No. 17-936

In the Supreme Court of the United States

GILEAD SCIENCES, INC., PETITIONER,
v.
UNITED STATES EX REL. JEFFREY CAMPIE ET AL.

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

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND BIOTECHNOLOGY INNOVATION ORGANIZATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

JAMES C. STANSEL
MELISSA B. KIMMEL
PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA
950 F Street, NW
Suite 300
Washington, DC 20004

JOHN A. MURPHY, III
BIOTECHNOLOGY INNOVATION ORGANIZATION
1201 Maryland Avenue, SW
Suite 900
Washington, DC 20024

DOUGLAS H. HALLWARD-DRIEMEIER
Counsel of Record
GREGORY H. LEVINE
MUNACHIMSO OKOJI
ROPES & GRAY LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 508-4776
Douglas.Hallward-Driemeier@ropesgray.com

PATRICK T. ROATH
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and regulations—Continued: Page(s)

Miscellaneous—Continued: Page(s)

In the Supreme Court of the United States

NO. 17-936

GILEAD SCIENCES, INC., PETITIONER,
v.
UNITED STATES EX REL. JEFFREY CAMPIE ET AL.

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

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND BIOTECHNOLOGY INNOVATION ORGANIZATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

Amici respectfully submit this brief to the Court in support of petitioner, Gilead Sciences, Inc.[1]

INTEREST OF AMICI CURIAE

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, non-profit association that represents the nation's leading biopharmaceu-

[1] Pursuant to Rule 37.1 of the Rules of the Supreme Court of the United States, no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for amici notified counsel of their intent to file this brief more than ten days before the date for filing the response brief. All parties have filed blanket consent to the filing of briefs amicus curiae.

tical and biotechnology companies. PhRMA's mission is to advocate for public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA's members invest billions of dollars each year to research and develop new drugs, more than 500 of which have been approved by FDA since 2000.

The Biotechnology Innovation Organization (BIO) is a trade association that represents entities such as biotechnology companies, academic institutions, and state biotechnology centers. BIO's members range from entrepreneurial companies developing new products to Fortune 500 companies, biotech associations, service providers, and academic centers.

The members of PhRMA and BIO closely monitor legal issues that affect the entire industry, and PhRMA and BIO often offer their perspective in cases raising such issues. The question presented here is critically important to PhRMA's and BIO's members because they, like petitioner, are regulated by FDA, subject to the requirements of the Federal Food, Drug, and Cosmetic Act (FDCA), and frequently the targets of private False Claims Act (FCA) claims. PhRMA and BIO respectfully submit that, if allowed to stand, the court of appeal's ruling will interfere with the proper administration of the FDCA by FDA and subject amici's members to inconsistent regulation as well as massive financial claims.

Amici therefore respectfully urge this Court to grant the petition for a writ of certiorari and reverse the ruling of the court of appeals.

INTRODUCTION

This Court has observed that the False Claims Act (FCA), "is not 'an all-purpose antifraud statute,' or a

vehicle for punishing garden-variety breaches of contract or regulatory violations." *Universal Health Servs., Inc.* v. *United States*, 136 S. Ct. 1989, 2003 (2016) (*Escobar*) (quoting *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 672 (2008)). To that end, the law requires a FCA relator to show that the "falsity" they have exposed was "material" to the government payor's decision to pay that claim. 31 U.S.C. 3729(a)(1)(A) and (B). "A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment." *Escobar*, 136 S. Ct. at 2003.

The rule adopted by the court of appeals undercuts this authority by permitting FCA relators to proceed to trial on the question whether a manufacturer committed "garden-variety breaches" of the FDCA, even if FDA had conclusively determined that was there no violation warranting enforcement. *Escobar*, 136 S. Ct. at 2003.

This outcome defies Congressional intent. As this Court has held, Congress intended that the FDCA's provisions "be enforced exclusively by the Federal Government." *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001). The decision below effectively grants plaintiffs an end run around the FDCA's explicit prohibition on private lawsuits seeking to enforce its provisions. See 21 U.S.C. 337(a) (no private right of action under the FDCA). By allowing courts to second-guess FDA in this manner, the ruling below transfers the power to make significant policy judgments regarding the scope and enforcement of the FDCA from FDA to private litigants. In practical terms, this decision displaces FDA as the authoritative

voice in the administration of the statutory framework it oversees and, if not overturned by this Court, will generate intolerable regulatory inconsistency.

