No. 14-1423

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES ex rel. JULIO ESCOBAR; CARMEN CORREA, ADMINISTRATRIX OF THE ESTATE OF YARUSHKA RIVERA,
Plaintiffs-Appellants,

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

UNIVERSAL HEALTH SERVICES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Massachusetts, No. 11-cv-11150

UNOPPOSED MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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August 22, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Chamber of Commerce of the United States of America hereby submits the following corporate disclosure statement:

The Chamber of Commerce is a nonprofit, non-stock corporation organized under the laws of the District of Columbia. It has no parent corporation, and no company owns 10 percent or more of its stock.

UNOPPOSED MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

Pursuant to Federal Rule of Appellate Procedure 29(a), the Chamber of Commerce of the United States of America ("Chamber") sought and received consent of all parties to file the accompanying *amicus curiae* brief in support of defendant-appellee Universal Health Services, Inc. Given this case's unique procedural posture, the Chamber files this motion out of an abundance of caution, in the event this Court were to conclude that leave is required notwithstanding Rule 29(a).

This Court ordered supplemental briefing to address the effect of the Supreme Court's decision in *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016) ("*Escobar II*") on further proceedings in this case. This Court specified that the parties' briefs "shall comply with the page limits . . . in Fed. R. App. P. 32(a)(7)." Order at 1 (July 18, 2016). This Court's order of July 27, 2016 expressly contemplates that *amicus* briefs may be filed in connection with the supplemental round of briefing, stating that "[a]ny briefs by amicus curiae shall be filed by August 22, 2016." Order at 1 (July 27, 2016). Consistent with this Court's orders, the Chamber's proposed *amicus* brief is timely filed and complies with the default length limits under the Federal Rules of Appellate Procedure.

To the extent leave of Court is required, the Chamber satisfies this Court's standard criteria for *amicus* participation. As the world's largest business federation, the Chamber is uniquely positioned to apprise the Court of the impact of its decision here on businesses in a range of industries nationwide. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, 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. The Chamber thus regularly files *amicus curiae* briefs in cases raising 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 a business's liability under the FCA. The Chamber's members, many of which are subject to complex and detailed regulatory schemes, have successfully defended scores of FCA cases arising out of government contracts, grants, and program participation in courts nationwide, including in this Circuit.

With increasing frequency in recent years, private relators have invoked the "implied false certification" theory of liability in an effort to transform minor deviations from obscure or complex contractual terms or background regulations

into violations of the FCA, and its "essentially punitive" regime of treble damages and penalties, *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784-85 (2000). As explained in the attached brief, if this Court were to adopt the diluted reading of the FCA's materiality and scienter requirements urged by relators, that development would cause significant harm to the business community within the First Circuit and beyond. Without materiality and scienter functioning as a meaningful check on implied false certification liability at the pleadings stage, that theory will expose businesses to potential FCA liability every time they submit a claim for payment unless they can ensure perfect compliance with every requirement conceivably relevant to participation in a federal program—a difficult, if not impossible feat, given the sheer number of rules and regulations governing many federal programs.

The Supreme Court's decision in *Escobar II* provides key constraints that should play a critical role in cabining the implied certification theory. Chief among them are the statute's materiality and scienter requirements. Indeed, to address very real concerns about "fair notice and open ended liability" that the implied false certification theory would otherwise present, the Supreme Court emphasized that the FCA's "rigorous" materiality and scienter requirements must be "strict[ly] enforce[d]" at the motion to dismiss stage. *Escobar II*, 136 S. Ct. at 2002, 2004 n.6. That is particularly true for *qui tam* cases, like this one, in which

relators seek extraordinary bounties for regulatory violations or breaches of contract that the government itself has already determined are best enforced through the administrative process, rather than by withholding payment or seeking recoupment.

The Chamber seeks to share its views with the Court on these important issues in a succinct and timely manner.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Court grant it leave to file the accompanying *amicus curiae* brief in support of defendant-appellee Universal Health Services, Inc.

Dated: August 22, 2016

Respectfully submitted,

/s/ John P. Elwood

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2016, a true and correct copy of the foregoing Unopposed Motion of the Chamber of Commerce of the United States of America for Leave to File Brief as *Amicus Curiae* in Support of Defendant-Appellee was filed with the Clerk of the United States Court of Appeals for the First Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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August 22, 2016

STATEMENT REGARDING PERMISSION TO FILE

All parties to this appeal have consented to the filing of this brief. In addition, to the extent leave of Court is required, *amicus curiae* is contemporaneously filing an unopposed motion for leave to file this brief.

CORPORATE DISCLOSURE STATEMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Cont'd: **Page(s)**

Cases—Cont'd: **Page(s)**

Statutes:

Rules: **Page(s)**

Regulations:

Other Authorities:

Other Authorities—Cont'd: **Page(s)**

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 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, 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. The Chamber regularly files *amicus curiae* briefs in cases raising 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 liability under the FCA. The Chamber's members, many of which are subject to complex and detailed regulatory schemes, have successfully defended scores of FCA cases arising out of government contracts, grants, and program participation in a variety of courts nationwide, including in this Circuit. With increasing frequency in recent years, private relators (only infrequently joined by the government itself) have invoked the "implied false certification" theory in an effort to transform minor deviations from

[1] Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

obscure or complex contractual terms or background regulations into FCA violations, triggering the Act's "essentially punitive" regime of treble damages and penalties, *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784-85 (2000).

