No. 17-936

In the

Supreme Court of the United States

GILEAD SCIENCES, INC.,

Petitioner,

v.

UNITED STATES EX REL. JEFFREY CAMPIE AND SHERILYN CAMPIE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONOCOPHILLIPS COMPANY IN SUPPORT OF PETITIONER

MERRITT E. MCALISTER
KING & SPALDING LLP
1180 Peachtree Street, NE
Atlanta, GA 30309
(404) 572-2752
mmcalister@kslaw.com

DARYL L. JOSEFFER
Counsel of Record
ASHLEY C. PARRISH
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 626-5524
djoseffer@kslaw.com
aparrish@kslaw.com

Counsel for ConocoPhillips Co.

February 2, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authority

INTEREST OF *AMICUS CURIAE*[1]

Amicus ConocoPhillips Company is a leader in the oil and natural gas industry. It is the world's largest independent exploration and production company based on production and proved reserves. Oil and natural gas production from the lower 48 States represents ConocoPhillips's largest business segment based on production. ConocoPhillips is also Alaska's largest oil and gas producer. Given its significant U.S.-based operations, ConocoPhillips has been one of the largest owners of federal exploration leases and production leases in the country. Having defended claims for allegedly underpaid royalties on those leases under the False Claims Act, ConocoPhillips has a keen interest in the consistent and faithful application of the False Claims Act, including the application of its materiality standard.

[1] Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that all parties, upon timely receipt of notice of intent to file this brief, have consented to its filing. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision threatens to transform routine regulatory disputes into expensive, high-stakes litigation for treble damages and other penalties—and to do so in a wide swath of cases involving highly regulated industries. In *Universal Health Services, Inc. v. United States ex rel. Escobar*, this Court held that false certification of compliance with regulatory requirements is actionable under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, only if the alleged misrepresentations were "material to the Government's payment decision." 136 S. Ct. 1989, 2002 (2016). The Ninth Circuit drained that standard of any force by permitting suits to proceed even when it is clear that the government continued to make payment with knowledge of the alleged misrepresentations.

These concerns are of great importance to every industry doing business with the United States, including especially highly regulated sectors like oil and gas. Since 2009, the Department of Justice has recovered almost $35 billion from settlements and judgments arising under the False Claims Act. *See DOJ Releases its 2016 False Claims Act Recovery Statistics,* The National Law Review, Dec. 16, 2016, https://www.natlawreview.com/article/doj-releases-its-2016-false-claims-act-recovery-statistics. That staggering amount does not account for the extraordinary litigation costs companies incur in defending False Claims Act litigation. Relators are incentivized by rich bounties to look for any alleged regulatory misstep, no matter how insignificant, as a basis for bringing suit. And in the context of highly regulated industries, such as oil and gas, there is no shortage of regulatory complexities that relators can exploit. Even though routine audits are the appropriate way to handle such disputes, extraordinary litigation costs—and the prospect of crushing liability for treble damages and civil penalties—force many defendants to settle even the most dubious claims.

ARGUMENT

I. *Escobar*'s Materiality Standard Imposes A Crucial Limit On The Scope Of The False Claims Act.

The False Claims Act imposes substantial penalties on those who knowingly defraud the federal government by submitting materially false claims for payment. 31 U.S.C. § 3729 *et seq*. This case involves an attempt to proceed on a theory of liability known as "implied false certification." Pet. App. 18a–19a. Under that theory, "when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if the claim fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement, so the theory goes, the defendant has made a misrepresentation that renders the claim 'false or fraudulent' under § 3729(a)(1)(A)." *Escobar*, 136 S. Ct. at 1995.

In *Escobar*, the Court approved the implied false certification theory but with an important safeguard: to support liability, "[a] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be *material* to the Government's payment decision in order to be actionable under the False Claims Act." *Id.* at 1996. Because of the financial incentives for whistleblowers to pursue *qui tam* litigation, a "rigorous materiality requirement" is essential to protect against abuse. *Id.*

The *Escobar* materiality standard is not "too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment." *Id.* at 2004 n.6. Where noncompliance with a regulatory requirement is "minor or insubstantial," that noncompliance is immaterial to the government's payment decision. *Id.* at 2003. The government's conduct is also relevant. "[I]f the [g]overnment pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Id.* at 2003–04.

