No. 15-7

In the Supreme Court of the United States

UNIVERSAL HEALTH SERVICES, INC.,

Petitioner,

v.

UNITED STATES AND COMMONWEALTH OF MASSACHUSETTS EX REL. JULIO ESCOBAR AND CARMEN CORREA,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

BLANK PAGE

INTRODUCTION

Respondents' claims under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, are based entirely on alleged regulatory violations. Thus, Federal Rule of Civil Procedure 9(b) required respondents to plead, as a matter of *fact*, the regulations that petitioner allegedly violated. Respondents' complaint failed to allege that petitioner violated 130 Mass. Code Regs. § 429.423(B)(2), the regulation on which the First Circuit relied in reversing dismissal, and respondents never mentioned that regulation at any point during the proceedings below. In adding an allegation that petitioner violated subsection 429.423(B)(2), the First Circuit effectively repleaded respondents' complaint—a departure from the norms of our adversarial system so severe as to warrant summary reversal.

As to the second question presented, dismissal of respondents' complaint would have been affirmed in the Seventh Circuit, which recently rejected the implied certification theory of FCA liability in *U.S. ex rel. Nelson v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015)—a fact that the United States, the real party in interest here, has acknowledged. Respondents themselves admit that *Sanford-Brown* "indisputably . . . conflicts with many decisions of the various Courts of Appeals," Br. in Opp. 27, but deny that it conflicts with the decision below because the First Circuit declined to use the label "implied certification." Implied certification, however, is precisely the theory of liability that respondents advanced, and that the First Circuit applied, here. Respondents never alleged that petitioner expressly certified compliance with any regulations. This has always been an implied certification case, and it is

thus a sound vehicle for resolving the second question presented.

Dismissal also would have been affirmed in the Second and Sixth Circuits, which, while recognizing the implied certification theory of FCA liability, hold that such a claim is only viable if it is based on an alleged violation of a statute, regulation, or contractual provision that is expressly designated a condition of payment. Respondents concede the existence of a circuit split on this issue but argue that it is academic because the regulation that the First Circuit added *sua sponte* was an express condition of payment. This is incorrect. Subsection 429.423(B)(2) is not expressly designated as a condition of payment, and the First Circuit did not hold that it is. Accordingly, this case is a sound vehicle for deciding the third question presented.

If the Court does not summarily reverse on the first question presented, it should grant plenary review of the second and third questions, which involve important and recurring questions regarding the validity and scope of "implied certification" liability under the FCA.

ARGUMENT

I. The First Circuit Salvaged Respondents' Deficient Complaint By Repleading It For Them

Respondents contend that the Court should not grant certiorari on the first question presented because the First Circuit did nothing more than "identify and apply the proper construction of governing law" to an issue properly before it. *See* Br. in Opp. 15–18. This ignores respondents' pleading burden.

The question on appeal was whether respondents' second amended complaint stated a claim for relief. *See* Pet. App. 2. Respondents' only theory of liability was that petitioner violated the FCA by seeking reimbursement while noncompliant with various regulations. Because the FCA was enacted to combat fraud on the government, *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000), "[e]very circuit to consider the issue has held that . . . complaints brought under it must comply with [Federal] Rule [of Civil Procedure] 9(b)." *U.S. ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551–52 (D.C. Cir. 2002).

Thus, Rule 9(b) required respondents to allege, with particularity and as a matter of *fact*, the regulations petitioner violated when seeking reimbursement. *See, e.g.*, *U.S. ex rel. Ge v. Takeda Pharm. Co.*, 737 F.3d 116, 123–25 (1st Cir. 2013) (applying Rule 9(b) to FCA complaint). Such allegations were a necessary *factual* predicate for respondents' FCA claims, no different from other allegations concerning the "who, what, when, where, and how" of petitioner's alleged fraud. *Id.* at 123 (citation omitted).

Here, although respondents alleged that petitioner violated a Massachusetts regulation (130 Mass. Code Regs. § 429.439) that references various other regulations, Pet. App. 56–58, their complaint failed to allege how petitioner violated that regulation's requirements, Pet. App. 44.

