IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel. HECTOR BALDERAS, ATTORNEY GENERAL, *Plaintiff-Respondent*, v. BRISTOL-MYERS SQUIBB COMPANY, SANOFI-AVENTIS U.S. LLC, SANOFI US SERVICES INC., formerly known as SANOFI-AVENTIS U.S. INC., SANOFI-SYNTHELABO INC., and DOE DEFENDANTS 1 TO 100, *Defendants-Petitioners.*	Case No. S-1-SC-37430

AMENDED BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Regulations

Other Authorities

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 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.[1]

One of the Chamber's functions is to advocate for the interests of its members and the broader business community in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including issues arising under the federal False Claims Act (FCA), 31 U.S.C. §§ 3729-3733 (2018), and similar state laws, such as the New Mexico Medicaid False Claims Act (MFCA), NMSA 1978, §§ 27-14-1 to -15 (2004). The number of lawsuits

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Rule 12-320(C) NMRA. Counsel for *amicus curiae* has notified the parties of its intention to file this brief and requested their consent. Counsel for petitioners has consented to the filing of this brief. Counsel for respondent has indicated it does not have a position on that question.

brought under those statutes has increased markedly in recent years, and the Chamber's members often have been defendants in those actions.

This appeal concerns the res judicata effect of a judgment in federal court dismissing a *qui tam* suit brought under the New Mexico MFCA on a subsequent lawsuit brought by the State. According to the Court of Appeals, the State's decision not to intervene in the prior action shields it from the claim-preclusive effects of the final judgment in that case. As a result, the State can relitigate the same or related claims against the same defendants in a new case.

In the Chamber's view, the Court of Appeals erred. This case meets all of the requirements for claim preclusion: The new claim rests upon the same facts as the dismissed *qui tam* complaint; the State was represented by the plaintiff (the relator) in that case and had the option to take over the case and pursue it (but declined to do so); and the dismissal in that case was a final judgment on the merits. The State already has received a full and fair opportunity to litigate the claim. It should not be permitted to ignore the judgment of the first court and try again.

The Court of Appeals' rule, if accepted by this Court, would upend settled principles of res judicata, expose defendants to meritless and duplicative litigation, encourage disrespect of judgments entered by

sister courts, and waste judicial resources. This Court therefore should reverse.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises an important res judicata issue: Whether the dismissal of a *qui tam* case raising claims under the federal and state false claims laws bars the State's current claims arising out of the same operative facts. The answer is yes.

In the prior case, *United States ex rel. Dickson v. Bristol-Myers Squibb Co.*, 332 F. Supp. 3d 927 (D.N.J. 2017) (*Dickson*), the *qui tam* relator brought claims under the federal False Claims Act (FCA), 31 U.S.C. §§ 3729-3733 (2018); the New Mexico Medicaid False Claims Act (MFCA), NMSA 1978, §§ 27-14-1 to -15 (2004); and other state false claims laws. The complaint's theory was that the defendants had made false and misleading statements about Plavix, a drug used to prevent heart attacks and strokes, and the state and federal governments relied on those statements in deciding to authorize Medicaid payments for the drug. Fourth Am. Compl. ¶¶ 339-44, *Dickson*. The relator brought the MFCA claims on behalf of the State of New Mexico. *Id.*; §§ 27-14-1 to -15.

The State had a full and fair opportunity to litigate the claims in the federal lawsuit. Under New Mexico law, the relator had to give the State notice of the case; the State was required to review the merits of the case before the case could go forward; and the State could take over,

dismiss, or settle the case at any time. Here, the State reviewed the case and determined that the claims were supported by substantial evidence. But it declined to intervene in the case, instead allowing the relator to continue litigating on its behalf. If the relator prevailed, the State would have received at least 70% of the recovery.

The relator litigated the case for six years. After four amendments of the complaint, the federal district court determined that the complaint failed to state a claim for relief. The court explained that the complaint pleaded facts establishing that any potential misstatements were not material to the governments' decisions to pay for Plavix. *Dickson*, 332 F. Supp. 3d at 949. Accordingly, the district court entered a final judgment dismissing the complaint.