The Supreme Court in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) ("*Escobar II*"), held that the implied false certification theory is valid "at least in some circumstances," *id.* at 1999, but emphasized that the FCA's materiality and scienter requirements provide critical checks on that potentially boundless theory that are necessary to ensure "fair notice" to defendants and guard against "open-ended liability," *id.* at 2002. Rigorous enforcement of those requirements is essential to prevent profound harm to the American business community—not only healthcare providers like appellee Universal Health Services, Inc. ("UHS"), but also the myriad businesses, non-profit organizations, and even municipalities that perform work for the federal government in a broad array of sectors, or receive funds through a vast range of federal programs. The Chamber and its members therefore have a substantial interest in the correct interpretation and application of the FCA's materiality and scienter requirements.

SUMMARY OF ARGUMENT

If relators' deeply flawed interpretation of *Escobar II* were to become law, the implied false certification theory would subject the government's contracting partners in every sector of the U.S. economy to the threat of punitive sanctions under the FCA, an antifraud statute, for even the most mundane regulatory violations. Particularly troubling is that, under relators' view, liability for treble damages and per-claim penalties would extend to even minor contractual or regulatory transgressions that the government knows about, has investigated, and has deemed immaterial to its payment decisions. The Supreme Court in *Escobar II* recognized these very real concerns and held that the FCA's "rigorous" materiality and scienter requirements provide critical limitations on liability—particularly (but by no means only) where "the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated." 136 S. Ct. at 2002, 2003. This Court should reject relators' invitation to ignore *Escobar*'s clear mandate and to declare open season on the American business community—and in the process, to increase the cost of performing critical government services.

I. An implied false certification theory unbounded by meaningful materiality or scienter requirements would allow relators to plead claims under the FCA based on perceived violations of obscure and technical industry standards, environmental regulations, anti-discrimination statutes, procurement manuals and

more—even if, before the FCA lawsuit, neither the government nor any potential defendant would have viewed those rules as material to payment. Such an expansive interpretation of implied false certification liability would effectively transform the FCA into a strict liability treble damages statute for violation of any contract term or regulation, no matter how trivial. This is simply not a workable environment for doing business.

II. Rigorous enforcement of the FCA's materiality and scienter requirements at the pleading stage, particularly in implied false certification *qui tam* suits, is essential to ensure that the statute's costs do not dwarf its benefits. The *qui tam* procedure is a mechanism designed to help the government enforce public rights and protect the public fisc. Where government regulators have determined that concerns about compliance with contractual and regulatory requirements are best addressed through administrative measures, rather than by withholding payment or seeking recoupment, a *qui tam* suit serves no purpose. In fact, a suit in this context can affirmatively undermine regulators' goals and impose the very sanction (trebled) that regulators deliberately avoided. Exacting materiality and scienter requirements give effect to the considered judgment of regulators, and protect defendants from private lawsuits motivated by personal benefit.

Further, the materiality requirement can and should be enforced rigorously on a motion to dismiss. The combination of the FCA's "punitive" liability regime, the severe financial, reputational, and practical consequences of being labeled a fraudster, and the reality that *qui tam* suits can drag on for years with costly and burdensome discovery exerts tremendous pressure on defendants to settle even the most tenuous claims. The motion to dismiss provides defendants with a critical procedural protection, but only if courts properly apply Federal Rules of Civil Procedure 8 and 9(b) and hold relators to their "rigorous" burden of "plead[ing] their claims with plausibility and particularity," including "pleading facts to support allegations of materiality." *Escobar II*, 136 S. Ct. at 2004 n.6. Prior to *Escobar II*, there were many unfortunate examples of district courts loosely applying those rules, subjecting the defendant to costly discovery, only to later enter judgment against plaintiffs based on fatal flaws that were apparent from the face of the complaint. Countless more defendants undoubtedly decided to settle rather than incur the costs of discovery. Congress never intended the FCA to impose such needless costs on the contracting partners who are providing critical government goods and services.

III. The pleadings here show that the government paid UHS' invoices, and after full investigation and with full knowledge of UHS' regulatory violations, did not seek to recoup any payments, providing a particularly clear basis for

dismissal. Although other cases may lack (at least at the pleading stage) such a clear record of government awareness, *Escobar II* did not and should not be read to suggest that such a compelling record is necessary to support a motion to dismiss. To the contrary, *Escobar II* made clear that "[t]he standard for materiality . . . is . . . rigorous" even at the pleading stage, and that relators must plead specific *facts*, with "plausibility and particularity," to support their materiality allegations. *Escobar II*, 136 S. Ct. at 2004 n.6. A relator cannot simply rely on the language of a regulation that purports to condition payment on compliance, or (as relators here argue) the number of regulations in which that language appears. Rather, a complaint must allege particular facts showing either that the government refused payment in the particular case or has regularly done so based on past violations of the same requirement that the defendant is alleged to have violated, or some other specific and particularized reason to conclude that the government "likely" would do so. *Id.* at 2002. If a complaint fails to do this, it must be dismissed for failure to plead materiality. Therefore, although it is plain that relators here have not pleaded materiality, this Court need not (and should not) hold or suggest that the pattern of this case is the only situation where a relator's complaint may be dismissed on materiality grounds.

