No. 21-1145

In the Supreme Court of the United States

MOLINA HEALTHCARE OF ILLINOIS, INC., ET AL.,
PETITIONERS,

v.

THOMAS PROSE

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

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

The Chamber has a strong interest in the questions presented in this case, which are fundamental to the scope of FCA liability and greatly impact the costs of defending such litigation. Many of the Chamber's members participate in various federal programs, subjecting them to complex and detailed regulatory schemes. Minor instances of noncompliance with regulatory and contractual provisions have served as the basis for FCA lawsuits in courts nationwide, including the Seventh Circuit. With increasing frequency in recent years, private relators (only infrequently joined by the government itself) have alleged violations of the FCA without providing any details about the actual claims purportedly submitted to the government for payment. In addition, *qui tam* actions

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties were given timely notice and consented to this filing.

have increasingly relied on an expansive interpretation of the "implied false certification" theory of liability. Both developments risk triggering the statute's "essentially punitive" regime of treble damages and penalties, *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 784-785 (2000), for "garden-variety breaches of contract or regulatory violations," *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 194 (2016).

The Seventh Circuit's relaxation of the pleading standards for FCA cases and its adoption of a virtually boundless implied false certification theory will have profound and far-reaching consequences for the Chamber's members. The decision below will harm not just managed care organizations like petitioner, but also myriad other businesses, non-profit organizations, and even municipalities that perform work for (or financed by) the federal government, or which receive funds through a vast array of federal programs. When courts allow weak cases involving complex programs to continue past the pleadings stage, as the Seventh Circuit did here, they often collapse at summary judgment, but only after years of costly litigation and burdensome discovery. It is thus critically important to the Chamber's members that courts scrupulously enforce Rule 9(b)'s strict pleading requirements and faithfully apply *Escobar*'s teachings regarding the limited scope of implied false certification liability. Complaints that fail to pass these critical threshold tests should be dismissed before needless and burdensome discovery and before the prospect of crushing treble damages and per-claim penalties coerces defendants into settling meritless claims. Any other rule creates deadweight litigation costs that ultimately are borne by the Government.

SUMMARY OF ARGUMENT

The Court should grant review to resolve two entrenched circuit splits regarding the pleading requirements for FCA complaints. With the decision below, the Seventh Circuit joins several other courts of appeals in declining to impose meaningful checks on *qui tam* actions at the motion to dismiss stage, thus inviting meritless FCA litigation that will impose substantial costs on the American business community and ultimately taxpayers.

As the petition correctly notes (and as respondent's counsel has observed in other pending petitions), courts are split on whether Rule 9(b) requires a relator to plead particulars of an alleged false claim or only bare facts giving rise to a plausible inference that false claims might have been submitted. Courts are also split on whether a request for payment that makes no specific representations about the goods or services provided can be false or fraudulent under a theory of implied false certification. No further percolation is needed, as a majority of the federal courts of appeals have weighed in on each of these issues and are intractably split.

The Seventh Circuit's erroneous decision on the first question undermines defendants' ability to resolve meritless *qui tam* actions at the pleading stage, including those the government has deemed unworthy to pursue. It presents the possibility of FCA liability—with the risk of crippling treble damages, penalties, and grave reputational harm—on every government contractor, grantee, and program participant even if a relator possesses no specific knowledge of any allegedly false claim. Every sector of the American economy suffers when weak FCA cases are allowed to proceed past the pleading stage. Perversely, the weaker and more attenuated the legal theory underlying a relator's claims, the more complex and costly discovery may be for defendants. Strictly enforcing Rule 9(b) helps to minimize deadweight loss to the economy and reduces the risk of unfairness to defendants.

As to the second question, the Seventh Circuit's adoption of an expansive theory of implied false certification liability stretches the FCA far beyond its intended limits. By holding that a claim for payment can be impliedly false even if it contains no representations at all, the decision would convert the FCA into "a blunt instrument" through which a private citizen can enforce compliance with any statute, regulation, or contract term, *United States ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010) (citation omitted), despite the absence of fraud, and despite the government's many better-tailored remedies for ensuring compliance. The Seventh Circuit's decision has implications far beyond the managed care context, potentially affecting any entity, public or private, that receives federal funds under a host of programs. Congress intended for the Act to root out fraud—not to convert every breach of contract or deviation from regulations into a fraud claim subject to the FCA's quasi-criminal penal regime.

