No. 18-315

IN THE SUPREME COURT OF THE UNITED STATES

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION

Petitioners,

v.

UNITED STATES OF AMERICA *EX. REL.* BILLY JOE HUNT,

Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

BRIEF OF DRI-THE VOICE OF THE DEFENSE BAR AND THE PROFESSIONAL SERVICES COUNCIL–THE VOICE OF THE GOVERNMENT SERVICES INDUSTRY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

DRI – The Voice of the Defense Bar (www.dri.org) is an international organization composed of more than 22,000 attorneys who defend the interests of industries, businesses, and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of the civil defense bar; promoting appreciation of the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* in carefully selected cases in which this Court is presented with questions that are exceptionally important to civil defense attorneys, their clients, and the conduct of civil litigation.

The Professional Services Council–The Voice of the Government Services Industry ("PSC") is the national trade association for the government professional and technology services industry. Many of PSC's more than 400 small, medium, and large member companies directly support the U.S. government through contracts with the Department of Defense and other national security and humanitarian-related federal departments and agencies, both domestically and abroad. Collectively, the association's members

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* themselves provided any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

employ hundreds of thousands of Americans in all 50 States and abroad.

Amici and their members represent those in the healthcare, defense, education, and government-services industries that are frequent targets of False Claims Act suits. The limitations issue presented by this case has the potential to increase litigation costs and uncertainty for *amici*'s members, particularly in connection with stale claims. *Amici* are concerned that these additional burdens and the increased difficulty in disposing of non-meritorious claims through motion practice will increase pressures to settle unmeritorious claims and, ultimately, increase the cost of providing government services.

This Court should not adopt the Eleventh Circuit's decision because it would give new life to stale claims that would otherwise have been time-barred under the six-year statute of limitation in Section 3731(b)(1). Such a rule would also impose significant practical obstacles for defendants and the U.S. government raising a limitations defense in relator-initiated cases, because its application depends on the knowledge of a United States official even in a non-intervened case, thus making a ruling on the limitations issue practically impossible until after protracted discovery.

SUMMARY OF ARGUMENT

This Court has diplomatically observed that the False Claims Act ("FCA") statute of limitation "could have [been] drafted [] with more precision," cautioning against simplistic readings that fail to account for the "[s]tatutory language" providing "context" to the meaning of this provision. *Graham County Soil and Water Conservation Dist. v. United States ex rel.*

Wilson, 545 U.S. 409, 415, 422 (2010). More generally, this Court has recognized that expansive readings of the FCA can create "almost boundless" liability. *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008). Given the FCA's potential for abuse, this Court has instructed courts to "strike a *balance* between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011) (quoting *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 295 (2010)). One important constraint on the FCA's potential for abuse is its statute of limitation. The Eleventh Circuit failed to strike the correct balance when it ruled that the knowledge of a United States agent could extend the limitations period for an FCA action pursuant to Section 3731(b)(2) even if the United States does not intervene in the case.

The Eleventh Circuit misapplied the FCA statute of limitation. *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1083 (11th Cir. 2018). Under that court's approach, a private relator, normally subject to a six-year statute of limitation, could extend the limitations period to ten years simply by waiting to tell the government of its claim. Such an interpretation is not only counter to the limitations provision, it undermines the policy goals of the FCA and imposes considerable costs on government contractors and the U.S. government itself.

One of the primary purposes of the *qui tam* provisions in the FCA is to incentivize private individuals to promptly inform the government of potential fraud. The Eleventh Circuit creates a countervailing incentive to hide claims from the government and so extend the limitations period.

Allowing the limitations period of Section 3731(b)(2) to govern a non-intervened suit also would create significant practical obstacles for defendants raising the limitations defense, and so increase the cost of defending against non-meritorious actions. Because the success of the defense would necessarily turn on the knowledge of a United States official—notwithstanding that the United States has declined to intervene in the suit and is not a party—limitations questions will require extensive third-party discovery from the government and be essentially impossible to resolve through early dispositive motions. The practical demands of intensive discovery and evidence-dependent motion practice will necessarily force government contractors to settle more non-meritorious claims, which ultimately increases the cost of providing government services. It will also impact the daily operations of government agencies and hamper those agencies' main missions—fulfilling statutory and administrative requirements—in favor of expending time and resources on stale cases, including precisely those cases the government considered insufficiently meritorious in which to intervene.

