ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5179

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

HONEYWELL INTERNATIONAL, INC.,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
NO. 08-CV-0961 (PLF)

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus curiae* Chamber of Commerce of the United States of America certifies as follows:

A. Parties and *Amici.* Chamber of Commerce of the United States of America is participating as an *amicus curiae* before this court. All other parties appearing to date in this Court are contained or referenced in the Opening Brief for Appellant, Doc. No. 1923111, filed on November 18, 2021.

B. Rulings Under Review. The ruling under review is the district court order and accompanying memorandum opinion denying Honeywell's motion for summary judgment. Judge Paul L. Friedman of the United States District Court for the District of Columbia issued both the order and memorandum opinion on November 25, 2020. The order is entry 232 on the district court docket and is available in the appendix at App. 319. The official citation for the opinion is *United States v. Honeywell International Inc.*, 502 F. Supp. 3d 427 (D.D.C. 2020). The opinion is entry 233 on the district court docket and is available in the appendix at App. 320.

C. Related Cases. To *amicus curiae*'s knowledge, there are no related cases.

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RULE 29 STATEMENTS

The government has consented to the filing of this *amicus* brief.

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Circuit Rule 29(b), undersigned counsel states that 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.

Pursuant to Circuit Rule 29(d), *amicus* is unaware of other entities or individuals intending to participate as *amici* in this matter.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* certifies that 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 the preparation or submission of this brief.

GLOSSARY

FCA	False Claims Act
FERC	Federal Energy Regulatory Commission
IRAP	Individual Retirement Income Plan
SEC	U.S. Securities and Exchange Commission

SUMMARY OF ARGUMENT AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") 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. Many of the Chamber's members are companies that enter into contracts or otherwise engage in business dealings with the United States government and thus face potential litigation risk and exposure to liability under the False Claims Act.

The district court was wrong to apply the proportionate share approach to the determination of damages in this case—where, after taking account of prior settlements, any recovery against Honeywell would increase the government's total damages to exceed the statutory limit. The False Claims Act ("FCA") places a statutory "*ceiling* on damages recoverable" by the government. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003) (emphasis added). Specifically, the statute caps the government's recovery at treble damages: "3 times" the amount of the government's injury. 31 U.S.C. § 3729(a)(1). Here, the

government concedes that it has already obtained those allowable damages—to the tune of more than $34 million—from prior and related settlements in litigation against other defendants for common damages sustained. But the district court's proportionate share approach would permit the government to recover *further* damages, in excess of the statutory maximum. Indeed, depending on the proportion of fault (if any) that could be ultimately assigned to Honeywell, the government could obtain more than *double* the treble damages it is allowed. That would contravene the statute's text and structure. This Court should instead require a *pro tanto* offset in this case to avoid a government windfall.

There are also prudential reasons to favor the *pro tanto* approach in this case. Although in theory it may be appealing to conduct a full accounting of comparative fault, courts have often recognized that in practice, such an approach creates procedural and substantive challenges that could be particularly formidable in this case, which has already gone on for 13 years. Using the proportionate share approach in this case (and in cases presenting similar challenges) could tee up expansive discovery battles and collateral litigation (including with nonparties); put complex apportionment issues before the factfinder; and discourage settlement in future similar circumstances. The jury would be required to apportion fault among Honeywell and *nonparties* for alleged conduct stretching back to the early 2000s (and earlier). Because the existing record is inadequate to support this daunting task,

the district court has already invited requests for *additional* discovery. *See* App. 415. These are unjustifiable costs to heap upon this long-running litigation—particularly where the government has already maxed out its allowable recovery. This Court should reverse.

ARGUMENT

I. The District Court Erred In Applying The Proportionate Share Approach In This Case, Which Would Allow The Government To Seek Damages That Exceed The FCA's Treble Damages Cap.

The district court was wrong to apply the proportionate share method in this case. The FCA states that violators are liable to the government for treble damages, 31 U.S.C. § 3729(a)(1), a provision the Supreme Court has characterized as a "ceiling" on the government's recoverable damages. *Cook County*, 538 U.S. at 130. But the district court's proportionate share approach would disregard that cap, permitting the government (if Honeywell is held liable at trial) to obtain more than *double* the treble damages it is allowed and has already obtained. That result would violate the statute's text and structure.

