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 *AMICUS CURIAE* THE ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES IN SUPPORT OF PETITIONER

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QUESTIONS ADDRESSED BY *AMICUS*

This Court has granted certiorari to review the following questions:

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

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

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INTEREST OF *AMICUS* AND SUMMARY OF ARGUMENT[1]

The Association of Private Sector Colleges and Universities ("APSCU") is a voluntary association of private sector educational institutions, incorporated as a not-for-profit organization in the District of Columbia. APSCU represents approximately 1,400 accredited, private postsecondary schools, institutes, colleges, and universities located throughout the United States. These institutions provide nontraditional students—particularly veterans, working parents, and underserved populations—with skills-based education opportunities, ranging from certificate and diploma programs to programs leading to associate's, bachelor's, master's, and doctoral degrees. Students attending private sector colleges and universities constitute approximately one-half of the technically trained workers who enter the United States workforce each year. Many of these students come from diverse social and economic backgrounds, and seek access to career-focused learning and the

[1] Pursuant to this Court's Rule 37, counsel for *amicus* represent that they authored this brief in its entirety and that, except as identified below, none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. DeVry Education Group Inc. and Bridgepoint Education, Inc. have each made monetary contributions intended to fund the preparation and submission of this brief because each is a former member of *amicus* with first-hand experience defending against the implied certification theory of liability in the higher education context, and therefore each has significant interest in the questions presented. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

job skills they need for a successful future. APSCU's members provide students who take different paths to higher education with opportunities unavailable to them at traditional colleges.

APSCU's member institutions annually provide educational opportunities to prepare more than three million students for employment in over 200 occupational fields. These institutions produce graduates at a lower cost, and often have higher graduation rates, than traditional non-profit or public schools. Unlike public institutions, career colleges and universities also receive no direct taxpayer subsidies. Instead, private sector colleges and universities pay taxes—about $1.7 billion in 2010. APSCU's members qualify as "institutions of higher education," 20 U.S.C. § 1002(a)(1), (b), eligible to participate in student-aid programs under Title IV of the Higher Education Act, 20 U.S.C. §§ 1070-1099d.

APSCU and its member institutions have a significant interest in the questions presented for review because the "implied certification" theory of legal falsity drastically expands the circumstances in which APSCU's members may be subjected to excessive and unwarranted liability under the False Claims Act ("FCA"). Specifically, the vast majority of APSCU's members participate in one or more of the federal student financial aid programs, including the financial aid program established under Title IV of the Higher Education Act. As participants in Title IV programs, these schools agree to comply with numerous statutes, regulations, and contractual requirements, including, for example, employee compensation restrictions, accreditation requirements, and recordkeeping provisions. Typically, that agreement is set forth in a Program Participation

Agreement ("PPA") between the school and the Department of Education documenting the school's agreement to comply with "all statutory provisions" and "all applicable regulatory provisions" under Title IV. As explained below, the "implied certification" theory at issue in this case is frequently used by *qui tam* relators to transform schools' agreements to comply with various ministerial requirements into a trigger for exposing colleges and universities to unwarranted liability, onerous statutory penalties, and the unjustified reputational stain of being labeled a "fraudster."

The traditional FCA lawsuit involves a claim that is *factually false*—such as a fraudulent invoice submitted to the government for work never performed. *See*, *e.g.*, *United States v. Bornstein*, 423 U.S. 303, 307 (1976). In contrast, many FCA actions in recent decades have advanced a novel and dangerous theory of *legal falsity* premised on a government contractor's "false certification." False certifications fall into two general categories: *express* and *implied*. An expressly false request for government payment is, as its name suggests, a request that explicitly and "falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment." *Mikes v. Straus*, 274 F.3d 687, 698 (2d Cir. 2001). An implied false certification, on the other hand, "is based on the notion that the act of submitting a claim for reimbursement itself *implies* compliance with governing federal rules that are a precondition to payment" from the government. *Id.* at 699 (emphasis added).

Importantly, under an implied theory of false certification, the actual request for payment is "facially truthful," yet is "construed as false if the

claimant 'violates its continuing duty to comply with the regulations on which payment is conditioned.'" *United States ex rel. Hobbs v. MedQuest Assocs., Inc.*, 711 F.3d 707, 714 (6th Cir. 2013) (quoting *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011)). The request for payment may make certain representations about the purpose of the requested funds, the nature of the services performed, or the identity of the requestor—all of which are true on their face. The implied certification theory, however, transforms that truthful claim into one that is *implicitly* false based on the notion that the government contractor had "previously" and truthfully "undertaken to expressly comply with a law, rule, or regulation," yet failed to do so. *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 996 (9th Cir. 2010). Courts that have adopted this theory "infer implied certifications from silence where certification was a prerequisite to the government action sought." *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010) (internal quotation marks omitted).

The implied false certification theory has spawned an industry of abusive and destructive FCA litigation against institutions of higher education. In the past decade, private parties—acting as FCA "relators" purportedly representing the government's interests—have filed scores of lawsuits against schools challenging their eligibility to participate in Title IV programs and demanding billions of dollars in FCA damages and civil penalties. *See*, *e.g.*, *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1176 (9th Cir. 2006) (imposing FCA liability based on a violation of "a necessary condition of continued eligibility and participation" in a federal program). These lawsuits have been filed against public

colleges and universities,[2] not-for-profit higher education institutions,[3] and even providers of educational content and tutoring.[4] Most of these lawsuits, however, have been filed against proprietary, for-profit educational institutions.[5] In all but a small

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[2] *See*, *e.g.*, *U.S. ex rel. Battle v. Bd. of Regents for the State of Ga.*, 468 F.3d 755 (11th Cir. 2006); *U.S. ex rel. Hamilton v. Yavapai Cmty. Coll. Dist.*, No. 12-cv-08193 (D. Ariz. 2012).

[3] *See*, *e.g.*, *U.S. ex rel. Jallali v. Nova Se. Univ., Inc.*, No. 11-cv-60342 (S.D. Fla. 2011), *aff'd*, 486 F. App'x 765 (11th Cir. 2012); *U.S. ex rel. Riley v. Embry-Riddle Aeronautical Univ., Inc.*, No. 08-cv-01401 (M.D. Fla. 2008); *U.S. ex rel. Kalyanaram v. N.Y. Inst. of Tech.*, No. 07-cv-09307 (S.D.N.Y. 2007); *United States v. Chapman Univ.*, 2006 WL 1562231 (C.D. Cal. May 23, 2006).

