ORAL ARGUMENT NOT YET SCHEDULED

No. 19-7139

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, EX REL. PAUL A. CIMINO,

Plaintiff,

and

PAUL A. CIMINO,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
a Delaware corporation,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 1:13-cv-00907-APM
(Honorable Amit P. Mehta)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA) AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

May 18, 2020

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae*, the Chamber of Commerce of the United States of America ("Chamber") and the Pharmaceutical Researchers and Manufacturers of America ("PhRMA") (together "*amici*"), state:

A. Parties and *Amici*

Except for the Chamber and PhRMA, all parties, intervenors and *amici* appearing in this Court are listed in the certificate filed by Defendant-Appellee, International Business Machines Corporation.

B. Rulings Under Review

Defendant-Appellee's certificate lists the rulings under review.

C. Related Cases

Defendant-Appellee's certificate lists any related cases.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amici curiae* make the following disclosures:

The Chamber of Commerce of the United States ("Chamber") is a nonprofit corporation representing the interests of more than three million businesses of all sizes, sectors, and regions. The Chamber has no parent corporation, and no publicly held company owns 10% or more of its stock.

PhRMA is a nonprofit association that represents the nation's leading biopharmaceutical and biotechnology companies. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

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CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING

Pursuant to Federal Rule of Appellate Procedure 29(1)(2), *amici* state that all parties have consented to the filing of this brief.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici*, their members and their counsel made any monetary contribution to the preparation and submission of this brief.

Pursuant to D.C. Circuit Rule 29(d), counsel for *amici* certify that no other non-government *amicus* brief of which they are aware focuses on the subjects addressed in this brief.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Regulations

Legislative Material

Scholarly Authorities

Other Authorities

GLOSSARY

Chamber	Chamber of Commerce of the United States of America
FAR	Federal Acquisition Regulation
FCA	False Claims Act
FDA	Food and Drug Administration
IBM	International Business Machines Corporation
IRS	Internal Revenue Service
JA	Joint Appendix
PhRMA	Pharmaceutical Research and Manufacturers of America

IDENTITY AND INTERESTS OF *AMICI 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 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 that raise issues of concern to the nation's business community, including cases arising under the False Claims Act ("FCA").

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a nonprofit association representing the country's leading research-based pharmaceutical and biotechnology companies.[1] PhRMA's mission is to advocate public policies encouraging the discovery of life-saving and life-enhancing new medicines. PhRMA's members are devoted to discovering and developing medicines that enable patients to live longer, healthier, and more productive lives. Since 2000, PhRMA member companies have invested more than $900 billion in the search for new treatments and cures, including an estimated $79.6 billion in

[1] A complete list of PhRMA members is available at *Members*, PhRMA, http://www.phrma.org/about/members (last visited May 12, 2020).

2018 alone. PhRMA closely monitors legal issues that affect the entire industry, and regularly offers its perspective in cases raising such issues, including cases arising under the FCA. Indeed, PhRMA's members are frequently the targets of private FCA claims.

The Chamber and PhRMA (together "*amici*") have a strong interest in ensuring that courts rigorously police the boundaries of FCA liability at the pleading stage. FCA litigation affects businesses from all sectors of the American economy. *Amici*'s members successfully defend FCA cases arising out of government contracts, grants, and program participation. However, when courts allow weak but complex cases to continue past the pleading stage, those cases often collapse in response to summary judgment motions, but only after years of costly, burdensome discovery.

INTRODUCTION

The Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar* instructed that the FCA's materiality requirement is "demanding" and "rigorous" and that courts should enforce this requirement at the pleading stage in order to provide a critical check on FCA claims and prevent the harms of disruptive, costly and prolonged litigation. 136 S. Ct. 1989, 1996, 2002, 2003, 2004 n.6 (2016). Like numerous circuit courts of appeals around the country, the district court here heeded the Supreme Court's instructions and

dismissed plaintiff's FCA claims. Both plaintiff and the Department of Justice, however, ask this Court to debilitate *Escobar* and ignore the weight of authority in a case that presents the most compelling case for dismissal on materiality grounds.

