No. 14-1440

# In the Supreme Court of the United States

TRIPLE CANOPY, INC.,
*Petitioner,*

v.

UNITED STATES OF AMERICA EX REL. OMAR BADR,
*Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## RESPONDENT'S BRIEF IN OPPOSITION


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## INTRODUCTION

Triple Canopy was awarded a $10 million contract to protect U.S. troops at an airbase in Iraq. The company was required by contract to ensure that its guards could use rifles and achieve qualifying marksmanship scores. When none of its 330 Ugandan guards qualified, Triple Canopy falsified its scorecards, placed the false records in its files, and billed the Army for millions of dollars.

Omar Badr, a decorated veteran who worked for Triple Canopy in Iraq, witnessed this fraud and reported it in person to senior executives at the company's Virginia headquarters. But Triple Canopy continued to falsify records and bill the Army for unqualified guards.

Badr then filed a *qui tam* action, alleging that the company violated the False Claims Act by knowingly "present[ing] … a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A), and "mak[ing] … false record[s] … material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). The decision below held that these allegations survive a motion to dismiss. Triple Canopy now contends that the decision was wrong because (1) the contract did not *expressly* condition payment on the marksmanship requirement and (2) the Army did not actually *rely* upon the false records.

But the express-condition rule Triple Canopy proposes has not been adopted by any circuit, has been rejected by four circuits, and has no basis in the statute's text. A similar rule exists for cases based on Medicare regulations, but that rule stems from a need to avoid federalizing medical-malpractice cases, and thus has no application here. And the proposed reliance requirement cannot be squared with this Court's holding that the Act does not "require[] proof that a defendant's false record or statement was submitted to the Government." *Allison Engine v. U.S. ex rel Sanders*, 553 U.S. 662, 671 (2008).

## STATEMENT

**1. Statutory Background.** The False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, "was adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts." *Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter*, 135 S. Ct. 1970, 1973 (2015). It "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

As relevant here, the FCA imposes civil liability on a person who "knowingly presents, or causes to be presented" to the government, "a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A), or "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)(B). The first section requires "present[ment]" of a fraudulent claim but does not require a false statement. The second requires a "false record or statement" but not presentment.

Suits to collect damages and civil penalties under the Act may be brought either by the Attorney General, or by a private person (known as a relator) who sues in the name of the United States in a proceeding known as a *qui tam* action. *See* 31 U.S.C. §§ 3739(a), 3729(b)(1). The United States may also intervene in a *qui tam* action, after which the relator "shall have the right to continue as a party to the action." 31 U.S.C. § 3730(c)(1).

**2. Facts.** Following his distinguished service as a Sergeant in the U.S. Army's 1st Ranger Regiment, for which he was awarded the Bronze Star, respondent Omar Badr went to work as a medic for petitioner Triple Canopy. Badr was assigned to the Al Asad Airbase, the second largest airbase in Iraq. In June 2009, the Army awarded Triple Canopy a one-year contract under which

the company would receive millions of dollars to provide qualified guards to protect U.S. military personnel and civilians at Al Asad. Pet. App. 3a.

One of Triple Canopy's most important "responsibilities" under its contract was to "ensure that all employees have received initial training on the weapon that they carry, [and] that they have qualified on a US Army qualification course." *Id.* at 4a, 58a. To satisfy this requirement, an employee had to score a minimum of 23 out of 40 rounds from a 25-meter distance. The company was contractually required to record the marksmanship scores for each guard on a standard form and to make those records available for inspection by Army officials. *Id.* at 4a, 58a.

Triple Canopy hired approximately 330 Ugandans to serve as guards at Al Asad. "[S]hortly after their arrival, Triple Canopy supervisors were aware that the Ugandans could not satisfy … the marksmanship requirement. Nonetheless, Triple Canopy submitted its monthly invoices for the guards." *Id.* at 4a. The first invoice, dated August 2009, billed the government $339,920 for these Ugandan "guards"—none of whom were qualified.

