No. 14-1440

IN THE

Supreme Court of the United States

TRIPLE CANOPY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA EX REL. OMAR BADR,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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Had Respondents filed this case in seven of the other 13 circuits, those courts would have upheld the district court's dismissal based on their precedent, in contrast to the Fourth Circuit's reversal here. On the other hand, had Respondents filed it in two of the other 13 circuits, those courts would have agreed with the Fourth Circuit based on their precedent. That is the landscape in which government contractors, grantees, and any others that submit claims for payment must attempt to operate and that opportunistic, financially incentivized relators and plaintiffs' attorneys will thrive. Indeed, the FCA's broad venue provisions make the plaintiff-friendly rules in the Fourth, D.C., and First Circuits available to most any relator.[1]

In the face of this landscape, Respondents fail to identify any actual vehicle problem with the petition and fail to advance any legitimate reason that this Court should deny certiorari. In fact, despite their attempts to slice and dice the circuit split to minimize it, the briefs in opposition illustrate the disagreement and confusion in the lower courts over the issues presented here. That disagreement and confusion require the intervention of this Court.

I. Review Is Warranted Based on the Circuit Split as to the Scope of the Implied Certification Theory.

The issue here warrants review because there is a deep and mature split between the D.C., First, and

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[1] *See* 31 U.S.C. § 3732(a) (allowing an FCA action to be brought "in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred.").

Fourth Circuits on the one hand and the Second, Third, Fifth, Sixth, Ninth, and Tenth Circuits on the other, as to whether a plaintiff must allege an express prerequisite for payment to state a claim for or establish a violation of the FCA.[2] The Respondents agree that the Fourth Circuit below, and the First and D.C. Circuits, in *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377 (1st Cir. 2011) and *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010), held that an express prerequisite for payment is not necessary for an FCA plaintiff to allege and prove a false claim under the theory of implied certification. *See* U.S. Br. at 16-17; Rel. Br. at 8-9. Contrary to those decisions, the Second, Third, Fifth, Sixth, Ninth, and Tenth Circuits require a plaintiff to allege and prove an express prerequisite for payment to proceed on an FCA claim. *See Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001); *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 313 (3d Cir. 2011); *United States ex rel. Steury v. Cardinal Health, Inc.* (*Steury II*), 735 F.3d 202, 207 (5th Cir. 2013); *Chesbrough v. Visiting Physicians Ass'n*, 655 F.3d 461, 468 (6th Cir. 2011); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 1000 (9th Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1168-69 (10th Cir. 2010).

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[2] This circuit split has been discussed extensively by academics. *See, e.g.*, Christopher L. Martin, Jr., *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 CAL. L. REV. 227, 232 (2013) (discussing split and arguing that "the Supreme Court should resolve the circuit split by recognizing the implied certification theory and adopting [*Mikes*'s rule of] express condition-of-payment"); Gregory Klass and Michael Holt, *Implied Certification under the False Claims Act*, 41 PUB. CONT. L.J. 1, 18-27 (2011) (discussing split).

The government concedes, as it must, that the Second Circuit is in conflict with the Fourth, First, and D.C. Circuits. U.S. Br. at 17-18. In *Mikes*, the Second Circuit held that implied certification requires proof that "the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid." 274 F.3d at 700 (emphasis in original). Both Respondents claim that *Mikes* rested on issues inherent to the health care field generally, along with particular issues of federalism.[3] *See* U.S. Br. at 18; Rel. Br. at 10-12. However, as the Relator concedes (at 11 n.1), the Second Circuit followed *Mikes* in *United States ex rel. Kirk v. Schindler*, 601 F.3d 94 (2d Cir. 2010), *rev'd on other grounds, Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401 (2011), holding that, in the context of the Vietnam Era Veterans Readjustment Assistance Act, "[a]n implied false certification takes place where a statute expressly conditions payment on compliance with a given statute or regulation . . ." 601 F.3d at 114. *Mikes* and *Kirk* confirm that the Second Circuit's view is that an FCA implied certification claim requires an express

[3] Generally, courts have applied FCA precedent without regard for the particular statutory context, making this claim that *Mikes* can be so limited unfounded. *See, e.g., United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1278-79 (D.C. Cir. 2010) (a case involving a government contract for science and engineering services provided to the Nuclear Regulatory Commission, citing *United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008), a Medicare FCA case, to support its general holding that with regard to FCA damages, "the government will sometimes be able to recover the full value of payments made to the defendant, but only where the government proves that it received no value from the product delivered.").

prerequisite for payment, in conflict with the Fourth, First, and D.C. Circuits.[4]

