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IN THE SUPREME COURT OF THE UNITED STATES

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UNIVERSAL HEALTH SERVICES, INC., :
Petitioner : No. 15-7

v. :

UNITED STATES AND MASSACHUSETTS, :
EX REL. JULIO ESCOBAR AND CARMEN :
CORREA, :
Respondents. :

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Washington, D.C.
Tuesday, April 19, 2016

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:01 a.m.

APPEARANCES:

ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf
of Petitioner.

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of
Respondents.

MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; for United
States, as amicus curiae, supporting Respondents.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 15-7, Universal Health Services v. The United States and Massachusetts ex rel. Escobar and Correa.

Mr. Englert.

ORAL ARGUMENT OF ROY T. ENGLERT, JR.

ON BEHALF OF THE PETITIONER

MR. ENGLERT: Thank you, Mr. Chief Justice, and may it please the Court:

This entire case turns on four words of the statute: "False or fraudulent claim." "False" and "fraudulent" have been unchanged since 1863 in this statute. "Claim" is defined by statute.

I'll come back to those words.

Three separate State agencies investigated the facts of this case in detail. All three agencies produced lengthy reports and proposed remedial measures for certain alleged regulatory violations. No agency asked for any money back. No sanction at all was imposed on the company. One individual was fined \$1,000 and the claimant director was given two years of supervision.

Through the magic of the

1 implied-certification theory under the False Claims Act,
2 the very same facts have now been recharacterized as
3 fraud on the government.

4 The First Circuit focused on a single
5 alleged regulatory violation involving a regulation not
6 cited in the complaint, not cited in any appellate
7 brief, not cited in the amicus brief of the Commonwealth
8 of Massachusetts. That is not what "fraud" means.

9 Now, coming back to the four words that
10 matter, "false or fraudulent claim."

11 "False" means false. This Court construed
12 that word in Williams v. United States. Footnote 3 of
13 Respondents' brief unsuccessfully tries to distinguish
14 Williams. The Solicitor General ignores Williams.

15 JUSTICE GINSBURG: It can't mean misleading,
16 then?

17 So "false" can only mean false? It can't
18 mean deceptive, misleading?

19 MR. ENGLERT: It cannot, Justice Ginsburg.
20 Because the body of law that covers deceptive and
21 misleading statements is not falsity. It's the law of
22 fraud. And the law of fraud is stated in Section 551 of
23 the Restatement (Second) of Torts.

24 JUSTICE BREYER: Suppose you have a private
25 contract. In the private contract, it's for medical

1 services. The written part does not actually use the
2 word "doctor," but the circumstances are such that any
3 reasonable person would assume, would believe that the
4 parties contracted for medical services provided by a
5 doctor.

6 This is an ordinary contract case. Could
7 not a jury or the judge find that that implicit term of
8 the contract that the services would be provided by a
9 doctor was breached, it was a material breach, and,
10 therefore, the implicit statement was false?

11 MR. ENGLERT: Two responses, if I may,
12 Justice Breyer.

13 First, the whole problem here is the
14 tortification of contract. Yes, that's a good contract
15 case, but it's not automatically a good tort case.

16 The second answer --

17 JUSTICE BREYER: No, no. What's the second?

18 MR. ENGLERT: Section 551(2)(e) of the
19 Restatement deals with that exact situation, facts basic
20 to the transaction. So the common law has developed a
21 meaning of fraud that will accommodate the cases in
22 which liability makes sense because every reasonable
23 person, as Your Honor said, would assume something to be
24 true.

25 Comments j and k and Illustrations 3, 4, 5

1 and 6 of the Restatement -- rather, 3, 4, 5, 6, 7 and 8,
2 give one example of facts basic to the transaction and
3 five examples of facts not basic to the transaction. It
4 is a very, very, very narrow duty of disclosure.

5 JUSTICE BREYER: Well, fine. But now let's
6 go a step further. We have our contract. The facts are
7 such that any reasonable person would assume there is an
8 implicit statement that the services will be provided by
9 a doctor. You say that could be a breach of contract.

10 Now it turns out that this company that has
11 that contract has sold the shares over the SEC. And the
12 SEC says, you know, it's so obvious that that implicit
13 statement in the contract meant that they had a doctor
14 who was a doctor -- that's so obvious -- that we think
15 in selling shares in this company, where indeed this
16 contract was absolutely critical, millions of dollars
17 was at stake, without a doctor, violating of implicit
18 statement that there was a doctor, we think that's fraud
19 under Rule 10(b)(5).

20 MR. ENGLERT: I'm glad Your Honor brought
21 that up.

22 JUSTICE BREYER: All right.

23 MR. ENGLERT: The SEC has a habit of
24 construing fraud under 10(b)(5), and this Court has a
25 habit of reining the SEC in. And the Chiarella case is

1 quite key here. And Chiarella is not cited in
2 Respondents' brief. It's not cited in the government's
3 brief. In all the dark green amicus briefs, it's cited
4 once, and the citation is to the dissent. Chiarella
5 says fraud in a statute is very broad, but it's broad
6 enough to cover the common law and no more. If Congress
7 wants to go broader than the common law --

8 JUSTICE BREYER: Well, fine. But what is --
9 I'm talking the common law. All I know about contracts
10 came from Blackjack Dawson, my contracts teacher --

11 (Laughter.)

12 JUSTICE BREYER: -- who was a great teacher,
13 and he taught the common law. So I don't know anything
14 else. I -- well, I won't go quite that far, but
15 nonetheless. Nonetheless, I think under common law, you
16 could say that that was a material breach of contract,
17 what I just talked to. And indeed, there happened to be
18 a whole set of regulations on the shelf, et cetera,
19 which spell it all out to which there was an implicit
20 reference in the contract if it's -- you understand what
21 I'm saying. It's common law that I'm saying.

22 MR. ENGLERT: Well, the thousands of pages
23 of regulations and the implicit reference in the
24 contract are not what the common law means by fraud.
25 They are, sadly, what the lower courts have meant by

1 fraud under the False Claims Act.

2 JUSTICE KAGAN: Mr. Englert, I guess I don't
3 understand that. I mean, let me take Justice Breyer's
4 hypothetical and make it even simpler.

5 Let's say that there's a contract and there
6 is an explicit term, and it says I commit to providing a
7 doctor's care. Yes? And then it turns out that the
8 medical care that was provided was not by a doctor. It
9 was by a nurse or it was by somebody with not even that
10 set of qualifications. And -- and then the person who
11 enters into the contract makes a statement, demands
12 payment, and says the care was provided.

13 Now, some care was provided; it is true.
14 But medical care, a doctor's care was not provided.
15 Now, by withholding that fact and by just saying the
16 care was provided, have I not committed fraud under the
17 common law?

18 MR. ENGLERT: No, Your Honor. Justice
19 Kagan, that is not fraud. And that situation is
20 actually dealt with by Restatement Section 551(2)(b) and
21 by the famous Junius decision written by Justice Cardozo
22 for the New York Court of Appeals.

23 JUSTICE KENNEDY: What -- what about
24 Restatements -- oh, I think it's 529, which -- which
25 says a statement is fraudulent if the maker knows or

1 believes that it's misleading because of his failure to
2 add an additional statement to make it true?

3 MR. ENGLERT: That's the same principle,
4 Justice Kennedy.

5 JUSTICE KENNEDY: And I don't see why that
6 isn't completely applicable to what the hypothetical
7 that Justice Kagan just gave.