The Ninth Circuit's decision below disregards the important guardrails that *Escobar* erected. As the petition explains, it also created a circuit split on an important, recurring question. This Court should therefore grant review to clarify this important area of law. A district court should dismiss a claim under the False Claims Act when the government has continued to approve and pay claims even after learning of alleged regulatory infractions. Pet. 19–20.

II. Proper Enforcement Of The Materiality Standard Is Especially Important In The Context Of Heavily Regulated Industries.

The government's knowledge of an alleged regulatory violation is often an important threshold issue in False Claims Act litigation. A robust materiality standard that focuses on the *government's* knowledge, as opposed to the scienter element's focus on the defendant's state of mind, enables claims under the False Claims Act to be tested at the motion-to-dismiss stage. That testing is especially important in cases involving heavily regulated industries, where regulatory disagreements often arise and are frequently known to the government.

The petition describes the Food and Drug Administration's regulations governing Gilead Sciences as a pharmaceutical manufacturer. Pet. 23–24. The concerns that arise in that context apply with equal force to other industries subject to significant federal oversight, including the oil and gas industry. Indeed, over the past decade, the oil and gas industry has faced increased litigation under the False Claims Act. *See, e.g.,* Department of Justice*, Fact Sheet—Significant False Claims Act Settlements & Judgments: Fiscal Years 2009–2016*, https://www.justice.gov/opa/press-release/file/918366/download. Litigation has largely involved the complex regulatory scheme governing the calculation of royalties owed for production of oil and gas from federal and Indian lands. *See, e.g.*, *In re Nat. Gas Royalties Qui Tam Litig.*, 562 F.3d 1032, 1037 (10th Cir. 2009); *United States of America ex rel. Johnson* *v. Shell Oil Co.*, 33 F. Supp. 2d 528, 531 (E.D. Tex. 1999); *United States ex rel. Koch v. Koch Indus., Inc.*, No. 91-CV-763-B, 1995 WL 812134, at *1 (N.D. Okla. Oct. 6, 1995); *Little v. ENI Petrol., Inc.*, No. CIV-06-120-M, 2009 WL 2424215, at *1 (W.D. Okla. July 31, 2009).

That litigation has ensnared ConocoPhillips. For instance, in 2007, a ConocoPhillips subsidiary paid $105 million to settle claims that it had underpaid natural gas royalties by purportedly claiming overly high deductions for the cost of transporting and treating gas. *See* Sara Stefanini, *ConocoPhillips Settles with DOJ for $105M*, Law360, Aug. 15, 2007, https://www.law360.com/articles/32645/conocophillips-settles-with-doj-for-105m. At all times, however, the subsidiary had fully disclosed to the government the manner in which it calculated the royalties. *Id.*

Not only does the government know how oil and gas companies calculate royalty payments, its complex regulations are apt to produce good-faith disagreements. Those disagreements could become fertile ground for unchecked abuse if the Ninth Circuit's misguided approach to the False Claims Act's materiality requirement is not corrected.

The Mineral Leasing Act, 30 U.S.C. § 181 *et seq.* (2000), generally governs the extraction of natural resources from government land. Under that Act, the producer-lessee pays the government-lessor "a royalty at a rate of not less than 12.5 percent in amount or value of the production removed or sold from the lease." 30 U.S.C. § 226(b)(1)(A). Implementing this provision, the Secretary of Interior has promulgated numerous regulations related to the calculation of royalties, with separate regulations addressing the calculation of royalty payments for Indian oil, 30 C.F.R. §§ 1206.50–1206.65; federal oil, 30 C.F.R. §§ 1206.100–1206.120; federal gas, 30 C.F.R. § 1206.150–1206.160; and Indian gas, 30 C.F.R. §§ 1206.17–1206.181. In 2016, the Office of Natural Resources Revenue promulgated replacement regulations in hopes of providing "greater simplicity, certainty, clarity, and consistency in product valuation." 81 Fed. Reg. 43338 (July 1, 2016). But they failed to accomplish that objective and the government recently repealed them, reinstating the preexisting regulatory requirements. *See* 82 Fed. Reg. 36934 (Aug. 7, 2017).

