No. 15-1129

In the Supreme Court of the United States

UNITED STATES EX REL. DEBRA MARSHALL
AND PEGGY THURMAN,

v.

WOODWARD, INC.

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

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

Contrary to the Petition, the questions actually presented by the decision below are:

1. Whether, in concluding that a government contractor did not know at the time it made any (assumed) false certifications that the certifications were false, a court errs by relying in part on the fact that the contractor subsequently investigated the *qui tam* relators' allegations and rejected them based on its sincere and reasonable belief that they were incorrect.

2. Whether, in concluding that any (assumed) false certifications did not have an objectively material influence on the Government's payment decision, a court errs by relying in part on the fact that the Government is fully informed about the *qui tam* relators' allegations, has investigated and rejected them, and continues to purchase, pay for, and use the contractor's products without requesting any process changes or financial changes in response.

RULE 29.6 STATEMENT

Respondent Woodward, Inc. ("Woodward") has no parent company, and no publicly held company owns 10% or more of its stock.

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RESTATEMENT OF THE CASE

Petitioners mischaracterize each of the two independent grounds that the Seventh Circuit relied upon in affirming summary judgment against their *qui tam* claims under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*.

First, in challenging the holding that Woodward did not have knowledge of any (assumed) falsehood, Petitioners contend that the court below ignored Woodward's knowledge at the time "when each statement was presented" and focused instead only on the time when Woodward "later [conducted] a self-evaluation." Pet. i. To the contrary, the decision below expressly held that "[Petitioners] do not point to any evidence that a decisionmaker at Woodward agreed with their concerns at the time Woodward made the statements…." Pet.App. 11. The court simply recognized, correctly, that this conclusion was bolstered by Woodward's subsequent investigation and rejection of Petitioners' allegations. *Id.* 10-11.

Second, in challenging the holding that any (assumed) falsehood was not material to the Government, Petitioners contend that the court below ignored the objective "potential effect of the statement when presented" and focused instead only on the subjective "actual effect of the statement when discovered." Pet. i. To the contrary, the decision below expressly held that materiality is an "objective standard" that turns on whether the statement is "capable of influencing" the Government's payment decision. Pet.App. 12. The court simply recognized, correctly, that it is highly relevant to the objective immateriality of an alleged falsehood that the Government is fully informed

about the allegation and yet continues to purchase, pay for, and use the product without requesting any type of changes in response. *Id.* 14-15.

In sum, the questions presented in the Petition are not truly presented by the decision below. On the questions actually presented by that decision, there is no conflict among the circuits, and Petitioners are essentially seeking fact-bound error-correction where no error is present. Accordingly, this Court's intervention is not warranted for either the knowledge issue or the materiality issue — let alone for both issues, as would be necessary to review and reverse the Seventh Circuit's judgment. The Petition should be denied.

1. This case involves allegations by Petitioners that Woodward falsely certified compliance with its own procedures for manufacturing and inspecting certain parts. But, even assuming such certifications were false, the record indisputably shows that Woodward did not know of the falsity at the time of the certifications, and the record also indisputably shows that the certifications were not objectively material to the Government's payment decision.

a. Woodward has long manufactured a helicopter fuel system part, known as the T2 sensor, for General Electric ("GE") and the Department of Defense ("DOD"). Pet.App. 2. The T2 sensor is part of a larger Woodward assembly, known as a T700 HMU, that regulates fuel flow in GE's T700 engines installed in DOD's Blackhawk and Apache helicopters. *Id.* Woodward sells the T700 HMU to GE for inclusion in T700 engines and also sells T2 sensors and T700 HMUs to DOD for spare parts. *Id.*

The T2 sensor contains a bulb assembly, consisting of a "coil" end and a "bellows" end, with the two ends connected by a capillary tube. *Id.* 3; *see also id.* 2 (picture). A change in air temperature triggers movement in the assembly and thereby alters fuel flow to the engine. *Id.* 3. This case concerns the T2 sensor's "Grade A" brazed joint, which connects the capillary tube to the sensor head at the bellows end. *Id.*