8 MR. ENGLERT: There's -- there's --

9 JUSTICE KENNEDY: There is a failure to make
10 an additional or qualifying matter in order to make that
11 statement not false. That's exactly the Justice's
12 hypothetical.

13 MR. ENGLERT: Justice Kennedy, if I
14 understood Justice Kagan's hypothetical question
15 correctly, it is not fraud within the meaning of
16 551(2)(b). But let's suppose that I'm wrong about that,
17 okay? Let's suppose that that is fraud. That's still a
18 very far cry from the facts in this case in which the
19 court of appeals had to invoke a regulation that cross
20 referenced another regulation that nobody had cited and
21 said the failure to announce a violation of that
22 violation when submitting a claim is fraud.

23 JUSTICE SOTOMAYOR: All right.

24 JUSTICE BREYER: I see that. That's to me
25 what's at the heart of this. How do you distinguish

1 those regulations, breach of which are fraudulent when
2 you breach them, and implicit promise not to, from those
3 that not? There are millions of regulations. That's
4 what all the amici are worried about.

5 But now, this is my basic question, and it
6 is a question. The obvious kind of distinction that
7 would seem possible is a contract-based distinction
8 between matters that are material where the whole
9 contract disappears and matters that are sometimes I
10 think called nonmaterial, I'll get the -- I'll forget
11 the exact word, partial, where even though the condition
12 is violated, you don't destroy the contract but you
13 might get damages for that.

14 Now, that's a distinction that every court
15 that deals with contracts is used to applying bread and
16 butter. All right? Normal daily basis. Why not use
17 that same distinction right here?

18 MR. ENGLERT: Because this is not a contract
19 case. The government has only --

20 JUSTICE BREYER: No, no. What you'd say, of
21 course it applies where the condition that was lied
22 about was material. And there can be implicit lies. Of
23 course, there has to be an implicit lie. But it could
24 be an implicit lie that I did not comply -- you might
25 implicitly imply that you fulfilled provision

1 No. 43876(b) which says paper should be three inches
2 long, okay? Okay. Or there could be an implicit lie
3 that that person in your hospital was a doctor. The
4 first you'd say is not material. The second is
5 material.

6 Now, that I'm asking because I wonder if a
7 distinction like that, drawn from contract law would, or
8 would not, satisfy most of the concerns that are -- are
9 raised in the amicus briefs supporting you.

10 MR. ENGLERT: Justice Breyer, it would not
11 satisfy most of those concerns for several reasons.

12 First and foremost, the False Claims Act has
13 its own definition of materiality, which is greatly
14 watered down from the common law. Something that is
15 capable of influencing a decisionmaker is material under
16 the False Claims Act. So materiality doesn't solve the
17 problem.

18 Now let me say also that materiality is, at
19 least arguably, a different element. When I say "at
20 least arguably," the statute actually doesn't say under
21 (a) (1) (A) that it has to be material, but courts have
22 properly read materiality in. But even if materiality
23 is read in, it's a different element on top of a false
24 or fraudulent claim.

25 And I really want to bring this Court back

1 with respect to the four words "false or fraudulent
2 claim" because for it to be fraudulent, there must be,
3 as Your Honor said, an implicit lie. And the common
4 law, cases like Junius, Restatements like 551(2)(b),
5 deal with the implicit lie.

6 JUSTICE SOTOMAYOR: I'm sorry. I'm totally
7 confused. I always thought that when you asked for
8 payment, you're making a promise: I did what I agreed
9 to do. Pay me, please.

10 That's, to me, what's sort of understood.
11 If I hired you to provide me with doctor services, you
12 ask me for money, I'm assuming you provided me with
13 doctor services. And you know you didn't. Why isn't
14 that a fraud?

15 MR. ENGLERT: Because it's a contract
16 breach. Breaking a promise is a contract breach. Some
17 contract breaches are fraud, most are --

18 JUSTICE SOTOMAYOR: So providing a gun that
19 doesn't shoot to the Army is simply a contract breach?

20 MR. ENGLERT: I don't know, Justice
21 Sotomayor. It depends on the facts of the case.

22 JUSTICE SOTOMAYOR: What -- what more facts
23 do you need? Government contracted for guns. All of a
24 sudden you deliver guns that don't shoot. That -- those
25 are the facts that led to this Act.

1 MR. ENGLERT: The additional facts I need
2 are what was stated in the claim, what was stated in
3 the regs, what were the reasonable understandings of the
4 contracting parties. And I'm not making these factors
5 up as --

6 JUSTICE SOTOMAYOR: Do you think that
7 anybody, except yourself, would ever think that it
8 wasn't a fraud to provide guns that don't shoot if
9 that's what the -- the government contracted for?
10 Whether --

11 MR. ENGLERT: Yes.

12 JUSTICE SOTOMAYOR: -- they made it --

13 MR. ENGLERT: Yes, depending on additional
14 facts, Justice Sotomayor, as stated in Section 551 of
15 the Restatement. If I'm wrong about these hypothetical
16 examples, I'm wrong, but I'm happy to rest on
17 Section 551 of the Restatement as to what "fraud" means.

18 Chiarella says as a holding of this Court
19 that the word "fraudulent" requires that there be a
20 duty. The Restatement, 551(2), is all about when there
21 is and there isn't a duty.

22 JUSTICE SOTOMAYOR: If we don't --

23 JUSTICE KAGAN: So I understood --

24 JUSTICE KENNEDY: Your earlier argument --
25 your earlier argument was your point that materiality

1 has its own definition under the Federal contracting
2 statutes, and it's so broad that we can't use it, so
3 we'll just forget about materiality? Is that -- do I
4 understand --

5 MR. ENGLERT: No, no. If I may.

6 JUSTICE KENNEDY: It's my misunderstanding.

7 MR. ENGLERT: The False Claims Act was
8 amended a few years ago, about 20 -- about 30 years
9 ago --

10 JUSTICE KENNEDY: Right. Right.

11 MR. ENGLERT: -- to redefine materiality. I
12 may be wrong on the timing, but it's been amended to
13 redefine materiality as a very, very low standard. But
14 the point is not use it or don't use it. The point is
15 that before you get to materiality, you have to have a
16 false or fraudulent claim.

17 Materiality is not part of the definition of
18 false or fraudulent. It is an additional requirement
19 beyond the false or fraudulent.

20 JUSTICE KENNEDY: That's what I have a hard
21 time understanding. It -- it seems to me we just can't
22 think about fraud unless we have materiality in some
23 sense. And it could be a very strict standard of
24 materiality.

25 MR. ENGLERT: Justice --

1 JUSTICE KENNEDY: Otherwise, it seems to me,
2 fraud doesn't make much sense.

3 MR. ENGLERT: Justice Kennedy, I agree with
4 you. For something to be fraud, it must be fraud as
5 defined by the common law, and it must be material.
6 That's this Court's holding in the Neder case.

7 So yes, I agree with you that to think about
8 fraud, one must have the kind of statement that is
9 fraudulent and materiality and scienter.

