No. 20-371

In the Supreme Court of the United States

CARE ALTERNATIVES, PETITIONER,

v.

UNITED STATES OF AMERICA; STATE OF NEW JERSEY EX REL. VICTORIA DRUDING, ET AL.

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

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 PETITIONER

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INTEREST OF *AMICI 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, 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 involving the False Claims Act (the "Act").

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, non-profit association that represents the nation's leading biopharmaceutical and biotechnology companies. PhRMA's mission is to advocate for public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA's members invest billions of dollars each year to research and develop new drugs, more than 500 of which have been approved since 2000. The members of PhRMA closely monitor legal issues that affect the entire industry, and PhRMA often offers its perspective in cases raising such issues.

Amici have a strong interest in the question presented here, which is fundamental to the scope of False

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[1] 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 one other than the *amici curiae*, their members, and their counsel made any monetary contribution to its preparation and submission. The parties were given timely notice and consented to this filing.

Claims Act liability. *Amici*'s members, many of which are subject to complex and detailed regulatory schemes, have successfully defended scores of False Claims Act cases arising out of government contracts, grants, and program participation in courts nationwide, including the Third Circuit. With increasing frequency, private relators (only infrequently joined by the government itself) have asserted that subjective judgments and opinions, as well as reasonable interpretations of ambiguous statutes, regulations, and contract provisions, can give rise to False Claims Act liability, 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). But opinions, unlike facts, are very rarely "true" or "false." Imposing liability for such inherently subjective views improperly converts the Act from a fraud prevention statute into something else entirely.

The Third Circuit's rejection of the "objective falsity" standard adopted by numerous other circuits will have far-reaching consequences for *Amici*'s members. That standard has implications not just for hospice providers like petitioner, but also for the 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. The Third Circuit's conclusion that a mere difference of opinion can render a claim "false" impermissibly broadens the intended scope of the Act and threatens the *in terrorem* effect of quasi-criminal False Claims Act liability in cases involving the types of discretionary judgments that medical and business professionals make daily.

SUMMARY OF ARGUMENT

Although this case involves a clinical judgment regarding hospice certification, it raises a recurring and "important broader question" about the meaning of falsity under the Act. Pet.22. The decision below deepens a circuit split on a question fundamental to False Claims Act liability—whether the statute requires a showing of "objective falsity." At least four circuits have held that the Act imposes liability only for statements that can be adjudged true or false by objective means. Two courts of appeals (including the Third Circuit) have rejected that standard. This Court should grant the petition to resolve that broader split.

The Third Circuit was wrong to reject the objective falsity standard. The Act imposes liability for presenting or causing to be presented "a false or fraudulent claim for payment" or making "a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)–(B). Because the statute does not define the term "false or fraudulent," this Court looks to the term's plain meaning and its understanding at common law. The settled meaning of the term "false" requires a relator to show more than simply that a claim was not reimbursable, was incorrect, or was untrue. Instead, a relator—like a common-law fraud plaintiff—must show that the claim was "provably false," *Ballard* v. *United States*, 329 U.S. 187, 196 (1946) (Jackson, J., concurring), and "designedly untrue," *False*, Black's Law Dictionary (1st ed. 1891).

By holding that a claim may be actionably false based on a matter of opinion or judgment, rather than objective falsehood, the Third Circuit broadened the statute past its intended limits. The False Claims Act is a *fraud* prevention statute. Yet, the decision below imposes the prospect of False Claims Act liability, with the risk of crippling treble damages, penalties, and grave reputational harm, on

every government contractor, grantee, and program participant whenever a self-interested private relator (supported by a paid expert) steps forward to second-guess a subjective judgment or offer a different interpretation of any one of countless byzantine regulations or contract provisions.

