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

BRIEF FOR *AMICUS CURIAE* PROFESSOR JOEL D. HESCH IN SUPPORT OF RESPONDENTS

Professor Joel D. Hesch
Liberty University School of Law
1971 University Boulevard
Lynchburg, VA 24515
JHesch@Liberty.edu
(434) 592-4251

Counsel for Amicus Curiae
Dated: March 2, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The False Claims Act Leaves no Room for the Judicially Created "Certification" Requirement. 4

II. The FCA does not contain a Certification Requirement. 8

III. The FCA Contains Five Safeguards that Adequately Protect Contractors and Eliminate the Need for a Certification Requirement. 10

IV. The Petitioner's Hypothetical Proves that there is No Need for a Certification Requirement. 17

V. If Certification is Required the Government can simply Require Contractors to Certify that All Provisions are Conditions of Payment. 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Heckler v. Cmty. Health Servs. of Crawford County, Inc.,
467 U.S. 51 (1984) 15, 16

Neder v. United States,
527 U.S. 1 (1999) 12

Rock Island, A. & L.R. Co. v. United States,
254 U.S. 141 (1920) 15

United States v. Dyncorp,
136 F.3d 676 (10th Cir. 1998) 9

United States v. Greene,
210 F.3d 373 (6th Cir. 2000) 9

United States ex rel. Clausen v. Lab. Corp. of Am., Inc.,
290 F.3d 1301 (11th Cir. 2002) 8, 9

United States ex rel. Fowler v. Caremark, R.X., LLC,
496 F.3d 730 (7th Cir. 2007) 9

U.S. ex rel. Hopper v. Anton,
91 F.3d 1261 (9th Cir. 1996) 12

U.S. ex rel. Hutcheson v. Blackstone,
647 F.3d 377 (1st Cir. 2011)..... 8, 10, 12

United States ex rel. Steury v. Cardinal Health, Inc.,
625 F.3d 262 (5th Cir. 2010) 4

United States ex rel. Wilkins v. United Health Group, Inc.,
659 F.3d 295 (3d Cir. 2011)..... 9

United States v. Mackby,
261 F.3d 821 (9th Cir. 2001) 9

United States v. Mackby,
339 F.3d 1013 (9th Cir. 2003) 14

United States v. Triple Canopy, Inc.,
775 F.3d 628 (4th Cir. 2015) 7, 8

Veridyne Corp. v. United States,
758 F.3d 1371 (Fed. Cir. 2014)..... 9

STATUTES AND REGULATIONS

31 U.S.C. §§ 3729-31 4

31 U.S.C. § 3729(a)(1)(A) 8

31 U.S.C. § 3729(a)(1)(B) 8, 12, 21, 22

31 U.S.C. § 3729(a)(d)(1) 12

31 U.S.C. § 3729(a)(d)(4) 18

31 U.S.C. § 3729(b)(4) 11

31 U.S.C. § 3730(c)(2)(A) 13

31 U.S.C. § 3730(c)(3) 13

OTHER AUTHORITIES

Fraud Statistics – Overview, Oct. 1, 1987 – Sept. 30, 2015, U.S. DEP'T OF JUSTICE (Nov. 23, 2015) (http://www.justice.gov/opa/file/796866/download). 4

Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards under the FCA*, 29 T.M. COOLEY L. REV. 217, 224 (2012) ... 4

Claire M. Sylvia, *The False Claims Act: Fraud Against the Government § 4:49. Other threshold issues—Materiality* 9, 11, 12

INTEREST OF *AMICUS CURIAE*[1]

Professor Joel D. Hesch is a tenured professor at Liberty University School of Law and an expert on the False Claims Act (FCA). He is the author of two whistleblower books[2] and several scholarly articles[3] relating to the FCA. Professor Hesch has been previously authorized to submit amicus briefs in three other FCA cases before this Court.[4] From 1990

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and not counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae made a monetary contribution to its preparation or submission.

[2] Joel D. Hesch, *Whistleblowing Rewards for Reporting Fraud Against the Government* (Third Ed. April 2013); Joel D. Hesch, *Reward: Collecting Millions for Reporting Tax Evasion (A Guide to the IRS Whistleblower Reward Program)* (March 15, 2009).

