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

BRIEF OF U.S. SENATOR CHARLES E. GRASSLEY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ROBERT L. KING
Counsel of Record
AARON M. ZIGLER
NOAH SMITH-DRELICH
KOREIN TILLERY, LLC
205 N. Michigan Avenue
Suite 1950
Chicago, Illinois 60601
(312) 641-9750
rking@koreintillery.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Senator Charles E. Grassley was the principal sponsor in the Senate of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, which modernized the FCA and made it a more effective weapon against Government fraud. Senator Grassley was also one of the Senate sponsors of the Fraud Enforcement & Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617, which further strengthened the FCA as a weapon against fraud affecting federal programs. In addition to serving as Senate sponsor, Senator Grassley has remained active in Congress in defending the original intent of the legislation. Senator Grassley thus has a strong interest in ensuring that the Court interprets the FCA in accordance with Congress's intent.

SUMMARY OF ARGUMENT

Never, throughout its long history, has the FCA required that a knowingly false or fraudulent claim for payment be accompanied by an express false certification of compliance. Congress wrote the FCA broadly to make it equal to the task of reining in the increasingly resourceful and ever-changing ways in which swindlers attempt to cheat the Government. Then, recognizing that false and fraudulent claims can take "many forms," the 1986 Congress reaffirmed that (1) the FCA's core purpose is to capture every

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[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 Senator Grassley and his counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

form of fraudulent scheme that threatens the public fisc, and (2) the Act must be broadly construed to serve these ends. The key question before the Court is this: Is an express false certification required for purposes of the FCA when a contractor *knowingly* provides goods and services the Government *clearly did not bargain for*? The answer, Senator Grassley submits, is no.

ARGUMENT

I. THERE IS NO EVIDENCE THAT CONGRESS EVER INTENDED THE FALSE CLAIMS ACT TO REQUIRE AN EXPRESS FALSE STATEMENT WHERE A CITIZEN KNOWINGLY FAILS TO PROVIDE GOODS OR SERVICES FOR WHICH THE GOVERNMENT DID NOT BARGAIN.

Petitioner and its amici argue that the FCA's language is qualified by an unwritten limitation: that false claims knowingly made in violation of Government requirements are false only if accompanied by a false express certification of compliance. Pet. Br. at 36; *see also* Brief of Washington Legal Foundation at 20; Brief of the National Association of Criminal Defense Lawyers at 21. Such a narrow construction of the FCA runs contrary to Congress's original intent to address fraud against the Government and then to strengthen and correct narrowing interpretations of the Act through its 1986 and 2009 amendments.

A. Since the Civil War, the FCA Has Been Intended to Be a Flexible Tool for Combating Fraud Against the Government.

Never, throughout its long history, has the FCA required that a knowingly false or fraudulent claim for payment be accompanied by an express false cer-

tification of compliance. No such requirement has ever been a part of the FCA's text, nor has one ever been suggested in any legislative history.

At the time of its passage, Congress intended that the FCA be used to combat the myriad fraudulent schemes perpetrated on the Government in the midst of the Civil War. *See, e.g.*, Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863) (statements of Sens. Wilson, Howard, Davis). The contractors who supplied defective, non-conforming goods and services to the Government were not required to provide "certifications of compliance." Unsurprisingly, then, there is no evidence that Congress in 1863 would have intended express false certification to be a prerequisite for liability under the statute. Rather, legislators were simply concerned then, as they were in later years, that the Government not fall prey to contractors who knowingly provide what the Government never intended to pay for. In other words, Congress sought to ensure that payments made by the Government, as Petitioners state, "truthfully reflect the services rendered." Pet. Br. at 4

Congress passed the FCA in response to widespread military contractor fraud against the Union Army in the Civil War. Congress had received reports of numerous fraudulent schemes: that the same mules were being sold repeatedly to Army quartermasters; that rotted ship hulls had been re-painted and then sold as new to the Navy; that infantry boots were manufactured from cardboard; that uniform cloth was made from recycled rags; and that gunpowder barrels were shipped containing sawdust. *See, e.g.*, 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman); Wayne Andrews, The Vanderbilt Legend 77-84 (1941); Cong. Globe,

37th Cong., 3d Sess. 955 (1863); Shoddy Army Contracts, Sacramento Daily Union, Sept. 27, 1861, at 4; Cong. Globe, 37th Cong., 3d Sess. 955 (1863). Congress was faced with an unprecedented problem: an epidemic of fraud arising from a diverse multitude of conspirators threatening the Treasury.

