UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 14-1423

UNITED STATES, ex rel. JULIO ESCOBAR; CARMEN CORREA,
administratrix of the Estate of Yarushka Rivera,

Plaintiffs-Appellants,

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff, -Amicus Curiae

v.

UNIVERSAL HEALTH SERVICES, INC.

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR *AMICUS CURIAE* TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLANTS AND REVERSAL

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Pursuant to Fed. R. App. P. 29, Taxpayers Against Fraud Education Fund respectfully submits this brief as *Amicus Curiae* in support of Appellants Escobar and Correa. A Motion for Leave to File has been filed contemporaneously herewith, and this brief is subject to that Motion. Taxpayers Against Fraud Education Fund supports Appellants for the reasons set forth below.

I. STATEMENT OF INTEREST

A. Taxpayers Against Fraud Education Fund

Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), has participated in litigation as a *qui tam* relator and as an *amicus curiae*, and has provided testimony to Congress about ways to improve the False Claims Act. TAFEF has a strong interest in ensuring proper interpretation and application of the False Claims Act. TAFEF is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

B. The Importance of the Outcome of this Litigation

The FCA imposes liability on any person who (A) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;" or (B) "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)-(B). The FCA reaches "all fraudulent attempts to cause the Government to pay [out] sums of money or to deliver property or services." S. Rep. No. 99-345, at 9 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274. As this Court has elaborated, "Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the government.'" *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377, 392 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 815 (2011) (*quoting Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003) and *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)).

The First Circuit has addressed how courts should analyze liability for false or fraudulent claims under the FCA, rejecting judicially-constructed approaches that may inappropriately cabin the types of conduct the statute was designed to reach. *United States ex rel. Hutcheson*, 647 F.3d 377; *New York v. Amgen*, 652 F.3d 103, 109-110 (1st Cir. 2011); *United States ex rel. Jones v. Brigham & Women's Hosp.*, 678 F.3d 72, 85-86 (1st Cir. 2012). In so doing, the Court has

held that the existing precepts of the FCA – knowledge and materiality – provide the appropriate means to limit the scope of liability under the statute and that courts should not substitute artificial categories or "magic word" tests to determine whether a claim is false. *See e.g., Hutcheson*, 647 F.3d at 388. However, just as the evolution of categories such as "false certification" and "legal falsity" became an artificial means to limit FCA liability, the categories of "conditions of payment" and "conditions of participation" are equally unavailing and merely offer new artificial boxes around FCA liability. The use and application of these forced classifications impacts the FCA's effectiveness in addressing rampant fraud in government healthcare and other programs.

The sole purpose of TAFEF's brief as *amicus curiae* is to address the proper legal analysis to determine falsity and materiality under the False Claims Act. TAFEF leaves any other disputed issues to the parties.

II. ARGUMENT

The District Court below granted the Motion to Dismiss Relator's Second Amended Complaint, finding that False Claims Act liability could not be supported by violations of the regulations at issue because those regulations reflected "conditions of participation" rather than "conditions of payment" for mental health services reimbursed under the Massachusetts Medicaid Program, MassHealth.[1]

[1] The District Court's decision also addressed whether the Second Amended

While recognizing that in *United States ex rel. Hutcheson*, the First Circuit rejected artificial categories to describe methods of analyzing whether a claim was false within the meaning of the FCA, including "legally" or "factually" false, as well as "express" or "implied" certification,[2] the District Court concluded that the First Circuit has not yet fully identified the proper test for evaluating when a claim is materially false under the False Claims Act. In absence of clear guidance, the District Court held that the distinction between "conditions of payment" and "conditions of participation" survives the First Circuit's decisions in *Hutcheson* and its progeny. Applying this distinction, the District Court determined that the express language of the regulations did not identify the requirements at issue as a "condition of payment" and, as such, FCA liability was precluded.[3]

Amicus TAFEF disagrees that there is an absence of guidance from the First Circuit as to the correct test to employ in evaluating whether a claim is materially

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Complaint states claims with sufficient particularity under Federal Rule of Civil Procedure 9(b), which this Brief does not address.