Woodward has developed its own set of procedures for manufacturing and inspection. *Id.* Shop Procedure 865, or "SP-865," concerns brazing, which is a process in which two metal surfaces are joined together by heating them along with a filler metal that flows into the joint and bonds the two surfaces. *Id.* When Woodward ships parts to DOD or GE, it provides a certificate of conformance stating that each shipment contains parts "in the Quantities and [of the] Quality called for" and "in accord with the applicable specifications." *Id.* 4. The Seventh Circuit assumed without deciding that Woodward's certificates represented that the T2 sensors were made in compliance with SP-865. *Id.* But the Seventh Circuit also recognized that "Woodward can revise provisions of SP-865 without notifying or obtaining consent from GE or the DOD." *Id.* 3-4.

b. Petitioners Debra Marshall and Peggy Thurman were Woodward employees who worked on the T2 sensor, but their ordinary assignments did not include work on the "Grade A" brazed joint at issue here. *Id.* 4. Petitioners received all of their training regarding brazing procedures from Woodward, as they had not previously worked in the field or obtained college or technical degrees. *Id.*

In early 2005, before Petitioners had raised any of the issues alleged here about the Grade A joint, T700 Project Engineer Heather Diedrich initiated an investigation into other issues with the T2 sensor. *Id.* 4-5, 22. Specifically, Diedrich asked Materials Engineer Barb Swanson to investigate leakage in the T2 sensor, and Marshall volunteered to assist. *Id.*

On April 6, 2005, Petitioners informed their supervisor Mark Meichtry, as well as Meichtry's superior, Steve Gorman, that they would not perform their assigned tasks on the T2 sensor due to asserted concerns that Marshall had developed regarding the Grade A joint. *Id.* 5. Later, on April 11, 2005, Marshall placed a "hold" on production of T2 sensor parts in light of her asserted concerns. *Id.*

In particular, Marshall's asserted concerns were that the Grade A joint did not comply with SP-865 because: (1) the joint's diametrical clearance (*i.e.*, the distance between the sensor head and the capillary tube) was too small; (2) "stop-off" and "flux" materials used in the brazing process were not adequately removed; and (3) the joint was not being x-ray inspected. *Id.*

c. Woodward did not (and does not) believe that the Grade A joint violated SP-865. When Petitioners raised those allegations, Woodward thoroughly investigated them and consistently rejected them as unfounded.

Petitioners' allegations prompted an immediate investigation by Woodward engineers including Diedrich, Swanson, and David Kuchinski. *Id.* On April 12, 2005, Meichtry informed Petitioners that the engineers had concluded that the process for the

T2 bulb assembly was fine, including in an email stating that "[t]he hold issue has been discussed with … engineers and engineering leaders[,] and the consensus was the parts [were] good to ship." *Id.*

At a follow-up meeting on April 14, 2005, Petitioners spoke with Meichtry, Gorman, Diedrich, Quality Director Spitty Tata, and Human Resources Manager Carol Smith. *Id.* 6. Gorman reiterated that Woodward's engineers had concluded that the parts were "okay." *Id.* Yet Marshall then suggested that braze material from another T2 sensor joint was "mask[ing]" problems with the Grade A joint, and so Woodward agreed to x-ray some parts to check for evidence of masking. *Id.*

However, without waiting for Woodward to conduct the x-rays and despite having been directed to leave the premises, Petitioners returned to the plant that night, cut several parts open, examined them under a microscope, and took some home — all without authorization from Woodward. *Id.* 6, 24. Marshall claimed that she observed masking in these parts. *Id.* But when Woodward engineers later reviewed x-rays of other parts, as had been offered at the April 14, 2005, meeting, they concluded that there was no evidence of masking that they believed would be of concern. *Id.*

Despite all this, on April 18, 2005, Petitioners continued to refuse to resume their assignments on the T2 sensor. *Id.* 6. Meichtry then instructed them to leave the plant. *Id.* 6-7. After doing so, Marshall called a Woodward hotline that allowed employees to report suspected violations of Woodward's quality policies to the Business Conduct Oversight Committee ("BCOC"), a group of senior managers

from various business units tasked with assessing such complaints. *See id.* 7.

Woodward's General Counsel at the time, Robert Reuterfors, directed Woodward Senior Engineer Ted Erickson to review the issues raised:

> [Y]our overriding instruction … is to prepare a report that is accurate and correct from the standpoint of professional engineering analysis. If you agree with the concerns [of Petitioners,] you should say so and let the chips fall where they may.