[4] *See*, *e.g.*, *U.S. ex rel. Calisesi v. HotChalk, Inc.*, No. 13-cv-01150 (D. Ariz. 2013); *U.S. ex rel. Caballero v. TestQuest, Inc.*, No. 12-cv-04626 (S.D.N.Y. 2012); *U.S. ex rel. Jane Doe v. Educ. Holdings 1, Inc.*, No. 09-cv-06876 (S.D.N.Y. 2009).

[5] *See*, *e.g.*, *U.S. ex rel. Backhus v. Corinthian Colls.*, No. 07-cv-891 (M.D. Fla. 2007); *U.S. ex rel. Buchanan v. S. Univ. Online*, No. 07-cv-00971 (W.D. Pa. 2007); *U.S. ex rel. Cruz v. W. Career Coll.*, No. 07-cv-01666 (E.D. Cal. 2007); *U.S. ex rel. Urquilla-Diaz v. Kaplan Univ.*, No. 07-cv-00669 (M.D. Fla. 2007); *U.S. ex rel. Goodstein v. Kaplan, Inc.*, No. 07-cv-01491 (E.D. Pa. 2007); *U.S. ex rel. Lee v. Corinthian Colls.*, No. 07-cv-1984 (C.D. Cal. 2007), *rev'd*, 655 F.3d 984 (9th Cir. 2011); *U.S. ex rel. Schultz v. DeVry, Inc.*, No. 07-cv-05425 (N.D. Ill. 2007); *U.S. ex rel. Torres v. Kaplan Higher Educ.*, No. 07-cv-05643 (N.D. Ill. 2007); *U.S. ex rel. Washington v. Educ. Mgmt. Corp.*, No. 07-cv-00461 (W.D. Pa. 2007); *U.S. ex rel. Bott v. Silicon Valley Colls.*, 262 F. App'x 810 (9th Cir. 2008); *U.S. ex rel. Brodale v. Apollo Grp.*, No. 08-cv-01399 (S.D. Cal. 2008); *U.S. ex rel. Lopez v. Strayer Educ. Inc.*, No. 08-cv-00589 (E.D. Va. 2008); *U.S. ex rel. Irwin v. Grand Canyon Univ.*, 2009 WL 322875 (D. Ariz. Feb. 10, 2009); *U.S. ex rel. Aldredge v. ATI Enters., Inc.*, No. 09-cv-01313-G (N.D. Tex. 2009); *U.S. ex rel. Chesney-Hill v. Career Educ. Corp.*, No. 09-cv-02744 (E.D. Pa. 2009); *U.S. ex rel. Andrews v. Alta Colls., Inc.*, No. 10-cv-00018-B (N.D. Tex. 2010); *U.S. ex rel. Pilecki-Simko v. Chubb Inst.*, 2010 WL 1076228

(D.N.J. Mar. 22, 2010); *U.S. ex rel. Boyce v. ED4MIL, LLC*, No. 10-cv-02097 (M.D. Pa. 2010); *U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, No. 10-cv-01401 (S.D. Cal. 2010); *U.S. ex rel. Clark v. Am. Commercial Colls., Inc.*, No. 10-cv-00129-C (N.D. Tex. 2010); *U.S. ex rel. Hoggett v. Univ. of Phoenix*, No. 10-cv-02478 (E.D. Cal. 2010); *U.S. ex rel. Palmer v. Mfrs. Tech. Inst., Inc.*, No. 10-cv-02391 (D. Kan. 2010); *U.S. ex rel. Sobek v. Educ. Mgmt., LLC*, No. 10-cv-00131 (W.D. Pa. 2010); *U.S. ex rel. Walters v. Educ. Mgmt. Corp.*, No. 10-cv-02479 (E.D. Cal. 2010); *U.S. ex rel. Jajdelski v. Kaplan, Inc.*, 834 F. Supp. 2d 1182 (D. Nev. 2011), *aff'd in part*, 517 F. App'x 534 (9th Cir. 2013); *U.S. ex rel. Leveski v. ITT Educ. Servs.*, 2011 WL 3471071 (S.D. Ind. Aug. 8, 2011), *rev'd*, 719 F.3d 818 (7th Cir. 2013); *U.S. ex rel. Gatsiopoulos v. Kaplan Higher Educ.*, 2011 WL 3489443 (S.D. Fla. 2011); *U.S. ex rel. Andrews v. Corinthian Colls., Inc.*, No. 11-cv-01675 (C.D. Cal. 2011); *United States v. Art Inst. Online, Inc.*, No. 11-00601 (W.D. Pa. 2011); *U.S. ex rel. Dong v. Distance Educ. Training Council*, No. 11-cv-00377 (D.D.C. 2011); *U.S. ex rel. Ferguson v. Bridgepoint Educ., Inc.*, No. 11-cv-00493 (S.D. Cal. 2011); *U.S. ex rel. Fernandez v. Fla. Nat'l Coll., Inc.*, No. 11-cv-22814 (S.D. Fla. 2011); *U.S. ex rel. Glaser v. Educacion Significativa, LLC*, No. 11-cv-01103 (S.D. Cal. 2011); *U.S. ex rel. Hays v. Corinthian Colls., Inc.*, No. 11-cv-01395 (C.D. Cal. 2011); *U.S. ex rel. Hinkle-Allin v. Ontario Health Educ. Co.*, No. 11-cv-06273 (C.D. Cal. 2011); *U.S. ex rel. LaPorte v. Premier Educ. Grp.*, No. 11-cv-3523 (D.N.J. 2011); *U.S. ex rel. Munoz v. Computer Sys. Inst., Inc.*, No. 11-cv-07899 (N.D. Ill. 2011); *U.S. ex rel. Rawles v. Universal Tech. Inst., Inc.*, No. 11-cv-02320 (D. Ariz. 2011); *U.S. ex rel. Coleman v. Kaplan, Inc.*, No. 12-cv-00459 (W.D. Tex. 2012); *U.S. ex rel. Deck v. Miami-Jacobs Bus. Coll. Co.*, No. 12-cv-00063 (S.D. Ohio 2012); *U.S. ex rel. Feria v. DeVry, Inc.*, No. 12-cv-00843 (W.D. Tex. 2012); *U.S. ex rel. Gascon v. Coll. of Bus. & Tech. Inc.*, No. 12-cv-21812 (S.D. Fla. 2012); *U.S. ex rel. Hoffman v. Nat'l Coll.*, 2013 WL 3421931 (N.D. Ind. 2013); *U.S. ex rel. Hysko v. Northcentral Univ., Inc.*, No. 12-cv-01672 (D. Ariz. 2012); *U.S. ex rel. Nelson v. Career Educ. Corp.*, No. 12-cv-00775 (E.D. Wis. 2012), *aff'd*, 788 F.3d 696 (7th Cir. 2015); *U.S. ex rel. Pena v. FastTrain II Corp.*, No. 12-cv-21431 (S.D. Fla. 2012); *U.S. ex rel. Rainwater v. Educ. Mgmt. Corp.*, No. 12-cv-01008 (M.D. Tenn. 2012); *U.S. ex rel.*