[2] *United States ex rel. Escobar v. Univ. Health Servs., Inc.*, No. 11-11170-DPW, 2014 WL 1271757 at *5 (D. Mass. Mar. 26, 2014) (*citing Hutcheson*, 647 F.3d at 380, 385; *Amgen*, 652 F.3d at 108-109; *Jones*, 687 F.3d at 85-86).

[3] Of note, while the District Court acknowledged that the regulation did not need to expressly state that it was a condition of payment to lay the foundation for FCA liability, *see Escobar, 2014 WL 1271757 at *5-7*, the court's analysis appeared to focus solely on whether the text of the regulation described the requirements at issue as conditions of "participation" or "payment." *See id.* at *7-11.

false within the meaning of the False Claims Act. Rather, TAFEF asserts that courts properly evaluate liability under the FCA by looking to whether the defendant has knowingly violated conditions that are material to the payment of the claim. This evaluation is not dependent on express statements in an underlying contract, statute, or regulation. Rather, the analysis should center on whether the requirement at issue has a material nexus to payment, in the context of all the extrinsic evidence (not just the express words of the statute, contract or regulation). *Hutcheson*, 647 F.3d at 387-88; *Amgen*, 652 F.3d at 110-11. In essence, the contextual evidence must establish a failure to comply with a requirement that would be capable of affecting the Government's decision to pay the claim. *Hutcheson*, 647 F.3d at 393-94; *Jones*, 678 F.3d at 94-95.

A. The Rejection of Artificial Categories in *Hutcheson* and Its Progeny

In *Hutcheson*, the First Circuit found that categorical limitations on falsity, such as express or implied certification, improperly restrict the scope of the FCA and "obscure and distort" the FCA's requirements, stating:

> Courts have created these categories in an effort to clarify how different behaviors can give rise to a false or fraudulent claim. Judicially-created categories sometimes can help carry out a statute's requirements, but they can also create artificial barriers that obscure and distort those requirements. The text of the FCA does not refer to "factually false" or "legally false" claims, nor does it refer to "express certification" or "implied certification." Indeed, it does not refer to "certification" at all. In light of this, and our view that these categories may do more to obscure than clarify the issues before us, we do not

employ them here.

647 F.3d at 385-86. Following the plain text of the FCA, the court concluded that "[t]he text of the FCA and our case law make clear that liability cannot arise under the FCA unless a defendant acted knowingly and the claim's defect is material." *Id.* at 388.

The First Circuit closely followed the analysis of the D.C. Circuit in *United States v. Science Applications International Corporation,* holding that non-compliance with contract terms may give rise to FCA liability, even if the contract does not specify that compliance with the contract term is a condition of payment. 626 F.3d 1257, 1269 (D.C. Cir. 2010). In *SAIC,* the court rejected the defendant's argument that legal preconditions of payment must be expressly designated, holding that "nothing in the statute's language specifically requires such a rule" and that adopting one "would foreclose FCA liability in situations that Congress intended to fall within the Act's scope." *Id.* at 1268. Rather, the D.C. Circuit specified, the statute's reach is limited through "the Act's materiality and scienter requirements." *Id.* at 1270.

Similarly, in *Amgen*, this Court made clear that it has rejected conceptual divisions between (1) legal and factual falsity and (2) express and implied certification; and more specifically, has rejected the notion that "a claim can only be impliedly false or fraudulent for non-compliance with a legal condition of

payment if that condition is expressly stated in a statute or regulation." 652 F.3d at 110. Instead, the Court confirmed, the FCA's materiality and scienter requirements appropriately "cabin the breadth of the phrase 'false or fraudulent.'" 652 F.3d at 110. *See also Jones*, 687 F.3d at 387-88 ("FCA liability continues to be circumscribed by 'strict enforcement of the Act's materiality and scienter requirements,'" *quoting SAIC*, 626 F.3d at 1280). These opinions demonstrate that the framework announced in *Hutcheson* still controls.