Respondent seeks to enforce two subparts of the FDCA through the back door of the FCA. First, respondent claims that petitioner violated the FDCA by making materially false statements to FDA in connection with FDA's review of petitioner's New Drug Application (NDA). Pet. App. 4a-12a; see 21 U.S.C. 355(e). Second, respondent alleges that petitioner committed several isolated violations of the Current Good Manufacturing Provisions (cGMP) framework administered by FDA, causing petitioner's drugs to become "adulterated." Pet. App. 4a-12a; see 21 U.S.C. 331(a) and (c).

Both of these claims would require the jury to make determinations of FDCA compliance, and the materiality of any non-compliance; tasks that are the proper province of FDA. By reversing the dismissal of respondent's complaint, the court of appeals has directed, for example, that a civil jury must decide whether to nullify FDA's judgment to approve petitioner's drug and manufacturing facility. Absent this Court's intervention, the question whether petitioner's alleged misrepresentation would have been "material" in the eyes of FDA decision-makers, and then would have resulted in withdrawing the NDA, will ultimately be resolved by a civil jury or judge in the Northern District of California, rather than by FDA, as Congress has directed. Likewise, a civil jury would determine how seriously FDA would have treated petitioner's alleged non-compliance with several rules found in FDA's cGMP framework—a highly nuanced and discretionary regulatory scheme.

In addition to contradicting Congressional intent, the ruling of the court of appeals conflicts with *Buckman*. In *Buckman*, this Court held that a state "fraud-on-the-FDA" claim was preempted by federal law because it would "inevitably conflict with the FDA's responsibility to police fraud consistently with the Agency's judgment and objectives," 531 U.S. at 350, recognizing that the FDCA "amply empowers the FDA to punish and deter fraud against [FDA], and that this authority is used by [FDA] to achieve a somewhat delicate balance of statutory objectives," *id.* at 348.

Buckman thus prohibits the kind of interference with FDA's authority sanctioned by the court of appeals. The theory of liability endorsed by the decision below displaces FDA from its statutorily prescribed role and supplants FDA's expert judgment with that of a civil jury or a judge. If allowed to stand, the ruling below would dissolve *Buckman*'s bar on dueling regulatory authorities and override Congress's decision to grant FDA exclusive responsibility for determining the existence and materiality of an alleged FDCA violation. As a result, conflicting interpretations of FDCA provisions would be reached in courtrooms nationwide, defeating *Buckman*'s central holding.

The question presented by this petition is important to the members of PhRMA and BIO. Members are concerned that the decision below hands private litigants a powerful and blunt tool to supplant or second-guess critical policy decisions made by FDA. Displacing FDA deprives PhRMA and BIO's members of their ability to rely on consistent, rational regulation, and exposes members to unpredictable financial exposure. PhRMA and BIO agree with petitioner that "[t]he Ninth Circuit's approach threatens to turn every

minor regulatory misstep into a potential FCA case with crushing liability." Pet. 2.

Through *Buckman*, this Court erected important guardrails intended to protect FDA's authority to make significant policy decisions regarding the statutory framework it oversees from interference that Congress did not intend. The decision below requires the Court to confirm those prudent restraints. Private superintendence of whether FDA has been "defrauded" makes little practical sense and squarely conflicts with the scheme that Congress established by statute. This Court should grant the writ and reverse, clarifying that courts should exercise considerable care to prevent private plaintiffs from supplanting the role of FDA by bringing cases that require judges and juries to resolve important policy questions that Congress has committed to FDA.

ARGUMENT

I. THE COURT OF APPEALS' OPINION WOULD TURN THE FCA INTO AN END RUN AROUND THE FDCA'S BAR ON PRIVATE ENFORCEMENT

In the FDCA, Congress expressly prohibited private citizens from suing to enforce the Act's provisions, 21 U.S.C. 337(a), leaving the statute's enforcement instead to the discretion of FDA and DOJ, weighing many competing public interests and calibrating the appropriate enforcement tool to best further those interests. The decision of the court of appeals would thwart that congressional determination by converting the FCA into an effective means for private litigants to sue companies for alleged violations of the FDCA and FDA regulations. The court of appeals gave scant attention to the actual Medicare or Medicaid reimburse-

ment criteria, positing instead a nonexistent requirement of compliance with virtually all FDA regulations in order for a drug to be eligible for reimbursement. In so doing, the court of appeals' decision directly contravenes the FDCA's bar on private enforcement, as it would put *qui tam* relators and civil juries in the position of deciding when an alleged infraction of FDA's highly intricate regulatory regime warrants potentially crippling liability. And, as discussed below, see pp. 14-24, *infra*, this case demonstrates the dangers of that approach. Not only has the court of appeals supplanted FDA as the entity charged with deciding when its regulations have been violated, it has empowered relators and juries to reach decisions directly contrary to those of the expert agency.