Amici and their members have a substantial interest in ensuring that *Escobar* is properly understood and applied. They are frequent targets in lawsuits brought by putative whistleblowers under the FCA, because many are heavily regulated entities that operate under highly complex statutory regimes, and also contract with the government or receive reimbursement under government programs. Meritless *qui tam* lawsuits pose potentially devastating risks to these businesses and organizations, particularly those in the healthcare sector, forcing them to divert scarce resources from their core missions. These cases can drag on for years, imposing substantial costs on defendants and courts for no purpose. It is thus critically important to *amici*'s members that courts scrupulously enforce the federal pleading requirements for *qui tam* actions. Complaints that do not satisfy those requirements should be dismissed before needless and burdensome discovery occurs and before the punitive regime of the FCA compels defendants to settle claims (and pass on the cost of undue litigation risk to the Government to the detriment of the public fisc) or cease contracting with the Government.

ARGUMENT

The district court correctly held that plaintiff-appellant Paul Cimino's complaint failed to state a valid FCA claim, because it both failed to allege any false statement that was material to the Government's payments to defendant-appellee International Business Machines Corporation ("IBM") *and* failed to allege that any false statement caused the Government to make any payment to IBM. Mem. Op. 1. *Amici* focus on Mr. Cimino's failure to allege a material false statement because of the critical importance of that gatekeeping requirement to FCA defendants under the Supreme Court's decision in *Escobar*. *Amici* agree with IBM that Mr. Cimino and the Department of Justice are urging this Court to adopt a position that would place it at odds with *Escobar* and with other courts of appeals' applications of *Escobar*. Their approach would also allow meritless FCA claims to move past the pleading stage, with devastating consequences for FCA defendants and damaging outcomes for the Government and taxpayers as well. If the Government's conduct in this case does not demonstrate a lack of materiality, then the materiality requirement simply would not serve the important gatekeeping purpose the Supreme Court ascribed to it in *Escobar*.

A. These Claims Present The Most Compelling Case For Dismissal On The Pleadings.

FCA claims premised on allegations that a government contractor, grantee, or participant in a government program has submitted false claims for payment fail

unless the false statements are "material to the Government's payment decision." *Escobar*, 136 S. Ct. at 2002. The Supreme Court recognized that the materiality requirement is a crucial safeguard against frivolous FCA suits, characterizing it as "demanding" and "rigorous." *Id.* at 2002, 2003. And the Court emphatically rejected the notion that materiality is "too fact intensive for courts to dismiss [FCA] cases on a motion to dismiss or at summary judgment." *Id.* at 2004 n.6. Thus, the materiality requirement, properly understood and applied, should prevent plaintiffs from using the FCA as an "'all-purpose antifraud statute' or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Id.* at 2003 (citation omitted).

This case involves the application of the materiality requirement in an oft-seen context familiar to *amici*'s members—where the Government concededly knows about the alleged misrepresentations and nonetheless continues to pay claims or contract obligations or declines to seek reimbursement or rescission of its obligations. In that context, this Court has emphasized that "courts need not opine in the abstract when the record offers insight into the Government's actual payment decisions." *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1032 (D.C. Cir. 2017). *See also Escobar*, 136 S. Ct. at 2002 (courts should "look to the effect on the [government's] likely or actual behavior" to determine whether an allegedly fraudulent statement was material (alteration omitted)

(quoting 26 Richard A. Lord, *Williston on Contracts* § 69:12, p. 549 (4th ed. 2003))). And *Escobar* made clear that the Government's continued approval and acceptance of goods or services after learning about such allegations is "very strong evidence" that the alleged false statements are not material. *Id.* at 2003; *see also McBride*, 848 F.3d at 132. In such circumstances, the FCA claims must be dismissed on the pleadings absent countervailing allegations. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (a claim may not proceed unless its factual allegations "raise a reasonable expectation that discovery will reveal evidence" establishing liability).

