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

BRIEF FOR THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, THE PROFESSIONAL SERVICES COUNCIL, AND THE INTERNATIONAL STABILITY OPERATIONS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Defense Industrial Association ("NDIA"), a non-profit, non-partisan organization, has a membership consisting of nearly 90,000 individuals and more than 1,600 companies, including some of the Nation's largest defense contractors.

The International Stability Operations Association ("ISOA") is a global partnership of private sector and non-governmental organizations providing critical services in fragile and complex environments worldwide. With over 55 member companies, and 200,000 implementers around the globe, the ISOA works to build, serve and represent its member organizations by providing diverse member services, publications, and events. Through communication and engagement, ISOA also builds partnerships across sectors to enhance the effectiveness of stability, peace, and development efforts across the globe. Many of ISOA's members have provided, and continue to provide, services under contract to the United States Government around the globe.

The Professional Services Council ("PSC") is the voice of the government professional and technology services industry. PSC's more than 380 member companies represent small, medium, and large business that provide federal departments and agencies with a wide range of services, including information

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, and their counsel made any monetary contribution to its preparation and submission. The parties were given timely notice and have consented to this filing.

technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, and environmental services. Together, the association's members employ hundreds of thousands of Americans in all 50 states. The federal government relies on PSC's members for many types of essential services since PSC member companies directly support the U.S. Government through contracts with the Department of Defense and other federal agencies, both domestically and in deployed war-zone environments.

Amici have a strong interest in the standards governing False Claims Act ("FCA") litigation. *Amici*'s members have successfully defended a significant number of FCA matters arising out of defense contracts in a variety of courts, including in the Fourth Circuit. In many cases, private relators (only infrequently joined by the government itself) have invoked an "implied certification" theory to transform minor alleged deviations from obscure or complex contractual terms or background regulatory requirements into an FCA violation, triggering that statute's "essentially punitive" regime of treble damages and penalties. See *Vermont Agency of Natural Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 784-785 (2000). In this way, the theory improperly transforms what are at *most* routine breach-of-contract claims (properly brought only by the government) into FCA liability (subject to suit by legions of private relators).

Whether the FCA imposes liability for "implied certification" claims—and, if so, what a plaintiff must plead to state a valid claim—are questions that have divided lower federal courts for years. As relators have exploited doctrinal uncertainty to plead ever-

increasing numbers of (ever-more-aggressive) "implied certification" cases, the circuit split has become deep and entrenched.

The division among lower courts has far-reaching consequences not only for defense contractors like petitioner—but also for any of the myriad businesses, non-profit organizations, and even municipalities that work for the government, or receive funds through a vast range of federal programs, from Medicare, school lunches, and disaster relief services, to software licensing, cigarette manufacturing, crude oil purchasing, student loans, and residential mortgage issuance. The Fourth Circuit has now joined a distinct minority of courts in endorsing the most extreme possible theory of "implied certification," broadening the scope of FCA liability immensely. This minority view subjects defendants to the *in terrorem* effect of punitive FCA liability, based on little more than an alleged breach of a contractual term or background regulation—even where no party *ever*, at the time of contracting, indicated that provision was a condition of payment.

SUMMARY OF ARGUMENT

Certiorari is urgently warranted because whether the FCA recognizes "implied certification" liability has generated a mature and entrenched circuit split that can only be resolved through this Court's intervention. In the brief interval between the docketing of the petition and this brief, the Seventh Circuit has weighed in, rejecting the Fourth Circuit's expansive standard and siding with the six other circuits which hold that an alleged violation cannot state an implied

false certification FCA claim unless it was *at least* a condition of payment.

The existing split, and the Fourth Circuit's decision in particular, will have far-reaching consequences in virtually every sector of the U.S. economy, from construction and manufacturing to logistics, education, and local governments. The decision joins the D.C. Circuit's minority view, ensuring that virtually every government contractor (typically subject to suit in Washington, D.C. or its suburbs) will face liability under this radical doctrine, affecting countless federal contracts and programs.

