No. 25-2820

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES EX REL. SARAH BEHNKE,

Plaintiff-Appellee,

v.

CAREMARKPCS HEALTH LLC; CVS CAREMARK PART D SERVICES LLC; AND CAREMARK RX LLC,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
No. 2:14-cv-00824, Hon. Mitchell S. Goldberg (Ret.)

Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America in Support of Defendants-Appellants

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Dated: January 16, 2026

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

In recent years, the Chamber has highlighted how windfall-driven relators have abused the False Claims Act's ("FCA") *qui tam* mechanism. That abuse has exacted a substantial economic toll on businesses nationwide, and the Chamber has a significant interest in preventing such harm to its members. The Chamber accordingly submits this brief to highlight the dangers posed by the district court's unwarranted

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund this brief's preparation or submission.

deference to an unprecedented regulatory interpretation. Inconsistent, unpredictable applications of the FCA impose significant financial and reputational costs on American businesses, unduly exacerbating the risks of regulatory uncertainty.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *qui tam* provision of the False Claims Act (FCA) authorizes whistleblower relators to help root out fraud perpetrated against the federal government. The FCA provides powerful incentives for relator-plaintiffs: Those held liable under the statute face treble damages plus civil penalties, 31 U.S.C. § 3729(a)(1)(G), and in non-intervened cases, the relator-plaintiffs stand to recover twenty-five to thirty percent of the "proceeds," *id.* § 3730(d)(2). In cases like this one, venturesome relators and their counsel seek to convert the FCA into a lottery ticket—with winnings paid out of defendants' coffers—that rewards individuals and lawyers who identify a novel regulatory interpretation that retroactively bars previously unobjectionable conduct. Multimillion-dollar (or greater) windfalls can result. And as *amicus* explains below, this use of the FCA is not consistent with key textual requirements for FCA liability, which

ensure that the statute is used to target actual frauds that harm the government.

As explained in greater detail in the opening brief of Defendants-Appellants (collectively, "Caremark"), Medicare regulations require health insurers (called "sponsors" under the relevant regulations) to report the prices that pharmacy benefit managers (PBMs) "actually paid" for drugs under Medicare Part D. 42 C.F.R. § 423.308. Relator Sarah Behnke, a former Aetna actuary, brought this *qui tam* FCA action against Caremark, asserting that sponsors Aetna and SilverScript—for whom Caremark acted as PBM—failed to disclose, in required year-end reports to CMS about price concessions, the supposed effects of certain contractual arrangements between Caremark and pharmacies.

The details of Behnke's theory, like the regulations underlying it, are complicated. Part D sponsors—insurance companies—are required to report to CMS the amount a Part D sponsor "actually paid" a pharmacy for medications covered by the Part D plan. Here, the sponsors undisputedly reported the exact prices Caremark, acting as the sponsors' PBM, paid pharmacies at the point of sale for Part D drugs.

Behnke's theory focuses on aspects of a contractual arrangement common in the pharmacy-benefit industry. Caremark's contracts with pharmacies contained a provision called an overall generic effective rate (GER) guarantee, under which Caremark agrees that it will pay the pharmacy a minimum percentage discount rate from generic drugs' "Average Wholesale Price"—a well-known "sticker price" measure—aggregated across its transactions with that pharmacy, during a given year. If Caremark paid the pharmacy less in the aggregate than this guaranteed percentage, Caremark would make a "reconciliation" payment to the pharmacy at the end of the year. *See* Blue Br. at 12. This gives the pharmacy sufficient certainty that it will get paid at least a specified percentage of drugs' prices so that it can plan for and maintain sufficient profitability to cover its own overhead, which in turn benefits the public by ensuring that the pharmacy will remain open and available to distribute health-supporting and life-saving medications.

Caremark's GER guarantees covered *all* generic drugs—both those covered under Part D and those subject to ordinary commercial-insurer rules. Behnke's theory rested on the notion that the prices Caremark paid for *commercially* insured drugs in aggregate came in below the GER-

guaranteed rate, which would have meant Caremark needed to make an annual "reconciliation" payment to the pharmacy under the GER guarantee.