After several failed attempts to train the Ugandans and satisfy the marksmanship requirement, "a Triple Canopy supervisor directed that false scorecard sheets be created for the guards and placed in their personnel files." *Id.* Additional Ugandan guards who arrived at Al Asad "were also unable to satisfy the marksmanship requirement, and consequently additional false scorecards were created." *Id.* In May 2010, the company attempted to have 40 additional guards qualify in marksmanship. None succeeded.

That same month, Badr met with Triple Canopy's human resources director and senior legal counsel at the company's headquarters in Herndon, Virginia, where he

informed them that their "entire Ugandan Guard Force at Al Asad was unqualified to provide security," that Triple Canopy was nevertheless billing the Army for security services, and that its managers at Al Asad "were committing fraud and ordering others to do so in order to cover up the situation." 4th Cir. JA 14 ¶¶ 17, 19.

Nevertheless, when Badr returned to Al Asad six days later, he was "ordered" by the Triple Canopy site manager "to prepare false scorecards" for the 40 guards. Pet. App. at 5a. He was told to falsely indicate that the men had obtained scores in the 30-31 range, and that the women had obtained scores of 24-26. Badr reluctantly followed his orders. A manager then signed the scorecards, falsely post-dated them, and placed them in the personnel records for review by government officials. *Id.* Once again, Triple Canopy billed the government as if nothing was amiss.

All told, Triple Canopy submitted invoices to the Army totaling $4,436,733 for the Ugandan "guards" at Al Asad, with each invoice listing the number of guards and a per-head charge. *Id.* The Army, unaware that the services were worthless, paid the total amount invoiced. In June 2010, when Triple Canopy learned that the Al Asad contract had been awarded to another company, it once again tried to get the guards to qualify. None did. Triple Canopy then transferred these guards to four other bases in Iraq at which the company had security contracts with the U.S. government.

**3. This Litigation.** Badr filed a *qui tam* action against Triple Canopy in 2011, alleging that the company's actions violated the FCA at Al Asad and the four other bases. The United States intervened with respect to Al Asad.

The district court granted Triple Canopy's motion to dismiss all of the FCA claims. Pet. App. 21a-51a. It held

that Badr and the government had both failed to "sufficiently allege the presentment of a false statement or certification in support of a demand for payment." *Id.* at 31a. It further held that Triple Canopy's creation of false records could not support an FCA claim absent "presentment of and reliance on" those false records. *Id.* at 31a. The court also dismissed Badr "for lack of standing," reasoning that he had no right to party status given the government's intervention. *Id.* at 31a n.1.

**4. The Decision Below.** The court of appeals reversed in part and affirmed in part. *Id.* at 1a-20a.

a. With respect to § 3729(a)(1)(A), the court held that the district court erred in requiring an "objectively false statement" in Triple Canopy's invoices. *Id.* at 8a-9a. A fraudulent claim may rest on an "implied certification"—that is, "when a party impliedly certifies compliance with a material contractual condition." *Id.* at 11a. "Implied certification," however, is merely a "label" for one of many ways in which a claim may be "false or fraudulent." *Id.* at 10a-11a & n.1. While a garden-variety breach of contract cannot support FCA liability, a complaint states a claim when it "alleges that the contractor, with the requisite scienter, made a request for payment under a contract and 'withheld information about its noncompliance with material contractual requirements.'" *Id.* at 12a (quoting *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010) ("*SAIC*")). And courts can "ensure that plaintiffs cannot shoehorn a breach of contract action into an FCA claim" through "strict enforcement of the Act's materiality and scienter requirements." *Id.* at 13a.

In a footnote, the court rejected Triple Canopy's proposed rule—requiring a "condition [that] is expressly designated as a condition for payment"—because "nothing in the statute's language specifically requires such a

rule." *Id.* at 13a n.5 (quoting *SAIC*, 626 F.3d at 1268). The court noted, however, that the absence of an express contractual requirement could in practice make it difficult for the plaintiff to show scienter and materiality. Because a violation must be "knowing," the plaintiff must show that the contractor "understood that the violation of a particular contractual provision would foreclose payment." *Id.* And the requirement must also be material; not every contractual requirement "provide[s] a condition of payment." *Id.*