number of cases, the Government declined to intervene as a plaintiff. Many of these FCA lawsuits have been based, at least in part, on the implied false certification theory. *See*, *e.g.*, *United States v. Educ. Mgmt. Corp.*, 871 F. Supp. 2d 433, 451 (W.D. Pa. 2012). These lawsuits are rooted in the fiction that a school's entirely accurate submission requesting payment of Title IV funds is deemed "false" where the school is alleged to be in noncompliance with a statutory or regulatory requirement. Exploiting the implied false certification theory, the plaintiffs in these lawsuits—some of them professional relators—often seek statutory damages for *each* student who requested Title IV funds over multi-year periods, resulting in multi-billion-dollar demands that the plaintiffs then seek to treble under the FCA's penalty provisions.

APSCU submits this *amicus curiae* brief to describe the experiences of institutions of higher education in defending against the implied certification

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Capriola v. BrightStar Educ. Grp. Inc., 2013 WL 1499319 (E.D. Cal. Apr. 11, 2013); *United States v. Empire Educ. Corp.*, 959 F. Supp. 2d 248 (N.D.N.Y. 2013); *U.S. ex rel. Gillespie v. Kaplan Univ.*, 2013 WL 3762445 (S.D. Fla. July 16, 2013); *U.S. ex rel. Barrett v. Beauty Basics, Inc.*, No. 13-cv-1989 (N.D. Ala. 2013); *U.S. ex rel. Brooks v. Stevens-Henager Coll., Inc.*, No. 13-CV-00009 (D. Idaho 2013); *U.S. ex rel. Caron v. B&H Educ., Inc.*, No. 13-cv-05256 (C.D. Cal. 2013); *U.S. ex rel. Rumann v. Phoenix Sch. of Law, LLC*, No. 13-cv-02102 (D. Ariz. 2013); *U.S. ex rel. Smith v. Va. Coll. LLC*, No. 13-cv-00547 (M.D. Ala. 2013); *U.S. ex rel. Miller v. Weston Educ., Inc.*, 2014 WL 1292407 (W.D. Mo. Mar. 31, 2014), *rev'd in part*, 784 F.3d 1198 (8th Cir. 2015); *U.S. ex rel. Powell v. Am. Intercontinental Univ.*, 2014 WL 4829206 (N.D. Ga. Sept. 29, 2014); *U.S. ex rel. Brooks v. Stevens-Henager Coll., Inc.*, No. 15-cv-00119 (D. Utah 2015); *U.S. ex rel. Rutledge v. Aveda*, 2015 WL 2238786 (N.D. Ala. 2015).

theory and to provide the Court with the real-world implications of that theory in the education sector. The FCA lawsuits brought against schools under the implied certification theory—and particularly the expansive version adopted by the First Circuit below—"expand the FCA well beyond its intended role of combating 'fraud against the Government.'" *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 669 (2008) (citation omitted). The theory effectively transforms the FCA from a remedy for government-contractor fraud into a scheme for private plaintiffs to extort settlements from colleges and universities seeking to avoid costly discovery or unable to sustain the severe risks of a trial on alleged regulatory or contractual violations. This in turn has led to less funding for classroom resources and student services, and undeserved financial windfalls for *qui tam* relators and their counsel. As history has shown, these harms fall disproportionately on APSCU's current and former member institutions and the students that those institutions serve.

ARGUMENT

This Court should limit the FCA to its intended sphere—*fraud* against the federal government—and firmly reject the legal fiction of implied certification. A truthful request for payment of federal funds is not "false" under the FCA simply because it is later shown that the requestor was not in compliance with a statutory, regulatory, or contractual requirement. Strictly limiting the FCA to remedying instances of actual fraud is a necessary check on the FCA's harsh and often destructive penalties, and helps to prevent relators from displacing the complex legal regimes that govern highly regulated industries, such as higher education. At a minimum, the implied certifi-

cation theory should be narrowly confined to statutory, regulatory, and contractual provisions with which the requestor's compliance is an express condition of *payment*—not the thousands of provisions that are a condition of *participation* in the government program.

I. THE LEGAL FICTION OF "IMPLIED CERTIFICATION" CANNOT PROPERLY TRANSFORM TRUTHFUL STATEMENTS INTO "FRAUD" UNDER THE FCA

In this case, petitioner Universal Health Services, a medical care provider, faced a scenario all too familiar to institutions of higher education: exposure to onerous liability and penalties under the FCA for making an entirely truthful and accurate request for payment from the federal government, based solely on the legal fiction of implied certification. That fiction has no basis under the FCA, a statute "intended to reach all types of *fraud*" against the federal government. *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (emphasis added).

The implied certification theory far exceeds the outermost limits of liability authorized by the FCA, which provides the federal government with a remedy against the submission of "false or fraudulent claim[s]" for payment. 31 U.S.C. § 3729(a)(1)(A), (a)(1)(B). Actual fraud is the focus of the FCA, and this Court has rejected theories that give rise to "'almost boundless'" FCA liability. *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 669 (2008) (citation omitted). A government contractor's legal or regulatory infractions cannot properly transform a facially truthful request for payment into knowing fraud.

In analogous contexts, this Court has rejected inferences of fraud under federal statutes far less punitive than the FCA. In *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), for example, this Court unanimously held that a securities issuer's statement that "we believe we are obeying the law" did not give rise to securities fraud liability where there was no allegation that the speaker did not honestly hold that opinion. *Id.* at 1327. It is *not* fraud, this Court held, to certify a good-faith belief that a company is in compliance with the law, even if that belief later "turned out to be wrong." *Id.* That logic applies with even greater force under the FCA, which (unlike the securities laws) imposes treble damages and statutory penalties for violations.

"[T]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999). Only knowing falsity—that is, *fraud*—supports liability under the FCA. *Id.* That construction is consistent with the statutory text and long-standing principles of due process, which does not allow for the imposition of treble damages and statutory penalties except for intentional misconduct, *see Safeco Ins. Co. v. Burr*, 551 U.S. 47, 69 (2007); *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915), and only then on a heightened evidentiary showing, *see Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 (1994); *Harrison v. Vose*, 50 U.S. (9 How.) 372, 378-79 (1850). Exposing schools to punitive liability and penalties based upon the fiction of implied false certification fails to heed these statutory and jurisprudential limitations.

