No. A17-0078

STATE OF MINNESOTA
IN SUPREME COURT

PHONE RECOVERY SERVICES, LLC, FOR ITSELF & O/B/O STATE OF MINNESOTA,
Appellant,

v.

QWEST CORP., ET AL.,
Respondents.

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic 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 that raise issues of vital concern to the nation's business community.

This case presents a question of significant importance to the Chamber's members—the scope of the Minnesota False Claims Act's tax bar. Appellant's interpretation of that provision would greatly expand the number of claims permitted under the Act. The resulting growth in litigation costs would injure many businesses in Minnesota, while the Minnesota Legislature would be no closer to attaining its purpose of discouraging fraud in government programs. The Chamber's members thus have a strong interest in ensuring that the tax bar is interpreted in accordance with the terms and purposes of the Act.

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[1] Pursuant to Minnesota Rule of Appellate Procedure 129.03, counsel for *amicus curiae* certifies that this brief was authored by counsel for *amicus curiae*. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

The Minnesota False Claims Act ("MFCA") permits private individuals to sue, on behalf of the government, persons who fraudulently acquire money or property from the State or a political subdivision, or who fraudulently avoid an obligation to transmit money or property to the State or a political subdivision. Minn. Stat. §§ 15C.01-.16. Like its federal counterpart, the MFCA expressly excludes claims based on tax payments. The MFCA provides that the Act "does not apply to claims, records, or statements made under portions of Minnesota Statutes relating to taxation." Minn. Stat. § 15C.03. Known colloquially as the "tax bar," that provision reflects the Minnesota Legislature's recognition that tax fraud "is directly addressed and remedied" through government enforcement, and that private lawsuits covering the same ground would be not only unnecessary, but actively harmful. *United States ex rel. Lissack v. Sakura Glob. Capital Mkts., Inc.*, 377 F.3d 145, 156 (2d Cir. 2004).[2]

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[2] Minnesota courts interpret the MFCA "under a unified FCA framework because the Minnesota FCA parallels the federal FCA." *Feinwachs v. Minnesota Hosp. Ass'n*, 2016 WL 424963, at *3 (D. Minn. Feb. 3, 2016) (internal quotation marks omitted); *see also United States ex rel. Scharber v. Golden Gate Nat'l Senior Care LLC*, 135 F. Supp. 3d 944, 966 (D. Minn. Sep. 29, 2015) (dismissing an MFCA claim after an FCA analysis because "the FCA and MFCA are almost identical and are interpreted the same way" (citing *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 916 n.1 (8th Cir. 2014)). *Lissack* is the "seminal case applying the [federal] Tax Bar." Ayres & McGuire, *Using the False Claims Act to Remedy Tax-Expenditure Fraud*, 66 Duke L.J. 535, 544 (2016).

The tax bar serves as an important limit designed to ensure that the costs of the MFCA's bounty system do not outstrip its benefits. Unless that provision is enforced, private parties would have every reason to usurp the State's tax-enforcement discretion, forcing law-abiding businesses to adopt inefficient tax positions and foisting unnecessary costs upon Minnesota courts and businesses. Because the Court of Appeals correctly determined that Relator-Appellant Phone Recovery Services, LLC ("PRS") would transgress that limit, its judgment should be affirmed.

ARGUMENT

I. PRIVATE FALSE-CLAIMS ACTIONS TO COLLECT TAXES INTERFERE WITH THE EXECUTIVE'S TAX ENFORCEMENT DISCRETION

Privatization of public tax enforcement risks "interfering with the [government's] efforts to enforce the tax laws." *Lissack*, 377 F.3d at 156. The State's responsibility for enforcing those laws necessarily involves determining which of those laws and which potential defendants constitute high enforcement priorities and which do not. New York, for instance, declined for many years to enforce its income tax laws against individuals who briefly traveled into the State for work because it determined that "imposing onerous burdens" on those doing business in the State, only to collect "small amounts of revenue," was contrary to

public policy.[3] At the same time, the State is charged with "ensur[ing] uniform enforcement of the tax law," *Deal v. Commissioner*, 78 T.C.M. (CCH) 638, 1999 WL 967076, at *2 (T.C. 1999), such that the laws that are enforced are imposed equally on all similarly situated taxpayers. MFCA actions based on taxes would interfere with both of those duties by allowing private litigants to usurp the State's discretion and enforce particular tax laws against particular defendants of their own choosing—regardless of whether the State has determined that enforcement would be appropriate or counterproductive, or whether other, similarly situated taxpayers have received the same treatment. An "evident purpose" of the tax bar, courts have recognized, is precisely "to prevent" this outcome. *Lissack*, 377 F.3d at 156.