Escobar's requirement that a complaint plausibly plead facts showing that a false statement was material to the Government's payment of a claim or obligation is simply one example of the general rule that complaints must plead facts that make a legal claim "plausible," and that, taken in context, elevate the "right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 556. In FCA cases, that requirement is heightened by the applicability of Federal Rule of Civil Procedure 9(b), which mandates that allegations of fraud be pled with "particularity."

Here, the Government knew about Mr. Cimino's allegations (essentially that IBM had somehow "tricked" the Government into buying or paying for software it did not need or receive), and nonetheless for an extended time period sought

neither reimbursement nor rescission. Indeed, during and after the time the Government was apprised of Mr. Cimino's allegations, the Government actually "add[ed] six months to the agreement" at issue. Mem. Op. 16. In addition, despite a thorough "multi-year investigation," the Government "declined to intervene" in the relator's lawsuit. *Id.* The Government's actual response to the allegations demonstrates, on its face, that the Government did not view the alleged misrepresentations as material to its payment decisions.

No additional allegations plausibly call into question the significance of the continued and additional payments. *See Twombly*, 550 U.S. at 556. As the district court concluded, the complaint fails to plausibly explain how allegations of fraud could have been material to the Government's decision to make payments to IBM, in light of the Government's actual conduct, including its extension of the contract and refusal to intervene in this lawsuit. *See* Mem. Op. 16 ("The court finds it implausible that the IRS sat on its hands upon learning that IBM had tricked it into signing a contract for $265 million for software that it did not need."); *id.* at 17 ("The court finds it implausible that the IRS has not attempted, in some way, to recover the nearly $90 million for which it received nothing in return, if the claimed false promise were material."). *See also McBride*, 848 F.3d at 1034 (holding alleged false statements immaterial where the Government had conducted an investigation after learning of the alleged misstatements and then "did not

disallow any charged costs," but instead continued to pay, including "an award fee for exceptional performance"). If this complaint sufficiently alleges a material misrepresentation, the materiality requirement is neither "rigorous" nor "demanding" and cannot serve its important purpose as mandated by *Escobar*.

In deciding whether a plaintiff's allegations plausibly allege a material misstatement, courts rely on "common sense" and judicial experience. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Respectfully, and based on the extensive experience of *amici*'s members with their own government contracting, Mr. Cimino's allegations—that the IRS was "tricked … into signing [and extending] a contract for $265 million for software that it did not need" because a contracting officer was on vacation, and that the IRS did not even try to recover $90 million "for which it received nothing in return," Mem. Op. 16, 17—are at odds with common sense and inherently implausible. Government contracts are generally governed by the Competition in Contracting Act of 1984, 41 U.S.C. § 253, which generally requires competition with certain limited exceptions; sole source contracting is permitted but is subject to internal review and separate justification and approval. *See generally* John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts*, ch. 3 (Acquisition Planning) (3d ed. 1998); *id.* at 282-92 ("Only One Source Available"). "Follow on contracts" are also subject to significant scrutiny. *Id.* at 292-95. Extensive regulations, too, address the

contracting process. *See* Federal Acquisition Regulation, 48 C.F.R. pts. 1-53. Agencies are not tricked into entering into multi-million dollar contracts because a contracting officer happens to be on vacation or a gullible official does not challenge a contractor's alleged threat to impose penalties under a contract if that contract is not renewed. In the context of this case, the district court correctly held that Mr. Cimino's allegations of materiality were, to say the least, not plausible.

B. The District Court's Application Of *Escobar* Accords With That Of Virtually All Courts Of Appeals.

Since *Escobar* was decided, numerous courts have considered FCA claims arising where the Government has continued to approve payments and accept goods or services after learning about alleged misrepresentations or fraud. Applying the Supreme Court's instruction that such circumstances constitute "very strong evidence" that the alleged false statements are not material, *Escobar*, 136 S. Ct. at 2003, and that courts may appropriately dismiss FCA claims at the pleading stage, *id.* at 2004 n.6, those courts have dismissed such claims, absent plausible countervailing allegations. *See*, *e.g.*, *McBride*, 848 F.3d at 132.

