No. 23-1958

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

v.

TEVA PHARMACEUTICALS USA, INC.;
TEVA NEUROSCIENCE, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the District of Massachusetts, No. 1:20-cv-11548, Hon. Nathaniel M. Gorton

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, 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.

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INTEREST OF *AMICUS CURIAE*

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 3 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.

False Claims Act cases touch on nearly every sector of the economy, including banking, defense, education, healthcare, and technology, and exact a substantial toll on the economy. Given the combination of the FCA's draconian liability provisions—treble damages plus per-claim penalties—and enormous litigation costs, even meritless cases can be used to extract substantial settlements. As a result, cases involving the

proper application of the FCA are of particular concern to *amicus* and its members.[1]

INTRODUCTION

The question presented in this appeal is straightforward. The Court accepted the appeal to decide whether 42 U.S.C. § 1320a-7b(g), which provides that "a claim that includes items or services resulting from a violation of" the Anti-Kickback Statute is a false claim under the FCA, requires but-for causation. The Supreme Court effectively resolved that question years ago, when it held that "a phrase such as 'results from' imposes a requirement of but-for causation." *Burrage v. United States*, 571 U.S. 204, 214 (2014). Section 1320a-7b(g)'s indistinguishable phrase "resulting from" must carry the same meaning: for an AKS violation to render a claim "false or fraudulent" under the FCA, the violation must be at least the but-for cause of the "items or services" for which the claim sought payment. *U.S. ex rel. Martin v. Hathaway*, 63 F.4th 1043, 1052-

[1] All parties to this appeal have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

53 (6th Cir.), *cert. denied*, 144 S. Ct. 224 (2023); *U.S. ex rel. Cairns v. D.S. Med. LLC*, 42 F.4th 828, 834-35 (8th Cir. 2022).

The district court's contrary decision impermissibly "give[s] the [statutory] text a meaning that is different from its ordinary, accepted meaning." *Burrage*, 571 U.S. at 216. And in so doing, it opens the floodgates to a torrent of meritless FCA actions based on allegations of AKS violations. Section 1320a-7b(g) applies to the same extent in *qui tam* actions as it does in government-initiated actions like this one. And without a requirement of but-for causation, relators will seek exorbitant *qui tam* settlements by alleging AKS violations—which are easy to allege, given the breadth of the AKS—with only an unclear or attenuated relationship to the "items or services" in claims for payment. 42 U.S.C. § 1320a-7b(g). That will impose deadweight costs on businesses and the public, and it will distort the FCA—a statute focused on *claims* that are false—into "a vehicle for punishing . . . regulatory violations" that do *not* cause any false claims. *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 579 U.S. 176, 194 (2016). This Court should, therefore, reverse the district court and hold that § 1320a-7b(g) requires but-for causation.

ARGUMENT

I. Section 1320a-7b(g) requires at least but-for causation.

When interpreting the FCA, the Court must "start . . . with [its] text." *U.S. ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 749 (2023). As relevant here, the FCA imposes liability on "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). The AKS, in turn, provides that "a claim that includes items or services resulting from a violation of [the AKS] constitutes a false or fraudulent claim for purposes of [the FCA]." 42 U.S.C. § 1320a-7b(g). Under these provisions, therefore, an underlying AKS "violation" may render a claim for payment "false or fraudulent" under the FCA, but only if that claim "includes items or services *resulting from*" the AKS violation. *Id.* (emphasis added).

There is no dispute that the phrase "resulting from" requires a "causal connection between an AKS violation and a claim submitted to the federal government." Add-6 (quoting *Guilfoile v. Shields*, 913 F.3d 178, 190 (1st Cir. 2019)).[2] And the Supreme Court has held that the

[2] Contrary to the district court's decision, *Guilfoile* did not reject a requirement of but-for causation. This Court simply held that § 1320a-7b(g) requires "a sufficient causal connection," without deciding what sort of "causal connection" would be "sufficient." 913 F.3d at 190. In fact, the

connection required by that phrase is "but-for causation." *Burrage*, 571 U.S. at 214. *Burrage* involved a criminal statute imposing a mandatory minimum sentence for the sale of illegal substances when "death or serious bodily injury results from the use of such substance." 21 U.S.C. § 841(a)(1), (b)(1)(A)-(C). The Supreme Court held that the "ordinary meaning" of "results from" requires proof "that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." 571 U.S. at 210-11 (cleaned up).