The District Court and the Court of Appeals correctly recognized that Appellant's suit threatened just that kind of interference. In concluding that 911, TAM, and TAP charges were subject to the MFCA tax bar, the District Court looked in part to "the policy behind the tax bar," which is to "ensure that state executive and legislative bodies retain sole authority and discretion to set and enforce state tax policy." *Phone Recovery Servs., LLC v. CenturyLink, Inc.*, No. 62-cv-14-3768, 2016 WL 8578377, at *4, *6 (Minn. Dist. Ct. Nov. 21, 2016), (citing *Lissack*, 377 F.3d at 153), *aff'd*, 901 N.W.2d 185 (Minn. Ct. App. 2017).

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[3] Rampell, *States Look Beyond Borders to Collect Owed Taxes*, N.Y. Times, Mar. 21, 2010, http://www.nytimes.com/2010/03/22/business/22tax.html (quoting former New York State Tax Commissioner).

The 911, TAM, and TAP charges implicate precisely that purpose, the court reasoned, because "[t]he legislature left it to the *executive agencies* to implement a scheme to define how the charges should be assessed." *Id.* at *6 (emphasis added). For PRS, a private party, to seek to enforce those charges would thus frustrate the overall legislative design. As the District Court stated, "[t]he tax bar is intended to preserve the determination of how to set and enforce state policy on the application of the tax, which is the essence of the dispute in this action." *Id.*[4]

Minnesota is not alone in recognizing the threats to State enforcement efforts created by qui tam tax suits concerning taxes. A former revenue director for Illinois—which has a more limited tax bar than Minnesota's, one that applies only to *income* taxes—"described false claims suits by individuals as one of his Department's biggest challenges."[5] "These actions need to be brought back to the tax administration and its lawyer, who is the Illinois Attorney General," he stated.[6] Recognizing this kind of threat, courts in other jurisdictions have carefully enforced the tax bar's limits. In *Chawla v. Gonzales*, for example, an individual

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[4] The Court of Appeals affirmed as a straightforward matter of statutory interpretation, without having to consider the underlying policies of the tax bar. *See Phone Recovery Servs., LLC v. Qwest*, 901 N.W.2d 185, 198 (Minn. Ct. App. Aug. 7, 2017) (declining to address policy arguments because "relating to taxation" has a plain and ordinary meaning).

[5] Council on State Taxation, *False Claims Acts Should Exclude State & Local Taxes*, cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/cost-fca-policy-statement-final.pdf (last visited Jan. 9, 2018).

[6] *Id.*

brought suit under the Massachusetts False Claims Act seeking to collect taxes on the proceeds from the sale of illegal drugs. 90 Mass. App. Ct. 1102, 2016 WL 4426379, at *1 (Aug. 22, 2016) (unpublished). Although income from such sales is taxable, the court explained, the State had for more than a decade declined to pursue efforts to collect that revenue, opting instead to prioritize the "potentially competing interest[]" of "prosecuting drug defendants under" the criminal law. *Id.* at *4. By filing suit under the Massachusetts False Claims Act, the relator had, in effect, attempted to "force the executive to switch its prosecutorial priorities" both "generally" and in "individual cases." *Id*. That, the court held, a "relator cannot" do. *Id.* By enacting the tax bar, it said, "the Legislature indicated that assessment and collection efforts were not to be second-guessed by private citizens." *Id.* at *4 n.11.[7] PRS seeks permission to engage in just such second-guessing. The courts below correctly refused.

II. PRIVATE FALSE-CLAIMS ACTIONS TO COLLECT TAXES THREATEN TO OVER-DETER BUSINESSES FROM TAKING BENEFICIAL TAX POSITIONS

The privatization of public tax enforcement that would be licensed if PRS's reading of the tax bar were upheld would also force businesses to adopt inefficient tax positions. As a matter of simple economics, the higher the penalty for a tax

[7] Indeed, courts have recognized that the risk of interference exists—and hence the tax bar applies—even when the false-claims suit does not seek the *assessment* or *collection* of taxes, but merely is predicated on a violation of tax-related laws, so long as the government may seek a remedy for that violation. *Lissack*, 377 F.3d at 153.

violation, the more likely taxpayers are to take a relatively conservative approach and "claim tax positions that are not in their best financial interest[s] but that may enable them to face the lowest chance of an audit." Blank & Levin, *When Is Tax Enforcement Publicized*, 30 Va. Tax Rev. 1, 35 (2010). Put another way, the threat of substantial penalties deters not just tax cheats, but also legitimate taxpayers staking out good-faith, taxpayer-friendly positions when the law is uncertain. Tax penalties, effectively inflated through private false-claims suits, can thus lead to an increase in the effective tax rates that companies pay. While that may provide more tax revenue for the State in the short term, saddling businesses with higher taxes than the Minnesota Legislature intended will lead to deleterious consequences in the long term—impeding companies' growth and potentially driving them to relocate to other, lower-tax jurisdictions. Accordingly, tax penalties are designed to strike a balance. They must be large enough to encourage compliance with the law, without being so large as to "over-deter individual taxpayers" from claiming benefits to which they are legitimately entitled. *Id.*

