U.S. at 543)—the lower federal courts have expanded the contours of the promissory fraud theory beyond the fact pattern in that case, where the bid-rigging scheme was the proximate cause of the claimant's eligibility to receive payment from the government, to cases in which the connection between the initial act of fraud and the claim for payment is significantly more

attenuated. The Seventh Circuit has held, for example, that whenever a defendant secures the right to participate in a federal benefit program by promising to comply with the program's eligibility requirements, without actually intending to comply with those requirements and in fact failing to do so, then the defendant may be liable for promissory fraud under the FCA. *See Main*, 426 F.3d at 916 (holding that a relator had stated a promissory fraud claim by alleging that an educational institution lied about its intention to comply with the restriction on incentive compensation).

This Court, of course, has never sanctioned such a boundless definition of promissory fraud, and a number of courts have attempted to cabin the theory's reach by imposing exacting pleading requirements on relators asserting such claims. In the Fifth and D.C. Circuits, a naked allegation that the defendant violated a program's regulatory requirements is insufficient to support an inference that the defendant lied about its intention to comply with those requirements and thus to state a claim under the promissory fraud theory. As the D.C. Circuit has explained, "there is no inference of fraudulent intent not to perform from the mere fact that a promise made is subsequently not performed." *United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1329-30 (D.C. Cir. 2005) (internal quotation marks omitted); *see also United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 386 (5th Cir. 2003) (same). To survive a motion to dismiss a promissory fraud claim in the Fifth and D.C. Circuits the relator must instead allege "that the defendant *promptly* followed through on its intent not to perform by *substantially* failing to carry out its obligations under the contract." *Willard*, 336 F.3d at 386 (emphases added); *see also Bettis*, 393 F.3d at 1330 (affirming a grant of summary judgment in favor of the defendant on a promissory fraud claim because there was no evidence that the defendant had repudiated the contract quickly after entering into it).

In conflict with the pleading requirements recognized in the Fifth and D.C. Circuits, the Ninth Circuit below relied exclusively upon relators' allegation of UOP's noncompliance with the restriction on incentive compensation to support the inference that UOP knowingly lied when it agreed in the PPA to comply with that restriction. Pet. App. 14a. The court did not require relators to allege—as they would have been required to do in the Fifth and D.C. Circuits—facts that, if proven, would have established that immediately after entering into the PPA, UOP substantially failed to comply with the restriction on incentive compensation by paying its admissions counselors incentive compensation based solely on enrollments.

The relaxed standard for pleading promissory fraud endorsed by the Ninth Circuit virtually guarantees that a claim will survive a motion to dismiss and that the defendant will face significant pressure to settle even the most dubious of promissory fraud claims. Coupled with the Ninth Circuit's vast extension of the false certification theory of FCA liability, the Ninth Circuit's unwillingness to police the bounds of the promissory fraud theory essentially transmutes the FCA into a remedy for "every kind of fraud practiced on the Government" (*McNinch*, 356 U.S. at 599)—in direct conflict with the contrary holdings of this Court and other circuits. This Court's review is warranted to resolve these conflicts and to ensure that government contractors are not saddled with the prospect of potentially bankrupting FCA liability based on alleged conduct that Congress intended to regulate under more nuanced—and less punitive—statutory and regulatory regimes.

CONCLUSION

In light of the circuits' profound disagreement regarding the scope of the FCA, and the significant impact of the FCA on everyone who contracts with the federal government, there is an urgent need for this Court to grant review and

clarify the statute's parameters. Without this Court's intervention, a litigant could bring an FCA false certification claim premised on the violation of any program eligibility requirement in the Seventh and Ninth Circuits, but would be barred from doing so in the Second, Fourth, and Fifth Circuits, where such claims are limited to requirements on which government payment is conditioned. Similarly, in the Fourth and Ninth Circuits, a litigant could base a false certification claim on any knowing "course of conduct" that violates a regulatory requirement, but would be restricted to false representations of regulatory compliance in the Second and Third Circuits. The decision below exacerbates this unacceptable conflict, and, if left uncorrected, will risk exposing government contractors to potentially bankrupting liability on the basis of obscure regulatory violations that Congress never intended to fall within the peculiar enforcement mechanism of the FCA.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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