The Third Circuit's rule has implications far beyond the hospice context. It potentially affects any entity, public or private, that receives federal funds in myriad contexts: government contractors working under cost-reimbursement contracts; medical providers delivering services based on their good-faith medical judgments; researchers submitting claims for grant funds based on their scientific opinions; and any business attempting to navigate the complex statutory, regulatory, or contractual regime that governs their receipt of government funds. Congress intended for the Act to root out fraud—not to punish routine good-faith professional and business judgments.

This Court should grant the petition to provide much-needed guidance on the meaning of falsity under the Act.

ARGUMENT

I. THE FALSE CLAIMS ACT REQUIRES OBJECTIVE FALSITY

The Third Circuit "reject[ed] the objective falsehood standard," App.22, concluding that it was "at odds with the meaning of 'false' under the [Act]" and "improperly conflate[d] the elements of falsity and scienter," *id.* at 10–11. Instead, adopting an approach the government has long advocated, *e.g.*, U.S. Br. 10, 12, *United States ex rel. Druding* v. *Care Alternatives, Inc.*, No. 18-3298 (3d Cir. Feb. 28, 2019), the Third Circuit held that a claim may be false if it was "submitted to the government as reimbursable" but was not "in fact reimbursable, based on the conditions for payment set out by the government." App.14.

In other words, all a relator must show to establish falsity under the Act is that a claim (or a statement material to it) was incorrect, as determined in hindsight by the finder of fact.

The Third Circuit's view is contrary to the plain meaning of the statutory text, gives short shrift to its limited scope, misreads *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), and deepens a circuit split about the meaning of "falsity" under the Act. Review is needed to provide clarity regarding an issue that potentially affects hundreds of False Claims Act cases each year. See generally U.S. Dep't of Justice, *Fraud Statistics—Overview*: *Oct. 1, 1986–Sept. 30, 2019*, at 2 (2019), https://bit.ly/3iI7K5Z (782 new cases filed under Act in Fiscal Year 2019).

A. The Third Circuit's Rule Is Contrary To The Settled Meaning Of "False Or Fraudulent"

The False Claims Act 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] In its current form, the statute imposes liability for presenting or causing to be

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[2] The Act 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 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)).

presented "a false or fraudulent claim for payment" or making "a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)–(B). The statute does not define "false or fraudulent," and so this Court presumes that Congress gave that term its "ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). And as this Court has observed in interpreting this very phrase, "[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Escobar*, 136 S. Ct. at 1999 (internal quotation marks omitted). In *Escobar*, this Court "presume[d] that Congress retained all * * * elements of common-law fraud that are consistent with the statutory text because there are no textual indicia to the contrary." 136 S. Ct. at 1999 n.2.

Neither the plain meaning nor the common-law understanding of the term "false" supports the Third Circuit's rule.

1. The earliest editions of Black's Law Dictionary make clear that "[i]n law, [false] means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud." See *False*, Black's Law Dictionary (1st ed. 1891); *False*, Black's Law Dictionary (2d ed. 1910). The same is true today. The term "false" ordinarily means not simply incorrect but "deceitful" or "lying," "not genuine" or "inauthentic," *False*, Black's Law Dictionary (11th ed. 2019). Certainly, that understanding of "false" is especially compelling when the word is coupled with "fraudulent," which requires a "provably false" representation. See *Ballard*, 329 U.S. at 196 (Jackson, J., concurring); see generally *Yates* v. *United States*, 574 U.S. 528, 543 (2015) (applying principle that "a word is known by the company it keeps" in fraud context); *United States* v. *Merklinger*, 16 F.3d 670, 673 (6th Cir. 1994) (applying

similar principle to conclude, consistent with common-law meaning, that "false making" of documents denotes forgery).