Id. Erickson evaluated and rejected Petitioners' allegations, concluding that: (1) the Grade A joint's diametrical clearance was proper; (2) using stop-off did not adversely affect the joint's quality; (3) x-ray inspecting the joint was not necessary; and (4) there was no relevant masking from the sensor's other joints. *Id.* Quality Director Tata concluded likewise in a separate report on Petitioners' allegations. *Id.* Based on the reports of Erickson and Tata, the BCOC concluded that Petitioners' allegations did not credibly allege a violation of Woodward's quality policies. *Id.*[1]

d. The Government and GE likewise investigated Petitioners' allegations. They too rejected them as unfounded.

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[1] When Petitioners continued to refuse to work on the T2 sensor even after the BCOC's conclusion, they were terminated for insubordination. Pet.App. 7-8. The Seventh Circuit rejected Petitioners' separate claim that their termination was an unlawful retaliatory discharge, *id.* 15-17, and they have not sought review of that holding here, Pet. i., 20-21.

On April 26, 2005, Petitioners and their counsel shared their allegations with DOD Special Agent Daniel Boucek. *Id.* 8. Boucek then looped in the Defense Contract Management Agency ("DCMA"), the federal agency responsible for monitoring contract compliance for military contractors. *See id.*

Specifically, on April 29, 2005, Boucek and Petitioners met with Harrison DySard, the DCMA Lead Technical Representative for Woodward's geographical area. *Id.* 27. By May 2, 2005, DySard had concluded that there were no imminent safety concerns, but that DCMA would "be looking at the sensor with new eyes." *Id.* To avoid alerting Woodward to his purpose, DySard told the company that he was conducting a general "audit" of various parts, including the T2 sensor. *Id.* 8. Woodward cooperated with DySard's audit, and he reviewed engineering drawings and procedures, product quality deficiency reports, and operations during assembly of the T2 sensor. *Id.* 8, 27. DySard also discussed Petitioners' allegations with his DCMA counterpart on-site at GE. *Id.*

Woodward itself had already informed GE of Petitioners' allegations and its investigation, no later than around May 4, 2005. *See id.* 8, 28-29. GE employees who were involved testified that GE had no concerns about the quality or performance of Woodward's T700 HMU. *See id.*

On November 21, 2005, DySard presented his conclusions to Boucek as well as a DCMA official and an Air Force Major. *Id.* 27. He reached the following conclusions:

- there was "nothing either incorrect or wrong with the procedures, assembly, or testing of the sensors";
- he had "witnessed testing, witnessed assemblies, inspected final assemblies, inspected fuel controls containing the sensor, reviewed engineering reports, list[ened] to theory from engineers[,] and found nothing to substantiate the claim that Woodward is, or was[,] involved in fraud on this part";
- there was "no evidence Woodward ha[d] tried to cover anything up, asked people to violate assembly procedures or testing requirements, or d[one] anything wrong";
- "[t]he specific claim that the sensor was supposed to be x-rayed but hadn't been was found to be false based on a review of the x-ray records for that part. [T]oo often people think they have a better way of doing things but that certainly does not mean that the old way is wrong, illegal, or involves fraud";
- "to make this unproved allegation public would be unfair to [Woodward] and cause needless concern where none belongs"; and
- the "[b]ottom line is [his] investigation is over and the allegation by [Petitioners] was not supported by any evidence."

Id. 8, 27-28. DySard also reported his findings to the DCMA Administrative Contracting Officer with authority to make T2 sensor contracting decisions. *Id.* 28.

The Government continues to purchase, pay for, and use Woodward's T2 sensors, without requesting any process changes or financial changes in response to Petitioners' allegations. *Id.* 8. The Government does so with full knowledge of those allegations, in light of: (1) the earlier reviews by DCMA and GE; (2) the attendance at DySard's deposition by counsel from both DCMA and DOJ; and (3) the receipt of the filings below by DOJ counsel.

2. As relevant here, Petitioners filed a sealed complaint in federal court alleging that Woodward violated the FCA by making false certifications that the T2 sensor complied with SP-865. *Id.* 18-19. After the United States declined to intervene, the complaint was unsealed and litigation began. *Id.* 19.

a. The District Court for the Northern District of Illinois (Feinerman, D.J.) granted summary judgment for Woodward. *Id.* The court assumed without deciding that false certifications had been made concerning the T2 sensor's compliance with SP-865. *Id.* 29-30. Nevertheless, the court held that no reasonable jury could find that Woodward had violated the FCA, because the record "indisputably shows" that "Woodward's statements were neither knowingly false nor material" to the Government. *Id.* 30; *see also id.* 30-39.

b. The Seventh Circuit (Flaum, Manion, Rovner, C.Js.) affirmed. *Id.* 1-2. Like the district court, the Seventh Circuit assumed without deciding that the FCA's falsity element was satisfied, but then held that neither the knowledge element nor the materiality element could be established. *Id.* 9-10.

