No. 06-1006

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

This case is exceptionally important to the thousands of companies that regularly do business with the federal government and that face staggering new False Claims Act ("FCA") liability—and inordinate pressure to settle legally doubtful FCA claims—under the Ninth Circuit's expansive interpretation of the statute. As demonstrated by the *amicus* briefs filed by representatives of the education, defense, and health-care industries, the Ninth Circuit's decision dramatically lowers the standard for pleading a cause of action under the FCA, exposes government contractors to potentially bankrupting FCA liability for a knowing violation of *any* of the countless regulations that govern participation in federal programs, and vastly amplifies the settlement pressure on FCA defendants. In this case alone, respondents are seeking more than a *billion* dollars in damages for alleged regulatory violations already subject to remedial regimes other than the FCA—and this is by no means an isolated example of plaintiffs invoking the FCA to secure recoveries wholly disproportionate to the alleged regulatory violations on which they are premised. Nothing in respondents' brief successfully calls the significance of this case into question.

Moreover, nothing in respondents' brief obscures the circuits' extensive split regarding the elements of an FCA cause of action. Indeed, the decision below exacerbates the lower courts' preexisting confusion regarding the requirements for pleading false certification and promissory fraud claims under the FCA, and fosters intolerable uncertainty for businesses that contract with the federal government.

This Court's review is warranted to bring much-needed clarity to this area of the law and to ensure that the FCA is not transformed into a tool for extracting extortionate and unjustified settlements from FCA defendants unable to bear the risks of going to trial.

A. THE DECISION BELOW PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE TO ALL COMPANIES THAT DO BUSINESS WITH THE FEDERAL GOVERNMENT.

Contrary to respondents' assertion, the Ninth Circuit's holding is anything but "narrow." Opp. 2. Its far-reaching implications extend to all companies that contract with the federal government, exposing them to new and unforeseen FCA liability for purely *regulatory* noncompliance previously addressed through more nuanced—and far less punitive—remedial regimes.

Under the Ninth Circuit's holding, University of Phoenix, Inc. ("UOP") and other educational institutions are confronted with the specter of multibillion-dollar judgments for knowingly violating any of the hundreds of threshold eligibility requirements that govern participation in the Title IV financial aid program. *See* 34 C.F.R. pt. 668 (setting forth 162 pages of regulations governing participation in the Title IV program); Br. of the Career Coll. Ass'n 6-8 (listing examples of regulatory requirements that could support an FCA claim under the Ninth Circuit's reasoning). Noncompliance with program eligibility requirements is properly addressed, however, under the Higher Education Act itself, which provides for the assessment of financial penalties and other remedial measures against noncompliant institutions (*see*, *e.g.*, 20 U.S.C. § 1094(c)(3)(B)(i)), rather than through the "blunt instrument" of the False Claims Act's potentially devastating treble-damages and civil penalty provisions. *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001).

The Ninth Circuit's decision has similarly alarming implications for government contractors in the defense and health-care industries, who, like UOP, must comply with extensive eligibility requirements to do business with the federal government and who now face the prospect of billion-dollar FCA penalties premised on any allegation that they

knowingly violated these requirements. *See* Br. of Nat'l Def. Indus. Ass'n 14; Br. of the Am. Health Care Ass'n et al. 9.

Respondents' attempt (Opp. 13-14) to cabin the scope of the Ninth Circuit's decision by emphasizing that it applies only to *knowing* regulatory violations, and to the requirements for surviving a motion to dismiss, overlooks the realities of the litigation process and the hydraulic settlement pressure exerted on FCA defendants. A requirement that a relator allege a knowing regulatory violation to withstand a motion to dismiss affords the defendant absolutely no protection against unsubstantiated FCA claims, because a relator can draft a complaint without difficulty that pleads a knowing violation, and need not produce evidence to support that allegation to survive a motion to dismiss. *See* 13 Op. Off. Legal Counsel 207, 220 (1989) ("Relators who have no interest in the smooth execution of the Government's work have a strong dollar stake in alleging fraud whether or not it exists.").