The decision invites plaintiffs to plead FCA liability for perceived violations of technical and obscure industry standards, affirmative action plans, environmental regulations, antidiscrimination statutes, procurement manuals, and more—contractual terms and rules that, prior to an FCA lawsuit, neither government nor defendant viewed as a condition of payment. In this manner, it transforms issues that at most would give rise to a breach of contract claim brought by the United States into punitive FCA liability that can be asserted by legions of bounty-hunting private relators. And it forces FCA defendants to litigate at great cost alleged contractual violations that the government itself may have ignored or waived for good reasons, such as the press of time or war.

The test adopted by the minority-view circuits, combined with some courts' permissive approach to the pleading requirements of Federal Rule of Civil Procedure 9(b), may allow relators to survive a motion to dismiss simply by alleging that a defendant

violated some term, statute, or regulation related to its receipt of federal funds, and further alleging that the provision was material—without regard to whether the provision in question was a condition of payment. Because some courts view materiality permissively as turning on questions of fact, defendants may be forced to litigate FCA cases past the pleading stage, incurring significant legal and discovery costs, and subjecting themselves to unpredictable fact-intensive judgments about whether a particular provision was material.

With the number of FCA lawsuits skyrocketing in recent years, the Department of Justice ("DOJ") vowing to link civil allegations to criminal prosecutions, and lower courts irreconcilably split 7-3, there is no question that this Court will have to resolve the implied certification issue. No benefit accrues from waiting for further development in the lower courts. The costs of delaying review are real for the government and its contractors. The minority view, combined with case law permissively reading Rule 9(b)'s pleading requirements, could effectively eliminate motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) as a meaningful constraint on FCA liability, given the ease of pleading breach of a minor contractual provision and materiality. The minority circuits have deputized private relators (and the relator's bar) as enforcers of the government's basic contractual rights and of every minor regulation—even where the government itself expresses no concern over the alleged conduct. And it creates a magnet for private relators to sue in a disproportionately influential jurisdiction. This case presents a clean and

timely vehicle for the Court to take up this important pure question of law

ARGUMENT

I. The Circuits Are Intractably Split On Whether And How The False Claims Act Imposes Liability For "Implied False Certification"

As petitioner explains, the question of "implied certification" has generated a deep and intractable division among the circuits, which when this petition was docketed were divided 6-3, with the Fourth Circuit in the minority. See Pet. 13-22 (detailing split between First, Fourth, and D.C. Circuits, on the one hand, and the Second, Third, Fifth, Sixth, Ninth, and Tenth Circuits, on the other). Since the petition was filed, the Seventh Circuit weighed in, siding with the majority view in *United States* v. *Sanford-Brown, Ltd.*, No. 14-2506, 2015 WL 3541422 (7th Cir. June 8, 2015).

Sanford-Brown involved FCA claims arising out of an educational institution's participation in the subsidy program under the Title IV of the Higher Education Act. 2015 WL 3541422, at *2. To be eligible to participate in that program, institutions are required to execute a Program Participation Agreement ("PPA") affirming that they will comply with "a panoply of statutory, regulatory, and contractual requirements." *Ibid.* The PPA there "incorporate[d] by reference thousands of pages of other federal laws and regulations." *Id.* at *8. The relator in *Sanford-Brown* alleged that the defendant school violated certain regulations having to do with student recruit-

ment practices, none of which were expressly made a condition of payment under the PPA.

Explicitly acknowledging that "other circuits have adopted th[e] so-called doctrine of implied false certification," the Seventh Circuit emphatically "declined to join them and instead join[ed] the Fifth Circuit." 2015 WL 3541422, at *12 (citing *U.S. ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010)). In the Seventh Circuit's view, it would be "unreasonable * * * to hold that an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference into the [PPA] are conditions of payment for purposes of liability under the FCA." *Ibid.*

Under the Fourth Circuit's rationale here, the outcome in *Sanford-Brown* would have been the opposite. If implied certification can be alleged for any contractual or regulatory violation, without any express condition of payment, based on the plaintiff's after-the-fact allegations about why that provision was material, the school in *Sanford-Brown* could have faced liability for failure to comply with any of the litany of regulations and rules incorporated by reference in the program participation agreement. The split of authority now stands at 7-3.