Amici respectfully urge the Court to restore the balance between encouraging fraud reporting and discouraging parasitic filings by holding that Section 3731(b)(2) does not control non-intervened suits. The Court should reverse the decision below to give effect to one of the FCA's constraints against "almost boundless" liability—its limitations period—and to ensure federal contractors and agencies alike are not burdened by the uncertainty and costs associated with stale suits.

ARGUMENT

I. The FCA's Breadth and Harsh Penalties Make It Subject to Private Litigation Abuse

The FCA encourages private citizens to sue companies defrauding the federal government, rewarding citizens handsomely if their lawsuits generate settlements or awards. The FCA provides for large mandatory fines, including an automatic trebling of the amount in dispute, plus high per-incident fines and attorney fees, to punish those who commit fraud against the government and to deter others from such conduct. 31 U.S.C. § 3729(a). These penalties make liability "essentially punitive in nature." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). The private relator who brings the action keeps up to 30% of the award. *See* 31 U.S.C. § 3730(d). Because the fines are calculated on a per-violation basis and damages are trebled, the awards for a relator increase with the length of time the violation occurs.

These incentives have led to important recoveries for the government and payouts to inside whistleblowers who uncovered actual and significant fraud. *See generally* John T. Boese, Civil False Claims and Qui Tam Actions (4th ed. 2011); U.S. Dep't of Justice, Press Release, *Justice Dep't Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018* (Dec. 21, 2018) ("2018 FCA Press Release"), https://tinyurl.com/ycrvbfv2. However, the opportunity for individuals to invoke the threat of FCA's harsh penalties to generate tremendous payouts has led to a long history of litigation abuse. *See id*. As this Court has observed, the FCA's strong penalties are not appropriate in many situations. *See, e.g,. Schindler Elevator Corp.*, 563 U.S. at 413.

A. History of the FCA

Congress enacted the FCA, originally called "The Informer's Act," in 1863 to prevent unscrupulous contractors from fraudulently selling provisions to the Union Army during the Civil War. *See* Boese, *supra*, at 1-6; Larry D. Lahman, *Bad Mules: A Primer on the Federal False Claims Act*, 76 Okla. B.J. 901, 901 (2005) (providing examples of decrepit mules, faulty rifles, and rancid rations). Often, war profiteers acted with impunity because the scale and complexity of war made prosecuting frauds too onerous. The 1863 Act included several features of the modern FCA: it applied to any fraud against the government, imposed penalties for each false claim, and authorized damages as a multiple of the government's loss. *See* Act of March 2, 1863, 12 Stat. 696-98.

Broad judicial interpretation of the FCA, however, has created openings for litigation abuse. *See* Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 Harv. J. on Leg. 315, 337-35 (2014). When government involvement in the economy expanded through the New Deal and pre-World War II military buildup, this Court lowered the bar for the information needed for bringing a *qui tam* action. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The result was a dramatic increase in "parasitic" *qui tam* suits, as people found ways to game the system. *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 679-80

(D.C. Cir. 1997) (recounting FCA's history). Some relators filed suits based on copying criminal indictments they played no role in helping to bring. *See id.* In 1943, Congress responded by requiring relators to base claims on information the government did not possess. *See* False Claims Act of 1943, Pub. L. 78-213, 57 Stat. 608, 608-09.

Over the past 30 years, Congress has amended the FCA to address reports that fraud was pervasive in government contracts. The concept of unscrupulous government contracting was popularized again in the 1980s, when contractors allegedly overcharged the military as much as $435 for a hammer, $640 for a toilet seat, and $7,600 for a coffee maker. *See* United Press Int'l, *Navy Paid $900 for Plane Ashtray*, Sun Sentinel, May 30, 1985. Similar reports led the Departments of Defense and Health and Human Services to triple their investigations into fraudulent claims. S. Rep. No. 99-345, p. 2 (1986). Congress responded by enacting the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153.

Through these amendments, Congress broadened the availability of FCA claims to more potential relators and increased the incentives. *See* 31 U.S.C. § 3730(e)(4)(B) (no longer requiring relators to be "insiders" with new information or first-hand knowledge of the alleged violation); 31 U.S.C. § 3729(a) (increasing per incident fines to their current level of $5,500 to $11,000 for each violation); 31 U.S.C. § 3730(d) (allowing the relator to keep up to 15% to 25% of the recovery when the government intervenes and up to 30% when the government declines to intervene).