Rather than intervene in the federal case, the State decided to try its luck in state court. But under the basic principles of fairness, finality, and respect for sister courts reflected in settled res judicata law, the State should not be allowed that second bite at the apple. The complaint in this case is premised on the same facts as in the prior case: The State alleges that the defendants made misrepresentations in promoting Plavix that caused the State to pay fraudulent claims, in violation of state common law and various state statutes. Compl. ¶¶ 2-6, *State ex rel. Balderas v. Bristol-Myers Squibb Co.*, No. D-101-CV-201602176 (N.M.

1st Dist. filed Sept. 14, 2016) (N.M. Compl.). The relator in the prior case was litigating in the name of the State and on behalf of the State. The State reviewed that litigation and had the authority to direct or terminate it. The district court's decision was a final decision on the merits. The district court dismissed the case with prejudice, and a state court does not have the authority to modify that judgment. Under those circumstances, the State may not come to state court and attempt to litigate the issues anew.

The Court of Appeals held that the prior judgment does not bar this case because the prior case was brought by a *qui tam* relator and the State did not intervene in the case. *State ex rel. Balderas v. Bristol-Myers Squibb Co.*, 2019-NMCA-016, ¶ 33, 436 P.3d 724 (Op.). The Court did not dispute that the requirements for finding claim preclusion were met. Instead, it decided to make an exception to the normal res judicata rules because it believed the State is furthering important public policies in this litigation. But there is no basis for creating such an exception under federal law, and the Court's exception would cause more problems than it would solve.

Failing to apply settled res judicata principles in cases like this one would harm litigants, the judicial system, and the public. The number of *qui tam* suits, both federal and state, has increased markedly in recent

years. Those suits are expensive. The Court of Appeals' rule would allow the State to litigate any dismissed, non-intervened case twice, significantly increasing the costs for no corresponding benefit. That would encourage duplicative and piecemeal litigation, undermine the finality of judgments, and create confusion about when res judicata applies.

There comes a point at which litigation must end, so the parties and the courts can move on. Here, the relator litigated on behalf of the State for six years and amended the complaint four times, yet failed to state a valid claim. The State should not be allowed to try again.

ARGUMENT

I. Final Dismissal Of A *Qui Tam* Action Under The New Mexico MFCA Precludes The State From Relitigating The Same Or Related Claims In A New Action

The State necessarily plays an important role in a *qui tam* action under the New Mexico MFCA. The State is notified of the claims; it must review the claims and conclude that they are supported by substantial evidence before the case can proceed; it can intervene in the case at any time; and it obtains the majority of any recovery. Under settled principles of claim preclusion, a final judgment dismissing the complaint in a *qui tam* case under the New Mexico MFCA bars the State's

relitigation of the same or related claims in a second lawsuit. The Court of Appeals' reasons for concluding otherwise do not withstand scrutiny.

A. All of the elements for claim preclusion are present here

Because the prior judgment was entered by a federal court, the res judicata effect of that judgment is determined using federal law. *See Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) ("The preclusive effect of a federal-court judgment is determined by federal common law."); *Moffat v. Branch*, 2005-NMCA-103, ¶ 11, 138 N.M. 224, 118 P.3d 732 ("Because the prior action was in federal court, federal law determines the preclusive effect of a federal judgment.").

The issue before this Court is claim preclusion, *i.e.*, whether the prior judgment bars a party or its privy from proceeding with claims arising out of the same facts in a new case. *See Montana v. United States*, 440 U.S. 147, 153 (1979). If claim preclusion applies, the State is barred from litigating all issues that "were or could have been raised" in the prior case—not only the issues that were litigated in the prior case. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

Under federal law (which is the same as New Mexico law), claim preclusion applies when three elements are present: (1) "a final

judgment on the merits in an earlier action"; (2) "identity of the parties in the two suits"; and (3) "identity of the cause of action in both suits." *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005); *see City of Eudora v. Rural Water Dist. No. 4, Douglas Cty.*, 875 F.3d 1030, 1035 (10th Cir. 2017); *see also Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 61, 148 N.M. 106, 231 P.3d 87. If those requirements are met, the new claims are barred unless the party seeking to avoid preclusion establishes that it "did not have a 'full and fair opportunity' to litigate the claim in the prior suit." *MACTEC*, 427 F.3d at 831; *see Yapp v. Excel Corp.,* 186 F.3d 1222, 1226 n.4 (10th Cir. 1999).

All three elements for claim preclusion are present in this case, and the State plainly had a full and fair opportunity to litigate in the prior suit.