Mr. Cimino and the Department of Justice effectively argue that an FCA claim may proceed past the pleading stage as long as a court can conceive of a reason that the Government might not have pursued repayment or rescission of a contract after learning of allegations of a multi-million dollar fraud. And both take the position that materiality can plausibly be alleged even where, for years, the

Government knows about and investigates the allegations and takes no action at all—*i.e.*, neither seeks repayment or rescission nor intervenes in the relator's suit. *See* Mem. Op. 16 n.3 ("[T]he IRS was made aware of this case not long after its filing."); 31 U.S.C. § 3730(b) (requiring service of a *qui tam* complaint "and written disclosure of substantially all material evidence and information" to be "served on the Government" when filed).

Acceptance of these arguments would put the D.C. Circuit at odds with the overwhelming weight of post-*Escobar* caselaw, as review of that precedent demonstrates. *See D'Agostino v. ev3, Inc.*, 845 F.3d 1, 7 (1st Cir. 2016) (affirming dismissal of claims because "the FCA requires that the fraudulent representation be material to the government's payment decision" and the Government's continued reimbursement of purchases "in the wake of [the plaintiff's] allegations casts serious doubt on the materiality of the [alleged] fraudulent representations"); *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 34 (1st Cir. 2017) (affirming dismissal of FCA claim because the FDA's decision not to suspend or withdraw its approval after learning of the alleged violations "render[ed] a claim of materiality implausible"); *id.* at 35-36 (finding "compelling" the fact that the Government continued to pay claims even after it "heard what Relators had to say"); *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (affirming dismissal of claims where the Government

"would *consistently reimburse*" purchases of a drug "with full knowledge of the purported noncompliance"); *id.* (finding significant that the Government had also taken no action against the defendants and declined to intervene in the FCA action); *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016) (plaintiff cannot establish materiality because "the subsidizing agency and other federal agencies" had investigated the college multiple times and "concluded that neither administrative penalties nor termination was warranted"); *United States ex rel. Marshall v. Woodward, Inc.*, 812 F.3d 556, 563 (7th Cir. 2015) (finding false statements immaterial because the Government continued paying for the product at issue after investigating plaintiff's allegations); *Abbott v. BP Expl. & Prod., Inc.*, 851 F.3d 384, 388 (5th Cir. 2017) (explaining that the Government's failure to take disciplinary action or terminate a contract following inquiries into alleged infractions was "strong evidence" of immateriality); *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 663 (5th Cir. 2017) ("[C]ontinued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in establishing materiality."), *cert. denied*, 139 S. Ct. 784 (2019); *United States ex rel. Thomas v. Black & Veatch Special Projects Corp.*, 820 F.3d 1162, 1165-661172, 1174 (10th Cir. 2016) (holding plaintiff's contentions were "simply incapable" of showing materiality where after learning of the alleged violations, the Government never withheld payment).

Indeed, the claims here were rightly dismissed on the pleadings even under the Ninth Circuit's outlier decision in *United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 783 (2019). There, the court allowed the FCA claim to proceed despite the Government's knowledge of plaintiff's allegations and continued payment of claims, because it read the complaint to allege a "dispute [about] exactly what the government knew and when, calling into question its 'actual knowledge'" of defendant's conduct. *Id.* at 906-07. Here, it is undisputed that for years after learning of the serious allegations in question, including after a multi-year investigation, the Government failed to seek repayment or rescission, extended its contract with defendant, and declined to intervene in this lawsuit.

This Court should decline the invitation to depart from the dominant and correct reading of *Escobar*.

C. The Materiality Requirement Serves An Important Gatekeeping Function.

Allowing meritless FCA claims to proceed to discovery imposes significant costs on defendants, government agencies, taxpayers and the economy. "[S]trict enforcement of the [FCA's] materiality … requirement[]" at the pleadings stage is crucial to protect companies, universities, hospitals and other counter-parties to government contracts from incurring crippling expenses to defend insubstantial

claims. *Escobar*, 136 S. Ct. at 2002. Enforcement of the gatekeeping role of the materiality requirement also benefits the Government and the public.

