No. 14-1440

In the Supreme Court of the United States

TRIPLE CANOPY, INC., PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. OMAR BADR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The United States hired petitioner to provide security services for a military base in Iraq under a contract that required all guards to pass a basic marksmanship test. Petitioner knowingly billed the government for guards who had failed the test, and petitioner falsified training records to conceal those failures. The questions presented are as follows:

1. Whether petitioner knowingly presented a "false or fraudulent claim for payment," 31 U.S.C. 3729(a)(1)(A), by seeking payment even though it knew that the guards had not satisfied basic marksmanship requirements, as specified in petitioner's contract with the government.

2. Whether petitioner can be held liable under 31 U.S.C. 3729(a)(1)(B) for "mak[ing]" or "us[ing]" false records and statements even though the government did not prove that federal officials actually relied on those records and statements in making specific payment decisions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and rule:

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 775 F.3d 628. The opinion of the district court (Pet. App. 21a-51a) is reported at 950 F. Supp. 2d 888.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2015. A petition for rehearing was denied on March 9, 2015 (Pet. App. 52a-53a). The petition for a writ of certiorari was filed on June 5, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 2009, the United States awarded petitioner a one-year contract to provide security for the Al Asad Airbase, the second largest airbase in

Iraq. Petitioner agreed to maintain entry control points, provide escorts and roving patrols, and furnish personnel adequate to repel attacks by enemy forces. Pet. App. 3a. The contract was governed by Task Order 11, which contained a "SPECIFIC TASK DESCRIPTION" that identified 20 "responsibilities" that petitioner assumed under the contract, including the provision of security personnel who met minimum proficiency standards for firearm use. *Id.* at 3a, 55a-58a. In particular, petitioner was required to "ensure that all employees have received initial training on the weapon[s] that they carry, that they have qualified on a US army qualification course, and that they have received, at a minimum, annual training/ requalification on an annual basis, and that the employee's target is kept on file for a minimum of 1 yr." *Id.* at 58a.

Petitioner hired approximately 332 Ugandan guards to serve at Al Asad. Many of those guards lacked even the basic ability to "zero" their rifles—that is, to adjust their rifle sights so that bullets would hit the aiming point in a given range. Pet. App. 4a. "Thus, shortly after their arrival, [petitioner's] supervisors were aware that the Ugandans could not satisfy the final responsibility of [petitioner's contract]: the marksmanship requirement." *Ibid.*

Petitioner instituted a training program to bring its guards up to minimum standards. Even after completing remedial training, however, none of the Ugandan guards was able to satisfy the marksmanship requirement.[1] The new Ugandan guards who arrived

[1] To pass the U.S. Army qualification course, a candidate must hit the target at least 23 times out of 40 attempts from 25 meters. Pet. App. 4a.

during 2009 and 2010 likewise were unable to satisfy the requirement. Pet. App. 4a.

Petitioner sought to conceal those problems by creating false marksmanship records for the Ugandan guards. After the first training program failed, a "supervisor directed that false scorecard sheets be created for the guards and placed in their personnel files." Pet. App. 4a. After new Ugandan guards arrived and similarly failed to pass the marksmanship test, a supervisor directed Omar Badr, who at the time was a medic for petitioner, "to prepare false scorecards for the guards, reflecting scores of 30-31 for male guards and 24-26 for the female guards." *Id.* at 4a-5a. Petitioner's "site manager signed these new scorecards and post-dated them, showing that the guards qualified in June 2010." *Id.* at 5a. Those scorecards were made available for inspection by the government officer responsible for verifying and accepting petitioner's services. *Ibid.* During the year that the contract was in effect, petitioner presented 12 monthly invoices totaling approximately $4.4 million for the services ostensibly provided by the Ugandan guards—a rate of $1100 per month for each guard. *Ibid.*

2. a. Badr, who was by then a former employee, filed a *qui tam* suit against petitioner under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.* The FCA imposes liability for civil penalties and treble damages on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1)(A), or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," 31 U.S.C. 3729(a)(1)(B). See 31 U.S.C.