A. The Implied Certification Theory Creates Unreasonable Outcomes For Colleges And Universities

The fiction of implied certification is frequently deployed against institutions that operate in highly regulated industries, such as institutions of higher education. Like health care providers, colleges and universities are subject to a complex regulatory environment and make numerous submissions to the federal government for funds. Postsecondary schools rely almost exclusively on tuition to provide education and services, and most students pay their tuition with assistance from federal Title IV funding. In recognition of this fact, Congress allows proprietary institutions of higher education to obtain up to 90% of their revenue from Title IV funds. 20 U.S.C. § 1094(a)(24).

These qualities make postsecondary schools prime targets for overreaching *qui tam* relators seeking to cash in on allegations of minor regulatory infractions. Some of these alleged infractions, moreover, bear little or no connection with Title IV funding. For example, in a case discussed in more detail below, Kaplan University has been defending itself against claims that certain of its policies and procedures for disabled employees were not in compliance with Section 504 of the Rehabilitation Act. *See Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1046-47 (11th Cir. 2015). In another case, Heritage College is facing an upcoming FCA trial on allegations that it failed to maintain adequate records. *See United States ex rel. Miller v. Weston Educ., Inc.*, 784 F.3d 1198, 1201 (8th Cir.), *petition for cert. filed*, No. 15-404 (U.S. Sept. 28, 2015). In yet another case, National College of Kentucky defended itself against a

claim that confidentiality and non-disparagement agreements that school faculty signed violated accreditation standards. *United States ex rel. Hoffman v. Nat'l Coll.*, No. 12-cv-237, 2013 WL 3421931, at *2 (N.D. Ind. July 8, 2013).

These FCA suits and others like them have proliferated notwithstanding the fact that APSCU's members—colleges, universities, and trade schools across the country—are closely regulated by multiple federal agencies and oversight authorities. Most prominent among these regulators is the U.S. Department of Education, which administers the Title IV funding programs and their attendant regulations. *APSCU v. Duncan*, 681 F.3d 427, 433 (D.C. Cir. 2012). Those regulations are extensive. The Department's regulations on schools' participation in its financial assistance programs alone fill 246 pages of the Federal Register and regulate such wide-ranging topics as the content and administration of tests employed to allow non-high school graduates access to postsecondary education and Title IV loans, *see* 34 C.F.R §§ 668.146(b), 668.151, to the distribution of mail voter registration forms to students, *see id.* § 668.14(d).[6]

Colleges and universities are also heavily regulated by the states and private regulatory authorities. California, for example, has adopted regulations covering everything from the types of reports a school must issue to the necessity of a library. Cal. Code Regs. tit. 5, § 74110 (annual report requirement); *id.* § 71740 ("A degree granting institution

[6] In addition, the Securities and Exchange Commission, the Consumer Financial Protection Bureau, and the Federal Trade Commission have all asserted or attempted to assert regulatory or enforcement authority over institutions of higher education.

shall make available for student use a library and other learning resources."). The states also frequently assert investigative and enforcement authority within the education sector, sometimes launching multi-year investigations in concert with other states or filing enforcement lawsuits.[7] Independent accreditors, such as the Accrediting Council for Independent Colleges and Schools, impose additional requirements on schools as a condition of maintaining accreditation.

To be eligible to participate in the Title IV program and receive Title IV funding, schools must enter into a Program Participation Agreement ("PPA") with the U.S. Secretary of Education. 20 U.S.C. § 1094(a). The PPA is a detailed agreement that sets forth a "panoply of statutory, regulatory, and contractual requirements" and then "incorporates by reference thousands of pages of other federal laws and regulations." *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 701, 707 (7th Cir.), *petition for cert. filed*, No. 15-729 (U.S. Dec. 2, 2015). Each PPA "shall condition the initial and continuing eligibility of an institution to participate in a program [for Title IV subsidies] upon compliance" with certain enumerated requirements. 20 U.S.C. § 1094(a). In addition, PPAs generally require schools to "comply with all statutory provisions," "all applicable regulatory provisions," and "all applicable special arrangements, agreements, and limitations entered into" under Title IV.[8]

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[7] *See*, *e.g.*, *People v. Alta Colls.*, No. 12 CH 1587 (Cir. Ct. of Cook Cnty. Ill. filed Jan. 18, 2012).

[8] Program Participation Agreement, *United States ex rel. Nelson v. Career Educ. Corp.*, No. 12-cv-775 (E.D. Wis. Jan. 3, 2014), ECF No. 65-1.

Given the complex web of laws and regulations imposed on postsecondary schools, it is not unusual for schools to be found noncompliant with one or more requirements. For example, the University of North Carolina recently disclosed that an internal investigation had revealed that one department within the school had falsified grades and attendance.[9] Similarly, the Department of Education recently determined that Harvard Law School and Yale University had violated regulations for responding to and reporting sex offenses, respectively.[10]

Against this regulatory backdrop, schools make numerous submissions to the federal government, ranging from the infrequent submission of PPAs to the frequent and numerous requests for payment of Title IV funds for students. For the latter, schools utilize the Department of Education's online system, which allows a school to make automated payment requests for multiple students at a time by providing information such as the school's identification number, the school's unique grant award number that corresponds to whether the funds are Pell Grants,

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[9] *See* Kenneth L. Wainstein, *Investigation of Irregular Classes in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill* at 3 (Oct. 16, 2014), http://carolinacommitment.unc.edu/reports-resources/investigation-of-irregular-classes-in-the-department-of-african-and-afro-american-studies-at-the-university-of-north-carolina-at-chapel-hill-2/.

[10] Harvard Law School, U.S. Dep't of Educ., No. 01-11-2002 (Dec. 30, 2014) (finding the "Law School failed to comply with the Title IX requirements for the prompt and equitable response to complaints of sexual harassment and sexual assault"); Yale University, U.S. Dep't of Educ., No. 00142600 (Apr. 19, 2013) (imposing $165,000 fine on the university for failing to properly report sex offenses in its required submission of annual statistics).

Perkins Loans, or the like, and the financial deposit information.[11] A school may submit tens of thousands of such requests for payment each year. In one recent FCA case based on an implied certification theory, for example, the relator provided evidence that the defendant school had submitted more than 200,000 requests for payment from the federal government during the seven-year period spanning approximately 2007 through 2013. *See* Initial Brief of Relator-Appellants Manuel Christiansen and Brian Ashton at 58-59 & n.56, *United States ex rel. Christiansen v. Everglades Coll.*, No. 14-13992 (11th Cir. Dec. 23, 2014) (hereinafter "Christiansen Br.").