Congress again updated the FCA to address new types of fraud after the financial crisis in 2009 and 2010. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. 111–21, 123 Stat. 1617; Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, § 1079A, 124 Stat. 1376, 2079 (amending 31 U.S.C. § 3730(h)); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. X, § 10104(j)(2), 124 Stat. 119, 901-02 (2010) (amending 31 U.S.C. § 3730(e)).

B. *Qui Tam* Lawsuits Are on the Rise

The FCA amendments have resulted in a growing *qui tam* bar and a record rise in *qui tam* lawsuits. In the mid-1980s, relators filed only a few dozen *qui tam* actions per year. *See* U.S. Dep't of Justice, Civil Division, *Fraud Statistics—Overview* (Dec. 19, 2017), https://tinyurl.com/ybfoto57 ("2017 Fraud Statistics") (reporting 30 *qui tam* actions in 1987). From the mid-1990s through 2009, an average of 300 to 400 *qui tam* suits were filed each year, with the DOJ initiating only about 150 claims each year. *See id.* Since 2009-2010, government filings have remained constant, but the number of *qui tam* filings has nearly doubled, with 706 filings in 2016, 674 in 2017, and 645 in 2018. *See id.*; 2018 FCA Press Release. Whereas the government will not intervene in every case, relators have no duty to exercise fair judgment—even a marginal FCA claim has potential value to them. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("relators are . . . less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc."). The government declines to participate in about 75% of relator-initiated claims,[2] often a sign that a given case lacks merit. *See, e.g., United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 331 (5th Cir. 2011) (stating that the non-intervened claims "presumably lacked merit"); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 242 n.31 (1st Cir. 2004) ("[T]he government's decision not to intervene in the action also suggested that [relator's] pleadings of fraud were inadequate."). These claims are nevertheless expensive and burdensome to defend, often producing settlements irrespective of the merits.

II. Allowing Relators to Take Advantage of Subsection 3731(b)(2) Is Contrary to the Purpose of the *Qui Tam* Provisions of the FCA.

Reading 31 U.S.C. § 3731(b)(2) to apply to non-intervened suits is inconsistent with the very purpose of the FCA's *qui tam* provisions. The FCA authorizes *qui tam* actions "to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not—to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.'" *United States ex rel. Sanders v. N. Am. Bus. Indus.*, 546 F.3d 288, 295 (4th Cir. 2008) (quoting *Hess*, 317 U.S. at 547);

[2] *See* 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, 1719 (2013); Memo, U.S. Dep't of Justice, Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (Jan. 10, 2018) ("2018 Dismissal Memo") (noting that while the number of *qui tam* filings have "increased substantially," "the rate of intervention has remained relatively static").

United States ex rel. Sikkenga v. Regence Bluecross Blueshield, 472 F.3d 702, 725 (10th Cir. 2006) ("Congress viewed qui tam prosecutions as providing a means to achieve rapid exposure of fraud against the public fisc, unencumbered by the lack of resources or the bureaucracy inherent in enforcement by public authorities."). In reviewing the history of the *qui tam* provision, the Senate noted that "one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain" because such enforcement relies on "the enterprising privateer" rather than "the slow-going public vessel." S. Rep. No. 99-345, p. 11 (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)).

But without an effective time bar, relators will have significant incentive to delay bringing their claims: the potential for larger damages and penalties and thus larger financial rewards for the relators. Sophisticated *qui tam* relators and their advocates would capitalize on these incentives to *delay* filing suit, to the detriment of the FCA's goal of promoting the efficient termination of fraud against the government. The FCA's statute of limitation complements and promotes the FCA's objectives by encouraging private individuals to report purported fraud to the government expeditiously.

III. A 10-year Statute of Limitation Will Increase Litigation Costs to the Government and Businesses.

Statutes of limitation provide vital "security and stability to human affairs." *Gabelli v. SEC*, 568 U.S.

442, 448-49 (2013) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)); *accord Artis v. D.C.*, 138 S. Ct. 594, 607-08 (2018) (concluding that statutes of limitation that are "'fundamental to a well-ordered judicial system'") (quoting *Board of Regents of University of State of New York v. Tomanio*, 446 U.S. 478, 487 (1980)). They "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 568 U.S. at 448 (quoting *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944)).