A. The FCA Prohibits The Government From Recovering More Than The Statutory Maximum.

The Supreme Court has explained that the FCA's treble damages provision is a "*ceiling* on damages recoverable" under the Act. *Cook County*, 538 U.S. at 130 (emphasis added); *see also Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1996 (2016) (noting that, under the FCA, "[d]efendants are subjected to treble

damages plus civil penalties of up to $10,000 per false claim"). The Court in *Cook County* reasoned that this was one of the reasons why adding treble damages to the FCA did not eliminate municipal liability: the FCA's treble damages were expressly limited as such and did not allow an "open-ended" recovery as do "classic punitive damages." *Cook County*, 538 U.S. at 131–32. There was thus no concern that more than treble damages would be imposed against defendant municipalities. *Id*. at 132. Other courts have also described the FCA's treble damages as being limited by statute. *See, e.g.*, *United States v. Mackby*, 339 F.3d 1013, 1018 (9th Cir. 2003) (characterizing the FCA as imposing a "*maximum* treble damage award" (emphasis added)).

Interpreting the FCA's treble damages provision as a statutory cap is consistent with the plain language of the Act, which speaks of "3 times the amount of damages" sustained, 31 U.S.C. § 3729(a)(1)—not restitution or disgorgement. These latter, equitable remedies are "distinct from compensable damages." *SEC v. Cavanagh*, 445 F.3d 105, 119 (2d Cir. 2006) (internal citation omitted); *cf. United States v. Novo A/S*, 5 F.4th 47, 56 (D.C. Cir. 2021) (reiterating that "restitution" under the Food, Drug, and Cosmetic Act "is different from traditional damages" such as those authorized under the False Claims Act (internal citation omitted)). While the remedy of disgorgement, for example, might in some cases justify a surplus recovery for the plaintiff, "[t]he stated goal of the damages remedy is *compensation*

of [a] plaintiff for legally recognized losses," which "means that [a] plaintiff should be fully indemnified for his loss, but that *he should not recover any windfall*." Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages, Equity, Restitution* § 3.1, 215 (3d ed. 2018) (emphasis added).

In other words, by referring expressly to "the amount of damages" and omitting any reference to equitable remedies such as disgorgement, the FCA's "plain language" indicates that "[t]he only allowable remedy" is a statutory multiplier of "compensatory damages." *United States ex rel. Taylor v. Gabelli*, No. 03-cv-8762, 2005 WL 2978921, at *7 (S.D.N.Y. 2005); *see also United States ex rel. Tyson v. Amerigroup Illinois, Inc.*, 488 F. Supp. 2d 719, 732 (N.D. Ill. 2007) ("Disgorgement of profits is not a remedy recoverable under the FCA."). If the government wishes to seek relief outside of compensatory damages, the FCA permits it to assess civil penalties. *See* 31 U.S.C. § 3729(a)(1) (providing that violators are "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000" per claim as adjusted by statutory inflation provisions). And the government can collect those penalties even without recovering damages. *See United States ex rel. Davis v. Dist. of Columbia*, 679 F.3d 832, 840 (D.C. Cir. 2012).

In sum, settled judicial interpretations of the Act confirm that the treble damages provision of the FCA is an express "*ceiling* on damages recoverable" under

the Act, consistent with the text and structure of the statute. *Cook County*, 538 U.S. at 130 (emphasis added).

B. The *Pro Tanto* Approach Should Be Applied Here To Prevent The Government From Seeking A Windfall Due To Its Earlier Settlements.

The *pro tanto* approach honors the FCA's treble damages cap by ensuring that the government recovers no more than "3 times the amount of damages" that the government sustained, 31 U.S.C. § 3729(a)(1), regardless of the amount of previous settlements. The same cannot be said of the proportionate share approach in cases such as this. Indeed, here—if the government obtains any damages against Honeywell—applying the proportionate share rule to determine relief would allow a total recovery by the government well above the statutory cap.