This Court should grant the petition to provide much-needed guidance on the questions presented.

ARGUMENT

I. THE DECISION BELOW JOINS LONGSTANDING, AND DEEPLY DRAWN, CIRCUIT SPLITS

As the petition correctly notes, the decision below deepens two entrenched circuit splits. Courts are divided about (1) whether Rule 9(b) requires an FCA plaintiff to plead the facts of a false claim with particularity, and (2) whether an FCA plaintiff can assert a claim based on an implied false certification theory where the defendant's request for payment contained no specific representations about the goods or services provided.

Every one of the regional federal courts of appeals has weighed in on whether Rule 9(b) requires *qui tam* relators to plead facts regarding at least one false claim in order to survive a motion to dismiss. In the decision below, the Seventh Circuit joined the Third, Fifth, Ninth, Tenth, and D.C. Circuits in concluding that a plaintiff need not plead with particularity the facts of any specific claim for payment. Pet. 16. The First, Sixth, Eighth, and Eleventh Circuits, by contrast, have held that Rule 9(b) applies with equal force to the FCA's false claim element. Pet. 14. Under the latter view, a relator cannot rely on bare assertions, statistical probabilities, or allegations of a widespread pattern or practice to sufficiently plead the existence of a false claim. *Ibid.* Sitting in the middle are the Second and Fourth Circuits, which require relators to plead details of specific false claims in at least some circumstances. See Pet. 16.

Escobar allowed, in certain circumstances, use of the implied false certification theory of falsity, but it did not fully define the limits of such liability. In the six years that have passed since *Escobar*, more than half of the federal courts of appeals have weighed in on whether that theory permits relators to pursue FCA claims based solely on a failure to disclose noncompliance with an underlying statutory, regulatory, or contractual provision. The Third, Fifth, Ninth, and Eleventh Circuits have rejected such an expansive theory of implied falsity, concluding that a claim must make specific representations about the goods or services provided, such that the failure to disclose noncompliance with statutory, regulatory, or contractual provisions renders those representations misleading half-truths. Pet. 20. By contrast, the D.C., Fourth, and Seventh Circuits have endorsed a theory of implied falsity under which any request for payment, if made while the claimant is in violation of an underlying requirement, is deemed false. *Ibid.*

The courts of appeals are starkly divided on both these questions, with the relator's choice of venue determining which of two irreconcilable approaches governs litigation with regard to each question. This Court should grant review to ensure consistent nationwide application of Rule 9(b) and *Escobar*'s guidance concerning the implied false certification theory of falsity.

II. THE DECISION BELOW PROFOUNDLY INCREASES RISK AND UNCERTAINTY FOR GOVERNMENT CONTRACTORS, GRANTEES, AND PROGRAM PARTICIPANTS

The decision below opens the door to significant discovery and litigation costs for a broad swath of meritless FCA claims. It also improperly exposes government contractors and others participating in government programs to the threat of treble damages and statutory penalties for noncompliance with any one of thousands of statutory provisions, rules, regulations, and contract clauses that govern relationships with the federal government—even where the relator has no knowledge of any actual false claim before filing suit. Both scenarios profoundly increase litigation risk to thousands of businesses and individuals, to the detriment of the business community, the government, and taxpayers.

A. Rule 9(b) Plays An Important Role In Cabining Expansive FCA Liability

Rule 9(b) requires a party pleading an FCA claim to "state with particularity the circumstances constituting fraud." It applies to every FCA complaint, hundreds of which are filed each year. *Escobar*, 579 U.S. at 195 n.6; Civ. Div., U.S. Dep't of Just., *Fraud Statistics – Overview*

(Feb. 1, 2022) ("DOJ Fraud Statistics"). "The point of Civil Rule 9(b) is to prevent, not facilitate, casual allegations of fraud." *United States ex rel. Hirt* v. *Walgreen Co.*, 846 F.3d 879, 882 (6th Cir. 2017). To that end, Rule 9(b) stands as a gatekeeper to discovery, a tool to "protect defendants from frivolous suits" and ensure that the plaintiff cannot "learn the complaint's bare essentials through discovery." *United States ex rel. Clausen* v. *Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1313 n.24 (11th Cir. 2002).