10 JUSTICE KAGAN: So what I understood you to
11 be saying, Mr. Englert, was that all of these common
12 examples, examples that really led to the False Claims
13 Act, are not fraud. So --

14 MR. ENGLERT: Oh, Justice Kagan, that's not
15 what I'm saying.

16 JUSTICE KAGAN: Well, let me just give you a
17 few of them.

18 MR. ENGLERT: Sure.

19 JUSTICE KAGAN: Justice Sotomayor said the
20 government contracts to buy guns; the guns don't shoot.
21 The government contracts to buy boots -- this was all
22 within the context of the Civil War -- the boots fell
23 apart after 12 hours. The government contracts to buy
24 food; the food was rancid.

25 And each of those contractors would come in

1 and would demand payment.

2 And the entire idea behind this statute is
3 that in that demand of payment is a representation. The
4 representation is that I've given you guns that shoot
5 and boots that wear and food that can be eaten. And
6 when -- when that is not true, that is a fraudulent
7 claim. And you're suggesting that all these
8 hypotheticals -- that somehow that's not a fraudulent
9 claim. And I guess that leaves me sort of wondering
10 what do you think would be a fraudulent claim?

11 MR. ENGLERT: Two things, Justice Kagan, in
12 response. One, those all may be fraudulent claims. I'm
13 not denying that any of those can be fraudulent claims.
14 And again, Section 551(2)(b) and (e) of the Restatement
15 cover those.

16 JUSTICE KAGAN: Well, if those are
17 fraudulent claims --

18 MR. ENGLERT: But if I may --

19 JUSTICE KAGAN: -- I -- I would think that
20 this is the exact same, is that the contract was for a
21 doctor's medical care, and a doctor's medical care was
22 not provided. A nondoctor's care was provided.

23 MR. ENGLERT: May I explain my key
24 disagreement with that analysis? In your question,
25 Justice Kagan, you embedded the proposition that there

1 are implicit representations in the claims. That was
2 not how the False Claims Act was read from 1863 to 1994.

3 The Ab-Tech case, decided by the Court of
4 Federal Claims in 1994, was the very first case after
5 131 years under the statute to use the
6 implied-certification theory.

7 This -- this concept that's easy to read
8 back to -- graft back onto the Civil War statute, that
9 there was an implied certification is not how people
10 were speaking at the time of the Civil War. It is a new
11 concept. It's something that has been causing the False
12 Claims Act to expand dramatically in the last 22 years,
13 but it is not -- there's nothing at all -- nobody relies
14 on the 1863 legislative. They rely on the 1986
15 subsequent legislative.

16 JUSTICE KAGAN: If I understand what you're
17 saying, you're saying that in representing that you have
18 satisfied the terms of the contract, you are -- or --
19 or -- let me say that -- I'll start it over.

20 In demanding payment for having satisfied
21 the contract, you are not representing that you are --
22 that you have satisfied the contract; that's your point?
23 In demanding payment for satisfaction of the contract,
24 you are not making a recommendation that you have
25 satisfied the contract?

1 MR. ENGLERT: Not that broadly. Not -- not
2 every jot and tittle of the contract. And there's a
3 policy reason why that's a good rule --

4 JUSTICE KAGAN: I'm not into every jot and
5 tittle. I'm into material portions of the contract.
6 That -- you know, that the guns shoot, that the boots
7 can be worn, that the food can be eaten --

8 MR. ENGLERT: That -- that --

9 JUSTICE KAGAN: -- and a doctor's care is a
10 doctor's care.

11 MR. ENGLERT: That is what the Restatement
12 refers to as essentiality, which is a much, much, much
13 higher standard than materiality. And this is where the
14 problem comes in. When essentiality, which does go to
15 the heart of an -- of an implicit representation,
16 arguably is confused with materiality, we have the
17 problems reflected in the light green amicus briefs in
18 this case.

19 Now, the Government's and Respondent's main
20 argument, as I see it, is really not even a textual
21 argument. It is that men must turn square corners when
22 they deal with the government. That's a perfectly fine
23 principle in certain settings but not when a punitive
24 statute is at issue.

25 When punishment is at issue, the relevant

1 principles are instead the principle of constitutional
2 avoidance and fair notice and the rule of lenity. And
3 both of those principles cut very strongly against the
4 implied certification theory. 27 years ago, this Court
5 considered a case of excessive punishment under the
6 False Claims Act called United States v. Halper. It was
7 later overruled in just eight years, but it remains
8 instructive.

9 The judicial instinct to avoid excessive
10 punishments was so strong that the Court let the
11 appellee out of FCA civil liability by invoking the
12 Double Jeopardy Clause.

13 When the Court overruled Halper, it
14 suggested in passing that the Eighth Amendment might be
15 better suited than the Fifth to address constitutional
16 excessiveness concerns. But the recognition by this
17 Court that punishment under the False Act -- False
18 Claims Act is Draconian is of long standing, and that
19 insight to --

20 JUSTICE BREYER: How do you want us to write
21 this? The -- you're in an area where billions of
22 dollars are at issue. There -- this is going on a long
23 time. I don't want to write something that's going to
24 upset everybody's expectations in the contract area.

25 On the other hand, the common sense of it,

1 and you just said the words, you said, well, if, in
2 fact, you send in a form which says certainly give me
3 money for supplying the guns or the medical care,
4 something is implied. And you used the word
5 "essentials" to describe that.

6 And then I also know that if the agency
7 wants to, it could put a little statement at the bottom
8 saying, I hereby certify I complied with every
9 regulation. And I guess if they -- if they did that,
10 then even you would not have an objection saying your
11 failure to do it while signing was fraud.

12 MR. ENGLERT: If it's --

13 JUSTICE BREYER: So what am I --

14 MR. ENGLERT: If it's in the taking --

15 JUSTICE BREYER: From your point of view,
16 this word is "essential," whatever that may mean, which
17 I will look up, how does it work? What's -- what's the
18 correct standard in your --

19 MR. ENGLERT: Well, here's how it writes.
20 "False" means false. "Fraud" means fraud.

21 JUSTICE BREYER: Everybody agrees with that.

22 MR. ENGLERT: Okay. "Fraud" means fraud as
23 reflected in the Restatement, and here's how it writes
24 from a policy dimension, Justice Breyer.

25 The government holds all the keys here. It

1 can change the claim form. It can change the contract.
2 It can go after people for contract violations using the
3 law of contracts and the law of government contracts,
4 which is very specialized. It can go after people for
5 debarment. It can go after people for money. It can go
6 after people for restitution. The government holds all
7 the keys, and indeed the government, frankly, should
8 hold all the keys.

9 JUSTICE BREYER: Please, because I have
10 read -- you have lots of good arguments, and I'm not --
11 I'm asking for advice from you, from your point of view,
12 what the sentence in the opinion should say that
13 describes the circumstances under which the person who
14 submits a form saying, I want a thousand dollars, I just
15 supplied the guns or the medical care, when that
16 person -- and, by the way, there are regs say they have
17 to fire, and the regs say it has to be a real doctor.
18 When has that person committed fraud or -- that's what I
19 want. What is the sentence you want me to write?

20 MR. ENGLERT: "See Restatement (Second) of
21 Torts, Section 551(2)(b) and (e), and Comments j and k,
22 and Illustrations 3 through 8." That's the sentence.