A. This Court has observed, on multiple occasions, that the False Claims Act (FCA), "is not 'an all-purpose antifraud statute,' or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Universal Health Servs., Inc.* v. *United States*, 136 S. Ct. 1989, 2003 (2016) (*Escobar*) (quoting *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 672 (2008)). Rather, through its many amendments, the Act's "focus remains on those who present or directly induce the submission of false or fraudulent claims" for payment. *Id.* at 1996. In other words, the FCA is directed to fraud against the *government fisc*, rather than fraud against the government generally. Thus, in *Escobar*, the Court reiterated that in order to be actionable under the FCA, any misrepresentation "must be material to the Government's *payment decision*." *Id.* at 2002 (emphasis added); 31 U.S.C. 3729(a)(1)(A) and (B).

Despite the Court's clear direction that assertions of FCA liability should focus on the *payment* decision, the court of appeals' opinion makes almost no reference to the reimbursement standards under the relevant federal programs. The only Medicare or Medicaid statutory provisions cited by the court of appeals are the general requirement that reimbursement for drugs is "contingent upon FDA approval," Pet. App. 9a, 27a (citing 42 U.S.C. 1395w-102(e), 1396r-8(k)(2)(A)), a requirement that was concededly satisfied for the drugs at issue here. Pet. App. 28a (observing that "[i]t is undisputed that at all times relevant, the drugs at issue were FDA-approved"). And the *only* provision cited by the court with respect to reimbursement requirements under direct federal purchasing programs is a general regulation under the Federal Acquisition Regulations System that makes clear that "quality assurance" for government acquisitions of drugs, biologics, and other medical supplies rests with FDA. Pet. App. 9a, 28a (citing 48 C.F.R. 46.408).

Despite the absence of any supporting authority, or even a close analysis of the reimbursement requirements, the court of appeals simply posited that any violation of FDA regulations renders false a claim for reimbursement of the affected drug. Specifically, the court stated that submitting a reimbursement claim to the government for any drug that is "misbrand[ed]" pursuant to FDA regulations is a "factually false certification." Pet. App. 22a. Similarly, the court held that "by submitting claims for payment or reimbursement" a drug manufacturer implicitly represents that the drugs "were not adulterated or misbranded" under those same regulations. *Ibid.* Under that view, if the drug is "adulterated or misbranded," the associated

claim is false "under a theory of implied false certification." *Ibid.* The court went further, holding as well that a jury could disregard the drug's FDA approval, and thus conclude that all claims involving the drug were false on a theory of "promissory fraud," if the plaintiff proved to the jury's satisfaction that the manufacturer "lied to the FDA to secure approval" of the drug or manufacturing facility. *Id.* at 15a.

B. By converting a violation of any FDA regulation that might render a drug "adulterated or misbranded" into a basis for asserting FCA liability, the court of appeals' decision violates directives of the Executive Branch, of Congress, and of this Court. To begin, as petitioner notes (Pet. 6), the FDA has itself explained that the fact that a drug is deemed adulterated "does not mean that there is necessarily something wrong with the drug," which "may still meet its labeled specifications, and the risk that the drug is unsafe or ineffective could be minimal." FDA, Facts About the Current Good Manufacturing Practices (cGMP Factsheet), https://www.fda.gov/drugs/developmentapprovalprocess/manufacturing/ucm169105.htm (last updated Oct. 6, 2017). Similarly, a drug could be deemed "misbranded" for reasons having nothing to do with its quality or utility. For example, under FDA regulations, a drug is deemed "misbranded" if its labeling lacks adequate directions for its intended use (*i.e.*, if it has an intended use other than the one indicated in the FDA approved labeling). 21 U.S.C. 352(f)(1); 21 C.F.R. 201.128. Yet, Medicare and Medicaid regulations each *explicitly* provide reimbursement for uses that are not FDA approved in certain circumstances. See generally Medicare Prescription Drug Benefit Manual, Ch. 6 § 10 (rev. Feb. 19, 2010), https://www.cms.gov/Medicare

/Prescription-Drug-Coverage/PrescriptionDrugCovCo ntra/downloads/ chapter6.pdf. Thus, the court of appeals' premise that a claim for a drug that is "adulterated or misbranded" is categorically a false claim for payment is contradicted by the government's own statements and regulations.