2. Thus, it has been "a wise and sound principle * * * deeply embedded in the common law" that "actions for fraud or misrepresentation must be based on objective statements of fact." See *Presidio Enters., Inc.* v. *Warner Bros. Distrib. Corp.*, 784 F.2d 674, 679 (5th Cir. 1986). For a statement to be deemed false, "some possible observations must be relevant to the determination of its truth or falsehood." A.J. Ayer, *Language, Truth and Logic* 27 (1952); see *Ollman* v. *Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc) (in defamation context, explaining that "we will consider the statement's verifiability—is the statement capable of being objectively characterized as true or false?"). Statements reflecting subjective judgments or opinions have not historically been subject to fraud liability because they "are not provably false, or rather * * * they are provably false only in extreme cases." Dan B. Dobbs et al., *The Law of Torts* § 676 (2d ed. 2015); see also, *e.g.*, *Deming* v. *Darling*, 20 N.E. 107, 108 (Mass. 1889) (Holmes, J.) (statements "open to difference of opinion" are not actionable as fraud). That rule did not "conflate[] scienter and falsity," App.12, but preserved a distinct role for proof of objective fact, *and* evidence about the defendant's subjective intent.

At common law, "[a] fraudulent misrepresentation claim based on an expression of opinion could lie for the one fact the opinion reliably conveyed: that the speaker in fact held the stated opinion." *Omnicare, Inc.* v. *Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 198 (2015) (Scalia, J., concurring in part). Additionally, "in some circumstances, the common law acknowledged that an expression of opinion reasonably implied 'that the maker knows of no fact incompatible with his opinion.'" *Ibid.* (quoting Restatement of Torts, § 539(1), at 91

(1931)). But as Justice Scalia explained, "[t]he no-facts-incompatible-with-the-opinion standard was a demanding one; it meant that a speaker's judgment had to 'var[y] so far from the truth that no reasonable man in his position could have such an opinion.'" *Ibid.* (quoting Restatement of Contracts § 474(b), p. 902, and Comment *b* (1932)). In effect, such an opinion is so provably unreasonable to be judged objectively false.

Applying these bedrock common-law principles to the Act, an opinion or judgment can be actionably "false or fraudulent" *only* where a speaker does not actually hold the stated opinion or no reasonable person could hold that opinion. Only in those limited scenarios could a judgment or opinion be "adjudged true or false" in a way that could be empirically verified. See *Presidio Enters.*, 784 F.2d at 679. The Third Circuit's "expansive" interpretation of "false or fraudulent" "produces a far broader field of misrepresentation; in fact, it produces almost the opposite of the common-law rule." *Omnicare*, 575 U.S. at 199 (Scalia, J., concurring in part).

B. The Third Circuit's Decision Deepens A Circuit Split On Whether The False Claims Act Only Penalizes Objective Falsity

As petitioner notes, the decision below created a clear circuit split about whether a clinician's good-faith judgment can be actionably false in the hospice context. The decision also deepened a broader split about whether the Act requires objective falsity.

1. At least four circuits (including the Fourth, Seventh, Tenth, and Eleventh Circuits) have explicitly adopted an objective falsity standard in False Claims Act cases. *United States* v. *AseraCare, Inc.*, 938 F.3d 1278, 1297–1298 (11th Cir. 2019); *United States ex rel. Drakeford* v. *Tuomey*, 792 F.3d 364, 383 (4th Cir. 2015) ("[F]or a claim to be 'false' under the [Act], the statement or

conduct alleged must represent an objective falsehood." (internal quotation marks omitted)); *United States ex rel. Yannacopoulos* v. *Gen. Dynamics*, 652 F.3d 818, 836 (7th Cir. 2011) ("A statement may be deemed 'false' for purposes of the False Claims Act only if the statement represents an 'objective falsehood.'"); *United States ex rel. Morton* v. *A Plus Benefits, Inc.*, 139 F. App'x 980, 982 (10th Cir. 2005) ("At a minimum the FCA requires proof of an objective falsehood.").[3]