The circuits have disagreed not only about whether implied certification is a valid theory of FCA liability at all—but also about the scope of that doctrine, where it is available. The case law reflects three well-defined, and irreconcilable, positions. Among circuits that reject a broad theory of implied certification, courts disagree about whether liability can attach to a mere condition of program participation. *Mikes* v. *Straus*, 274 F.3d 687 (2d Cir. 2001), for

instance, rejected implied-certification liability based upon alleged non-compliance with a "condition[] of participation" in a federal program, while recognizing that a narrower class of implied false certification based upon a "condition [of] payment" might be viable. *Id.* at 701-702; see also *Sanford-Brown*, 2015 WL 3541422, at *12 (citing *Mikes* for this distinction). Other courts within the majority disagree. *E.g.*, *U.S. ex rel. Hendow* v. *Univ. of Phoenix*, 461 F.3d 1166, 1176 (9th Cir. 2006), cert. denied, 550 U.S. 903 (2007) (rejecting this as a "distinction without a difference," at least where "if * * * conditions of participation were not conditions of payment, there would be no conditions of payment at all"),; *U.S. ex rel. Ebeid* v. *Lungwitz*, 616 F.3d 993, 997 (9th Cir.) ("[T]he participation-payment differentiation set forth in *Mikes* [is] limited to the Medicare context."), cert. denied, 131 S. Ct. 801 (2010). The Fourth Circuit and the other two minority-view jurisdictions, by contrast, admit no such limitation on their broad conception of implied certification liability. See, *e.g.*, Pet. App. 13a n.5.

With the circuits now divided 7-3, there is no benefit from, or need for, further percolation in the lower courts. Of the circuits that have yet to address the issue, the Federal Circuit only rarely has occasion to adjudicate FCA claims (only when FCA allegations have been pleaded as counterclaims in the Court of Federal Claims). The Eighth Circuit has not historically been a favored venue for FCA litigation.[2] That

[2] See Enclosure to Letter from Laurie E. Ekstrand, Dir., Homeland Sec. & Justice, GAO, to Reps. F. James Sensenbrenner and Chris Cannon, and Sen. Charles E. Grassley ("Enclosure to Ekstrand Letter") 27 (Jan. 31, 2006), *available at* http://www.gao.gov/new.items/d06320r.pdf (listing no district

leaves the Eleventh Circuit, which could only deepen the split by weighing in, not resolve it.

II. The Fourth Circuit's Broad Theory Of Implied Certification Profoundly Increases Risk And Uncertainty For Government Contractors And Grantees

There can be no dispute that the FCA is a statute of exceptional importance, affecting a broad cross-section of American industry, whose interpretation this Court has revisited frequently. *E.g.*, *Kellogg Brown & Root Services, Inc.* v. *U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015); *Schindler Elevator Corp.* v. *U.S. ex rel. Kirk*, 131 S. Ct. 1885 (2011); *Graham Cnty. Soil & Water Conservation Dist.* v. *U.S. ex rel. Wilson*, 559 U.S. 280 (2010); *U.S. ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928 (2009). The emergence of a sweepingly broad theory of implied false certification presents an equally compelling basis for this Court's review.

A. Implied Certification Improperly Threatens Punitive FCA Liability For Alleged Violations Of Obscure Or Insignificant Contract Terms Or Rules

The Fourth Circuit's sweeping theory of implied false certification threatens federal contractors, grantees, and federal program participants with the FCA's "punitive" treble damages and penalties whenever a private plaintiff alleges non-performance of any one of hundreds of contractual or regulatory requirements. Unless potential FCA defendants ensure perfect compliance with every requirement involved

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courts from the Eighth Circuit in the top seventeen districts for *qui tam* cases from 1987 through 2005).

in participating in a federal program—which can be difficult or even impossible given the dizzying array of rules and regulations governing some complex federal programs, such as Medicare—the contractor risks crippling FCA liability every time it submits, or causes another party to submit, a claim for payment to the government. This is simply not a workable legal environment for doing business. By divorcing the materiality inquiry from the explicit terms of the contract or program regulation at issue, the Fourth Circuit invites the government and relators to allege that virtually any term is material.