In this case, the government has already fully recovered the approximately $34 million it claims to be owed. *See* App. 404–05 (noting that the government seeks a "total of $34,922,273" in damages, but that settling defendants have already "paid a total of $36,042,241" in common damages). Under the district court's approach, Honeywell could be liable for more than $34 million *in addition*—an amount that would *double* the treble damages that the government has already recovered. Even if Honeywell were found responsible for just 10% of the relevant liability, the government would still recover a multimillion-dollar, extra-statutory windfall.

For these reasons, the *pro tanto* approach should be applied in this case. The Supreme Court has implicitly endorsed the *pro tanto* approach in the FCA context. *See United States v. Bornstein*, 423 U.S. 303, 316 (1976) (explaining that "subtractions are made for *compensatory payments* previously received by the Government from any source" when computing a defendant's FCA damages (emphasis added)). And other courts have held that the *pro tanto* rule is appropriate in order to avoid a government recovery that exceeds the statutory maximum. *See, e.g.*, *United States ex rel. Purcell v. MWI Corp.*, 15 F. Supp. 3d 18, 27–30 (D.D.C. 2014) (after "compensatory" third-party payments were deducted under *pro tanto* rule, the government had "gotten what it paid for" and its recovery was "limited to civil penalties"), *rev'd on other grounds*, *United States ex rel. Purcell v. MWI Corp.*, 807 F. 3d 281, 291 (D.C. Cir. 2015); *Miller v. Holzmann*, 563 F. Supp. 2d 54, 144 n.144 (D.D.C. 2008) (applying the *pro tanto* approach because "[t]he law disfavors double recovery as unjust enrichment").[1]

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[1] *See also United States ex. rel. Lutz v. BlueWave Healthcare Consultants, Inc.*, No. 9:14-cv-230, 2018 WL 11282049, at *5 (D.S.C. 2018) (applying *pro tanto* offset because "the Government cannot recover twice for common damages" among settling and non-settling defendants); *United States v. Zan Mach. Co. Inc.*, 803 F. Supp. 620, 624 (E.D.N.Y. 1992) (applying *pro tanto* approach where the government would otherwise "recover *more* than a double recovery of its actual damages" and reasoning that an "actual unjust enrichment to the government cannot be condoned"); *United States ex rel. Bunk v. Birkart Globistics GmbH & Co.*, No.

Applying the *pro tanto* approach in order to avoid a government recovery of damages in excess of the statutory ceiling due to earlier settlements will in some circumstances mean that a nonsettling defendant pays less than its fault-based share of damages. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 212 (1994) (observing potential for a "litigating defendant's liability" to "differ from its equitable share" under the *pro tanto* approach). But that does not support applying the proportionate share approach in cases such as this.

To begin, the FCA provides that defendants may be liable for civil penalties—often in large amounts—even if they do *not* owe damages. *See, e.g.*, *Purcell*, 15 F. Supp. 3d at 32 ($580,000 in civil penalties imposed even where government had already obtained full damages recovery); *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 400, 411 (4th Cir. 2013) (defendant paid $24 million in civil penalties after a "full offset, with no damages remaining payable"); *United States ex rel. Drakeford v. Tuomey*, 976 F. Supp. 2d 776, 792 (D.S.C. 2013) ($119 million in civil penalties). There is thus no concern that responsible defendants will escape FCA accountability.

1:02-cv-1168, 2011 WL 5005313, at *17 n.23 (E.D. Va. 2011) (government "appear[ed] to agree that the *pro tanto* credit is appropriate" and was ultimately "not . . . entitled to recover any additional amount" under any approach).

Furthermore, where settling defendants have already paid in full the damages that the government sustained, that is a reflection of the government's *own discretionary decisions* to execute those settlements and thereby apportion damages among defendants in a manner consistent with the public interest. "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). It is thus assumed that the government's "interest" in litigating (and settling) is to ensure "that justice shall be done." *Id.*; *see also Freeport-McMoran Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) ("[N]o one . . . has suggested that the principle [set forth in *Berger* in the criminal context] does not apply with equal force to the government's civil lawyers."); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) (citing *Berger* in civil context). Consistent with the FCA, the government was free to limit the damages it recovered from settling defendants in accordance with its *own* assessment of fault—thereby reserving the potential for additional damages from Honeywell (within the statutory cap)—but the government chose otherwise here.