The Eleventh Circuit's interpretation of Section 3731(b) forces businesses to choose between defending stale FCA claims with less evidence—due to the normal processes of fading memories and document loss—or incurring the costs of retaining institutional knowledge and documents related to every government contract for the entire limitation period. Because the Eleventh Circuit rule focuses on what the government knew and when, the "innumerable [discovery] headaches" necessitated by applying subsection 3731(b)(2) to non-intervened suits would fall on the government as well. *Sanders*, 546 F.3d at 295.

"'Documents create a paper reality we call proof.' The absence of such documentary proof may stymie the search for the truth." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003). Extending subsection 3731(b)(2) to non-intervened suits would only increase the evidentiary demands on both FCA defendants and government agencies. As the Fourth Circuit concluded, such an interpretation would force defendants "to seek out and litigate the identity and knowledge of a government official not a party to the action. And government agencies would be subjected to disruption and expense in responding to discovery requests in actions in which the government affirmatively chose to avoid those concerns by declining to intervene." *Sanders*, 546 F.3d at 295. In short, the Eleventh Circuit's statutory interpretation would increase discovery burdens by focusing the limitations inquiry on a *third-party's knowledge* over a period up to ten years.

Through normal processes, access to documentary proof will wane, impeding the ability of parties and courts to reach just results. Given the vast number of electronic records now created on a daily basis, most if not all large organizations delete records or transfer them to less accessible storage over time, often automatically according to regular document retention and destruction policies. Destruction of business records in compliance with valid document retention policies is "common in business" and perfectly legal under normal circumstances. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005). This Court has recognized how normal document retention policies impact the availability of documentary evidence. *See*, *e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018) (noting that the "Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years"); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2241 n.19 (2016) (Thomas, J. dissenting) (acknowledging the University of Texas's current 5-year records retention policy for student records in assessing what factfinding could be done to compare categories of applicants). If a relator waits to bring suit for up to a decade under the Eleventh Circuit's rationale, it is more likely that relevant documents no longer will be available.

Despite all efforts of contractors to maintain records, government retention policies will affect the availability of agency records that could be vital to demonstrate government knowledge (and the related commencement of the limitations period) or liability. Normal governmental retention policies have resulted in the destruction of discoverable information in FCA suits. *See, e.g., United States v. Taber Extrusions L.P.*, No. 4:00CV00255, 2001 U.S. Dist. LEXIS 24600, at *8-9 (E.D. Ark. Dec. 27, 2001); *United States ex rel. Baker v. Cmty. Health Sys.*, No. 05-279 WJ/ACT, 2012 U.S. Dist. LEXIS 146865 (D.N.M. Aug. 31, 2012). Such evidentiary issues will only be exacerbated if the subsection 3731(b)(2) ten-year repose period is extended to non-intervened suits brought by private relators.

Even without added burdens, the fact-intensive nature of FCA claims ordinarily requires extensive discovery from the relevant agencies. *See* David S. Torborg, *The Dark Side of the Boom: The Peculiar Dilemma of Government Spoliation in Modern False Claims Act Litigation*, 26 J. LAW & HEALTH 181, 184, 187-90 (2013). Extending the limitations period to capture otherwise barred claims only increases that burden on the government. And the Eleventh Circuit's approach injects into private cases yet another fact particularly within the records or knowledge of the government agency: when the agency knew or reasonably should have known facts material to the right of action.

IV. Increased Litigation Costs and Punitive Liability Will Force More Unwarranted Settlements.

Many targets of FCA lawsuits engage in low-dollar, high-volume transactions in government-supported programs or with the government itself. Courts must be able to weed out groundless claims at the motion-to-dismiss stage. Otherwise, targets of *qui tam* suits likely will settle even meritless claims, as many do not have the resources to risk going to trial. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (appreciating that with "even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). A loss, even if remote on the merits, could financially ruin a defendant and impose the high reputational cost of being labeled a fraudster.