Sanford-Brown's facts exemplify the dangers and uncertainty for potential FCA defendants if the Fourth Circuit's decision stands. The defendant in *Sanford-Brown* was an educational institution receiving federal subsidies from the Department of Education. 2015 WL 3541422, at *2. By the Seventh Circuit's estimation, the agreement imposing up-front conditions of program participation "incorporate[d] by reference thousands of pages of other federal laws and regulations." *Id.* at *8. A *qui tam* relator alleged violations of several regulations of indirect relevance to the overall program (i.e., involving student recruitment practices), none of which were expressly made conditions of payment. Yet under the Fourth Circuit's test, the relator there would have pleaded a valid claim for FCA liability.

Large federal contracts, including in the defense realm, raise similar concerns. For example, the Army has now issued five sets of Logistics Civil Augmentation Program ("LOGCAP") contracts in support of military operations overseas, each entailing a wide range of logistical services such as housing, food and

recreation for America's troops. Those contracts are sprawling and complex, containing (or incorporating by reference) an enormous number of terms, both in the base contracts and in the hundreds of individual statements of work and task orders implemented under them. The agreements also incorporate "a patchwork of other agreements and instruments" such as the Army Field Manual and guidelines and other guidance documents issued by various components of the Department of Defense. See, *e.g.*, *Carmichael* v. *Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1276 n.2 (11th Cir. 2009), cert. denied, 130 S. Ct. 3499 (2010).

Not surprisingly, many plaintiffs have alleged FCA claims involving perceived violations of the LOGCAP contracts, premised on the precise theory of implied certification at issue here. See, *e.g.*, *U.S. ex rel. Watkins* v. *KBR, Inc.*, No. 4:10-cv-4010, 2015 WL 2455533, at *7, *13-16 (C.D. Ill. May 22, 2015) (dismissing FCA claim where relator failed to identify a contractual requirement to certify compliance with a specific provision when requesting payment). Under the current split, whether LOGCAP contractors face FCA liability for failing to perform any of hundreds of contractual, regulatory and statutory requirements depends on where a case is brought. And because virtually all defense contractors are subject to suit in Washington, D.C., or its suburbs, the Fourth Circuit's rule imposes ongoing costs every day it remains on the books.

The list of potential bases for implied certification liability is literally boundless. In *Chesbrough* v. *VPA P.C.*, 655 F.3d 461, 467-468 (6th Cir. 2011), for instance, a plaintiff alleged non-compliance with an in-

dustry standard for radiology studies derived from Medicare regulations. In *U.S. ex rel. Marcy* v. *Rowan Cos.*, 520 F.3d 384, 388 (5th Cir. 2008), the plaintiff alleged that a defendant's lease payments impliedly certified compliance with certain background environmental statutes. And the plaintiff in *U.S. ex rel. Willard* v. *Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 380 (5th Cir. 2003), alleged non-compliance with antidiscrimination statutes, associated with claims for payment for medical services. Finally, in both *U.S. ex rel. King* v. *F.E. Moran, Inc.*, No. 00-cv-3877, 2002 WL 2003219, at *11-12 (N.D. Ill. Aug. 29, 2002), and *U.S. ex rel. Yannacopoulos* v. *General Dynamics*, No. 03-cv-3012, 2007 WL 495257, at *3 (N.D. Ill. Feb. 13, 2007), *qui tam* plaintiffs sought implied certification liability for alleged non-compliance with technical requirements located in procurement manuals and guidelines.