Applying these standards, the court found that the Army's task order "lists the marksmanship requirement as a 'responsibility' Triple Canopy must fulfill under the contract," and that Triple Canopy not only failed to comply but "undertook a fraudulent scheme that included falsifying records to obscure its failure." *Id.* at 14a. Triple Canopy's supervisors had "actual knowledge" of this fraud and, indeed, ordered it to be carried out. *Id.*

As for materiality, the court observed that "common sense strongly suggests that the Government's decision to pay a contractor for providing base security in an active combat zone would be influenced by knowledge that the guards could not, for lack of a better term, shoot straight." *Id.* at 15a. And the elaborate cover-up also indicated materiality—"[i]f Triple Canopy believed that the marksmanship requirement was immaterial to the Government's decision to pay, it was unlikely to orchestrate a scheme to falsify records on multiple occasions." *Id.*

b. With respect to § 3729(a)(1)(B), the court of appeals held that the government need not allege that it has actually "reviewed" the falsified scorecards. Pet. App. at 17a. The FCA, the court explained, "reaches government contractors who employ false records that are capable of influencing a decision, not simply those

who create records that actually do influence the decision." *Id.* at 17a. A contrary approach, the court reasoned, would be "doubly deficient; it would inappropriately require actual reliance on the false record and import a presentment requirement from § 3729(a)(1)(A) that is not present in § 3729(a)(1)(B)." *Id.* at 18a.

Applying that standard, the court concluded that "[t]he false records in this case—the falsified scorecards—are material to the false statement (the invoices) because they complete the fraud." *Id.* at 18. The false records make the invoices appear legitimate; an Army official who reviewed the guards' personnel files would conclude that that Triple Canopy had complied with the marksmanship requirement. *Id.*

c. Finally, the court of appeals reversed the district court's decision to dismiss Badr as a party because the government had intervened. The FCA's text, the court noted, provides that after intervention the relator "shall have the right to continue as a party to the action." 31 U.S.C. § 3730(c)(1).

d. Triple Canopy petitioned for rehearing en banc. No judge requested a poll, and the petition was denied. Pet. App. 53a.

## REASONS FOR DENYING THE PETITION

### I. There is No Circuit Split Over the Scope of Implied Certification, and Triple Canopy's Express-Condition Rule Has No Basis in the Statutory Text.

The FCA imposes civil liability on a person who "knowingly presents" to the government "a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). The decision below recognized that "claims can be false when a party impliedly certifies compliance with a material contractual condition," if that

condition represents "a condition of payment"—meaning that a violation of the condition "would foreclose payment." Pet. App. 11a, 13a n.5. Triple Canopy argues that the court erred because it did no go one step further and impose a requirement that plaintiffs prove that that payment was *expressly* preconditioned on compliance with a particular statutory, regulatory, or contractual provision. Indeed, Triple Canopy contends (at 13-27) that the circuits are split over whether to adopt such a rule. In fact, Triple Canopy's proposed rule has not been adopted by any circuit, has been rejected by four circuits, and has no basis in the statute's text.

**1.** Four circuits (the First, Fourth, Ninth, and D.C. Circuits) have rejected Triple Canopy's theory, and none has accepted it. The D.C. Circuit has given the most in-depth treatment to the issue, flatly rejecting the rule that a claim presented to the government is false or fraudulent "only if the government contractor violates requirements that are *expressly* designated as preconditions to payment." *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1268 (D.C. Cir. 2010) ("*SAIC*") (emphasis in original). "[N]othing in the statute specifically requires such a rule," the court explained, and "adopting one would foreclose FCA liability in situations that Congress intended to fall within the Act's scope." *Id.*

For example, the D.C. Circuit reasoned that an express-condition rule would allow a contractor to "escape liability" even where it (1) "knows that it violated a contractual requirement," (2) "recognizes that compliance with the requirement is material to the government's decision to pay," and (3) "submits claims for payment that omit any mention of the requirement while knowing that were the violation disclosed no payment would be forthcoming." *Id.* The court "decline[d] to create such a coun-

terintuitive gap in the FCA by imposing a legal requirement found nowhere in the statute's language." *Id.* at 1269.