Proving the date of the government's knowledge will be next to impossible at the motion-to-dismiss stage. A plaintiff need only plead that the alleged violation occurred within the last ten years. A defendant, on the other hand, may establish a limitations defense at the motion-to-dismiss stage only if the availability of the defense is plain and definitive from the face of the complaint. *Jones v. Bock*, 549 U.S. 199, 215 (2007) (noting that "[i]f the allegations . . . show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim"); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959); Fed. R. Civ. P. 8(c) & 12(b)(6). Even with relevant allegations in the complaint, the U.S. Court of Appeals for the District of Columbia Circuit has recognized that there is "an inherent problem" in raising a statute of limitation defense at the motion-to-dismiss stage. *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981). Unless the applicability of the statute of limitation is definitive "beyond doubt" on the face of the complaint, *Jones v. Rogers Mem'l Hosp.*, 442 F.2d 773, 775 (D.C. Cir. 1971), federal courts lean to allowing "both parties to make a record adequate to measure the applicability of such a defense, to the benefit of both the trial court and any reviewing tribunal." *Richards*, 662 F.2d at 73.

Assuming an FCA plaintiff pleads an alleged date the government became aware of the purported violation, the plaintiff will not plead a date that is fatal to the claim. Only after discovery can the defendant develop evidence to demonstrate the claim's untimeliness. And even at the summary judgment stage it may be difficult to succeed, given the potential for faded memories, destroyed documents, and the death, disappearance, or unavailability of witnesses. *See United States v. Kubrick*, 444 U.S. 111, 117 (1979).

Accordingly, the expansion of subsection 3731(b)(2) to non-intervened suits puts higher pressure on defendants to settle, given the threat of extensive and time-consuming discovery, the risk of higher penalties due to longer periods of purported violations, and the difficulty of proving a limitations defense that focuses on the government's knowledge. The longer a defendant must wait to "lift the cloud on its reputation" from fraud accusations, the greater is the "undue pressure . . . to settle the case." *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 776 (7th Cir. 2016) (quoting *Fidelity*

National Title Insurance Co. of New York v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745, 749 (7th Cir. 2005)).

V. Implications for the Government

As set out above, an expansive reading of Section 3731(b) will burden the government even when it declines to intervene. *See* 2018 Dismissal Memo (noting that "[e]ven in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate"). Applying subsection 3731(b)(2) in non-intervened cases, in particular, injects into the litigation specific questions concerning the government's knowledge that may have no relation to any issue other than the limitations period. The added costs will come at the expense of the agencies' missions. Discovery requests require agencies to commit time and resources to reviewing and objecting to requests, retrieving and collecting documents, reviewing documents for relevance and for privilege, producing documents, and preparing agency witnesses for depositions and trial. *United States ex rel. Maldonado v. Ball Homes, LLC*, No. CV 5: 17-379-DCR, 2018 WL 3213614, at *3 (E.D. Ky. June 29, 2018); *see also Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 159 (5th Cir. 1997) (noting that the FCA is designed to "encourag[e] the government to monitor relators' actions and step in when a relator is not acting in the best interest of the public" even when the government has decided not to intervene). Often agencies must also monitor filings to ensure there is no inadvertent disclosure of classified documents, file statements of interest, participate in mediation or settlement negotiations, and participate as *amicus* on appeal. *See id.*

Interfering with agency management of its own contractors also compromises its ability to pursue the best results for the public. *See United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010). This problem is not merely theoretical. In one example, the government presented credible evidence that the *qui tam* litigation—even without intervention—would delay the clean-up and closure of a CERCLA Superfund site "by diverting the focus of security planners and management from the clean-up effort, by requiring the reassignment of personnel from the project to a review of classified documents for declassification or redaction in aid of litigation, and by placing an added financial burden on the project through a requirement to shift funds from clean-up to litigation." *United States ex rel. Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 937 (10th Cir. 2005). More recently, the government expressed concern about the burdensome discovery requests that likely would be issued to the Food and Drug Administration to determine "exactly what the government knew and when"—leading the U.S. to take the unusual action of informing the Court it would seek dismissal of the relator's claim if the case were revived and remanded. See Br. for the United States as *amicus curiae* in *Gilead Sciences Inc. v. U.S. ex rel Campie*, 2018, No. 17-936, p. 15-16.

As one scholar has noted, "most non-intervened suits exact a net cost on the public." 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. CINN. L. REV. 1233, 1264-65 (2008). A holding that subsection 3731(b)(2) does not apply in non-intervened cases will allow for earlier adjudication of limitations questions, reduce the discovery burden on government agencies, and diminish the distraction to federal agencies created by the increasing number of private FCA actions.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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