Thus, FCA liability is not anchored to whether the drafter of a contract, statute, or regulation used talismanic words to denominate "conditions of payment," but rather whether the condition at issue is material to the payment decision based on the contextual evidence.

B. The Artificial Classifications of "Conditions of Payment" and "Conditions of Participation" Should Also be Rejected

Where FCA liability is premised on the violation of a statute, regulation, or contract provision, FCA liability attaches where a failure to comply has the potential to affect entitlement to payment. Thus, the inquiry is whether an appropriate nexus is established between compliance with that statute, regulation or contract provision, and defendant's claim for payment.

Efforts to articulate this nexus has led to a long line of authority that swings between cases that essentially evaluate the materiality of the relationship between the underlying violation in the context of the affected program and cases that

require an express statement. Whether called "certification" or "condition of payment" or materiality or something else, *Amicus* TAFEF submits that an express statement requirement under any rubric is incorrect. The statute contains no such requirement and a "one size fits all" standard is simply ill-fit for analyzing misrepresentations and fraud – conduct which, by its nature, is context-specific and often involves looking for a loophole. Rather, as this Circuit has recognized, courts are well-suited to review the extrinsic evidence in the context of a government program and determine whether a program requirement is material to payment of a claim.

1. From Certification to Condition of Payment

Prior to this Circuit's decision in *Hutcheson*, many courts established the nexus to payment using the theory of "false certification." This construct required an affirmative false certification of compliance with government program terms in order to render a defendant liable under the False Claims Act. This theory evolved to include so-called "implied certification," which referred to claims that reflected violations of core program terms, but where there was no express statement of compliance; rather, the claims "represented an implied certification . . . of [defendant's] continuing adherence to the requirements for participation in the . . . program." *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994); *see also United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d

1163, 1169 (10th Cir. 2010).

Concerned with how to cabin liability in cases where the program terms are tangential or irrelevant to payment, some courts began to limit the availability of "implied certification" to those cases where the underlying contract, statute, or regulation expressly stated that compliance was a prerequisite to payment. *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001); *see also United States ex rel. Kirk v. Schindler Elevator Corp*., 601 F.3d 94, 114, n.15 (2nd Cir. Apr. 6, 2010), *rev. & remanded on other grounds sub nom. Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011).

Following the narrowing suggested by *Mikes* and its progeny, the pendulum swung, and this type of talismanic, or "magic word," requirement has been rejected by this Circuit and others. *E.g.*, *Hutcheson*, 647 F.3d at 386-88; *SAIC*, 626 F.3d at 1269; *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F. 3d 1166, 1176 (9th Cir. 2006). As made clear by those decisions, imposing an express words requirement inappropriately narrows FCA liability such that it would not reach situations plainly contemplated by the statute and instead would "create artificial barriers" that obscure the FCA's requirements. *Hutcheson*, 647 F.3d at 385-86.

As the jurisprudence on this topic has grown, the nexus between compliance with a contract, statute, or regulation and the claim is no longer described narrowly as "certification" but instead as "condition of payment." This is consistent with the

long line of authority holding that knowing submission of claims resulting from violation of a material condition of payment creates FCA liability. *E.g.*, *Hutcheson*, 647 F.3d at 379; *United States v. Rogan*, 459 F. Supp. 2d 692, 714-17 (N.D. Ill. 2006), *aff'd* 517 F.3d 449 (7th Cir. 2008); *McNutt ex rel. United States v. Haleyville Medical Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005).

However, faced with concerns about how to determine liability in cases where program terms (particularly in government healthcare programs) are voluminous and, in some cases, contain terms that are tangential to payment, some courts have created a distinction between "conditions of payment" and "conditions of participation." While this phraseology may be helpful to differentiate between terms of an underlying statute or regulation that are too tangential to payment to render the claim false, it can also operate, as this Circuit found with other artificial categories, to "obscure and distort" the scope of FCA liability. Indeed, because government healthcare regulations have long used the term "condition of participation" without regard to its meaning under the FCA, rejecting liability simply because a regulation used that phrase instead of another would limit the statute's reach such that it did not address situations that Congress plainly intended it to cover.