This gatekeeping role is consistent with the basic purpose of the FCA's *qui tam* provisions, which are "intended to encourage individuals who are either close observers or involved in the fraudulent activity to come forward, and is not intended to create windfalls for people with secondhand knowledge of the wrongdoing." *United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 561 (8th Cir. 2006) (quoting *United States ex rel. Kinney* v. *Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003)); see also *Ebeid ex rel. United States* v. *Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010) ("[T]he FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government."); *United States ex rel. Fine* v. *Advanced Sci., Inc.*, 99 F.3d 1000, 1004 (10th Cir. 1996) ("Congress sought to increase private enforcement of the False Claims Act by encouraging insiders with information of fraud to come forward."). "Either a [relator] ha[s] direct knowledge of the fact that the [defendants] engaged in the fraudulent conduct, or he d[oes] not." *Kinney*, 327 F.3d at 674. And if a relator has direct knowledge of the alleged fraud, then he should be able to plead that fraud with particularity. *Id.* at 674-675. (holding that relator's failure to identify fraud with particularity shows that he was not an original source of the information, as required by 31 U.S.C. § 3730(e)(4)).

If a relator cannot allege the facts of a false claim with particularity, the relator is very likely *not* the type of private plaintiff the *qui tam* provisions contemplate stepping into the shoes of the United States. In other words, if a relator "lack[s] the information to" allege the who, what, when, where, and how of a fraud, "he was not the right plaintiff to bring th[e] *qui tam* claim" in the first instance. *Hirt,* 846 F.3d at 882. Relaxing Rule 9(b)'s strict requirements for plaintiffs who offer no specific allegations regarding the submission of false *claims* undermines that rule's purpose of "prevent[ing] the filing of a complaint as a pretext for the discovery of unknown wrongs and protects potential defendants * * * from the harm that comes from being charged with the commission of fraudulent acts." *Semegen* v. *Weidner*, 780 F.2d 727, 731 (9th Cir. 1985); see also *United States ex rel. Keller* v. *Eisai, Inc.,* 568 Fed. App'x 783, 801 n.23 (11th Cir. 2014) ("[L]owering the pleading requirements would allow plaintiffs without knowledge of the fraud to bring baseless actions, * * * and extract settlements, all while damaging the defendant's goodwill and reputation.").

Rule 9(b)'s gatekeeping role is particularly important for cases in which the government declines to intervene—which make up the bulk of FCA litigation in federal courts, but which are least likely to be meritorious. See DOJ Fraud Statistics at 3 (declined cases make up only 7.2 percent of total *qui tam* recovery since 1986); Ralph C. Mayrell, *Digging Into FCA Stats: In-House Litigation Budget Insights*, Law360 (July 13, 2021), https://bit.ly/3hUp89K (DOJ declines to intervene in approximately 75 percent of cases, and 90 percent of declined cases ended in no recovery for the government). In this category of cases, the government, using the powerful investigative tools the FCA affords, see 31 U.S.C. § 3733, had the opportunity to review and investigate the relator's allegations and decided not to pursue the case itself. In these circumstances, the permissive rationale adopted by the Seventh Circuit and others—relaxing Rule 9(b)'s standards to allow a plaintiff to discover facts to supplement its bare-bones complaint—makes little sense. The government's decision not to intervene after conducting a full investigation tends to underscore that there is little to be gained from allowing a relator years of discovery to seek details about the purported false claims that are missing from its complaint.

Whether courts strictly apply Rule 9(b) in declined cases to require particularity for the false claim element will often make the difference between dismissal on the pleadings and proceeding into burdensome and protracted discovery. By relaxing the rule, the Seventh Circuit's decision makes it more likely that relators without the insider knowledge contemplated by the FCA will seek out that forum and others like it for a fast-track to discovery. As discussed below, see pp. 13-20, *infra*, permitting such meritless cases to proceed will exact a significant cost with little gain.