23 JUSTICE BREYER: 551 --

24 MR. ENGLERT: (2)(e) -- (b) and (e),
25 Comments j and k, Illustrations 3 through 8.

1 I'd like to reserve the balance of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Frederick.

4 ORAL ARGUMENT OF DAVID C. FREDERICK

5 ON BEHALF OF THE RESPONDENTS

6 MR. FREDERICK: Thank you, Mr. Chief

7 Justice, and may it please the Court:

8 When a claimant asserts a right to
9 government funds without disclosing that it has
10 knowingly violated the government's material payment
11 conditions, that claim is both false and fraudulent
12 regardless of whether it contains --

13 JUSTICE SOTOMAYOR: Mr. Frederick --

14 MR. FREDERICK: -- express false statements.

15 JUSTICE SOTOMAYOR: -- this confuses me to
16 no end. I don't know why the lower court relied on the
17 Section 423, this -- the director's qualifications and
18 responsibilities when there's a direct regulation that
19 says that the health service will only pay for services
20 rendered by a staff member who's qualified.

21 Why did they go off on this indirect method
22 of analyzing this case?

23 MR. FREDERICK: I think the original sin
24 here, if I can express it that way, Justice Sotomayor,
25 was by the district court which was so focused on what

1 were conditions of participation. It used a formulation
2 of conditions of participation versus conditions of
3 payment. And once it constructed that ideological
4 dichotomy, it was so focused on what the conditions of
5 participation were that it lost sight of the fact that
6 these regulations all work together and in a way --

7 JUSTICE SOTOMAYOR: But there's a regulation
8 right on point.

9 MR. FREDERICK: I understand, Justice
10 Sotomayor. And had I been fortunate enough to litigate
11 the case in the district court, we might have cited that
12 provision.

13 But I would point out that the key point
14 here -- and I don't think the other side disputes this,
15 is that when you're providing mental healthcare to
16 teenagers and other children, it should be supervised,
17 and it should be given by people who have the proper
18 license.

19 I don't think that it takes any great leap
20 of essentiality or materiality or intrinsicness or
21 whatever words the Petitioner wants to come up with,
22 that's pretty basic.

23 And the violation that occurred here was one
24 that is all over the mass health regulations. You can
25 look at it in the supervisor, the clinical director's

1 requirements to maintain supervision, which is what the
2 First Circuit relied on; if you look at the express
3 payment condition, which is .441(a), it expressly links
4 to .424, which lays out all the qualifications of the
5 nurses and the social workers and the psychologists --

6 CHIEF JUSTICE ROBERTS: So is your -- is
7 your position that every material breach of a contract
8 gives rise to a False Claims Act -- a claim under the
9 False Claims Act as false and fraudulent?

10 MR. FREDERICK: No. Our position is that
11 there are two other requirements in the Act. One is
12 that they be done knowingly. And under the statute, the
13 definition of "knowing" has three features, with
14 knowledge, deliberate indifference or reckless
15 disregard.

16 So there is a knowledge requirement that has
17 to be done, and I would point out, Justice Breyer, that
18 actually solves virtually every problem in the
19 Petitioner's amici because they are talking about
20 situations in which they are not focusing on the
21 knowledge requirement of the fraudster who is seeking to
22 get government funds.

23 CHIEF JUSTICE ROBERTS: So -- so if -- I
24 know you've got another one, and I want to keep that in
25 mind, but if it's a situation where the alleged material

1 breach is of Massachusetts Regulation 185(Z)(3), (4),
2 (8), (10), or whatever, you -- the claimant would have
3 to show knowledge of that regulation?

4 MR. FREDERICK: Knowledge that -- that when
5 it was breaching it, it was going to be material to the
6 government. That's the second part of what I think is
7 important.

8 CHIEF JUSTICE ROBERTS: So, I guess, I mean
9 that --

10 MR. FREDERICK: So --

11 CHIEF JUSTICE ROBERTS: That causes concern,
12 of course, because there are thousands of pages of
13 regulations under Medicaid or Medicare programs. And I
14 guess your -- your position would precipitate litigation
15 over whether or not the person who said, here's our
16 bill, knew about -- knew under the reckless and whatever
17 standard, about the particular regulation that the
18 government or the relator is claiming made the
19 submission fraudulent?

20 MR. FREDERICK: The court test, Mr. Chief
21 Justice, is whether the State could reject the claim for
22 reimbursement, whether it had a basis in rejecting it
23 because it was a material claim. It's a --

24 CHIEF JUSTICE ROBERTS: But I thought you
25 said --

1 MR. FREDERICK: -- material violation. So
2 if it was a material violation --

3 CHIEF JUSTICE ROBERTS: Yes.

4 MR. FREDERICK: -- and the government had a
5 basis for rejecting the claim in saying your services do
6 not cover reimbursement --

7 CHIEF JUSTICE ROBERTS: I understand that.

8 MR. FREDERICK: -- it becomes a fraudulent
9 or false claim if the claimant omits telling the
10 government that there was something material --

11 CHIEF JUSTICE ROBERTS: Well, but I thought
12 your point was the first thing is that the claimant has
13 to know about it.

14 MR. FREDERICK: That's correct.

15 CHIEF JUSTICE ROBERTS: It has to know about
16 the particular requirement in the regulation.

17 MR. FREDERICK: That's correct. And it has
18 to know that it was important to the government. It was
19 a material condition for the government, that the
20 government could reject payment on this basis.

21 CHIEF JUSTICE ROBERTS: But it has to know
22 not only about the particular provision but that it was
23 material and the government wouldn't pay without it.

24 MR. FREDERICK: That's correct. And that's
25 why, Justice Kennedy, to go back to your question, the

1 key Restatement provision here is not 551, it's 529,
2 which we've cited in our brief at page 29, and which
3 essentially is not discussed in the opening presentation
4 by my friend.

5 JUSTICE BREYER: But here, looking --
6 looking at what you just said, you said the three
7 conditions are where it's not written on the form, and
8 the -- the submitter has to know about it, second, he --
9 it has to have been material.

10 MR. FREDERICK: Correct.

11 JUSTICE BREYER: And, third, he has to omit
12 telling the government about it.

13 MR. FREDERICK: That's right.

14 JUSTICE BREYER: Okay. Now, I look at the
15 two things he talked about in the Restatement, and he
16 says matters known to him that he knows to be necessary
17 to prevent his partial or ambiguous statement from being
18 misleading -- boy, that's pretty close to what you
19 said -- and then (e) is facts basic to the transaction
20 if he knows the other is about to do it under a mistake.

21 What's the difference between -- I mean, I
22 know the people are experts, and this will tell me there
23 are huge differences. But what's the difference between
24 what you just said and what he said?

25 MR. FREDERICK: Well, I think that the

1 difference is that I think there's an easier Restatement
2 provision that is more directly on point. And if I
3 could just quote from our brief at page 28 to 29. We
4 quote the Restatement, Section 529: "A representation
5 stating the truth so far as it goes but which the maker
6 knows or believes to be" materialness -- "materially
7 misleading because of his failure to state additional or
8 qualifying matter is a fraudulent representation."

9 Here --

10 CHIEF JUSTICE ROBERTS: But it's got to
11 be -- he has to know about the specific provision in the
12 regulation.

13 MR. FREDERICK: That's correct. That's
14 correct.

15 But here, Mr. Chief Justice, I think that it
16 would be odd to suppose that in what are 28 provisions
17 of the Mass Health regulations in what is a massive
18 program involving, you know, billions of dollars, where
19 their business model is predicated on serving indigent
20 people so that they can get access to
21 Medicaid-reimbursed funds, that they would read the
22 regulations. And a number of them say it is critical to
23 provide supervision when you're providing mental health
24 care.