A number of other circuits, while not using the terminology "objective falsity," have effectively applied that standard and the common-law principles it embodies. *E.g.*, *United States ex rel. Jones* v. *Brigham & Women's Hosp.*, 678 F.3d 72, 87 (1st Cir. 2012) ("[E]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false." (citation and internal quotation marks omitted)); *United States ex rel. Riley* v. *St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004) ("The district court concluded, however, that expressions of opinion or scientific judgments about which reasonable minds may differ cannot be 'false.' We agree * * * and accept that the FCA requires a statement known to be false, which means a lie is actionable but not an error." (citation omitted)); see also *United States* v. *Paulus*, 894 F.3d 267, 275 (6th Cir. 2018) (holding, in criminal fraud case, that "opinions—when given honestly—are almost never false"; "opinions may trigger liability for fraud when they are not honestly held

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[3] Even these circuits struggle with what "objectively false" means, underscoring the need for this Court's guidance. For example, the Tenth Circuit recently reversed a district court's decision applying the objective falsity standard in a medical necessity case, but did not overrule its own prior decision endorsing that standard. *United States ex rel. Polukoff* v. *St. Mark's Hosp.* 895 F.3d 730, 742 (2018).

by their maker, or when the speaker knows of facts that are fundamentally incompatible with his opinion").

2. By contrast, at least two circuits have categorically rejected the objective falsity standard in False Claims Act cases: the Third Circuit in the decision below, and the Ninth Circuit in an opinion issued soon afterwards, *Winter ex rel. United States* v. *Garden Regional Hospital & Medical Center, Inc.*, 953 F.3d 1108 (9th Cir. 2020). Like the Third Circuit, the *Winter* court held that the objective falsity standard would improperly insulate opinions from scrutiny. *Id.* at 1117. And, again like the Third Circuit, the court viewed materiality and scienter as the appropriate means to circumscribe potentially expansive liability. *Id.* at 1117–1118.

The courts of appeals are thus intractably divided about whether a claim or statement must be objectively false to trigger False Claims Act liability, subjecting a host of government contractors and program participants to widely divergent standards for liability based on the happenstance of where relators choose to file suit. This Court should grant certiorari to ensure consistent nationwide application.

II. THE THIRD CIRCUIT'S HOLDING PROFOUNDLY INCREASES RISK AND UNCERTAINTY FOR GOVERNMENT CONTRACTORS, GRANTEES, AND PROGRAM PARTICIPANTS

The Third Circuit's rule opens the door to punitive False Claims Act liability for myriad medical and professional judgments outside of the hospice context, as well as for certifications of compliance with ambiguous statutory, regulatory, or contractual requirements. It improperly exposes government contractors and others participating in government programs to the threat of treble damages and statutory penalties whenever a self-interested relator with a hired "expert" second-guesses a subjective

judgment or offers a different interpretation of a provision subject to several reasonable interpretations. Such a rule profoundly increases risk to thousands of individuals and entities, to the detriment of the business community, the government, and the public.

A. The Objective Falsity Requirement Plays An Important Role In Cabining Expansive Liability

"The [False Claims Act] is a fraud prevention statute." *United States ex rel. Lamers* v. *City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999). The requirement that a claim be objectively false plays an important role in maintaining fundamental limitations on the Act's reach. In the medical context implicated by this case, using the Act as a mechanism for "question[ing] a health care provider's judgment regarding a specific course of treatment" risks transforming the Act into "a federal malpractice statute." *United States ex rel. Phillips* v. *Permian Residential Care Ctr.*, 386 F. Supp. 2d 879, 884 (W.D. Tex. 2005). More broadly, an objective falsity requirement helps ensure the Act is not used as a means for "policing technical compliance with administrative regulations," *Lamers*, 168 F.3d at 1020, or disputed statutory or contractual terms. The Third Circuit's rule risks "render[ing] meaningless the fundamental distinction between actions for fraud and breach of contract," allowing a relator to "base a fraud claim on nothing more than his own interpretation" of a defendant's obligations. *United States ex rel. Wilson* v. *Kellogg Brown & Root, Inc.*, 525 F.3d 370, 378 (4th Cir. 2008).