Courts have correctly recognized that whether a requirement is a condition of payment or participation is often "a distinction without a difference." *Hendow*,

461 F.3d at 1176; *see also Conner*, 543 F.3d at 1222[4] (*quoting Hendow* and explaining that "some regulations or statutes may be so integral to the government's payment decision as to make any divide between conditions of participation and conditions of payment a 'distinction without a difference'"); *United States ex rel. Tyson v. Amerigroup Ill., Inc.*, 488 F. Supp. 2d 719, 726 (N.D. Ill. 2007) (*quoting Hendow* and declaring that "'[I]f we held that conditions of participation were not conditions of payment, there would be no conditions of payment at all'"). (To wit: In many cases, it defies logic that conditions of participation are relegated to an artificial box separated from condition of payment, when establishing eligibility to participate in a government-funded program is necessarily the first condition that must be met before a claim for payment under that program can be paid).

The discussion of the delineation between these two categories has led to the pendulum swinging back again to an express words requirement. Rather than using the phraseology "condition of payment" or "condition of participation" to evaluate the relationship between the underlying program term and the government's payment decision, some courts have moved to examining regulations

[4] While *Conner* found the certification in hospital cost reports to comply with all applicable statutes and regulations did not render every regulatory requirement material to the payment decision, the court also recognized that *Hendow* properly found that requirements governing the entitlement to funds properly formed the basis for FCA liability. 543 F.3d at 1222.

for the use of the words "condition of payment" when describing a requirement. *E.g.*, *Virginia ex rel. Hunter Labs. v. Quest Diagnostics, Inc.*, No. 1:13–CV–1129 No. 1:13-CV-1129, 2014 WL 1928211, at *10 (E.D. Va. May 13, 2014) ("The name of the Agreement alone—the Virginia Medicaid Independent Laboratory Participation Agreement … does not suggest that the Commonwealth would have withheld payment for work already performed"); *United States ex rel. Hobbs v. MedQuest Assoc., Inc.*, 711 F.3d 707, 715 (6th Cir. 2013) (finding supervising-physician regulations are not conditions of payment).

Amicus TAFEF suggests that this return to an express-words analysis that looks to determine whether the requirement is characterized as a "condition of payment" or a "condition of participation" is a move back to relying upon artificial categories – an approach this Circuit has already rejected. The inappropriate narrowing it effectuates is plain: Government agencies have written contracts and program requirements for decades without judicial constructs in mind, and the fact that certain words are not used makes core program requirements no less related to payment. An express words rubric would render many such requirements unenforceable under the FCA, creating an enormous loophole for fraud to go unchecked. *See SAIC*, 626 F.3d at 1268-69 ("[N]othing in the statute's language specifically requires such a rule, and we fear that adopting one would foreclose FCA liability in situations that Congress intended to fall within the Act's scope

(internal citation omitted) . . . We decline to create such a counterintuitive gap in the FCA by imposing a legal requirement found nowhere in the statute's language").

As described more fully below, *Amicus* TAFEF asserts that analysis of FCA liability is more appropriately constrained by the principles of knowledge and materiality, not more artificial boxes.

2. Materiality and Condition of Payment

While this Court has not yet specifically rejected the distinction between a "condition of payment" and a "condition of participation" for the purpose of evaluating liability under the FCA, it has made clear that the analysis of whether a requirement is a "condition of payment" is not limited to an evaluation of the express words of the statute or regulation. *Hutcheson*, 647 F.3d at 388. Rather, this Court has stated that determination of whether "the claims at issue misrepresented compliance with a material precondition of payment" is a "fact-intensive and context-specific inquiry." *Amgen*, 652 F.3d at 110-11. Moreover, while express language may certainly "'constitute dispositive evidence of materiality,' materiality may be established in other ways, 'such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at issue.'" *Hutcheson*, 647 F.3d at 394, *quoting SAIC*, 626 F.3d at 1269.