25 CHIEF JUSTICE ROBERTS: Okay. So you think

1 it's an easy case to prove, in other words, because they
2 would have necessarily known that. But what they have
3 to know is of that regulation, whatever one of the 28 it
4 is, and they have to know that the government will
5 regard that as material.

6 MR. FREDERICK: That's correct. But -- but
7 the key point here, Mr. Chief Justice, is I don't think
8 that that should be a difficult case.

9 Now, the other side spends a lot of time
10 talking about worthless services, and they seek in their
11 brief at pages 37 and 38 to say that the standard is
12 only when these goods are so worthless or the services
13 are so worthless, that it would be rather obvious. And
14 I would point out that if the worthless services are
15 recoverable under the False Claims Act, then it is okay
16 to have an implied certification theory. They have
17 essentially conceded that if the goods are completely
18 worthless, it would be okay for the government to bring
19 a False Claims Act case.

20 Now, I would submit that if the goods are
21 partially worthless, if -- those have also to be
22 recoverable because there's no clear way to draw a line
23 between those that are partially worthless and those
24 that are completely worthless.

25 Let me give you a simple example.

1 Here, under what I understand Petitioner's
2 theory to be, if Petitioner had gotten some college
3 interns who were studying psychology, and it decided to
4 allow those interns to practice in their medical
5 facilities, and those college interns gave what was
6 called therapy to teenagers, under their theory, they
7 don't have to tell the government that these are college
8 interns who don't have college degrees, or
9 certifications, or licenses required by the State, and
10 it is A-OK to charge the government full freight. Not
11 only for the service, but under .408, they're also
12 charging with the representation that they have embedded
13 in a supervision cost.

14 CHIEF JUSTICE ROBERTS: I suspect most cases
15 are a little more complicated than that, and that's
16 where the difficulty comes in when you have hundreds,
17 thousands of pages of regulations. And typically not --
18 probably not the government. They didn't in this case.
19 They didn't pick up the -- the false claim; it was the
20 relator. And the relator comes in and says, well, you
21 didn't -- you violated the provision, not that the
22 college intern is a doctor, but that -- whatever it is.
23 You know, you have to use this particular syringes or
24 drug company, and, in fact, you didn't. And, therefore,
25 blah, blah, blah.

1 And I guess that's where the problem comes
2 in, in that it's a little more complicated than that.
3 And I just don't know if I can take your abstract
4 hypothetical and transfer it to the reality of
5 government contract.

6 MR. FREDERICK: Well, let me -- let me go
7 with the core of what I think the concern is in your
8 statement, and in the position by the amici on the other
9 side, and it's that we don't have enough notice. We
10 don't know what's really important to the government.
11 That's their basic problem. Right?

12 Now, they don't solve that problem under
13 either of the two theories that they present in their
14 case. If notice is the problem, the government could
15 solve that by having the check-off box -- I think,
16 Justice Breyer, you were the one who mentioned this --
17 that says, I certify I've complied with all the
18 regulations. Well, that doesn't give them any notice.

19 And it doesn't give them any notice if,
20 attached to the contract claim form, the Federal
21 Acquisition Regulations or the Department of Defense
22 regulations or the HHS regulations are copied. We would
23 just be killing forests in order to generate that. That
24 doesn't give them any more notice either,
25 Mr. Chief Justice.

1 CHIEF JUSTICE ROBERTS: Well, but it will,
2 because it changes the reality. They're going to look
3 at that, and they're going to say, wow. Every single
4 thing we're going to get in trouble in a False Claims
5 Act. So our bid is going to be a little bit higher to
6 cover that potential risk.

7 MR. FREDERICK: These are not bid-ask
8 situations, by and large, Mr. Chief Justice. These are
9 in the healthcare area under entitlement programs in
10 which the government is setting the rate and in which
11 the person is saying, I'm providing service in
12 compliance with the Federal statutes and the
13 regulations, and, therefore, I have a legal entitlement
14 to receive reimbursement.

15 So in that scenario, the problem is that
16 what they really want is for the government to pick and
17 choose among the things that are most important, and
18 once you do that, you're creating a roadmap for fraud.
19 Because all you're doing -- every time you omit
20 something that might be material in any particular
21 circumstance, but it's not specified in the list of the
22 absolutely most critical things, you're just inviting
23 them to say we're not complying with it.

24 JUSTICE BREYER: So what has it done? What
25 has the government done when they certify things? Do

1 they say things like, I hereby certify that I complied
2 with all material regulations? What do they say?

3 MR. FREDERICK: Well, there's some
4 provisions that have certification requirements. But I
5 would point out that even if you were to do that, it's
6 not going to solve most of --

7 JUSTICE BREYER: No, I agree with you.

8 MR. FREDERICK: -- because of grant
9 programs. There are Federal dollars that are going to
10 third parties in which people are engaging in contracts
11 with third parties and they are being paid by the
12 Federal government. And in those kinds of situations,
13 even your kind of basic certification isn't going to
14 work.

15 So the problem here, Mr. Chief Justice,
16 fundamentally, is one where the two elements of
17 materiality and knowledge are going to solve the vast
18 bulk of the problems. Because if the claimant is acting
19 negligently or at a lower standard, simply just missed
20 it, that's not going to be a case that will be
21 actionable under the False Claims Act.

22 And, furthermore, if the claimant is asking
23 for something that the government doesn't deem to be
24 material, in which the test would be can the government
25 withhold payment, then that isn't going to be actionable

1 under the False Claims Act either.

2 And notably, the other side has a lot of
3 amicus briefs, but they don't really point to any
4 specific cases. And if you look at Professor Angstrom's
5 amicus brief, he is the leading scholar on what has
6 happened with the False Claims Act empirically. He has
7 studied all 6,000 filings since 1986, and he's charted
8 what they -- what's happened to them.

9 And his conclusion is that not only has
10 there been no spike as a result of the implied
11 certification theory having been adopted, but that, in
12 fact, the problems that are identified don't actually
13 come to pass because the vast bulk of the cases that are
14 not intervened in by the government, in fact, are done
15 at a motion to dismiss.

16 And so I would submit to you that if you
17 looked at the actual data for the False Claims Act, a
18 lot of what you would conclude on the basis of the other
19 side is hyperbole. There is a lot of fear, but it comes
20 down to two points: One is they would like to have
21 notice so that, presumably, they don't have to comply
22 with the things that the government doesn't more
23 specifically reticulate in its rules. And they want to
24 be able to know, if they want to get around that, what
25 are the key things that they have to get around.

1 I would submit to you that in the Civil War,
2 as Justice Kagan's hypotheticals pointed out, there was
3 a problem of implied certification because contractors
4 were selling boots that were made out of cardboard, not
5 leather, and guns that didn't shoot, and mules that were
6 not live and whole mules. And that is exactly the same
7 kind of problem that we're talking about now over 150
8 years later, with respect to mental health services that
9 are not being provided by licensed and supervised
10 professionals. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Mr. Stewart.

13 ORAL ARGUMENT OF MALCOLM L. STEWART
14 FOR UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE RESPONDENTS

16 MR. STEWART: Mr. Chief Justice, and may it
17 please the Court:

18 The statute refers to false or fraudulent
19 claims, and I think there are two different but
20 complementary analytic routes that the Court could take
21 to conclude that, if the facts alleged in Respondent's
22 complaint are true, false or fraudulent claims were
23 submitted.