Final Judgment on the Merits

A court has issued a final judgment on the merits, for res judicata purposes, when it finally adjudicates all of the claims. *MACTEC*, 427 F.3d at 831 (claim preclusion prevents "relitigating a legal claim that was or could have been the subject of a previously issued final judgment"); *see*

Angel v. Bullington, 330 U.S. 183, 190 (1947) ("The 'merits' of a claim are disposed of when they are refused enforcement.").

As the Court of Appeals recognized, the phrase "final judgment on the merits" "is something of a misnomer," because a court need not make "a judicial determination of the actual merits" to enter a final judgment for claim-preclusion purposes. Op. ¶ 16 (internal quotation marks omitted); *see also* Restatement (Second) of Judgments § 19 cmt. a (1982). Rather, the court must have finally resolved the claims in some way that ended the case. A dismissal of the complaint with prejudice is a final judgment on the merits, even if the reason for dismissal was the legal insufficiency of the complaint, rather than the lack of factual support for the claims. *Wallis v. Smith*, 2001-NMCA-017, ¶ 6, 130 N.M. 214, 22 P.3d 682.

The U.S. Supreme Court has recognized that a dismissal for failure to state a claim is a final judgment on the merits for claim-preclusion purposes. In *Moitie*, the Court considered the res judicata effect of a dismissal of a complaint alleging antitrust violations on the ground that the plaintiffs had not sufficiently alleged an injury. 452 U.S. at 396. Some of the plaintiffs in the original case appealed, and others filed a

new lawsuit raising nearly identical claims. *Id.* at 396-97. The U.S. Supreme Court held that the new lawsuit was barred by res judicata, because "dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits'" for purposes of res judicata. *Id.* at 399 n.3. The Court then rejected the plaintiff's request that it make an exception to res judicata because of the appeal in the first case, explaining that the plaintiffs in the second case made "a calculated choice to forgo their appeals" and file the new lawsuit. *Id.* at 400-01.

The rule that a dismissal for failure to state a claim is a final judgment on the merits is settled law. The Supreme Court had applied that rule decades before its decision in *Moitie*. *See Angel*, 330 U.S. at 190 (holding that dismissal for lack of jurisdiction is a final decision on the merits with res judicata effect); *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("If the court . . . determine[s] that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."). And the Court has reiterated the rule since then. *See Semtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001) (citing *Moitie* for the proposition that a dismissal for failure to state a claim is a judgment on the merits).

Applying that rule here, the federal court's dismissal of the complaint in the prior case was a final judgment on the merits. The district court gave the relator four chances to replead her claims over a period of six years. The court eventually dismissed the complaint because the relator could not establish that any potential misstatements were material to the federal and state governments' decisions to pay for Plavix. *Dickson*, 332 F. Supp. 3d at 949. Materiality is an element of a claim under the federal FCA and New Mexico MFCA, *see Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2002 (2016); *Dickson*, 332 F. Supp. 3d at 960, and so the plaintiff could not proceed without establishing materiality.

Further, the dismissal was with prejudice. The court's order states that the "Relator's Fourth Amended Complaint is DISMISSED," without qualification. Am. Order, *Dickson*, ECF No. 125. The court did not give the relator leave to amend. And neither the relator, the State, nor any other government moved to clarify or modify the dismissal. The case was over.

The preclusive effect of a Rule 12(b)(6) dismissal reflects the judiciary's desire to balance the plaintiff's right to be heard, the

defendant's right to escape vexatious and meritless litigation, and the court system's interest in judicial economy. *See* Restatement (Second) of Judgments § 19 cmt. a. Although every plaintiff should have her day in court, considerations of fairness and judicial administration "require that, at some point, litigation over the particular controversy come to an end." *Id.*

Identity of Parties/Privity

Claim preclusion requires that the new litigation involve either the same parties as the prior case, or persons who were in privity with them. *See Montana*, 440 U.S. at 153-55; *Pelt v. Utah*, 539 F.3d 1271, 1281 (10th Cir. 2008). A person was in privity with a party in prior litigation when he or she received notice of the litigation and was "adequately represented by" that party. *Richards v. Jefferson Cty.*, 517 U.S. 793, 801-02 (1996). When a complaint asserted claims "on behalf of any non-parties," that is strong evidence that the party and non-parties were in privity. *Id.* at 801.

