No. 13-1399

IN THE
Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V., *et al.*,
Petitioners,

v.

UNITED STATES *EX REL. KURT BUNK, et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae will address the following question:

Whether the Fourth Circuit erred in holding, in conflict with this Court's jurisprudence and with decisions of other courts, that the False Claims Act requires – and the Eighth Amendment's Excessive Fines Clause condones – mechanical imposition of a separate civil penalty for *each invoice* submitted to the Government, without regard to the defendant's culpability, even where the invoices are "false" only by operation of law under *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)?

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INTEREST OF AMICUS CURIAE

The National Defense Industrial Association ("NDIA") is a non-partisan, non-profit organization whose membership consists of 90,000 individuals and 1,780 companies, including some of the nation's largest defense contractors.[1] Because a substantial percentage of all False Claims Act ("FCA") lawsuits target defense contractors, defense contractors are particularly vulnerable to the irrational and inequitable results of the mechanical "per invoice" rule followed below. The "per invoice" rule will increase the power of relators to extract settlements even on meritless claims. For each of these reasons, NDIA and its members have a strong interest in ensuring that FCA penalties are based on the culpability of the defendant, not on fortuity and happenstance.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than the *amicus curiae*, its members, or its counsel made such a monetary contribution. Counsel of record for all parties received notice at least 10 days prior to the due date of NDIA's intention to file this brief, and letters consenting to the filing of this brief have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Litigation under the FCA has mushroomed in recent years. The Government intervenes in only a small percentage of *qui tam* cases under the FCA, and many of the remaining cases lack merit. Nevertheless, the high cost of litigating FCA cases, combined with the bad publicity associated with such litigation and the risk of potentially enormous liability, create pressure for defense contractors to settle even meritless *qui tam* actions.

The Fourth Circuit has greatly exacerbated these trends by adopting a mechanical rule that calculates statutory penalties under the FCA simply by multiplying the number of invoices submitted to the Government, even though the number of invoices may bear no relationship to the contractor's culpability or the harm suffered by the Government. Rather than advancing the Government's legitimate anti-fraud interests, the per-invoice rule creates a perverse incentive for private parties to pursue claims – even marginal claims – involving large numbers of invoices.

Under the FCA's venue provisions, relators will be able to concentrate their FCA litigation against defense contractors in the Fourth Circuit in order to take advantage of its mechanical rule for calculating penalties. The additional pressure to settle created by the Fourth Circuit's rule will make it difficult to litigate future cases to a conclusion. Because the legal issue presented is straightforward, further percolation in the courts of appeals is

unlikely to assist this Court. For all of these reasons, the Court should grant review of FCA question presented in this case.

On the merits, the Fourth Circuit's mechanical rule should be rejected on both statutory and constitutional grounds. As a statutory matter, the FCA imposes liability only for acts which cause false claims to be presented to the Government. Under modern theories of FCA liability, an act of fraudulent inducement or false certification may be separate from the subsequent submission of an invoice. In such cases, the number of invoices is both fortuitous and irrelevant to the number of fraudulent "causative acts." Under the Excessive Fines Clause, moreover, penalties must be proportional to the gravity of the offense. By divorcing the amount of the penalty from the defendant's culpability, the Fourth Circuit has created a serious constitutional problem.

ARGUMENT

I. The Decision Below Will Cause Serious And Unwarranted Harm To The Defense Industry.

A. The Proliferation Of False Claims Act Litigation Is A Serious Concern To Defense Contractors.

Congress enacted the original version of the FCA in response to the actions of Civil War profiteers, who promised the Government one thing but actually provided another. "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."[2]

The FCA has developed over the years. Today, FCA cases typically do not involve the substitution of sand for sugar, but instead present more complicated theories of liability. Some cases, for example, are based on a "fraudulent inducement" theory. In these case, genuine goods and services may be delivered at a fair price, but it is alleged that a false statement or illegal practice helped secure the contract.[3] A growing number of cases involve a theory of "false certification" (express or even implied) of compliance with regulatory or contractual requirements.[4] In such cases, "the 'claim' is, in practical terms, neither 'false' nor overstated."[5]

As theories of liability under the FCA have expanded and grown more complex, contractors' financial exposure has risen exponentially. According to the U.S. Department of Justice, "nearly

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[2] 1 Fred A. Shannon, *The Organization and Administration of the Union Army*, 1861-1865, at 58 (1965) (quoting Robert Tomes, *Fortunes of War*, 29 Harper's Monthly Mag. 228 (1864)), *quoted in United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989).