24 One way to look at this is to focus on the
25 fact that in Medicaid, as in other government

1 entitlement programs, a person who submits a claim is
2 not simply asking for money; he is representing that he
3 has a legal entitlement to be paid. And you can say, if
4 a person asserts that he is legally entitled to be paid,
5 and he knows that he has no such legal entitlement, the
6 claim is false.

7 And then you would ask, under what
8 circumstances would a person know that he had no legal
9 entitlement to be paid? And the answer would be, if the
10 person knows that he has failed to comply with a
11 material term of the contract or a material regulatory
12 requirement, by definition, the government will have no
13 obligation to pay, and the claim of legal entitlement
14 will be false.

15 And I think, Justice Breyer, you were
16 exactly right in pointing to the law of contracts which
17 draws a distinction between material and nonmaterial
18 terms. And the purpose of that distinction is to
19 identify the situation in which a breach by one party
20 will excuse the counterparty's failure to perform. And
21 so a -- if the government is obligated to pay money and
22 the contractor makes certain corresponding performances,
23 if a nonmaterial term is breached, the government's
24 obligation to pay remains intact.

25 And so a person who knew himself to be in

1 breach of a nonmaterial term and requested payment
2 anyway wouldn't be making a false claim. He would be
3 claiming a legal entitlement to be paid; he would be
4 entitled to be paid because the breach wouldn't excuse
5 the government's payment obligation. But if the term
6 that was being breached was material, the claim of legal
7 entitlement would be false.

8 The other analytic route that you could take
9 to -- to get to the same result in this case really
10 follows up on Justice Kagan's hypothetical about the
11 situation in which there is a contract for services to
12 be performed by a doctor, and the -- the person who has
13 arranged for services to be provided by someone else
14 comes in and says services have been performed; pay me.

15 And it seems like clear fraud under 529 and
16 551 under the Restatement. You have made a
17 representation, services have been performed.
18 Explaining that they were performed by a nondoctor under
19 the circumstances is essential to make that
20 representation nonmisleading.

21 And what we have here, at least if the facts
22 are as alleged, is basically the same thing. The
23 complaint recites that in requesting payment, Universal
24 Health Services submitted various invoices, and they
25 used billing codes, five-digit numbers that were

1 determined by -- identified by MassHealth as the codes
2 you use for particular types of services. One of them
3 corresponded to individual therapy, one to group
4 therapy, one to family therapy.

5 Now obviously, the claims would have been
6 false if no services had been provided at all. And I
7 assume everyone would agree that if MassHealth -- I'm
8 sorry -- if Universal Health Services had billed for
9 services provided in a group setting but had used the
10 code that MassHealth had identified for individual
11 therapy, that would have been a false claim because
12 MassHealth is entitled to treat the use of that code as
13 a representation that the services were -- were
14 performed individually.

15 And, really, it's no -- it's not a large
16 leap to say when you use the code for individual
17 therapy, you are representing by -- that the services
18 were performed, the treatment was performed by a person
19 who was legally authorized to provide mental health
20 therapy under Massachusetts law.

21 Now, unlike the contract hypothetical that
22 Justice Kagan identified, in determining what implicit
23 representations are being made, we wouldn't look to the
24 previous promise that the person had made because
25 there's no contract. We would look at the MassHealth

1 regs that identify who -- what kind of credentials do
2 you have to have to perform particular types of mental
3 health services and would --

4 CHIEF JUSTICE ROBERTS: How do you tell --
5 Mr. Stewart, because at least under Mr. Frederick's view
6 you have to have knowledge that the government wouldn't
7 pay. I assume the government wouldn't pay even for
8 nonmaterial provisions.

9 I mean, if you're supposed to pay -- you
10 know, for \$100,000 you're going to provide these
11 services, and you don't provide small service? You
12 still pay, but you wouldn't pay for that. I mean, I
13 don't understand that, how some things are material --
14 does it go pay at all, or -- or carve out a particular
15 provision?

16 When -- when is the government -- when is
17 there going to be not performance of a contract and the
18 government's going to pay for that anyway?

19 MR. STEWART: Well, I think if we got a bill
20 for particular services and the services had been
21 essentially performed as they were expected to be, the
22 government's policy objectives were adequately advanced
23 but some technical requirement had not been complied
24 with, that if it's a nonmaterial term, then by
25 definition, it wouldn't excuse the government's duty to

1 perform.

2 CHIEF JUSTICE ROBERTS: Okay. So the
3 contract is to provide all these health services, and by
4 the way, you've got to buy, you know, staplers made in
5 the United States, not -- not abroad. And they do
6 everything, but they don't buy staplers made in the
7 United States.

8 I would say the government, if they're, you
9 know, rigorous contracting officers, would say okay, you
10 get, you know, 99,000 whatever, but we're going to
11 penalize you because you didn't use staplers -- we put
12 that in there for a reason, you didn't do it, so we're
13 going to withhold \$100, right?

14 MR. STEWART: We would certainly agree that
15 in government contracting it's sometimes the case that
16 the government's trying to serve ancillary policy
17 objectives such as buy America, et cetera.

18 And so if under the terms of the agreement
19 and the -- the law of contracts, the government would be
20 legally entitled to withhold payment or a portion of the
21 payment in that circumstance, then that would be a false
22 claim.

23 CHIEF JUSTICE ROBERTS: Not -- if that would
24 be --

25 JUSTICE KAGAN: If --

1 CHIEF JUSTICE ROBERTS: -- a false claim --

2 MR. STEWART: It --

3 CHIEF JUSTICE ROBERTS: -- and then they
4 could bring -- and a relator can sue for that, then I
5 don't understand the difference between material and
6 immaterial.

7 MR. STEWART: Well, if it -- if it was the
8 case -- I mean, it may be that you -- that your more
9 expansive conception of material terms is correct, and
10 that there would be some circumstances that I hadn't
11 envisioned in which the government could lawfully
12 withhold payment, even though the violation seemed
13 fairly tangential to the claim. If that's the case, all
14 it means is that the --

15 JUSTICE KAGAN: What are examples of --

16 CHIEF JUSTICE ROBERTS: I'm sorry. Just --
17 all it means is?

18 MR. STEWART: All it means is that there
19 would be more expansive False Claims Act liability, but
20 not because we would be punishing people who didn't
21 cheat the government. If -- if knowledge of the
22 particular breach at issue could have led responsible
23 government contracting officers to withhold payment
24 wholly or in part, and the person --

25 JUSTICE BREYER: Well --

1 MR. STEWART: -- knows that he is in breach,
2 he should be made --

3 JUSTICE BREYER: The wholly or in part,
4 now -- now, I just copied out of the Horn book the basic
5 difference between a material breach and a partial or
6 nonmaterial breach of contract. A material breach of
7 contract is a contract that -- a breach that allows one
8 party to repudiate the contract. A nonmaterial breach
9 is a breach that gives rise to damages but cannot serve
10 as the basis for repudiation.

11 Now, until this last interchange, I thought
12 that was the distinction you were drawing, that if the
13 piece of paper says nothing, but pay me, and there is a
14 violation of a reg, if the violation of that reg is such
15 to be material, meaning, it would be a basis for
16 repudiation, then it is an implied -- then it is an
17 implied statement. It was complied with, and it's
18 fraud.

19 But if it's just staples, you may have to
20 pay damage for staples, but that certainly doesn't -- to
21 say the contrary there would make the contractor
22 responsible for having complied with every one of 40,000
23 regulations, the size of the room, size of the table.