The regulations are not easy to follow or apply. Take, for example, the regulations governing the calculation of royalties for natural gas production, which are similar to those that apply when calculating royalties for production of oil from federal lands. *See* 30 C.F.R. §§ 1206.100–1206.120. As a general matter, the government "can take royalties as cash payments based on the value of production (royalties in value) or can take payments in shares of the production itself (royalties in kind)." *Little*, 2009 WL 2424215, at *1. Either way, the lessee is responsible for calculating the payment, which the Office of Natural Resources Revenue audits. *Id.* Valuation standards depend on whether gas is processed or unprocessed, *see* 30 C.F.R. §§ 1206.152, 1206.153, but, as a general matter, the "value of production" should be no less "than the gross proceeds accruing to the lessee for lease production" minus certain allowable deductions. 30 C.F.R. § 1206.152(h) (2016); *see also Amoco Prod. Co. v.*

Watson, 410 F.3d 722, 725 (D.C. Cir. 2005), *aff'd sub nom.*, *BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006).

Litigation has often arisen over this "elaborate array of statutes and rules." *Amoco Prod. Co.*, 410 F.3d at 725. When calculating "gross proceeds," the Mineral Leasing Act "require[s] lessees to put the gas into marketable condition at no cost to the United States—the so-called 'marketable condition rule.'" *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1033 (D.C. Cir. 2008); *see also* 30 C.F.R. § 1206.152(i) (governing unprocessed gas); 30 C.F.R. § 1206.153(i) (governing processed gas). "Marketable condition" is defined, in turn, as "lease products which are sufficiently free from impurities and otherwise in a condition that they will be accepted by a purchaser under a sales contract typical for the field or area." 30 C.F.R. § 1206.151. If, however, a lessee sells "unmarketable" gas at a lower price, the gross proceeds are "increased to the extent that the gross proceeds have been reduced because the purchaser, or any other person, is providing certain services" to put the gas in the marketable condition. 30 C.F.R. § 1206.152(i).

When the gas produced under a lease is sold in a remote market (as it often is), a lessee may deduct from its gross proceeds its actual costs of transporting the gas from the wellhead to the point of sale. 30 C.F.R. § 1206.157(a)-(b). This "transportation allowance" is defined as "an allowance for the reasonable, actual costs of moving [gas] to a point of sale or delivery off the lease . . . or away from a processing plant." 30 C.F.R. § 1206.151.

Unsurprisingly, disputes have arisen over how to deduct and calculate the transportation allowance, including the costs for compression services required for transportation. *See, e.g.*, *Devon Energy*, 551 F.3d 1030.

Disputes have also arisen over what it means to place production into "marketable condition," and whether the government understands "marketable condition" to refer to untreated gas at the wellhead or treated gas utilized in a distant area. *Amoco Prod. Co.*, 410 F.3d at 729. Whether one imposes a geographical restriction on "marketable condition" impacts the complex interplay between deductions for transportation costs (permissible) and for placing gas in "marketable condition" (impermissible). The government has issued varying—and indeed opposing—guidance interpreting its regulations. *Id.* at 728–30 (describing agency's evolving positions).

Unless *Escobar* is applied faithfully and consistently, good-faith regulatory disagreements over these and many other regulatory requirements could become an easy basis for opportunistic relators to file litigation under the False Claims Act. Where government regulation is extensive, there are limitless opportunities to identify and argue over purported regulatory foot faults. But the False Claims Act "is not an appropriate vehicle for policing technical compliance with administrative regulations." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999). *Escobar*'s materiality standard is a critical safety-valve for ensuring that the False Claims Act does not extend so far as to "punish[] garden-variety . . . regulatory violations." *Escobar*, 136 S. Ct. at 2003.