3729(b)(4) (defining "material" to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property"). The "claims" subject to the FCA include "any request or demand * * * for money or property" that is "presented to an officer, employee, or agent of the United States." 31 U.S.C. 3729(b)(2). Badr alleged that petitioner had knowingly billed the government for security personnel at Al Asad who did not satisfy basic contractual requirements, and that petitioner had concealed those deficiencies by falsifying the marksmanship scorecards for its guards. Pet. App. 5a. Badr made similar allegations against petitioner with respect to four additional military bases. *Ibid.*

The United States intervened in part, limiting its allegations to misconduct regarding the provision of personnel at Al Asad. Pet. App. 5a. The government's complaint-in-intervention asserted claims under 31 U.S.C. 3729(a)(1)(A) and (B), alleging that petitioner had knowingly "billed the Government the full price for each and every one of its unqualified guards" and had "falsified documents in its files to show that the unqualified guards each qualified as a 'Marksman' on a U.S. Army Qualification course." Pet. App. 6a (citation omitted); see *id.* at 5a-6a. The government also brought several common-law claims. *Id.* at 6a.

The district court dismissed the FCA claims filed both by the government and by Badr. Pet. App. 21a-51a. The court rejected the government's claim under Section 3729(a)(1)(A) on the ground that the complaint had "failed to sufficiently plead that [petitioner] submitted a demand for payment containing an objective-

ly false statement." *Id.* at 22a. The court appeared to base that holding on the fact that petitioner's claims for payment did not explicitly assert that petitioner and its employees satisfied applicable contractual requirements. See *id.* at 21a (describing the question presented as "whether submission of an invoice listing the title of an employee whose services were billed, without reference to whether the employee met contractual conditions, constitutes a false claim under the [FCA]").

The district court rejected the government's "false records" claim under Section 3729(a)(1)(B) because the complaint did not "alleg[e] that the Government reviewed the weapons scorecards for the purposes of issuing payment." Pet. App. 23a. The court held that the Section 3729(a)(1)(B) claim had thus failed adequately to allege "reliance upon the allegedly falsified records." *Ibid.* The court dismissed the government's common-law fraud claims on similar grounds, *id.* at 48a-51a, and dismissed Badr's claims for failure to plead with sufficient particularity that fraud had occurred at locations other than Al Asad, *id.* at 42a-43a.[2]

b. The court of appeals reversed the dismissal of the government's FCA claims. Pet. App. 1a-19a.[3] The court first held that the government adequately

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[2] The district court dismissed the government's remaining common-law claims in a subsequent order. Although the court dismissed those claims without prejudice, the court of appeals concluded that the district court's judgment was final and appealable because the government and Badr had elected to stand on their complaints rather than to amend them. Pet. App. 6a n.2.

[3] The court of appeals also affirmed the dismissal of Badr's claims with respect to locations other than Al Asad. Pet. App. 19a-20a.

pleaded that petitioner had "knowingly present[ed], or cause[d] to be presented, a false or fraudulent claim for payment." 31 U.S.C. 3729(a)(1)(A). The court explained that "a claim for payment is false when it rests on a false representation of compliance with an applicable . . . contractual term," and that "[s]uch 'false certifications' [may be] 'either express or implied.'" Pet. App. 10a (quoting *United States* v. *Science Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010) (*SAIC*)) (brackets omitted). The court described petitioner's claims for payment in this case as a form of "implied certification," while noting "that this label simply recognizes one of the variety of ways in which a claim can be false." *Ibid.* (citation and internal quotation marks omitted). Under an implied-certification theory, "the Government pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and 'withheld information about its non-compliance with material contractual requirements.'" *Id.* at 12a (quoting *SAIC*, 626 F.3d at 1269). The court cautioned that the theory should not be used "to turn the violation of minor contractual provisions into an FCA action," and it explained that the best protection against that risk is "strict enforcement of the Act's materiality and scienter requirements." *Id.* at 13a (quoting *SAIC*, 626 F.3d at 1270).

In a footnote, the court of appeals rejected petitioner's argument "that implied representations can give rise to liability only when the condition is expressly designated [by the government] as a condition for payment." Pet. App. 13a n.5. The court observed that "nothing in the statute's language specifically requires such a rule." *Ibid.* (citation omitted). The

court noted, however, that this case does not "involv[e] subjective interpretations of vague contractual language," but rather "an objective falsehood—the marksmanship requirement is a specific, objective, requirement that [petitioner's] guards did not meet." *Id.* at 12a n.4 (citation omitted).