Examples abound of the types of plainly improper False Claims Act claims that would survive under the Third Circuit's expansive interpretation.

1. To begin with an example closely related to the facts of this case: An objective falsity requirement is necessary to rein in the growing number of False Claims Act

suits based on allegations that medical providers delivered services that relators contend were medically unreasonable and unnecessary. These suits, often based on a review of medical records years later without examining the actual patients treated, subject good-faith medical judgments to potentially crippling liability from any self-interested relator who can find an expert willing to testify that the services were not actually reasonable and necessary. Cf. *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (relators are "motivated primarily by prospects of monetary reward rather than the public good").

The Medicare Act generally prohibits payment "for any expenses incurred for items or services" that "are not reasonable and necessary for the diagnosis and treatment of illness or injury." 42 U.S.C. § 1395y(a)(1)(A). But "[m]edicine is not a field of absolutes. There is not ordinarily only one correct route to be followed at any given time." *Barton* v. *Owen*, 139 Cal. Rptr. 494, 504 (Cal. Ct. App. 1977). The government itself relies on this principle when defending the conduct of its own clinicians in cases brought under the Federal Tort Claims Act. See, *e.g.*, U.S. Br., *Milton* v. *United States*, No. 06-16455, 2007 WL 1511916 (9th Cir. Apr. 12, 2007) ("The legal respect for alternative diagnosis and treatment has long been recognized."). The government also depends on this principle when defending against prisoners' medical-treatment-related deliberate indifference claims. See, *e.g.*, *Toguchi* v. *Chung*, 391 F.3d 1051, 1057–1058 (9th Cir. 2004).

But when it comes to the False Claims Act, the government has consistently argued that all a relator must do is present testimony from one witness who disagrees with the treating physician's judgment. There is no reason to treat a physician's judgment any differently in this context. Requiring a relator to prove objective falsity helps to ensure that inherently delicate medical judgments do

not expose providers to the blunt enforcement mechanism of treble damages and penalties.

2. The Third Circuit's decision also substantially increases risk from program participants' scientific and other technical judgments. "The Act is concerned with ferreting out 'wrongdoing,' not scientific errors. What is false as a matter of science is not, by that very fact, wrong as a matter of morals. The Act would not put either Ptolemy or Copernicus on trial." *Wang* v. *FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992) (citation omitted), overruled on other grounds by *United States ex rel. Hartpence* v. *Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015).

Yet that is effectively what the Third Circuit's decision would do. Consider *United States ex rel. Milam* v. *Regents of the University of California*, 912 F. Supp. 868 (D. Md. 1995). Relators alleged that a university, its cancer research center, and its researchers violated the Act by applying for federal research grants based on scientific studies alleged to be inaccurate. *Id.* at 873–874. The court held that the relator presented "a legitimate scientific dispute, not a fraud case," and "[d]isagreements over scientific methodology do not give rise to False Claims Act liability." *Id.* at 886. It is far from certain that a court applying the Third Circuit's rule would reach the same result. Even a less-than-"legitimate" scientific dispute might create liability if the relator presents a paid "expert" who disagrees with the defendant's scientific judgment.

3. Another common example involves alleged violations of a cost-reimbursement principle used in government contracting. Contracting regulations provide that an allowable cost (*i.e.*, a cost the government will reimburse) must be "reasonable." 48 C.F.R. § 31.201-2(a)(1). Reasonableness is determined using a fact-intensive

analysis considering "a variety of considerations and circumstances," only a few of which are even mentioned in the regulation. 48 C.F.R. § 31.201-3(b). The government typically bears responsibility in the first instance for determining the reasonableness of costs and approving final vouchers, but only *after* the contractor has performed the work and submitted a request for payment. 48 C.F.R. § 42.302(a)(7). That approach reflects the reality that some factors affecting costs' reasonableness will be unknown before performance is complete.