Indeed, basic principles of joint and several liability establish that the government retains the discretion to apportion liability by enforcing an FCA treble damages *judgment* against one, some, or all defendants. *See Honeycutt v. United*

States, 137 S. Ct. 1626, 1631 (2017) (under joint and several liability, plaintiff can "recover only once for the full amount" of the harm). There is no reason to expect that different principles should apply when the government obtains multiple FCA *settlements*. *See, e.g.*, Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint & Several Liability*, 68 N.Y.U. L. Rev. 427, 440 (1993) ("Without a right of contribution, if the plaintiff litigates and prevails against both defendants, it can choose to obtain its full damages from one of the defendants, despite the resulting unfairness. It is not clear why one should be more concerned about this unfairness when the plaintiff settles with one defendant and litigates against the other.").

II. The Proportionate Share Approach Often Creates Procedural And Substantive Challenges That Make It Inappropriate In This Case.

Applying the *pro tanto* approach in this case is not only consistent with the FCA—it also makes prudential sense. As courts have recognized, the proportionate share approach often gives rise to substantial impracticalities for juries, costs for the judicial system, and burdens for parties and nonparties alike. What is more, the proportionate share approach can discourage settlements. These considerations demonstrate that the alternative *pro tanto* approach should apply here.

A. Courts Have Recognized The Disadvantages Of The Proportionate Share Approach In Various Contexts, Especially Compared To The *Pro Tanto* Approach.

As compared to the *pro tanto* approach, the proportionate share approach has multiple downsides that arise in various contexts:

First, the proportionate share approach tends to put complex, fact-intensive apportionment issues before the jury. As the Supreme Court has observed, apportioning fault among multiple parties is no simple feat. Dividing up damages among a "cluster" of responsible parties "presents difficult issues, for the participation of each [party] . . . may have varied. Some may have profited more than others; some may have caused more damage to the injured plaintiff." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981). The challenges inherent in determining proportional fault are further exacerbated in complicated cases with multiple potentially responsible parties: "[T]he complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation." *Id.* at 638.

As a result, juries that must decide the proportionate fault of each party face a daunting—and potentially speculative—task. "[D]etermining the relative fault of each party imposes a considerable burden on a factfinder and 'obviate[s] much of the advantage of partial settlement to the judicial system.'" *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1029 (2d Cir. 1992) (quoting *In re Atlantic Fin. Mgmt. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)).

The *pro tanto* method, by contrast, requires relatively straightforward arithmetic: a nonsettling defendant is liable for total damages minus the sum of a plaintiff's previous recoveries on common damages. No fault allocation is required.

The *pro tanto* approach is thus "likely to save both the Court and the parties the burden and expense of a lengthy trial." *Veolia Es Special Servs., Inc. v. Hiltop Invs., Inc.*, No. 3:07-0153, 2010 WL 898097, at *8 (S.D.W.V. 2010).

Second, the proportionate share approach is complicated by the need to litigate the fault of nonparties that have *already settled*. *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 165–66 (2003) (noting that "apportionment" of fault "could vastly complicate adjudications," and "all the more so if . . . [non-defendants] should come within the apportionment pool"). All things being equal, apportioning fault is more feasible among "*parties* [who have] the opportunity to present evidence at trial." *Action Manufacturing Co., Inc. v. Simon Wrecking Co.*, 428 F. Supp. 2d 288, 326 (E.D. Pa. 2006) (emphasis added). It is a different matter altogether when responsible entities have exited a litigation through settlement. In those circumstances, the record is "not adequately developed as to the liability of all the [settling] parties," and—at least without further discovery that implicates nonparties—factfinders are not equipped to assess proportionate fault. *Id.* The proportionate share approach thus "creates a substantial possibility of extended collateral litigation." *In re Oil Spill by Amoco Cadiz Off Coast of France*, 954 F.2d 1279, 1318 (7th Cir. 1992).