But for some *Part D* plans and in some years, the prices Caremark paid for Part D medications in the aggregate were higher than the effective rate set by the GER guarantee, while commercial prices in the aggregate were lower than the rate set by the guarantee. Behnke presumed that in paying those higher prices, Caremark *intentionally overpaid* on those drugs to "offset" the lower commercial-medication prices—thus purportedly reducing the "reconciliation" payment owed to the pharmacy. Behnke postulated that the sponsors should have reported this offset to CMS as a pricing concession in a "direct or indirect remuneration" ("DIR") report, and concluded from this that Caremark had caused the sponsors to falsify claims.

Even though Behnke was the only person of which Caremark (or *amicus*'s counsel) is aware—whether outside government or in it—to put forward that novel reading of the relevant regulations, the district court ratified her theory. The court ruled that Caremark had caused sponsors

to submit tens of millions of false claims to CMS because Caremark's end-of-year DIR reporting for those claims was false as a matter of law.

Among its other errors, ably described in Caremark's brief, the district court misapplied the FCA's materiality and falsity requirements. *Amicus* writes separately to highlight the significant dangers associated with the district court's failure to rigorously police the FCA's boundaries.

First, the district court erroneously concluded that materiality turned primarily on a generalized governmental interest in having accurate prices, coupled with the purportedly large cumulative amount of the notional overpayments, instead of on whether the government would have paid the claims with full knowledge of Caremark's alleged misrepresentations. That error, if affirmed, would wipe out an important guardrail that keeps the FCA from converting regulatory disagreements into company-threatening liabilities.

And, *second*, for similar underlying reasons, the district court's falsity rulings—which rejected Caremark's reasonable and practicable interpretation of the regulations for Behnke's strained and unmanageable one—place an impossible onus on companies to predict even off-the-wall theories of regulatory interpretation and proactively

comply with them. Other courts have wisely rejected such requirements, and this Court should do the same.

ARGUMENT

I. The District Court's Erroneous Materiality Analysis Elevates the Risks to Business Posed by Meritless Suits.

The district court reasoned that the allegedly false claims were material primarily because the government has a general interest in accurate price reporting, and the sums at issue added up to tens of millions of dollars. *See* R.499 at 56–57. That analysis asked the wrong questions. What matters for materiality is not whether the total amounts at issue are significant, but whether the government would have paid the claims if it knew how Caremark's pharmacy guarantees worked. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 194–95 (2016). In misapplying the materiality standard, the district court removed one of the primary guardrails that prevent *qui tam* relators from abusing the FCA for personal profit.

A. The district court's materiality analysis was error.

The district court made several fundamental errors in assessing Behnke's claim under the FCA's materiality standard. *See* Blue Br. at 48–60. Of particular import to *amicus* and the business community at

large, it analyzed the materiality question at too high a level of generality, asking whether the government usually cares about "accurate reporting." *See* JA150; Blue Br. 51. Unsurprisingly, the conclusion was that it does. The district court then employed a crude gut-feeling assessment of the purported damages, apparently reasoning that because the number had a lot of trailing zeroes, the government would have found the purportedly false claims material.

That *ad hoc*, chancellor's-foot approach to what should have been a rigorous and law-directed inquiry skipped over the question that actually matters: if the government had known about *these particular* purported inaccuracies in Caremark's reports, would it have stopped paying the claims? *See Escobar*, 579 U.S. at 194–95. After all, if the government believes a claim should be paid, no relator should be able to recover under the FCA whether that claim is for fifty dollars or fifty million.

The district court's error-riddled analysis—especially if affirmed—increases the risk that meritless, immaterial FCA claims will survive dismissal, dragging businesses through expensive litigation. They raise the specter of multimillion-dollar damages, trebled, plus civil penalties, imposed not for defrauding the government but (as in this case) simply

for attempting to comply with the letter of a regulation that yields effects a relator can cast as suspicious. And as explained below, that runs counter to the spirit animating the FCA's focus on contractors that *actually* defraud the government.

