No. 21-15420

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ZACHARY SILBERSHER, Relator; UNITED STATES OF AMERICA; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF INDIANA; STATE OF IOWA; STATE OF LOUISIANA; STATE OF MARYLAND; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF MONTANA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OKLAHOMA; STATE OF RHODE ISLAND; STATE OF TENNESSEE; STATE OF TEXAS; STATE OF VERMONT; STATE OF WASHINGTON; COMMONWEALTH OF MASSACHUSETTS; COMMONWEALTH OF VIRGINIA; DISTRICT OF COLUMBIA, ex rel,

Plaintiffs - Appellees,

v.

ALLERGAN, INC.; ALLERGAN USA, INC.; ALLERGAN SALES, LLC; FOREST LABORATORIES HOLDINGS, LTD.; ADAMAS PHARMA LLC; ADAMAS PHARMACEUTICALS, INC.,

Defendants - Appellants.

On Appeal from the United States District Court for the Northern District of California, No. 18-cv-03018

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America ("the Chamber") states that it 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. Pharmaceutical Research and Manufacturers of America ("PhRMA") states that it is a non-profit, tax-exempt organization incorporated in Delaware. PhRMA has no parent corporation, and no corporation or publicly held company owns 10% or more of its stock.

Date: June 17, 2021

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies research, develop, and manufacture medicines that allow patients to live longer, healthier, and more productive lives. Since 2000, PhRMA member companies have invested

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

nearly $1 trillion in the search for new treatments and cures, including an estimated $83 billion in 2019 alone—more R&D investment than any other industry in America. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates in such cases as an *amicus curiae*.

False Claims Act cases touch on nearly every sector of the economy, including defense, education, banking, technology, and healthcare, and exact a substantial toll on the economy. Companies can spend hundreds of thousands or even millions of dollars fielding discovery demands in a single case that will end without recovery for the government. Given the combination of the Act's draconian liability provisions—treble damages plus per-claim penalties—and enormous litigation costs, even meritless cases can be used to extract substantial settlements. As a result, cases involving the proper application of the False Claims Act and the correct dismissal standards are of particular concern to *amici* and their members.

INTRODUCTION

"The public disclosure bar is intended to encourage suits by whistle-blowers with genuinely valuable information, while discouraging litigation by plaintiffs who have no significant information of their own to contribute." *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 570 (9th Cir. 2016). The False Claims Act is designed "to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Id.* (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294–95 (2010)). Silbersher is not a "whistleblower[] with genuinely valuable information"; his complaint relies entirely on information that was already readily accessible to the public.

All of the factual information contained in Silbersher's complaint is available on the Public Patent Application Information Retrieval website ("Public PAIR"). These public disclosures that form the basis of his complaint qualify as government reports and/or news media under the public disclosure bar. *See* 31 U.S.C. § 3730(e)(4)(A)(ii)–(iii). The Supreme Court relied "especially" on the expansive nature of the "'news media'" channel of disclosure in concluding that the bar has a "'broa[d]

sweep.'" *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407–08 (2011) (quoting *Graham Cty.*, 559 U.S. at 290); *cf. id.* at 409 ("When all of the sources [of public disclosures listed in the statute] are considered, the reference to 'news media'—which the Court of Appeals did not consider—suggests a much broader scope."). That broad category covers all publicly accessible websites that disseminate information, including Public PAIR.

For good reason, Congress barred *qui tam* actions that add nothing to the information already available to the public. The government does not need Silbersher's help to know what is posted on one of its own websites. Indeed, if the government believed the defendants had defrauded it, it likely would have intervened to pursue this action. The defendants' motion to dismiss under the public disclosure bar arises only because the government declined to intervene. The many cases in which the government declines to intervene contribute only a small share of the government's total FCA recoveries—but collectively cost businesses billions of dollars each year to defend. Courts should rigorously enforce the balance struck by Congress and dismiss cases like this one that try

to turn the *qui tam* mechanism into a business opportunity without offering anything that was not already publicly disclosed.