ARGUMENT

I. Rigorous Application of the Materiality and Scienter Requirements Provides Essential Certainty for Government Contractors, Grantees, and Program Participants

The implied false certification theory is the proverbial sword of Damocles hanging over federal contractors, grantees, and program participants nationwide. It threatens punitive treble damages and penalties whenever a self-interested private relator alleges non- (or even partial) compliance with any one of hundreds of contractual or regulatory requirements that may apply in a given matter.

Federal courts should implement the Supreme Court's instruction that materiality and scienter impose "demanding" and "rigorous" hurdles for plaintiffs to survive dismissal on the pleadings. *Escobar II*, 136 S. Ct. at 2002, 2003, 2004 n.6. Otherwise, contractors nationwide will be subject to years of expensive and burdensome discovery and litigation, under the threat of FCA liability, every time they submit a claim for payment unless they can ensure perfect compliance with every requirement conceivably relevant to participation in a federal program—a difficult, if not impossible feat. This is simply not a workable environment for doing business.

To take just one example, for defense contractors, an expansive implied false certification theory requires essentially 100 percent compliance with a seemingly limitless range of contractual provisions. The Army has issued four sets of

Logistics Civil Augmentation Program ("LOGCAP") contracts in support of military operations overseas, each entailing a wide range of logistical services such as housing, food, and recreation for America's troops. Those contracts are sprawling and complex, containing (or incorporating by reference) literally *thousands* of terms, both in the base contracts and in the hundreds of individual statements of work and task orders implemented under them. The agreements incorporate "a patchwork of other agreements and instruments," including large portions of the two-thousand-page Federal Acquisition Regulation, as well as guidance documents issued by various entities within the Department of Defense, many of which have little (if anything) to do with the actual goods or services the contractor has been hired to provide. *See, e.g.*, *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1276 n.2 (11th Cir. 2009); Compl. ¶ 24, *U.S. ex rel. McLain v. Kellogg Brown & Root Servs., Inc.*, No. 08-cv-499 (E.D. Va. May 16, 2008), ECF No. 1 (alleging that relevant Statement of Work required that "all Electrical work would conform to Army Facilities Component Systems drawings"); Dep't of the Army, *Army Facilities Components System User Guide*, Tech. Manual TM-5304 (Oct. 1990) (one of several manuals), https://www.wbdg.org/ccb/ARMYCOE/COETM/tm_5_304.pdf.

Unless allegations of implied false certification are subject to meaningful scrutiny at the pleading stage, including for materiality and scienter, false

certification liability could adversely affect not only every entity or person, public or private, that receives federal funds, but also the government itself, and ultimately the American taxpayer. Relators have been remarkably aggressive in bringing suit across a range of industries[2]—even when the government shows no interest in the issues, and more troubling still, when the government has paid the claims despite its knowledge of the allegations.[3] The theory's inherent uncertainty may well force responsible companies to charge higher prices to compensate for the increased costs posed by far-reaching and potentially catastrophic FCA liability. Some firms may even decline to bid on contracts in the first place if they

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[2] *See, e.g.*, *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001) (healthcare services); *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202 (5th Cir. 2013) (per curiam) (medical manufacturing); *U.S. ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163 (10th Cir. 2010) (waste disposal services); *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015) (higher education services), *vacated*, 136 S. Ct. 2506 (2016); *U.S. ex rel. Shemesh v. CA, Inc.*, No. 09-cv-1600, 2015 WL 1446547 (D.D.C. Mar. 31, 2015) (software development); *U.S. ex rel. Bilotta v. Novartis Pharm. Corp.*, 50 F. Supp. 3d 497 (S.D.N.Y. 2014) (pharmaceutical manufacturing); *U.S. ex rel. McLain v. Fluor Enters., Inc.*, 60 F. Supp. 3d 705 (E.D. La. 2014) (disaster relief construction services); *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 712 F.3d 761 (2d Cir. 2013) (provision of urban housing to low-income residents); *U.S. ex rel. Pritzker v. Sodexho, Inc.*, 364 F. App'x 787 (3d Cir. 2010) (public school lunch services).

[3] *See, e.g.*, *U.S. ex rel. Thomas v. Black & Veatch Special Projects Corp.*, 820 F.3d 1162 (10th Cir. 2016); *U.S. ex rel. Marshall v. Woodward, Inc.*, 812 F.3d 556 (7th Cir. 2015); *U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818 (7th Cir. 2011); *U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724 (4th Cir. 2010); *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370 (4th Cir. 2008); *U.S. ex rel. McBride v. Halliburton Co.*, 44 F. Supp. 3d 69 (D.D.C. 2014).

cannot reasonably anticipate the costs of doing business with the government. Simply put, now that implied false certification is a valid theory of liability "at least in some circumstances," *Escobar II*, 136 S. Ct. at 1999, meaningful limitations are essential.