Applying those principles here, the State was in privity with the *qui tam* relator in the prior case. The whole point of a *qui tam* lawsuit is to permit the relator to stand in for the State. *See Black's Law Dictionary*

1444 (10th ed. 2014) (definition of "qui tam action"). A *qui tam* relator bringing claims under the New Mexico MFCA is not representing his or her own interests, but the interests of the State of New Mexico. The relator brings the claims "in the name of the [S]tate" and "on behalf of the State of New Mexico." Fourth Am. Compl. ¶ 337, *Dickson*; *see* § 27-14-7(C) ("A private civil action . . . for a violation of the Medicaid False Claims Act . . . shall be brought in the name of the state.").

Further, the State is not a passive bystander in *qui tam* litigation under the New Mexico MFCA. The Legislature ensured that when it enacted the statute. It included several provisions that require the State to play an important role in any *qui tam* suit:

- *Notice:* The MFCA requires that the relator give the State (specifically, the Human Services Department) actual notice of the action at least 60 days before even the defendant is notified. §§ 27-14-7(C), (D). The relator must provide the State with a copy of the complaint and must disclose all material evidence that supports the complaint. § 27-14-7(C).

- *State Investigation:* The MFCA requires the State to investigate the merits of every complaint and "make a written determination of whether there is substantial evidence that a violation has occurred." § 27-14-7(C). The case may not proceed without that affirmative written determination. *Id.* And the complaint is sealed for 60 days to give the State time to investigate. *Id.*

- *Intervention:* Before the expiration of the 60-day period, the State may intervene or may allow the relator to proceed with the

case. § 27-14-7(E). If the State declines to intervene, it retains the right to intervene at any time with good cause. § 27-14-8(D).

- *Dismissal or Settlement:* The MFCA authorizes the State to dismiss or settle the case on its own, irrespective of the relator's wishes. § 27-14-8.

- *Recovery:* Whether a relator or the State conducts the case, the State obtains at least 70% of any recovery. § 27-14-9(B).

Under New Mexico law, then, the State necessarily plays a significant role in a *qui tam* case under the MFCA.

Indeed, the State plays a more robust role than the federal government in a federal *qui tam* case. The New Mexico MFCA (unlike the federal FCA) affirmatively requires the State to make a determination that there is "substantial evidence" to support the *qui tam* case before the case can go forward. Op. ¶ 6 (citing § 27-14-7(C)).

By providing the State with such robust protections and authority over a *qui tam* action, the MFCA's framework inextricably links the State to the litigation and to the relator who is proceeding on the State's behalf. In this case, the State was given ample notice of the claims presented during the six-year course of this litigation; it knew of the specific evidence underlying those claims; and it was required to evaluate those claims to make sure they had merit before the case could proceed.

Further, the State could have taken over the litigation at any point, and it would have received at least 70% of any money judgment the relator obtained. The MFCA's *qui tam* provisions thus ensured that the State had "the opportunity to be heard concerning [its] interests through the medium of a representative," here, the relator. Restatement (Second) of Judgments § 41 cmt. a; *see Montana*, 440 U.S. at 154 ("[T]he persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be 'strangers to the cause.'"). The State therefore cannot continue litigating the same claims against the same defendants.

That conclusion is consistent with how the federal government would be treated in similar circumstances. As the U.S. Supreme Court has noted, the United States is a "real party in interest" in all *qui tam* FCA cases, and it is therefore "bound by the judgment in all FCA actions regardless of its participation in the case." *United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 934-36 (2009). That rule adequately protects the federal government's interests, because if the federal government "believes its rights are being jeopardized by an ongoing *qui tam* action," it has recourse—it can intervene in the case. *Id.* The same was true for the State here. *See* Op. ¶ 19. And the conclusion

that the government is bound by a decision obtained by a *qui tam* relator who litigated on its behalf is firmly grounded in the common law. *See* 3 William Blackstone, *Commentaries* *160 ("But if any one hath begun a *qui tam*, or popular, action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and *conclusive even to the king himself*." (emphasis added)).