The fiction of implied certification cannot reasonably be reconciled with these realities. Consider, for example, the specifics of electronic payment requests that allegedly become the "false claims" under the implied certification theory.[12] The information provided in these requests includes the school's identification number and grant number, bank account information, and the amount of funds the school is requesting for the relevant students.[13] The only express "certification" during the entire process is that "the funds are being expended within three business days of receipt for the purpose and condition of the agreement." *See* Frequently Asked Questions, http://www2.ed.gov/programs/fie/faq.html (last modified July 18, 2011). Nothing suggests that when an

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[11] *See* https://www.g5.gov/ext/exthelp2/toc0.html (providing tutorials on how to create a payment request) (last visited on Jan. 25, 2016).

[12] *See* https://www.g5.gov/ext/exthelp2/tpc/fcae1078-3cc0-4e06-902f-2c096e0778d9/topic.html?mode=S&printitname=fcae1078-3cc0-4e06-902f-2c096e0778d9_JOBAID.doc (online tutorial) (last visited Jan. 25, 2016).

[13] *Id.*

employee performs this ministerial submission, that employee is certifying that the school is in perfect compliance with every law and regulation adopted pursuant to the Higher Education Act.

Yet, in FCA litigation against schools, that precise fiction has been adopted to hold a school liable under the FCA. *United States v. Educ. Mgmt. Corp.*, 871 F. Supp. 2d 433, 451 (W.D. Pa. 2012). The implied certification theory therefore has the "effect of putting words" in the school's "mouth" that it has complied with each and every contractual, legal, and regulatory provision included in the PPA. 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 2.03[G][2], at 2-207 (4th ed. Supp. 2015-2). This is "unreasonable": "an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference into the PPA are [not] conditions of payment for purposes of liability under the FCA" and a violation of any one of them does not make every request for payment "false." *Sanford-Brown*, 788 F.3d at 711.

Nor can a school's previous agreement with the Department of Education in a PPA provide an actionable certification under the FCA. Schools enter into PPAs only periodically, when school officials certify that their schools will comply with applicable law going forward in order to maintain the schools' eligibility to participate in Title IV programs. But an agreement to comply with law in the future is not a certification of past or present compliance; and a school's future statutory or regulatory violations cannot reasonably render the agreement "false" or "fraudulent" when it was entered. *Cf. Omnicare*, 135 S. Ct. at 1327.

B. The Implied Certification Theory Unduly Coerces Defendants To Settle Even Meritless Cases

In addition to resting on an untenable and unreasonable fiction, the implied certification theory impermissibly extends the FCA's harsh damages and penalties, which are already "essentially punitive in nature." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000).

Under the FCA, defendants are subject to treble damages and civil penalties ranging from $5,500 to $11,000 per false claim. 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.3(a)(9). Those penalties are set to rise significantly this year through a one-time "catch up" adjustment for inflation, with the exact amount to be determined by the Department of Justice and Office of Management and Budget through a notice and comment rulemaking.[14] The adjusted penalties could be as high as $9,300 to $18,600 per "false" claim. In addition to these penalties, a determination that a school has violated the FCA could lead to debarment or suspension—a "death sentence" for any school. *See* 48 C.F.R. § 9.406-2(a)(1) (possible debarment in the event of a "civil judgment for . . . [c]ommission of fraud" "in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract"); *id.* § 9.406-2(b)(1)(vi) (possible debarment for knowing failure to "disclose" "credible evidence" of a "[v]iolation of the civil False Claims Act"); *see also*, *e.g.*, *id.* § 9.407-2(a)(1) (suspension); *id.* § 9.407-2(a)(8) (suspension).

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[14] *See* Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599-600 (2015) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note).

Qui tam relators and the government frequently argue in implied certification cases brought against schools that because each request for Title IV funding is a separate "false claim," each funding request triggers the maximum civil penalty. For example, in an FCA case that went to trial against Everglades College doing business as Keiser University, the relators and the government seized upon the implied certification theory to argue that *each* of 234,127 requests for payment by the school was a false claim. *See United States ex rel. Christiansen v. Everglades Coll.*, No. 12-cv-60185, 2014 WL 5139301, at *1 (S.D. Fla. Aug. 14, 2014) (findings of fact and law after bench trial); Christiansen Br. 10, 58-59 & n.56. Utilizing the implied certification theory, the relators sought between $1.287 and $2.575 billion in civil fines alone.

In addition, the relators sought to recover (with the support of the United States) the full amount of Title IV funds dispersed to Keiser—$1.288 billion—and then *trebled* to nearly $3.9 billion. Christiansen Br. 10, 59. Indeed, before the case was settled on appeal, the relators had argued to the Eleventh Circuit that the value of the education the students actually received was entirely irrelevant to the damages calculation. In the relators' view, the traditional method of calculating damages—actual loss to the government—"does not translate neatly into the [implied] false certification context because the . . . funds are intended to benefit third parties, such as the students in the case at hand." *Id.* at 27.[15] But

[15] Similar arguments have been successfully advanced in the Medicare context to calculate FCA damages without discounting the substantial value of services rendered. *See*, *e.g.*, *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 386 (4th Cir.

such arguments ignore the complete disconnect between the relators' measure of damages and an alleged regulatory infraction that has no impact on the quality or value of the education provided. *See also*, *e.g.*, *infra* at 28-30 (suit seeking FCA damages for alleged inadequacies in school's policies for disabled employees).

The total recovery that the relators sought from Keiser University under their implied certification theory would have squarely implicated the Eighth Amendment's prohibition on excessive fines and the Due Process Clause. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562-63 (1996). With treble damages of $3.864 billion, and up to $2.575 billion in civil fines, the relators were seeking *between $5.15 and $6.44 billion* in damages under the FCA. Liability of this magnitude—which is a danger in any FCA case premised on the implied false certification theory—would bankrupt any school, thereby placing undue pressure on schools to settle even unmeritorious FCA claims. *Cf. Haroco, Inc. v. Am. Nat'l Bank & Trust Co.*, 747 F.2d 384, 399 n.16 (7th Cir. 1984) (noting the "*in terrorem* settlement value that the threat of treble damages may add to spurious claims"), *aff'd*, 473 U.S. 606 (1985).

The case brought by the United States against Education Management Corporation ("EDMC") is also illustrative of the implied certification theory's dramatic potential for abuse. Like the Keiser case, the relator, and later the United States, pursued an

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2015) (no discount on FCA damages where false certification under the Stark Act meant that the government owed "nothing"); *United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008) (same).

implied certification theory (along with others), arguing that "each and every request for payment by EDMC" was implicitly false during the time in which the school was allegedly in violation of the ban on so-called "incentive compensation." *Educ. Mgmt. Corp.*, 871 F. Supp. 2d at 451.[16] The district court accepted the implied certification theory of liability based on binding Third Circuit precedent, *see id.*, putting into play a theory of liability that could have easily closed EDMC's doors to its more than 100,000 students across the country. Moreover, the "multi-billion dollar" damages demand allowed the government to seek correspondingly "expansive" discovery. Order at 5, *United States v. Educ. Mgmt. LLC*, No. 07-cv-00461 (W.D. Pa. July 23, 2013), ECF No. 291.