24 MR. STEWART: Well, I mean, first, there is
25 a distinction between situations in which one

1 contracting party could sue for damages, and situations
2 in which one contracting party could refuse to
3 perform --

4 JUSTICE BREYER: Yes.

5 MR. STEWART: -- its own obligations under
6 the contract, including payment.

7 But I think the second thing is that the
8 scienter requirement really is crucial here. It applies
9 both to knowledge of the breach, and knowledge that it
10 is material to the government.

11 The only other thing I wanted to -- to
12 clarify in response to -- to your question is, we would
13 say the test is whether the person knew that the
14 government could lawfully withhold payment, not
15 necessarily --

16 CHIEF JUSTICE ROBERTS: Withhold payment,
17 but not repudiate the contract.

18 MR. STEWART: Withhold payment on the
19 particular claim, because there would certainly be
20 plenty of situations in which, if somebody billed for
21 services that were not reimbursable under the terms of
22 the particular program, there --

23 CHIEF JUSTICE ROBERTS: In other words, if
24 they don't -- if they put the wrong billing code down,
25 and, you know, you shouldn't have to pay them. But I

1 don't know that means you can say, okay, you're fired as
2 our Medicare provider in the State of Massachusetts,
3 which is what I understand materiality in the contract
4 concept to be.

5 But what you're saying is it's a false claim
6 if it's -- and, you know, you said you were providing
7 X-rays and you didn't. Okay. But -- and that's
8 material, I would think, in the sense that you have to
9 pay for it. You shouldn't pay them for it, but I don't
10 know if it's material in the sense that you can get out
11 of the whole --

12 MR. STEWART: Then I would say material in
13 the sense of allowing the government to decline to
14 comply with its corresponding obligation to pay for that
15 particular shipment or those particular services,
16 because we certainly, as you say --

17 JUSTICE SOTOMAYOR: Well, but that doesn't
18 answer the question. There's a miscoding that's
19 intentional and knowing, and there's a miscoding that's
20 negligent.

21 MR. STEWART: Exactly.

22 JUSTICE SOTOMAYOR: So if it's a mistake,
23 you could withhold payment, but you can't sue under the
24 False Claims Act, correct?

25 MR. STEWART: Exactly. And there is a

1 mental state that the FCA contemplates between
2 negligence and actual knowledge, because it defines the
3 term "knowingly" to include recklessness and --

4 JUSTICE KAGAN: Mr. Stewart -- I'm sorry.

5 MR. STEWART: Go ahead.

6 JUSTICE KAGAN: Could you just -- what are
7 immaterial terms for the government? I mean, give me
8 some examples. What would count as not material?

9 MR. STEWART: I mean, I don't know if there
10 are any terms that are wholly immaterial, because if
11 there were, presumably they wouldn't be in the -- the
12 agreement or the -- the regulations. But there are
13 certainly terms that would be immaterial to particular
14 claims.

15 So, for example, if the government had a
16 rule that said at all times, a hospital that is
17 receiving Medicaid reimbursement has to have the
18 following equipment in its operating room. It might
19 well be the case that a violation of that requirement
20 would disentitle the claimant to payment for -- for
21 surgical services performed, but would not disentitle
22 the claimant to payment for services that had nothing to
23 do with use of the operating room.

24 And so to follow up on what I was saying
25 before, I think what we have here is really a fairly

1 close variant on the hypothetical that -- that you
2 floated, the case in which they represent that they
3 performed individual therapy. They don't say that the
4 person who performed it was not legally authorized to
5 render billable services under the MassHealth program.
6 That would seem to be a classic case of implied
7 misrepresentation, fraudulent omission, et cetera.

8 JUSTICE KAGAN: When you started and you
9 said that there are two ways in which this could be
10 argued, do you have a preference as to which one of
11 those two ways makes most sense, or are there cases
12 where they diverge, and we should be aware of that?

13 MR. STEWART: I think this -- probably the
14 one that would be most helpful to the government is the
15 first one: That if you assert a claim of legal
16 entitlement to be paid and you know that you are not
17 legally entitled to be paid or are reckless as to that
18 fact, the claim is -- the claim is false and it's
19 knowingly false. That -- that would be the one that's
20 most helpful to the government just because there are
21 so -- there's such variations in the nature of the
22 documentation that is provided by claimants under
23 various government programs. That -- that general rule
24 would be of the greatest health -- help.

25 The second I offer, really because in a

1 sense, it's an easier way to decide this case. If the
2 government was not -- I mean, I'm sorry -- if the Court
3 was not ready yet to decide whether the broader
4 proposition was correct, it could still say, in this
5 case, there was not simply a claim for a particular
6 dollar amount. There was at least a little bit of
7 detail as to what were the nature of the services to be
8 performed. And giving that detail without giving the
9 offsetting fact, if it is a fact, that the services were
10 performed by noncredentialed, unsupervised people, would
11 render the -- the statement that was made misleading.

12 The last two things, if I -- if I could just
13 say them very briefly, Mr. Englert referred to the
14 newness of implied certification. The term "implied
15 certification" is new. I don't believe it was used
16 until the last 25 years or so. But the concept that a
17 person can be held liable for fraud even though he says
18 nothing explicitly false but labors to create a false
19 impression, that's been around for ages.

20 The second thing is, Mr. Englert said that
21 the current FCA adopts a watered-down version of the
22 materiality requirement. I think if you compare the
23 current statutory definition to this Court's formulation
24 of the traditional materiality standard in *Neder*, in
25 *Gaudin*, in *Kungys*, that the current statutory definition

1 is drawn essentially verbatim from this Court's
2 description of what material -- materiality had
3 traditionally been at common law.

4 CHIEF JUSTICE ROBERTS: And, Mr. Stewart,
5 both United States and Massachusetts did not intervene
6 in this case; is that right?

7 MR. STEWART: That's correct.

8 CHIEF JUSTICE ROBERTS: Why is that?

9 MR. STEWART: We don't -- I don't know the
10 answer, and we don't typically give public explanations
11 of why we don't intervene. Sometimes it's because the
12 dollar amount is small. Sometimes it's because the --
13 we think that the relator is capable of handling the
14 case himself, or the relator's counsel. Sometimes we do
15 decline to intervene, because we're skeptical of the
16 merits of a case. But even in those situations, it
17 could be that we agree with the relator's theory and
18 simply don't know whether the facts could be proved. It
19 comes in all variations.

20 I -- our amicus brief is obviously the --
21 the best evidence of what we believe the correct legal
22 rule to be. The only other thing I would say is that
23 our decisions about whether to intervene in particular
24 cases would be skewed if we believed that courts would
25 draw from our failure to intervene an adverse inference

1 as to our views on the legal theory. If we felt that we
2 would be made to seem skeptical of the implied
3 certification by not intervening, we'd feel pressured to
4 do it.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Eight minutes, Mr. Englert.

7 MR. ENGLERT: Thank you, Mr. Chief Justice.

8 REBUTTAL ARGUMENT OF ROY T. ENGLERT, JR.

9 ON BEHALF OF THE PETITIONER

10 MR. ENGLERT: The False Claims Act uses
11 words drawn from the common law of torts, not words
12 drawn from the common law of contracts. This is
13 Henry Steiner and Duncan Kennedy, not Charles Fried.