In many recent years, the number of new *qui tam* actions has exceeded 650 per year. *See* Civil Div., U.S. Dep't of Justice, *Fraud Statistics - Overview: October 1, 1986 - Sept. 30, 2019*, at 1-2 (2019). *Qui tam* claims brought under the FCA affect nearly every sector of the U.S. economy, including health care, defense, software, energy, banking, education, construction, consulting, local government, and more. *See State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436 (2016) (insurance companies); *Escobar*, 136 S. Ct. at 1989 (health care providers); *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015) (defense contractors); *Abbott*, 851 F.3d 384 (energy companies); *Sanford-Brown*, 840 F.3d 445 (institutions of higher learning); Keith D. Barber et al., *Prolific Plaintiffs or Rabid Relators? Recent Developments in False Claims Act Litigation*, 1 Ind. Health L. Rev. 135, 171-72 (2004) (hospitals). Most cases brought only by relators—that is, cases in which the Department of Justice declines to intervene—are without merit. *See* Michael Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev. 1559, 1563-64, 1580 (2015).

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).

FCA litigation is costly for numerous reasons. First, it takes a long time. Even meritless, no-recovery cases drag on for years. And, FCA cases are also costly because they often require extensive discovery for relators to attempt to establish the required elements. FCA discovery imposes heavy burdens across the economy in every industry—defendants can spend hundreds of thousands of dollars and more, solely to address discovery demands in a meritless case.

It is also frequently costly to litigate damages issues. Although the loss resulting from inoperable machinery may be easily determined, it is far from easy to determine the value of, *e.g.*, recreational services provided with inaccurate usage records, *McBride*, 848 F.3d at 1028-29; jet engines that perform as specified but allegedly had prices negotiated based on inaccurate data, *United States v. United Techs. Corp.*, 782 F.3d 718, 721-23 (6th Cir. 2015); or pharmaceuticals

manufactured in a factory alleged not to meet industry standards, *United States ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 698, 701 (4th Cir. 2014). To value these deficiencies, a plaintiff must take extensive discovery from both the defendant and the Government about market price and obtain expert testimony in order to perform a "'comparable sales' analysis" and establish fair market value. *United Techs.*, 782 F.3d at 731.

A case in this Circuit vividly illustrates the burdens and costs of meritless claims that should be dismissed for lack of materiality. In *McBride*, the plaintiff made allegations of faulty record keeping in connection with a government contract for recreational facilities. In the pre-*Escobar* era, the defendant's motion to dismiss was denied, and discovery ensued. That discovery required 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 50 military bases. Reply Memorandum in Support of Defendants' Bill of Costs at 3-5, *United States ex rel. McBride v. Halliburton Co.*, No. 1:05-cv-00828 (D.D.C. Nov. 13, 2015), ECF No. 228. Ultimately, the district court granted summary judgment to defendant *eight years* after the plaintiff's claims were unsealed. *McBride*, 843 F.3d at 1029-30. After *Escobar* was decided, this Court affirmed dismissal of plaintiff's claims, holding that the alleged false statements were not material to the Government's payment decisions—but not before the

defendant endured years of litigation and massive, burdensome and expensive discovery. In sum, for many defendants, the costs of years of discovery to win summary judgment are enough by themselves 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").

These known costs of FCA litigation exist alongside of tremendous potential costs in a regime that is avowedly "punitive." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784-86 (2000). Defendants face oppressive risks from FCA litigation if it is allowed to proceed past the pleadings stage. Potential bounties for FCA relators "generally rang[e] from 15 to 25 percent if the Government intervenes … and from 25 to 30 percent if it does not." *Id.* at 769-70 (citing 31 U.S.C. § 3730(d)(1)-(2)). In addition to litigation costs, if a defendant loses, it faces treble damages. 31 U.S.C. § 3729(a). Defendants also face penalties of between $11,181 and $22,363 per false claim for violations after November 2, 2015, *id.*; 28 C.F.R. § 85.5, an amount that ratchets up annually including 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). In addition, a finding of FCA liability can also result in suspension and debarment from government contracting. *See* 2 C.F.R. § 180.800. This is equivalent to the

death penalty for government contractors. *See* Ralph C. Nash & John Cibinic, *Suspension of Contractors: The Nuclear Sanction*, 3 Nash & Cibinic Rep. ¶ 24 (Mar. 1989). Because of the extraordinarily draconian nature of FCA liability, defendants often cannot afford to litigate and are forced to settle even meritless lawsuits. *See* David A. Hyman, *Health Care Fraud and Abuse: Market Change, Social Norms, and the Trust "Reposed in the Workmen,"* 30 J. Legal Stud. 531, 552 (2001).