Reviewing the complaint's allegations, the court of appeals "readily conclude[d] that the Government ha[d] sufficiently alleged a false claim." Pet. App. 14a. The court observed that the complaint "properly alleges that [petitioner's] supervisors had actual knowledge of the Ugandan guards' failure to satisfy the marksmanship requirement and ordered the scorecards' falsification." *Ibid.* The court also found that the government had sufficiently pleaded materiality, since "common sense strongly suggests that the Government's decision to pay a contractor for providing base security in an active combat zone would be influenced by knowledge that the guards could not, for lack of a better term, shoot straight." *Id.* at 15a. The court further observed that, "[i]f [petitioner] believed that the marksmanship requirement was immaterial to the Government's decision to pay, it was unlikely to orchestrate a scheme to falsify records on multiple occasions." *Ibid.* The court accordingly reversed the dismissal of the government's claim under Section 3729(a)(1)(A). *Id.* at 16a.

The court of appeals also reversed the dismissal of the government's "false records" claim under 31 U.S.C. 3729(a)(1)(B). That provision "creates liability when a contractor 'knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.'" Pet. App. 16a (citation omitted). The court explained that the "ma-

teriality" requirement ensures that "the FCA reaches government contractors who employ false records that are capable of influencing a decision, not simply those who create records that actually do influence the decision." *Id.* at 17a; see *ibid.* ("Materiality focuses on the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered.") (citation, internal quotation marks, and emphasis omitted).

The court of appeals held that the government was not required to establish the "actual effect" of a contractor's false statement on a specific decision by the government to pay a claim. Pet. App. 17a. The court explained that such a requirement would relieve a contractor of FCA liability whenever "the governmental entity decides that it should continue to fund the contract, notwithstanding the fact that it knew the contractor had made a false statement in connection with a claim." *Id.* at 17a-18a. The court characterized that approach as "doubly deficient," because "it would inappropriately require actual reliance on the false record and import a presentment requirement from § 3729(a)(1)(A) that is not present in § 3729(a)(1)(B)." *Id.* at 18a. The court concluded that "[a] false record may, in the appropriate circumstances, have the potential to influence the Government's payment decision even if the Government ultimately does not review the record." *Ibid.*

Applying that standard, the court of appeals held that the government had adequately pleaded materiality under Section 3729(a)(1)(B). Pet. App. 18a. The court explained that "[t]he false scorecards make the invoices appear legitimate because, in the event the [government] reviewed the guards' personnel files," it

"would conclude that [petitioner] had complied with the marksmanship requirement." *Ibid.* The court concluded that, because the false scorecards "offered the most direct evidence that [petitioner's] guards satisfied the marksmanship requirement," they were "integral to the false statement and satisfy the materiality standard." *Id.* at 18a-19a.

ARGUMENT

The Fourth Circuit correctly held that the United States had stated valid FCA claims under Sections 3729(a)(1)(A) and (B). Courts that have addressed the implied-certification theory of FCA liability have accepted the basic principle that a claim for payment may be "false or fraudulent" under Section 3729(a)(1)(A) even if the request for payment itself does not contain an explicit falsehood. Although some variation exists among the courts of appeals regarding the doctrine's contours, petitioner greatly overstates the extent of any disagreement, and no court of appeals has found Section 3729(a)(1)(A) to be inapplicable under circumstances similar to those presented here. Petitioner's argument that Section 3729(a)(1)(B) requires the government to establish actual reliance is likewise incorrect and has not been accepted by any court of appeals. Further review is not warranted.

1. Congress enacted the FCA "in 1863 with the principal goal of stopping the massive frauds perpetrated by large private contractors during the Civil War." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) (citation, internal quotation marks, and brackets omitted). The statute was designed to target those "practicing a fraud upon the Government," for instance by delivering ammunition "filled not with the proper explosive

materials for use, but with saw-dust." Cong. Globe, 37th Cong., 3d Sess. 952, 955 (1863). Congress has amended the FCA several times, often broadening its scope "to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services." S. Rep. No. 345, 99th Cong., 2d Sess. 9 (1986); see *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232 (1968) ("[T]he Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.").