[3] 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 1.06[B] (4th ed. 2014).

[4] *Id.* § 1.06[C].

[5] *Id.*

half the total recoveries since the Act was amended" in 1986 have come in the past four years.[6] In addition, the number of *qui tam* suits filed by private relators has "soared," surpassing in 2013 a record set just the year before.[7] Procurement cases, primarily involving defense contractors, also saw record recoveries of $890 million, making the defense industry the second-largest target of FCA claims after the health care industry.[8]

This proliferation of FCA litigation, coupled with the complexities and uncertainties of modern theories of liability, is of serious concern to defense contractors. The Government intervenes in relatively few *qui tam* cases – approximately 20 percent according to the Justice Department.[9] The remaining *qui tam* cases are often found to lack merit.[10] Yet even when there is no meritorious

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[6] Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (Dec. 20, 2013), http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html (emphasis added).

[7] *Id.*

[8] *Id.*

[9] Press Release, U.S. Dep't of Justice, Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012), http://www.justice.gov/iso/opa/civil/speeches/2012/civ-speech-1206071.html.

[10] *See* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1720-21 (2013).

claim, FCA litigation can exert a strong *in terrorem* effect. Relators can extract settlements from contractors averse to high discovery costs, the risk of large losses, and reputational harms, notwithstanding the weakness of the relators' claims or the lack of a governmental enforcement interest. One scholar of *qui tam* litigation has noted that "indifference to social cost may lead profit-motivated private enforcers to initiate so-called *in terrorem* lawsuits, using the threat of massive discovery costs or bad publicity to extract settlements when the social cost of adjudication would exceed any possible benefit or, worse, where culpability is entirely absent."[11]

B. The Fourth Circuit's "Per-Invoice" Rule Exacerbates The Threat To Defense Contractors Without Advancing Government Interests.

The abusive potential of private FCA enforcement is magnified by the decision below. Under the rule adopted by the Fourth Circuit, statutory penalties are multiplied by the number of invoices submitted – even when there is nothing false about the invoices, and the number of invoices bears *no* correlation to the defendant's culpability. Defense contractors submit approximately 13.8 million invoices to the Department of Defense each

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[11] David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence From Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1254 (2012).

year, and thus are particularly vulnerable to this illogical rule.[12]

The Fourth Circuit described its rule as a "monster of our own creation,"[13] and that description is well-deserved. For any given contract, including defense contracts, the number of invoices can vary depending on factors such as the type of contract, the economics underlying the transaction, and the requirements of the particular contracting officer. For example, nearly a quarter of defense contracts (by dollar amount) are cost-reimbursement contracts.[14] These contracts are often used for "research and development or complex projects where the costs of performance cannot be reasonably estimated with a high degree of accuracy."[15] Since it would not be economically feasible to invoice the Government on such contracts only when a final product is delivered – which may occur only after years of investment and effort – contractors rely on frequent invoicing to maintain cash flow. In recognition of the economics of the contracts, federal regulations allow contractors to invoice the

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[12] Jacques S. Gansler, Democracy's Arsenal: Creating a Twenty-First Century Defense Industry 198 (2011).

[13] Pet. App. 35a.

[14] Letter from Daniel I. Gordon, Adm'r, Office of Fed. Procurement Policy, to Sen. Joseph I. Lieberman 1, 10 (Jul. 8, 2011), http://www.whitehouse.gov/sites/default/files/omb/procurement/reports/cost-reimbursement-contracting-by-executive-agencies-report-to-congress.pdf.