Because reasonableness is determined by after-the-fact weighing of various factors, a contractor's good-faith certification that its costs were reasonable cannot be objectively false. Yet, there is a virtual cottage industry of False Claims Act claims brought by both relators and the government pursuing suits based on reasonableness certifications. For example, one relator alleged that a defense contractor made impliedly false claims by submitting invoices for charter air services. The relator did not dispute that the services had been provided; he simply advanced his own view that the services should have been provided at lower cost, and therefore that the costs were unreasonable. *United States ex rel. Watkins* v. *KBR, Inc.*, 106 F. Supp. 3d 946, 953 (C.D. Ill. 2015). Although the court dismissed the case, it did so by rejecting the implied false certification theory altogether—an option no longer available post-*Escobar*. Although the court acknowledged that "whether a cost is reasonable is a highly contestable * * * issue," it held the issue would support a False Claims Act claim. *Id.* at 967.

By contrast, strict adherence to the objective falsity requirement has properly resulted in dismissal of False Claims Act actions based on the same theory. For example, one relator alleged that a contractor had falsely certified that its costs were reasonable because the contractor had not awarded a subcontract to the lowest bidder.

United States ex rel. Garzione v. *PAE Gov't Servs., Inc.*, 164 F. Supp. 3d 806, 812 (E.D. Va. 2016). In holding that the relator had failed to plead falsity, the court emphasized that "[t]he regulations applicable to * * * what constitutes a 'reasonable' price are general and by their terms confer a great deal of discretion and judgment on the selecting contractor." *Id.* at 813.

The Third Circuit's expansive view of falsity could further encourage "unreasonable cost" suits—and bolster their chances of surviving a motion to dismiss. Taking disputes about cost reasonableness out of the realm of ordinary contract disputes, and instead permitting relators to second-guess reasonableness certifications, would vastly increase the risk to contractors of entering into cost-reimbursement contracts. Indeed, it could even discourage their use in favor of other forms of contract. But cost-reimbursement contracts serve a critical function in government contracting, as the government is able to induce contractors to perform low-fee, high-risk work by agreeing to bear the risk of unanticipated performance costs. See *U.S. Steel Corp.* v. *United States*, 367 F.2d 399, 408 (Ct. Cl. 1996); accord Kate M. Manuel, Cong. Research Serv., R41168, *Contract Types: Legal Overview* 4 (2014).

4. Objective falsity questions also frequently arise in False Claims Act suits seeking to "use [the Act] as a blunt instrument to enforce compliance" with a relator's subjective interpretation of ambiguous statutes, regulations, or contract provisions. *Mikes* v. *Straus*, 274 F.3d 687, 699 (2d Cir. 2001), abrogated in part by *Escobar*, 136 S. Ct. 1989. Circuits that require objective falsity have consistently held that "differences in interpretation growing out of a disputed legal question," such as disputes concerning the proper interpretation of an ambiguous statute, regulation, or contract term, are "not false under the FCA." *Wilson*, 525 F.3d at 377 (quoting *Lamers*, 168 F.3d at 1018); *Morton*, 139 F. App'x at 984 ("Expression of a legal opinion

* * * depending * * * on the resolution of two sets of inherently ambiguous determinations by defendants[] cannot form the basis for an FCA claim."); *Tyger Constr. Co.* v. *United States*, 28 Fed. Cl. 35, 56 (1993) ("Attaching FCA liability to expressions of legal opinion would have an impermissibly stifling effect * * * . Indication is absent that Congress intended to penalize good faith disputes over contract liability.").

The Third Circuit's rule, however, would permit False Claims Act liability despite a contractor's reliance on a reasonable interpretation of an ambiguous provision if a court later determines that the contractor's interpretation was not the best one. That approach creates tremendous additional risk for companies forced to navigate highly complex and technical statutory and regulatory regimes. Cf. *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981) ("The Social Security Act [of which the Medicaid program is a part] is among the most intricate ever drafted by Congress. Its Byzantine construction * * * makes the Act almost unintelligible to the uninitiated." (internal quotation marks omitted)).