The current statute applies to "any person who * * * knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1)(A). By using the expansive phrase "false or fraudulent," Congress sought to include any "improper claim [that] is aimed at extracting money [from] the government." *Mikes* v. *Straus*, 274 F.3d 687, 696 (2d Cir. 2001). In holding that FCA liability can be premised on an "implied certification" or "implied false certification" of compliance with contractual or other prerequisites to payment, courts have simply recognized that, at least in the absence of an express disclaimer, a person who submits a claim for payment thereby implicitly represents that he satisfies all applicable legal requirements. If that implicit representation is inaccurate, the claim for payment itself is "false or fraudulent," even though it does not contain an explicit false statement.[4]

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[4] In less-formal settings as well, a request for payment can imply the existence of particular facts, even though the requester does not state explicitly that those facts are true. For instance, if a parent promises to pay a child $10 for every hour spent mowing the lawn, and the child returns at the end of the day requesting $20, the child has impliedly represented that the job required two

The implied-certification theory accords with the common understanding of the phrase "false or fraudulent." See *Mikes*, 274 F.3d at 696 ("'False' can mean 'not true,' 'deceitful,' or 'tending to mislead.'") (quoting *Webster's Third New International Dictionary* 819 (1981) (*Webster's*)). It gives effect to Congress's recognition that "a false claim may take many forms, the most common being a claim for goods or services not provided, *or provided in violation of contract terms, specification, statute, or regulation*." S. Rep. No. 345, 99th Cong., 2d Sess. 9 (1986) (emphasis added). The theory also accords with the background common-law principles that define the tort of fraudulent misrepresentation. Under those principles, "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation." 3 Restatement (Second) of Torts § 529, at 62 (1977); see *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996) ("[A]ctionable fraud requires a material misrepresentation or omission.") (emphasis omitted); *Mikes*, 274 F.3d at 696 ("A common definition of 'fraud' is 'an intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another in reliance upon it to part with some valuable thing.'") (quoting *Webster's* 904).

Here, petitioner submitted monthly requests for payment that identified the number of "guards" employed by the company but did not alert the government that those individuals had failed to satisfy basic marksmanship requirements that were contractual

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hours' labor—a representation that would be false if the job in fact required only one hour.

conditions of payment. See Pet. App. 5a. That sort of material and misleading omission has traditionally been actionable at common law, and neither the text nor the history of the FCA suggests that Congress intended to insulate such conduct from liability under Section 3729(a)(1)(A). Judicial references to the implied-certification theory of FCA liability are simply shorthand for the established principle that a communication can be materially misleading, and can give rise to liability for fraudulent misrepresentation if the requisite scienter is established, even though it contains no explicit false statement. See *id.* at 12a (explaining that, under an implied-certification theory, "the Government pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and 'withheld information about its noncompliance with material contractual requirements'") (quoting *SAIC*, 626 F.3d at 1269).

The court of appeals in this case accepted the implied-certification theory, recognizing "that claims can be false when a party impliedly certifies compliance with a material contractual condition." Pet. App. 11a. Just as Civil War contractors defrauded the government by charging it for bullets filled with sawdust, petitioner defrauded the government by seeking payment for security guards "know[ing] that the guards could not, for lack of a better term, shoot straight." *Id.* at 15a. The decision below is consistent with decisions of several other circuits that have approved liability for implied false certifications. See *Mikes*, 274 F.3d at 697 (2d Cir.); *United States ex rel. Wilkins* v. *United Health Grp., Inc.*, 659 F.3d 295, 306 (3d Cir. 2011); *United States ex rel. Augustine* v.

Century Health Servs., Inc., 289 F.3d 409, 414-415 (6th Cir. 2002); *Ebeid ex rel. United States* v. *Lungwitz*, 616 F.3d 993, 996-998 (9th Cir.), cert. denied, 562 U.S. 1102 (2010); *United States ex rel. Conner* v. *Salina Reg'l Health Ctr.*, 543 F.3d 1211, 1217 (10th Cir. 2008); *United States* v. *Science Applications Int'l Corp.*, 626 F.3d 1257, 1268-1270 (D.C. Cir.); see also *United States ex rel. Hutcheson* v. *Blackstone Med., Inc.*, 647 F.3d 377, 385-388, 392-394 (1st Cir.) (declining to use the term "implied certification," but recognizing that a claim may be false or fraudulent even if the claim form contains no explicit false statement), cert. denied, 132 S. Ct. 815 (2011); *United States ex rel. Osheroff* v. *Humana, Inc.*, 776 F.3d 805, 808 n.1 (11th Cir. 2015) (reserving judgment on the implied-certification theory); *United States ex rel. Absher* v. *Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 711 & n.13 (7th Cir. 2014) (*Momence*) (same); *United States ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010) (same).[5]