Once the low motion-to-dismiss threshold has been passed, the settlement pressure on FCA defendants facing claims for hundreds of millions of dollars in damages becomes overwhelming. Rather than risk a financially crippling judgment, the vast majority of FCA defendants are compelled to enter into settlement agreements, regardless of the accuracy of the relators' allegations. The requirement that an FCA relator plead a knowing regulatory violation is therefore no barrier at all to the relator's recovery of an extortionate multimillion-dollar settlement from a defendant unable to withstand the risks and uncertainties of trial. Indeed, notwithstanding respondents' blithe assertion to the contrary (Opp. 14), these potential FCA liabilities may compel some companies to forgo government contracting opportunities altogether. *See* Br. of Nat'l Def. Indus. Ass'n 18 (if the Ninth Circuit's decision stands, "[c]ompanies with important commercial technology needed by the military will choose not to enter government contracting").

B. THE CIRCUITS ARE DEEPLY DIVIDED REGARDING THE REQUIREMENTS FOR PLEADING AN FCA CAUSE OF ACTION.

Respondents' attempt to reconcile the decision below with other circuits' interpretations of the FCA is also unsuccessful. Indeed, even before the decision below, the circuits were already at odds regarding the parameters of the false certification and promissory fraud theories of FCA liability. The decision in this case exacerbates the lower courts' confusion and underscores the urgent need for this Court's review.

1. The Ninth Circuit held that an FCA false certification claim need not be based on an alleged misrepresentation regarding a regulatory requirement on which government payment is conditioned, but can instead be premised on an alleged misrepresentation in connection with a threshold condition of program eligibility, such as the restriction on incentive compensation at issue here. This expansion of the FCA's scope is obviously very significant on a practical level; moreover, it conflicts with decisions from three other circuits limiting the false certification theory to conditions of government payment, including a Fifth Circuit decision dismissing a virtually identical FCA claim premised on alleged violations of the restriction on incentive compensation. *See Mikes*, 274 F.3d at 699; *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 793 (4th Cir. 1999); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997); *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). *But see United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005) (rejecting the distinction between conditions of payment and conditions of eligibility), *cert. denied*, 126

S. Ct. 1786 (2006).[1] Accordingly, in the Second, Fourth, and Fifth Circuits, respondents' suit would have been dismissed because it is premised on alleged false representations concerning a threshold requirement governing eligibility to participate in the federal financial aid program, rather than on a condition of receiving financial aid payments once initial program eligibility has been established. *See* 20 U.S.C. § 1094(a) (a program participation agreement "condition[s] the initial and continuing *eligibility* of an institution to participate in a program upon compliance" with its terms, including the restriction on incentive compensation) (emphasis added); Pet. App. 26a.[2]

Respondents do not contest the fact that courts outside of the Ninth Circuit have drawn a legal distinction between conditions of program eligibility and conditions of payment, and have restricted the false certification theory to alleged knowing violations of payment conditions. Opp. 18. They instead argue that the "distinction . . . is not implicated in this case" because, according to respondents, the Ninth Circuit held that the restriction on incentive compensation *is* a condition of payment. *Id.* (emphasis omitted).

The Ninth Circuit, however, correctly recognized that "compliance with the incentive compensation ban is a necessary condition of continued *eligibility* and *participation*" in

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[1] Respondents' suggestion (Opp. 19. n.4) that the Second Circuit's holding in *Mikes* is limited to the Medicare context is incorrect because the court's reasoning is not based on any considerations peculiar to the Medicare setting. It rests instead upon the Second Circuit's unequivocal determination that the false certification theory of FCA liability is applicable only "where a party certifies compliance with a statute or regulation as a condition to governmental payment." *Mikes*, 274 F.3d at 697.