Rather than risk the demise of an entire school system, and to put a stop to the slow bleed caused by the cost of fulfilling its discovery obligations that were diverting resources from education programs, EDMC agreed to pay nearly $96 million to settle four FCA actions against the school and an investigation by state attorneys general.[17] Remarkably, this settlement closely followed a summary judgment ruling that, although adverse to EDMC, explained that the United States and the relator "face a difficult burden to succeed on their claims." *United States v. Educ.*

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[16] The Higher Education Act's compensation provision prohibited at the time the payment of bonuses or other incentive payments to recruiters based solely on the number of students the recruiter enrolled. *Educ. Mgmt. Corp.*, 871 F. Supp. 2d at 440.

[17] *See* Press Release, Department of Justice, For-Profit College Company to Pay $95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations (Nov. 16, 2015), http://www.justice.gov/usao-wdpa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud.

Mgmt. LLC, No. 07-cv-461, 2014 WL 1796686, at *5 (W.D. Pa. May 6, 2014). According to the district court, the government would need evidence at trial of a "top-down, corporate-wide fraud—not merely isolated instances of inadequate evaluations by supervisors." *Id.* Yet, so coercive was the implied certification theory and its attendant threat of "multi-billion-dollar" damages that EDMC was forced to settle what may well have been an "anemic" case at trial. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

These cases illustrate how the false certification theory builds on, and extends, the FCA's already "essentially punitive" damages provisions. *Stevens*, 529 U.S. at 784-85. Congress never intended the FCA to be a tool for government prosecutors—or private *qui tam* relators—to threaten to drive colleges and universities into bankruptcy whenever they lose an FCA lawsuit. This Court should reject the destructive fiction of implied certification.

C. The Implied Certification Theory Displaces Regulations Designed To Redress Infractions

This enormous and undue financial pressure to settle even anemic cases, based on the fiction that a facially true request for payment is implicitly false, is also entirely unnecessary. A complex regulatory regime already exists to ensure that colleges and universities use Title IV funds appropriately. The implied certification theory not only expands FCA jurisdiction far beyond its intended reach, but also simultaneously "undermine[s] the government's own regulatory procedures" designed specifically to enforce compliance. *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 799 (8th Cir. 2011) (citation omitted).

The Department of Education has ample authority, without resorting to boundless FCA doctrines, "to enforce the PPA through administrative mechanisms . . . up to and including the power to terminate" a school's participation in the government loan programs. *Sanford-Brown*, 788 F.3d at 712. For example, the Department of Education may "[t]erminate the institution's eligibility" for Title IV funds "in whole or as to a particular location" when the Secretary determines that certain conditions have been met. 34 C.F.R. § 600.41(a)(1). The Department may also "[l]imit . . . the authority of the institution to disburse, deliver, or cause the disbursement or delivery of funds" under Title IV or take "emergency action." *Id.* § 600.41(a)(2), (3); *see also id.* § 600.41(b)-(e). The agency may also suspend funding, impose fines, and limit institutions' ability to contract with third parties. *Id.* § 668.81(a); *see also id.* § 668.83 (emergency action); *id.* § 668.86 ("Limitation or termination proceedings"); *id.* § 668.87 (prehearing conferences); *id.* § 668.88 (administrative hearings); *id.* § 668.89 (powers of hearing officer); *id.* § 668.90 (adjudicatory powers). These are just some of the administrative powers that led the Seventh Circuit to conclude that "[t]he FCA is simply not the proper mechanism for government to enforce violations of conditions of participation contained in—or incorporated by reference into—a PPA." *Sanford-Brown*, 788 F.3d at 712; *accord United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008); *Mikes v. Straus*, 274 F.3d 687, 700, 702 (2d Cir. 2001).[18]

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[18] Separate from these provisions, independent accreditors also exercise immense power over schools to define the standards for academic accreditation. A school's loss of accreditation

Indeed, the Department of Education recently exercised those immense powers (and not the implied certification theory of liability or even the FCA) to effectively shut down Corinthian Colleges. Dissatisfied with the school's production of documents and data related to the school's job placement claims, the Department used its administrative powers to institute a 21-day hold on the school's ability to receive financial aid in June 2014. This action alone put the school on the path toward bankruptcy, according to its filings with the Securities and Exchange Commission. Shortly thereafter, Corinthian agreed to sell or close the vast majority of its campuses in exchange for the Department agreeing to release $35 million in student financial aid. Corinthian eventually closed its doors in April 2015 and declared bankruptcy.

To be sure, not every exercise of enforcement power by the Department of Education results in the loss of Title IV funding—a death knell for the educational institution. Most enforcement actions do not. But that is precisely why such measured determinations are best left to the agency, which is better situated than courts to balance the need for regulatory oversight and the compelling interests of the institution and its students. It is also why there is no basis to presume, as the implied certification theory does, that every regulatory infraction causes the payment of Title IV funds that would not otherwise have been paid.

The resulting tension between relators acting as "bounty hunters,"[19] and official government policy

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is itself a ground for enforcement action by the Department of Education. 34 C.F.R. § 600.41(a)(1)(ii)(C).

[19] *United States ex rel. Bogina v. Medline Indus., Inc.*, ___ F.3d ___, 2016 WL 25611, at *2 (7th Cir. Jan. 4, 2016).

was exemplified by their conflicting actions with respect to the compensation provision. *See supra* at 20 n.16. At the same time that relators filed FCA lawsuits against schools seeking a return of all Title IV funds relying in part on the implied certification theory of liability,[20] the policy of the United States, as expressed in a 2002 memorandum issued by the Deputy Secretary of the U.S. Department of Education, was that a violation of the compensation provision did "*not* result[] in monetary loss to the Department." Memorandum, *United States ex rel. Lee v. Corinthian Colls.*, No. 07-cv-01984 (C.D. Cal. Aug. 3, 2009), ECF No. 37-5 at 1 (emphasis added). Indeed, the government memorandum directly undermined the relators' theory that a violation made the school ineligible, explaining that "[i]mproper recruiting does not render a recruited student ineligible to receive student aid funds" and recommend that the usual sanction for a violation would be "the imposition of a fine." *Id.* Yet the expansive *qui tam* cases proceeded nonetheless, often into expensive discovery.[21] *See*, *e.g.*, Order, *U.S. ex rel. Lee v. Corinthian Colls.*, No. 07-cv-01984 (C.D. Cal. Mar. 15, 2013), ECF No. 224 at 1-2. That the government intervened as a plaintiff in at least one of these cases, *see supra* at 19-21, only highlights the conflict inherent in using the FCA to displace targeted regulatory mechanisms.