Rather than affirm dismissal because of this failure, the First Circuit salvaged respondents' complaint by effectively repleading the factual predicate for their claims. The court held that the conduct alleged in respondents' complaint violated 130 Mass. Code Regs.

§ 429.423(B)(2), one of the several regulations referenced in section 429.439, Pet. App. 16, even though respondents never once cited any part of subsection 429.423(B)(2) in the district court or on appeal, much less alleged how petitioner violated the regulation. The First Circuit thus contravened the bedrock principle that plaintiffs, not courts, plead a complaint's factual allegations.[1] *See, e.g.*, *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983) ("It is not . . . proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.").

The cases respondents cite are not to the contrary. Petitioner does not dispute that when a "claim is properly before the court, the court . . . retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)). But that power is not at issue in this case. Nor is this a case in which the parties stipulated to the meaning of the governing law, *see U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993), or have otherwise colluded to limit the legal issues before the court, *see* Br. in Opp. 17. Likewise, while this Court may have the power to resolve questions not raised by parties in their petitions for certiorari, *see Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 320–21 n.6 (1971), an

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[1] Indeed, the district court on remand directed respondents to formally amend their complaint to incorporate "explicitly . . . the regulatory provision that the First Circuit relied on." App. 4a.

appellate court's reinstatement of a dismissed complaint based on a factual allegation *never pleaded* by a plaintiff but instead added *sua sponte* by the court of appeals is a horse of a different color.

Respondents also argue that the Court's supervisory authority applies in civil cases only to the extent necessary to "implement[] a remedy for a recognized right." *See* Br. in Opp. 14. This also fails. In keeping with the Court's longstanding recognition of its "*general* power to supervise the administration of justice in the federal courts," *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 260 (1953) (emphasis added), the Court's rules contain no such limitation, *see* Sup. Ct. R. 10(a). And in practice, the Court regularly exercises its supervisory authority in civil cases.

For instance, the Court routinely grants certiorari to clarify federal practice in civil cases, *e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (pleading an antitrust conspiracy), and to prevent marked departures from procedural norms, *e.g.*, *Valley Forge Christian Coll. v Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 470 (1982) (court of appeals adopted "unusually broad and novel view of standing"); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 570–71 (1979) (lower courts "depart[ed] . . . from the procedure normally followed"). This case falls squarely within the path marked by these precedents.

The First Circuit's approach here turns the basic underpinning of our adversary system on its head. *See, e.g.*, *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as

arbiters of legal questions presented and argued by the parties before them."). The Court should therefore summarily reverse. *Cf. Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam) (summarily reversing where the court of appeals improperly weighed evidence on summary judgment).

II. This Case Is A Sound Vehicle For Resolving The Second Question Presented

In *U.S. ex rel. Nelson v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015), the Seventh Circuit rejected the implied certification theory of liability under the FCA. The United States—the real party in interest—filed an *amicus* brief in support of rehearing *en banc* in *Sanford-Brown* that described the resulting circuit split:

> [T]he panel erred in summarily rejecting the "implied certification" theory of FCA liability .... No other court of appeals has rejected the implied certification theory of liability. Indeed, with the exception of the Fifth, Eighth and Eleventh Circuits, every other court of appeals has adopted some variant of that theory, recognizing that a claim may be "false or fraudulent" under Section 3729(a)(1) even if it contains no false statements on its face where it impliedly but falsely represents that the defendant complied with a requirement material to payment.

App. 20a–21a (Brief for the United States as *Amicus Curiae* in Support of Rehearing *En Banc* at 13, *U.S. ex rel. Nelson v. Sanford-Brown, Ltd.*, No. 14-2506 (7th Cir. July 9, 2015), ECF No. 61) (citing cases, including *U.S. ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 387 (1st Cir. 2011)).