[3] Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed under the False Claims Act,* 38 SEATTLE L. REV. 901 (2015); Joel D. Hesch, *The False Claims Act Creates a 'Zone of Protection' That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 DRAKE L. REV. 361 (2014); Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards under the FCA*, 29 T.M. COOLEY L. REV. 217 (2012); Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt,* 6 LIBERTY UNIV. L. REV, 51 (2011); Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 LIBERTY UNIV. L. REV. 111 (2006).

[4] Brief for *Amicus Curiae* Professor Joel D. Hesch in support of Petitioner, dated April 6, 2015, filed in *U.S. ex rel. Gonzalez v. Planned Parenthood of Los Angeles* (No. 14-1080); Brief for *Amicus Curiae* Professor Joel D. Hesch in Support of

to 2006, Professor Hesch worked as a trial attorney in the Civil Fraud Section of the Department of Justice (DOJ), where he conducted nationwide FCA investigations affecting twenty different government agencies. While at DOJ, he facilitated cases recovering more than one billion dollars, including the trial of *Rockwell v. United States,* 549 U.S. 457 (2007). He now teaches as a professor and represents whistleblowers as a private attorney. Professor Hesch offers his scholarship and unique experiences with the FCA to aid this Court in ruling upon the circuit split pertaining to the so-called implied certification exception to the judicially created certification requirement.

SUMMARY OF ARGUMENT

The real illusion in the "implied certification" theory is the fictitious certification requirement. In fact, there is no need for an *implied* certification because there is no actual *certification* requirement in the False Claims Act (FCA). The FCA already contains five safeguards to protect against the dangers that prompted lower courts to re-write the FCA. In other words, this Court should not be addressing the proper parameters of the judicially created "implied certification," but should rather be deciding whether the underlying "certification" requirement is even appropriate in the first place. Simply stated, if it was improper for lower courts to

---

Respondents, dated January 22, 2008, filed in *Allison Engine Comp. v. U.S. ex rel. Sanders* (No. 07-214); Brief for *Amicus Curiae* Professor Joel D. Hesch in Support of Petitioner, dated June 26, 2014, filed in *U.S. ex rel. Gurumurthy Kalyanaram v. New York Institute of Technology* (No. 13-1444).

inject a certification requirement into the otherwise unambiguous FCA, there would be no reason for the courts to have created the implied certification exception.

This Court accepted the case because the lower courts are hopelessly split on setting the boundaries of the "implied certification" exception. The problem, however, is not with the judge-made exception to the rule, but the fact that judges made up the certification requirement. According to most lower courts, certification requires either that the allegedly violated contract provision or regulation actually state that it is a "condition of payment" or the contractor certify in its invoices that it complied with particular contract provisions notwithstanding that it is invoicing for performing **all** contract provisions.

To be liable under the FCA, it is clear that the government must only prove (1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent. Most lower courts, however, have also held that the FCA has a "materiality" requirement, which prevents FCA liability based upon merely ancillary or trivial requirements. Assuming the validity of the judicially added materiality requirement, there is no true need for courts to add yet another requirement into the FCA whereby not only must the claim be knowingly false and material, but there also must be a certification. What this Court should do is hold that the FCA requires materiality, which would obviate the need for the judicially added certification

requirement because the FCA properly reaches knowing violations of material contract or program requirements.

ARGUMENT

I. The False Claims Act Leaves no Room for the Judicially Created "Certification" Requirement.

As much as ten percent of all federal government spending is lost due to fraud.[5] The chief tool to combat fraud is the False Claims Act (FCA), 31 U.S.C. §§ 3729-31. *E.g., United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 (5th Cir. 2010). Since its modernization in 1986, the government has recovered over $45 billion in funds under the Act.[6] However, this still represents only a fraction of the amount of funds lost due to fraud.[7]

---

[5] *See* Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards under the FCA*, 29 T.M. COOLEY L. REV. 217, 224 (2012). Congress enlisted the help of the public when it included *qui tam* provisions in the False Claims Act (FCA), which authorize private individuals to receive a portion of the amount recovered for reporting fraud against the government. 31 U.S.C. §§ 3729-31. Today, over seventy percent of all fraud recoveries by the government are the result of *qui tam* cases. *See* Hesch, *supra, Breaking the Siege,* at 229 ("Whistleblower *qui tam* suits have become the Government's chief anti-fraud tool and account for about 70% of all funds the DOJ recovers from defrauders.").