The Corinthian example shows how a school's primary regulator can effectively exercise plenary

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[20] *See*, *e.g.*, Complaint for Damages, with Demand for Jury Trial, *United States ex rel. Carter v. Bridgepoint Educ., Inc.*, No. 10-cv-1401 (S.D. Cal. July 2, 2010), ECF No. 1, ¶ 34 (alleging the school is not "eligible under the Title IV program due" to violations of the compensation provision).

[21] *See*, *e.g.*, Order, *Carter*, No. 10-cv-01401 (S.D. Cal. Jan. 8, 2014), ECF No. 41 (denying motion to dismiss).

regulatory power over a school's use of Title IV funds. The government's exercise of that regulatory power, moreover, is subject to Executive oversight through the Appointments Clause and the review mechanisms afforded by the Administrative Procedure Act. There is no need for legal fictions that have the effect of vesting similar powers in private *qui tam* relators. To the contrary, the fiction of implied false certification intrudes on Executive Branch power, disrupts the complex regulatory structure that governs institutions of higher education, and injects harmful uncertainty into the affairs of proprietary institutions of higher education.

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This Court should firmly reject the implied false certification theory. That theory rests on an untenable fiction that an employee's submission of a routine request for funding is the equivalent of an express certificate of compliance by the institution. Moreover, in the higher education context, the implied certification fiction so grossly distorts the FCA's penalty and treble damages provisions that almost any finding of liability threatens the school's existence. The theory serves no legitimate purpose, given that the Executive Branch has ample authority and expertise to enforce the rules and regulations that it imposes on colleges and universities—and true frauds can be redressed through many mechanisms. In contrast, upholding the implied certification theory would "expand the FCA well beyond its intended role of combating 'fraud against the Government.'" *Allison Engine*, 553 U.S. at 669 (citation omitted).

II. AT A MINIMUM, THE IMPLIED CERTIFICATION THEORY SHOULD BE NARROWLY LIMITED TO EXPRESS CONDITIONS OF PAYMENT

Should this Court nonetheless uphold the implied certification theory of liability, the Court should make clear that the theory applies only to violations of express conditions of *payment* of federal funds, not conditions of *participation* in federal programs. *See*, *e.g.*, *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487, 502 (S.D. Tex. 2003) (dismissing an FCA suit premised on a violation of the compensation provision because the restriction is merely "a condition of eligibility to participate in the program, not an express condition of payment of specific claims"), *aff'd*, 111 F. App'x 296 (5th Cir. 2004). A contractor's participation in a federal program—that is, its eligibility for federal funds—says nothing about the conditions under which those funds might later be paid. The distinction between conditions of payment and conditions of participation is critical to ensuring that the FCA does not become "the very type of enforcement tool that courts have repeatedly cautioned against—a general enforcement mechanism for the entire federal regulatory scheme." 1 Boese, *supra*, § 2.03[G][1][b], at 2-203.

An express condition of payment is a law, regulation, or contractual provision that sets forth a specific regulatory mandate and expressly states that the government contractor "must comply in order to be paid." *Mikes*, 274 F.3d at 700. These are the few, critically important, laws "where compliance is a prerequisite to payment." *Id.* at 698.

In contrast, a condition of participation, or eligibility, is a rule or regulation that must be followed by

participants in the program, but a violation of which will not necessarily result in a cutoff from payment. *See Mikes*, 274 F.3d at 696. An example might be a regulation providing that "[a]n institution described in paragraph (a) of this section must annually, for the preceding reporting year, prepare a report that contains the following information." 34 C.F.R. § 668.47(c). Such regulations, which abound in the Code of Federal Regulations, govern the ministerial duties of participants in federal programs but do not—and should not—trigger FCA liability for infractions.[22]

The rationale for the distinction rests on the "restitutionary" purpose of the FCA—to recover "ill-[]gotten funds." *Mikes*, 274 F.3d at 697. If "the alleged noncompliance would not have influenced the government's decision to pay," the Government has lost no money and there are no "ill-[]gotten funds." *Id.* Imposing liability in those instances where "regulatory noncompliance" is "irrelevant to the government's disbursement decision" would be "anomalous," and provide the government with a windfall. *Id.* Accordingly, the Second Circuit and others have correctly held that conditions of participation cannot

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[22] *See*, *e.g.*, 34 C.F.R § 668.14(b)(30) (requiring an institution to implement measures "to effectively combat the unauthorized distribution of copyrighted material by users of the institution's network"); *id.* § 668.14(c)(1) (requiring an institution certify that it has "in operation a drug abuse prevention program"); *id.* § 668.14(c)(2)(i) (requiring an institution to establish a campus security policy); *id.* § 668.43(a)(1)(iv) (requiring an institution to publish information on estimated transportation costs for students); *id.* § 668.45(a)(5) (requiring an institution to publish its graduation statistics annually by July 1); *id.* § 668.47(c) (requiring institutions to prepare an annual report on athletic program participation).

support FCA liability, whereas conditions of payment can impose FCA liability. *See id.* at 698. The U.S. Department of Education itself made this clear in its 2002 memorandum stating that the agency did not regard a school's violation of the compensation provision to breach a condition of payment of Title IV funds. *See supra* at 23-24.

The requirement of an *express* condition of payment before imposing FCA liability for noncompliance is critical to limiting the scope of the certification theory of liability, an already expansive doctrine. Bedrock notions of due process prohibit exposing defendants to treble damages and civil penalties based on *implicitly* false statements. *See*, *e.g.*, *Harrison*, 50 U.S. at 378-79 ("It is settled . . . that, where penalties are to be recovered, greater fullness of evidence is necessary to make out such a case as the law contemplates," and "one shall not incur a penalty in cases of doubt"). Schools should not face the alarming prospect of potentially bankrupting FCA liability and suspension or debarment premised on their noncompliance with regulatory or contractual provisions that have no legitimate bearing on the schools' receipt of government funds.