Thus, the Seventh Circuit broke with its sister circuits when it unequivocally "decline[d] to join" the "number of . . . circuits [that] have adopted this so-called doctrine of implied false certification," and in doing so noted that "before today this doctrine was 'unsettled' in this circuit." *Sanford-Brown*, 788 F.3d at 711–12 & n.7. This was not mere "dicta," and it was neither "unclear" nor "obscure." Br. in Opp. 25–27.

Respondents attempt to downplay *Sanford-Brown*, arguing that it was "not a Medicaid case." Br. in Opp. 24. But *Sanford-Brown*'s rejection of implied certification did not exempt Medicaid cases from its reach, and respondents ignore the Seventh Circuit's statement that its holding was "[c]onsistent with *Momence*'s foreshadowing." *Id.* at 711 (citing *U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 712 (7th Cir. 2014)). *Momence* was a Medicaid case. *Momence*, 764 F.3d at 712.[2]

Respondents ultimately concede, as they must, "*Sanford-Brown*'s conflict with the opinions of almost all of its sister Courts of Appeals." *See* Br. in Opp. 28. Respondents argue that nevertheless, this case does not present an appropriate vehicle to address the conflict because the First Circuit "disclaimed reliance" on the implied certification theory. *Id.* at 2, 19. This is incorrect.

The First Circuit has rejected labels used by other Circuits to categorize FCA claims, including "express certification" and "implied certification." Pet. App. 17

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[2] Respondents also suggest that *Sanford-Brown* did not reject implied certification, speculating that "the Seventh Circuit may have only intended to reject the doctrine in the case before it." Br. in Opp. 27. Nowhere does *Sanford-Brown* actually say this.

n.14 (citing *Hutcheson*, 647 F.3d at 385). But while the First Circuit has eschewed such labels, respondents ignore the First Circuit's test, as described in its decision below: "We ask simply whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment." Pet. App. 13.

This is an "implied certification" test, regardless of how it is labeled. Indeed, as the United States observed in *Sanford-Brown*, the First Circuit is among the circuits recognizing the implied certification theory. *See* App. 21a (citing *Hutcheson*). Here, respondents *have never alleged* that petitioner somehow expressly misrepresented compliance with any regulations when it submitted claims for reimbursement. Respondents' theory has always been that petitioner implicitly certified compliance with regulations. After *Sanford-Brown*, the Seventh Circuit would have affirmed dismissal of respondents' complaint.

III. This Case Is A Sound Vehicle For Resolving The Third Question Presented

In those circuits that recognize implied certification claims, there is a split concerning whether such claims can proceed where the statute, regulation, or contractual provision allegedly violated is not expressly designated a condition of payment. Pet. 18–20. Respondents do not seriously dispute the existence of this split or that the First Circuit is on one side of it, having held that conditions of payment need not be expressly designated. *See Hutcheson*, 647 F.3d at 386–88; Pet. App. 13.

1. Respondents instead argue that the third question presented is "academic" because the First Circuit

determined that the regulation at issue here (130 Mass. Code Regs. § 429.423(B)(2)) was "expressly" designated a condition of payment. Br. in Opp. 29. Respondents rely on the First Circuit's statement that "the provisions at issue in this case clearly imposed conditions of payment." *Id.* at 30 (citing Pet. App. 15).

As an initial matter, whether something is "clearly" a condition of payment is different from whether something is "expressly designated" a condition of payment. *See* Pet. App. 13 ("Preconditions of payment, which may be found in sources such as statutes, regulations, and contracts, need not be 'expressly designated.'" (quoting *Hutcheson*, 647 F.3d at 387–88)).

More importantly, subsection 429.423(B)(2) does not state on its face that it is a condition of payment. Rather, the First Circuit held that compliance with a *different* regulation, 130 Mass. Code Regs. § 429.439, is an express condition of payment because it states that "[s]ervices provided by a satellite program are reimbursable only if the program meets the standards described below." Pet. App. 56. Subsection 429.439(C) in turn states that a clinical director "must meet all of the requirements in 130 Mass. Code Regs. § 429.423(B)." *Id.* at 57. Those "requirements" are set forth in subsection 429.423(B)(1), which provides, *inter alia*, a clinical director's licensure and experience requirements—matters not at issue in this case.