The District Court suggests that the materiality analysis is separate from whether a condition of payment exists. Indeed, it is the gap between those two concepts that appears to force a hyper-technical examination of the express words of the regulation for "condition of payment" language. TAFEF submits that the District Court's reading of the First Circuit's holdings is erroneous. While the Court in *Hutcheson* did employ a two-step analysis of first, whether there was a misrepresentation of compliance with a condition of payment, and second, whether the misrepresentation was material, it did not employ an explicit two step analysis in other cases, or advocate that the identification of the initial misrepresentation incorporated an express words analysis. *E.g.*, *Amgen*, 652 F.3d at 111-16; *Jones*, 678 F.3d at 85-95. In *Amgen*, for example, the Court fluidly examined whether there was a misrepresentation of compliance with a material precondition of payment in various state Medicaid programs using a "fact-intensive and context-specific" analysis of the statutes, regulations, manuals, and provider agreements in each state. There is no suggestion in *Hutcheson* or *Amgen* that establishing that an underlying contractual, statutory, or regulatory term that is violated is "a condition of payment" requires meeting a stricter threshold than is necessary to establish that such a violation is material under the False Claims Act. While an underlying condition, term, or requirement must be identified, there is no suggestion that a contract, statute or regulation containing that condition must use specific words to

denominate the requirement as "material" in order to support the existence of FCA liability.

Assessing whether the condition, term, or requirement at issue is a condition of payment is part of the analysis of whether the violation of a contractual, statutory or regulatory provision is material to the government's payment decision. This Circuit has made clear that knowledge and materiality are the means by which the FCA limits the scope of liability for "false claims." In order to determine whether there has been a violation of a condition that is material to payment, it is incongruous to require that the determination be artificially truncated in two-steps with two different standards. Perforce, if courts require the express words "condition of payment" in order to support FCA liability, then the question of whether the violation was material to payment would be rendered superfluous in nearly all cases.

This is precisely in line with the analyses employed by numerous courts. As posited by the various courts, the inquiry into whether the underlying condition or term (whether of a contract, statute, or regulation) is a condition of payment is essentially a materiality analysis, *i.e.*, whether the requirement relates to "core terms" or "core eligibility" of the program,[5] the government's benefit of the

[5] *Ab-Tech*, 31 Fed. Cl. at 434 (referring to the concealment of "a fact vital to the integrity of the program" and "information critical to the decision to pay"); *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593 (S.D.N.Y. 2013) (referring

bargain,[6] or "entitlement" to payment.[7]

Thus, a materiality analysis provides the dividing line between those requirements that are so integral to the program that a violation is capable of influencing the payment decision, and those where "noncompliance would not have influenced the government's decision to pay the claim" or were "tangential." *Mikes*, 274 F.3d at 697; *United States ex rel. Winkler v. BAE Sys.*, 957 F. Supp. 2d 856, 867 (E.D. Mich. 2013). This definition of materiality has long been adopted by this Court, and has been incorporated into the FCA itself. 31 U.S.C. 3729(b)(4). *Hutcheson*, 647 F.3d at 394, *citing United States ex rel. Loughren v. Unum Group*, 613 F.3d 300, 307 (1st Cir. 2010); S. Rep. No. 111-10, at 10 ("material" means "having a natural tendency to influence, or being capable of influencing," the decision to pay).[8]

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to "core eligibility requirements"); *United States v. TDC Mgmt. Corp.*, 288 F.3d 421, 426 (D.C. Cir. 2002) (referring to "core terms" of the contract).

[6] *E.g.*, *SAIC*, 626 F.3d at 1271 ("Payment requests by a contractor who has violated minor contractual provisions that are merely ancillary to the parties' bargain are neither false nor fraudulent").

[7] *United States v. Bourseau*, 531 F.3d 1159, 1168 (9th Cir. 2008).

