No. 18-1044

IN THE

Supreme Court of the United States

PHARMERICA CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* MARC SILVER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, BIOTECHNOLOGY INNOVATION ORGANIZATION, AMERICAN HEALTH CARE ASSOCIATION AND NATIONAL CENTER FOR ASSISTED LIVING, NATIONAL ASSOCIATION OF CHAIN DRUG STORES, SENIOR CARE PHARMACY COALITION, AND NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the following industry organizations move for leave to file the attached brief as amici curiae in support of petitioner.

This motion and the attached brief are filed on behalf of the Pharmaceutical Research and Manufacturers of America (PhRMA); the Biotechnology Innovation Organization (BIO); the American Health Care Association and the National Center for Assisted Living (AHCA/NCAL); the National Association of Chain Drug Stores (NACDS); the Senior Care Pharmacy Coalition (SCPC); and the National Defense Industrial Association (NDIA). Petitioner has filed blanket consent to the filing of amicus briefs. Respondent has withheld consent to the filing of this brief.

Amici and their members have a strong interest in ensuring that the False Claims Act's public disclosure bar serves its critical gatekeeping function: preventing *qui tam* suits by relators with no firsthand knowledge of fraud. As amici explain in the attached motion, amici's member companies are frequent defendants in False Claims Act suits. The public disclosure bar serves as a bulwark against meritless *qui tam* complaints by reserving *qui tam* litigation's significant financial awards "'for whistle-blowing insiders with genuinely valuable information,'" without whom the fraud would likely pass undetected. *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 R. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)). The decision below weakens that protection by disallowing courts from acknowledging the relator's subjective basis for his allegations, even when

the relator admits—as the relator in this case did—that those allegations are derived in whole or substantial part from publicly available information. The correctness of that decision is a recurring issue for amici's member companies.

Amici will address the ways in which the decision below conflicts with those of other circuits and undermines Congress's manifest intent to foreclose *qui tam* suits like the one at bar. In addition, amici will bring their industry perspective to bear on the significant burdens their member companies face because of frequent, meritless *qui tam* litigation that the decision below further enables. Amici submit that their perspective on these issues will be of "considerable help" to the Court. Sup. Ct. R. 37.1. Amici have frequently submitted amicus briefs with this Court, including in other False Claims Act cases.

For these reasons, amici respectfully request that the Court grant them leave to file the attached brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

STATUTORY PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE[1]

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the world's leading research-based biopharmaceutical and biotechnology companies, each of which is devoted to inventing medicines that allow patients to live longer, healthier, more productive lives. PhRMA members alone invested an estimated $44.5 billion in 2007 in discovering and developing new medicines. PhRMA advocates for public policies that encourage discovery of important new medicines for patients by pharmaceutical and biotechnology research companies.

The Biotechnology Innovation Organization (BIO) is the largest biotechnology organization in the world, providing advocacy, business development and communications services for more than 1,250 members worldwide. BIO members are involved in researching and developing innovative healthcare, agricultural, industrial and environmental biotechnology products. Corporate members range from entrepreneurial companies developing a first product to Fortune 100 multinationals. BIO also represents state and regional biotech associations, academic centers, venture capital firms, and other service providers to the industry.

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amici's intent to file this brief at least 10 days prior to its due date.

The American Health Care Association and the National Center for Assisted Living (AHCA/NCAL) are the Nation's leading long-term care organizations. They serve as the national representative of more than 13,500 non-profit and proprietary facilities dedicated to improving the lives of more than 1.5 million frail, elderly, and disabled Americans who receive long-term or post-acute care in skilled nursing facilities, assisted living residences, and homes for persons with intellectual and developmental disabilities. One way in which AHCA/NCAL promote the interests of their members is by participating as amici curiae in cases with important and far-ranging consequences for their members.

The National Association of Chain Drug Stores (NACDS) is a 501(c)(6) nonprofit trade association. NACDS's over eighty members consists of chain community pharmacy companies, including traditional drug stores, supermarkets, and mass merchants with pharmacies—from regional chains with four pharmacies to national companies. NACDS members operate more than 40,000 pharmacies in the United States and employ 152,000 pharmacists. NACDS members fill more than three billion prescriptions annually and aid patients in taking their medicines correctly and safely, while offering innovative services that improve patient health and healthcare affordability.

The Senior Care Pharmacy Coalition (SCPC) is a 501(c)(6) trade association incorporated and with principal place of business in the District of Columbia. SCPC's sixty-five members own and operate more than three hundred fifty independent long-term care (LTC) pharmacies serving 850,000 patients each day in skilled nursing facilities, assisted living facilities, and other senior care settings throughout the United States.