ARGUMENT

I. THE COMPLAINT SHOULD HAVE BEEN DISMISSED UNDER THE PUBLIC DISCLOSURE BAR.

Defendants ably explain why the Public PAIR disclosures are "Federal reports" and qualify as "news media" and why patent prosecutions before the U.S. Patent & Trademark Office are "Federal hearings." *See* 31 U.S.C. § 3730(e)(4)(A)(ii)–(iii). *Amici* write to explain their view on the proper meaning of "news media" as that term applies to all publicly available websites that disseminate information and their perspective as to why it is in the public interest for courts to dismiss parasitic complaints brought by professional relators.

A. Publicly Accessible Websites that Disseminate Information Constitute "News Media" Under the False Claims Act.

Silbersher's complaint should be dismissed because it relies exclusively on information subject to the False Claims Act's public disclosure bar. The complaint is populated by facts obtained exclusively from a publicly accessible internet website, the Public PAIR. Publicly accessible websites designed to disseminate information are "news

media" within the meaning of the Act, and information from such websites cannot support a relator's claim. *See* 31 U.S.C. § 3730(e)(4)(A)(iii) (under Act's public disclosure bar, courts must "dismiss an action . . . if substantially the same allegations or transactions as alleged in the action . . . were publicly disclosed . . . from the news media").

1. Congress designed the public disclosure bar to have a "broad sweep." *Schindler Elevator Corp.*, 563 U.S. at 407–08 (internal quotation and alteration marks omitted); *see also id.* at 408 (public disclosure bar provisions "reflect[] intent to avoid underinclusiveness even at the risk of redundancy"); *id.* at 410 (citing example of redundancy contemplated by statute). Congress enacted the bar to strike a balance by encouraging suits providing new or original information while "discourag[ing] parasitic suits brought by individuals with no information of their own to contribute to the suit." *United States v. Sprint Commc'ns, Inc.*, 855 F.3d 985, 993 (9th Cir. 2017) (quoting *United States ex rel. Zaretsky v. Johnson Controls, Inc.*, 457 F.3d 1009, 1017 (9th Cir. 2006)).

Rigorous enforcement of the bar is particularly appropriate because Congress enacted an exception for precisely those relators whose efforts

might be helpful to the government notwithstanding the existence of a public disclosure: "original sources," defined as relators who voluntarily disclosed the information before it was made public or who have independent knowledge of the information and can materially add to the public disclosure. 31 U.S.C. § 3730(e)(4)(A)–(B). If a relator voluntarily disclosed the information to the government before it was made public, then the relator's action will not be "parasitic." *See United States ex rel. Devlin v. State of Cal.*, 84 F.3d 358, 362 (9th Cir. 1996) (defining "parasitic suits" as those where "a plaintiff seeks a reward even though he has contributed nothing significant to the exposure of the fraud"). And relators who have independent knowledge of the publicly disclosed information and can add materially to it may be able to play the constructive role that Congress intended even where certain information underlying a suit has been publicly disclosed. But where an action is based on publicly disclosed information, and where the relator cannot satisfy either of these "original source" definitions, then the action simply

imposes costs for no valid purpose, and Congress has determined that the action may not proceed. *See id.*[2]

As part of the bar for non-original sources, Congress included "news media" disclosures as one of the covered categories of disclosures. The Supreme Court has already recognized the expansiveness of the "news media" category. In interpreting the bar, the Court observed that "sources of public disclosure in § 3730(e)(4)(A), *especially 'news media,'* suggest that the public disclosure bar provides 'a broad sweep.'" *Schindler Elevator Corp.*, 563 U.S. at 408 (quoting *Graham Cty.*, 559 U.S. at 290, 293) (emphasis added; brackets omitted).