[6] Fraud Statistics – Overview, Oct. 1, 1987 – Sept. 30, 2015, U.S. DEP'T OF JUSTICE (Nov. 23, 2015) (available at http://www.justice.gov/opa/file/796866/download).

[7] *See* Hesch, *supra* note 5*, Breaking the Siege,* at 224-25, notes 37-40 (estimating that more than $350 billion a year in

Therefore, it is vital that the courts give the FCA its full effect.

Recently, courts have undermined the FCA by injecting a judicially created "certification" requirement in the FCA, which threatens the effectiveness, and frankly, the viability of the FCA. In short, most lower courts have improperly added a requirement to the otherwise unambiguous FCA that the contract or regulation must specifically state which requirements rise to the level of "conditions of payment" or that invoices must certify what specific terms or conditions were satisfied.

Once broached, however, the subject of a "certification" requirement to the FCA quickly becomes a slippery slope. By now, most courts have realized that they must pull back from the certification theory and have created an exception, known as the "implied certification" exception. This is because few, if any contracts or regulations, actually contain any condition of payment language tied to any requirement, but instead assume that the billing entity will comply with **all** of the contract and program requirements. Thus, the implied certification theory was born through necessity because the FCA would cease to have meaningful application, let alone fulfill its purpose of recovering ill-gotten gains, if the judge-made certification requirement is left intact. A myriad of implied certification rules have since emerged, creating a circuit split to be decided by this Court.

---

government spending is lost due to fraud).

For instance, assume that a company wins a small business set-aside contract, but is not really a small business. Those following a judicially added *certification* rule would require that the contract state that being a small business is a "condition of payment" for the FCA to apply. The problem is that few, if any, contracts or regulations would satisfy this added judicial requirement and thus the certification rule is shielding contractors from FCA liability when they submit claims they know to be false. Indeed, few of the contracts or programs in which the government spends hundreds of billions of dollars annually go through the motions of identifying which contract provisions (that might later be knowingly breached) would be subject to only contract remedies and which would be subject to FCA remedies. Thus, most knowing submissions of false claims would fall outside of the judge-added certification requirement.

Because this judicial certification rule has the potential to swallow up the FCA, most courts have created some form of a so-called "implied certification" exception. Essentially, judges have identified situations in which they would *imply* that there was a certification when none exists. Not surprisingly, the judge-made exception to the judge-made rule has resulted in widely varying implied certification rulings. With respect to the small business example, some courts would insist that there be an express requirement in the contract or a certification in the invoice while others would imply a certification because it is obvious that the requirement was material.

The Fourth Circuit, which has a broad implied certification rule, cites to a hypothetical in which a company was required to supply ninety-one octane gas, but knowingly provided eight-seven octane gas. *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 636 (4th Cir. 2015). Because there was no mention in the contract that the octane level was a condition of payment and nothing in the invoice certified that the correct octane gas was supplied, the court noted that other circuits might hold that this case would be outside of the FCA in light of the judge-made "certification" theory. The answer by the Fourth Circuit was to assume that the entity *impliedly* certified that they complied with this contract term. To justify its lenient implied certification rule and to address the concerns that obscure rules might not be met, the court stated that it will insist upon strict adherence to the FCA's "materiality" requirement. *Id.* at 637. The court noted that it will also take a stringent view of the FCA's existing scienter requirement and ensure proper proof that the contractor knew it was not complying with a material requirement. *Id.* If both existing FCA safeguards are met, the Fourth Circuit would imply a certification where no certification exists. What the court should have held instead is that if both are met, there is no need for a certification requirement.

As demonstrated by the logic of the Fourth Circuit, the real illusion in the "implied certification" theory is the fictitious certification requirement. In fact, there is no need for an implied certification because there is no actual *certification* requirement in the FCA, as specifically noted by the First Circuit.

United States ex rel. Hutcheson v. Blackstone, 647 F.3d 377, 385 (1st Cir. 2011).

As shown below, there are two reasons why this Court should strike the judicially created certification element. First, there is no room to interpret the FCA as requiring the additional certification requirement because the statute is clear and unambiguous. Second, and of critical importance, the FCA already provides five safeguards that protect against the dangers noted by the Petitioner. In other words, there is no authority for a court to re-write the FCA to add protections that do not rise to the level of a constitutional guarantee simply because a judge would have drafted the statute differently or desired more defenses.