More than twenty-five business partners support SCPC and its members in providing pharmacy care and related services to many of the nation's most vulnerable and medically compromised citizens.

The National Defense Industrial Association (NDIA) is a non-partisan and non-profit organization comprised of more than 1,650 corporations and 75,000 individuals spanning the entire spectrum of the defense industry. NDIA's corporate members include not only some of the nation's largest military equipment contractors, but also companies that provide the U.S. military and other federal departments and agencies with a multitude of professional, logistical, and technological services, both domestically and in overseas combat zones and other dangerous locations. Individuals who are members of NDIA come from the Federal Government, the military services, small businesses, corporations, prime contractors, academia, and the international community.

Amici and their members have a strong interest in ensuring that the False Claims Act's public disclosure bar serves its critical gatekeeping function: preventing *qui tam* suits by relators with no firsthand knowledge of fraud. As amici explain in the attached motion, amici's member companies are frequent defendants in False Claims Act suits. The public disclosure bar serves as a bulwark against meritless *qui tam* complaints by reserving *qui tam* litigation's significant financial awards "'for whistle-blowing insiders with genuinely valuable information,'" without whom the fraud would likely pass undetected. *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 R. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)). The decision below weakens that pro-

tection by disallowing courts from acknowledging the relator's subjective basis for his allegations, even when the relator admits—as the relator in this case did—that those allegations are derived in whole or substantial part from publicly available information. The correctness of that decision is a recurring issue for amici's member companies.

SUMMARY OF ARGUMENT

This Court should grant review to determine the effect of a relator's testimony that he actually derived his complaint from public sources.

1. The courts of appeals are divided on this question. The Fourth Circuit holds that, in cases arising from conduct predating March 23, 2010, the manner in which the relator "actually derived" his allegations is dispositive of whether the public disclosure bar is triggered. *See, e.g.*, *United States ex rel. Siller* v. *Becton Dickinson & Co. ex rel. Microbiology Sys. Div.*, 21 F.3d 1339, 1348 (4th Cir. 1994). Other circuits hold that the public disclosure bar is also triggered if the allegations are "substantially similar" to public disclosures. This majority view takes account of the relator's subjective basis for his claims both because the standard is broader than, and thus incorporates, the "actually derived" test, *see, e.g.*, *United States ex rel. Boothe* v. *Sun Healthcare Grp., Inc.*, 496 F.3d 1169, 1174 (10th Cir. 2007); *Hays* v. *Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003), and because the actual basis for the relator's allegations may inform the degree to which those allegations resemble public disclosures, *see United States ex rel. Fine* v. *Advanced Scis., Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996). In the decision below, however, the Third Circuit refused to consider the relator's subjective basis at all—conflicting with both sides of this pre-existing split.

2. Ignoring a relator's actual basis for his allegations wrongly enables *qui tam* suits by opportunistic relators without firsthand knowledge of fraud. Congress created significant financial incentives for individuals who blow the whistle on wrongdoing. These incentives are designed to reward true insiders. But Congress's purpose is frustrated when relators can bring claims based on information that would have been equally available to anyone. The Third Circuit's decision blinds courts to the evidence most probative to this inquiry: How, in fact, did the relator come to discover the alleged fraud?

3. Opening the gates to *qui tam* suits by relators without firsthand knowledge of fraud imposes significant burdens on defendants. Companies such as amici's members pay a heavy price for *qui tam* lawsuits, which are numerous, often lengthy, and reputation-damaging—regardless of their merit. The Third Circuit's decision only makes it easier for opportunistic relators and relators' lawyers to bring suits and collect a windfall, even when their claims admittedly derive from publicly available sources.

4. This case presents a clean vehicle for the Court to address this important, recurring question. The Court has never addressed what it means for *qui tam* allegations to be "based on" or "substantially similar to" public disclosures—a threshold issue for any public disclosure bar defense. Clarifying this requirement will influence the outcome in numerous cases. And the Court can do so here free from factual entanglement, given that the Third Circuit's opinion accepted the premise that the relator holds a good-faith, subjective belief that he actually derived his allegations from publicly disclosed sources.