Both the First Circuit and the Fourth Circuit (in this case) have followed the D.C. Circuit's lead. *See United States ex rel. Hutcheson v. Blackstone Med.*, 647 F.3d 377, 388 (1st Cir. 2011) ("We agree [with the D.C. Circuit that the express-condition rule] is not set forth in the text of the FCA."); *United States v. Universal Health Servs., Inc.*, 780 F.3d 504, 512 (1st Cir. 2015) ("Preconditions of payment, which may be found in sources such as statutes, regulations, and contracts, need not be expressly designated."); Pet. App. 13a n.5 ("We decline to impose Triple Canopy's proposed requirement" because "nothing in the statute's language specifically requires such a rule.") (quoting *SAIC*, 626 F.3d at 1268).

Even before the D.C. Circuit's opinion in *SAIC*, the Ninth Circuit had likewise rejected an express-condition rule in the context of claims based on federal regulations. *See United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1177 (9th Cir. 2006) ("An explicit statement, however, is not necessary to make a statutory requirement a condition of payment, and we have never held as much."); *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (reaffirming that "our precedent contain[s] no such limitation").

**2.** None of the other circuits follow Triple Canopy's proposed approach. Only the Second Circuit has adopted a rule resembling what Triple Canopy proposes, but that rule is limited to claims based on Medicare regulations, is animated by specific federalism concerns, and does not immunize violations of material contract terms.

a. In *Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001), the Second Circuit rejected an attempt to use the False Claims Act to sue a group of physicians who billed for medical procedures allegedly "not performed in accordance with the relevant standard of care" under Medicare regulations. There was no suggestion that a material contract requirement had been violated. In this context, the court worried that "permitting *qui tam* plaintiffs to assert that defendants' quality of care failed to meet medical standards would promote federalization of medical malpractice," replacing the aggrieved patient with the federal government. *Id.* at 700.

In light of "[i]nterests of federalism," and the courts' limited competence "to monitor quality of care issues," *Mikes* adopted a "limited application of implied certification in the health care field" under which liability exists only when the "statute or regulation upon which the plaintiff relies expressly states the provider must comply in order to be paid." *Id.* This approach "reconciles, on the one hand, the need to enforce the Medicare statute with, on the other hand, the active role actors outside the federal government play in assuring that appropriate standards of medical care are met." *Id.*

b. The First, Ninth, and D.C. Circuits have all read *Mikes* as reflecting a special rule for claims based on Medicare's standard-of-care regulations. *See SAIC*, 626 F.3d at 1270. These courts have identified three grounds for distinguishing *Mikes*. Each applies here.

First, *Mikes* "confined its reasoning to claims by medical providers under Medicare guidelines," and should thus be limited to its "context-specific setting." *SAIC*, 626 F.3d at 1270; *Hutcheson*, 647 F.3d at 388 ("We are unpersuaded that the Second Circuit would extend that rule to situations" outside the health-care context);

*Hendow*, 461 F.3d at 1177 ("[T]he *Mikes* court was dealing with the Medicare context, to which the court specifically confined its reasoning," and imposed only "an additional requirement on Medicare cases."); *Ebeid*, 616 F.3d at 998 n.3 (declining to "decide whether to adopt the Second Circuit's requirement in the Medicare context that 'the underlying statute expressly condition payment on compliance,' as [the relator's] position fails regardless").

Second, *Mikes* arose in a "substantially different situation" because, unlike here, it "involved the violation of no contract requirement," and thus has "no applicability" to a case involving requirements "actually incorporated into [the] contract." *SAIC*, 626 F.3d at 1270; *Hutcheson*, 647 F.3d at 388 n.11 ("We are unaware of any decision by the Second Circuit finding that a claim was not false or fraudulent where the claim failed to meet a material contract term.").[1]

Third, *Mikes* relied heavily on "federalism" and the need to avoid a reading that would lead to the "federalization of medical care." 274 F.3d at 700. It rested in part on the presumption against preemption—specifically, the rule that "the regulation of health and safety matters is primarily, and historically, a matter of local concern."