Even more fundamentally, permitting a private citizen relator to assert liability under the FCA based on an allegation that the defendant violated the FDCA would run afoul of Congress's express prohibition on private enforcement of the FDCA. In the Act, Congress made clear that, with the exception of certain enforcement actions by states with respect to food, "all such proceedings for enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the United States." 21 U.S.C. 337(a). As the Court has observed, this provision "leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the [FDCA]." *Buckman Co.* v. *Plaintiff's Legal Comm.*, 531 U.S. 341, 349 n.4 (2001).

In *Buckman*, the Court explained in detail how private enforcement of the FDCA, even under the guise of a distinct cause of action, "would exert an extraneous pull on the scheme established by Congress." 531 U.S. at 353. *Buckman* held that a state "fraud-on-the-FDA" claim was preempted by federal law because it would "inevitably conflict with the FDA's responsibility to police fraud consistently with the Agency's judgment and objectives." *Id.* at 350. The Court observed that the FDCA "amply empowers the FDA to punish and deter fraud against [FDA], and that this authority is used by [FDA] to achieve a somewhat delicate balance of statutory objectives." *Id.* at 348. As the

Court recognized, the availability of a range of regulatory options "is a critical component of the statutory and regulatory framework under which the FDA pursues difficult (and often competing) objectives." *Id.* at 349.

Although *Buckman* addressed state law fraud-on-the-FDA claims, the Court's reasoning applies with equal force to relators' claims under the federal FCA. *Buckman*'s analysis and holding are not limited to federalism concerns, but rather rely equally on the need to reserve to FDA the right to make important policy choices governing its regulatory regime. *Buckman* rightly noted that permitting a dueling regulatory framework would "dramatically increase the burdens facing potential applicants—burdens not contemplated by Congress in enacting the FDCA" and consequently prevent new drugs from being developed, 531 U.S. at 350, an observation that applies whether the "dueling framework" is erected by private plaintiffs asserting parallel state or federal claims. [2]

The Solicitor General has expressed his agreement in filings before this Court and the courts of appeals. On behalf of FDA, the Solicitor General emphasized there is "no private right[] of action to enforce the

---

[2] *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228 (2014), is not to the contrary. There, the Court determined that FDCA did not preclude a litigant from bringing a claim under the Lanham Act challenging a competitor's use of a beverage label that FDCA had approved. *Id.* at 2242. The Lanham Act's unfair competition standard was independent of and "complement[ed]" government enforcement of the FDCA. *Id.* at 2241. Significantly, the plaintiff's Lanham Act theory of liability did not require the jury first to find a violation of the FDCA as a predicate for liability under the Lanham Act. Here, by contrast, the court of appeals' ruling contemplates just that.

FDCA," rather "[t]he United States has exclusive authority to enforce the Act's provisions, subject only to a limited exception for some actions by States (but not private parties)." United States Amicus Curiae Br. at 4, *Warner-Lambert Co.* v. *Kent*, 128 S. Ct. 1168 (Nov. 2007) (No. 06-1498). Similarly, before the Third Circuit, the United States argued that "the prospect of hundreds of individual juries determining the propriety of particular device approvals, or the appropriate standards to apply to those approvals, is the antithesis of the orderly scheme Congress put in place and charged the FDA with implementing." *Horn* v. *Thoratec Corp.*, 376 F.3d 163 (2004) (citing Statement of Interest of the United States of America at 7-9).