B. The FCA's Falsity Requirement Helps To Avoid Converting The FCA Into An All-Purpose Contract And Regulatory Enforcement Statute

The FCA was enacted in 1863 and signed into law by President Lincoln "to prevent and punish *frauds* upon the Government of the United States." Cong. Globe, 37th Cong., 3d Sess. 348 (1863) (statement of Sen. Wilson) (emphasis added).[2] The FCA is not "a vehicle for punish-

[2] The FCA was enacted in response to allegations of rampant war profiteering during the Civil War. *United States* v. *McNinch*, 356 U.S. 595, 599 (1958). Private contractors supporting the Union

ing garden-variety breaches of contract or regulatory violations," *Escobar*, 579 U.S. at 194, but the Seventh Circuit's endorsement of an expansive implied false certification theory threatens to turn it into one. Strictly enforcing the falsity requirement for FCA claims based on an implied false certification theory is critical because of the complex contractual and regulatory schemes that businesses routinely face when they partner with the government as contractors, as grantees, or simply as program participants.

It is common, even typical, for those assisting the government in implementing its programs to be subject to detailed statutory, regulatory, and contractual obligations. Those legal regimes are at minimum "complex" (Federal Family Education Loan Program),[3] and often "complex [and] poorly-worded" (Small Disadvantaged Business regulations).[4] Government contracts regularly incorporate "thousands of pages of other federal laws and regulations" of comparable complexity,[5] like the 2,000-page Federal Acquisition Regulation and the 1,300-page

Army were accused of defrauding the federal treasury through flagrantly wrongful acts: "For sugar, [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories." *United States ex rel. Newsham* v. *Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989) (quoting 1 F. Shannon, The Organization and Administration of the Union Army, 1861–1865, at 54-56 (1965)).

[3] *United States ex rel. Vigil* v. *Nelnet, Inc.*, 639 F.3d 791, 799 (8th Cir. 2011).

[4] *H.B. Mac, Inc.* v. *United States*, 36 Fed. Cl. 793, 816 (1996), rev'd on other grounds, 153 F.3d 1338 (Fed. Cir. 1998).

[5] *United States* v. *Sanford-Brown, Ltd*, 788 F.3d 696, 707 (7th Cir. 2015).

Defense Federal Acquisition Regulation Supplement, which applies to every Department of Defense contract and which one former Army contract specialist described as "a procurement system so vast, complex and rigid it would make Kafka blush."[6] Many federal regulatory regimes are so reticulated and challenging that courts and scholars routinely describe them as "byzantine[] and all-encompassing" (Agricultural Marketing Agreement Act of 1937),[7] "intricate" and "almost unintelligible" (the Social Security Act),[8] and "onerous and impenetrable" and "byzantine to the point of incomprehensibility" (government procurement rules).[9] That brings us to the Medicare and Medicaid programs at issue here, which are governed by statutory and regulatory provisions that federal appeals courts have described as "among the most completely impenetrable texts within human experience."[10]

Virtually every interaction that businesses undertake with the government is thus likely to involve a complex

[6] Matt Savare, *The Absurdity of Government Contracting*, Lowenstein Sandler (June 12, 2020), https://bit.ly/3vW0Ap8.

[7] *United States ex rel. Sequoia Orange Co.* v. *Sunland Packing House Co.*, 912 F. Supp. 1325, 1329 (E.D. Cal. 1995).

[8] *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981).

[9] Steven R. Koltai, *How the Healthcare.gov Mess Happened and How To Fix It*, Brookings Inst. (Nov. 25, 2013), https://brook.gs/3oaOkdr (referencing "onerous and impenetrable procurement rules"); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 Yale L.J. 616, 672 n.180 (2013) (referencing the "byzantine" two-thousand-page Federal Acquisition Regulations governing federal government contracting and procurement).

[10] *Abraham Lincoln Mem. Hosp.* v. *Sebelius*, 698 F.3d 536, 541 (7th Cir. 2012) (quoting *Rehabilitation Ass'n of Va., Inc.* v. *Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994)).

web of laws, rules, and regulations that lurk in the background of each request for payment but are not specifically referenced in that request. Treating the mere submission of a request for payment as an implicit certification of complete compliance with all applicable laws, rules, and regulations would expose these businesses to the risk of lengthy and costly litigation, potentially crippling treble damages and statutory penalties, and reputational harm whenever an FCA plaintiff identifies a single provision which he subjectively believes the business may not have fully satisfied. That risk is particularly pronounced in programs like the one here, where the supposed "false claim" involves not a single contract or transaction with a government agency, but untold thousands of repeated transactions, all implicating the same purported certification of compliance with highly complex and technical statutory and regulatory regimes. See *Schweiker*, 453 U.S. at 43.