Interpreting "news media" broadly is also required by the ordinary meaning of the phrase as enacted by Congress in 1986 and left unchanged

[2] The district court did not reach Silbersher's argument that he was an "original source" because he materially added to the public disclosure. But it is difficult to imagine that he could satisfy that standard. After all, "[i]f a relator merely uses his or her unique experience or training to conclude that the material elements already in the public domain constitute a false claim, then a *qui tam* action cannot proceed." *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1245 (9th Cir. 2000) (internal quotation marks omitted); *see also United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020–21 (9th Cir. 1999).

since enactment.[3] The term "news" was defined simply as "a report of recent events" or "material reported in a newspaper or news periodical or on a newscast." *News*, Webster's New Collegiate Dictionary 767 (1980); *see also News*, The American Heritage Dictionary 1218 (3d ed. 1992) ("Information about recent events or happenings, especially as reported by newspapers, periodicals, radio, or television."). And the definition of "medium" (the singular form of "media") was very broad: "a channel of communication." *Media* and *Medium*, Webster's New Collegiate Dictionary 707, 708 (1980). That definition undoubtedly includes the internet when applied to current modes of communicating information—an approach consistent with developments in other areas of the law where existing language is applied to new technologies. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("And whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium

[3] While Congress amended the public disclosure bar in 2010, the amendments did not change the text of the "news media" category except by placing it in romanette (iii) in an enumerated list. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. X, § 10104(j)(2), 124 Stat. 119, 901 (2010).

for communication appears."). Today, even the largest print newspapers—the paragons of "traditional media"—have more internet subscribers than print subscribers.[4] Their websites obviously are "news media," and publicly accessible websites that perform the same function of disseminating information are as well. *See News*, The American Heritage Dictionary 1187 (5th ed. 2011) ("Information about recent events or happenings, especially as reported by means of newspapers, *websites*, radio, television, and other forms of media." (emphasis added)); *Media*, Black's Law Dictionary (11th ed. 2019) (including "the Internet" as an example of a "means of mass communication").

2. This definition accords with the broad consensus that dozens of courts have reached that publicly accessible websites intended to disseminate information qualify as "news media" under the Act. After all, "[g]enerally accessible websites," even those that are "not traditional news sources," "serve the same purpose as newspapers or radio broadcasts, to provide the general public with access to information."

[4] *See* Keach Hagey et al., *In News Industry, a Stark Divide Between Haves and Have-Nots*, Wall St. J. (May 4, 2019), https://www.wsj.com/graphics/local-newspapers-stark-divide/ (noting that the *New York Times*, *Wall Street Journal*, and *Washington Post* have more internet subscribers than print subscribers).

United States ex rel. Repko v. Guthrie Clinic, P.C., No. 3:04CV1556, 2011 WL 3875987, at *7 (M.D. Pa. Sept. 1, 2011), *aff'd*, 490 F. App'x 502 (3d Cir. 2012); *see also United States ex rel. Beauchamp v. Academi Training Ctr., LLC*, 816 F.3d 37, 43 n.6 (4th Cir. 2016) ("Courts have unanimously construed the term 'public disclosure' to include websites and online articles."); *United States ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 813 (11th Cir. 2015) ("[T]he clinics' publicly available websites, which are intended to disseminate information about the clinics' programs, qualify as news media for purposes of the public disclosure provision."); *United States ex rel. Cherwenka v. Fastenal Co.*, No. 14-cv-00187, 2018 WL 2069026, at *7 (D. Minn. May 3, 2018) (news media includes "information publicly available on a website"); *United States ex rel. Hagerty v. Cyberonics, Inc.*, 95 F. Supp. 3d 240, 257 n.7 (D. Mass. 2015) (news media includes information on "readily accessible websites") (quoting *United States ex rel. Green v. Serv. Contract Educ. & Training Tr. Fund*, 843 F. Supp. 2d 20, 32 (D.D.C. 2012)).