Notably, the plaintiffs did not succeed on their implied certification theories in *any* of these cases. But in the Fourth Circuit today, each of these cases—and many others—could survive a motion to dismiss and perhaps could result in substantive liability. The decision here suspends the sword of FCA liability over the head of government contractors, small businesses, subsidized farmers, and school districts nationwide for non-compliance with thousands of regulatory and contractual provisions. As explained below, assurances that FCA liability arises only for violations of *material* provisions is cold comfort because materiality is easily pleaded, and given the fact-intensive and unpredictable nature of materiality determinations at trial. See Pet. App. 14a (quoting

United States v. *Science Applications Int'l Corp.*, 626 F.3d 1257, 1271 (D.C. Cir. 2010) ("*SAIC*").

B. The Implied Certification Theory Deprives Defendants Of Fair Notice About What Actions May Lead To FCA Liability

In minority-view circuits, a potential FCA defendant cannot predict what contract provisions, rules, regulations, or program requirements will later be deemed preconditions to payment, violating basic notions of due process. "'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *FCC* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)).

The minority-view implied-certification theory violates that test, because it has not, and cannot, articulate a workable principle to identify which terms, conditions, and obligations will be deemed material after the fact by private plaintiffs or courts. The decision thus deprives defendants of fair notice about what conduct is actionable under the FCA. See, *e.g.*, *U.S. ex rel. Bidani* v. *Lewis*, 264 F. Supp. 2d 612, 615 (N.D. Ill. 2003) (relying on DOJ statement of interest asserting that specific federal law "is a critical provision of the Medicare statute" and thus that "compliance with it is material to the government's treatment of claims for reimbursement," even without such a statement in the Medicare program itself); *U.S. ex rel. Thompson* v. *Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1046 (S.D. Tex. 1998) (relying on after-the-fact declaration of government em-

ployee that payment was conditioned on defendant's certification that the Medicare services identified in annual hospital cost reports complied with laws and regulations governing provision of healthcare services). These cases reflect the reality that an "implied false certification" exists only by operation of law after the fact, and is not based on something a defendant actually said (or to which it explicitly agreed) in advance. As a result, potential FCA defendants have no way to determine *ex ante* what conditions they may be "impliedly certifying" compliance with when they submit a claim for payment, potentially giving rise to an FCA claim.

Numerous commentators have recognized what the facts of these cases demonstrate: the implied certification theory is marred by a "high degree of uncertainty," Marcia G. Madsen, *False Claims Act: What Government Contractors Should Know About the Implied Certification Theory of Liability*, *in Government Contracts* 2011, at 481 (PLI, Corporate & Sec., Mun. Law Practice, No. 28982, 2011), and "little predictability," Richard J. Webber, *Exploring the Outer Boundaries of False Claims Act Liability: Implied Certifications and Materiality*, 36 Procurement Law, Winter 2001, at 14, 14. In other words, businesses are left either to guess which requirements will be deemed a condition of payment, or to assume that every requirement could potentially support FCA liability.

The Fourth Circuit's sweeping and vague theory of implied false certification is at odds with the need for clear, predictable, and well-defined standards of liability. See, *e.g.*, *Town of Concord* v. *Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.) (le-

gal rules "must be clear enough for lawyers to explain them to clients," "must be administratively workable," and "must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings"). Yet the decision here creates an unclear, unpredictable, ill-defined standard of liability under which companies cannot meaningfully ensure their compliance with the FCA or rationally assess the costs and risks of doing business with the government. Now more than ever, FCA jurisprudence requires this Court's intervention, to remove a cloud of uncertainty that could prevent businesses from efficiently delivering the goods and services they provide to the government—and may even deter them from participating in federal programs altogether.

C. The Fourth Circuit's Implied Certification Theory, Combined With Some Courts' Permissive Reading of Rule 9(b), Could Be Effectively Immune From A Motion to Dismiss, And Creates A Magnet For Forum-Shopping Relators