ARGUMENT

The False Claims Act creates powerful financial incentives for relators to prosecute claims of fraud on behalf of the federal government. *See* 31 U.S.C. § 3730(d). Although these incentives impose substantial public costs, Congress deemed them necessary to encourage suits by true whistleblowers—that is, "individuals who are either close observers or otherwise involved in the fraudulent activity." S. Rep. No. 99-345, at 4 (1986). But Congress also foresaw that such attractive bounties would invite "'parasitic lawsuits by those who learn of the fraud through public channels and seek remuneration although they contributed nothing to the exposure of the fraud.'" *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 296 n.16 (2010) (quoting *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 319 (2d Cir. 1992)). The False Claims Act's public disclosure bar serves to thwart these opportunistic suits and limit the class of relators to "persons with firsthand knowledge of alleged wrongdoing." *United States ex rel. Devlin* v. *California*, 84 F.3d 358, 362 (9th Cir. 1996).

This case presents the question: Is the public disclosure bar triggered when a relator with no "firsthand knowledge of alleged wrongdoing" testifies that he did, in fact, "learn of the fraud through public channels"?

In the decision below, the Third Circuit became the first court to hold that a relator's testimony on the source of his knowledge is categorically irrelevant to the public disclosure bar, even if the testimony is undisputed and credited by the factfinder. Pet. App. 28-32. This holding conflicts with the decisions of other courts of appeals, undermines the public disclosure bar's clear congressional purpose, and imposes signifi-

cant burdens on defendants. This Court's review is warranted.

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH BOTH SIDES OF A PRE-EXISTING CIRCUIT SPLIT

A. The courts of appeals have long divided over when a *qui tam* action should be considered "based upon the public disclosure of allegations or transactions" within the meaning of the version of the public disclosure bar applicable to claims arising from pre-2010 conduct. *See* 31 U.S.C. § 3730(e)(4) (2006).

The Fourth Circuit applies an exclusively subjective test, triggered only if the relator "actually derived" his allegations from public disclosures. *See United States ex rel. Siller* v. *Becton Dickinson & Co. ex rel. Microbiology Sys. Div.*, 21 F.3d 1339, 1348 (4th Cir. 1994); *see also, e.g.*, *Citynet, LLC on behalf of United States* v. *Frontier W. Virginia Inc.*, No. CV 2:14-15947, 2018 WL 1582527, at *15, *20 (S.D. W. Va. Mar. 30, 2018) (applying Fourth Circuit's "actually derived" test "to the conduct alleged that occurred prior to March 23, 2010"). The Seventh Circuit applied the same test until 2009. *United States ex rel. Mathews* v. *Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999), *overruled by Glaser* v. *Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009). These courts reason that a subjective test is the more natural reading of the phrase "based on," and that a lawsuit derived from a relator's independent knowledge is not "parasitic" merely because that knowledge also happened to be disclosed by unrelated public sources. *Mathews*, 166 F.3d at 863. Thus, in the eyes of these courts, the presence of publicly-available sources disclosing the content of the suit should not pose a bar, so long as the relator actually relied upon independent knowledge.

The remaining courts of appeals have given the public disclosure bar a decidedly "broader construction." *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 683 (D.C. Cir. 1997). In the majority view, the public disclosure bar triggers if the relator's allegations or the transactions upon which they are based are "supported by" or "substantially similar to" allegations disclosed by public sources. *Id.* at 682; *accord Glaser*, 570 F.3d at 915 (collecting cases). These courts reason that a subjective-only test would render superfluous the original source exception and fail to serve the False Claims Act's policy aim of incentivizing private investigation only where detecting the fraud would otherwise prove difficult. *E.g.*, *Findley*, 105 F.3d at 683-685.[2] These courts thus apply a test that bars suits based on allegations that *could* have been discovered through publicly available sources (whether or not they actually were).

By holding that courts must refuse to consider a relator's own acknowledgement of the sources of the relator's knowledge underlying his or her allegations, the Third Circuit put itself in conflict with both sides of this split.

The conflict between the Third Circuit's ruling and the minority view is straightforward. The Third Circuit categorically refused to consider a relator's testimony that he "actually derived" his allegations from public disclosures—the only fact that matters, under the minority view. *Siller*, 21 F.3d at 1348. For example, the Fourth Circuit has not hesitated to deem suits barred based on the relator's sworn description of the

[2] As explained below, the 2010 amendments expressly adopted the majority view, which all circuits now apply to False Claims Act claims based on conduct occurring after 2010.

subjective basis for their complaint. *See, e.g.*, *United States ex rel. Black* v. *Health & Hosp. Corp. of Marion Cty.*, 494 F. App'x 285, 294-295 (4th Cir. 2012) (public disclosure bar applicable because relator admitted in sworn declaration that he used public disclosures to "'better articulate'" his legal theory).