Realizing that existing laws and enforcement powers were inadequate to combat these frauds, Congress passed the False Claims Act. *See* Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863) (statements of Sens. Wilson, Howard, Davis). Congress wrote the FCA broadly to make it equal to the task of reining in the increasingly resourceful and ever-changing ways in which swindlers attempt to cheat the Government. As one contemporary court noted:

> [The False Claims Act] is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory … that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting … under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

United States v. Griswold, 24 F. 361, 366 (D. Or. 1885); *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (quoting *Griswold* with approval); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (same). Courts through the years have continued to recognize that Congress intended the FCA to be flexible and far-

reaching, and to ensure that "contractors … 'turn square corners when they deal with the government.'" *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995) (quoting *Rock Island, Arkansas & Louisiana R.R. Co. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.)); *United States v. Neifert-White Co.*, 390 U.S. 228 (1968).

What Congress did not do was require contractors to provide an express false certification of compliance to trigger liability. And there was no reason for it to do so. The means by which the Government was provided with goods and services in 1863 did not include compliance forms complete with tidy compliance certification checkboxes. Moreover, there is no evidence—and it is nonsensical to suggest—that Congress would not have minded the Government paying for cardboard boots as long as the cardboard boot supplier did not affirmatively lie about the boots containing cardboard. Given these realities of how contractors supplied the Government, an express certification requirement would have made little sense to Congress in 1863, particularly in light of Congress's central concern at the time: to protect "our Treasury [from being] plundered from day to day by bands of conspirators." Cong. Globe, 37th Cong., 3d Sess. 955 (statement of Sen. Howard).

B. Congress's Modern Amendments to the FCA Embraced the Earlier Congress's Original Intent and Strengthened the Act's Capacity to Serve its Broad Remedial Purposes.

When Congress took up the pen once more in 1986 to strengthen the False Claims Act, Senator Grassley and his colleagues echoed the concerns of the Act's original supporters. As in 1863, among Congress's

chief concerns were frauds involving the provision of goods and services that failed to conform to the Government's requirements. As Senator Grassley remarked, the "Civil war era horror stories," like "contractors selling boxes of sawdust in place of boxes of muskets and reselling horses to the cavalry two and three times" still "sound all too familiar." 132 Cong. Rec. S11238-04 (daily ed. Aug. 11, 1986) (statement of Sen. Grassley). The FCA is "in desperate need of reform."… [T]he Government needs help and, in fact, needs lots of help to adequately protect the Treasury against growing and increasingly sophisticated fraud." *Id.*

Senator Grassley was not alone in recognizing the seriousness of this problem. During one Senate hearing, a speaker testifying on behalf of Business Executives for National Security (BENS) presented a list of defense contractors that were currently under investigation for fraud. Among these frauds were "noncompliance with contract" and "product substitution." *FCA Hearing Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary*, 99th Cong. 109 (1985) (statement of D. Wayne Silby, representative from BENS). In addition, the Inspector General of the Department of Defense (DOD) testified that defense contractors were supplying the Government with "shoddy material" such as "armorplate that is one-fourth the specification" or a "parachute shroud line that is made out of 25-year-old nylon tire cord." *Defense Procurement Fraud Law Enforcement, Hearing before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary*, 99th Cong. 22 (1985) (statement of Joseph Sherick, Inspector General, Department of Defense).

The only significant difference between 1986 and 1863 seemed to be the size and scope of the fraudulent schemes assaulting the public fisc.

At the time of the 1986 amendments, the Department of Justice informed Congress that fraud was "draining 1 to 10 percent of the entire Federal budget," or "$10 to $100 billion annually." S. Rep. 99-345, at 3 (1986), 1986 U.S.C.C.A.N. 5266, 5268. One of the primary offenders, Congress recognized, was health care fraud, which had become a major drain on public resources by 1986. *See, e.g.*, S. Rep. 99-345, at 21-22 (1986), 1986 U.S.C.C.A.N. 5286-87 ("[C]laims under the Medicare and Medicaid programs are claims 'upon or against the Government.'"). In a 1985 report to Congress by the Economic Crime Council—an advisory body to the DOJ established by the Attorney General—the Council established health care programs as an "area[] of national significance relating to economic crime." *Report of the Economic Crime Council to the Attorney General: Investigation and Prosecution of Fraud in Defense Procurement and Health Care Benefits Programs*, U.S. DEPARTMENT OF JUSTICE, Washington, D.C., 1985, at i.