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[5] Although this Court has not directly addressed the validity of the implied-certification theory, it has upheld the imposition of FCA liability in cases where the claim for payment contained no explicit false statement. See *United States* v. *Bornstein*, 423 U.S. 303 (1976) (subcontractor liable under FCA for causing prime contractor to submit claims to the government for radio kits containing electron tubes that did not conform to governmental specifications); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943) (defendants liable under FCA for claims submitted under contracts obtained through collusive bidding). The Court has also denied petitions for a writ of certiorari in at least two cases where the courts of appeals had upheld liability despite the absence of any explicit false statements on the requests for payment. See *Blackstone Med., Inc.* v. *United States ex rel. Hutcheson*, 132 S. Ct. 815 (2011) (No. 11-269); *United States ex rel. Ebeid* v. *Lungwitz*, 562 U.S. 1102 (2010) (No. 10-461).

After the petition for certiorari in this case was filed, the Seventh Circuit issued its decision in *United States* v. *Sanford-Brown, Ltd.*, 788 F.3d 696 (2015). The court in *Sanford-Brown* stated that, "[a]lthough a number of other circuits have adopted th[e] so-called doctrine of implied false certification, we decline to join them and instead join the Fifth Circuit. *See U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010)." *Id.* at 711-712 (citation and footnote omitted). The court also stated that "before today [the implied-certification] doctrine was 'unsettled' in this circuit," *id.* at 711 n.7 (citing *Momence*, 764 F.3d at 711 & n.13), suggesting that the *Sanford-Brown* court viewed its decision as resolving the issue within the Seventh Circuit.

If the decision in *Sanford-Brown* is read as categorically rejecting the implied-certification theory, and as holding that a claim for payment can be "false or fraudulent" within the meaning of Section 3729(a)(1)(A) only if it contains an explicit false statement, then that decision conflicts with the ruling below and with decisions of several other circuits. See pp. 12-13, *supra*. There is good reason to doubt, however, that the *Sanford-Brown* court intended its decision to sweep so broadly. Except for the two sentences quoted above, the court's analysis of Section 3729(a)(1)(A) focused entirely on the specific statutory context in which the allegedly false claims were submitted, *i.e.*, the implementation of Program Participation Agreements under Title IV of the Higher Education Act. See 788 F.3d at 701, 709-712. In addition, the court described itself as "join[ing] the Fifth Circuit," *id.* at 712, and the Fifth Circuit decision that it cited reserved judgment on the implied-certification

theory rather than rejecting it, see *Steury*, 625 F.3d at 268. In light of the ambiguous nature of the *Sanford-Brown* opinion taken as a whole, and the factual dissimilarity between that case and this one, there is no sound reason to conclude that the Seventh Circuit would have found Section 3729(a)(1)(A) to be inapplicable on the facts presented here. Review in this case is accordingly not warranted.

2. Petitioner also seeks this Court's intervention to resolve disagreement regarding "the scope of the implied certification theory." Pet. 14. But petitioner overstates the extent of any disagreement among the circuits, and no court of appeals has held Section 3729(a)(1)(A) to be inapplicable under circumstances similar to those presented here.

The circuits correctly recognize that a legal rule must be material to the government's payment decision in order for its violation to serve as a predicate for liability under the implied-certification theory. See 31 U.S.C. 3729(b)(4) ("[T]he term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."). The implied-certification theory reflects the understanding that, if a person requests federal funds without expressly acknowledging that he fails to satisfy some prerequisite to payment, the request itself can properly be understood as an implicit representation that all such conditions are satisfied. A requester's awareness that he is violating some legal requirement unrelated to the government's payment decision would not render that implicit representation false.

Petitioner argues that six circuits restrict the implied-certification theory to circumstances "where

payment under the contract was *expressly* conditioned on compliance with a contractual provision, statute or regulation." Pet. 14 (emphasis added); see Pet. 16. Petitioner contends that the court below joined two other circuits in holding, by contrast, "that an FCA plaintiff need not allege that payment was expressly conditioned on compliance with a contractual provision, statute, or regulation," as long as the violated condition was "material." Pet. 14. Petitioner misstates the extent of the division, which is closer to three-to-one *against* an express-condition-of-payment requirement.