The Third Circuit's decision conflicts with the majority view as well. For one, the majority-view courts to address the subject have been clear that the objective, "substantially similar" test *supplements*, not supplants, the subjective "actually derived" test. The public disclosure bar is triggered if either test is met. *See, e.g.*, *United States ex rel. Boothe* v. *Sun Healthcare Grp., Inc.*, 496 F.3d 1169, 1174 (10th Cir. 2007) (Gorsuch, J.) ("[A]ll [circuits] have held, *at a minimum*, that dismissal is warranted where the plaintiff seeks to pursue a claim, the essence of which is 'derived from' a prior public disclosure." (emphasis added)); *Hays* v. *Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003) ("A suit is 'based upon' a public disclosure if the allegations are 'derived from' *or* 'supported by' the disclosure." (emphasis added)); *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 319, 324 (2d Cir. 1992) (invoking objective test to dismiss complaint while still recognizing that the public disclosure bar applies to "those who learn of the fraud through public channels"). And even in applying the objective test, courts still have not categorically refused to consider a relator's subjective basis for his or her knowledge of the allegations or transactions in the complaint. *See, e.g.*, *United States ex rel. Fine* v. *Advanced Scis., Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996) (relator admitted that public disclosures "provided the basis for [his] allegations," and that admission "confirm[ed] that there is a substantial identity between" the public disclosure and his allegations, thereby trig-

gering the bar). The Third Circuit's rule forbidding any consideration of subjective evidence cannot be reconciled with any of these decisions.

B. With respect to the post-2010 public disclosure bar, the Third Circuit again stands alone. The courts of appeals agree that the 2010 amendments expressly codified the majority, "substantially similar" test. *See* 31 U.S.C. § 3730(e)(4) (2012) (public disclosure bar triggered "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed").[3] And as explained above, the circuits generally agree that this new test is *broader* than the purely subjective "derived from" test that Congress intended to eliminate.[4] Only the Third Circuit has construed this broader understanding of the public disclosure bar not to encompass a *qui tam* action that the subjective "derived from" test would have foreclosed.

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[3] *See, e.g.*, *United States ex rel. Bellevue* v. *Universal Health Servs. of Hartgrove, Inc.*, 867 F.3d 712, 718 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1284 (2018); *United States ex rel. Jones* v. *Collegiate Funding Servs., Inc.*, 469 F. App'x 244, 256 n.15 (4th Cir. 2012); *see also* Sylvia, *The False Claims Act: Fraud Against the Government* § 11:55 (updated June 2018) ("Courts have viewed the 'substantially the same' language as meaning the same thing as the earlier 'substantially similar' or 'supported by' tests and therefore have found pre-2010 case law instructive on the meaning of substantially the same.").

[4] *See, e.g.*, *United States ex rel. May* v. *Purdue Pharma L.P.*, 811 F.3d 636, 641 (4th Cir. 2016); *Glaser*, 570 F.3d at 915; *United States ex rel. Ondis* v. *City of Woonsocket*, 587 F.3d 49, 57 (1st Cir. 2009); *Boothe*, 496 F.3d at 1173; *Findley*, 105 F.3d at 683.

II. THE THIRD CIRCUIT'S DECISION WRONGLY ENABLES *QUI TAM* SUITS BY OPPORTUNISTIC RELATORS WITH NO FIRSTHAND KNOWLEDGE OF FRAUD

Congress created the public disclosure bar to "preclud[e] suits by opportunists who lack first-hand knowledge of the fraud." *United States* v. *Northrop Corp.*, 59 F.3d 953, 966 n.11 (9th Cir. 1995).

This intent is apparent from the structure of the statute. As this Court has explained, Congress authorized significant financial rewards "'for whistle-blowing *insiders* with genuinely valuable information,'" without whom the fraud would likely pass undetected. *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) (emphasis added) (quoting *United States ex rel. Springfield Terminal R. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)). These rewards compensate true whistleblowers "who take significant personal risks to bring wrongdoing to light, to break conspiracies of silence among employees of malfeasors, and to encourage whistleblowing and disclosure of fraud." *United States ex rel. Mathews* v. *Bank of Farmington*, 166 F.3d 853, 858 (7th Cir. 1999), *overruled by Glaser* v. *Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009).