Moreover, since *Mikes*, five circuits have required an express prerequisite for payment in implied certification claims. *See United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 313 (3d Cir. 2011); *United States ex rel. Steury v. Cardinal Health, Inc.* (*Steury II*), 735 F.3d 202, 207 (5th Cir. 2013); *Chesbrough v. Visiting Physicians Ass'n*, 655 F.3d 461, 468 (6th Cir. 2011); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 1000 (9th Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1168-69 (10th Cir. 2010). For example, the Fifth Circuit, in *Steury II*, made clear that an express prerequisite for payment is a *sine qua non* of an implied certification claim. In that case, while not officially adopting the implied certification theory, the court rejected the relator's implied certification claim because she failed to allege that the relevant contractual provision "was a condition without which the government would not have paid [defendant]." 735 F.3d at 207. The Fifth Circuit explained that it had accepted the predominant view among circuit courts that "'only where the government *expressly conditioned payment on compliance with the underlying statute or regulation*'" will an

[4] Since *Kirk*, the Second Circuit has not addressed implied certification. However, recent decisions demonstrate that courts within the Second Circuit require the express prerequisite for payment outside the Medicare context. *See United States ex rel. Kirk v. Schindler Elevator Corp.*, No. 05-cv-2917 (SHS), 2015 WL 5296714, at *7 (S.D.N.Y. Sept. 10, 2015) (Vietnam Era Veterans Readjustment Assistance Act); *United States ex rel. Kraus v. Wells Fargo & Co.*, --- F. Supp. 3d ----, 2015 WL 4509036, at *5 (E.D.N.Y. 2015) (Sarbanes-Oxley Act).

implied certification claim potentially lie. *Id*. at 207 and 207 n.3 (emphasis added).

Similarly, in *Chesbrough*, the Sixth Circuit explained that, under the implied certification theory, "'liability can attach if the claimant violates its continuing duty to comply with the regulations on which payment is conditioned.'" 655 F.3d at 468 (citations omitted). Therefore, under the implied certification theory, "noncompliance constitutes actionable fraud only when compliance is a prerequisite to obtaining payment." *Id*. The court held that the Chesbroughs' implied certification claim failed because "they [did] not allege that [defendant] was *expressly required* to comply with those standards as a prerequisite to payment of claims." *Id*. (emphasis added).

The Government distorts the treatment of implied certification by these circuits and others by claiming that those courts "have distinguished not between express and implied conditions of payment, but rather between contractual requirements that are 'conditions of participation' in a government program . . . and those that are 'conditions of payment' . . ." U.S. Br. at 18-19; *see also id*. at 20-21. Not so. Of the cases cited, *Steury II*, *Chesbrough*, and *Lemmon* do not even mention conditions of participation. And the cases that mention conditions of participation do not support the government's contention that conditions of payment may be implicit. For example, in *Wilkins*, the Third Circuit made a distinction between conditions of participation and conditions of payment, but merely to make the point that a condition of participation in a government program, by itself, cannot serve as a prerequisite for payment absent express language to that effect. *Wilkins*, 659 F.3d at 309-10.

This split of authority, as explained by Triple Canopy in its petition (at 25-26), warrants this Court's intervention because it will continue to produce confusion in the federal court system and will subject entities doing business with the Government to different pleading standards depending on where an FCA claim is brought. It will inflict potentially fatal reputational harm on businesses and grantees for mere alleged contractual violations, greatly increase the Government's leverage in settlement, and force contractors and grantees to structure compliance programs to prevent contractual breaches from being turned into FCA violations. Pet. at 25-26. Instead of addressing these consequences, Respondents offer that the FCA's "materiality and scienter" requirements will insulate entities from crippling FCA liability.[5] U.S. Br. at 21-22; Rel. Br. at 13-14. As the Fifth Circuit has explained, however, the prerequisite and materiality requirements are *separate* standards: "[t]he prerequisite requirement has to do with more than just the materiality of a false certification; it ultimately has to do with whether it is fair to find a false certification or false claim for payment in

[5] The Relator characterizes the liability at issue here as based on "an attempt . . . to sell worthless services to the U.S. Army . . ." Rel. Br. at 13-14. The theory of "worthless services" was not discussed by the Court of Appeals, and it is not relevant here, as it is based upon a finding of factual falsity, not legal falsity. *See Mikes*, 274 F.3d at 703 (describing worthless services as being "effectively derivative of an allegation that a claim is factually false because it seeks reimbursement for a service not provided."). For the same reasons, the Government's comparison of the guards' failure to satisfy one of numerous contractual provisions to a Civil War contractor's providing to the Government "bullets filled with saw-dust" also fails. *See* U.S. Br. at 12.

the first place." *United States ex rel. Steury v. Cardinal Health, Inc.* (*Steury I*), 625 F.3d 262, 269 (5th Cir. 2010). Moreover, an invocation of non-materiality by a court after the fact provides no certainty at all to a contractor or grantee as to which provisions are "material" and are therefore subject to FCA liability, either at the time of execution of a contract, at the time of performance of a contract, or for that matter when contract non-performance issues are initially raised by a whistleblower or regulator.[6] *See also* NDIA Amicus Br. at 9-15.

