No. 15-16380

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.*
JEFFREY CAMPIE and SHERILYN CAMPIE, et al.,

Plaintiffs-Appellants,

v.

GILEAD SCIENCES, INC.,

Defendant-Appellee.

Appeal from a Decision of the U.S. District Court for the
Northern District of California
Case No. 3:11-cv-941 (Chen, J.)

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING OR REHEARING EN BANC

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August 31, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Chamber of Commerce of the United States of America submits the following corporate disclosure statement:

The Chamber of Commerce is a non-profit, non-stock corporation organized under the laws of the District of Columbia. It has no parent corporation, and no company owns 10 percent or more of its stock.

Dated: August 31, 2017

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INTEREST OF *AMICUS CURIAE*[1]

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, 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. The Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community, including cases involving the False Claims Act ("FCA").

The Chamber has a strong interest in ensuring that courts rigorously police the boundaries of FCA liability at the pleadings stage. FCA litigation affects businesses from all sectors of the American economy. The Chamber's members, many of which are subject to complex regulatory schemes, have successfully defended scores of FCA cases arising out of government contracts, grants, and program participation in a variety of courts nationwide, including in this Circuit, but often have succeeded only after years of costly litigation and discovery. The potential liabilities and litigation costs have only increased as relators invoke ever

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution for the brief's preparation or submission. All parties have consented to the filing of this brief.

more esoteric and complex "implied false certification" theories that attempt to transform minor deviations from obscure contractual terms or regulations into potentially devastating treble damages claims. When courts allow such weak but complex cases to continue past the pleadings stage, as the Panel did here, Op.24-29, they often collapse at summary judgment after years of costly discovery.

The Supreme Court in *Universal Health Services, Inc. v. United States ex rel. Escobar* recognized that the FCA's materiality and scienter requirements should be "demanding" to provide a critical check on the potentially boundless implied certification theory (and on the FCA in general) to guard against "open-ended liability." 136 S. Ct. 1989, 2002, 2003 (2016). As the Supreme Court recognized, "rigorous" enforcement of the materiality standard at the pleadings stage is essential to prevent the harms of disruptive, costly, and prolonged litigation, *see id.* at 2004 n.6. The principles at issue here affect countless businesses across a broad array of industries, as well as non-profit organizations and even municipalities and state-affiliated entities that directly or indirectly perform work for the federal government or administer funds under a vast range of federal programs. The Chamber and its members therefore have a substantial interest in having this Court revisit a Panel decision that sets too low a standard for materiality.

SUMMARY OF ARGUMENT

Appellee's Petition for Rehearing ("Pet.") should be granted because the Panel's opinion undercuts the viability of challenging materiality on the pleadings based on the government's acquiescence to the alleged misconduct, inviting a raft of complex and costly FCA cases to the district courts of this circuit at great expense to industry and the taxpayer.

I. As commentators have already noted, the Panel's decision is an outlier in terms of materiality after *Escobar* and diverges from other circuits. The Panel disregarded *Escobar*'s mandates that government acquiescence is "very strong evidence" of immateriality and that materiality can be resolved on the pleadings, even in this, a case that plainly shows the government's indifference to the alleged misconduct years after learning of it.

II. All sectors of the American economy in some fashion are exposed to the high costs of litigating weak FCA cases that are allowed to proceed past the pleadings stage. Ironically, the weaker and the more attenuated the legal theory underlying the relator's claims, the more complex and costly the discovery is for defendants. Strictly enforcing materiality at the pleadings stage minimizes the deadweight loss to the economy of frivolous FCA cases.

III. Contractors will pass those litigation costs on to the government, billing them directly to the government or indirectly increasing the prices they bid, if they

bid at all. Immaterial FCA claims can also disrupt agencies' balance between regulatory goals and sanctions. Stopping immaterial claims at the pleadings stage protects agencies from added costs and disruption.