Nonetheless, relators increasingly have sought to transform almost every purported contractual or regulatory violation into a high-stakes FCA case and will continue to do so if not checked at the pleadings stage. For example, in the Fifth Circuit, a relator alleged that a construction company providing temporary shelter after Hurricane Katrina violated the FCA when its subcontractors connected temporary housing units to power appliances and water pumps but lacked state permits to do so, violating a requirement that "[a]ll work performed shall be in accordance with all applicable federal, state and local codes and regulations." *United States ex rel. McLain* v. *Fluor Enters., Inc.*, 681 Fed. App'x 355, 357, 360-362 (5th Cir. 2017) (per curiam) (affirming summary judgment for defendants four years after unsealing of complaint, after discovery and multiple motions to dismiss). In the Central District of California, the court rejected a relator's assertion that a government contractor violated the FCA by "t[aking] * * * shortcuts in designing and constructing" a weather sensor for the government, where the relator identified no specific misrepresentation in the contractor's claim for payment and merely argued that the shortcuts violated the contractor's underlying contractual promises. *United States ex rel. Mateski* v. *Raytheon Co.*, No. 2:06-cv-03614, 2017 WL 1954942, at *1, 5 (C.D. Cal. Feb. 10, 2017). And in the Eleventh Circuit, a district court granted judgment as a matter of law to the defendant on the relator's claim that the defendant violated the FCA by submitting claims for Medicaid reimbursement without preparing and maintaining comprehensive care plans required by Florida law, in violation of its Medicaid provider agreement to comply with all applicable laws, rules, and regulations. *Ruckh* v. *Salus Rehab., LLC*, 963 F.3d 1089, 1096, 1109 (11th Cir. 2020).

Government contractors, grantees, and program participants are subject to a huge number of statutory, regulatory, and contractual requirements. Rigorous enforcement of the falsity requirement is critical to avoid the risk that the FCA will be used to impose devastating and essentially penal liability for minor noncompliance with such provisions.

C. ***Qui Tam*** **Actions Impose Needless Costs On American Businesses—And The Government**

The breadth and uncertainty of FCA liability under the Seventh Circuit's decision would increase the costs of doing business for broad swaths of the U.S. economy—not only for contractors, grantees, and program participants, but also for the government itself and, ultimately, the American taxpayer.

1. FCA liability potentially affects any entity or person, public or private, that receives federal funds in

myriad forms. Thus, a broad cross-section of businesses and individuals are exposed to protracted litigation and potential liability under the Seventh Circuit's expansive interpretations of Rule 9(b) and the implied false certification theory. See, *e.g.*, *Sanford-Brown*, 788 F.3d 696 (higher education); *United States ex rel. Steury* v. *Cardinal Health, Inc.*, 735 F.3d 202 (5th Cir. 2013) (medical manufacturing); *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.* v. *Westchester Cnty.*, 712 F.3d 761 (2d Cir. 2013) (low-income housing); *United States ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163 (10th Cir. 2010) (waste disposal); *United States* v. *Science Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010) (consulting services); *United States ex rel. Pritzker* v. *Sodexho, Inc.*, 364 F. App'x 787 (3d Cir. 2010) (public school-lunch services); *Mikes* v. *Straus*, 274 F.3d 687 (2d Cir. 2001) (healthcare services); *Grand Union Co.* v. *United States*, 696 F.2d 888 (11th Cir. 1983) (food stamp program); *United States ex rel. Shemesh* v. *CA, Inc.*, No. 09-cv-1600, 2015 WL 1446547 (D.D.C. Mar. 31, 2015) (software development); *United States ex rel. Oliver* v. *Philip Morris USA, Inc.*, 101 F. Supp. 3d 111 (D.D.C. 2015) (cigarette manufacturing); *United States ex rel. Bias* v. *Tangipahoa Parish Sch. Bd.*, 86 F. Supp. 3d 535 (E.D. La. 2015) (public school ROTC program); *United States ex rel. Bilotta* v. *Novartis Pharm. Corp.*, 50 F. Supp. 3d 497 (S.D.N.Y. 2014) (pharmaceutical manufacturing); *United States* v. *Americus Mortg. Corp.*, No. 12-cv-2676, 2014 WL 4273884 (S.D. Tex. Aug. 29, 2014) (mortgage lending); *United States ex rel. McLain* v. *Fluor Enters., Inc.*, 60 F. Supp. 3d 705 (E.D. La. 2014) (disaster relief construction services); *United States ex rel. Landis* v. *Tailwind Sports Corp.*, 51 F. Supp. 3d 9 (D.D.C. 2014) (athletic sponsorship); *United States ex rel.*

Koch v. *Koch Indus., Inc.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999) (crude oil purchasing).