This is not a hypothetical concern. Since 2008, for example, Kaplan University has been defending itself against claims by a former instructor that the school's policies and procedures for disabled employees were not in compliance with Section 504 of the Rehabilitation Act. *See Urquilla-Diaz*, 780 F.3d at 1046-47. Specifically, the former instructor utilized findings issued by a field office of the Department of Education's Office of Civil Rights ("OCR") concerning the school's policies and procedures. OCR recommended, for example, that the "'complaint procedures

should be amended to require the University to notify complainants in writing of the results of investigations,'" a recommendation that the relator seized upon to bring a false certification case under the FCA. *Id.* at 1047. Indeed, the relator was able to force expensive discovery on the school, even though it was undisputed that Kaplan cooperated with OCR and eventually received a compliance letter from OCR "stating that no further monitoring was necessary because [the school] had fulfilled its obligations under the resolution agreement." *Id.* at 1047.

This OCR-finding-turned-FCA-action should never have been filed, much less litigated through summary judgment and appeal to the Eleventh Circuit as it was. Compliance with Section 504 of the Rehabilitation Act is *not* a condition of payment under the terms of the PPA; nor are any of the other incorporated statutes and regulations listed in that document. Kaplan only "agreed that it would 'comply with . . . Section 504 of the Rehabilitation Act and the implementing regulations 34 C.F.R. Part 104 (barring discrimination on the basis of physical handicap).'" *Urquilla-Diaz*, 780 F.3d at 1045 (citation omitted). Nowhere does the Department of Education expressly state that it will not release Title IV funds to a school for noncompliance with Section 504 of the Rehabilitation Act. Indeed, despite OCR's findings, "[a]t no time did the agency revoke Kaplan's eligibility to receive Title IV funds." *Id.* at 1047.

Even though Kaplan fully prevailed, it did so only after litigating for nearly seven years under the constant threat of excessive FCA damages and penalties. The relators in that case did not even allege any harm to Kaplan's students as a result of the

supposedly false implied certification. The real harm to students, as it turned out, was in forcing Kaplan to expend significant sums in litigation fees and expenses that could have been better spent on its educational offerings.

Kaplan's experiences are far from unique. Heritage College is presently seeking this Court's review of an Eighth Circuit decision holding that participation in Title IV is "'*explicitly* conditioned, in three different ways, on compliance' with adequate recordkeeping." *Miller*, 784 F.3d at 1208 (citation omitted). Yet, none of the identified three "ways"—20 U.S.C. § 1094(a), 34 C.F.R. § 668.14(a)(1), (b)(4), or the PPA itself—states that compliance with the recordkeeping requirement is so important to the Department that "compliance is a prerequisite to payment." *Mikes*, 274 F.3d at 698. The evidence presented on summary judgment demonstrated "that *none* of the identified altered records impacted Title IV disbursements or refunds." *Miller*, 784 F.3d at 1206 (emphasis added).

The cases against Kaplan and Heritage College involved accusations that the schools violated provisions identified in the PPA. Not so for Computer Systems Institute, Inc. That school faces potential liability under a false certification theory of FCA liability for allegedly making misrepresentations in violation of a regulation not even "specifically named in the PPA." *United States ex rel. Munoz v. Computer Sys. Inst., Inc.*, No. 11-CV-7899, 2013 WL 5781810, at *6 (N.D. Ill. Oct. 25, 2013). According to the district court in that case, because the "PPA contains a general agreement to abide by *all* regulatory provisions promulgated under statutory authority," *every single regulation* adopted under the Higher Educa-

tion Act qualifies as a "condition of payment" sufficient to establish the element of falsity in an FCA case. *See id.* (emphasis added). Discovery is currently ongoing in that case.

In another case against Alta Colleges doing business as Westwood College, the relators brought an FCA claim based on alleged misstatements that the school made, not to the United States, but to *state regulators*. *See* Complaint ¶¶ 31-33, *United States ex rel. Brazell v. Alta Colls., Inc.*, No. 05-cv-0319-N (N.D. Tex. filed Apr. 7, 2009), ECF No. 45. Yet the relators and the United States (which later intervened as a plaintiff) pursued their claim based on the fiction that the alleged false statements *to the state regulators* meant the school's submissions *to the federal government* were also "false" because there is a federal regulation stating that a school must be "legally authorized to provide an educational program beyond secondary education in the State in which the institution is physically located in accordance with § 600.9." 34 C.F.R. § 600.5(a)(4). A school's statements to a state regulator, however, are in no meaningful sense a false claim to the federal government or a federal condition of payment. The matter was eventually settled.

As these examples demonstrate, the distinction between conditions of payment and participation is critical to ensuring that the false certification theory of liability (whether express or implied) does not allow a "mere breach of contract" or a minor regulatory infraction to "give rise to liability under the [FCA]." *See, e.g.*, *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 824 (7th Cir. 2011). Basic notions of fairness dictate that a defendant must have notice through explicit language in the statute,

regulation, or contractual provision, that a violation would result in non-payment and may be considered grounds for a claim of fraud on the United States. A failure to honor the distinction between conditions of participation and conditions of payment can turn the FCA into "a blunt instrument to enforce compliance with *all* . . . regulations." *Mikes*, 274 F.3d at 699 (emphasis added).

Courts that have declined to require an explicit condition of participation take misguided comfort in the assumption that "'strict enforcement of the Act's materiality and scienter requirements'" will prevent the statute from becoming a general enforcement mechanism for all contractual and regulatory breaches. *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 637 (4th Cir.), *petition for cert. filed*, No. 14-1440 (U.S. June 5, 2015) (citation omitted); *see also*, *e.g.*, *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1176 (9th Cir. 2006) (same); *Munoz*, 2013 WL 5781810, at *6 (same). While those requirements are indeed important, the argument overlooks the realities of defending against an FCA claim. Scienter need not be pled with particularity under Federal Rule of Civil Procedure 9(b), and the materiality of a regulation is often either assumed or deemed to be a factual question inappropriate for a decision on the pleadings. *See Munoz*, 2013 WL 5781810, at *4, *6. Thus, by effectively punting on the falsity element of the FCA, these courts are subjecting schools to the enormous cost of discovery. Moreover, the longer a baseless FCA suit remains pending, the more "needless[] harm" is inflicted on defendant's "goodwill and reputation" by a suit that, "at best, [is] missing some of its core underpinnings, and, at worst, [contains] baseless allegations used to extract settlements." *United States ex rel. Clausen v.*

Lab. Corp. of Am., Inc., 290 F.3d 1301, 1314 n.24 (11th Cir. 2002). These harms fall not only on the schools, but also on their students and graduates. To put an end to these untoward and unjustified results, this Court should make clear that a false certification theory is only viable if the alleged violation is of an express condition of payment.

CONCLUSION

The decision of the court of appeals should be reversed. This Court should reject the implied certification theory, or, in the alternative, limit it to violations of express conditions of payment.

Respectfully submitted.

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