B. Materiality plays an essential role in cabining FCA liability.

The FCA was enacted "to prevent and punish frauds upon the Government of the United States." Cong. Globe, 37th Cong., 3d Sess. 348 (1863) (statement of Sen. Wilson).[2] Because it is a fraud-prevention statute, enforcement of its materiality standard plays an important role in limiting the Act's reach, in order to prevent imposing treble damages and civil penalties for minor errors or disagreements about the interpretation of ambiguous regulations. To qualify as a fraud, a

[2] The False Claims Act was enacted in response to allegations of rampant war profiteering during the Civil War. *United States v. McNinch*, 356 U.S. 595, 599 (1958). Private contractors supporting the Union Army were accused of defrauding the federal treasury through flagrantly wrongful acts: "For sugar, [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories." *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989) (quoting 1 F. Shannon, *The Organization and Administration of the Union Army, 1861–1865*, at 58 (1965)).

violation of a statute, rule, or regulation should go "to the very essence of the bargain" between the government and the defendant. *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 489 (3d Cir. 2017) (quoting *Escobar*, 579 U.S. at 193 n.5); *see also Escobar*, 579 U.S at 192 ("concerns about fair notice and open-ended liability" in FCA cases should be "addressed through strict enforcement of the Act's materiality and scienter requirements," which "are rigorous"). But if the district court's decision is upheld, a statute enacted for the salutary purpose of redressing flagrant and egregious acts of fraud, such as the provision of patently worthless goods to soldiers serving their country in harsh conditions, will instead continue to be used to pursue treble damages based on purported violations of abstruse laws, rules, and regulations. That will be the case even where, as here, the government has declined to endorse relator's theory of falsity.

The need for strict enforcement of the materiality requirement is particularly critical because the contractual and regulatory schemes that businesses routinely face when they assist the government in implementing programs—as contractors, grantees, or simply as program participants—can be rats' nests of opaque provisions that interact in

unpredictable ways. Those legal regimes are at a minimum "complex," *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 799 (8th Cir. 2011), if not also "poorly[ ]worded," *H.B. Mac, Inc. v. United States*, 36 Fed. Cl. 793, 816 (1996), *rev'd on other grounds,* 153 F.3d 1338 (Fed. Cir. 1998). Government contracts regularly incorporate "thousands of pages of other federal laws and regulations" of comparable complexity. *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 707 (7th Cir. 2015), *superseded in part*, 840 F.3d 445 (7th Cir. 2016).

Many federal regulatory regimes are so reticulated and challenging that courts routinely describe them as "byzantine," *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1329 (E.D. Cal. 1995), "intricate" and "almost unintelligible," *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981). Scholars fare no better, calling federal regulations "onerous and impenetrable" and "byzantine to the point of incomprehensibility." Steven R. Koltai, *How the Healthcare.gov Mess Happened and How To Fix It*, Brookings Inst. (Nov. 25, 2013), https://brook.gs/3oaOkdr; *see also, e.g.*, David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 Yale L.J. 616, 672 n.180 (2013) (referencing the "byzantine" two-thousand-page Federal

Acquisition Regulations governing federal government contracting and procurement). The Medicare programs at issue here, far from being an exception to this rule, are among its most exemplary embodiments. Courts have described these rules as "among the most completely impenetrable texts within human experience." *Abraham Lincoln Mem. Hosp. v. Sebelius*, 698 F.3d 536, 541 (7th Cir. 2012) (quoting *Rehab. Ass'n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994)). Given this complexity, it is important for courts to interpret government *inaction* in the face of a purported regulatory violation as a strong signal that the accused violation is immaterial.