2. The skyrocketing number of *qui tam* suits over the past decade underscores the importance of carefully enforcing the legal limits that the Seventh Circuit ignored. Since 1986, an "army of whistleblowers, consultants, and, of course, lawyers" has been released onto the landscape of American business. 1 John T. Boese, *Civil False Claims and* Qui Tam *Actions*, at xxi (4th ed. 2011). Over that period, more than 20,000 FCA actions have been filed, nearly 14,600 of which were *qui tam* suits. DOJ Fraud Statistics, *supra*. Only a fraction of those have resulted in any monetary recovery for the government. See Christina Orsini Broderick, Note, Qui Tam *Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 975 (2007) (less than 10 percent of non-intervened *qui tam* actions result in recovery); *Digging Into FCA Stats*, *supra* (similar).

Meritless *qui tam* actions are "downright harmful" to the business community. See *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 298 (2010). The FCA's treble damages and penalties provisions are "essentially punitive." *Stevens*, 529 U.S. at 784. Businesses face the specter of treble damages and substantial civil penalties of over $23,607 per false claim. 86 Fed. Reg. 70,740 (Dec. 13, 2021); 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). But wholly apart from the prospect of an eventual judgment, simply *defending* an FCA case 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). For example, "[p]harmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with FCA investigations. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (Oct. 2011).

The discovery process creates much of that financial burden. In one recent case involving a defense contract, for example, the defendant "produced over two million pages of documents" before the relator's claims were dismissed on summary judgment nearly a decade after the relator filed suit. *See United States ex rel. McBride* v. *Halliburton Co.*, 848 F.3d 1027, 1029-1030 (D.C. Cir. 2017). Discovery costs for FCA cases are particularly high because many (perhaps most) cases turn on complex allegations of violations of highly technical regulations or contract terms that take years to navigate before summary judgment. For this reason, discovery costs alone 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." *Smith* v. *Duffey*, 576 F.3d 336, 340 (7th Cir. 2009).

Moreover, the mere existence of allegations (no matter how tenuous) that a company "defraud[ed] our country sends a message" and "[r]eputation[,] * * * once tarnished, is extremely difficult to restore." Canni, *supra*, at 11; accord *United States ex rel. Grenadyor* v. *Ukr. Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1105-1108 (7th Cir. 2014) ("[A] public accusation of fraud can do great damage to a firm[.]"). For companies that do significant government work, "the mere presence of allegations of fraud may cause [federal] agencies to question the contractor's business practices." Canni, *supra*, at 11. And a finding of FCA liability can result in suspension and debarment from government contracting, see 2 C.F.R. § 180.800—"equivalent to the death penalty" for many government contractors. Ralph C. Nash & John Cibinic, *Suspension* *of Contractors: The Nuclear Sanction*, 3 Nash & Cibinic Rep. ¶ 24 (Mar. 1989). FCA allegations can also trigger satellite litigation, such as shareholder derivative suits. *E.g.*, Stipulation of Settlement at 1, *In re Oracle Corp. Derivative Litig.*, No. 10-cv-3392 (N.D. Cal. May 28, 2013) [ECF No. 95].

Given this "perfect storm" of financial and practical pressures, relators are keenly aware that mere allegations, regardless of their merit, can "be used to extract settlements." Sean Elameto, *Guarding the Guardians: Accountability in* Qui Tam *Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 824 (2012); see also, *e.g., Haroco, Inc.* v. *Am. Nat. Bank & Tr. Co. of Chi.*, 747 F.2d 384, 399 n.16 (7th Cir. 1984) (noting the "*in terrorem* settlement value that the threat of treble damages may add to spurious claims"). "Punitive" liability and the potential that lawsuits will drag on for years creates intense pressure on defendants to settle even "questionable claims." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011); John T. Boese & Beth C. McClain, *Why* Thompson *Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 Ala. L. Rev. 1, 18 (1999) (statute's treble damages and penalty structure "place[] great pressure on defendants to settle even meritless suits"). And the simple reality is that most declined *qui tam* actions are meritless: The government intervenes in a small minority of *qui tam* actions. Yet the vast majority of the over $70 billion obtained under the False Claims Act since 1986 has come from that small subset of intervened cases. See DOJ Fraud Statistics, *supra*. In stark contrast, the much larger universe of declined cases has produced less than $3.5 billion in recoveries since 1986. *Ibid.*