[2] Indeed, respondents seem to agree that, properly conceived, the restriction on incentive compensation is a threshold condition of program eligibility. *See* Opp. 3 ("to become eligible to receive Title IV funds, . . . a school must first enter into a Program Participation Agreement").

the Title IV program. Pet. App. 16a (emphases added). Despite this recognition—and the Department of Education's own conclusion that violations of the restriction on incentive compensation do not cause the government monetary loss (*id.* at 52a)—the Ninth Circuit reinstated respondents' FCA claim because it reasoned that UOP would never have received financial aid payments from the federal government if it had not initially attested that it met the Title IV program's threshold eligibility requirements. *Id.* at 16a-17a. By treating conditions of eligibility as legally indistinguishable from conditions of payment, the Ninth Circuit nullified the legal distinction between these two categories of requirements, and vastly increased the range of regulatory violations on which FCA causes of action—seeking civil penalties of up to $11,000 per claim and treble damages—can be premised.

Respondents see nothing wrong with this outcome. According to respondents, the Ninth Circuit's "decision reflects the common sense proposition that the False Claims Act prohibits lying to obtain government benefits in *all* its forms." Opp. 12 (emphasis added). But the essentially boundless interpretation of the FCA endorsed by the Ninth Circuit conflicts with the statute's plain language, which proscribes the use of fraud to "get a . . . claim paid" (31 U.S.C. § 3729(a)(2)), not to obtain threshold program eligibility. *Cf. Rockwell Int'l Corp. v. United States*, No. 05-1272, 549 U.S. ___ (Mar. 27, 2007) (slip op. 15). Respondents' characterization of the FCA is also flatly inconsistent with this Court's recognition that the statute "was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958).[3]

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[3] To the extent that, as urged by respondents (Opp. 15), the Court gave contrary indications regarding the FCA's scope in *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968), that potential inconsistency merely underscores the need for this Court to provide authoritative guidance concerning the statute's parameters.

The language of the FCA—confirmed by this Court's prior interpretations of the statute—demonstrates that Congress did not intend for the FCA to be an all-purpose remedy for every type of alleged fraud on the government. By extending the FCA's reach beyond its textual bounds, the Ninth Circuit has displaced those statutory and regulatory mechanisms that are designed to address misrepresentations relating to federal program eligibility requirements. *See*, *e.g.*, 18 U.S.C. § 1001; 20 U.S.C. § 1094(c)(3)(B)(i).[4]

2. The decision below further extends the FCA's reach—and exacerbates lower-court confusion—by deeming an alleged "fraudulent course of conduct" sufficient to state a false certification claim. Pet. App. 13a. Thus, unlike in the Second and Third Circuits, where an FCA plaintiff must identify a false statement of statutory or regulatory compliance to plead a false certification claim (*see Mikes*, 274 F.3d at 696; *United States ex rel. Quinn v. OmniCare Inc.*, 382 F.3d 432, 441 (3d Cir. 2004)), a plaintiff in the Ninth Circuit need only allege that the defendant engaged in conduct that violated a statutory or regulatory requirement to survive a motion to dismiss. *But see Harrison*, 176 F.3d at 788 (agreeing with the Ninth Circuit).

Respondents attempt to reconcile the Ninth Circuit's decision with other circuits' interpretations of the false certification theory by suggesting that the Ninth Circuit was con-

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[4] Respondents point to a passage from the legislative history of the 1986 FCA amendments that suggests that the statute imposes liability on claimants "'ineligible to participate in the [federal payment] program.'" Opp. 15 (quoting S. Rep. No. 345, 99th Cong., 2d Sess., at 9 (1986)). In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), however, this Court rejected reliance on that same congressional report because the discussion referenced in *Stevens*, and relied upon by respondents, merely purports to summarize the FCA's scope at the time Congress undertook the 1986 amendments, not to describe the effect of the amendments themselves. *Id.* at 783 n.12.