In rejecting petitioner's argument "that implied representations can give rise to liability only when the condition is expressly designated as a condition for payment," the court below noted that "nothing in the statute's language specifically requires such a rule." Pet. App. 13a n.5 (citation omitted). The D.C. Circuit has also rejected that proposed rule, explaining that it would create a "counterintuitive gap" in FCA liability:

> Consider a company that contracts with the government to supply gasoline with an octane rating of ninety-one or higher. The contract provides that the government will pay the contractor on a monthly basis but nowhere states that supplying gasoline of the specified octane is a precondition of payment. Notwithstanding the contract's ninety-one octane requirement, the company knowingly supplies gasoline that has an octane rating of only eighty-seven and fails to disclose this discrepancy to the government. The company then submits preprinted monthly invoice forms supplied by the government—forms that ask the contractor to specify the amount of gasoline supplied during the

> month but nowhere require it to certify that the gasoline is at least ninety-one octane. So long as the government can show that supplying gasoline at the specified octane level was a material requirement of the contract, no one would doubt that the monthly invoice qualifies as a false claim under the FCA despite the fact that neither the contract nor the invoice expressly stated that monthly payments were conditioned on complying with the required octane level.

SAIC, 626 F.3d at 1269. The First Circuit agrees. See *Hutcheson*, 647 F.3d at 388 ("[T]he rule advanced by [defendant] that only express statements in statutes and regulations can establish preconditions of payment is not set forth in the text of the FCA.").

The Second Circuit is the only court of appeals to endorse a rule that payment must expressly be conditioned on compliance with a requirement before a person may be held liable under the FCA for requesting payment despite a knowing violation of that requirement. In *Mikes*, *supra*, physicians had allegedly performed substandard spirometry tests in violation of a Medicare statute requiring services to meet "professionally recognized standards of health care." 274 F.3d at 699 (quoting 42 U.S.C. 1320c-5(a)(2)). The plaintiff argued that, by requesting reimbursement for their substandard services, the physicians had falsely implied compliance with that federal requirement. See *ibid.* The court agreed with the plaintiff that "a medical provider should be found to have implicitly certified compliance with a particular rule as a condition of reimbursement in limited circumstances." *Id.* at 700. The court further held, however, that such an implicit certification may be found "only when the

underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid." *Ibid.* Because the Medicare standard-of-care statute "does not expressly condition *payment* on compliance with its terms," the court ruled that the plaintiff had not adequately pleaded that the physicians' reimbursement requests were false. *Id.* at 702.

As other courts of appeals have explained, the rule articulated in *Mikes* was animated by concerns unique to its context. The plaintiff in *Mikes* had "alleged that Medicare claims submitted by the defendant health care providers were false or fraudulent because the underlying medical treatment had failed to meet a standard of care" imposed by statute. *Hutcheson*, 647 F.3d at 388. To permit FCA liability under those circumstances would have "allow[ed] the government and relators to supplant private plaintiffs in medical malpractice suits." *Ibid.*; see *Mikes*, 274 F.3d at 700 (plaintiff's theory "would promote federalization of medical malpractice"). In this case, by contrast, the relevant condition of payment was not related to physicians' standard of care or to any other matter that is customarily governed by state law. The case therefore "implicates none of the federalism concerns involved in *Mikes*." *SAIC*, 626 F.3d at 1270.

Petitioner asserts that five other courts of appeals "have strictly cabined application of implied certification FCA liability to circumstances where payment under the contract is *expressly* conditioned upon compliance with the allegedly violated contract provision, statute, or regulation." Pet. 16. In fact, the decisions on which petitioner relies have distinguished not between express and implied conditions of payment, but

between contractual requirements that are "conditions of participation" in a government program (on the one hand) and those that are "conditions of payment" (on the other).[6] In *Wilkins*, *supra*, for example, the plaintiff alleged that the defendant health care providers had violated the FCA by seeking reimbursement under Medicare despite having "knowingly violated several Medicare marketing regulations" and despite "providing kickbacks in violation of the Medicare Anti-Kickback Statute." 659 F.3d at 298. The court ruled that FCA liability could not be based on the defendants' violation of the marketing regulations, because "compliance with the marketing regulations [wa]s a condition of participation and not a condition of payment." *Id.* at 309. The court approved potential liability for violation of the anti-kickback statute, however, because "[c]ompliance with the [statute] is clearly a condition of payment under Parts C and D of Medicare." *Id.* at 313.