III. The Question Presented Deserves This Court's Immediate Attention.

The potential impact of the Ninth Circuit's wayward decision is staggering—especially as applied to the oil and gas industry. Under the False Claims Act, a defendant found liable for submitting a material "false claim" to the government must pay civil penalties of between $10,957 and $21,916 *per claim*, 28 C.F.R. § 85.5, and treble damages on the government's actual loss, 31 U.S.C. § 3729(a). In 2015, the government projected its present value of future federal royalty receipts from oil and gas reserves to be more than $63 billion. *See* 2015 Bureau of the Fiscal Service, U.S. Dep't of Treasury, 2015 Financial Report of the United States Government, Federal Oil and Gas Resources, https://www.fiscal.treasury.gov/fsreports/rpt/finrep/finrep15/supp_info/fr_supplement_oilandgas.htm. Even if a whistleblower claimed underpayment on only 1% of royalties owed, the industry could be facing nearly $2 billion in treble damages alone—to say nothing of penalties that would accrue on each royalty owed.

Where systems already exist to oversee and enforce regulatory noncompliance, it is especially important to police expansive False Claims Act liability theories. In the context of royalty payments, for example, the Office of Natural Resources Revenue performs routine audits of the calculation of payments. *See* 30 U.S.C. § 1711(a), (c). And where compliance issues implicate public safety concerns, courts have reasonably presumed that the government will act quickly to address material regulatory violations. *See United States ex rel. Harman v. Trinity Indus., Inc.*, 872 F.3d 645, 663 (5th Cir. 2017). In this setting, the government's decision to pay for goods or services without objecting to circumstances known to exist (through either routine audits or other means) should be conclusive evidence that the alleged violation is immaterial.

Regulators, not private litigants, are best suited to resolve compliance issues. *See* Pet. 23–24 (discussing importance of leaving regulatory decision to the FDA). The Ninth Circuit's decision below pays no heed to regulatory systems already in place to address potential noncompliance with complex regulations. To the contrary, the decision "dangerously transfers regulatory authority from expert agencies to private litigants." Pet. 23. A defendant could be subject to treble damages and enormous penalties for alleged underpayments that a routine audit would have addressed—just as Congress intended the audit to do. *See United States ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746, 765 (3d Cir. 2017) ("[A]t base, this case appears to be nothing more than an effort to convert an unprofitable private audit . . . into a successful recovery of funds under the guise of a *qui tam* action."). That makes early resolution of meritless claims, including on motions to dismiss under *Escobar*, essential.

For the oil and gas industry, concerns over expansive False Claims Act theories are particularly great as the government expands opportunities for oil and gas production onshore and offshore across the

United States. Undoubtedly new compliance issues will emerge that opportunistic relators might employ. For example, the Ninth Circuit's decision may invite relators to disrupt politically controversial projects related to the expansion of opportunities to produce and explore oil in Alaska. Private parties are likely to pursue litigation in Alaska or in other States within the Ninth Circuit to take advantage of the Ninth Circuit's watered-down materiality standard—a standard that now conflicts sharply with the standards applied in the Fifth and Tenth Circuits, where oil-and-gas False Claims Act cases have most often been filed. *See* Pet. 17–18 (discussing *Abbott v. B.P. Exploration & Prod., Inc.*, 851 F.3d 384, 388 (5th Cir. 2017) and *United States ex rel. Thomas v. Black & Veatch Special Projects Corp.*, 820 F.3d 1162, 1165–66, 1168 (10th Cir. 2016)).

Unchecked liability under the False Claims Act is a threat to every industry doing business with the federal government. This Court should grant the petition to ensure that lower courts do not erode that standard.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

DARYL L. JOSEFFER
Counsel of Record
ASHLEY C. PARRISH
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 626-5524
djoseffer@kslaw.com

MERRITT E. MCALISTER
KING & SPALDING LLP
1180 Peachtree Street, NE
Atlanta, GA 30309
(404) 572-2752
mmcalister@kslaw.com