II. The FCA does not contain a Certification Requirement.

The FCA is straightforward. The most common liability provisions state that a person is liable if he or she either (a) "knowingly presents … a false or fraudulent claim for payment or approval," or (b) "knowingly makes [or] uses … a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A) & (B). It is settled that a *prima facie* case under the False Claims Act "requires that (1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent."[8] Courts also require that

[8] *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1310 n. 19 (11th Cir. 2002); *accord United States ex*

the false claim be "material" to payment. Although the FCA did not add "materiality" until the 2009 Amendments, and then only included it under section (a)(1)(B), most courts had previously held that materiality was implicit in all liability provisions in the Act. *See* Claire M. Sylvia, *The False Claims Act: Fraud Against the Government § 4:49.*

---

rel. Wilkins v. United Health Group, Inc., 659 F.3d 295, 305 (3d Cir. 2011) ("(1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent."); *United States ex rel. Fowler v. Caremark, R.X., LLC*, 496 F.3d 730, 741 (7th Cir. 2007) ((1) a false or fraudulent claim; (2) which was presented, or caused to be presented, by the defendant to the United States for payment or approval; (3) with the knowledge that the claim was false."); *United States v. Mackby*, 261 F.3d 821, 826 (9th Cir. 2001) ("(1) a "false or fraudulent" claim; (2) which was presented, or caused to be presented, by the defendant to the United States for payment or approval; (3) with knowledge that the claim was false"); *Veridyne Corp. v. United States*, 758 F.3d 1371, 1378 (Fed. Cir. 2014) ("(1) the contractor presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; (3) the contractor knew the claim was false or fraudulent; and (4) the United States suffered damages as a result of the false or fraudulent claim."); *United States v. Greene*, 210 F.3d 373 (6th Cir. 2000) (" (1) that the defendant presented a false or fraudulent claim against the United States; (2) that the claim was presented to an agency of the United States; and (3) that the defendant knew that the claim was false, fictitious, or fraudulent."); *United States v. Dyncorp*, 136 F.3d 676, 682 (10th Cir. 1998) ("(1) a "claim" was presented to the government by the defendant, or the defendant "caused" a third party to submit the "claim," (2) the claim was "false or fraudulent," (3) the defendant presented the claim knowing it was "false or fraudulent," and (4) the defendant made or used a false statement which the defendant knew to be false, and which was causally connected to the false claim.").

Other threshold issues—Materiality (gathering cases).

The FCA could not be clearer that these are the only requirements for liability. There simply is no ambiguity that would permit a court to add yet another element, known as the certification rule. As noted by the First Circuit, the FCA neither expressly nor impliedly contains any requirement that the contractor also *certify* to compliance with every condition or that a regulation specifically state it is a condition of payment. *Blackstone*, 647 F.3d at 385. Accordingly, the FCA itself is unambiguous and does not contain or leave room for the certification requirement.

The next section demonstrates that there is no significant need, let alone judicially permissible reason, for the courts to create a certification requirement because the FCA already contains five protections to withstand appropriate judicial scrutiny and adequately protect contractors. Again, the role of the courts is not to re-write statutes to offer what a judge might consider the best possible protection, but to enforce statutes that comply with the limits of the Constitution.

III. The FCA Contains Five Safeguards that Adequately Protect Contractors and Eliminate the Need for a Certification Requirement.

Although companies are happy to be awarded complex government contracts worth millions of dollars, they come up with a myriad of reasons to cry

foul when they get caught for knowingly failing to live up to the terms because they are subject to treble damages under the FCA. The primary complaint in this setting is that there are too many requirements to keep straight and therefore they should not be held to the letter of the contract for FCA liability. Many courts have bought into this argument and have added the so-called *certification* requirement.

In order to justify re-writing an unambiguous statute to provide additional protections not provided for by Congress, a court must first find a fatal flaw in the statute, such as violating some constitutional protection or mandate. As shown below, there exist five different types of safeguards that eliminate the risks cited by the Petitioner. Therefore, this Court should not decide which implied certification theory is best, but rather should find that the FCA already provides all the necessary constitutional protections without adding the certification element.