Courts have included a wide array of websites in that category, including government websites, college websites, blog posts, and even comment sections. *United States ex rel. Hong v. Newport Sensors, Inc.*,

No. SACV 13-1164-JLS (JPRx), 2016 WL 8929246, at *4 (C.D. Cal. May 19, 2016) (government and university websites); *Green v. AmerisourceBergen Corp.*, No. 4:15-CV-379, 2017 WL 1209909, at *6 (S.D. Tex. Mar. 31, 2017) ("blog posts and newsletters published online"); *United States ex rel. Carter v. Bridgepoint Educ., Inc.*, No. 10-CV-1401 JLS (WVG), 2015 WL 4892259, at *6 n.4 (S.D. Cal. Aug. 17, 2015) (online comment on San Diego Reader website). The same applies to public websites, like Public PAIR,[5] that provide the public with compiled information that can be searched. *See, e.g.*, *United States ex rel. Doe v. Staples, Inc.*, 932 F. Supp. 2d 34, 39–40 (D.D.C. 2013) (a website containing a searchable compilation of manifest information submitted

[5] Importantly, this case does not hinge on material accessible only on the private section of PAIR where applicants can privately view the status of their own patent applications. *See* USPTO, Private PAIR, 7.4.2, Quick Start Guide, at 2–3 (2009), https://www.uspto.gov/sites/default/files/patents/process/status/private_pair/PrivPairOverview_Oct09.pdf. The Public PAIR, which is at issue in this case, is meant to allow for public access to various patent materials and applications. *See* USPTO, *Portal Applications* (2019), https://www.uspto.gov/learning-and-resources/portal-applications (stating that Public PAIR allows "Access [to] public application image file wrapper, including patents, published application documents, and applications to which a patented or published application claims domestic priority."). The public nature of this section of the portal underscores why Public PAIR falls within the broad meaning of "news media."

to Customs by shippers); *Repko*, 2011 WL 3875987, at *8 (websites collecting information on philanthropies, Standard & Poor's website, and Bloomberg Professional website), *aff'd*, 490 F. App'x 502, 504 (3d Cir. 2012) ("We agree with the District Court's . . . conclusion that the websites and prior litigation it referenced constitute public disclosure of information.").

It makes no difference that only a subset of the public would likely be interested in accessing such websites. There is no dispute that the term "news media" encompasses publications disseminated to—and of interest to—only small slices of the public, such as trade journals, newsletters, scholarly articles, scientific literature, and local newspapers with limited circulation. All are news media, because they make information available to the public. Indeed, the Supreme Court approvingly cited a decision noting that "the most obscure local news report" qualifies as a disclosure in the news media. *Graham Cty.*, 559 U.S. at 291 n.9.[6] Many other courts agree. *See, e.g., United States ex rel.*

[6] As noted above, the 2010 amendments did not alter the language of the "news media" category and, therefore, did not alter the force of the Court's references to the breadth of the "news media" category in *Graham County* and *Schindler Elevator Corp.*, both of which applied the version of the statute that was in effect prior to the amendments.

Ondis v. City of Woonsocket, 587 F.3d 49, 52 (1st Cir. 2009) ("newspapers of general circulation in Woonsocket," Rhode Island, qualify as "news media"); *United States ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 463 (S.D.N.Y. 2002) (holding that "news media" includes those sources that "disseminate information to the public" and "are as generally accessible to any other strangers to the fraud as would be a newspaper article," including scientific and scholarly periodicals), *aff'd*, 53 F. App'x 153 (2d Cir. 2002); *United States ex rel. Freedom Unlimited, Inc. v. City of Pittsburgh,* No. 12-cv-01600, 2016 WL 1255294, at *17 (W.D. Pa. Mar. 31, 2016) ("'News media' unquestionably includes articles disseminated by local newspapers."), *vacated on other grounds*, 728 F. App'x 101 (3d Cir. 2018).