That holding resolves this appeal. As with the statute in *Burrage*, the Supreme Court has held that the FCA must be interpreted according to its "ordinary meaning." *Kellogg Brown & Root Servs. v. U.S. ex rel. Carter*, 575 U.S. 650, 662 (2015); *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011). And there is no meaningful difference between "results from" and § 1320a-7b(g)'s causal phrase "resulting from." So there is no difference between the phrases' ordinary meanings: they both unambiguously require at least but-for causation. *Burrage*, 571 U.S.

Court went on to hold that the plaintiff had "plausibly alleged a sufficient causal connection" by alleging that the defendant could not have sought government benefits for its services "*if not for*" the alleged AKS violation—in other words, by alleging but-for causation. *Id.* at 191 (emphasis added).

at 210-11; *see Martin*, 63 F.4th at 1052 ("The ordinary meaning of 'resulting from' is but-for causation."); *Cairns*, 42 F.4th at 835 ("'Resulting,' which is the present-participle form of the verb, has the same meaning as its present-tense cousin, 'results.' So we have little trouble concluding that, in common and ordinary usage, the participle phrase 'resulting from' also expresses 'a but-for causal relationship.'" (citations omitted)). When Congress enacted § 1320a-7b(g) in 2010, it did so against "the traditional background principle[]" that "a phrase such as 'results from' imposes a requirement of but-for causation," *Burrage*, 571 U.S. at 214, and "against the backdrop of a handful of cases that observed similar language as requiring but-for causation," *Martin*, 63 F.4th at 1052. Nothing in § 1320a-7b(g) indicates that Congress intended to depart from this background understanding by assigning the phrase "resulting from" anything other than its ordinary meaning. *Id.*; *Cairns*, 42 F.4th at 836.

The government cannot identify any plausible reason to give the FCA's "text a meaning that is different from its ordinary, accepted meaning." *Burrage*, 571 U.S. at 216; *see Schindler Elevator*, 563 U.S. at 410 (explaining that the Court has "cautioned … against" giving the

FCA's text "a 'different, somewhat special meaning'" instead of its "'primary meaning'" (quoting *Muscarello v. United States*, 524 U.S. 125, 130, 128 (1998)). The government has argued that *Burrage* does not apply to "different statute[s] and context[s]," D. Ct. Dkt. 189 at 9, but *Burrage* did not depend on anything specific to the statute at issue.[3] Because that statute did "not define the phrase 'results from,'" the Supreme Court "g[a]ve it its ordinary meaning." 571 U.S. at 210. And the phrase's "common understanding"—not some specialized, statute-specific meaning—reflects a "but-for requirement." *Id.* at 211. To reach that conclusion, the Court cited a dictionary, the Restatement of Torts, a hypothetical involving a baseball game, common law principles, and cases arising under a variety of distinct federal statutes. *Id.* at 210-14.[4]

[3] The government's reliance on *Schutte* is misplaced. *See* D. Ct. Dkt. 189 at 9. There, the Supreme Court found that the meaning of "willfully" in one statute should not be applied to *different* terms in the FCA. 598 U.S. at 754. The Court also held that its earlier decision had not interpreted "willfully" in the way the defendants claimed. *Id.* at 754-55. *Burrage*, in contrast, undeniably interpreted language indistinguishable from § 1320a-7b(g)'s phrase "resulting from" to require but-for causation.

[4] *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (Title VII); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (ADEA); *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007) (FCRA); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258 (1992) (civil RICO).

It could not be clearer that the Court understood its interpretation of "results from" to apply generally as a matter of plain English: "[I]t is one of the *traditional background principles* against which Congress legislates that a phrase such as 'results from' imposes a requirement of but-for causation." *Id.* at 214 (emphasis added) (cleaned up). That background principle applies with full force to the FCA and the AKS.

Indeed, the government has conceded that § 1320a-7b(g) requires a "causal connection" between an AKS violation and the items or services in a claim for payment, *see* D. Ct. Dkt. 189 at 10, but it has offered no coherent explanation for what it thinks that necessary connection *is*. It mostly relies on obscurantist labels: there must be a "sufficient causal connection"; the claim must be "tainted" by a kickback; a patient must be "*exposed* to" an AKS violation; and so on. D. Ct. Dkt. 161 at 5-8; D. Ct. Dkt. 189 at 5-8; Brief for the United States as Amicus Curiae at 9-15, *U.S. ex rel. Flanagan v. Fresenius Med. Care Holdings, Inc.*, No. 23-1305 (1st Cir. Aug. 21, 2023) ("*Fresenius* Amicus Br."). But what does any of that *mean*? What kind of "causal connection" is "sufficient"? What constitutes an actionable "taint"? When is a patient "exposed to" an AKS violation? More fundamentally, what do any of those inquiries have to do

with the statutory phrase "resulting from"? And why should a court play these unhelpful word games when the actual statutory text has an "ordinary, accepted meaning" that "imports but-for causality"? *Burrage*, 571 U.S. at 216.