Critically, it is not only putative defendants who would incur harm from failures of the gatekeeping function of materiality under the FCA. Contractors, grantees, and federal program participants will pass along these litigation costs to the Government by increasing the prices they bid to account for this potentially catastrophic risk. *Cf. United States v. Data Translation, Inc.*, 984 F.2d 1256, 1262 (1st Cir. 1992) (Breyer, C.J.) ("significantly 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. 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. *See* 48 C.F.R. § 31.205-47(a)(3), (e).

Moreover, as the Department of Justice recently recognized, some firms may cease bidding on government contracts to avoid unpredictable but potentially

catastrophic FCA liability risk. *See* Memorandum from Michael D. Granston, Dir., Commercial Litig. Branch, Fraud Section, U.S. Dep't of Justice, to Attorneys, Commercial Litig. Branch, Fraud Section at 5 (Jan. 10, 2018) ("*Granston Mem.*") ("[T]here may be instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exit the government program or industry."). Contractors are thus made wary of engaging in business with the Government, *see* Michael Macagnone, *DOD Buying Group Pushes House Panel for Rules Reform*, Law360 (May 17, 2017), and in some cases, have left in droves over concerns about potential fraud liability. *See* David Hogberg, Nat'l Ctr. for Pub. Policy Research, *The Next Exodus: Primary-Care Physicians and Medicare* (Aug. 2012) (discussing doctors who have left Medicare over such concerns). As the legislative history of the Competition in Contracting Act makes clear, the reduction in qualified entities willing to do business with the Government deprives the Government of competition and choice, which generally results in higher prices. *See* S. Rep. No. 98-50, at 3 (1983) ("[C]ompetition in contracting saves money.").

Finally, the litigation of FCA claims based on immaterial alleged fraud or misrepresentations may also disrupt government agencies' own decision making—specifically, where the Government chooses to address or remediate problems with contract performance its own way, but the plaintiff nonetheless chooses to pursue

litigation. Agencies have numerous tools to address contractor non-compliance: They can demand information, require a certification of compliance, or exercise audit rights. *See United States ex rel. Howard v. Lockheed Martin Corp.*, 14 F. Supp. 3d 982, 1014 (S.D. Ohio 2014) (government issued corrective action requests upon discovery of contractual noncompliance). Even the Government has recently recognized the potential for FCA claims to disrupt agencies' ability to calibrate the costs and benefits of litigating FCA claims. *See Granston Mem.* at 4-5 (collecting examples where agencies valued competing considerations more than recovery for alleged false claims). *See also United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000) (if FCA claim were allowed, it could "unilaterally divest[] the government of the opportunity to exercise … the discretion to accept or disaffirm the contract on the basis of complex variables reflecting the officials' views of the government's longterm interests"); *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 220 (1989) ("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").

* * * *

The 1986 FCA amendments were "[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." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) (quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)). It is important that the FCA strike this balance because claims brought solely by relators are generally "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). Allowing meritless FCA claims to proceed past the pleadings stage imposes substantial costs on defendants, government agencies, taxpayers and the economy, and benefits no one (but the relator). Only consistent, "strict enforcement of the [FCA's] materiality … requirement[]" at the pleadings stage, *Escobar*, 136 S. Ct. at 2002, can prevent this harm.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

This brief complies with the word-count limitation of Fed. R. App. P. 32(e). This brief contains 4,535 words, not counting the parts excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2020, I will cause the foregoing document to be electronically filed through this Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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