II. The FCA's Materiality and Scienter Requirements Are Critical to Keep the Implied False Certification Theory Within Appropriate Bounds

To address real concerns about "fair notice and open ended liability" that the implied false certification theory presents, *Escobar II* emphasized that the FCA's "rigorous" and "demanding" materiality and scienter requirements must be "strictly enforced" at the motion to dismiss stage. 136 S. Ct. at 2002, 2003, 2004 n.6 (discussing requirements to "plead . . . claims with plausibility and particularity"). That is particularly true where relators seek extraordinary bounties for modest regulatory violations or breaches of contract that the government itself has already determined are appropriately addressed through the administrative process or other mechanisms, rather than by withholding payment or seeking recoupment.

A. An Exacting Materiality Standard Furthers the Goals of the FCA

The FCA was enacted for a very specific purpose—to protect the financial resources of the government from fraud losses. *See Escobar II*, 136 S. Ct. at 1996; *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970, 1973 (2015). It "is not 'an all-purpose antifraud statute,' or a vehicle for punishing

garden-variety breaches of contract or regulatory violations." *Escobar II*, 136 S. Ct. at 2003 (quoting *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 672 (2008)); *accord Mikes*, 274 F.3d at 699 (FCA not "designed for use as a blunt instrument to enforce compliance with all [government] regulations").

Further, the FCA's *qui tam* procedure is a means of assisting the government in enforcing its rights and protecting the public fisc. Unlike in private-party litigation, a relator is not vindicating any personal right to money owed to the United States. *See* Jonathan H. Gold, Current Developments 2006-2007, *Legal Duties That* Qui Tam *Relators and Their Counsel Owe to the Government*, 20 Geo. J. Legal Ethics 629, 630 (2007) ("Fraud injures the proprietary interest of the government, not the relator's interest."); *see also* 1 John T. Boese, *Civil False Claims and* Qui Tam *Actions* §4.01[B], at 4-12 (4th ed. 2011 & Supp. 2012) (relator cannot bring personal claims for common law fraud, unjust enrichment, or violation of other statutes). The interest that the FCA is designed to protect "is a public interest, regardless of who actually litigates the claim." Valerie R. Park, Note, *The False Claims Act,* Qui Tam *Relators, and the Government: Which Is the Real Party to the Action?*, 43 Stan. L. Rev. 1061, 1072 (1991).

Nonetheless, relators "pursue different goals and respond to different incentives than do public agencies" and have no "direct accountability" to the public. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev.

543, 574 (2000). On the one hand, regulatory schemes often contain remedies tailored to the particular context. If the government has concerns about compliance with contractual or regulatory requirements, for instance, it can demand information, require a certification of compliance, or exercise inspection rights. *E.g.*, 42 U.S.C. § 1437f(o)(8)(C)-(E) (providing for regular inspections of public housing to ensure continued eligibility for subsidy). The government can also issue notices of corrective action, addressing the issue without resorting to extreme measures that could negatively affect continued performance. *See, e.g.*, *U.S. ex rel. Howard v. Lockheed Martin Corp.*, 14 F. Supp. 3d 982 (S.D. Ohio 2014) (government issued Corrective Action Requests upon discovering contractual noncompliance). As the Department of Justice ("DOJ") 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. OLC. 207, 220 (1989).

Relators, on the other hand, "are motivated primarily by prospects of monetary reward rather than the public good," *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 949 (1997), and so have little concern for the important public policy considerations that regulators so carefully weigh when administering

a complex government program. Although the government may elect to rely on (or even refrain from pursuing) its administrative remedies for regulatory or contract violations, a bounty-hunting relator sees things differently. Focused solely on his own recovery, a relator has no incentive to ignore *any* regulatory or contract violation, no matter how technical; if it might lead to a lucrative payday, a relator will have cause to pursue it.

This heavy-handed use of the *qui tam* procedure is antithetical to the FCA's goals. *See U.S. ex rel. Searle v. DRS Tech. Servs., Inc.*, No. 14-cv-402, 2015 WL 6691973, at *10 (E.D. Va. Nov. 2, 2015) ("[T]he purposes of the FCA . . . [are] not served by imposing liability on honest disagreements, routine adjustments and corrections, and sincere and comparatively minor oversights, particularly when the party invoking [the FCA] is an uninjured third party."), *appeal docketed*, No. 15-2442 (4th Cir. Nov. 17, 2015). A *qui tam* suit serves no purpose where the government has decided that a regulatory or contractual violation is best addressed through the administrative process, rather than by withholding payment, seeking recoupment, or disqualifying the contractor from program participation.