struing only the promissory fraud theory—not the false certification theory—when referring to a "fraudulent course of conduct." Opp. 22. But the unambiguous language of the Ninth Circuit's opinion conclusively rebuts that assertion. *See* Pet. App. 13a ("under *either* the false certification theory *or* the promissory fraud theory, the essential elements of False Claims Act liability remain the same: (1) a false statement or fraudulent course of conduct") (emphases added). The Ninth Circuit's unequivocal language leaves no doubt that, in conflict with the Second and Third Circuits, it considers a fraudulent course of conduct sufficient to state a false certification claim.[5]

3. The decision below also rejects the requirements that other circuits have imposed on pleading promissory fraud under the FCA. Whereas the Fifth and D.C. Circuits require that plaintiffs pursuing a promissory fraud claim allege "prompt[]" and "substantial[]" noncompliance with a promise made to obtain program eligibility (*United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 386 (5th Cir. 2003); *see also United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1329-30 (D.C. Cir. 2005)), the Ninth Circuit did not require respondents to allege that UOP promptly failed to comply with the

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[5] Respondents further attempt to explain away the Ninth Circuit's "fraudulent course of conduct" language by arguing that the court considered only the express—and not the implied—false certification theory. Opp. 22. That argument only highlights the extent to which the Ninth Circuit expanded the scope of the express false certification theory. By holding that a fraudulent course of conduct is sufficient to plead an express false certification claim, the Ninth Circuit eviscerated the distinction between the well-established express false certification theory and the often-criticized implied false certification theory (*Harrison*, 176 F.3d at 786 n.8), which premises FCA liability on the questionable proposition that a claimant impliedly certifies regulatory compliance whenever it submits a claim for payment to the government (*see Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 532 (10th Cir. 2000)).

restriction on incentive compensation or that UOP's conduct was substantially noncompliant with that requirement. None of the conclusory allegations recited in respondents' brief can alter the erroneous pleading standard endorsed by the Ninth Circuit or satisfy the higher threshold applied in the Fifth and D.C. Circuits. Opp. 25.[6]

C. THIS CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO CLARIFY THE FCA'S SCOPE.

This case presents an ideal (and rare) opportunity for this Court to clarify comprehensively the parameters of the false certification and promissory fraud theories of FCA liability.

Respondents nevertheless assert that this Court should deny certiorari because a final judgment has not yet been entered against UOP. Opp. 28. Because respondents are seeking more than a billion dollars in damages, however, it is unlikely that this Court will ever have the opportunity to review a final judgment in this case. If this Court does not grant review at this time, UOP—despite its firm conviction that respondents' allegations are unfounded, self-interested, and outrageous—will face enormous pressure to settle the case in order to avoid the uncertainties of going to trial.[7]

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[6] Respondents fault UOP's reliance on *Bettis* because the case was decided on summary judgment. Opp. 24. But in considering the evidentiary showing that must be made to survive summary judgment, the D.C. Circuit necessarily delineated the factual allegations that a plaintiff must plead to overcome a motion to dismiss.

[7] Respondents contend that the Department of Education's review of UOP's recruiting policies substantiated the allegations in their complaint. Opp. 7. But the initial report quoted by respondents relied heavily on respondents' own self-interested statements. Notably, the settlement that terminated the program review proceedings did not require UOP to admit any liability, to repay any of the financial aid received by its students, or to modify any of its recruiting policies—a result that represents an implicit rejection of respondents' highly colored allegations.

For this and other reasons, this Court frequently grants review of cases that are in an interlocutory posture. *See Credit Suisse Sec. (USA) LLC v. Billing*, No. 05-1157 (cert. granted Dec. 7, 2006); *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Norfolk S. Ry. v. Kirby*, 543 U.S. 14 (2004). Review is warranted here because it is unlikely that the Court will have another opportunity to consider this case and because the important legal issues raised in the petition for a writ of certiorari are cleanly presented on an undisputed factual record.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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