Recognizing that false and fraudulent claims can take "many forms," S. Rep. 99-345, at 9 (1986), 1986 U.S.C.C.A.N. 5274, the 1986 Congress reaffirmed that (1) the FCA's core purpose is to capture every form of fraudulent scheme that threatens the public fisc, and (2) the Act must be broadly construed to serve these ends. Specifically noting that "[t]he Supreme Court's Opinion in *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), indicated that the False Claims Act 'was intended to reach *all* types of fraud, without qualification, that might result in financial loss to the Government,'" the 1986 Congress

expressed its "strong[] endorse[ment] [of] this interpretation of the act." S. Rep. 99-345, at 19 (1986), 1986 U.S.C.C.A.N. 5284 (emphasis added).

And as in 1863, there is no evidence Congress contemplated a "qualification" of an express false certification of compliance. Quite the contrary. The legislative history demonstrates that Congress was specifically concerned with, among other things, implicitly false or fraudulent behavior in goods and services contracts.

Reflecting the importance of combating frauds involving provision of non-conforming goods, the 1986 Senate Report made clear that "a false claim may take many forms, the *most common* being a claim for goods or services not provided, or *provided in violation of contract terms, specification, statute, or regulation*." S. Rep. 99-345, at 9 (1986), 1986 U.S.C.C.A.N. 5274 (emphasis added). That language describes the so-called implied certification theory of falsity.

The cases cited in the Senate Report similarly underscore the viability of the implied certification theory. Both *United States v. Bornstein*, 423 U.S. 303 (1976) (subcontractor was liable for causing contractor to overbill the Government for goods that did not meet the Government's specifications, despite the fact that there was no express certification of compliance or active concealment by the contractor of the subcontractor's noncompliance), and *United States v. Henry*, 424 F.2d 677 (5th Cir. 1970) (contractor delivered goods that did not meet Government specifications, but the invoices at issue contained no express certification regarding compliance with those certifications), involved impliedly false certifications.

The 1986 Senate Report also expressly describes ineligible claims for payment as being "false or

fraudulent." Congress specifically identified claims submitted by Medicare and Medicaid providers who are ineligible to receive payment under those programs, citing *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975) ("A claim is within the purview of the False Claims Act if it is grounded in fraud which might result in financial loss to the Government."). There should be no doubt that Congress employed broad statutory language aimed at least in part at certifications of eligibility for Government payment, particularly under programs like Medicare and Medicaid.

C. An Express False Statement of Compliance Requirement Would Contradict Congress's FCA Policy Aims.

Finally, it is helpful to consider the policy ramifications of requiring, for the first time, an express false statement of compliance for False Claims Act liability.

The FCA is primarily concerned with the conduct of knowingly requesting payment for something for which the Government did not bargain—whether or not that conduct is associated with false representations, express or otherwise. After all, a delivery of muskets mislabeled "sawdust" would not implicate FCA concerns. In Petitioner's words, the Government would not argue that the goods were not "truthfully rendered." Pet. Br. at 4. But should the Court adopt Petitioner's restrictive interpretation, Pet. Br. at 3-4, 42; Resp. Br. at 41-55, the knowing provision of boxes of sawdust in place of muskets, shoddy uniforms, and parachutes made out of quarter-century old nylon cord would all escape liability, unless the contractor orally or in writing specifically stated it had provided everything according to the Government's specifica-

tions. In these examples, regardless of what the contractor said or did not say, the Government did not get what it paid for, and the contractor knew it. And if the Court agrees that eligibility for federal programs is not an actionable element under the FCA, Pet. Br. at 29-33, then persons or entities that are not qualified at all to participate in the program may also escape liability for fraud. Resp. Br. at 49. The financial consequences of this would be severe. From 1987 to 2015, over $31.1 billion has been recovered in healthcare-related FCA actions. *See* Department of Justice, Fraud Statistics—Health and Human Services, October 1, 1987 — September 30, 2015, *available at* https://www.justice.gov/opa/file/796866/ download.

The key question before the Court is this: Is an express false certification required for purposes of the FCA when a contractor *knowingly* provides goods and services the Government *clearly did not bargain for*? The answer, Senator Grassley submits, is no. It has always been no. Senator Grassley does not express an opinion on whether the historically grounded, congressionally reaffirmed theory of implied false certification of liability applies to the facts of this case. But if the Court denies the theory altogether, it would severely hamper the Government's ability to recover taxpayer funds lost to fraud.

CONCLUSION

For these reasons and those in the respondent's brief, the judgment of the court below that implied false certifications fall within the FCA should be affirmed.

Respectfully submitted,

ROBERT L. KING
COUNSEL OF RECORD
AARON M. ZIGLER
NOAH SMITH-DRELICH
KOREIN TILLERY, LLC
205 N. Michigan Avenue
Suite 1950
Chicago, Illinois 60601
(312) 641-9750
rking@koreintillery.com

Counsel for Amicus Curiae

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