If the MFCA could be used to impose liability on companies for purported tax violations, it would effectively raise the State's carefully calculated penalties and create precisely the over-deterrence just described. As the Second Circuit has explained, false-claims liability "arising from the identical conduct" that triggers ordinary tax penalties, would simply "duplicate those remedies" that already exist

under the tax laws. *Lissack*, 377 F.3d at 156 (internal citation and quotation marks omitted). In doing so, tax-based MFCA claims would increase the effective penalties taxpayers face for violating the tax laws, requiring them to pay twice—once under the tax laws, and once under the MFCA.

That MFCA liability is usually limited to conduct that was "knowingly" entered into does not mitigate that risk. Minn. Stat. § 15C.02(a)(1)-(7). As Judge Posner recognized in the analogous context of securities fraud litigation, even though "fraud is nominally a species of deliberate wrongdoing," there is still a real "danger of overdeterrence." *Fry v. UAL Corp.*, 84 F.3d 936, 938 (7th Cir. 1996). That is so, he explained, because the legal rules at issue, as well as "the application of those doctrines to particular factual situations[,] are so difficult, complex, and uncertain that there is a serious danger of erroneous impositions of liability." *Id.* All of that is true when it comes to tax law violations as well. As in the securities law context, there is a significant risk that a court will (erroneously) treat a wrongful tax position as a fraudulent one. Thus, penalties ostensibly targeted at fraud can, as a practical matter, over-deter non-fraudulent conduct as well.

Experience in jurisdictions without tax bars confirms that such a chilling effect on businesses is far from hypothetical. Experts have documented a notable uptick in *qui tam* false-claims actions based on tax violations in jurisdictions that allow those suits. *See* Dolan & McCormally, *Which Way the Wind Blows:*

Mitigating Whistleblowing Risk, 139 Tax Notes 1537, 1537 (2013). Accordingly, "corporations have grown increasingly fearful of" such actions, Houghton et al., *Qui Tam Lawsuits: Recommendations for Meaningful Reform—Part 1*, 67 State Tax Notes 595, 596 (2013), and as a result are being advised "[w]hen deciding whether to take a particular tax position, [to] consider not just the possible penalties and interest associated with an adverse audit determination, but also the risk of FCA or class action litigation." Martire & Ferrante, *A Decade of Lessons from Litigating State Tax False Claims Act Cases*, 70 State Tax Notes 127, 130 (2013).

III. PRIVATE FALSE-CLAIMS ACTIONS TO COLLECT TAXES IMPOSE UNNECESSARY COSTS ON COURTS AND LITIGANTS

Finally, because relators generally have less relevant expertise than executive agencies charged with enforcing the tax laws, they are more likely to file suits based on erroneous understandings of the law and hence to impose unnecessary costs on courts and litigants. Tax laws are frequently complex; tax agencies, by virtue of their role as administrators and enforcers of those laws, develop expertise in navigating and interpreting them. That expertise, however, is generally not shared by members of the public, including relators. *See generally* Jones, *Much Ado About* Qui Tam *for State Taxes*, 73 State Tax Notes 585 (2014) ("[T]he administrative body … has the enforcement power because private enforcement models lack the expertise to evaluate such claims."). Hence, when the

government declines to bring suit, but "opportunistic members of the public with significantly less knowledge than the departments of revenue that have chosen not to pursue the taxpayers being sued" nevertheless press forward, there is good reason to think that the relators' legal theory is misguided. Lutz et al., *A Recipe for Bad Tax Policy: False Claims Acts and State Taxation*, 22 J. of Multistate Tax'n & Incentives 14, 16 (2013). Indeed, a study examining the outcomes in decades' worth of federal false-claims suits concluded that "most qui tam actions brought without government intervention assert meritless or frivolous claims." Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 826 (2012). There is little benefit, and much cost, in requiring businesses to defend against—and courts to adjudicate—such meritless claims.

CONCLUSION

The Minnesota Legislature had good reason to categorically bar private plaintiffs from usurping the State's role in enforcing the State's tax laws. Privatization of public tax enforcement imposes significant costs on the State and its businesses, with little to show for it. This Court should honor the Minnesota Legislature's judgment and apply the tax bar with full force.

Respectfully submitted,

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February 7, 2018

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief conforms to the requirements of Minn. R. App. P. 132.01, for a brief produced with a proportional font. The length of this brief is 2,446 words. This brief was prepared using Microsoft Word 2016.

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February 7, 2018

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