Punishing entities' venial regulatory sins as though they were mortal ones also gets in the way of agency objectives. *See* Memorandum from Michael D. Granston, Dir., Commercial Litig. Branch, Fraud Section, U.S. Dep't of Justice, Memorandum to Attorneys, Commercial Litig. Branch, Fraud Section at 4 (Jan. 10, 2018) ("Granston Memo") (noting instances where "a *qui tam* action threatens to interfere with an agency's policies or the administration of its programs"). Agencies are hardly toothless in the face of real noncompliance. They can demand information, require certifications of compliance, exercise audit or

inspection rights, issue notices of corrective action, or even initiate formal investigations, all of which serve to address issues without resorting to extreme measures like FCA litigation that could negatively affect continued performance. *See, e.g.,* 42 U.S.C. § 1437f(o)(8)(C)–(E) (providing for regular inspections of public housing to ensure continued eligibility for subsidy); *United States ex rel. Howard v. Lockheed Martin Corp.*, 14 F. Supp. 3d 982, 1003 (S.D. Ohio 2014) (government issued Corrective Action Requests upon discovering contractual noncompliance). As the Justice Department itself explained, "it is frequently in the government's interest, as it would be in the interest of any contracting party, to avoid excessive concern over minor failings that might threaten a useful course of dealing with the other party," particularly where "performance otherwise has been adequate." *Constitutionality of the* Qui Tam *Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 220 (1989).

A *qui tam* suit can undermine agencies' efforts as contracting parties and as regulators. Allowing a suit to proceed after the government has affirmatively chosen to correct discrepancies instead of punish them—or, as here, has declined to say that a defendant's

statements even merit correction—risks imposing the very type of drastic sanctions that the agencies deliberately avoided. *See, e.g.*, *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008) (improper use of qui tam suits can "undermine the government's own administrative scheme for ensuring that hospitals remain in compliance and for bringing them back into compliance when they fall short of what the Medicare regulations and statutes require"); *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000) (permitting FCA claim based on violation of a statute could "unilaterally divest[] the government of the opportunity to exercise … the discretion to accept or disaffirm the contract on the basis of complex variables reflecting the officials' views of the government's longterm interests"); Granston Memo at 4–5 (collecting examples where agencies valued competing considerations more than recovery for alleged false claims).

Rigorous enforcement of the materiality requirement, particularly in cases like this one where the government has made no attempt to recoup funds, will mitigate these disruptions. Here, the record showed that despite knowing the details of Caremark's GER guarantees

(including *after* Behnke filed this case), multiple government agencies chose, again and again throughout the relevant time period, not to endorse Behnke's interpretation of the reporting requirements. *See* Blue Br. 53–59.

This, in other words, is not *Druding*. In *United States ex rel. Druding v. Care Alternatives*, 81 F.4th 361, 374 (2023), this Court held that government inaction is not necessarily dispositive, on its own, of immateriality. Nevertheless, the Court's reasoning made clear that government inaction creates a genuine issue of fact and precludes summary judgment for a relator. *Id.* Here, moreover, as Caremark explains, the district court heard *no* evidence to the contrary. Behnke "did not call any government witnesses" or "even a paid expert" to support her theory that Caremark's purported "offset," supposedly designed to avoid minimum payments under GER guarantees mattered to the government. Blue Br. 56.

II. The District Court's Falsity Finding Separately Undercut the FCA's Safeguards.

A. A finding of falsity for purposes of FCA liability requires an objective falsehood, and none was present here.

Because the FCA is "a fraud prevention statute," it targets "lies to the government." *United States ex rel. Lamers v. City of Green Bay,* 168 F.3d 1013, 1020 (7th Cir. 1999). Where a party's legal obligations are "not exactly clear" due to ambiguity in the governing legal instrument, that is "precisely the sort of claim that courts have determined not to be a false statement under the FCA." *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.,* 525 F.3d 370, 377 (4th Cir. 2008).

The statute's falsity requirement is therefore not met merely because a relator or a court thinks one interpretation is better than another reasonable one. *United States ex rel. Hopper v. Anton,* 91 F.3d 1261, 1267 (9th Cir. 1996) ("For a certified statement to be 'false' under the Act, it must be an intentional, palpable lie.… Innocent mistakes, mere negligent misrepresentations and differences in interpretations are not false certifications under the Act."); *cf. United States v. Harra,* 985 F.3d 196, 215 (3d Cir. 2021) (in false-statements prosecution, "ambiguity of a reporting requirement …. is relevant to falsity in its own right").