3. Defendants in FCA cases thus are confronted with an impossible choice: pay millions of dollars to litigate the

case to summary judgment or even trial (all while facing the risk of an adverse judgment and treble damages)—or settle. The prospect of that choice has a real, and predictable, chilling effect. Fear that running afoul of a single provision in a complex statutory and regulatory landscape will lead to burdensome litigation and potentially crippling FCA liability may lead contractors to shy away from bidding on federal contracts, or cause them to raise prices to account for the inevitable costs of defending non-meritorious suits.

The reduction in qualified entities willing to do business with the government deprives the government of choice, and reduced competition means the government very likely will pay higher prices, receive less valuable products or services, or both. See, *e.g.*, *United States* v. *Data Translation, Inc.*, 984 F.2d 1256, 1262 (1st Cir. 1992) (Breyer, C.J.) ("[S]ignificantly increasing competitive firms' cost of doing federal government business[] could result in the government's being charged higher * * * prices."); Memorandum from Michael D. Granston, Dir., Commercial Litig. Branch, Fraud Section, U.S. Dep't of Just., to Attorneys, Commercial Litig. Branch, Fraud Section at 5 (Jan. 10, 2018) ("Granston Memo") ("[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."); S. Rep. 98-50, at 3 (1983) ("[C]ompetition in contracting saves money."). These costs will not be limited to just one industry. The government heavily relies on contractors to provide goods and services in a vast array of industries—from national defense, healthcare, and medical manufacturing, to software development, waste disposal, telecommunications, mortgage lending, disaster relief, and consulting services.

What is more, because the costs of FCA litigation are passed on to the government, directly or indirectly, those costs ultimately will be borne by the taxpayer. Already, taxpayers bear a significant part of the direct cost of FCA suits. For instance, cost-based contractors are allowed to pass on to the government up to 80% of their legal expenses from litigating non-intervened *qui tam* cases when they prevail. FAR 31.205-47(a)(3), (e). And contractors undoubtedly pass those costs to taxpayers indirectly as well, by increasing the prices they charge for their services to account for the risk that their service to the public will expose them to costly and protracted litigation.

4. What is more, litigating overbroad implied false certification claims can disrupt agency objectives. Granston Memo 4 (noting instances where "a *qui tam* action threatens to interfere with an agency's policies or the administration of its programs"). Agencies have numerous tools to address contractor non-compliance. They can demand information, require a certification of compliance, exercise audit or inspection rights, or issue notices of corrective action, all of which can address an issue without resorting to extreme measures like FCA litigation that could negatively affect continued performance. See *e.g.*, 42 U.S.C. § 1437f(o)(8)(C)-(E) (providing for regular inspections of public housing to ensure continued eligibility for subsidy); *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 discovering contractual noncompliance).

As the Justice Department itself explained, "it is frequently in the Government's interest, as it would be in the interest of any contracting party, to avoid excessive concern over minor failings that might threaten a useful course of dealing with the other party," particularly if "the contractor's performance otherwise has been adequate."

Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 207, 220 (1989).

A *qui tam* suit can undermine agencies' efforts as contracting parties and as regulators, nullifying their decisions to *correct* (rather than penalize) errors, and imposing the type of drastic sanctions that the agencies deliberately avoided. See, *e.g.*, *United States ex rel. Conner* v. *Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008) (improper use of *qui tam* suits can "undermine the government's own administrative scheme for ensuring that hospitals remain in compliance and for bringing them back into compliance when they fall short of what the Medicare regulations and statutes require"); *United States ex rel. Siewick* v. *Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000) (permitting FCA claim based on violation of a statute could "unilaterally divest[] the government of the opportunity to exercise * * * the discretion to accept or disaffirm the contract on the basis of the complex variables reflecting the officials' views of the government's long-term interests"); Granston Memo at 4-5 (collecting examples where agencies valued competing considerations more than recovery for alleged false claims). Rigorous enforcement of the falsity requirement at the pleadings stage can mitigate these disruptions.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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