Identity of Cause

Claim preclusion applies when the present suit raises the same cause of action as the prior suit. *MACTEC*, 427 F.3d at 831. That does not mean the claims in both cases must be identical. Rather, for claim-preclusion purposes, the "cause of action" includes "all claims or legal theories of recovery that arise from the same transaction," meaning a common nucleus of operative facts. *Id.* at 832; *see Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶¶ 22-24, 124 N.M. 479, 952 P.2d 474; *see also* Restatement (Second) of Judgments § 24.

If two cases arise out of the same nucleus of operative facts (and the other requirements for claim preclusion are met), then the prior judgment bars litigation of any "legal claim that was or could have been the subject of a previously issued final judgment." *MACTEC*, 427 F.3d

at 831; *see Moitie*, 452 U.S. at 398 ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

This case rests on the same transaction—meaning the same operative facts—as the prior lawsuit. In the prior lawsuit, the relator claimed that the defendants knowingly caused the submission of false claims to New Mexico's Medicaid program by misrepresenting Plavix's cost-effectiveness and medical necessity to doctors and to the State, and thus caused the State's Medicaid program to reimburse for Plavix prescriptions where a cheaper alternative existed. Fourth Am. Compl. ¶¶ 339-44, *Dickson*. In this lawsuit, the State claims that the same alleged misrepresentations constituted fraud in violation of state laws other than the MFCA, including the New Mexico Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2009); the New Mexico Medicaid Fraud Act, NMSA 1978, §§ 30-44-1 to -8 (1989, as amended through 2004); and the New Mexico Fraud Against Taxpayers Act, NMSA 1978, §§ 44-9-1 to -14 (2007, as amended through 2015). Op. ¶ 9.; *see* N.M. Compl. ¶¶ 1-6.

The particular legal theories in the two cases are different. But that does not matter, because the claims arise from a "common nucleus of operative facts." *MACTEC*, 427 F.3d at 832; *Chavez*, 1998-NMCA-004, ¶¶ 22-24. Accordingly, for claim-preclusion purposes, this case involves the same cause of action as the prior case.

Full and Fair Opportunity to Litigate

Here, the State plainly had "a 'full and fair opportunity' to litigate the claim in the prior suit." *MACTEC*, 427 F.3d at 831. It had notice of the lawsuit; it specifically evaluated the relator's claims; and it made a decision not to intervene. The State could have changed its mind and participated in the lawsuit at any time. Instead, it chose to allow the relator to litigate on its behalf, hoping to obtain a substantial recovery without actually litigating the claims itself. The State does not argue that it lacked a fair opportunity to litigate in the prior case.

B. The Court of Appeals' reasons for declining to apply settled claim-preclusion law do not hold up

The Court of Appeals recognized that the elements for claim preclusion are met in this case. It observed that a dismissal for failure to state a claim "[g]enerally" qualifies as a final judgment on the merits. Op. ¶ 16 (citing *Moitie*, 452 U.S. at 399 n.3). It acknowledged that the

relator in a *qui tam* case under the New Mexico MFCA "sues on behalf of the government to vindicate the government's interests," and that the State is the "real party in interest" in that lawsuit. *Id.* ¶ 18. It recounted the substantial role that the State necessarily plays in *qui tam* actions under the New Mexico MFCA. *Id.* ¶¶ 4-6. It correctly observed that the res judicata effect of the prior lawsuit is not limited to the actual claims litigated in that case, but extends to any "claims that could have been brought in the first action." *Id.* ¶ 15. And it never suggested that the State was denied a full and fair opportunity to litigate.

Instead, the Court of Appeals decided to make an exception to the settled res judicata rules for "certain circumstances" in which "the government's role in vindicating public interests militates against preclusion of its claims." Op. ¶ 19. Under this exception, when there is a prior *qui tam* case in which the State declined to intervene, the Court considers the prior judgment to be one "on the merits" with respect to the relator, but *not* with respect to the State. *Id.* ¶ 32. That holding is incorrect as a matter of federal law, and it is not good policy either.

First, the U.S. Supreme Court already has rejected the argument that courts can devise public-policy exceptions to federal res judicata law.

In *Moitie*, the Court specifically rejected the plaintiff's request that it recognize a public-policy or fairness exception to res judicata when one plaintiff chose to appeal a judgment (and prevailed on appeal) and another party did not appeal (and therefore did not get the benefit of the reversal on appeal). The Court explained that "there is simply no principle of law or equity which sanctions the rejection" of settled res judicata principles. 452 U.S. at 401 (internal quotation marks omitted); *see id.* at 400 ("[T]his Court recognizes no general equitable doctrine" that allows "an exception to the finality of" a judgment.).