The government has no answer, because its basic contention—that § 1320a-7b(g) imposes a causation requirement but not a but-for causation requirement—is incoherent. There *is no* recognized causal standard less demanding than but-for causation, which "represents *the minimum* requirement for a finding of causation." *Id.* at 211 (quotation marks omitted); *see also Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo. 1993) (en banc) (cited by *Burrage*, 571 U.S. at 211) ("'But for' is an absolute minimum for causation because it is merely causation in fact.").[5] The government's failure to grasp that point

[5] The government cites *Paroline v. United States*, 572 U.S. 434, 458 (2014), for the proposition that "alternative causal standards" exist. *Fresenius* Amicus Br. at 17. But most alternatives, such as proximate causation, are *more stringent* than but-for causation. *Paroline*, 572 U.S. at 446. To the extent that some tort cases have applied the but-for requirement to capture scenarios "when the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them," *id.* at 451 (cleaned up), the government does not claim that FCA cases present such an unusual joint-and-inextricable causation scenario. And in any event, *Burrage* expressly

bottoms out in its nonsensical claim that an AKS violation can *cause* the provision of items or services even if those exact same items or services would still have been provided in the absence of the AKS violation. *Fresenius* Amicus Br. at 20. Whatever connection the government thinks exists between an AKS violation and items or services that would have been provided even in the absence of the violation, it is not a *causal* connection—an act simply *cannot* cause an event "when the event would have occurred without it." *Burrage*, 571 U.S. at 215-16 (quotation marks omitted).

The government's contextual arguments fare no better. The government relies on other AKS provisions, but this case is about the scope *of the FCA*, not the AKS. *Fresenius* Amicus Br. at 17-19. There is nothing "incongruous" about interpreting § 1320a-7b(g) to require a but-for causal connection between an AKS violation and a claim for payment even if no such causal relationship is required under the AKS itself. D. Ct. Dkt. 161 at 8 (quoting *U.S. ex rel. Fitzer v. Allergan, Inc.*, 2022 WL 3599139, at *10 (D. Md. Aug. 23, 2022)); *see Fresenius* Amicus Br. at 18.

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rejected that combined-cause theory as a permissible interpretation of "results from." 571 U.S. at 215-16.

The AKS and the FCA are distinct statutes that prohibit different conduct; the False *Claims* Act is focused on claims for payment and is not implicated if a kickback does not result in a claim for payment. In addition, the AKS is a criminal statute enforceable only by the United States, while the FCA, by virtue of its *qui tam* provisions, may be enforced by anyone. 31 U.S.C. § 3730(b). Because third-party "informer" actions are "highly subject to abuse," *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775 (2000), Congress subjected them to multiple restrictions that do not apply to suits brought by the government. *E.g.*, 31 U.S.C. § 3730(b)(5) (first-to-file bar); *id.* § 3730(e)(3) (government action bar); *id.* § 3730(e)(4)(A) (public disclosure bar); *see also id.* § 3730(c)(2)(A)-(B) (authorizing government to dismiss or settle FCA action over relator's objections). Section 1320a-7b(g), by limiting a private relator's ability under the FCA to rely on AKS provisions that the government can always enforce directly in appropriate cases, serves the same purpose.[6]

[6] For the same reason, the government is wrong to suggest that interpreting § 1320a-7b(g) to require but-for causation would somehow "narrow[] the AKS." D. Ct. Dkt. 189 at 8 (emphasis omitted). Section 1320a-7b(g) has no effect on the AKS's scope; it affects only when the AKS can be indirectly enforced *through the FCA*. Requiring an FCA plaintiff

Without statutory text or context on its side, the government resorts to speculation about congressional purpose. *E.g.*, D. Ct. Dkt. 189 at 8. As an initial matter, of course, a statute's "purpose is expressed by the ordinary meaning of the words used." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) (quoting *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)); *see Laaman v. Warden, N.H. State Prison*, 238 F.3d 14, 16 (1st Cir. 2001). Because the Supreme Court has already decided the ordinary meaning of "resulting from," the government's suppositions about congressional intent have no legitimate role to play. *E.g.*, *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *Baker v. Smith & Wesson, Inc.*, 40 F.4th 43, 48 (1st Cir. 2022).