First, most courts have held that the FCA itself already has a "materiality" requirement, which prevents FCA liability based upon merely ancillary or trivial requirements. *See* Claire M. Sylvia, *The False Claims Act: Fraud Against the Government § 4:49. Other threshold issues—Materiality* (gathering cases). The FCA defines materiality as having a "natural tendency to influence, or be capable of influencing" the government's decision to pay a claim. 31 U.S.C. § 3729(b)(4). Only if a court finds that the violated provision was material does FCA liability attach. Because this is one of the most significant protections obviating the need for the

certification theory, this Court can and should bring certainty to this area of the law by finding that the 2009 materiality provision applies to all FCA liability provisions, and not just § 3729(a)(1)(B). This is something this Court has done in other settings. *See Neder v. United States*, 527 U.S. 1, 23 (1999) (determining that materiality is a requirement for liability under the federal mail fraud and bank fraud statutes). In short, it would be far more proper for this Court to determine that the FCA requires materiality than to impose a requirement that every government contract or program contain specific language identifying which provisions are "conditions of payment" through the judicially created certification requirement.

Second, the FCA requires proof that the contractor *knew* that the claim was false.[9] The FCA does not impose liability for innocent mistakes or mere differences of opinion. *E.g., United States ex rel. Hopper v. Anton,* 91 F.3d 1261, 1268 (9th Cir. 1996) ("Innocent mistakes, mere negligent misrepresentations and differences in interpretations are not false certifications under the Act."). Rather, the FCA defines "knowing" conduct to mean actual knowledge of the falsity or acting with deliberate ignorance or reckless disregard for the truth. 31 U.S.C. § 3729(a)(d)(1).

Third, the FCA protects against overreaching relators. A concern raised by some contractors is a

---

[9] With respect to the first two safeguards, materiality plus scienter, the Fourth Circuit cited both as the basis for finding implied certification. *Blackstone*, 647 F.3d at 385.

fear of a relator chasing trivial or non-material claims when the government declines to intervene in a FCA *qui tam* case. This is because the FCA grants the relator the ability to go forward alone. 31 U.S.C. § 3730(c)(3). However, Congress built into the FCA protections from a relator's attempt to characterize every minor contract infraction as fraud or damages for noncompliance with merely ancillary regulations. Not only must the relator still prove the false claims were *material* and that the contractor acted *knowingly*, but the FCA has several specific safeguards to protect against wayward relators. Specifically, not only does the government have the power to intervene and take over the prosecution of a *qui tam* action, the FCA vests the government with the right to settle the case, limit discovery, and, most importantly, the power to unilaterally "dismiss the action notwithstanding the objections" of a relator. 31 U.S.C. § 3730(c)(2)(A). Thus, both the courts and the government have the ability to keep relators from proceeding with allegations that are immaterial or would harm government programs.

Fourth, the contractor also has a few additional protections available that are outside of the text of the FCA, which further demonstrates why there is no legitimate basis for a court to scale back the FCA by inserting a certification element due to a perceived fear of overreaching. For instance, the contractor can always seek legal advice from counsel when wondering if a regulatory requirement is either required or material. In addition, the contractor should engage in frank discussions with the government when in doubt whether a provision in a contract or regulation is required. Choosing to bury

one's head in the sand is not (and ought not be) a valid defense to a government contract when it is otherwise shown that the contractor knowingly violated a material contract requirement.

Fifth, the measure of damages provides a final safety valve from trivial violations becoming significant liability under the FCA. If the materiality and scienter provisions were not enough protection, the government must still attribute damages to the provision that was violated. For instance, in the hypothetical presented by the Petitioner, it feared that not topping off the lawn mower's gas tank before mowing might be grounds for FCA type liability. Yet, even if it could get past the materiality requirement, which would be very unlikely, the government would still need to apportion damages attributable to such breach. It is doubtful that the contractor would be subject to damages for failing to fill the gas tank before mowing.[10]

In sum, not only is the FCA clear and unambiguous, but there already exist at least five safeguards protecting contractors from onerous or unforeseen liability hiding within potentially

---

[10] Although the FCA does not require damages to be awarded civil penalties, courts are reluctant to award significant civil penalties when disproportional to damages. *E.g., United States v. Mackby,* 339 F.3d 1013, 1018 (9th Cir. 2003) (awarding civil penalties on only 111 of 1,459 false claims to avoid excessive fines where treble damages amounted to $175,000). The constitutional parameters of the amount of civil penalties is outside of the scope of this case, but do not diminish the fact that damages are an additional protection from overreaching allegations.

hundreds of legal requirements in regulations incorporated into government contracts. Unless this Court finds the FCA ambiguous or unconstitutional, it cannot sustain re-writing the statute. Merely because some judges wished that Congress had added a certification element above and beyond these five protections does not give the courts such legislative authority. Therefore, there is no basis for this Court to allow the lower courts to rewrite the statute to add the certification element.