Rather, in the Court's view, "justice is achieved" when settled res judicata law "is evenhandedly applied," so that all litigants can rely on final judgments. *Moitie*, 452 U.S. at 401 (quotations omitted). A "contrary view," the Court explained, would create "uncertainty and confusion" and would "undermin[e] the conclusive character of judgments." *Id.* at 398. The "very purpose" of res judicata, the Court observed, is to avoid that uncertainty and confusion by having clear rules about the effect of prior judgments. *Id.* at 398-99.

The Court of Appeals therefore should have applied settled res judicata principles rather than creating an exception to them. And by

creating an exception, the Court undermined the fairness and finality principles on which all litigants justifiably rely.

To justify its exception, the Court of Appeals reasoned that applying claim preclusion with respect to cases in which the State declined to intervene would be bad policy, because it "would give private parties perverse incentives to file poorly drafted or improperly pleaded qui tam actions." Op. ¶ 19 (internal quotation marks omitted). That logic does not hold up. *Qui tam* relators have a strong incentive to vigorously litigate their claims because they receive a share of the monetary recovery if they prevail. *See* § 27-14-9(B). And if a complaint is poorly drafted or improperly pleaded, the State can dismiss it or intervene. *See* §§ 27-14-7, 27-14-8. In fact, the State is required to evaluate the relator's claim to ensure that it is supported by "substantial evidence" before the relator can proceed with the claim. § 27-14-7(C). The Legislature built all of these protections into the MFCA. They ensure that a relator has many incentives to prepare a good complaint that is supported by sufficient evidence.

Further, the Court of Appeals' public-policy exception would create its own set of problems. First, it would create confusion as to when a

judgment is a final judgment on the merits. It is well settled that a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) with no leave to amend is a final judgment "on the merits" for res judicata purposes. *See Moitie*, 452 U.S. at 399 n.3; *Angel*, 330 U.S. at 193. Yet the Court of Appeals deemed the prior dismissal to be one without prejudice, so it would not qualify as a final judgment on the merits. Op. ¶ 33. That is not what the judgment said: it was a final dismissal with no leave to replead the claims. Am. Order, *Dickson*, ECF No. 125. A dismissal that does not give leave to amend is presumed to be with prejudice. *See* Fed. R. Civ. P. 41(b). And the Court of Appeals had no authority to modify the federal court's judgment to make it a dismissal without prejudice. *Mondou v. N.Y., N.H. & Hartford R.R.*, 223 U.S. 1, 58 (1912) ("[S]tate courts have no power to revise the action of the [f]ederal courts."). By deeming the prior judgment here to be one "without prejudice," Op. ¶ 33, the Court has created confusion as to what other judgments might be recast in that way.

Not only did the Court of Appeals change the terms of the judgment, but it did so only with respect to the State, and not the relator. Under settled res judicata law, the dismissal either is a final judgment on the

merits, or it is not. There is no basis for treating a party differently from those in privity with her. The whole point of privity is that, because the party represents the privy's interests, the two are treated the same for res judicata purposes. *See Montana*, 440 U.S. at 153-55. The Court of Appeals' exception therefore creates confusion not only as to the first element of the settled claim-preclusion test (final judgment on the merits), but the second element (same party or its privy) as well.

Further, the Court of Appeals' exception would create a number of other problems. It would disincentivize the State from adequately screening and monitoring MFCA claims, because the State would know that it has another chance if the relator's claims are dismissed. It would lead to duplicative and piecemeal litigation, because the State would have every incentive to try again if the relator's lawsuit fails. That, in turn, would burden both defendants in *qui tam* actions and the courts. And it would encourage litigants in other cases to assert other public-policy exceptions to res judicata. That is precisely the type of judicial inefficiency that res judicata is designed to prevent.

The Court of Appeals cited no binding precedent that compelled its conclusion. Rather, it relied primarily on the Fifth Circuit's decision in

Williams v. Bell Helicopter Textron, Inc., 417 F.3d 450 (5th Cir. 2005). *See* Op. ¶¶ 20-23. In that case, a federal district court dismissed a relator's federal FCA action for failure to state a claim under the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *Williams*, 417 F.3d at 453. The district court stated that the dismissal was with prejudice with respect to both the relator and the United States. *Id.* The relator and the United States appealed. The court of appeals affirmed the dismissal *with* prejudice with respect to the relator, *id.* at 454, but decided that the dismissal should be *without* prejudice with respect to the United States, *id.* at 455.