Unlike the Ninth Circuit, other appellate courts have recognized that claims like those here implicate the exact concern that *Buckman* articulated, and have on that basis dismissed those claims. In *D'Agostino* v. *ev3, Inc.*, the First Circuit affirmed the dismissal of an FCA complaint premised on alleged violations of the FDCA, holding that a ruling to the contrary would "turn the FCA into a tool with which a jury of six people could retroactively eliminate the value of FDA approval and effectively require that a product largely be withdrawn from the market even when the FDA itself sees no reason to do so." 845 F.3d 1, 8 (2017). Citing *Buckman*, the First Circuit noted that "[t]he collateral effects of allowing juries in *qui tam* actions to find causation by determining the judgment of the FDA when the FDA itself has not spoken are akin to those practical effects that counsel in favor of not allowing state-

law fraud-on-the-FDA claims." *Ibid.*[3] Considering the practical challenges to proving liability on such a theory demonstrates the problem. "How would a relator prove that the FDA would not have granted approval but for the fraudulent representations made by the applicant? Would competing experts read someone's mind? Whose? What if former officials no longer in government were of one view, and current officials of another?" *Id.* at 9. The Fourth Circuit likewise affirmed the dismissal of a complaint advancing a similar theory. The court noted that where an "agency has broad powers to enforce its own regulations, as the FDA does * * *, allowing 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.'" *United States ex rel. Rostholder* v. *Omnicare, Inc.*, 745 F.3d 694, 702 (4th Cir. 2014) (quoting *United States ex rel. Wilkins* v. *United Health Grp., Inc.*, 659 F.3d 295, 310 (3d Cir. 2011)).

As explained below, respondent's theories of FCA liability, which the court of appeals endorsed, would predicate liability on first proving that petitioner violated the FDCA and then having the jury conclude that the remedy for those violations is to negate FDA's approval of the drug. That would ascribe to the jury precisely the role that Congress, for good reason, reserved to FDA.

---

[3] In a subsequent ruling, the First Circuit observed that the decision by the court of appeals in this case provides "no rebuttal at all to [the] observation that [a jury] should not be able to overrule the FDA." *United States ex rel. Nargol* v. *DePuy Orthopaedics*, 865 F.3d 29, 36 (2017).

II. THE COURT OF APPEALS' DECISION PERMITS JURIES NOT ONLY TO DISPLACE FDA'S AUTHORITY BUT TO CONTRADICT FDA'S ACTUAL DECISIONS

A. The Court of Appeals Wrongly Permits a Jury, at a Private Litigant's Request, to Nullify FDA's Approval of a Drug

Respondent's "promissory fraud" theory of FCA liability would impermissibly allow the court to overturn FDA's decision to approve a drug. That theory is grounded in allegations that petitioner violated the FDCA by making materially untrue statements to FDA in order to obtain approval for its drug and later for a new manufacturing facility. Pet. App. 4a-12a; 21 U.S.C. 355(e). Although the court of appeals acknowledged that "[i]t is undisputed that at all times relevant, the drugs at issue were FDA-approved," the court nonetheless held that respondent could prove that petitioner's drugs were only "*ostensibly* 'FDA approved,'" Pet. App. 23a (emphasis supplied), and therefore failed to satisfy the prerequisite for Medicare or Medicaid reimbursement that the drug be FDA approved. *Id.* at 9a, 27a-28a (citing 42 U.S.C. 1395w-102(e), 1396r-8(k)(2)(A)). Because petitioner "was submitting claims for payment for 'FDA approved' drugs," respondent could prove those claims were false by showing petitioner "made false statements * * * in order to get FDA approval and thus become eligible for government funds." *Id.* at 25a. By convincing the jury to disregard FDA's approval of the drug and manufacturing facility, respondent could demonstrate that "each claim was fraudulent even if false representations were not made therein." *Ibid.*

Resolution of this theory of liability thus *requires* the court adjudicating the claim to assess whether FDA was hoodwinked, and ascertain whether FDA would have made a different decision if it had before it the allegations in respondent's claim. If permitted to stand, the ruling below would allow judges and juries to stand in the shoes of FDA and render conflicting decisions about the "materiality" of alleged violations of FDA rules without the benefit of FDA's expert judgment, making it impossible for regulated entities to comply with the law. The ruling below thus permits precisely what Congress sought to avoid in 21 U.S.C. 337(a) by expressly precluding private litigation to enforce the FDCA. It also interferes with the need, recognized in *Buckman*, for FDA to make the significant policy choices regarding the statutory schemes it oversees. 531 U.S. at 349.