A much larger percentage of the public has ready access to the Public PAIR website than to small, local newspapers or niche trade journals. And the information available to the public on Public PAIR plays an important public notice function because patents are meant to put the public on notice of "the degree of lawful conduct" and allow "reasonable competitors [to] form[] their business strategies" in light of what is and what is not protected. *Springs Window Fashions LP v. Novo*

Indus., L.P., 323 F.3d 989, 995 (Fed. Cir. 2003) (quoting *Hockerson-Halberstadt, Inc. v. Avia Grp. Int'l, Inc.*, 222 F.3d 951, 957 (Fed. Cir. 2000)). Given that local newspapers and limited-distribution trade or professional journals are "news media" because they distribute information to even small slices of the public, publicly accessible websites that disseminate information more broadly must also be considered "news media." *Repko*, 2011 WL 3875987, at *7 (generally accessible websites are "news media" because they "serve the same purpose as newspapers or radio broadcasts, to provide the general public with access to information"). Public PAIR, with its important public notice function and general availability, falls comfortably within the "news media" definition.

3. Instead of siding with the vast majority of courts and applying a broad definition of "news media," the district court here chose to apply a novel five-factor test created by the district court in the *Integra* case. *United States ex rel. Integra Med Analytics LLC v. Providence Health & Servs.*, No. CV 17-1694 PSG (SSx), 2019 WL 3282619, at *14–15 (C.D. Cal. July 16, 2019), *rev'd on other grounds*, No. 19-56367, 2021 WL 1233378 (9th Cir. Mar. 31, 2021). On appeal in *Integra*, this Court

reversed the decision below but did not reach the novel "news media" test created by the district court. That court recognized that it was departing from "what appears to be a general consensus in the federal courts," 2019 WL 3282619, at *13, and this Court should now correct that errant departure.

The district court's five-factor test in *Integra* reflects an incorrect statutory interpretation based on a cramped definition of "news media." Many of the factors are amorphous and ambiguous, such as what "some people would describe" as "news media," whether "online source[s] function[] like . . . traditional outlets," or whether the information is "newsworthy." *Id.* at *15. It's anyone's guess what would fall in any of these categories, and the test invites subjective and inconsistent decisions. The open-ended nature of this approach is particularly problematic in this context, because *ad hoc*, subjective decisions about what is "newsworthy" raise the specter of content-based discrimination. Much of what is disclosed in the news media may not comport with many people's conception of what is newsworthy, but courts have no warrant to narrow the term that Congress employed based on their own views about what is fit to print.

Other courts have properly eschewed such a subjective test, instead relying on the public nature of the information, not its content. For example, niche scholarly periodicals are not traditional news outlets and may not strike very many people as newsworthy, but they are still considered news media. *See, e.g.*, *Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d at 463; *United States ex rel. Colquitt v. Abbott Labs.*, 864 F. Supp. 2d 499, 518 (N.D. Tex. 2012). And even *advertisements* in newspapers are disclosures in "news media." *Osheroff*, 776 F.3d at 813; *Ondis*, 582 F. Supp. 2d at 217 (information appearing in "legal notices and/or classified advertisements" is disclosed in "news media" even though those are not "substantive news stories").

The *Integra* district court's approach also entails unnecessary complication and invites drawn-out litigation. For example, it could require discovery about how a website operates to determine whether it functions like a traditional news outlet (whatever that means). The public disclosure bar is supposed to screen out improper relators at the threshold; an approach that requires discovery to determine whether the relator is allowed to bring a *qui tam* action in the first place would be anomalous and counterproductive. And such discovery would be

especially thorny because it would involve investigating third-party news media entities and their publication practices. *See, e.g.*, *Cutler v. Lewiston Daily Sun*, 105 F.R.D. 137, 139–40 (D. Me. 1985) (newspaper litigating discovery dispute by asserting trade secret protection and confidentiality over publishing practices and discussion of possible protective order). Offering that kind of discovery lifeline to relators who are not original sources would burden the court system as well as defendants, with no countervailing benefit.

This Court should reject the ill-founded multi-factor *Integra* approach and instead hold that publicly accessible websites that disseminate information to the public qualify as "news media." Under that definition, disclosures on Public PAIR clearly trigger the public disclosure bar. Because Silbersher's complaint is based on such disclosures, it should be dismissed (unless he can show that he is an original source of the disclosures).[7]

[7] While the Court should reject the five-factor test applied by the district court, *amici* agree with defendants that the Public PAIR website would qualify as news media even under that test.