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[1] To be sure, one Second Circuit decision appeared to follow the *Mikes* analysis outside the Medicare context. *See United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94 (2d Cir. 2010). But that decision—which was reversed by this Court on other grounds, *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401 (2011)—did not involve the violation of a material contract term. There is thus no Second Circuit decision "rejecting an FCA claim where, as the government alleges here, the defendant sought payment after knowingly violating a material requirement of its contract." *SAIC*, 626 F.3d at 1270.

*Id.* (quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)). This case, by contrast, involves the sort of violation that led Congress to enact the False Claim Act after the Civil War: a federal defense contractor's violation of a material term in a contract with the U.S. Army. As in *SAIC*, this case "implicates none of the federalism concerns involved in *Mikes*." 626 F.3d at 1270.

c. The petition (at 14-20) not only mischaracterizes the Second Circuit's Medicare-specific approach but also mischaracterizes the decisions of five other circuits as reflecting a broad categorical rule that FCA liability may be premised only upon requirements expressly designated as preconditions to payment. Most of the cited cases involve Medicare fraud, and none go as far as Triple Canopy suggests. As already noted, the Ninth Circuit has expressly declined to decide whether to follow *Mikes* in the Medicare context. *See Ebeid*, 616 F.3d at 998 n.3.

The decision below recognized that "[c]ourts infer impled certification from silence 'where certification was a prerequisite to the government action sought,'" but did not require that the prerequisite be expressly described, in magic words, as a precondition of payment. Pet. App. 11a (quoting *SAIC*, 626 F.3d at 1266). The other circuits follow the same approach and—with the exception of the limited *Mikes* rule for claims based on Medicare regulations—have not required magic words or an express precondition. *See United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 305-07 (3d Cir. 2011); *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 205 (5th Cir. 2013); *Chesbrough v. Visiting Physicians Ass'n*, 655 F.3d 461, 468 (6th Cir. 2011); *United States ex rel. Lemmon v. Envirocare*, 614 F.3d 1163, 1168-69 (10th Cir. 2010). Not one of these decisions

expresses disagreement with the First, Fourth, Ninth, or D.C. Circuits—as one might expect if they had staked out a different approach.

**3.** Absent a genuine circuit split, Triple Canopy is left with policy arguments that mischaracterize the decision below and ignore the critical role of the materiality and scienter requirements in cabining liability. Thus, the petition describes the implied-certification theory as "unbounded" and contends that it allows a "run-of-the-mill contractual breach" to subject innocent contractors to "the spectre of crippling … liability." Pet. 25. The petitioner's amici go further still, hypothesizing FCA liability based on "violations of technical and obscure industry standards, affirmative action plans, environmental regulations, antidiscrimination statutes, procurement manuals, and more." Br. for Nat'l Defense Indus. Ass'n 4.

These far-fetched scenarios describe an utterly different regime from the one articulated by the decision below. The Fourth Circuit stressed the need for "strict enforcement of materiality and scienter requirements." Pet App. 13a. It also pointed out that, given these requirements, "the Government might have a difficult time proving its case without an express contractual provision." *Id.* In particular, the court emphasized that "the Government must establish that both the contractor and the Government understood that the violation of a particular contractual provision would foreclose payment." Id. at 13a n.5; *see also id.* (noting that "not every part of a contract can be assumed, as a matter of law, to provide a condition of payment"). These requirements set a high bar—one that this case clears but that the fanciful hypotheticals cannot.

This case is thus an especially bad vehicle to consider the outer margins of FCA liability. It falls instead within

the traditional heartland of the FCA: an attempt by a defense contractor to sell worthless services to the U.S. Army during wartime. Triple Canopy's fraud was far from hyper-technical; it involved a year-long scheme to defraud the government out of millions of dollars and cover up the fraud through falsified records. And it directly endangered the lives of U.S. servicemembers.

## II. There is No Circuit Split Over the Validity of Implied-Certification Liability.

Although the bulk of the petition is devoted to the contours of implied-certification liability, Triple Canopy also asks this Court (at 27-28) to "grant review to examine the underlying legitimacy of the implied certification theory of liability itself." The petition, however, does not contend that there is any circuit split over this question, and there is none.