[8] To be sure, materiality under the FCA is an objective standard and does not require a showing of actual reliance by the government. *See United States ex rel. Loughren v. Unum Group*, 613 F.3d 300, 309 (1st Cir. 2010) (confirming that a false statement is material where it "could have influenced" government's payment decision). There is an important distinction between having a "natural tendency to influence" and actually influencing a payment decision. The proper focus in evaluating materiality is on the "potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered." *United*

This is also consistent with the fact that not all frauds involve factual falsity *or* underlying contract or statutory terms. As this Circuit recognized, some of the oldest cases interpreting false or fraudulent claims under the FCA "do not speak in terms of these newly created categories, which are not in the text of the FCA." *Hutcheson* at 390. Rather:

> While *Bornstein*, *Rivera*, and *Scolnick* arguably involve misrepresentations of a strictly factual nature, *Hess* and *Murray & Sorenson* involve misrepresentations related to a legal status. As we held in *Murray & Sorenson*, "in *Hess* there was an implied false representation that the bids were competitive, and in this case there was an implied false representation that the bids were at a figure which the corporate defendant would have submitted in competition instead of at a somewhat higher figure" due to the tip. *Murray & Sorenson, 207 F.2d at 124*. These claims did not misstate a fact; they implied that the defendants had not engaged in certain illicit behaviors that would disqualify them from payment. Neither decision identified a statute, regulation, or certification as the basis of the legal precondition of payment the respective defendants had failed to meet.

Id. at 390-391, *citing United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) and *Murray & Sorenson v. United States*, 207 F.2d 119 (1st Cir. 1953) (other

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States ex rel. Harrison v. Westinghouse Savannah River Co.,352 F.3d 908, 916-17 (4th Cir. 2003). *See also United States ex rel. Feldman v. Van Gorp.*, 697 F.3d 78, 96 (2d Cir. 2012) (stating that materiality under the FCA "does not require evidence that a program officer relied upon the specific falsehoods proven"); *United States v. Rogan*, 517 F.3d 449, 552 (7th Cir. 2008) (rejecting the argument that the government must show it would actually have taken enforcement action if it had been aware of the falsity); *Longhi v. Lithium Power Techs.*, 575 F.3d 458, 470 (5th Cir. 2008).

citations omitted).

As this Circuit properly identified, categorical rules are at odds with the holdings of controlling decisions of both the First Circuit and the Supreme Court. *Id.* The lack of categorical rules remains true to the statute's purpose, "to reach all types of fraud, without qualification, that might result in financial loss to the government.'" *Hutcheson,* at 392, *quoting Cook Cnty.,* 538 U.S. at 129. The principles of knowledge and materiality permit courts to engage in a fulsome inquiry regarding whether claims are false or fraudulent under the FCA, thereby properly balancing any stretches of the law to within the limits of material falsehoods, but without creating hypertechnical gaps in the statute's reach.

Here, TAFEF respectfully suggests that any artificial distinctions created by a requirement that express words of "condition of payment" exist should be rejected. Rather, the analysis of whether there is a misrepresentation with compliance of a material precondition of payment should be a fluid one, allowing the court to employ a fact-specific and contextual inquiry of all the extrinsic evidence, in order to determine whether failure to comply with the requirement at issue was capable of influencing the government's decision to pay the claim. Rather than limit this inquiry to whether the express words of the contract, statute, or regulation identify a requirement as a "condition of payment," courts

appropriately look to the relevant language and other extrinsic evidence to examine the nexus between the requirement and the entitlement to payment.

III. CONCLUSION

For the foregoing reasons, the judgment below should be vacated.

Respectfully submitted,

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AUGUST 25, 2014

CERTIFICATE OF COMPLIANCE WITH FRAP 29(c)(5)

The undersigned, counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies pursuant to Federal Rule of Appellate Procedure 29 that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than Taxpayers Against Fraud Education Fund, *Amicus Curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Dated: August 25, 2014 /s/ Jennifer M. Verkamp

CERTIFICATE OF COMPLIANCE WITH FRAP 29(d) AND FRAP 32(a)

The undersigned, counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 4,485 words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

Dated: August 25, 2014 /s/ Jennifer M. Verkamp

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2014, I caused a corrected copy of the foregoing brief to be filed electronically with the Court's CM/ECF system, and that all counsel will be served by the CM/ECF system.

/s/ Jennifer M. Verkamp