But such rewards are neither necessary nor justified to encourage the ferreting out of fraud that "anyone could identify." *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 413 (2011). To prevent the needless paying out of significant public funds, Congress designed the public disclosure bar "to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." *United States ex rel. Stinson, Lyons, Ger-*

lin & Bustamante, P.A. v. *Prudential Ins. Co.*, 944 F.2d 1149, 1155-1156 (3d Cir. 1991).

The Third Circuit's novel holding would blind courts to the piece of evidence most probative to this inquiry: How, in fact, did the relator come to know about the fraud? If the relator did so by examining "information that would have been equally available" to anyone—as the relator in this case maintains he did—then the case is one that Congress plainly intended to foreclose.

Because the Third Circuit's rule needlessly restricts the data courts may properly consider, it needlessly increases the likelihood of error. False Claims Act cases may arise in a variety of complex circumstances. Forcing judges to reconstruct a chain of inferences by prohibiting reliance on a relator's own admissions may serve only to waste judicial resources confirming what the relator already knows.

The Third Circuit's rule may also make it easier for opportunistic lawyers to recruit *qui tam* relators who bring no insider knowledge to the table. In *United States ex rel. Lopez* v. *Strayer Education, Inc.*, 698 F. Supp. 2d 633 (E.D. Va. 2010), for example, the relator's deposition transcript made clear "that [she] kn[ew] no facts derived from her own experiences which might serve as a basis" for the allegations in her complaint. *Id.* at 637. Instead, the district court found that relator's counsel "came to [the relator] with the 'facts,' and [the relator] merely helped by providing a name necessary to file suit." *Id.* at 643. As the district court correctly determined, the relator in that case was the quintessential example of "an opportunistic litigant, adding no value to the government's efforts to combat fraud," *id.* at 644, and who was therefore "precisely the

type of litigant the public disclosure bar aims to discourage," *id.* at 637. Yet under the Third Circuit's rule, the district court would have been forced to ignore the relator's revealing deposition testimony and to treat the allegations in the complaint as if they had derived from the relator's own knowledge, when they clearly had not. Forced adherence to that legal fiction enables *qui tam* relators and their counsel to reap the benefits of *qui tam* litigation—benefits Congress created to compensate true insiders—while providing nothing to the public in return.

III. ALLOWING SUITS BY OPPORTUNISTIC RELATORS WITHOUT FIRSTHAND KNOWLEDGE OF FRAUD IMPOSES SIGNIFICANT BURDENS ON DEFENDANTS

Opening the floodgates to relators without firsthand knowledge of fraud would exacerbate the already heavy burdens that *qui tam* litigation imposes on defendants and the public.

False Claims Act litigation demands "a tremendous expenditure of time and energy." 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). And its effects are particularly acute for companies in the healthcare and pharmaceutical industries, such as amici's members. *See* U.S. Dep't of Justice, Civil Division, *Fraud Statistics—Overview, October 1, 1986 – September 30, 2018* ("DOJ Fraud Statistics"), at 1, 3, https://www.justice.gov/civil/page/file/1080696/download (visited Mar. 11, 2019) (noting that more than 70% of *qui tam* cases filed in 2017 targeted defendants in the health and human services industry). Indeed, "[p]harmaceutical, medical devices, and health care companies spend billions each

year" on the costs associated with False Claims Act litigation. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

The number of new *qui tam* actions has increased dramatically in recent years. In 1987, just three *qui tam* suits were filed against healthcare industry defendants; in 2017, that number was almost five hundred. DOJ Fraud Statistics at 3. Unless defendants are prepared to settle aggressively, each of those cases can be expected to last years. According to data obtained from Freedom of Information requests, "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"; "110 extended for more than *five years* after declination"; and one extended for more than *ten* years. Chamber of Commerce of the United States of America et al. Amicus Br. 13, *Gilead Scis., Inc.* v. *United States ex rel. Campie*, No. 17-936 (U.S. Feb. 1, 2018). Defendant companies, including amici's members, often pay handsomely to avoid these expenses, even in unmeritorious cases. In 2017, the cost to the healthcare industry of settlements and judgments in non-intervened *qui tam* cases exceeded $445 million. DOJ Fraud Statistics at 3.