ARGUMENT

I. The Panel's Decision Creates a Serious Risk That Immaterial Claims Will Be Allowed to Proceed to Discovery

Amicus agrees with Gilead that the Panel misapplied *Escobar*'s materiality standard (Pet.6-8), improperly relieved relators' burden in pleading materiality (Pet.8-9), and exacerbated a circuit split about when government acquiescence can render an alleged FCA violation immaterial (Pet.9-13). The Panel opinion represents a break from *Escobar* as well as the law adopted by other circuits, effectively gutting a materiality standard that the Supreme Court only recently emphasized is "demanding" and "rigorous." *Escobar*, 136 S. Ct. at 1996, 2002, 2003, 2004 n.6.[2] Unless this Court reconsiders the Panel's decision, there is a

[2] *See, e.g.*, David O'Brien et al., *9th Circ. Decision Could Be a Bitter Pill for Pharma Cos.*, Law360 (Aug. 8, 2017), http://goo.gl/yFTdbw ("a break from the Fourth Circuit[]"; "open[s] the door for more plaintiffs to attempt to transform FDA violations into FCA suits"; "stands in contrast to the law in other circuits"); Sean J. Hartigan et al., *Ninth Circuit Issues Expansive Reading of Escobar* (Smith Pachter McWhorter), July 14, 2017, http://goo.gl/f6VRwc ("establish[es] a low bar . . . to meet *Escobar*'s implied certification test"); Anne K. Walsh, *Ninth Circuit Revives False Claims Act Case Applying Escobar Materiality Standard*, Hyman, Phelps & McNamara: FDA Law Blog (July 17, 2017), http://goo.gl/HmFxWH ("reached the opposite conclusion from the First Circuit"; "may be an outlier in the post-*Escobar* world"); Conor Duffy, *Ninth Circuit Relies on Escobar to Revive False Claims Act Suit Against Pharmaceutical Manufacturer* (Robinson Cole),

substantial risk that it will eviscerate government acquiescence as a basis for challenging materiality on the pleadings, contrary to *Escobar*'s plain expectation that such issues could be adjudicated at that stage.[3] *Id.* at 2003-04 & n.6.

The Panel's adverse materiality ruling arises out of circumstances that should have supported an easy dismissal on materiality grounds. This case involves precisely the situation that *Escobar* said would be strong evidence of immateriality: "[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." 136 S. Ct. at 2003. Here, the government continued to pay for the allegedly adulterated drug, left regulatory

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July 21, 2017, http://goo.gl/HdcPgF ("particularly notable as compared to a recent Third Circuit holding"; "creates a potential split among circuits"); Michael A. Baudinet & Jeremy S. Byrum, *Ninth Circuit Ruling Weakens Materiality Standard Under the FCA*, McGuireWoods Blog (July 28, 2017), http://goo.gl/xiE7rM ("reduces the rigor of *Escobar*'s materiality analysis"); Samuel M. Shapiro, *Ninth Circuit Holds That FDA Violations Can Lead to FCA Liability* (Arnall Golden Gregory), Aug. 2017, at 4, http://goo.gl/G12ZR3 ("a significant expansion of the Supreme Court's 'materiality' standard"). The relators' bar likewise suggests the case is an outlier. *E.g.*, Eric J. Buescher, *Ninth Circuit Overturns Dismissal of False Claims Act Case Against Gilead, Clarifies Types of Falsity That Give Rise to Liability*, Cotchett Pitre & McCarthy Blog (July 17, 2017), https://goo.gl/NNDCmj ("an important case in explaining the reach of the various theories of falsity under the statute")

[3] *Amicus* focuses on the Panel's decision to disregard government acquiescence as "very strong evidence" of immateriality, *Escobar*, 136 S. Ct at 2003-04, because government acquiescence was the exclusive focus on the Panel's materiality ruling, Op.24-29. *Amicus* notes that the Panel's falsity decision is equally problematic, not least because it splits from other circuits, as explained by Gilead. *See* Pet.13-14.

approvals in place, and did not seek refunds for past sales, long after the relators notified the government of their allegations and after the government itself issued reports describing the alleged adulteration. Pet.4-5. If government acquiescence does not provide a defense under such circumstances, the defense may be a practical nullity at the pleadings stage.