The First Circuit instead looked to subsection 429.439(B)(2), which contains a nonexhaustive list of job duties of a clinic director, including items such as establishment of a staffing schedule and staff job descriptions, alongside "overall supervision" of staff. Although this incomplete list of job functions does not set

forth the "requirements" contemplated by 130 Mass. Code Regs. § 429.439(C), the court nonetheless concluded that such functions were conditions of payment sufficient to support an FCA claim. The effect of this cut-and-paste reasoning was to find an implied condition of payment in subsection 429.423(B)(2), a result which would not have occurred in the Second and Sixth Circuits. *See* Pet. 25–29; *cf. U.S. ex rel. Hobbs v. Medquest Assocs.*, 711 F.3d 707, 715 (6th Cir. 2013) ("A conclusion that compliance with the supervising-physician requirements is a condition of payment is only possible by weaving together isolated phrases from several sections in the complex scheme of Medicare regulations.").

2. Respondents attempt to re-frame the third question presented by suggesting that it turns on questions of state, not federal, law. Br. in Opp. 21, 32–34.[3] This is meritless, as the third question presented addresses when implied certification claims are viable under the FCA—plainly a question of federal law. It is irrelevant that an alleged state, as opposed to federal, regulatory violation is the basis for respondents' FCA claims.

Of course, the antecedent question here is whether subsection 429.423(B)(2) *expressly* makes compliance a condition of payment. On its face, it does not. And as discussed above, the First Circuit did not hold that it does. Thus, this Court need not disturb the First Circuit's interpretation of that regulatory provision to decide the third question presented and reverse.

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[3] Although respondents do not differentiate among the three questions presented, this argument has no conceivable bearing on the first and second questions.

3. Respondents contend that a recent regulatory revision renders the third question presented irrelevant by making compliance with 130 Mass. Code Regs. § 429.424 an express condition of payment. Br. in Opp. 34-36. The First Circuit's reversal, however, was based on a different regulation, 130 Mass. Code Regs. § 429.423(B)(2), which was not affected by the regulatory revision cited by respondents. That section 429.424 may have been amended to expressly provide that it is a condition of payment does not change the fact that subsection 429.423(B)(2) is not an express condition of payment.

In any event, even if the 2014 revisions to 130 Mass. Code Regs. § 429.424 had any relevance here, respondents' allegations long antedate the 2014 revisions to section 429.424 they tout, which had an "[e]ffective" date of "March 27, 2014." 2014 Mass. Reg. 357789 (Apr. 11, 2014). The 2014 revisions, as a substantive regulatory change,[4] have no retroactive effect

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[4] Respondents argue, based on the agency transmittal letter, that the 2014 revisions were a mere "clarification" of existing law. But the full passage from the transmittal letter (only partially quoted by respondents) states: "These changes include *clarification* of 'crisis intervention' services as 'psychotherapy in crisis' services, *and specifying* [in section 429.424] the types of staff members, including psychiatric nurse mental health clinical specialists, who are authorized to provide mental health services for which mental health centers may bill." Memorandum from Kristin L. Thorn, Medicaid Dir., to Mental Health Centers Participating in MassHealth 1 (Apr. 2014), http://www.mass.gov/eohhs/docs/masshealth/transletters-2014/mhc-47.pdf (emphasis added). The 2014 revisions went further than merely "clarifying" existing law because they "specified" which types of staff members could perform billable services. In addition, the transmittal letter indicates that the regulations implement a statutory change bearing only on services provided on or after January 1, 2014.

here. *Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen.*, 908 N.E.2d 740, 752–53 (Mass. 2009) (noting that "a regulatory change affecting substantive rights generally only applies prospectively" and concluding that a regulation did not apply retroactively where amended regulations "effectively impose a new liability on [petitioner]" (citation omitted)).

CONCLUSION

The Court should grant the petition for certiorari.

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Respectfully submitted,

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