Indeed, such a suit can in fact affirmatively undermine regulators' efforts, nullify their decisions to *correct* (rather than penalize) errors, and impose the type of drastic sanctions that regulators deliberately avoided. *See, e.g., U.S. 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"); *U.S. 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 longterm interests"); *cf. U.S. ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 702 (4th Cir. 2014) ("[A]llowing FCA liability based on regulatory non-compliance could 'short-circuit the very remedial process the Government has established to address non-compliance with those regulations.'").[4]

Meaningful materiality and scienter requirements, rigorously enforced at the pleading stage, give effect to the government's policy choices, and prevent opportunistic self-interested relators from substituting their judgment for that of the government regulators tasked with administering the program. Relators' approach,

[4] Perhaps the most egregious abuse of the implied certification theory occurs where the government seeks performance that deviates from the contract. To force a contractor to defend a *qui tam* suit by a relator attempting to "enforce" the original contract terms would penalize a contractor for simply following the government's instructions. *See, e.g.*, *Searle*, 2015 WL 6691973, at *1, *5 (implied false certification theory based on contractor's deviations from military standards that had been "approved by or done at the direction of the Army").

by contrast, casts the shadow of FCA liability over the kind of pragmatic give-and-take that often occurs under government contracts or in the context of complex federal programs—and in so doing, thwarts the very purpose of the FCA.[5]

B. Materiality Can and Should Be Meaningfully Enforced on a Motion to Dismiss

The Supreme Court in *Escobar II* expressly and pointedly rejected the argument—remarkably, advanced again by relators here and apparently the United States (Appellants' Supp. Br. 58-65; U.S. Amicus Br. 23)—that materiality is "too fact intensive" to be resolved on the pleadings. The Supreme Court emphasized that the materiality standard is "rigorous" and "demanding," and must be meaningfully enforced at the motion to dismiss stage. 136 S. Ct. at 2003, 2004 n.6. Relators' convoluted and confusing interpretation, by contrast, would virtually

[5] Although the United States can dismiss any *qui tam* action, it rarely does so, instead routinely letting relators "proceed with[] thousands of non-meritorious qui tam suits." Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-65 (2008). The government has repeatedly stated that it does not routinely devote resources to determining whether suits are meritless and should be dismissed on that ground. As a result, the government only rarely intervenes to dismiss. Most often, the government is only too happy to "wait it out," reaping the bounty if a defendant elects to settle or the relator is ultimately successful. *Id.* at 1265-66; *accord* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of* Qui Tam *Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1717 (2013) (noting that 460-case subsample of *qui tam* actions "revealed exactly *none* in which DOJ exercised its termination authority").

eviscerate the motion to dismiss as a meaningful constraint on *qui tam* bounty-hunters, resulting in profound consequences across the U.S. economy.[6]

1. *The Recent Surge in* Qui Tam *Litigation Has Imposed Significant Costs on American Businesses*

Since the 1986 FCA amendments, an "army of whistleblowers, consultants, and, of course, lawyers" have been released onto the landscape of American business. Boese, *supra*, at xxi; *see also* Peter Loftus, *Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich*, Wall St. J., July 24, 2014 (discussing emergence of "serial whistleblower[s]"). In the last few years, the number of *qui tam* actions has skyrocketed, increasing from roughly 400 per year to nearly double that figure—more than 700 in each of 2013 and 2014 and over 630 in 2015. Civil Division, U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987-Sept. 30, 2015*, at 1-2 (2015), https://www.justice.gov/opa/file/796866/download. This jump in *qui tam* cases stems from several factors that combine to pressure defendants into

[6] UHS persuasively shows how relators distort and misread *Escobar II*. *See* Appellee's Supp. Br. 8-15. Among other things, the Supreme Court's opinion squarely forecloses relators' suggestion that materiality must "ordinarily" "be decided by the jury." Appellant's Supp. Br. 61. *See Escobar II*, 136 S. Ct. at 2004 n.6 ("reject[ing] [the] assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss"). Nor does the Supreme Court's opinion support relators' confusing suggestion that the *defendant* would bear a burden at the pleading stage, or that the government's payment of claims despite knowledge of the alleged violations would not be a basis to seek dismissal on the face of pleadings. Appellant's Supp. Br. 59-62.

settlements that are highly lucrative for relators, but do little to root out actual fraud against the government.

To begin with, the FCA imposes "essentially punitive" financial sanctions, *Vt. Agency of Nat. Res.*, 529 U.S. at 784, including treble damages. To make matters worse, relators often attempt to measure damages aggressively based on the *entire value* of a contract or the *entire amount* billed, even if the alleged fraud affected only a small portion of performance or billing. *But cf. U.S. ex rel. Wall v. Circle C Constr., LLC*, 813 F.3d 616, 617 (6th Cir. 2016) (rejecting "taint" theory of FCA damages). The FCA also authorizes civil penalties of between $10,781 and $21,563 per false claim, a sum that can implicate constitutional concerns where a contract or government program (e.g., Medicare) involves submission of many small-value claims.[7] In addition, the FCA permits relators to recover attorneys' fees and "reasonable expenses." 31 U.S.C. § 3730(d)(1)-(2).