The Panel's reasoning is deeply flawed in several other respects. First, the Panel mistakenly concluded that government acquiescence only could be shown by establishing government knowledge contemporaneous with payment. It emphasized Gilead's alleged "false claims [to] procure[] certain approvals *in the first instance*," and that "the parties dispute exactly what the government knew *and when*, calling into question [the government's] 'actual knowledge.'" Op.26, 28-29 (emphasis added). *Escobar* imposed no such contemporaneity limit; as other courts have noted, the government's failure to take action to rescind approvals or recover payment after learning of the allegations is evidence of immateriality. *See Escobar*, 136 S. Ct. at 2001, 2003; *accord U.S. ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1034 (D.C. Cir. 2017) ("[That] DCAA investigated [relator]'s allegations and did not disallow any charged costs . . . is 'very strong evidence' that the requirements . . . are not material." (quoting *Escobar*, 136 S. Ct. at 2003)).

Second, the showing that the Panel held was sufficient to defeat a motion to dismiss—"*more than the mere possibility* that the government would be *entitled* to

refuse payment if it were aware of the violations"—squarely conflicts with *Escobar*'s materiality standard. Op.29. Rather than looking to probabilities and legal entitlement, *Escobar* "look[ed] to the *effect* on the [government's] *likely or actual* behavior," a far higher standard than the Panel's language suggests. 136 S. Ct. at 2003 (emphasis added) (citation omitted).

Third, in support of its conclusion that that the government's failure to rescind payment or continued payment was not evidence of immateriality, the Panel emphasized "there are many reasons the FDA may choose not to withdraw a drug approval," Op.28—which the Panel called the "'the *sine qua non*' of federal funding," Op.25 (citation omitted)—that are "unrelated to the concern that the government paid out billions of dollars for nonconforming and adulterated drugs," Op. 28. But *Escobar* made nothing of the fact that there might be other reasons the government would continue to pay (or not rescind payment). Rightly so. *Every* decision—particularly every *government* decision—is a product of resource constraints. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (listing considerations). Government acquiescence would mean nothing at the pleadings stage if any imagined reasons beside immateriality for why the government continued to pay sufficed to defeat a motion to dismiss.

II. Litigating Immaterial FCA Claims Past the Pleadings Stage Imposes a High Cost on Nearly Every Sector of the Economy

FCA litigation touches nearly every sector of the economy, including health care, defense, education, banking, construction, consulting, software, energy, mortgage lending, local government—even athletic sponsorship.[4] FCA cases can arise out of any and every minor violation of any rule. Materiality is an important gatekeeper. "[S]trict enforcement of the [FCA's] materiality . . . requirement[]" at the pleadings stage is key to preventing industry from incurring crippling expenses to defend against insubstantial claims. *Escobar*, 136 S. Ct. at 2002.

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[4] *See, e.g.*, *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001) (healthcare services); *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202 (5th Cir. 2013) (per curiam) (medical manufacturing); *U.S. ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163 (10th Cir. 2010) (waste disposal); *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010) (consulting services); *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015) (higher education), *vacated*, 136 S. Ct. 2506 (2016), *reinstated in part, superseded in part*, 840 F.3d 445 (7th Cir. 2016); *U.S. ex rel. Shemesh v. CA, Inc.*, No. 09-cv-1600, 2015 WL 1446547 (D.D.C. Mar. 31, 2015) (software development); *United States v. Americus Mortg. Corp.*, No. 12-cv-02676, 2014 WL 4273884 (S.D. Tex. Aug. 29, 2014) (mortgage lending); *U.S. ex rel. McLain v. Fluor Enters., Inc.*, 60 F. Supp. 3d 705 (E.D. La. 2014) (disaster relief construction services); *U.S. ex rel. Oliver v. Philip Morris USA, Inc.*, 101 F. Supp. 3d 111 (D.D.C. 2015) (cigarette manufacturing), *aff'd*, 826 F.3d 466 (D.C. Cir. 2016); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (defense support services); *U.S. ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9 (D.D.C. 2014) (athletic sponsorship); *U.S. ex rel. Koch v. Koch Indus., Inc.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999) (crude oil purchasing); *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 712 F.3d 761 (2d Cir. 2013) (provision of low-income housing); *U.S. ex rel. Bias v. Tangipahoa Parish Sch. Bd.*, 86 F. Supp. 3d 535 (E.D. La. 2015) (public school Junior ROTC program); *U.S. ex rel. Pritzker v. Sodexho, Inc.*, 364 F. App'x 787 (3d Cir. 2010) (public school lunch services); *Grand Union Co. v. United States*, 696 F.2d 888 (11th Cir. 1983) (food stamp program).