And certainty within the federal court system is required because the issue will only recur without clarification. The stakes could hardly be greater. As the NDIA's amicus brief explained, relators and the Government itself bring new suits almost daily arising from a variety of legal obligations involving a host of government contracts, affecting such diverse areas as athletic sponsorships, public school lunches, urban housing for low-income residents, Junior ROTC programs, software development, and mortgage lending. NDIA Amicus Br. at 19-21. These contracts have billions of dollars' worth of impact on the national economy. Moreover, now is the right time to address this important issue. The vast majority of circuits have already weighed in, and there can be no question that the circuits are

[6] The Government does not deny that the implied certification theory deprives defendants of fair notice about what actions may lead to FCA liability. U.S. Br. at 22 (citing NDIA Amicus Br. at 13). Rather, the Government insists that such concerns are misplaced here given the allegations that Petitioner supposedly took steps to falsify records, thus suggesting notice. That rationale would permit any relator to bootstrap a weak claim out of a 12(b)(6) motion by alleging that the documents supporting the allegedly false claim were also falsified, and that the alleged effort to falsify supported both materiality and notice of the prohibition.

divided. This division and confusion will not end absent this Court's intervention. The split is presented squarely here and, notably, the Government does not even contend that there is a vehicle problem with this petition.

II. Whether Implied Certification Is Properly Within the Scope of FCA Liability Is a Proper Issue for This Court's Review.

Review by this Court likewise is warranted because there is a split among the circuits as to the validity of the implied certification theory generally. Since the filing of Triple Canopy's petition, the Seventh Circuit rejected the implied certification theory. *See United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 711-12 (7th Cir. 2015) (noting that the implied certification theory had been previously been "'unsettled' in this circuit" and holding that "[a]lthough a number of other circuits have adopted this so-called doctrine of implied false certification . . . we decline to join them"). Both Respondents argue that the Seventh Circuit's decision does not mean what it plainly says.[7] U.S. Br. at 14; *see also* Rel. Br. at 14-15. Had the court intended to limit its holding rejecting the implied certification theory, it would have done so. Instead, the Seventh Circuit outright rejected that theory of liability, pitting it against the eight circuits that have adopted some version of the theory.

[7] Nevertheless, the Government concedes that the decision in *Sanford-Brown* "suggest[s] that the *Sanford-Brown* court viewed its decision as resolving the issue within the Seventh Circuit." U.S. Br. at 14.

And there is good reason to reject the theory: it goes beyond anything intended by Congress when it passed the FCA. *See Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 669 (2008) (warning against attempts to "expand the FCA well beyond its intended role of combating 'fraud against *the Government*'"—thus rendering the reach of the FCA as "almost boundless.") (emphasis in original) (citations omitted). This case squarely presents the question of whether a "false or fraudulent claim" under the FCA can rest where there is no objective falsehood made by the defendant in that claim for payment or accompanying certification of compliance. This Court can and should address this important question of federal law, which is now the subject of a split among the circuits.

III. Review Is Necessary to Address the Circuit Split as to Pleading Standards for Claims Under Section 3729(a)(1)(B) of the FCA.

Finally, review is warranted to address the confusion regarding the applicable pleading standards for FCA claims under 31 U.S.C. § 3729(a)(1)(B). By dismissing reliance as a required element for false statements or false records claims under section 3729(a)(1)(B) of the FCA, the Court of Appeals' decision contravenes this Court's jurisprudence that all fraud-based claims must be pleaded with particularity pursuant to Rule 9(b). *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007). Rule 9(b) requires a showing of reliance on fraudulent statements or conduct. *See, e.g., Swanson v. Citibank, N.A.*, 614 F.3d 400, 406 (7th Cir. 2010); *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 22 (D.C. Cir. 2008).

Additionally, the Court of Appeals' ruling creates a circuit split, as at least three circuits—the Fifth, Eighth, and Eleventh—have held that actual causation or reliance are necessary to plead any claim under the FCA generally. *See United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 365 (5th Cir. 2014); *United States ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 591 F. App'x 693, 703-04 (11th Cir. 2014); *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 799 (8th Cir. 2011).

Both Respondents avoid this Court's previous pronouncements regarding the pleading requirements of Rule 9(b) and attempt to minimize the circuit split. The Government argues that the decisions of the Fifth, Eighth, and Eleventh Circuits can be distinguished on their facts (U.S. Br. at 24-25), but ignores that each of these courts required that claims under section 3729(a)(1)(B), and/or FCA claims generally, require a showing of causation or reliance. *See* Pet. at 32-33. The Relator does not discuss this authority at all. The Government suggests that the FCA must be an exception to the fraud pleading requirements, akin to federal mail, wire, and bank fraud statutes. U.S. Br. at 23. However, the Government provides no authority in support of that proposition, nor any authority—other than the Court of Appeals' decision—to suggest that Rule 9(b) does not apply in full to the FCA. In short, given the conflict between the Court of Appeals and at least three circuits, this Court's review is also necessary to resolve confusion as to the pleading requirements for false records claims under the FCA.

CONCLUSION

For the foregoing reasons, as well as those discussed in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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