First, the Seventh Circuit "agree[d] with the district court that no reasonable jury could impute knowledge of falsity to Woodward based on the evidence presented." *Id.* 12. Notably, the court held that "[Petitioners] do not point to any evidence that a decisionmaker at Woodward agreed with their concerns *at the time Woodward made the statements* …." *Id.* 11 (emphasis added). For instance, Petitioners and their proffered experts had asserted that Woodward engineer Steve Krugler knew as early as 1997 that failure to x-ray inspect the Grade A joint violated SP-865; but the court found that "Krugler explained at the time that X-ray inspection was unnecessary [and] reiterated that belief during litigation," thereby refuting the assertion that "Krugler had knowledge that Woodward's certifications were false at the time that they were made." *Id.* 11-12. Likewise, while Petitioners had pointed to alleged comments by employees that "Woodward ignored quality concerns to meet its customers' demands," the court explained that those "stray remarks do not amount to knowledge of falsity" because "[t]hey do not demonstrate that anyone at Woodward believed that [Petitioners'] concerns were valid." *Id.* 10-11. The court bolstered that conclusion by pointing out that, to the contrary, "Woodward thoroughly investigated [Petitioners'] allegations" and "Woodward's engineers concluded that the parts were fine and that the allegations were unfounded." *Id.* 11.

Second, the Seventh Circuit also "agree[d] with the district court that Woodward's allegedly false statements were not material." *Id.* 15. Notably, the court recognized that materiality under the FCA is

an "objective standard" that turns on whether the alleged false statement is "capable of influencing" the Government's payment decision. *Id.* 12-13 (citing 31 U.S.C. § 3279(b)(4) and *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008)). The court further recognized, though, that "the government's actual conduct" is "relevant to assessing materiality" under the objective, potential-effect standard. *Id.* 14. Specifically, the court reasoned that where, as here, the Government "thoroughly investigated" Petitioners' asserted concerns and yet "continues to pay for and use" the product without requesting any process changes or financial changes in response, the Government's acquiescence "suggests that the allegedly false statements were immaterial" because they are objectively incapable of influencing the Government's payment decision. *Id.* Moreover, wholly apart from the Government's actual conduct, the court held that compliance with SP-865 was not material to the Government given that "Woodward has the right to change its shop procedures at any time without the government's permission." *Id.* As the court explained, if the specific procedures in SP-865 were "truly material to the government's decision to buy the sensor, it would be odd to give Woodward a unilateral right to change them." *Id.*

c. Belying their current assertions that the panel's decision conflicted with prior Seventh Circuit precedent, Petitioners did not seek panel rehearing or rehearing en banc. *Compare* Pet. 1, *with id.* 20, 30, 36.

REASONS FOR DENYING THE PETITION

The Petition mischaracterizes the Seventh Circuit's holdings on knowledge and materiality. The actual holdings do not present any circuit split. They are fact-bound determinations that are clearly correct. This Court's review is not warranted for either of the real questions presented, let alone both of them.

I. THE PETITION MISCHARACTERIZES THE ACTUAL QUESTION PRESENTED BY THE SEVENTH CIRCUIT'S KNOWLEDGE HOLDING, WHICH IS SPLITLESS, FACT-BOUND, AND CORRECT

A. Petitioners misstate the question that is actually presented by the Seventh Circuit's knowledge holding. The Petition presents the following question: "Is a contractor's knowledge that its statements were false determined by the contractor's knowledge when each statement was presented, or by what the contractor later asserts during a self-evaluation?" Pet. i. Using that purported dichotomy, Petitioners assert that the Seventh Circuit held the latter while other circuits have held the former. *Id.* 36-37. But, in reality, the decision below likewise determined Woodward's knowledge *as of the time of the certifications*.