14 The test, as stated by my friends on the
15 other side, is the core test is whether the State could
16 reject the claim for reimbursement. That is a contract
17 standard; that is not a tort standard. And if this
18 Court accepts that version of the implied-certification
19 theory, it will be much broader than anything the lower
20 courts have ever done, and a parade of horrors in the
21 light green amicus briefs would cite many horrible
22 cases. Mr. Frederick says they cite none. They cite
23 many real-world horrible cases. That would be the tip
24 of the iceberg if this Court accepts their theory.

25 It has been suggested that everyone knows

1 that it's common sense and that it's obvious that people
2 who provide counseling services to teenagers must be
3 licensed. Well, apparently, the Commonwealth of
4 Massachusetts doesn't find it obvious. Section
5 429.424(E) (1), quoted on page 8 of our opening brief,
6 states the standards in which "counselors and unlicensed
7 staff may provide counseling services."

8 If it's so obvious, why did the First
9 Circuit have to rely on a regulation that applies only
10 to satellite facilities? When the First Circuit found a
11 regulation that no one had cited in all of this
12 litigation, it didn't cite one that applies to every
13 facility. It cited one that applies only to satellite
14 facilities. And yet, we're told it's so obvious that my
15 clients should have known that, and that there is
16 materiality and scienter in this case.

17 Volume II of the Joint Appendix contains
18 seven complaints to State agencies, four reports by
19 State agencies, two consent decrees, and four other
20 documents. They cite many, many, many, many
21 regulations. This morass of regulations, bluntly, is
22 worse than the Internal Revenue Code. It's full of
23 cross-references; it's full of contradictions, as the
24 First Circuit itself acknowledged in footnote 15.

25 The way the First Circuit resolved the

1 contradiction was to refer to the nonpromulgating
2 agency; so it's Chevron on steroids. These things are
3 not obvious. These regulations are not obvious.

4 Now, Mr. Frederick and Mr. Stewart, and in
5 particular Mr. Frederick, may seem to have scored a blow
6 when he put -- said fraudster shouldn't get to pick and
7 choose which regulations they comply.

8 Well, if you assume fraud, if you put the
9 rabbit in the hat, you can take the rabbit out of the
10 hat. People should pick and choose which regulations
11 they comply with. Why? Because there's so many and
12 confusing. And who holds the keys to telling them which
13 regulations to comply with? The regulating agency or
14 the contracting agency.

15 If the contracting agency or the regulating
16 agency says, please focus on this regulation because it
17 really matters, guess what? People will focus on the
18 regulation because they know it really matters. If
19 relators come in after the fact, not the Commonwealth of
20 Massachusetts, not the United States, but relators come
21 in after the fact and say, this was so critical that you
22 should have known and you acted -- it was material, it
23 was essential, and you acted with scienter, and they get
24 treble damages, attorney's fees, \$5500 or more, \$5500
25 minimum per claim civil penalties, and the opprobrium of

1 calling someone a fraudster, that's not the system in
2 which the regulators have control. That is not the
3 administrative state we know. That is a game of
4 got-you, after-the-fact got-you.

5 JUSTICE BREYER: How does it differ, what
6 you just said, from this thing in the Restatement where
7 you say it would be fraud, facts basic to the
8 transaction or matters known, that he knows to prevent
9 his statement from being misleading? The statement is,
10 implicitly, I did the work. And this kind of problem,
11 is it or is it not, basic to the transaction that the
12 doctor be certified, is the kind of thing that I think
13 you and other lawyers argue very well on opposite sides,
14 as you just did.

15 But the standard you advocate is, according
16 to the Restatement, misleading statement about a fact
17 basic to the transaction, misleading, implicitly, I did
18 it. Truth? I didn't. You see, I'm saying your
19 standard gives rise to the same problem, doesn't it?

20 MR. ENGLERT: No.

21 JUSTICE BREYER: Why?

22 MR. ENGLERT: Because the common law has
23 worked through these problems, Justice Breyer. The
24 common law of torts, not the common law of contracts.
25 Look at illustrations 3 through 8 of the -- of the

1 Restatement.

2 But if that doesn't do it for you, think
3 about the dog that didn't bark in the room. Look for
4 common-law fraud cases that state their theory. You
5 won't find them. You won't find them. They don't
6 exist. This is a theory made up by the plaintiffs' bar
7 in the last 22 years, and it has run amok.

8 There is a parade of horrors in the light
9 green amicus briefs. There is a parade of horrors in
10 the red -- in the dark green amicus briefs. Their
11 parade of horrors is that it would be A-OK to do these
12 things. It's not A-OK to do these things. There are
13 calibrated remedies administered by the government for
14 breach of contract, for violating regulations.

15 The Massachusetts authorities had calibrated
16 remedies in this case: Two years of suspension and a
17 \$1,000 fine. They didn't ask for any money back. They
18 didn't ask for any money back. They didn't say, this is
19 the kind of thing that is so basic that you should give
20 us our money back. They said, we need some corrective
21 measures. These are services for poor people. These
22 are --

23 JUSTICE SOTOMAYOR: Let's not forget
24 something. Money came from the Federal government. It
25 may be a system in this cooperative program that's

1 flawed, but Massachusetts Health has no incentive to
2 seek the money back because they're not paying it.

3 The people with the incentive are the
4 Federal government, and that's why we have the False
5 Claims Act, because the Federal government can't enforce
6 all seeking of money back in these cooperative programs.

7 MR. ENGLERT: Okay. But it has to be a
8 false or fraudulent claim, which are terms derived from
9 the common law, construed in this Court's cases,
10 elaborated through the common law --

11 JUSTICE SOTOMAYOR: I have a very hard time
12 accepting that if you provide -- if you claim money for
13 a service that you don't render, not a qualified
14 individual, unsupervised by a qualified individual,
15 which is a requirement specifically in the regulations,
16 I'm having a hard time understanding how you have not
17 committed a fraud --

18 MR. ENGLERT: Your Honor, all the --

19 JUSTICE SOTOMAYOR: -- if you knew what you
20 were doing.

21 MR. ENGLERT: All that was submitted was a
22 request for payment. The government controls what it
23 will require in a request for payment. There is no
24 allegation of a false statement in the request for
25 payment. The only allegation is that every jot and

1 tittle of every MassHealth regulation is incorporated as
2 long as it's approved --

3 JUSTICE SOTOMAYOR: I don't think that it's
4 every --

5 MR. ENGLERT: -- under scienter.

6 JUSTICE SOTOMAYOR: -- provision.

7 MR. ENGLERT: Well, Your Honor, it's --

8 JUSTICE SOTOMAYOR: But I think it's a very
9 basic provision --

10 MR. ENGLERT: Your Honor, with respect --

11 JUSTICE SOTOMAYOR: -- when you say, I
12 performed this service, that you performed a service in
13 accordance with the contract.

14 MR. ENGLERT: And in seven complaints to
15 administrative agencies, in the -- in the operative
16 complaint in this case, amended many times, why is not
17 the regulation the First Circuit relied on even cited?
18 Why is the regulation Mr. Frederick says he would have
19 used if he had been litigating this case in the district
20 court even cited?

21 It proves my point, Your Honor, that this is
22 a morass. And for one to think, after the fact, this is
23 basic and central and this is fraud, is a plaintiff's
24 lawyer's game.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 12:01 p.m., the case in the
4 above-entitled matter was submitted.)

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