Petitioner gives mere lip service to why the FCA's materiality and scienter elements do not protect against abuses. It begins by faulting the Court of Appeals for thinking that "just by submitting a claim, the claimant 'implicitly communicates that it has conformed to the relevant program requirements.'" Br. at 29. The Petitioner argues that this logic is not found or supported by the FCA. What the Petitioner fails to accept is that when one agrees to perform a government contract, they agree to turn square corners and comply with all requirements, understanding therefore that the contract price is based upon full compliance. *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63 (1984) ("Men must turn square corners when they deal with the Government.") (*citing Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920)). According to this Court in *Heckler*,

> This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard

> for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law. *Id.*

At best, Petitioner resorts to policy arguments regarding why materiality combined with scienter does not offer the protection it hoped Congress would have provided. Specifically, the Petitioner complains that it can be hard to determine which portions of the contract are material. The solution it offers to this Court is to require "certainty" by forcing every government contract or program to identify which requirements are not only *material*, but form a condition of payment, even though the government wants compliance with all provisions. That is not a valid reason to alter the plain language of a statute that establishes materiality as the benchmark.

What the Petitioner is really asking is for this Court to pick what it views as the best way to draft a statute, between (1) following the protections in the FCA enacted by Congress, which relies heavily upon materiality and scienter requirements (but allows the contractor to seek advice from counsel or the government when in doubt), or (2) re-writing the FCA by first adding a certification rule and then creating a very strict exemption to the judge-made certification rule, such that only if the regulation or contract expressly states that a particular contract or

program requirement is a condition of payment does the FCA apply. The second option, however, is not something this Court can do. Its role is *not* to determine if there is a better way Congress *could have* drafted a statute that offers more protection to one party, but to enforce clear and unambiguous statutes.

IV. The Petitioner's Hypothetical proves that there is No Need for a Judicially Created Certification Requirement.

The Petitioner relies upon a hypothetical case involving mowing the lawn by a child named Johnny. In addition to mowing the lawn, the contract contained three conditions: (1) wear protective safety goggles, (2) fill the lawn mower with gas before starting, and (3) mow the lawn only between 3:00 and 5:00 p.m., when most of the neighbors will not yet be home from work. Br. at 3. Johnny admits that he knew and agreed to keep all three, but then purposefully chose to ignore each of them. Leaving aside that this was not a government contract for the moment, Petitioner asserts that no FCA liability can be attached to mowing outside of the required time because there was no mention in the contract that it was a "condition of payment."

This hypothetical provides a good opportunity to determine if the five FCA safeguards provide the necessary protections to eliminate the need or ability of the courts to judicially add a sixth protection in the form of a certification requirement.

First, did Johnny have the requisite *scienter*? The Petitioner stated that Johnny clearly knew and agreed to mow at 3:00 p.m. He made a conscious decision to breach that provision, without asking for a modification to the agreement. Accordingly, the scienter element is met. However, there are other safeguards or elements needed before FCA liability can attach.

Second, was mowing the lawn at 3:30 p.m., instead of 3:00 p.m. *material*? It is very unlikely that this would meet the FCA's definition of materiality, which is defined as having a "natural tendency to influence, or be capable of influencing" the government's decision to pay a claim. 31 U.S.C. § 3729(a)(d)(4). If however, he had mowed at midnight and woke up the neighborhood, it would be material. But, under the Petitioner's hypothetical, it would not amount to a FCA violation even without a judicially added certification requirement.

Third, what damages, if any, would be attributable to mowing 30 minutes late? Leaving aside that there would be no FCA case because it was not material, it is also unlikely that the value of the contract would be affected for mowing 30 minutes late.

Fourth, Johnny could have asked his mom for advice if he can mow the lawn at 3:30 p.m. She could have waived the timing. She certainly would have preferred being asked than the "Johnny come lately" approach of seeking forgiveness instead of asking for permission.

Fifth, if a neighbor was offered a reward for reporting that Johnny violated the contract, Johnny's mom, as the real party in interest, can settle or even dismiss the whistleblower's case if she thinks it would interfere with her contract or program. Thus, mom has the ability to control trivial claims by those seeking a reward.