[15] *Id.* at 1.

Government every two weeks.[16] Small businesses may invoice the Government even more frequently.[17]

Similarly, GSA Multiple Award Schedule ("MAS") contracts are available for use by federal agencies worldwide, and can result in contractors submitting thousands of invoices over the life of a single contract. Under the MAS Program, GSA enters into government-wide contracts with commercial firms to provide over 20 million commercial products and services[18] – everything from relocation services (Schedule 48) to information technology equipment, services, and software (Schedule 70). In general, contractors in this program are *obligated* to accept orders placed by an executive agency.[19] Thus, a contractor in this program could have little control over the number of orders received and invoices submitted.

As the Fourth Circuit recognized, it is "inevitable" that courts will "confront FCA actions involving thousands of invoices," given the "prodigious size and sophistication" of government contracts.[20] This case demonstrates that there is no

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[16] FAR § 52.216-7.

[17] *Id.*

[18] *See* GSA, GSA Desk Reference Guide to the Multiple Award Schedules Program, https://interact.gsa.gov/blog/gsa-desk-reference-guide-multiple-award-schedules-program (last visited June 18, 2014).

[19] *See* GSA, Managing a Schedules Contract, http://www.gsa.gov/portal/content/202845 (last visited June 18, 2014).

[20] Pet. App. 37a.

reason to believe that the number of invoices submitted will have any necessary correlation to a contractor's culpability in an FCA case. Yet under the Fourth Circuit's rule, high-invoicing defense contractors will become disproportionately attractive targets for FCA litigation.

By increasing a defendant's exposure many times over, a mechanical per-invoice rule increases the incentives for relators to bring even weak claims, and also increases the incentives for risk-averse defendants to settle those claims. It does so, moreover, based on pure happenstance: not how strong a case of fraud, nor how great the harm to taxpayers, but how frequently the ministerial act of invoicing takes place. Contractors will bear the brunt of the Fourth Circuit's regime, but it does not advance the Government's legitimate anti-fraud interests. Instead, the Fourth Circuit's approach drives a wedge between relator and Government incentives. The Government's interest is in uncovering the most serious and harmful frauds, but relators and their counsel now have a greater financial incentive to pursue technical (and even tenuous) violations by high-invoicing contractors.

Moreover, the per-invoice rule will create perverse incentives that could harm the Government's procurement interests. By inflating the risks of entering a contract, some companies – particularly small businesses and those for whom the Government is just one customer (e.g., information technology contractors) – may opt not to pursue

public sector business. The resulting decline in competition could reduce value to the Government.[21]

Similarly, the per-invoice rule would create an incentive for contractors to invoice less frequently. The resulting cash-flow reduction would raise contract costs, thwarting what the Defense Department calls a "Win-Win" of "lower price in exchange for better cash flow."[22] It could also drive many small businesses, which are less able to tolerate decreased cash flow, out of government contracting.[23]

C. Immediate Review Is Warranted.

The threat posed by the decision below is real and immediate. Under the FCA's venue provision, a

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[21] Dep't of Defense, Performance of the Defense Acquisition System: 2014 Annual Report 97-98 (June 13, 2014), http://www.acq.osd.mil/docs/Performance-of-Defense-Acquisition-System-2014.pdf.

[22] Dep't of Defense, Defense Procurement and Acquisitions Policy, Performance Based Payments Guide: The Better Buying Power Initiative 7 (2014), http://www.acq.osd.mil/dpap/cpic/cp/docs/Performance_Based_Payment_(PBP)_Guide.pdf.