That aside, the government's arguments lack merit. The government focuses on the purpose *of the AKS*, arguing (for example) that "the purpose of the AKS was to ensure, on a prophylactic basis, that payments to providers or patients would not impact medical decision-making." D. Ct. Dkt. 189 at 9. But, again, this is not an AKS case—it's an *FCA* case. Although the AKS may "forb[id] financial conflicts

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to prove but-for causation does not limit the government's ability to enforce the AKS.

themselves" even if they do not affect "medical decisions," *Fresenius* Amicus Br. at 7, the FCA prohibits only "false or fraudulent claims for payment" that are "meant to appropriate government assets," *U.S. ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 423-24 (2023). The FCA is not "a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Escobar*, 579 U.S. at 194. So, while an unsuccessful kickback scheme might violate the AKS, *Fresenius* Amicus Br. at 7, 10, 17-18, it does not violate *the FCA*—the FCA is not violated unless the kickback scheme *results in* the provision of items or services for which a person seeks payment from the government.

When the government addresses the FCA's history, it cites two lone floor statements by individual legislators that § 1320a-7b(g) would "strengthen[] whistleblower actions based on medical care kickbacks." *Fresenius* Amicus Br. at 4, 18 (quoting 155 Cong. Rec. S10,853 (daily ed. Oct. 28, 2009) (statement of Sen. Kaufman)). Even if individual floor statements could ever inform a statute's meaning,[7] they are irrelevant to

[7] Because "'[f]loor statements by individual legislators rank among the least illuminating forms of legislative history,'" courts should "not attribute to Congress as a whole the views expressed in individual legislators' floor statements." *Zucker v. Rodriguez*, 919 F.3d 649, 660 (1st Cir. 2019) (quoting *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 307 (2017)).

the causation question here. According to the statements, § 1320a-7b(g) was meant to permit liability for claims that "result[] from illegal kickbacks" but are "not submitted directly by the wrongdoers themselves." 155 Cong. Rec. S10,853; *Fresenius* Amicus Br. at 4. All that means is that a claim can be false or fraudulent even if *the submitter* did not violate the AKS, as long as some other actor in the causal chain leading to the submission of the claim *did* violate the AKS. *See also* 31 U.S.C. § 3729(a)(1)(A) (creating FCA liability for anyone who "knowingly presents, *or causes to be presented*, a false or fraudulent claim" (emphasis added)). The items or services included in the claim still must "result[] from" an AKS violation, 155 Cong. Rec. S10,853, and nothing in the legislative history suggests that Congress intended § 1320a-7b(g)'s "resulting from" requirement to demand anything less than but-for causation.

The government's discussion of *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377 (1st Cir. 2011), reflects the same confusion. *Hutcheson* held that a device manufacturer that violated the AKS could be liable under the FCA for "causing" hospitals to submit false claims, even if the hospitals themselves were not aware of the

manufacturer's AKS violation. *Id.* at 388-91. That has nothing to do with whether the AKS violation was the but-for cause of the hospitals' services, contrary to the government's mystifying claim that kickbacks "which were unknown to the hospitals and not paid to them[] could not, by definition, have been the 'but for' cause of the hospitals' claims." D. Ct. Dkt. 189 at 12. The *Hutcheson* plaintiff alleged that the defendant "paid kickbacks to doctors" and that "*as a result of the kickbacks*, doctors across the country had performed spinal surgeries on Medicare and Medicaid patients using [its] devices." 647 F.3d at 380-81 (emphasis added). If kickbacks caused the doctors to perform surgeries and the doctors' hospitals billed the government for those surgeries, then the kickbacks *were* the but-for cause of the items and services in the hospitals' claims even if the hospitals did not know about them. *See also id.* at 393 (holding that because "the 'underlying transaction' violated the AKS," "*resulting claims* were ineligible for payment" (emphasis added)).

The bottom line is that the "ordinary meaning" of § 1320a-7b(g)'s phrase "resulting from" requires but-for causation, and the government identifies no genuine "textual or contextual indication" that Congress intended a different meaning. *Burrage*, 571 U.S. at 212. Congress could

have written § 1320a-7b(g) to impose some other standard, but "[i]t chose instead to use language that imports but-for causality." *Id.* at 216. This Court should honor that choice and hold that a claim is "false or fraudulent" under § 1320a-7b(g) only if an AKS violation was, at a minimum, the but-for cause of the "items or services" in the claim.

II. The district court's decision will lead to an explosion of meritless and costly *qui tam* actions.

Although the United States filed this case, the vast majority of FCA actions—71 percent of them since 1986—are initiated by private relators.[8] And § 1320a-7b(g) applies equally to both government-initiated and *qui tam* actions. By relieving FCA plaintiffs from any obligation to plead and prove but-for causation, the district court's interpretation of § 1320a-7b(g) will expose government contractors to a flood of *qui tam* actions based on allegations of AKS violations.