The decision below expressly held that "[Petitioners] do not point to any evidence that a decisionmaker at Woodward agreed with their concerns at the time Woodward made the statements…." Pet.App. 11. For example, the decision expressly concluded that the evidence was "insufficient to show that [Woodward engineer] Krugler had knowledge that Woodward's

certifications were false at the time that they were made." *Id.* 12; *see also id.* 11-12.

The Petition misleadingly omits any mention of these critical statements in the decision below. Pet. 20-21, 36-39. Instead, Petitioners fixate on the fact that the decision discussed the investigation that Woodward conducted after they had raised their asserted concerns. *Id.* Thus, the real question presented is *not* whether knowledge of falsity must be determined at the time the statements were made; rather, it is whether, in concluding that a contractor lacked knowledge of falsity at the time it made the statements, a court may rely in part on the contractor's subsequent investigation and rejection of the falsity allegations.

B. Petitioners identify no circuit split on the real question presented. They do not cite any case holding that a contractor's subsequent investigation and rejection of falsity allegations cannot be used to bolster the conclusion that the contractor lacked knowledge of falsity at the time it made the alleged false statements.

Indeed, the few cases that Petitioners cite (Pet. 36-37) were not applying the FCA's knowledge element at all, let alone addressing the relationship between a contractor's knowledge at the time of the statements at issue and the contractor's subsequent investigation of falsity allegations. *See United States v. Anchor Mortgage Corp.*, 711 F.3d 745, 748 (7th Cir. 2013) (holding only that, under the FCA's reduced-damages provision, self-reporting later violations does not reduce damages for earlier unreported violations); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir.

1999) (holding only that the district court had adopted too narrow an interpretation of the FCA's falsity element); *U.S. ex rel. Oliver v. The Parsons Co.*, 195 F.3d 457, 463 & n.3 (9th Cir. 1999) (holding only that a contractor who knowingly made a false claim cannot negate the FCA's falsity element by later hypothesizing a reasonable interpretation of the claim that would have rendered it true; and also holding that, nevertheless, the reasonableness of the interpretation is relevant to whether the contractor acted knowingly in the first place).

The absence of a circuit split is unsurprising because the Seventh Circuit's holding is clearly correct. When a court is deciding whether a contractor knew that a statement was false at the time it was made, it would be illogical to prohibit the court from considering the fact that the contractor subsequently investigated and rejected the falsity allegations. The contractor's ultimate determination that the statements were true is powerful evidence that it did not know the statements were false when they were initially made, at least absent any counter-evidence that the relevant decisionmakers changed their mind in the interim or that the investigation was pretextual. *See* Pet.App. 10-11 (finding no such counter-evidence here). Indeed, it would be especially illogical to prohibit a court from relying in part on a contractor's subsequent investigation when, as here, there is no affirmative evidence at all that the contractor's decisionmakers believed the statements were false at the time they were made. Since the absence of such evidence is alone fatal to the plaintiffs' case, the court's reliance on the later investigation is at worst superfluous.

C. Petitioners thus are forced to contest the determination by both courts below that there is no evidence whatsoever that Woodward had knowledge of falsity at the time the certifications were made. Pet. 37-38. But such a fact-bound request for error correction does not warrant this Court's review.

Moreover, the analysis of the record by the courts below was clearly correct. Petitioners contend that Krugler knew as early as 1997 that the Grade A joint violated SP-865 simply because he knew that the joint was not being x-ray inspected. *Id.* But, as the Seventh Circuit explained, "Krugler explained at the time that X-ray inspection was unnecessary [and] reiterated that belief during litigation." Pet.App. 11. And, as the court further explained, it is irrelevant that Petitioners' proffered experts disagreed with Krugler's belief that the Grade A joint complied with SP-865. *Id.* 12. Proof of "knowledge" of falsity requires much more than "a difference in interpretation or even negligence." *Id.* 10.

D. Likely recognizing the foregoing reasons why the knowledge question does not warrant this Court's review, Petitioners devote only three pages to that question, focusing instead almost entirely on the materiality question. *Compare* Pet. 36-39, *with id.* 21-36. But the Seventh Circuit's knowledge holding is an independent ground supporting its judgment. Pet.App. 9-10. Accordingly, the fact that the knowledge question is clearly not certworthy is sufficient basis to deny the Petition in its entirety, regardless of whether the materiality question would be certworthy on its own. In any event, the materiality question is not certworthy either, as demonstrated below.