1. The Fourth Circuit's implied-certification theory, combined with some recent decisions taking a permissive approach to Rule 9(b)'s pleading requirements, provides plaintiffs a roadmap to plead an FCA claim in a manner sufficient to survive a motion to dismiss. A relator can often easily allege that a defendant violated some term, statute, or regulation related to its receipt of federal funds, and further allege that the provision in question was material—without regard to whether there is any explicit statement identifying the provision in question as such, in the

contract or regulation. Moreover, some courts among the implied-certification minority have (improperly) construed Rule 9(b) permissively, allowing claims to survive a motion to dismiss without the kind of "identifying details" that Rule 9(b) might require for "common law or securities fraud claims." *E.g.*, *U.S. ex rel. Heath* v. *AT&T, Inc.*, No. 14-7094, 2015 WL 3852180, at *11 (D.C. Cir. June 23, 2015). In this context, and because materiality often turns on questions of fact, defendants may be forced to litigate FCA cases well past the pleading stage, incurring significant legal and discovery costs, and subjecting themselves to unpredictable fact-intensive judgments about materiality.

United States v. *Honeywell Int'l Inc.*, 798 F. Supp. 2d 12 (D.D.C. 2011), illustrates the point. There, the government alleged that certain goods purchased from the defendant failed to meet an industry standard five-year warranty. The complaint conceded that the contract did not explicitly condition payment on such a warranty, but alleged that the government "understood [the warranty] to be a condition of payment." *Id.* at 20. The court found that allegation, among others, sufficient to survive a motion to dismiss, even though "the government d[id] not state directly in its complaint that [the defendant] also understood such requirements to be conditions of payment." *Ibid.* The defendant had argued that the government had simply misconstrued the warranty; that argument, in the court's view, "raise[d] questions of fact that are more appropriately resolved after discovery closes, such as the scope of the warranty and whether [the retailer] issued that precise warranty upon each sale." *Id.* at 21; see also *U.S. ex rel. Landis*

v. *Tailwind Sports Corp.*, 51 F. Supp. 3d 9, 51 (D.D.C. 2014) (denying motion to dismiss implied certification claims, based on allegations that compliance with rules of governing bodies of international bicycling organizations was material to sponsorship agreement with U.S. Postal Service).

In response to these concerns, the Fourth and other minority-view circuits assert that the materiality inquiry will serve as an effective constraint on meritless or abusive FCA litigation. *E.g.*, Pet. App. 13a-14a; *SAIC*, 626 F.3d at 1270 (concern is "very real" but "can be effectively addressed through strict enforcement of the [FCA's] materiality and scienter requirements"). But that response is likely to be cold comfort, particularly in Circuits that have diluted Rule 9(b) pleading requirements. See *Heath*, 2015 WL 3852180, at *12. Materiality under the FCA is defined as "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).

Effectively eliminating the motion to dismiss as a constraint on meritless FCA litigation would have real costs, and could force defendants to settle claims to avoid burdensome discovery and risking FCA treble damages and penalties. *E.g.*, *Smith* v. *Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (discovery in "complex litigation can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak"); *International Data Bank, Ltd.* v. *Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987) (treble damages provisions increase danger of defendants settling nuisance suits). As one of the FCA's leading commentators observed, the statute's treble damages and penalty structure "places great pressure on defendants to

settle even meritless suits." John T. Boese & Beth C. McClain, *Why* Thompson *Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 Ala. L. Rev. 1, 18 (1999); accord Robert Salcido, *DOJ Must Reevaluate Use of False Claims Act in Medicare Disputes*, Wash. Legal Found. Legal Backgrounder at 4 (Jan. 7, 2000), *available at* http://goo.gl/YyZTdS ("dirty little secret" of FCA litigation is that "given the civil penalty provision and the costs and risks associated with litigation, the rational move for [FCA defendants] * * * is to settle the action even if the [plaintiff's] likelihood of success is incredibly small").

2. The Fourth Circuit's expansive implied certification theory all but ensures rampant forum shopping. The FCA allows nationwide service of process, see 31 U.S.C. § 3732(a), often giving plaintiffs flexibility to sue in several jurisdictions. A complaint may be filed "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 [31 U.S.C.] section 3729 occurred." *Ibid*. FCA defendants often operate in multiple states, including offices or operations in the Washington, D.C. suburbs—and thus are typically subject to suit in the minority-view Fourth or D.C. Circuits, or both.