This theory of liability is also inconsistent with the intricate process established by FDA to make these difficult determinations. According to one of respondent's theories, had FDA known that certain statements were not true, it would have "withdraw[n] approval" of petitioner's drugs. 21 U.S.C. 355(e). But under the FDCA, the presence of even an intentional misrepresentation in a NDA, without more, is not a sufficient basis for FDA to withdraw approval for a drug. Before revoking approval, FDA must make the additional determination that an "untrue statement" is "material." See *ibid.* (FDA shall withdraw approval of a drug if, *inter alia*, it finds that an application includes an "untrue statement of a material fact").

FDA has established internal procedures that prescribe which experts within the agency are competent to determine that an untrue statement in an NDA is

material. *See* FDA Application Integrity Policy (AIP) Procedures Manual Section 1-1-3 ¶ 7. "A determination that an untrue statement is material is necessary for purposes of invoking the AIP. The Center [in this case, the Center for Drug Evaluation and Research] should make a written determination [of materiality]. This determination may involve discussions with OCC [FDA's Office of Chief Counsel]." *Ibid.* These designated agency experts are afforded discretion to assess and factor into their determinations the "public health significance" of the product. 56 Fed. Reg. 46,191, 46,194 (Sept. 10, 1991). And even after reaching a materiality determination, FDA remains obligated to provide the applicant with "notice and opportunity for hearing" to contest the Agency's ruling. 21 U.S.C. 355(e). Proceeding in this FCA suit as respondent proposes would afford petitioner none of these procedural protections.

Critically, FDA has not found that petitioner made materially untrue statements in the course of the NDA review process, nor has FDA withdrawn approval for petitioner's drug, even though FDA has been aware of respondent's allegations for years. See Pet. 9; Pet. App. 6a-8a. Thus, in order for respondent to prevail, he would not only need to ask a jury to make a determination reserved by Congress to FDA, he would have to convince a jury to make *a different* determination than the FDA has already made.

Lawsuits grounded in "fraud-on-the-FDA" theories have grown increasingly common. See, *e.g.*, *United States ex rel. Petratos* v. *Genentech Inc.*, 855 F.3d 481, 487 (3d Cir. 2017) (FCA claim premised on alleged violations of FDA adverse reporting requirements); *United States ex rel. Colquitt* v. *Abbott Labs.*, 858 F.3d 365, 370 (5th Cir. 2017) (FCA claim premised on alleged vio-

lations of FDA pre-market notification rules); *D'Agostino*., 845 F.3d 1, 3 (1st Cir. 2017) (FCA claim premised on allegedly fraudulent representations to FDA in device approval process); *United States ex rel. Duxbury* v. *Ortho Biotech Prods., L.P.*, 579 F.3d 13, 16 (1st Cir. 2009) (FCA claim premised on alleged violations of FDA off-label promotion rules). The proliferation of such cases will only accelerate if the court of appeals' decision is allowed to stand.

The prospect of juries imposing potentially crippling liability based on their disregard for FDA's own assessment of the facts poses an unmanageable burden on PhRMA and BIO's members. As pharmaceutical and biotechnology companies whose products result in billions of dollars in claims to the Federal Health Care Programs each year, these members are already subject to significant scrutiny, and, as a result, invest substantial resources in efforts to comply with applicable fraud and abuse laws. If not overturned, the court of appeals' decision threatens to introduce an additional degree of uncertainty and arbitrariness to FCA litigation and liability that is simply untenable. Ultimately, this will negatively impact the ability of BIO and PhRMA's members to invest time, energy, and monetary resources into developing and producing life-saving drugs.

B. Private Enforcement of FDA's Highly Complex cGMP Framework Is Particularly Inconsistent With FDA Enforcement Regime

Respondent's attempt to enforce FDA's Current Good Manufacturing Provisions (cGMP) through private litigation is especially egregious. As noted above,

see pp. 8-9, *supra*, the court of appeals simply declared by *ipse dixit* that a claim for a drug that is "adulterated or misbranded" is implicitly false, Pet. App. 22a, and further identified failure to operate "in conformity with current good manufacturing practices" as rendering a drug "adulterated," *id.* at 9a-10a. The court of appeals has thus, in effect, blessed respondent's bid to weaponize for litigation scattered evidence that a drug manufacturer may have engaged in even trivial violations of FDA's highly specialized regulatory provisions governing manufacturing practices.

The concerns articulated by this Court in *Buckman* apply with special force to this specific set of rules because FDA oversees compliance with this framework through an interactive process with regulated entities and relies on a graduated, carefully calibrated system of enforcement. These rules are thus ill-suited to serve as a springboard to civil litigation. The court of appeals erred by converting a set of rules that FDA must administer in a careful, discretionary manner into a standard of liability that a private litigant may sue to enforce.