B. Enforcing the Public Disclosure Bar Is Important and in the Public Interest.

Applying the public disclosure bar provisions in this case—and properly dismissing *qui tam* actions brought by relators who add no independent information to what is publicly available—honors the balance that Congress, in enacting these provisions, struck between the useful actions it sought to encourage and the parasitic and unhelpful ones it barred. It bears repeating that the public disclosure bar is a qualified and limited bar, not an absolute bar; it is subject to Congress's exemption of relators who qualify as "original sources," and it is also subject to the government's right to intervene in cases to which the public disclosure bar applies. These important qualifications ensure that meritorious suits can continue. Courts therefore have no reason to hesitate about applying the public disclosure bar according to its terms, as doing so affects only those relators who have no independent knowledge of the information their claims are based on and who present no information that materially adds to what was publicly disclosed. 31 U.S.C. § 3730(e)(4)(A)–(B). Especially where the government has declined to intervene, dismissal under those circumstances is highly unlikely to leave fraud unpunished.

There has been an explosion in *qui tam* litigation, with 672 new cases filed in fiscal year 2020 alone.[8] Failing to respect the balance struck by the public disclosure bar enacted by Congress—and as further calibrated in the 2010 amendments—burdens defendants, the courts, and the government itself. *See Graham Cty.*, 559 U.S. at 294 (describing the 1986 FCA amendments as "[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own" (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)). And it is not an accident that the public disclosure bar is implicated in actions brought by professional relators like Silbersher, who has brought multiple similar suits. *See also United States ex rel. Silbersher v. Valeant Pharm. Int'l, Inc.*, No. 20-16176 (9th Cir. filed June 16, 2020); *United States ex rel. Silbersher v. Janssen Biotech Inc.*, No. 2:19-cv-12107 (D.N.J. filed May 3, 2019). An "insider[] with genuinely valuable information" does not need to base his action on publicly

[8] *See* U.S. Dep't of Justice, Fraud Statistics – Overview (Oct. 1986–Sept. 2020), https://www.justice.gov/opa/press-release/file/1354316/download ("DOJ Fraud Statistics").

disclosed information. Conversely, a non-insider who views the False Claims Act as a business opportunity has no choice but to rely on publicly disclosed information, as he has no actual information of his own.

The prospect of enormous bounties has spawned a cottage industry of professional relators. But despite their increasing prevalence, such relators do nothing to aid the government's anti-fraud efforts. In this case, the government already has access to the Public PAIR information on which Silbersher relies and could have brought a suit if it had believed there was a basis to do so. Yet the government tellingly declined to intervene. In another example, the government declined to intervene in multiple suits brought by the professional relator Integra Med Analytics, which claims to perform statistical analysis of government healthcare program data to identify potential fraud. This Court recently ordered the dismissal of one of Integra's *qui tam* actions for failure to plead meaningful factual allegations showing fraud, *Providence Health & Services,* 2021 WL 1233378, at *4, and the Fifth Circuit did the same in a nearly identical case last year, *United States ex rel. Integra Med Analytics, L.L.C. v. Baylor Scott & White Health*, 816 F. App'x 892, 901 (5th Cir. 2020) (per curiam).

Professional relators' bounty-hunting efforts can also lead to problematic behavior. To obtain the inside knowledge they need to get beyond publicly available information, professional relators often attempt to enlist insiders. But insiders who have genuine firsthand knowledge of fraud can go to the government themselves and have no apparent incentive to provide information to a professional relator who would seek the bounty the insiders might be able to claim themselves. According to the government, some professional relators appear to have dealt with this problem by resorting to false pretenses to elicit information from insiders. *See* U.S. Mot. to Dismiss Relator's Second Am. Compl. 5, *United States ex rel. Health Choice Grp., LLC v. Bayer Corp.*, No. 5:17-cv-126-RWS-CMC (E.D. Tex. Dec. 17, 2018), ECF No. 116 (describing one professional relator's surreptitious efforts to gather information from hospital insiders under the guise of a "research study"); *see also United States ex rel. Health Choice Alliance LLC v. Eli Lilly Co.*, No. 5:17-CV-00123-RWS-CMC, 2019 WL 4727422, at *8 (E.D. Tex. Sept. 27, 2019), *appeal filed*, No. 19-40906 (5th Cir.) (dismissing professional relator's suit at the government's request).