[7] Until recently, the FCA authorized penalties of between $5,500 and $11,000 per false claim. Those penalty amounts apply to relators' claims against UHS. However, in 2015, Congress directed agencies to issue "catch up adjustments" of civil penalties. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 583, 599-601 (codified at 28 U.S.C. § 2461 note). DOJ implemented this directive on June 29, 2016 by nearly doubling the potential FCA penalties. Dep't of Justice, Civil Monetary Penalties Inflation Adjustment, 81 Fed. Reg. 42,491, 42,494 (June 30, 2016) (to be codified at 28 C.F.R. § 85.53(a)(9)). Given that Congress also instructed agencies to issue annual adjustments beginning in 2017, 28 U.S.C. § 2461 note, FCA penalties will continue to climb.

Indeed, the mere pendency of an FCA suit imposes often untenable burdens. Defending such a suit requires a "tremendous expenditure of time and energy." Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor?; A Proposal to Amend the FCA to Require that All* Qui Tam *Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 11 n.66 (2007). "Pharmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with FCA investigations. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

Further, the existence of allegations (no matter how tenuous) that a company "defraud[ed] [the] country sends a [harmful] message" and "[r]eputation[,] . . . once tarnished, is extremely difficult to restore." Canni, *supra*, at 11; *accord* Sean Elameto, *Guarding the Guardians: Accountability in* Qui Tam *Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 824 (2012). 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; *see U.S. ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1105-08 (7th Cir. 2014) ("[A] public accusation of fraud can do great damage to a firm[.]"). 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).

This combination of the FCA's "punitive" liability regime, the severe financial, reputational, and practical consequences of being labeled a fraudster, and the reality that even meritless lawsuits can drag on for years exerts significant pressure on defendants to "settl[e] questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *accord Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2550 (2015) ("[T]he costs of litigation, including the expense of discovery and experts, may 'push cost-conscious defendants to settle even anemic cases." (citation omitted)); *see also* Malcom J. Harkins, III, *The Ubiquitous False Claims Act: The Incongruous Relationship Between a Civil War Era Fraud Statute and the Modern Administrative State*, 1 St. Louis U. J. Health L. & Pol'y 131, 174 (2007) (defendants forced "to settle otherwise unmeritorious [FCA] suits to avoid risking financial ruin caused by an adverse ruling").

2. *Proper Application of Rules 8 and 9(b) to the FCA's Materiality Requirement at the Pleading Stage Is Essential to Weed Out Meritless* Qui Tam *Actions*

Perhaps the most important mechanism for "weeding out meritless claims" is the motion to dismiss. *See Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct.

2459, 2471 (2014); *cf. Amgen, Inc. v. Harris*, 136 S. Ct. 758, 759-60 (2016) (summarily reversing Ninth Circuit's second reversal of district court's grant of motion to dismiss, emphasizing that the Ninth Circuit again "failed to properly evaluate" complaint under proper motion to dismiss standard). That is particularly true for FCA claims, which must satisfy not only the plausibility requirement of Federal Rule of Civil Procedure 8, but also Rule 9(b)'s more onerous mandate that fraud allegations (including materiality) be pleaded with particularity. *See Escobar II*, 136 S. Ct. at 2004 n.6.

A proper application of Rule 9(b) helps ensure that relators do not "needlessly harm a defendant's goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinning, and, at worst, [founded on] baseless allegations used to extract settlements." *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1313 n.24 (11th Cir. 2002); *accord Pencheng Si v. Laogai Research Found.*, 71 F. Supp. 3d 73, 85 (D.D.C. 2014) (Rule 9(b) designed to "protect reputations of . . . professionals from scurrilous and baseless allegations of fraud"). Rule 9(b) also "deters the use of complaints as a pretext for fishing expeditions." *Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, 781 F.3d 1003, 1010-11 (8th Cir. 2015); *Wilson*, 525 F.3d at 380 (Rule 9(b) "seeks to prevent" relators from pleading claims at a high level of generality in the hope that

their allegations will be substantiated by "facts learned through the costly process of discovery").

The potential scope of liability under the implied false certification theory, and significant consequences that accompany even the pendency of an FCA action, highlight the importance of the Supreme Court's instruction that lower courts closely scrutinize materiality allegations under Rule 9(b), *see Escobar II*, 136 S. Ct. at 2002, 2003, 2004 n.6, lest even tenuous allegations survive the pleading stage and engender costly discovery.[8] "It is no answer to say that a claim . . . can, if groundless, be weeded out early in the discovery process . . ., given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

By way of only a few examples, in *United States ex rel. Searle v. DRS Technical Services, Inc.*, a defense contractor hired to draft government technical manuals was forced to defend FCA claims through discovery and summary judgment, even though the district court ultimately criticized the suit as an "abuse" of the implied certification doctrine. 2015 WL 6691973, at *9. There, the relators

[8] The materiality requirement works in tandem with the scienter requirement—which must also be pleaded with particularity—to alleviate due process concerns about an expansive implied false certification theory. A relator must plead specific facts supporting both that the defendant's misrepresentation was material to the government's payment decision *and* that the defendant knew it was material when it submitted its claim. *Escobar II*, 136 S. Ct. at 1996.