The *pro tanto* approach, on the other hand, "enables the district court to avoid what could be a complex and unproductive inquiry into the responsibility of missing

parties." *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999); *see also Action Manufacturing*, 428 F. Supp. 2d at 326 (noting that under the *pro tanto* method, it is "possible to account for the settlements of [parties] not before the court" without engaging in the burdensome factfinding that accompanies the allocation of fault).[2]

Third, the "proportionate share approach does not promote early settlement to the same extent as the [] *pro tanto* approach." *AmeriPride Servs. Inc. v. Texas E. Overseas Inc.*, 782 F.3d 474, 487 (9th Cir. 2015). One of the primary incentives to settle is finality and the accompanying predictability of ending a litigation and all of its costs, once and for all. But with the proportionate share approach, there is a "substantial possibility of extended collateral litigation," *In re Oil Spill*, 954 F.2d at 1318, including discovery that implicates defendants that already settled. Defendants are much less likely to settle if they know that settlement is but a *prelude* to further litigation, including litigation that may require discovery years later after extended proceedings that those defendants have no power to expedite. Settlement

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[2] The *McDermott* Court concluded that the *pro tanto* method *when paired with a good-faith hearing* had "no clear advantage with respect to judicial economy." 511 U.S. at 217. But good-faith hearings are not required in FCA cases like this one because the federal government is the plaintiff. Unlike the typical private litigant, the government is both well-funded and assumed to make decisions by accounting for the public interest. *See supra* pp. 8–9. It is therefore assumed that there is not any risk that the government would strike quick and unfair settlements in order to fund a "war chest" for further litigation. *McDermott*, 511 U.S. at 213.

is also less likely under the proportionate share approach for the separate reason that the early settlements of other defendants have "no effect on the potential liability" of nonsettling defendants: there is thus "no incentive to settle early on." *Action Manufacturing*, 428 F. Supp. 2d at 326; *see also McDermott*, 511 U.S. at 215 (*pro tanto* rule "encourages settlements by giving the defendant that settles first an opportunity to pay less").

For converse reasons, the *pro tanto* rule does incentivize settlement. Settling defendants can rest assured that they will not be dragged into messy discovery battles regarding the litigation of fault. And "[d]efendants also have a greater interest in settling in order to avoid paying more . . . after trial." *TBG, Inc. v. Bendis*, 36 F.3d 916, 925 (10th Cir. 1994).

B. The Proportionate Share Approach Is Especially Problematic In FCA Cases Like This One.

Although it might be appealing "in theory" to apportion fault among all defendants—including those who settled years ago, as well as the defendant here who did not settle—doing so "would add whole new dimensions of complexity" to FCA treble-damages suits and would "seriously undermine their effectiveness." *Cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737 (1977) (adopting direct-purchaser rule in antitrust context to avoid litigation regarding allocation of overcharges); *see also In re Oil Spill*, 954 F.2d at 1318 ("[W]hy should the judicial system invest so heavily in adjusting accounts among wrongdoers? Neither justification for the tort

system—compensation of victims and the creation of incentives to take care—would be served by this collateral litigation."); *United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 61 (8th Cir. 1973) ("The damages to be assessed in this case require, by the number of the parties involved alone, complex compilations.").

This case illustrates some of the problematic features that may accompany the proportionate share approach. To begin, this case was brought in June 2008, and its underlying facts stretch back more than two decades. *See* App. 321–45. That delay between the alleged violations and trial will obviously "add[] new complications to what already is complex litigation." *Texas Industries*, 451 U.S. at 638; *see also Akzo Nobel Coatings*, 197 F.3d at 308 (remarking on "the difficulties of fixing responsibility for wastes sent years (if not decades) ago to a firm that did not keep good records and contaminated a wide area"). Indeed, the FCA statute includes an especially generous statute of limitations period: a lawsuit may be initiated up to "6 years after the date on which [a] violation . . . is committed" *or* "3 years after the date when facts material to the right of action are known or reasonably should have been known [to the government] . . . but in no event more than *10 years* after the date on which the violation is committed." 31 U.S.C. § 3731(b) (emphasis added). The government is therefore able to *bring* FCA actions nearly a decade after alleged violations occur. And in light of the complexity that attends many FCA cases, trial may not take place for *another* decade still. Again, this litigation has been underway

for thirteen years and yet awaits trial. *See also Miller*, 563 F. Supp. 2d at 144 (multi-defendant FCA case went to trial "[n]early twenty years after the[] underlying events").