[23] This result would contravene the Government's commitment to awarding contracts to small businesses. The Government has an overall statutory goal of awarding at least 23 percent of all prime and subcontractor government contracts to small businesses. *See* 15 U.S.C. § 644(g). It has additional goals for women-owned (5%), socially and economically disadvantaged (5%), service-disabled veteran (3%), and HUBZone (3%) small businesses. *Id.* The risks imposed by this decision will deter small businesses and adversely impact the government's progress in this area.

defendant can be sued in any district where it "can be found, resides, [or] transacts business," or where any false claim is made. 31 U.S.C. § 3732(a). The defense industry's main customers are located in the Fourth Circuit (*e.g.*, the Pentagon), and many contractors maintain substantial presences there. Relators will have every reason to exploit the per-invoice rule by bringing cases against defense contractors in the Fourth Circuit to the full extent permitted under the FCA's venue provision.

Moreover, delaying review is unlikely to result in useful percolation of the issue in other circuits. One of the primary consequences of the per-invoice rule is that FCA defendants now face the prospect of dramatically inflated penalties. Unlike innovative theories of primary liability that might be susceptible to challenge on the pleadings, the scope of available remedies cannot be litigated at an early stage of the case. Even a defendant confident in its defenses will face a strong incentive to settle and avoid the outsized risks of proceeding to trial. Absent intervention by this Court, the per-invoice rule's own consequences will make the issue difficult to litigate to conclusion.

II. The False Claims Act And The Constitution Require Penalties To Be Levied Based On Culpability, Not Fortuity.

The FCA "imposes liability only for the commission of acts which *cause* false claims to be

presented."[24] Applied to the paradigmatic violations with which the Thirty-Seventh Congress was concerned, the analysis would have been straightforward: if a contractor submitted to the Union Army three invoices for sugar, and three times delivered sand, it "caused false claims to be presented" three times. But the same cannot be said under modern theories of liability. In these cases, there may be some underlying culpable act which "causes false claims to be presented" – an act of fraudulent inducement or false certification of compliance. But the separate act of submitting successive *truthful* invoices does not "cause" serial false claims. To the contrary, the number of truthful invoices submitted is "fortuitous" and "wholly irrelevant" to the number of fraudulent "causative acts."[25]

The Fourth Circuit's interpretation is not just contrary to this Court's precedents, but will also frustrate the purpose of the statute. This Court has explained that Congress enacted the FCA to "stop th[e] plundering of the public treasury."[26] The primary way the statute achieves this purpose is by providing for treble damages, ensuring that every dollar wrongfully taken from the treasury will be paid back three-fold. Together with the delegation of enforcement authority to private relators, the

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[24] *United States v. Bornstein*, 423 U.S. 303, 312 (1976) (emphasis added).

[25] *Id.*

[26] *United States v. McNinch*, 356 U.S. 595, 599 (1958).

availability of treble damages creates an incentive for individuals to root out the most serious and harmful frauds. Under the Fourth Circuit's view, however, the role of "making the government completely whole" is played not by the damages provision, but by civil penalties.[27] Not only does this misunderstand the respective roles of damages and penalties, but the per-invoice rule will actually *dissuade* relators from pursuing the most serious harms to the treasury.[28]

Finally, the Fourth Circuit's approach is flatly inconsistent with the Excessive Fines Clause of the Eighth Amendment. If that constitutional protection means anything, it prohibits penalties that bear *no* rational relationship to the defendant's culpability.[29] The Fourth Circuit did not offer any reason to believe that the number of truthful invoices submitted under a contract, even one tainted by an underlying fraud, has anything to do with the defendant's culpability. Nor would such a theory make sense. If one contractor fraudulently induces the Government to buy ten bags of sugar and submits one invoice for the whole order, and another contractor commits identical misconduct but invoices each bag separately, no one would say that one contractor is more culpable than the other. Yet the Fourth Circuit

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[27] Pet. App. 37a.

[28] *See supra* p. 9.

[29] *See United States v. Bajakajian*, 524 U.S. 321, 324 (1998) (holding unconstitutional a forfeiture that "would be grossly disproportional to the gravity of [the] offense").

would punish the second contractor ten times more severely than the first. The Constitution does not allow the Government to wield its power to punish in this irrational manner.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition for writ of certiorari, the Court should grant the petition.

Respectfully submitted,

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