1. Relators will seek to transform almost any contractual or regulatory violation into a high-stakes FCA case if not checked at the pleadings stage by a rigorous materiality test. Among countless other attenuated theories that have been advanced in recent years, relators have claimed that:

- an oil well operating on a federal lease used equipment for which the design specifications were missing an engineer's stamp to document engineer approval required by applicable regulations, *Abbott v. BP Expl. & Prod., Inc.*, 851 F.3d 384, 388 (5th Cir. 2017) (affirming summary judgment in case unsealed in 2010, because fact that agency "decided to allow [the well] to continue drilling after a substantial investigation into Plaintiffs' allegations" "represent[ed] 'strong evidence' that the requirements in those regulations are not material");
- a ship-repair business allegedly violated regulations requiring consideration of annual receipts and employees of affiliated companies in determining eligibility for small-business set-aside contracts, *A1 Procurement, LLC v. Thermcor, Inc.*, No. 15-cv-15, 2017 WL 2881350, at *5-7 (E.D. Va. July 5, 2017) (adopting magistrate judge's order dismissing case unsealed in 2013 because fact that Small Business Administration knew of eligibility problems but "did not . . . terminate [contractor] from the [set-aside] program" indicated alleged misrepresentations were not material);

- a defense contractor violated record-keeping regulations by recording inaccurate figures for how many individuals used recreation facilities, *McBride*, 848 F.3d at 1034 (affirming grant of summary judgment in case unsealed in 2006; holding that fact that auditor took no action after investigating allegations "is very strong evidence" requirements not material); and
- a construction company providing temporary shelter after Hurricane Katrina had subcontractors connect temporary housing units to liquefied petroleum gas to power appliances and water pumps, but the subcontractors lacked state permits, violating subcontract requirement that "[a]ll work performed shall be in accordance with all applicable federal, state and local codes and regulations," *U.S. ex rel. McLain v. Fluor Enters., Inc.*, 681 F. App'x 355, 357, 360-62 (5th Cir. 2017) (per curiam) (affirming dismissal of complaint unsealed in 2013).

2. The cost to businesses of courts' reluctance to dismiss these weak FCA cases at the pleadings stage is significant. Defending FCA cases requires a "tremendous expenditure of time and energy." Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require that All* Qui Tam *Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 11 n.66 (2007). "Pharmaceutical, medical

devices, and health care companies" alone "spend billions each year" dealing with FCA litigation. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011). But FCA discovery imposes heavy burdens on defendants in *every* industry—they can spend hundreds of thousands of dollars (millions, even) fielding discovery demands in a case.

FCA litigation cases is costly in part simply because it takes a long time. Even meritless no-recovery cases frequently drag on for years. Data obtained from DOJ under the Freedom of Information Act ("FOIA") show that of the 2,086 cases in which DOJ declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 dragged on for more than three years after the government declined to intervene. *See* DOJ FOIA Data Spreadsheet (hosted by Vinson & Elkins LLP), http://goo.gl/iaOgeG. Of those, 110 extended for more than *five years* after declination, and one case for more than ten years.