Further, the record on comparative fault in this case is "not adequately developed as to the liability of all the [settling] parties." *Action Manufacturing*, 428 F. Supp. 2d at 326. In part because the government proceeded against the various defendants through separate lawsuits—a not uncommon practice in FCA litigation—Honeywell lacks "evidence of the prior settling defendants' proportionate share of fault." App. 415. As Honeywell argued below, it would be impossible to determine Honeywell's proportionate share of fault without evidence from several of the parties that have already settled. In response to this dilemma, the district court's only proposed solution was *additional* discovery: "Should Honeywell determine that additional discovery is necessary, it may file a motion seeking to reopen discovery, specifically identifying the additional discovery it requires." *Id*.

Although the district court characterized additional discovery as a "workable" or "practical" solution, *see* App. 414, it would be far from it. Not only did the underlying events take place decades ago, but allocating fault would implicate more than a dozen different legal entities across the globe, including the Japanese company Toyobo, First Choice Armor & Equipment, Armor Holdings, Second Chance Body Armor and its several wholly-subsidiaries, as well as Honeywell. *See*

App. 33–39; App. 310–11. There is no reason to believe that all these entities would have preserved records relevant to fault issues following the settlements from which they benefited; entities enter such settlements, in part, precisely in order to terminate any discovery-related obligations that arose from the litigation being settled. It is plain that obtaining all relevant discovery—if even feasible—would come at a tremendous cost to Honeywell and the parties who already settled with the government. That cost cannot be justified where the government has already recouped its damages fully through settlement.

Even setting aside the costs related to discovery, the proportionate share approach would impose additional complexity on the pre-trial and trial proceedings here. Indeed, in its order certifying this interlocutory appeal, the district court acknowledged that "reversal on appeal would narrow the issues to be resolved at trial," because under the proportionate share approach, "the jury would need to consider and reach a conclusion on the extent to which the United States' alleged overpayment for Z Shield-containing vests resulted from Honeywell's alleged statements and omissions, versus those of other settling parties." App. 436. No such inquiry would be required under the *pro tanto* approach, which "would remove the need to litigate comparative fault and to adjudicate an entire category of damages, and would significantly alter the issues to be addressed at trial." App. 438 (internal citation and quotation marks omitted).

Among the complexities the proportionate share approach would introduce into damages-phase proceedings in this case is the need for the jury to be separately and additionally instructed on how to determine proportional fault. In traditional tort cases such as *McDermott*, the jury is *already* instructed about how to decide proportional fault at the liability stage. *See* Restatement (Third) of Torts § 26 cmt. c (Am. L. Inst. 2000) ("When several persons are legally responsible for an indivisible part, the court instructs the jury to apportion responsibility among those persons for the indivisible part."); *id.* at § 8 cmt. c (juries are instructed as to the "relevant factors" for "determin[ing] percentages of responsibility"). Accordingly, applying the proportionate share approach in those contexts does not impose that additional burden on the jury. The FCA, by contrast, does not require or envision that a factfinder must determine defendants' proportionate share of fault at any stage of the proceedings. Thus, applying the proportionate share approach here would require the factfinder to apply common law principles without any statutory guidance.

CONCLUSION

For the foregoing reasons, this Court should reverse and direct that judgment be entered for Honeywell on the government's claim for statutory damages.

Respectfully submitted,

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DATED: November 24, 2021

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(g)(1) because it contains 4,407 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e). 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Beth S. Brinkmann
Beth S. Brinkmann

DATED: November 24, 2021

CERTIFICATE OF SERVICE

I certify that on November 24, 2021, I electronically filed the foregoing Brief for *Amicus Curiae* with the Clerk of the Court using the CM/ECF System. I further certify that the participants in this case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ *Beth S. Brinkmann*
Beth S. Brinkmann

DATED: November 24, 2021