For example, one contractor hired to provide information technology services to a federal agency "promised to make a good faith effort to subcontract a certain percentage of the IT work to be performed under the contract to qualified small businesses." *United States ex rel. Tran* v. *Comput. Sci. Corp.*, 53 F. Supp. 3d 104, 109 (D.D.C. 2014). Interpreting this provision required the contractor to follow a chain of interrelated statutes and regulations. The contractor concluded it could make a "good faith effort" by contracting directly with qualified small businesses, even if those businesses further subcontracted work to some larger firms. *Id.* at 119. Relators later argued that this approach was impermissible. *Id.* at 121. Despite the ambiguous nature of the contract, the district court declined to dismiss, holding that the

defendant's interpretation required "too many leaps" and reasoning that one regulation the contractor relied on was a "*general* contracting provision," not a "small business requiremen[t]." *Id.* at 119–121. The defendant then apparently settled for an undisclosed amount.

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

The breadth and uncertainty of False Claims Act liability under the Third Circuit's definition of "falsity" 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. False Claims Act 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 liability under the Third Circuit's expansive rule. See, *e.g.*, *United States* v. *Sanford-Brown, Ltd.*, 840 F.3d 445 (7th Cir. 2016) (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 Cty.*, 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. *Sci. 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*, 274 F.3d 687 (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), aff'd, 826 F.3d 466 (D.C. Cir. 2016); *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-02676, 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 limiting the Act's sweep. 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, nearly 20,000 False Claims Act actions have been filed, more than 13,000 of which were *qui tam* suits. *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).

Meritless *qui tam* actions are "downright harmful" to the business community. See *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 298 (2010). The Act's treble damages and penalties provisions are "essentially punitive." *Stevens*, 529 U.S. at 784–785. Businesses face the specter of treble

damages and civil penalties of over $23,331 per false claim. Civil Monetary Penalties Inflation Adjustment, 85 Fed. Reg. 37,004-01 (June 19, 2020); 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). Wholly apart from the prospect of an eventual judgment, simply *defending* a False Claims Act 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 False Claims Act investigations. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011). Moreover, the mere existence of allegations (however 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. *Ukrainian 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 False Claims Act 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). False Claims Act 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). 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).

3. The Third Circuit's assertion that the Act's scienter element "helps to limit the possibility" of expansive liability, App.12, offers little comfort to defendants. Although scienter may be resolved on a motion to dismiss in appropriate cases, scienter allegations are not subject to Federal Rule of Civil Procedure 9(b)'s heightened pleading standard. Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). Thus, a relator need not plead scienter allegations with particularity. See, *e.g.*, *Adomitis ex rel. United States* v. *San Bernardino Mountains Cmty. Hosp. Dist.*, 816 F. App'x 64, 66 (9th Cir. 2020). As a result, courts frequently decline to dismiss False Claims Act complaints on scienter grounds. Defendants in such cases are then confronted with an impossible choice: pay millions of dollars to litigate the case to summary judgment or even trial, all while facing the prospect of treble damages—or settle.

The prospect of that choice has a real, and predictable, chilling effect. Fear that second-guessing of good-faith judgments will lead to burdensome litigation and potentially crippling False Claims Act 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. Doctors have exited Medicare in droves, due in part to concerns about

False Claims Act liability based on self-interested relators, acting years later, second-guessing their good-faith professional judgments about appropriate medical care. See David Hogberg, *The Next Exodus: Primary-Care Physicians and Medicare*, Nat'l Ctr. for Public Policy Research (Aug. 1, 2012), https://bit.ly/36QlERo. Ensuring that liability can only be based on statements that are objectively false will minimize these significant risks.

CONCLUSION

For these reasons, and those in petitioner's brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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