Williams is inapposite for several reasons. First, it was not a res judicata case. The court of appeals was deciding the effect of the federal district court's dismissal in the first lawsuit, not evaluating the effect of that judgment on a second, later lawsuit. *Williams*, 417 F.3d at 453. Accordingly, the Fifth Circuit did not address the res judicata factors or even mention res judicata. All it did was decide that the dismissal in the original case should have been entered without prejudice. And it had the authority to do that, because it was a federal appellate court reviewing a judgment of a federal district court.

Further, the Fifth Circuit's reasoning about why the dismissal should be without prejudice to the government does not apply here. The Fifth Circuit relied in part on the fact that the dismissal was for failure to plead fraud with particularity. *Williams*, 417 F.3d at 455. The dismissal here was a final decision that the complaint did not state a claim upon which relief could be granted. *Dickson*, 332 F. Supp. 3d at 960.

Finally, to the extent that the Fifth Circuit's decision could be read to authorize courts to decline to give res judicata effect to a prior judgment based on policy concerns, that reading would be inconsistent with *Moitie*. The Fifth Circuit reasoned that the dismissal should be without prejudice because the government may have believed that the case had merit but chose not to intervene due to cost or other reasons. 417 F.3d at 455. But the government's reasons for declining to intervene are not relevant to the claim-preclusion analysis. The point is that because the relator was litigating on behalf of the State and the State was adequately represented by the relator, the State is bound by the judgment against the relator. The State's decision not to intervene does not change the character of the judgment against the relator or make it any less final.

II. Failing To Apply Settled Res Judicata Principles Would Harm Litigants And The Judicial System

The practical consequences of the decision below confirm that this Court should reverse. Wielded properly, *qui tam* statutes like the FCA and MFCA can serve as "powerful tool[s]" to uncover and deter fraud against the government. *United States v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001). But many *qui tam* cases lack merit, and those cases impose significant costs on defendants and on the judicial system. This Court should not add to those costs by allowing the State to relitigate any non-intervened *qui tam* case that was dismissed for failure to state a claim. Doing so would lead to wasteful, duplicative litigation and would undermine the finality of judgments and the public's faith in the judicial system.

A. Federal and state *qui tam* actions impose significant costs on litigants and on the judicial system

The number of federal *qui tam* actions has increased significantly in the past three decades. *See* DOJ, *Fraud Statistics Overview: October 1, 1986—September 30, 2018* at 1 (2018), https://perma.cc/3PU4-3N3P (*Fraud Statistics Overview*). In 1990, relators filed 72 actions under the federal FCA. *Id.* By 2000, that number had increased by more than 400 percent. *Id.* From 2010 to 2018, the number nearly doubled again, and

federal district courts fielded an average of 668 claims per year, or nearly 13 each week. *Id.*

State actions have likewise proliferated. Most states, including New Mexico, have enacted their own false claims statutes with *qui tam* provisions. *See* U.S. Chamber Inst. for Legal Reform, *The Great Myths of State False Claims Acts: Alternatives to State* Qui Tam *Statutes* 7 (Oct. 2013), perma.cc/EMK8-6RC8.

And some suits involve claims under both federal and state false claims laws. This case illustrates the point. The fourth amended complaint asserted claims under the federal FCA and under 24 States' false claims statutes. *Dickson*, 332 F. Supp. 3d at 935. That is not atypical. *See, e.g.*, *United States ex rel. King v. Solvay S.A.*, 823 F. Supp. 2d 472, 481 (S.D. Tex. 2011) (explaining that relator's complaint alleged violations of the FCA and 23 different state false claims statutes); *United States ex rel. Bogart v. King Pharm.*, 414 F. Supp. 2d 540, 541 (E.D. Pa. 2006) (dismissing claims under nearly a dozen States' false claims statutes).

These lawsuits impose significant costs on litigants and on the courts. Defending *qui tam* actions "requires a tremendous expenditure

of time and energy," forcing defendants to "turn their focus from their businesses to defending against allegations of fraud." 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). And of course, *qui tam* suits impose significant costs on the already overburdened judicial system.