The scenario that played out below is, if anything, worse than punishing a regulated entity for making a different choice than a court might later elect between two reasonable interpretations. The district court did not "start … with the text," which is "always" the correct place to begin. *See United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 749 (2023). Under Medicare Part D, sponsors are required to report the prices "[a]ctually paid" for medications, and to report *reductions* in that price only when they qualify as "direct or indirect remuneration" ("DIR"). *See* 42 C.F.R. § 423.308. Such remuneration qualifies for reporting only where it "decrease[s] the cost incurred under the Part D plan." *Id.*.

Here, the "offset" supposedly generated through the GER guarantee was not a remuneration under the plain text of the regulation. A GER guarantee is a *one-way* guarantee from Caremark to the pharmacies—that is, Caremark guarantees that it will *pay* the pharmacies a minimum aggregate discounted rate. The pharmacies make no reciprocal promise to refund money to Caremark if aggregate drug pricing exceeds that minimum. And so there was simply no "remuneration" affecting Caremark's Part D medication prices that had

to be reported in a DIR Report. In short, the prices reported were not falsehoods at all—but, at a minimum, they were not *objective* falsehoods. The district court penalized Caremark not for selecting "incorrectly" among reasonable interpretations, but for selecting the only textually honest interpretation—and one that was accordingly *more* reasonable than the one Behnke advanced and the district court erroneously adopted.

Tellingly, CMS has never adopted Behnke's counter-textual reading. CMS provides extensive guidance listing many different arrangements that can count as remuneration. CMS has never listed these kinds of GER arrangements as remuneration. And the government in its statements of interest has never endorsed the view that GER arrangements amount to remuneration. The district court erred by substituting its own counter-textual read of the regulations.

B. The objective-falsehood standard is sound policy.

Requiring an objective falsehood before imposing FCA liability is—like requiring that any such falsehood be material—a critical safeguard for entities that do business with the government. That requirement avoids subjecting those entities to potentially crippling liability whenever

they must make a judgment call, interpret a disputed legal question, or act in the absence of a clear obligation. *Lamers,* 168 F.3d at 1018. Businesses increasingly find themselves faced with those choices in today's regulatory environment. Indeed, the HHS Office of Inspector General itself has noted, in the related context of pharmaceutical manufacturing, that "the use of reasonable assumptions is common practice" in the pharmaceutical industry and that "nearly two-thirds reported wanting additional guidance from CMS on assumptions-related issues." U.S. Dep't of Health & Human Servs., Office of Inspector General, *Reasonable Assumptions in Manufacturer Reporting of AMPs and Best Prices* (2019), https://tinyurl.com/kzxb3ksr ("OIG Report"). In situations like these, imposing FCA liability would improperly extend the statute far from its *fraud* bearings.

Requiring an objective falsehood also encourages good government practices by requiring agencies to specify when there is, in fact, a particular approach that the agency concludes regulated entities must follow. That, in turn, protects the regulated public by ensuring that there are clear directions, announced in advance, providing guidance about where regulated entities do and do not have discretion about how to

execute a statutory, regulatory, or contractual obligation. It is a matter of first principles and fair notice that an agency must clearly communicate its policies *before* a private party can be sanctioned with treble damages and statutory penalties for violating them. *See Harra,* 985 F.3d at 212 (explaining the "fundamental principle" of our legal system "that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required") (quoting *FCC v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012)); *Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 156 (2012) ("[A]gencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires.") (cleaned up) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n,* 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)). In other words, agencies cannot say one thing up front—"use your judgment"—only to have a relator later argue that a different judgment call would have been somehow better.

If upheld, the approach taken by the district court would open the doors to expansive FCA liability, seriatim litigation, and considerable financial and reputational costs over an array of unsettled statutory, regulatory, or contractual requirements. The risk of crippling treble

damages and statutory penalties may also force many businesses to settle even meritless cases out of concern that a court, or a jury, might prefer a different choice from the available interpretations of ambiguous obligations. Where, as here, a defendant's position reflects an interpretation that is not just reasonable but is also correct, it is doubly clear that the falsity element of a FCA claim has not been satisfied.