In the Medicare context, "[c]onditions of participation are enforced through administrative mechanisms, and the ultimate sanction for violation of such conditions is removal from the government program, while conditions of payment are those which, if the government knew they were not being followed, might cause

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[6] "Conditions of payment" and "conditions of participation" are not mutually exclusive. See *United States* v. *Universal Health Servs., Inc.*, 780 F.3d 504, 513-514 (1st Cir. 2015), petition for cert. pending, No. 15-7 (filed June 30, 2015); *United States ex rel. Hendow* v. *University of Phx.*, 461 F.3d 1166, 1176-1177 (9th Cir. 2006), cert. denied, 550 U.S. 903 (2007). In many circumstances, a claimant's violation of a particular requirement may provide legitimate grounds both for denying a specific payment request and for terminating the claimant's participation in the relevant federal program.

it to actually refuse payment." *Wilkins*, 659 F.3d at 309 (citation, internal quotation marks, ellipsis, and brackets omitted). Here, by contrast, petitioner does not contend that the government would have paid petitioner's monthly bills (much less that the contract would have required the government to do so) if it had known that none of the guards whose services were involved had passed the required marksmanship test. Rather, the question is whether a contractual requirement may be material to the government's payment decision for FCA purposes even if it is not expressly designated as a condition of payment. See Pet. App. 13a n.5. The court in *Wilkins* did not address that question.[7]

The *Wilkins* court did note the plaintiff's "alleg[ation] that compliance with the [anti-kickback statute] was an express condition of payment to which [the defendants] agreed when they entered into an agreement with CMS." 659 F.3d at 313. But the court did not say that a contractual requirement may be a condition of payment *only* if it is expressly designated as such.[8] Other decisions cited by petitioner (Pet. 3)

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[7] In dicta, the Third Circuit had earlier deemed "compelling" the argument "that a finding of FCA liability, based on implied false certification theory, should not be limited to situations where the underlying regulation or statute expressly states that compliance is a condition of payment." *United States ex rel. Quinn* v. *Omnicare, Inc.*, 382 F.3d 432, 442-443 (2004). *Wilkins* did not address—much less repudiate—that sentiment.

[8] The Fourth Circuit in this case observed that, "[i]n practice, the Government might have a difficult time proving its case without an express contractual provision" stating that the violated requirement was a condition of payment. Pet. App. 13a n.5. But it declined petitioner's invitation to hold categorically that the implied-certification theory may be invoked "*only* when the condition

similarly rest on the condition of participation/condition of payment distinction, without distinguishing between express and implied conditions of payment. See *United States ex rel. Steury* v. *Cardinal Health, Inc.*, 735 F.3d 202, 205-207 (5th Cir. 2013) (per curiam); *Chesbrough* v. *VPA, P.C.*, 655 F.3d 461, 467-468 (6th Cir. 2011); *Ebeid*, 616 F.3d at 997-998. And the Tenth Circuit's decision in *United States ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163 (2010), turned on whether the regulations that the defendant was alleged to have violated were material to the government's decision to pay, not on whether compliance with the regulations had explicitly been identified as a condition of payment. *Id.* at 1169-1170.

Finally, petitioner and its amici greatly exaggerate the practical consequences that can be expected to flow from the Fourth Circuit's decision in this case. Amici argue that, unless contractors "ensure perfect compliance with every requirement involved in participating in a federal program," they will face "treble damages and penalties whenever a private plaintiff alleges non-performance of any one of hundreds of contractual or regulatory requirements." Nat'l Def. Indus. Ass'n Amicus Br. (NDIA Br.) 9-10. The court below recognized, however, that "the purposes of the FCA [a]re not served by imposing liability on honest disagreements, routine adjustments and corrections, and sincere and comparatively minor oversights." Pet. App. 10a (citation and internal quotation marks omitted). It explained that "[t]he best manner for continuing to ensure that plaintiffs cannot shoehorn a breach of contract claim into an FCA claim is 'strict

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is expressly designated as a condition for payment." *Ibid.* (emphasis added).

enforcement of the Act's materiality and scienter requirements.'" *Id.* at 13a (quoting *SAIC*, 626 F.3d at 1270).

Amici argue that those requirements offer "cold comfort" because some circuits do not apply them with sufficient rigor. NDIA Br. 17; see *ibid.* (arguing that some circuits "have diluted Rule 9(b) pleading requirements"). But speculation that some courts may incorrectly apply *other* aspects of the FCA provides no basis for "adopting a circumscribed view of what it means for a claim to be false or fraudulent." *SAIC*, 626 F.3d at 1270. Amici's contention that "the implied certification theory deprives defendants of fair notice about what actions may lead to FCA liability" (NDIA Br. 13) is particularly misplaced here, given the extraordinary lengths to which petitioner went in concealing its serious breach of "a specific, objective" contractual requirement. Pet. App. 12a n.4.