alleged that the contractor improperly prepared the manuals without the benefit of a "technical data package" that the government had intended to—but never did—provide. *Id.* at *1, *9. The contractor moved to dismiss on several grounds, including failure to adequately plead materiality. Br. in Support of Tolliver Grp., Inc.'s Mot. to Dismiss at 6, *U.S. ex rel. Searle v. DRS Tech. Servs., Inc.*, No. 14-cv-402 (E.D. Va. Mar. 20, 2015), ECF No. 27. The contractor argued that, as the party responsible for providing the technical data package, the government necessarily knew that the contractor did not have it and nonetheless paid the contractor's claims. Therefore, whether the contractor prepared the manuals based on the package was not material to the government's payment decision. *Id.*

The district court summarily denied the motion to dismiss without a written opinion. *See* Order, *U.S. ex rel. Searle v. DRS Tech. Servs., Inc.*, No. 14-cv-402 (E.D. Va. June 19, 2015), ECF No. 65. Yet after costly discovery and fact development, the court granted the contractor summary judgment. 2015 WL 6691973, at *9, *12-13. Discovery confirmed what had been readily apparent from the face of the complaint—that the government "knew that it did not [provide the technical data package]," and still accepted the contractor's performance. *Id.* at *1, *5. Meaningful enforcement of the materiality requirement at the motion to dismiss stage would have saved the contractor and the court—and ultimately the public—valuable time and resources.

Similarly, in *United States ex rel. Lee v. Corinthian Colleges*, relators filed an implied false certification FCA suit against a vocational school company based on alleged violations of the Higher Education Act's compensation provisions, which prohibited certain incentive payments to recruiters. Compl. ¶¶ 25-31, *U.S. ex rel. Lee v. Corinthian Colls.*, No. 07-cv-1984 (C.D. Cal. Mar. 26, 2007), ECF No. 1. The Department of Education's policy, however, established that a violation of those provisions did "not[] result in monetary loss to the Department" or affect a student's eligibility for financial aid. Ex. D to Def. Ernst & Young LLP's Req. for Judicial Notice in Supp. of Mot. to Dismiss at 1, *U.S. ex rel. Lee v. Corinthian Colls.*, No. 07-cv-1984 (C.D. Cal. Aug. 3, 2009), ECF No. 37-5. Rather, such a violation should be "treat[ed] . . . as a compliance matter" and subject to administrative sanctions. *Id.* In other words, the government itself had determined that the violation for which relators sought treble damages was not material to payment.

Nonetheless, the FCA suit proceeded into drawn-out costly discovery. *U.S. ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984 (9th Cir. 2011) (directing that relators be allowed to amend complaint). Although the case ultimately was dismissed, the defendant incurred substantial costs and was unable to recoup those costs at the close of litigation. *See U.S. ex rel. Lee v. Corinthian Colls.*, No. 07-1984, 2013 U.S. Dist. LEXIS 188352 (C.D. Cal. Mar. 15, 2013) (dismissing case),

dismissal aff'd and order for sanctions rev'd, Nos. 13-55700, 56121, 2016 WL 3212242, at *2 (9th Cir. June 9, 2016); Defs.' Mot. for Sanctions and Att'ys' Fees at 23-25, *U.S. ex rel. Lee v. Corinthian Colls.*, No. 07-cv-01984 (C.D. Cal. Apr. 18, 2013), ECF No. 232 (setting forth substantial costs incurred by defendant).

III. Evidence That the Government Paid the Defendant's Claims Despite Actual Knowledge of Contractual or Regulatory Violations Is Sufficient, But Not Necessary, to Warrant Dismissal on the Pleadings

As UHS persuasively demonstrates (Appellee's Supp. Br. 16-19), the pleadings here establish that UHS' regulatory violations had no bearing on the government's payment decisions. Relators' complaint and the documents attached to it show that the government paid UHS' invoices, fully investigated relators' complaints and learned of UHS' violations, and did not seek to recoup any payments or otherwise impose penalties related to payment. This is a clear-cut case of regulatory violations that are immaterial to payment. *See Escobar II*, 136 S. Ct. at 2003 ("[I]f the government 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.").

In many cases, however, the pleadings will not reveal, on their face, whether the government was aware of the defendant's alleged regulatory violations. (Indeed, even the contractor itself, acting in good faith, may not know until a relator files suit about a handful of alleged deviations from the hundreds of

contractual and regulatory provisions to which it is subject.) But that does not mean—and the Supreme Court in *Escobar II* certainly did not suggest—that those cases would survive a motion to dismiss. To the contrary, *Escobar II* made clear that the burden lies on relators to *plead specific facts* supporting their allegations of materiality and scienter, with "plausibility and particularity." *Id.* at 2004 n.6.