Those jurisdictions thus have a disproportionate effect on nationwide FCA jurisprudence given the concentration of *qui tam* cases in the D.C. and Fourth Circuits. Even before the panel decision here, the two Fourth Circuit district courts comprising the Washington D.C. suburbs, together with the U.S. District Court for the District of Columbia, where numerous government agencies and contractors op-

erate or are headquartered, were all among the top ten venues nationwide for *qui tam* actions. See Enclosure to Ekstrand Letter, *supra*, at 27. That preference will become more pronounced given the panel's relator-friendly decision.

This Court has long recognized the inequities inherent in, and has sought to discourage, forum shopping. *E.g.*, *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965) ("[T]he twin aims of the *Erie* [*R. Co.* v. *Tompkins*, 304 U.S. 64 (1938)] rule[are the] discouragement of forum-shopping and avoidance of inequitable administration of the laws."); *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987); *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 428 (1996). Those cases are grounded in the basic principle that a case "for the same transaction" tried in one court should not yield "a substantially different result" if tried in another. *Guaranty Trust Co. of N.Y.* v. *York*, 326 U.S. 99, 109 (1945). Yet under the existing circuit split, that disfavored result is all but guaranteed.

D. Implied Certification Affects A Vast Portion Of The U.S. Economy

The uncertainty and vast expansion of FCA liability resulting from the Fourth Circuit's implied-certification theory affects almost every sector of the economy. FCA liability potentially affects any entity or person, public or private, that receives federal funds in various forms—and relators are not shy in bringing suit, even when the government expresses no interest in the claims. See, *e.g.*, *Mikes*, 274 F.3d 687 (healthcare services); *Steury*, 735 F.3d 202 (medical manufacturing); *U.S. ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163 (10th Cir. 2010)

(waste disposal services); *SAIC*, 626 F.3d 1257 (consulting services); *Sanford-Brown*, 2015 WL 3541422 (higher education services); *U.S. ex rel. Shemesh* v. *CA, Inc.*, No. 09-cv-1600, 2015 WL 1446547 (D.D.C. Mar. 31, 2015) (software development); *U.S. ex rel. Bilotta* v. *Novartis Pharm. Corp.*, 50 F. Supp. 3d 497 (S.D.N.Y. 2014) (pharmaceutical manufacturing); *United States* v. *Americus Mortg. Corp.*, No. 12-cv-02676, 2014 WL 4273884 (S.D. Tex. Aug. 29, 2014) (mortgage lending); *U.S. ex rel. McLain* v. *Fluor Enters., Inc.*, 60 F. Supp. 3d 705 (E.D. La. 2014) (disaster relief construction services); *U.S. ex rel. Oliver* v. *Philip Morris USA, Inc.*, No. 08-0034, 2015 WL 1941578 (D.D.C. Apr. 30, 2015) (cigarette manufacturing); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), (defense support services), cert. denied, 135 S. Ct. 1163 (2015); *Landis*, 51 F. Supp. 3d 9 (athletic sponsorship); *U.S. ex rel. Koch* v. *Koch Indus., Inc.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999) (crude oil purchasing); *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.* v. *Westchester Cnty.*, 712 F.3d 761 (2d Cir. 2013) (provision of urban housing to low-income residents); *U.S. ex rel. Bias* v. *Tangipahoa Parish Sch. Bd.*, No. 12-cv-2202, 2015 WL 225410 (E.D. La. Jan. 15, 2015) (public school Junior ROTC program); *U.S. ex rel. Pritzker* v. *Sodexho, Inc.*, 364 F. App'x 787 (3d Cir.), (public school lunch services), cert. denied, 562 U.S. 838 (2010); *Grand Union Co.* v. *United States*, 696 F.2d 888 (11th Cir. 1983) (food stamp program). The sheer magnitude and scope of the economic activity potentially subject to implied certification liability underscores the need for this Court's review.