3. Petitioner argues (Pet. 29-33) that the government's complaint did not adequately state a claim under 31 U.S.C. 3729(a)(1)(B) because the government failed to plead reliance. That argument lacks merit, and the decision below does not conflict with any decision of this Court or another court of appeals.

Section 3729(a)(1)(B) imposes civil liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." The statute defines "material" to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. 3729(b)(4). As the court of appeals explained, Section 3729(a)(1)(B) "reaches government contractors who employ false records that are capable of influencing a

decision, not simply those who create records that actually do influence the decision." Pet. App. 17a. The false scorecards that petitioner made clearly were capable of influencing the government's payment decisions; indeed, that is the obvious reason that the scorecards were created. See *id.* at 15a ("If [petitioner] believed that the marksmanship requirement was immaterial to the Government's decision to pay, it was unlikely to orchestrate a scheme to falsify records on multiple occasions.").

In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court reached a similar conclusion with respect to the federal mail, wire, and bank fraud statutes. Although the Court construed those laws to require a material misrepresentation or omission, it recognized that "the [mail, wire, and bank] fraud statutes did not incorporate *all* the elements of common-law fraud." *Id.* at 24. The Court explained that "[t]he common-law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in the federal fraud statutes." *Id.* at 24-25. Because the mail, wire, and bank fraud statutes "prohibit[] the 'scheme to defraud,' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted." *Id.* at 25. Similarly here, Section 3729(a)(1)(B) prohibits the knowing creation or use of "a false record or statement material to a false or fraudulent claim," without regard to whether the false record or statement ultimately influences the government's payment decision. As in *Neder*, addition of a reliance element "would clearly be inconsistent with the statute[] Congress enacted." *Ibid.*

Petitioner argues (Pet. 30) that actual reliance is required by Federal Rule of Civil Procedure 9(b). Rule 9(b) provides that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." It requires heightened pleading for certain elements of a fraud claim, but it does not add *new* elements that would not otherwise exist, nor does it override Congress's choice in Section 3729(a)(1)(B) to require materiality rather than reliance. Petitioner cites two decisions (Pet. 30) in which Rule 9(b) was applied to the plaintiff's pleading of reliance, but neither of those decisions discussed Section 3729(a)(1)(B) or involved the FCA. See *Swanson* v. *Citibank, N.A.*, 614 F.3d 400, 407 (7th Cir. 2010) ("common-law fraud"); *Aktieselskabet AF 21. Nov. 2001* v. *Fame Jeans Inc.*, 525 F.3d 8, 22 (D.C. Cir. 2008) ("fraudulent misrepresentation").

Petitioner also argues that the courts of appeals are divided as to whether "reliance is a necessary element of any claim under the FCA." Pet. 32. Petitioner suggests that three circuits have held that "an FCA plaintiff must specifically allege how the false records *actually caused* the government to pay out money." *Ibid.* Petitioner's reliance on those decisions is misplaced.

In *United States ex rel. Mastej* v. *Health Management Associates*, 591 Fed. Appx. 693, 709 (11th Cir. 2014), cert. denied, 135 S. Ct. 2379 (2015), the issue was whether "the Defendants [had] sought and received reimbursement from" the government through a claim for payment. *Ibid.*[9] In *United States ex rel.*

[9] The plaintiff's "make or use" claim under the predecessor to Section 3729(a)(1)(B) failed in *Mastej*, not because that provision required reliance, but because the plaintiff "d[id] not allege with

Vigil v. *Nelnet, Inc.*, 639 F.3d 791 (8th Cir. 2011), the complaint failed to allege "any details relating to the making, using, or submitting of any Certifications," and also failed to allege why "alleged regulatory violations were material to the government's decision to pay" any claim. *Id.* at 799. And in *United States ex rel. Spicer* v. *Westbrook*, 751 F.3d 354 (5th Cir. 2014), the court explained that "a false statement or fraudulent course of conduct" must have "caused the government to pay out money," by which the court meant that the false statement or fraudulent conduct must have "involved a claim" for payment. *Id.* at 365. None of those decisions concerned a defendant, like petitioner, who "knowingly ma[de] * * * false record[s]" that were indisputably "material to a false or fraudulent claim" for payment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2015

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sufficient particularity that the Defendants made any false statement (much less one that was material to a false claim)." 591 Fed. Appx. at 711.