In short, the overarching problem with the entire petition is that it fails to recognize that a court cannot substitute its judgment for Congress and re-write the law to require that the contract expressly state which, if any, provisions are conditions of payment, when there already exist five sufficient safeguards. These protections work remarkably well, and in Johnny's case, missing the mowing time by 30 minutes would likely not result in FCA liability. The same result would apply for the other two minor violations of not topping off the tank or wearing safety glasses. If Johnny wanted more certainty, he could have simply asked his mom for clarification. That is not a flaw in the law, but a conscious decision to knowingly submit a false claim and then hope it was not material in the eyes of the government or a court. In any event, the five safeguards would prevent a FCA claim for any of the three immaterial violations listed in Petitioner's hypothetical even without a judicially created certification requirement. On the other hand, to require a certification would exempt from the FCA Johnny billing for mowing even if he did not mow because the contract contained no mention that mowing was a condition of payment and the invoice did not certify that he mowed the lawn.

V. If Certification is Required the Government can simply Require Contractors to Certify that All Provisions are Conditions of Payment.

If this Court upholds the judicially created certification requirement, it would disrupt government contracting because every agency would have to evaluate and modify every government contract or program in order to identify which contract provisions are deemed "conditions of payment." Because the government expects all contract terms to be complied with, one solution would be for the President to issue an Executive Order or Congress to pass a law requiring all government contracts to contain the following sentence in every contract or program: "Each and every contract provision or program requirement is a condition of payment." They could also demand that every invoice contain a certification that the contractor complied with all contract or program requirements.

If the government adds a broad condition of payment clause to every contract, then every government contract would satisfy the so-called judicially created certification requirement. We would be back to square one; asking if the FCA meets constitutional muster through its existing five safeguards (*i.e.*, materiality, scienter, limitations on relators, ability to seek advice from counsel or the government, and proof of damages). As demonstrated herein, these five safeguards provide the necessary constitutional protections and adequate shelter against abuse even without the courts adding a

certification requirement. Therefore, the courts should not re-write the statute to require a condition of payment clause in the contract or certifications of compliance in invoices.

What this Court should do is make clear that the existing *materiality* provision applies to *all* FCA liability provisions, not just § 3729(a)(1)(B). Doing so would obviate the need for creating a certification requirement in the first place because the clear language and intent of the FCA is to reach all knowing submissions of false claims that are *material*. Conversely, if this Court were to find that the FCA contains a certification requirement, it should hold that contractors impliedly certify that they complied with all *material* contract and program requirements. Either way, the materiality requirement, combined with the other four safeguards, provides sufficient protections to contractors while still satisfying the goals of the FCA.

CONCLUSION

This Court will be doing more than addressing the legitimacy and parameters of the judicially created "implied certification" exception when it decides this case, but it will effectively be deciding the fate of the False Claims Act. This is particularly so because contracts rarely contain any indication of conditions of payment and invoices generally do not contain any certification of compliance. Thus, if this Court upholds the certification requirement added by the lower courts, many knowing violations of government contracts would be outside of the FCA's

reach, absent a judicially created implied certification exception. Therefore, this Court should begin its examination by addressing whether courts have authority to re-write the unambiguous FCA to inject a certification requirement in the first place. In fact, there is not only no room for the courts to rewrite the unambiguous FCA by inserting a certification requirement, but there is no true need for it because there already exist five safeguards that fully account for the doomsayers' fears that every breach of contract will become a FCA case or that failing to follow some obscure regulation will result in treble damages.

What this Court should do in order to provide more clarity and certainty of these protections is to find that the existing FCA *materiality* provision applies to *all* FCA liability provisions, not just § 3729(a)(1)(B). Indeed, if a knowing submission of a false claim is considered *material*, it is clearly already within the proper reach of the FCA, with or without a certification requirement. To suggest that this Court now needs to create a second judicial rule in order to remedy the adverse effects of the first is circular reasoning. Since there is no need for the certification requirement, there is no need for implied certification either.

Respectfully submitted,

/s/ Professor Joel D. Hesch
Liberty University School of Law
1971 University Boulevard
Lynchburg, VA 24515

JHesch@Liberty.edu
(434) 592-4251

Dated: March 2, 2016
Counsel for *Amicus Curiae*