Businesses may also suffer reputational hardship from simply having to defend a False Claims Act action. The "mere presence of allegations of fraud may cause [government] agencies to question the contractor's business practices." Canni, 37 Pub. Cont. L.J. at 11. As the government has recognized, such reputational risk, combined with financial harm, could lead some businesses to exit the government program altogether. *See* Memo. from Michael Granston, Dir., Com-

mercial Litig. to Commercial Litig. Branch, Fraud Sec. 5 (Jan. 10, 2018), https://drive.google.com/file/d/1PjNaQyopCs_KDWy8RL0QPAEIPTnv31ph/view ("[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."); *see also* Macagnone, *DOD Buying Group Pushes House Panel for Rules Reform*, Law360 (May 17, 2017), https://www.law360.com/articles/924706/dod-buying-group-pushes-house-panel-for-rules-reform (according to the former head of federal acquisition policy, companies often decline federal contracts "because of reputational risk and the very onerous application of [a] remedy for something that is certainly unintentional").

The public disclosure bar serves as an important bulwark against an even greater acceleration of these costs. Its gatekeeping role ensures that only relators with actual inside information are deputized to prosecute expensive litigation on the government's behalf. Without it, relators with no special insight into corporate practices "have a strong dollar stake in alleging fraud whether or not it exists." U.S. Dep't of Justice, Office of Legal Counsel, *Constitutionality of the* Qui Tam *Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 220 (1989). And as this Court has noted, relators in general are "less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

An expansion of the class of relators to persons with no personal knowledge of fraud, including persons who are merely recruited by their attorneys, would divert even more time and capital away from healthcare

companies' research and development efforts. The added expenses could significantly increase the already substantial costs of developing and marketing new treatments that treat, cure, or prevent so many debilitating and life-threatening diseases and conditions. And whatever recoveries that ultimately result will serve not as a reward to a whistleblower who risked her job and reputation to expose fraud among her coworkers, but as a windfall to a stranger no better situated to sue than any member of the public.

IV. THE ISSUE PRESENTED IS OF NATIONAL IMPORTANCE AND THIS CASE PROVIDES AN APPROPRIATE OPPORTUNITY TO ADDRESS IT

The application of the public disclosure bar is among the most frequently litigated issues in False Claims Act cases. *See, e.g.*, Boese, *Civil False Claims and* Qui Tam *Actions*, § 4.02[A], at 4-53 (4th ed. 2019-1 Supp.) ("Despite Congress's attempts to simplify jurisdiction over *qui tam* suits, Section 3703(e)(4) has become the most frequently litigated issue in such actions."); Sylvia, *The False Claims Act: Fraud Against the Government* § 11.34 (updated 2018) (public disclosure bar has "generated much litigation"). This frequency stems in part from the bar's high stakes—dismissal of the suit or the possibility of treble damages and penalties—and in part from the uncertain meaning of the bar's terms. *See, e.g.*, *United States ex rel. Mistick PBT* v. *Housing Auth. of City of Pittsburgh*, 186 F.3d 376, 387 (3d Cir. 1999) (Alito, J.) (cataloguing ways in which the False Claims Act "does not reflect careful drafting or a precise use of language"). Several times in recent years, this Court has been called upon to clarify the bar's scope. *See Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 404 (2011);

Graham Cty. Soil & Water Conservation Dist. v. *United States ex rel. Wilson*, 559 U.S. 280, 283 (2010); *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 467 (2007); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 941 (1997). And none of those cases addressed the appropriate test for determining when a complaint is "based on" or "substantially similar to" publicly disclosed allegations or transactions—threshold questions in any public disclosure bar case.

The extent to which the public disclosure bar turns on how the relator actually came to know the allegations in the complaint has significant implications for False Claims Act practice. A rule that permits courts to consider the actual, subjective origin of a relator's allegation would make it easier to weed out precluded *qui tam* suits during discovery. In some cases, like this one, improper suits could be uncovered on the basis of a single deposition. Conversely, the rule embraced by the Third Circuit, prohibiting courts from at all considering the origins of a relator's allegations, would increase the case's cost and complexity. Such a rule would require the parties (and the court) to reconstruct what may have been highly detailed inferences the relator used to support his complaint.

This case offers a clean legal vehicle for the Court to address the issue, free from factual entanglement. The relevant portion of the Third Circuit's opinion did not suggest that petitioners had somehow misconstrued the relator's testimony. Nor did the court's analysis turn on any particular facts. Instead, the court accepted the premise that the relator maintained an "honest . . . belief that certain public documents themselves disclose[d] the alleged fraud" (Pet. App. 30) and held as a categorical matter that, "in the context of the public disclosure bar, courts may not rest their conclu-

sions based only on the relator's view of the state of the public disclosures" (Pet. App. 32). In other words, the Third Circuit held that whether a relator's complaint is "based on" or "substantially similar" to a public disclosure is a question for the court and the court alone; the relators' own insights are immaterial. The validity of this crisp, bright line rule is amenable to this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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