FCA cases are also costly because highly complex and attenuated implied false certification theories require extensive discovery for relators to establish required elements. Failure to strictly enforce materiality at the pleadings stage results in an enormous deadweight loss to the economy, as even meritless cases that end without recovery require years of discovery. For instance, to show knowledge, relators have to show the relevant rule is unambiguous, or that the defendants' did not hold an objectively reasonable reading of the rule, or that the

contractor was warned away from its interpretation by the government. *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287-91 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 625 (2017). Also, under the Panel's rule, demonstrating or challenging materiality will require detailed discovery from the defendant and the government to determine when the government learned of the alleged misconduct in relation to opportunities the government had to deny or rescind payments or approvals.

Damages are also costly to establish. Although it is relatively straightforward to price an inoperable gun as having almost no value, it is far less simple to determine the value of (for instance) recreational services allegedly provided with inaccurate usage records, *McBride*, 848 F.3d at 1028-29; jet engines that perform as specified but allegedly had their prices negotiated based on inaccurate data, *United States v. United Techs. Corp.*, 782 F.3d 718, 721-23 (6th Cir. 2015); or, similar to this case, pharmaceuticals manufactured in a factory that allegedly does not meet the latest industry standards, *U.S. ex rel. Rostholder v. California*, 745 F.3d 694, 698, 701 (4th Cir. 2014). Valuing the impact of these "deficiencies," if any, requires extensive discovery from the defendant and the government about market price to perform a "'comparable sales' analysis" to "establish[] 'fair market value.'" *United Techs.*, 782 F.3d. at 731 (citation omitted).

The *McBride* case involving allegations of faulty recordkeeping exemplifies the practical costs of a lax materiality standard: The litigation required the production of "over two million pages of documents" from the defendant, *McBride*, 848 F.3d at 1029, and required defendant to manually scan thousands of pages of records from fifty bases in the middle of a war zone. *See* Reply Mem. in Supp. of Defs.' Bill of Costs at 3-4, *U.S. ex rel. McBride v. Halliburton Co.*, No. 05-cv-828 (D.D.C. Nov. 13, 2015) [Dkt. 228]. Relator's claims eventually were dismissed on summary judgment *eight years* after the claims were unsealed. *McBride*, 848 F.3d at 1029-30. For many defendants, the certainty of years of discovery to win summary judgment, not to mention the chance of FCA liability, are enough to drive them to settle. *See Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (discovery in "complex litigation can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak"). Contractors will pass these costs on to the government. *See infra* pp.13-15.

III. The Panel's Watered Down Materiality Standard Will Be Costly and Disruptive to Agencies and Taxpayers

Litigation costs for weak FCA cases are passed on to the government directly and indirectly, and can be disruptive to agency policy and business objectives. Strict enforcement of materiality at the pleadings stage can mitigate those costs and disruptions.

1. Defendants face huge risks from FCA litigation if allowed to proceed past the pleadings stage. In addition to litigation costs, *see supra* pp.10-13, if a defendant loses, it faces treble damages, 31 U.S.C. § 3729(a). Defendants also face penalties of between $10,957 and $21,916 per false claim for violations after November 1, 2015, 31 U.S.C. § 3729(a); 28 C.F.R. § 85.5, an amount that ratchets up annually even for pending cases, 28 U.S.C. § 2461 note. The FCA also authorizes relators to recover attorneys' fees and "reasonable expenses." 31 U.S.C. § 3730(d)(1)-(2). A finding of FCA liability also can result in suspension and debarment from government contracting, *see* 2 C.F.R. § 180.800—"equivalent to the death penalty" for government contractors. 3 Ralph C. Nash & John Cibinic, *Suspension of Contractors: The Nuclear Sanction*, Nash & Cibinic Rep. ¶ 24 (Mar. 1989).

2. The risks and costs of litigating immaterial claims force companies to charge the government higher prices to compensate for far-reaching and potentially catastrophic FCA liability and litigation costs. *Cf. United States v. Data Translation, Inc.*, 984 F.2d 1256, 1262 (1st Cir. 1992) (Breyer, C.J.) ("[S]ignificantly increasing competitive firms' cost of doing federal government business[] could result in the government's being charged higher . . . prices."). Already, taxpayers bear a significant part of the direct cost of such suits. For instance, cost-based contractors are allowed to pass on to the government up to

80% of their legal expenses from litigating non-intervened *qui tam* cases when they prevail. FAR 31.205-47(a)(3), (e).