FDA drug approval decisions involve carefully weighing the risks and benefits of a drug. Among other things, FDA must refuse to approve an NDA if it finds that the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to preserve its identity, strength, quality, and purity. 21 U.S.C. 355(d)(3). Further, FDA may withdraw approval if it determines, based on new information obtained after approving the application, that the methods used in, or the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to preserve its

identity, strength, quality, and purity, and were not made adequate within a reasonable time after receipt of written notice from FDA specifying the deficiencies. See 21 U.S.C. 355(e); 21 C.F.R. 314.150(a)(2)(iv) and (b)(2).

Pursuant to authority provided by the FDCA, FDA requires drug manufacturers to comply with the cGMP framework, which establishes the minimum requirements for the methods, facilities, and controls used in manufacturing and processing drugs. See 21 U.S.C. 371; 21 C.F.R. 210, 211. These regulations and agency guidance documents set forth a highly technical regulatory framework aimed at fostering quality procedures in drug manufacturing, and preventing the production of unsafe or ineffective products. See *ibid.*

Under the FDCA, drugs not manufactured, processed, packaged, or held in conformance with cGMP requirements are deemed legally "adulterated." 21 U.S.C. 351(a)(2)(B). However, as FDA routinely acknowledges, failure to manufacture a drug in compliance with cGMP "does not mean that there is necessarily something wrong with the drug." cGMP Factsheet, *supra*. In fact, according to FDA, an "adulterated" drug is likely to "still meet its labeled specifications and the risk that the drug is unsafe or ineffective could be minimal." *Ibid.*

The cGMP framework is not designed to be interpreted by non-experts, but is rather a matter of agency judgment. See 43 Fed. Reg. 45,018 (Sept. 29, 1978) ("The [FDA] determines what constitutes 'current good manufacturing practice' based upon its experience with the manufacture of drugs through inspectional and compliance activities; [and] upon knowledge gained

from reviewing new drug applications. * * * Although the practices must be 'current' in the industry, they need not be widely prevalent."). FDA's comprehensive yet "flexible" regulatory scheme "allow[s] each manufacturer to decide individually how to best implement the necessary controls by using scientifically sound design, processing methods, and testing procedures." See cGMP Factsheet, *supra*.

Accordingly, assessing compliance with the interacting layers of cGMP regulation and FDA guidance demands FDA's unique expertise and judgment. See 43 Fed. Reg. 45,018 ("The accumulated knowledge and experience of FDA in the area of current good manufacturing practice is reflected in a body of information * * * which is the basis for agency expertise"); see also *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("[A]pplying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives."). Given this background, delegating the responsibility for enforcing this regime to private litigants defies Congressional intent.

cGMP enforcement is similarly complex. The primary tool to ensure cGMP compliance is an FDA facility inspection, in which FDA reviews a firm's compliance with cGMPs to determine whether manufacturing is occurring in a "state of control" (*i.e.*, there is an "*adequate level of assurance* of quality, strength, identity and purity"). FDA, Compliance Program Guidance Manual 7356.002, Drug Manufacturing Inspections 9 (Oct. 2017) (emphasis added). If an on-site inspection yields a potential violation, FDA has a range of enforcement options available at its discretion to ensure compliance with cGMP. In the first instance, if an

FDA investigator observes "significant objectionable conditions," agency procedures instruct the investigator to document the observations in an establishment inspection report (EIR), an internal FDA record, and to issue an FDA Form 483 to the manufacturer (an advisory notice that details the "investigational observations"). FDA, *Investigations Operations Manual* § 5.2.3 (2017). While issuance of Form 483 constitutes the investigator's personal observations and not a finding of a cGMP violation by the FDA, companies are "encouraged to respond" in writing with a plan to ameliorate the observed deficiencies. *Ibid.*; FDA Form 483 Frequently Asked Questions (Form 483 FAQ), https://www.fda.gov/ICECI/Inspections/ucm256377.htm (last visited Feb. 1, 2018).[4] Following an inspection, FDA considers all evidence and documentation obtained onsite, including the EIR and any responses made by the company to the 483, to determine, "what further action, if any, is appropriate to protect public health." Form 483 FAQ, *supra*.