Despite adding little to no value, meritless and improper *qui tam* actions impose enormous financial costs. Many of *amici*'s members already are subject to significant scrutiny under the False Claims Act and invest substantial resources in efforts to ensure compliance with applicable fraud and abuse laws. Vexatious litigation only adds to those costs. As the Chamber has noted, of the 2,086 cases in which the government declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 of them nonetheless lasted for more than three years after the government declined intervention, and 110 of those extended for more than five years after declination. Br. of Chamber of Commerce of the United States of America et al. as *Amici Curiae* at 13, *Gilead Scis., Inc. v. United States ex rel. Campie*, No. 17-936 (U.S. Feb. 1, 2018). It is not surprising, then, that "[p]harmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with False Claims Act litigation. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

Moreover, even if a professional relator has done nothing more than take public information and put it in a complaint, defendants face

tremendous pressures to settle because the costs of litigating are so high and the potential downside so great, thanks to the False Claims Act's uniquely draconian remedies—treble damages, plus per-claim penalties, plus attorney's fee liability. *See United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359–60 (11th Cir. 2006) (noting the importance of enforcing dismissal standards in *qui tam* actions because "'Defendant[s] may decide to settle the case to avoid the enormous cost of . . . discovery'" and because of "the quasi-criminal nature of FCA violations (i.e., a violator is liable for treble damages)") (quoting *United States ex rel. Clausen v. Lab. Corp. of Am.*, 198 F.R.D. 560, 564 (N.D. Ga. 2000)).

Nor are defendants the only ones who pay the price when professional relators try to turn the *qui tam* mechanism into a business model and sue based on public information. Government resources are finite too. In cases that should be dismissed under the public disclosure bar, the government was already in the position of being able to file suit based on the public information before the would-be relator copied that information and placed it in a complaint. Every *qui tam* action, even declined suits, requires government monitoring and, if it gets past the pleading stage, government involvement in discovery. This is no small

burden. Thousands of *qui tam* actions are regularly pending under seal awaiting the government's decision as to whether to intervene;[9] the government nearly always obtains an extension of the statutory 60-day deadline to make that decision, and often many years' worth of extensions. The more resources the government must devote to monitor parasitic suits, the fewer resources are available to investigate other *qui tam* actions—and the backlog will keep growing.

Finally, the simple reality is that most declined *qui tam* actions, like this one, are meritless. The government intervenes in a small minority of *qui tam* actions—about 20 percent over the last several years.[10] Yet the vast majority of the over $64 billion obtained under the False Claims Act since 1986 has come from that small subset of

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[9] *See* 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, 1716 & n.86 (2013) (3000 *qui tam* actions were pending under seal).

[10] Press Release, U.S. Dep't of Justice, Deputy Associate Attorney General Stephen Cox Provides Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 27, 2020), https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced.

intervened cases.[11] In stark contrast, the much larger universe of thousands of declined cases has produced less than $3 billion in recovery.[12]

For all these reasons, the Court should vigorously enforce the public disclosure bar.

[11] *See* DOJ Fraud Statistics, at 3.

[12] *See id.*

CONCLUSION

The Court should hold that the public disclosure bar requires dismissal of Silbersher's complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the length limitations of Fed. R. App. P. 29(a)(5) and Ninth Circuit Rule 32-1 because this brief contains 5,090 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 using Microsoft Word 365ProPlus in Century Schoolbook 14-point font.

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