The FCA's *qui tam* provisions create strong incentives for relators to bring even extraordinarily weak claims. Those provisions authorize private citizens who have suffered no injury to bring actions for treble

[8] U.S. Dep't of Justice, Fraud Statistics – Overview (Oct. 1, 1986–Sept. 30, 2022) at 3 ("DOJ Fraud Statistics"), https://www.justice.gov/d9/press-releases/attachments/2023/02/07/fy2022_statistics_0.pdf.

damages and per-claim penalties of $13,508–$27,018—remedies that "are essentially punitive in nature." *Stevens*, 529 U.S. at 784. If the United States intervenes, a relator keeps 15 to 25 percent of any recovery, as well as attorneys' fees and costs; if the United States declines to intervene, a relator keeps up to 30 percent of any recovery, as well as fees and costs. 31 U.S.C. § 3730(d)(1)-(2). Even if a *qui tam* suit is doomed to fail, defendants face tremendous pressure to settle because the costs of litigating are so high and the potential downside so great. *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359-60 (11th Cir. 2006). These potential remedies, along with the ability to extract *in terrorem* settlements from innocent defendants, have led to an explosion in *qui tam* litigation, with 652 new cases filed in fiscal year 2022 alone. DOJ Fraud Statistics at 2.

If § 1320a-7b(g) is interpreted to require only some amorphous non-causal connection between an alleged AKS violation and claims for payment, those numbers will only go up. Because of the costs of litigating FCA actions, a motion to dismiss is often a defendant's only chance to defeat a meritless *qui tam* claim; once a claim survives a motion to dismiss, the costs of discovery and risks of trial leave little choice but to

settle even "questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (recognizing that discovery costs "can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak"). By rejecting but-for causation as a requirement under § 1320a-7b(g), the district court's decision reduces the facts a relator must plead under that section to survive a motion to dismiss, making § 1320a-7b(g) claims particularly attractive for enterprising relators. That is even more true in Circuits, like this one, that have held that § 1320a-7b(g) "obviate[s] the need for a plaintiff to plead materiality," *Guilfoile*, 913 F.3d at 190.

This is a problem because most *qui tam* actions—including those based on alleged AKS violations—are meritless. The government intervenes in a small minority of *qui tam* actions, but the vast majority of the over $72 billion obtained under the FCA since 1986 has come from that small subset of intervened cases. Fraud Statistics at 3. The much larger universe of declined cases has produced just 6.5 percent of the total recovery. *Id.* These meritless *qui tam* actions impose enormous financial costs. Many of *amicus*'s members are in industries where businesses

interact with the government and therefore invest substantial resources in efforts to ensure compliance and avoid FCA exposure. Meritless *qui tam* litigation only adds to those costs.[9]

Relaxing the pleading burden for *qui tam* claims based on alleged AKS violations will also exacerbate constitutional concerns with the "*qui tam* device." *Polansky*, 599 U.S. at 442 (Kavanaugh, J., joined by Barrett, J., concurring); *id.* at 449 (Thomas, J., dissenting). The tension between allowing uninjured private citizens to sue on the United States' behalf and Article II of the U.S. Constitution—under which "[t]he entire 'executive Power' belongs to the President alone," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020), and "civil litigation . . . for vindicating public rights" may be conducted "only by persons who are 'Officers of the United States,'" *Buckley v. Valeo*, 424 U.S. 1, 138-40 (1976) (per curiam)—has "been noticed for decades." *Polansky*, 599 U.S. at 449-50 (Thomas, J., dissenting). Although this government-plaintiff case does

[9] These costs are particularly severe for healthcare defendants like Teva. Every year, FCA claims cost healthcare companies "billions." John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011). Of the more than 15,000 *qui tam* suits filed between 1986 and 2022, 61 percent related to healthcare. DOJ Fraud Statistics at 3, 6.

not directly implicate the constitutionality of the FCA's *qui tam* provisions, those constitutional concerns counsel against dramatically increasing the number of *qui tam* suits through an unnatural interpretation of § 1320a-7b(g).

CONCLUSION

The Court should reverse the decision of the district court and hold that 42 U.S.C. § 1320a-7b(g) requires but-for causation.

Respectfully submitted,

/s/ Jeffrey S. Bucholtz

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,182 words, excluding the parts exempted by Fed. R. App. P. 32(f). I further certify that this brief 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 the brief was prepared in 14-point Century Schoolbook font using Microsoft Word ProPlus 365.

Dated: February 27, 2024

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2024, I electronically filed the foregoing amicus brief with the Clerk of Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Jeffrey S. Bucholtz
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