FDA's process for determining whether to pursue further action is multi-layered and laden with judgment calls of the sort necessarily delegated to FDA. In pursuing subsequent action, FDA has yet further discretion to elicit voluntary compliance through other informal mechanisms. For example, to address "violations of regulatory significance" FDA may issue a Warning Letter, or place a "GMP hold" on products

[4] If an FDA investigator observes an issue which, in her or his judgment, is "of questionable significance," she or he has discretion to forego including that issue in a Form 483 and to conduct informal conversation with management that is documented as a "non-reportable observation" in the EIR. See FDA, *Investigations Operations Manual* § 5.2.3 (2017).

manufactured at the facility. See FDA, *Regulatory Procedures Manual (RPM)* §§ 4-2, 4-1 (2017); see also 21 C.F.R. 314.125(b). The Warning Letter constitutes a finding of cGMP noncompliance and provides notice that an enforcement or regulatory action may be forthcoming if the company does not remedy the violations to FDA's satisfaction. See RPM § 4-1, *supra*. To issue a Warning Letter, FDA must follow detailed internal approval procedures. *Ibid.* For the most serious violations, FDA may pursue a range of administrative and judicial enforcement actions, including seizure of adulterated products, withdrawal of market approval, injunctive relief, and referral to the Department of Justice for criminal prosecution. See, *e.g.*, 21 U.S.C. 332(a), 334(a), 335(d), 333.

Bureaucratic oversight of cGMP compliance and enforcement is extensive. FDA's Office of Regulatory Affairs (ORA), tasked with enforcing cGMP, employs 5,000 expert staff and operates 227 offices and thirteen laboratories throughout the United States. See FDA, FY 2017 Budget Office of Regulatory Affairs-Field Activities, https://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/BudgetReports/UCM488559.pdf. In 2017, ORA conducted 1,883 inspections of regulated drug facilities. See FDA, Inspections Classifications, https://www.fda.gov/ICECI/Inspections/ucm222557.htm (last visited Feb. 1, 2018). Although FDA possesses authority to take formal enforcement action to enforce the FDCA, 96 percent of the inspections in 2017 were classified as "No Action Indicated" or "Voluntary Action Indicated" events. *Ibid.* Of these, 46 percent were "Voluntary Action Indicated." *Ibid.* Considering that Form 483s typically cite multiple cGMP violations, this suggests there were likely *thou-*

sands of alleged cGMP violations observed by FDA investigators that did not rise to the level of requiring any official agency action whatsoever. *Ibid.*

When FDA allows a legally "adulterated" drug to remain on the market while the company brings its practices into cGMP compliance, it judiciously weighs the risks presented by cGMP violations against the benefits to patient health. Because interrupting the manufacturing and supply of a drug can lead to drug shortages, and removing a drug from the market altogether renders it unavailable to patients, FDA must carefully balance competing considerations when determining the public health significance of cGMP violations for a specific drug. For example, cGMP Warning Letters typically include language asking the manufacturer to notify the agency if the corrective action planned by the manufacturer would limit supply of the drug or pharmaceutical ingredient. See RPM § 4-1-10, *supra.*

The rule adopted by the court of appeals would, by its terms, permit allegations of even technical cGMP foot faults to satisfy the "falsity" element of the FCA, leaving to juries to substitute their judgment whether particular cGMP violations are sufficiently material to render the drug effectively unapproved. If permitted to stand, the ruling would encourage interference with the broad statutory authority Congress has conferred on FDA and deprive the public of the benefit of FDA's unique ability to "pursue[] difficult (and often competing) objectives." *Buckman*, 531 U.S. at 349. It also makes the cost of complying with the law prohibitive, and could lead manufacturers to withdraw drugs from the market to avoid FCA liability when doing so would not be in the best interests of public health as deter-

mined by FDA. The ruling of the court of appeals thus threatens FDA's decision-making authority and endangers the development and availability of critical drugs in a manner that is inconsistent with Congress's clear intent.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Court should grant the writ.

Respectfully submitted,

DOUGLAS H. HALLWARD-DRIEMEIER
GREGORY H. LEVINE
PATRICK T. ROATH
MUNACHIMSO OKOJI
ROPES & GRAY LLP

JAMES C. STANSEL
MELISSA B. KIMMEL
PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA

JOHN A. MURPHY, III
BIOTECHNOLOGY INNOVATION ORGANIZATION

February 2018