Some firms may decline even to bid on contracts to avoid unpredictable but potentially catastrophic FCA risk. A former head of federal acquisition policy noted that potential contractors are wary of "the reputational risk and the very onerous application of [a] remedy for something that is certainly unintentional" when engaging in business with the government. Michael Macagnone, *DOD Buying Group Pushes House Panel for Rules Reform*, Law360 (May 17, 2017), http://goo.gl/TaqwDO. It is not just a theoretical possibility that people will decline to perform needed services for the government: For example, doctors have exited Medicare in droves, due partly to concerns about "fraud" liability based on auditors' subjective assessment of deviations from program requirements. *See* David Hogberg, *The Next Exodus: Primary-Care Physicians and Medicare*, Nat'l Policy Analysis (Aug. 2012), http://goo.gl/9uLxe. The reduction in qualified entities willing to do business with the government deprives the government of choice and reduced competition likely means the government will pay higher prices.

3. The risk and cost of litigating immaterial claims likewise create the danger of altering agencies' careful policy and enforcement choices. If an agency has concerns about compliance with contractual or regulatory requirements, for

instance, it can demand information, require a certification of compliance, or exercise inspection rights. *E.g.*, 42 U.S.C. § 1437f(o)(8)(C)-(E) (providing for regular inspections of public housing to ensure continued eligibility for subsidy). The government can also issue notices of corrective action, addressing the issue without resorting to extreme measures that could negatively affect continued performance. *See, e.g., U.S. ex rel. Howard v. Lockheed Martin Corp.*, 14 F. Supp. 3d 982, 1014 (S.D. Ohio 2014) (government issued Corrective Action Requests upon discovering contractual noncompliance). As the Justice Department itself explained, "it is frequently in the Government's interest, as it would be in the interest of any contracting party, to avoid excessive concern over minor failings that might threaten a useful course of dealing with the other party," particularly if "the contractor's performance otherwise has been adequate." Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 207, 220 (1989).

A *qui tam* suit can affirmatively undermine regulators' efforts, nullifying their decisions to *correct* (rather than penalize) errors, and imposing the type of drastic sanctions that regulators deliberately avoided. *See, e.g., U.S. ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008) (improper use of *qui tam* suits can "undermine the government's own administrative scheme for ensuring that hospitals remain in compliance and for bringing them back into compliance when they fall short of what the Medicare regulations and statutes

require"); *U.S. ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000) (permitting FCA claim based on violation of a statute could "unilaterally divest[] the government of the opportunity to exercise . . . the discretion to accept or disaffirm the contract on the basis of the complex variables reflecting the officials' views of the government's longterm interests").

The government cannot be relied upon to protect agencies' policy choices by dismissing immaterial FCA claims. DOJ rarely exercises its authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss *qui tam* actions. Instead, the government routinely lets relators "proceed with[] thousands of non-meritorious qui tam suits." 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, 1264-65 (2008); *accord* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1717 (2013) (noting that 460-case subsample of *qui tam* actions "revealed exactly *none* in which DOJ exercised its termination authority"). In fact, in some cases, DOJ itself pursues cases where the contracting agency itself does not believe the case has merit. *See, e.g., United States v. BAE Sys. Tactical Vehicle Sys., LP*, No. 15-cv-12225, 2017 WL 1457493, at *2 (E.D. Mich. Apr. 25, 2017) (noting the Army

withdrew underlying contract claim while DOJ persisted in the FCA action). DOJ is thus unlikely to rein in relators (or itself) when there may be money on the table.

CONCLUSION

For these reasons, and those set forth in Appellee's Petition for Rehearing or Rehearing En Banc, the Court should grant Appellee's Petition.

Respectfully submitted.

/s/ *John P. Elwood*

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Dated: August 31, 2017

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because it contains 4,190 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: August 31, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 31, 2017.

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