The skyrocketing number of FCA lawsuits in recent years underscores the need for certainty on this point. Since the 1986 amendments to the FCA, an "army of whistleblowers, consultants, and, of course, lawyers" have been released onto the landscape of American business. 1 John T. Boese, *Civil False Claims and* Qui Tam *Actions*, at xxi (4th ed. 2011). In the last few years alone, the number of *qui tam* actions increased from roughly 400 per year to nearly double that figure—700 in each of 2013 and 2014. See Press Release, U.S. Dep't of Justice, *Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014* (Nov. 20, 2014), http://goo.gl/vXAxBB. Despite the volume of *qui tam* claims, actions in which DOJ declines to intervene account for only 3.6% of total *qui tam* monetary settlements and judgments. DOJ, *Fraud Statistics—Overview: Oct. 1, 1987–Sept. 30, 2013* ("*Fraud Statistics*"), at 1-2 (2013), *available at* http://goo.gl/VI9nrJ. The Fourth Circuit's rule here applies equally to intervened and non-intervened cases. Looking forward, DOJ recently implemented a new procedure whereby all new *qui tam* complaints will be shared between the Civil and Criminal Divisions immediately upon filing, as part of DOJ's efforts to "step[] up" FCA enforcement still further. Leslie R. Caldwell, Ass't Att'y Gen. for Crim. Div., U.S. Dep't of Justice, Remarks at the Taxpayers Against Fraud Education Fund Conference (Sept. 17, 2014), http://goo.gl/P4j8RA. In this climate, the prospect and scope of FCA litigation is a paramount concern for American businesses.

III. Implied Certification Has No Basis In The False Claims Act

The implied-certification theory accepted by a minority of circuits not only departs from the views of other courts, but is simply wrong on the merits. Under the minority view, relators are free to bring FCA actions that, properly understood, should be litigated—if at all—by the government, through claims for breach of contract or associated remedies.

The FCA serves an important but limited purpose: helping to detect and combat fraud. The *sine qua non* of an FCA claim under 31 U.S.C. § 3729(a)(1)(A) is the alleged submission of a "false or fraudulent" claim for payment. See also H.R. Rep. No. 99-660, at 16 (1986) ("The purpose of [the 1986 FCA amendments] is to * * * strengthen and clarify the government's ability to detect and prosecute civil fraud * * * ."). As courts have repeatedly recognized, "[t]he FCA is not a general 'enforcement device' for federal statutes, regulations, and contracts." *Steury*, 625 F.3d at 268; accord *Mikes*, 274 F.3d at 699 (FCA "was not designed for use as a blunt instrument to enforce compliance").

Limiting FCA liability to instances where "a contractor's compliance with federal statutes, regulations, or contract provisions" was an explicit "'condition' or 'prerequisite' for payment under a contract" recognizes that "unless the Government conditions payment on a certification of compliance, a contractor's mere request for payment does not fairly imply such certification." *Steury*, 625 F.3d at 268. Although the Fourth Circuit viewed the materiality requirement as an adequate safeguard, see Pet App. 13a-14a, "[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 the first place." *Steury*, 625 F.3d at 269. Indeed, "even if a contractor falsely certifies compliance (implicitly or explicitly) with some statute, regulation, or contract provision, the underlying claim for payment is not 'false' within the meaning of the FCA if the contractor is not required to certify compliance in order to receive payment." *Ibid.*

The Fourth Circuit's expansion of FCA liability far beyond these core principles is not only contrary to the statutory text and purpose, but is simply unnecessary, because the government has a broad range of other remedies to recover on such claims. The government may, of course, sue for breach of contract, including based on of the kind of implicit promise that underlies the certification claims here. See 23 Richard A. Lord, *Williston on Contracts* § 63:14 (4th ed. 2003). The government may assess administrative penalties, simply refuse to pay, or debar a contractor from future work. But these remedies share a key characteristic: only the United States itself may assert them. Nothing in the FCA's text, history, or structure suggests that Congress intended so radically to expand the universe of potential FCA plaintiffs, to allow private relators to sue for perceived transgressions of the myriad and picayune contractual and regulatory provisions associated with the typical government contract or benefit program. This Court's review is urgently needed.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of *certiorari* should be granted.

Respectfully submitted.

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