III. Meritless *Qui Tam* Actions Needlessly Burden American Businesses, American Taxpayers, and the Federal Government.

FCA liability potentially affects any person or entity, public or private, that receives or handles federal funds in myriad forms. A broad cross-section of businesses and individuals would be exposed to protracted litigation and potential liability if the district court's erroneous rulings are affirmed.[3]

[3] The district court's improperly permissive materiality and falsity standards would risk heightened FCA liability across a broad cross-section of businesses and organizations. *See, e.g.*, *United States ex rel. Lesnik v. ISM Vuzem d.o.o.*, 112 F.4th 816 (9th Cir. 2024) (visas for automobile-plant workers); *Miller v. United States ex rel. Miller*, 110 F.4th 533 (2d Cir. 2024) (credit cards); *United States ex rel. Angelo v. Allstate Ins. Co.*, 106 F.4th 441 (6th Cir. 2024) (car insurance); *United States ex rel. Zotos v. Town of Hingham*, 98 F.4th 339 (1st Cir. 2024) (municipal road design); *United States ex rel. Vt. Nat'l Tel. Co. v. Northstar Wireless, LLC*, 34 F.4th 29 (D.C. Cir. 2022) (telecommunications services); *United States ex rel. Schweizer v. Canon,*

This broadened scope of liability, coupled with the rising number of *qui tam* suits, underscores the importance of rigorously applying the FCA materiality standard.[4] Since 1986, an "army of whistleblowers, consultants, and, of course, lawyers" has been released onto this landscape. 1 John T. Boese, *Civil False Claims and* Qui Tam *Actions*, at

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Inc., 9 F.4th 269 (5th Cir. 2021) (office equipment); *Sanford-Brown*, 840 F.3d 445 (higher education); *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 816 F.3d 315 (5th Cir. 2016) (public-school JROTC programs); *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202 (5th Cir. 2013) (medical-device manufacturing); *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 712 F.3d 761 (2d Cir. 2013) (housing); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163 (10th Cir. 2010) (waste disposal); *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010) (consulting); *United States ex rel. Pritzker v. Sodexho, Inc.*, 364 F. App'x 787 (3d Cir. 2010) (public-school student meals); *Grand Union Co. v. United States*, 696 F.2d 888 (11th Cir. 1983) (groceries); *United States ex rel. TZAC, Inc. v. Christian Aid*, No. 17-cv-4135, 2021 WL 2354985 (S.D.N.Y. June 9, 2021) (charitable aid); *United States ex rel. Shemesh v. CA, Inc.*, 89 F. Supp. 3d 36 (D.D.C. 2015) (software development); *United States v. Americus Mortg. Corp.*, No. 12-cv-02676, 2014 WL 4273884 (S.D. Tex. Aug. 29, 2014) (mortgage lending); *United States ex rel. McLain v. Fluor Enters., Inc.*, 60 F. Supp. 3d 705 (E.D. La. 2014) (disaster relief); *United States ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9 (D.D.C. 2014) (athletic sponsorship).

[4] In 2024, for example, the Department of Justice noted that "whistleblowers filed 979 qui tam lawsuits, the highest number in a single year." U.S. Dep't of Justice, *False Claims Act Settlements & Judgments Exceed $2.9B in Fiscal Year 2024* (Jan 15. 2025), https://tinyurl.com/3m9jk43s. That represented a nearly 30% increase over the previous highest total. *See* Civ. Div. U.S. Dep't of Justice, *Fraud Statistics—Overview* (Sep. 30, 2024), https://tinyurl.com/4yb7hreu.

xxi (4th ed. 2011). Between 1986 and the end of the 2024 fiscal year, more than 24,000 FCA actions have been filed, and the vast majority of those—nearly 17,000, or over 70 %—were *qui tam* suits. Civ. Div. U.S. Dep't of Justice, *Fraud Statistics—Overview* (Sep. 30, 2024), https://tinyurl.com/4yb7hreu ("DOJ Fraud Statistics"). The rewards for this court-flooding wave of litigation have been relatively meager. Only "about 10 percent of non-intervened cases result in recovery." *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1087 (11th Cir. 2018); *see* Ralph C. Mayrell, *Digging Into FCA Stats: In-House Litigation Budget Insights,* Law360 (July 13, 2021), https://tinyurl.com/3bx65vts (DOJ declines to intervene in approximately 75 percent of cases, and 90 percent of declined cases ended in no recovery for the government).