The petitioner's amici (at 7) suggest that there is a split between the courts that have adopted implied-certification liability and the Seventh Circuit's recent decision in *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 711 (7th Cir. 2015). To be sure, that decision "decline[d] to join the circuits" that have "adopted this so-called doctrine of implied false certification," but it did not foreclose the possibility of implied-certification liability in a future case. And it declined to adopt the theory under circumstances where every other circuit's law would dictate the same outcome: the absence of any relevant condition of payment in a statute or regulation. The court held that "the thousands of pages of federal statutes and regulations incorporated by reference into" a school's Program Participation Agreement with the U.S. Department of Education were not "conditions of payment for purposes of the FCA." *Id.* Instead, the court "joined the Fifth Circuit," which has yet to decide

whether to adopt implied certification. *Id.*; *see Steury*, 625 F.3d at 262 (declining to "resolve the issue [of implied certification] because in any event the factual allegations in [the] complaint provide no basis for implying a false certification").

Aside from the lack of a split, Triple Canopy's attack on the implied-certification theory is also notable for its failure to engage with the statute's text. No express false statement is required to establish liability under § 3729(a)(1)(A). To the contrary, the statute uses the phrase "false or fraudulent," and a contractor's claim for payment may be "false or fraudulent" even if it does not contain an express false statement.

## III. Triple Canopy's Creation of False Records Provides an Independent Basis for Liability, and Its Reliance Defense is Baseless.

Under the FCA's "false record" provision, Triple Canopy is independently liable for "knowingly mak[ing] … false record[s]"—the falsified scorecards—that were "material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). Triple Canopy asserts (at 29-33) that the court of appeals should have imposed a reliance requirement, insisting that the making of false records should be actionable only where records were submitted to, and relied upon, by the government. But nothing in the text of § 3729(a)(1)(B) supports such a requirement. Indeed, as the court of appeals recognized, engrafting this new requirement onto the statute would "import a presentment requirement from § 3729(a)(1)(A) that is not present in § 3729(a)(1)(B)." Pet. App. *Id.* at 18a. The statute, moreover, prohibits not only the "us[ing]" but the "mak[ing]" of false records. And it defines materiality to mean only "a natural tendency to influence, or be

*capable of influencing*, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4) (emphasis added).

Triple Canopy's petition makes no effort to anchor its reliance argument in the statute's text. Nor does Triple Canopy confront this Court's decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 671 (2008), which foreclosed the same argument for precisely the reason given by the court of appeals. As the Court explained: "The inclusion of an express presentment requirement" in § 3729(a)(1)(A), "combined with the absence of anything similar" in § 3729(a)(1)(A), "suggests that Congress did not intend to include a presentment requirement" in § 3729(a)(1)(B). *Id.* Thus, § 3729(a)(1)(B) does not "require[] proof that a defendant's false record or statement was submitted to the Government." *Id.*

Lacking a footing in the statute's text or this Court's precedent, Triple Canopy suggests that the court of appeals should have required the pleading of a reliance defense under Federal Rule of Civil Procedure 9(b). But Rule 9(b) just requires that a fraud claim be pleaded with particularity; it does not (and cannot, under the Rules Enabling Act) alter the claim's *substantive* requirements, which do not include reliance. If a false record need not even have been "submitted" to the government, as this Court held in *Allison Engine*, then how could a court sensibly insist that the government have relied upon it? Triple Canopy offers no answer.

Finally, in a last-ditch effort, Triple Canopy claims a circuit split on this issue. It contends (at 32-33) that three circuits (the Fifth, Eighth, and Eleventh) "have all held that reliance is a necessary element," and thus a false-records claim must allege that "the false records *actually caused* the government to pay out money." Again, how could this be a requirement if even presentment or submission is not required? In any event, the

three cases cited by Triple Canopy do not stand for this proposition. Indeed, they do not even mention a reliance requirement for false-record claims, let alone confront the statute's text or this Court's contrary precedent.

## CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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