II. THE PETITION MISCHARACTERIZES THE ACTUAL QUESTION PRESENTED BY THE SEVENTH CIRCUIT'S MATERIALITY HOLDING, WHICH IS SPLITLESS, FACT-BOUND, AND CORRECT

A. Petitioners misstate the question that is actually presented by the Seventh Circuit's materiality holding. The Petition presents the following question: "Is the materiality of a false statement based on the potential effect of the statement when presented or on the actual effect of the statement when discovered?" Pet. i. Using that purported dichotomy, Petitioners assert that the Seventh Circuit held the latter while other circuits have held the former. *Id.* 30-31. But, in reality, the decision below likewise determined materiality by applying *an objective, potential-effect standard*.

The decision below expressly held that materiality under the FCA is an "objective standard" that turns on whether the alleged false statement is "capable of influencing" the Government's payment decision. Pet.App. 12-13 (citing 31 U.S.C. § 3279(b)(4) and *Rogan*, 517 F.3d at 452). Notably, *Rogan* and § 3279(b)(4) are the principal authorities upon which Petitioners themselves rely. Pet. 21-30.

The Petition admits in passing that the decision below invoked the materiality standard articulated in § 3729(b)(4) and *Rogan*. *Id.* 30. Yet Petitioners fixate on the fact that, in applying that standard, the decision discussed the Government's actual conduct after it was fully informed of Petitioners' allegations. *Id.* 30-31. Thus, the real question presented is *not* whether materiality must be determined under an objective, potential-effect standard; rather, it is whether, in concluding that an alleged false

statement objectively lacked the potential to affect the Government's payment decision, a court may consider it relevant that the Government is fully informed about the falsity allegation and yet continues to purchase, pay for, and use the product without requesting any process changes or financial changes in response.

B. Petitioners identify no circuit split on the real question presented. They do not cite any case holding that the fact that the Government continues to purchase, pay for, and use a product without change even after becoming fully informed of the alleged false statement is irrelevant to whether the falsity objectively had the potential to affect the Government's payment decision.

Almost all of the cases that Petitioners cite (Pet. 21-31) are inapposite. One group of cases merely holds that a false statement objectively *could have* had the potential to affect the Government's payment decision even though it did not actually affect the payment decision in light of the *fortuity* that the Government either allowed the payment without reading the false statement or disallowed the payment despite reading the false statement. *See United States v. Triple Canopy, Inc.*, 775 F.3d 628, 639 (4th Cir. 2015); *United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008); *U.S. ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc.*, 400 F.3d 428, 446-47 (6th Cir. 2005). A second group of cases merely holds that, where a contractor stopped making the false statements *before* the Government learned of them, a Government official's testimony as to whether he *would have* denied previous payments if he had known at the time is neither necessary nor

dispositive, given the testimony's post hoc nature and the witness's possible idiosyncrasies. *See Rogan*, 517 F.3d at 452; *U.S. ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 82-84, 94-96 (2d Cir. 2012). And a third group of cases merely holds that, where a contractor makes false statements *to obtain* a contract, the Government's continued payments for services under the contract may be irrelevant, because the fraudulent inducement does not necessarily pertain to *the services' quality*. *See U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 915-17 (4th Cir. 2003); *U.S. ex rel. Longhi v. United States*, 575 F.3d 458, 471-72 (5th Cir. 2009).

Indeed, the only apposite case that Petitioners cite reached the same conclusion as the Seventh Circuit did here. Namely, in *U.S. ex rel. Loughren v. Unum Group*, 613 F.3d 300 (1st Cir. 2010), the court held that "evidence of the [Government's] knowledge [of], and apparent acquiescence in," the same type of allegedly false statements that have been challenged by the *qui tam* relator is "highly relevant to the essential element of materiality," because it strongly suggests that the falsity "could not have been capable of influencing the [Government's payment] decision." *See id.* at 316. Moreover, Petitioners fail to acknowledge that other cases are in accord. *See, e.g.*, *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 378-79 (4th Cir. 2008) (holding that an allegedly false certification of contractual compliance lacked "the capability … to influence" the Government where the Government "had already observed [the defendant's] performance … [and] had ample basis by which to judge [the defendant] and its ability to comply").