The complaint must allege that the defendant withheld or misrepresented information that was "likely or *actual[ly]*," *id.* at 2002 (emphasis added)—not merely hypothetically—critical to the government's decision to pay. *See U.S. ex rel. Williams v. City of Brockton Police Dep't*, No. 12-cv-12193, 2016 WL 4179863, at *5 (D. Mass. Aug. 5, 2016) (*Escobar II* requires the court to examine on a motion to dismiss "the extent to which the Government actually has or would refuse to pay a claim if it knows of non-compliance"); *contra* U.S. Amicus Br. at 13 (asserting that *qui tam* plaintiff need not allege that effect on decision to pay was even "likely"). An allegation that the government would have had the *option* to decline payment is insufficient. *Escobar II*, 136 S. Ct. at 2003; *accord id.* at 2004 (rejecting contention that a "statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation"). Therefore, a relator cannot simply rely on the language of a regulation that purports to condition payment on compliance, or (as relators here argue and this Court previously held, *U.S. ex rel.*

Escobar v. Universal Health Servs., Inc., 780 F.3d 504, 514-15 (1st Cir. 2015) ("*Escobar I*")) the number of regulations in which that language appears.[9]

The question is not how the government *could* have handled the claim at issue, but how—in the real world—the government likely would handle, or *actually* did handle, the claim or similar previous claims. Put another way, *Escobar II* directs courts to focus on how the government has exercised its discretion to police violations of the particular requirement in the context of administering the entire regulatory scheme (and the hundreds of other requirements it includes). This rule provides critical grounding and context, as it is far too easy for a relator, after the fact, to portray a particular regulation or contract term, viewed in isolation, as important in a theoretical sense. *Cf. Escobar II*, 136 S. Ct. at 2004 (criticizing the government's position that requirement to use American-made staplers would be material to performance of contract for health services). Thus, one essential teaching of *Escobar II* is that a relator must allege specific facts to show that a particular contractual or regulatory provision was likely or actually important to the government—when viewed against the practical and often

[9] By contrast, the text of a regulation can defeat materiality if it makes clear that the government has no authority to refuse payment based on the conduct at issue. *See Williams*, 2016 WL 4179863, at *6 (allegations of noncompliance with anti-discrimination laws not material because Title VI and regulations promulgated under it provide that a grantee will be deemed noncompliant only after there has been an express finding of discrimination).

complicated reality of administering large government programs. *See id.* at 2003-04.[10]

To meet this "demanding" and "rigorous" burden, *id.* at 2002, 2003, 2004 n.6, a relator therefore must plead facts showing either that the government refused payment, sought recoupment, or disqualified the defendant, or that the government has regularly done so based on past violations of the same requirement that the defendant is alleged to have violated, or some other specific and particularized reason to conclude the government would "likely" do so. *Compare U.S. ex rel. Dresser v. Qualium Corp.*, No. 12-cv-01745, 2016 WL 3880763, at *6 (N.D. Cal. July 18, 2016) (dismissing implied certification claims on grounds that "[t]he Amended Complaint alleges in several places that the government would not have paid Defendants' claims had they known of Defendants' fraudulent conduct, but does not explain why .... This does not meet [*Escobar II's*] heightened materiality standard") *and U.S. ex rel. Se. Carpenters Reg'l Council v. Fulton Cty.*, No. 14-cv-4071, 2016 WL 4158392, at *8 (N.D. Ga. Aug. 5, 2016) (allegation that defendant was required to comply with Davis-Bacon Act as condition of contract

[10] Reading *Escobar II* to adopt a multi-factor "holistic" test (U.S. Amicus Br. 9, 12), ignores the Court's focus on pattern-of-payment as "very strong evidence" of non-materiality. 136 S. Ct. at 2003-04 & n.6. *U.S. ex rel. Winkelman v. CVS Caremark Corp.*, No. 15-1991, 2016 WL 3568145, at *8 (1st Cir. June 30, 2016), involved the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4)(B)(2), not the relationship between the common law and FCA materiality.

insufficient to plead materiality), *with Williams*, 2016 WL 4179863, at *7 (relator adequately pleaded materiality for implied certification claims by identifying specific examples in which the government previously had required remittance of funds and disqualified contractors from future awards based on noncompliance with relevant regulations).

If the relator fails to include such particularized allegations, his claims must be dismissed on materiality grounds, irrespective of whether the government was actually aware of the defendant's conduct. That is, payment despite actual knowledge of the violation is sufficient, but by no means necessary, to defeat materiality. Where, as here, the pleadings demonstrate that the government did not refuse payment or seek recoupment in the case at issue, and the complaint says nothing about the government's historical practices, the relator's materiality allegations necessarily fail. The result is the same even where there is no evidence of the government's treatment of the particular claim, absent the relator's identification of specific facts showing that the government regularly refuses to pay the type of claim or other particularized reasons why the government would likely do so. *See Escobar II*, 136 S. Ct. at 2003-04 (relator must plead materiality through facts showing government's treatment of the "particular claim" or the

"type of claim"). Any other rule would eviscerate the motion to dismiss as a meaningful tool to dispose of meritless *qui tam* lawsuits.[11]

CONCLUSION

For all of these reasons, this Court should affirm the district court's order dismissing relators' complaint.

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Respectfully submitted,

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[11] Notably, an exacting materiality requirement should not significantly affect *the government's* ability to plead materiality. The government presumably has ready access to information about how it treated similar claims in the past, and has considered its past conduct—and the importance of consistency in the administration of federal programs—in deciding whether to bring suit. Relators have no incentive to be so discerning.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2016, a true and correct copy of the foregoing Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America in Support of Defendant-Appellee was filed with the Clerk of the United States Court of Appeals for the First Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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