"Pharmaceutical, medical devices, and health care companies" alone "spend billions each year" defending against false claims lawsuits. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011); *see Fraud Statistics Overview* 1, 3 (in 2018, 446 out of 645 federal *qui tam* actions targeted healthcare-related businesses). Those costs ultimately are borne by the public in the form of higher prices for goods and services. Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein In Out-of-Control* Qui Tam *Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1265 (2008) (the majority of non-intervened suits "exact a net cost on the public"). That is, as the cost of defending

against myriad *qui tam* actions becomes a growing cost of doing business, that cost is necessarily passed to consumers.

Some relators have uncovered real fraud, and their lawsuits have served an important public purpose. *See Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) (acknowledging that the FCA is a "useful tool against fraud in modern times"). But many *qui tam* suits lack merit. According to one analysis, 92% of cases in which the federal government declined to intervene were frivolous or meritless suits that were dismissed without any recovery. Christina O. Broderick, Qui Tam *Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 974-75 (2007) (using data from 1987 to 2004). When a state or federal court determines that a *qui tam* lawsuit lacks merit and dismisses it, it has made a judgment that the potential benefits of a case no longer justify its costs, and that judgment should be respected.

B. The Court of Appeals' decision, if allowed to stand, would impose unjustified costs and upset the finality of judgments

The Court of Appeals' exception to res judicata would significantly increase the costs associated with *qui tam* litigation. According to the

Court of Appeals, a State is not bound by a judgment dismissing a *qui tam* relator's complaint any time the State declined to intervene in the case. Op. ¶ 33. That is a substantial proportion of cases; in most federal and state cases, the government declines to intervene. Rich, 76 U. Cin. L. Rev. at 1264-65. In all of those cases, the State could relitigate the very same claims that the prior court already rejected—even though the State necessarily was aware of and approved those cases. §§ 27-14-7 to -9. The State would have no incentive to intervene or dismiss a *qui tam* action that lacks merit, because the State would not be bound by a dismissal.

The result would be to substantially increase the costs on *qui tam* defendants. A defendant could be forced to litigate the same claims twice for any non-intervened case that was dismissed for failure to state a claim. In this case, for example, the defendants litigated in federal court for six years—and now they must start over in state court. Further, New Mexico is only one of the 24 States involved in the prior lawsuit. If the other state courts follow the lead of the Court of Appeals, these costs could be replicated across many States.

The doctrine of res judicata was designed so that litigants could avoid those unjustified costs. *Montana*, 440 U.S. at 153-54 (key purpose of claim preclusion is to protect defendants "from the expense and vexation attending multiple lawsuits"). And when defendants must spend additional costs on relitigating the same claims, they frequently have to divert funds from other purposes (such as research, development, and other drivers of economic growth), or pass along those costs to consumers.

The costs of duplicative litigation are borne not only by the defendants, but by the courts that must adjudicate the duplicative claims. Those courts must push aside other lawsuits to consider claims that a sister court already has rejected. Doing so means that justice will be delayed for litigants in other cases who are trying to have their claims heard for the first time. Faithful application of res judicata laws ensures that courts can "conserve judicial resources," *Montana*, 440 U.S. at 153, rather than spending them on claims that have already been determined to lack merit.

More fundamentally, the Court of Appeals' exception to res judicata undermines the finality of judgments and faith in the court system more

generally. The reason that the U.S. Supreme Court has emphatically refused to create exceptions to res judicata is because it recognizes that "[t]he doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Moitie*, 452 U.S. at 401. "Public policy dictates that there be an end of litigation" and that "those who have contested an issue shall be bound by the result of the contest." *Baldwin v. Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). If courts begin to recognize exceptions to res judicata, litigants will view that as an invitation to start attacking prior decisions. And when courts start revisiting final decisions of sister courts, that increases the possibility of inconsistent decisions, thereby undermining reliance on and respect for the judicial system. *Montana*, 440 U.S. at 153-54.

There comes a point at which litigation must end, so the parties and the courts can move on. When the *qui tam* relator and the defendant have spent years litigating a case and the state or federal court determines that the case lacks merit, the parties must be able to rely on that judgment. This Court therefore should apply settled res judicata

principles and hold that the State's claims here are barred by the prior federal judgment.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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