The absence of a circuit split is unsurprising because the Seventh Circuit's holding is clearly correct. When the Government is fully informed about the alleged false statement and yet continues to purchase, pay for, and use the product without requesting any process change or financial change in response, it would be illogical for the Government nonetheless to claim that it was the victim of a material fraud about the quality of the product. And when the Government itself could not logically prevail in a fraud claim, it would be especially illogical for a *qui tam* relator to prevail on that same claim on the Government's purported behalf. In short, as the Seventh Circuit recognized in an earlier case, it "verges on … frivolous" to bring a *qui tam* fraud suit alleging insufficient product testing where "the federal government is 100% satisfied with the … products it receives … and with the representations made in connection with the sales." *See Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732-34 (7th Cir. 1999).

C. Petitioners thus are forced to contest the determination by both courts below that the evidence indisputably shows that the Government is fully informed about the alleged false certifications and yet remains unconcerned. Pet. 31-33. But such a fact-bound request for error correction does not warrant this Court's review.

Moreover, the analysis of the record by the courts below was clearly correct. Petitioners contend that DySard's investigation in 2005 was unreliable for various reasons. *See id.* But, as the Seventh Circuit explained, DySard testified in his deposition that the alleged "inadequacies in [his] investigation" "did not

affect the outcome of his investigation." *See* Pet.App. 15. And, as the court further explained, "even if the government was misled … at the time [of DySard's investigation], it has since been made aware of Woodward's actual practices yet continues to buy and use the sensor" without requesting any type of change in response. *See id.*

D. In any event, the Seventh Circuit provided an additional basis for its materiality holding that is independent of the Government's actual conduct. Namely, the court explained that Woodward's "right to changes its shop procedures at any time without the government's permission" refutes Petitioners' claim that Woodward's compliance with the "specific [SP-865] standards are truly material to the government's decision to buy the sensor." *Id.* 14. Accordingly, this case is not an appropriate vehicle for this Court to consider whether the Government's actual conduct is relevant to materiality, because the materiality holding below does not depend on the Government's actual conduct and thus will be unaffected by this Court's decision.

To be sure, Petitioners also contest the Seventh Circuit's "right to change" rationale. Pet. 34-35. But Petitioners do not even frame that as a question presented, let alone allege that a circuit split exists on it. *Id.* And their request for fact-bound error correction does not warrant this Court's review.

Moreover, the Seventh Circuit's analysis was clearly correct. Petitioners contend that Woodward's right to change SP-865 at any time without the Government's permission does not negate the potential effect on the Government of any (assumed) false certification of compliance with SP-865 as it

existed at the time of certification. *Id.* But, as the Seventh Circuit explained, a false statement in a certification is not "necessarily material" because it might involve a "minor technical violation[ ]" that is "inconsequential" to the Government's payment decision. Pet.App. 13. And, as the court further explained, that is precisely so for the non-compliance with SP-865 alleged here: because Woodward had the contractual right to resolve any technical non-compliance with "specific" provisions in SP-865 simply by revising its own shop procedures to say even more precisely what it believed they already meant, "it would be odd" if the Government cared about any (assumed) false certification in this regard. *See id.* 14. Moreover, while Petitioners also now dispute that Woodward had the contractual right to unilaterally revise SP-865, they ignore that they already conceded this point in the district court. *Compare* Pet. 35, *with* Dkt. 204, ¶13 (in responding to Woodward's statement of undisputed fact that "[its] contracts with DOD and GE do not require it to notify or obtain the consent of those customers before altering or revising SP-865," Petitioners "agree[d]," at least "[t]echnically speaking").

In sum, this case is not an appropriate vehicle to review any version of the question presented concerning the relevance of the Government's conduct to materiality. Woodward's unilateral right to change SP-865 is an independent ground for the court's materiality holding, and the court's additional holding that Woodward lacked knowledge of any (assumed) false certifications at the time they were made is an independent ground for the court's judgment rejecting Petitioners' *qui tam* claims.

CONCLUSION

The Petition should be denied.[2]

MAY 2016

Respectfully Submitted,

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[2] Petitioners rightly do not request this Court to GVR in light of the forthcoming decision in *United Health Services v. U.S. ex rel. Escobar*, No. 15-7 (U.S.). The questions presented in that case concern the FCA's falsity element — specifically, the so-called "implied certification" theory of falsity — whereas the Seventh Circuit in this case assumed that the FCA's falsity element was satisfied and instead ruled against Petitioners on the FCA's knowledge and materiality elements. Thus, however this Court resolves *Escobar*, it will not affect the Seventh Circuit's judgment here.