If these litigations had no knock-on effects, this abysmal, sub-Mendoza-line batting average might nevertheless be an acceptable means of ferreting out fraud on the government. But meritless *qui tam* actions are anything but anodyne. They are, to the contrary, "downright harmful" to the business community (to say nothing of their effect on courts' already-clogged dockets). *See Graham Cnty. Soil & Water*

Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280, 298 (2010). The FCA's civil penalties (in 2025, $28,619 per false claim) and treble-damages provisions are "essentially punitive." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000); *see* Civil Monetary Penalties Inflation Adjustments for 2025, 90 Fed. Reg. 29,445, 29,447 (July 3, 2025); 31 U.S.C. § 3729(a). And setting aside the prospects of adverse judgments, simply *defending* an FCA case requires a "tremendous expenditure of time and energy." Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require that All* Qui Tam *Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 11 n.66 (2007). For example, pharmaceutical, medical devices, and health care companies "spend billions each year" dealing with False Claims Act investigations. John T. Bentivoglio *et al.*, *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

Moreover, even tenuous or completely unfounded allegations that a company "defraud[ed] our country send[] a message," and "[r]eputation …, once tarnished, is extremely difficult to restore." Canni,

supra, at 11; *accord United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1105 (7th Cir. 2014) ("[A] public accusation of fraud can do great damage to a firm."). For companies that are repeat players in assisting the government in running its programs, "the mere presence of allegations of fraud may cause [federal] agencies to question the contractor's business practices." Canni, *supra*, at 11. FCA liability can result in suspension and debarment from government contracting, *see* 2 C.F.R. § 180.800(a)(3)—"equivalent to the death penalty" for many contractors, Ralph C. Nash & John Cibinic, *Suspension of Contractors: The Nuclear Sanction*, 3 Nash & Cibinic Rep. ¶ 24 (Mar. 1989). And FCA allegations may also trigger similarly expensive follow-on litigation, such as shareholder derivative suits. *E.g.*, Stipulation of Settlement, *In re Oracle Corp. Derivative Litig.*, No. 10-cv-3392, ECF No. 95, at 1 (N.D. Cal. May 28, 2013).

Relators are thus keenly aware that mere allegations, regardless of merit, can "be used to extract settlements." Sean Elameto, *Guarding the Guardians: Accountability in* Qui Tam *Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 824 (2012). Punitive liability and the potential for years-long litigation creates intense pressure to settle even

"questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

The prospect of choosing between settling a meritless claim, on the one hand, and, on the other, paying millions of dollars to litigate a case—with its risk of an adverse judgment and treble damages—has a real and predictable chilling effect on companies and individuals that are evaluating whether to do business with the federal government. In turn, a reduction in qualified entities and individuals willing to deal with the government deprives the government of choice. Reduced competition means that the government very likely will pay higher prices, receive less valuable products or services, or both. *See, e.g.*, *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1262 (1st Cir. 1992) (Breyer, C.J.) ("[S]ignificantly increasing competitive firms' cost of doing federal government business[] could result in the government's being charged higher … prices."); Granston Memo at 5 ("[T]here may be instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exit the government program or industry.").

What is more, because the costs of FCA litigation are passed on to the government, either directly or indirectly, those costs ultimately will be borne by the taxpayer. Already, taxpayers bear a significant part of the *direct* cost of FCA suits. Contractors undoubtedly pass costs to taxpayers indirectly as well, by increasing the prices they charge for their services to account for the risk that their service to the public will expose them to costly and protracted litigation.

CONCLUSION

For the foregoing reasons and those in the accompanying briefs, the district court's order should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations in Fed. R. App. P. 29(a)(5), because it contains 5,296 words, which is less than one-half the maximum length authorized in Fed. R. App. P. 32(a)(7)(B)(i) for a party's principal brief.

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