No. 09-666

In the Supreme Court of the United States

LITHIUM POWER TECHNOLOGIES, INC. ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. ALFRED J. LONGHI, JR., ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MICHAEL S. RAAB
NICHOLAS BAGLEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Petitioners were held liable under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, for falsifying information in several applications for federal research funding. The court of appeals held that the false statements in question were relevant to the government's decision to fund petitioners' research; that the evidence demonstrated that petitioners had acted with the requisite scienter; and that the government was entitled to a damages award in the amount of the funding that petitioners had secured under false pretenses. The questions presented are as follows:

1. Whether the court of appeals correctly concluded that petitioners' false statements were material to the government's funding decisions.

2. Whether the court of appeals correctly found that petitioners had acted with reckless disregard for the truth or falsity of their statements.

3. Whether the court of appeals correctly determined that the proper measure of damages to the United States was the amount of money that the government had disbursed as a result of petitioners' false statements.

4. Whether the court of appeals correctly held that it would violate public policy to dismiss the relator's FCA suit against his former employer based on the relator's agreement to release the employer from legal claims.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 09-666

LITHIUM POWER TECHNOLOGIES, INC. ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. ALFRED J. LONGHI, JR., ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 575 F.3d 458. The opinions of the district court granting the government's motions for summary judgment (Pet. App. 39-68, 69-120) are reported at 530 F. Supp. 2d 888 and 513 F. Supp. 2d 866.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2009. A petition for rehearing was denied on September 8, 2009 (Pet. App. 140-141). The petition for a writ of certiorari was filed on December 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, is "the Government's primary litigative tool for combating fraud." S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986). Under the FCA as it existed at the time of the events at issue in this case, any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1), "is liable to the United States Government" for civil penalties "plus 3 times the amount of damages which the Government sustains because of the act[s] of that person," 31 U.S.C. 3729(a).[1] Suits to collect damages and civil penalties under the Act may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1). The FCA defines the terms "knowing" and "knowingly" to encompass situations in which a person "has actual knowledge of [particular] information," "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. 3729(b)(1)-(3). The Act further provides that "no proof of specific intent to defraud is required." 31 U.S.C. 3729(b).

2. In 1982, Congress established the Small Business Innovation Research (SBIR) Program to provide research assistance to small businesses "in order to main-

---

[1] In 2009, while this case was pending, Congress amended the FCA. See Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4, 123 Stat. 1621. All citations to the FCA in this brief are to the Act as it existed prior to those amendments.

tain and strengthen the competitive free enterprise system and the national economy." 15 U.S.C. 638(a). To achieve that objective, Congress directed each federal agency with a research and development budget exceeding $100 million to establish an SBIR program and to provide specified portions of that budget to small businesses. See 15 U.S.C. 638(f). Each agency with an SBIR program is responsible for "select[ing] awardees for its SBIR funding." 15 U.S.C. 638(g)(5).

The Department of Defense (DoD) administers an SBIR program in which 12 military components participate. Pet. App. 3. Small businesses seeking to secure an SBIR grant generally submit proposals in response to specific research topics identified in "program solicitations." See *ibid.* Proposals are evaluated "on a competitive basis," 67 Fed. Reg. 60,084 (2002), and DoD selects those proposals that it "perceive[s] offer the best value to the government and nation," Pet. App. 3. The program is highly selective. *Id.* at 70. Among other factors, "DoD specifically considers the: (1) key personnel available to perform the research, (2) facilities and equipment available to the applicant, and (3) scope of any previously funded work performed by the applicant that may be similar to that proposed." *Id.* at 3.

Two types of SBIR grants are available under DoD's SBIR program. The first is a small trial grant for Phase I research. "A Phase I research grant is intended for the recipient to determine the scientific, technical, and commercial merit and feasibility of ideas submitted under the SBIR program." Pet. App. 4. Phase I grant awards range from $60,000 to $100,000 and cover up to a nine-month period. *Ibid.*

If DoD determines that the recipient of a Phase I grant has demonstrated that future research "may po-

tentially yield a product or process of continuing importance to the DoD and the private sector, it can award a Phase II grant." Pet. App. 4. Only those applicants who have received a Phase I award can submit a Phase II proposal. *Ibid.* "A Phase II grant is expected to produce a well-defined, deliverable prototype and typically ranges from $500,000 to $750,000 over a two-year period." *Ibid.*

"During Phase III of a research and development project, an applicant is expected to obtain funding from the private sector or non-SBIR government sources to develop the prototype into a viable product." Pet. App. 4. The Phase I and Phase II grants thus are intended to aid in the development of a product that, during Phase III, the small business can market on its own.

3. Petitioner Lithium Power Technologies, Inc. (Lithium Power), is in the business of designing and manufacturing specialized lithium-based batteries. Pet. App. 4. Petitioner M. Zafar Munshi is Lithium Power's majority shareholder, president, chief executive officer, and chairman of the board. *Ibid.* To date, Lithium Power has derived most of its funding from government sources. *Id.* at 73.

Petitioners first applied for SBIR funds in 1998. Pet. App. 72. They submitted proposals and won Phase I and Phase II grant awards from both the Air Force and the Ballistic Missile Defense Office (BMDO). See *id.* at 71-73. Those grants were for "research that could lead to the development of very thin rechargeable batteries," *id.* at 5, and "study [of] the feasibility of microelectrical-mechanical systems * * * batteries using solid electrolytes for micro-satellites" *id.* at 73. Petitioners received a total of more than $1.6 million under the four SBIR grants. *Id.* at 5.

In 2000, relator Alfred J. Longhi, Jr., joined Lithium Power as Vice President for Sales and Marketing. Pet. App. 5. Over the next two years, "Longhi began to suspect that [petitioners] were defrauding the federal government" by, *inter alia*, making false statements in SBIR applications. *Ibid.* Longhi was laid off in 2002. *Id.* at 6.

4. Shortly before he was laid off, Longhi filed a *qui tam* action against petitioners under the FCA. Pet. App. 6. In 2005, after investigating Longhi's claims, the United States intervened in the suit. *Id.* at 6-7. The following year, the United States moved for partial summary judgment as to liability. *Id.* at 7. In that motion, the government "argued that the undisputed record evidence demonstrated that [petitioners] had, at a minimum, shown a reckless disregard for the truth regarding many of the representations in their four SBIR grant proposals." *Ibid.*

The district court entered summary judgment for the government as to liability. Pet. App. 69-120; see *id.* at 7-8. The court concluded that petitioners' "BMDO Phase II proposal falsely stated that Lithium Power was incorporated in 1992" when the company was not actually incorporated until 1998; that Lithium Power had "knowingly falsified statements regarding its facilities and equipment"; that petitioners had "acted with reckless disregard to the falsity of statements by representing that Lithium Power had cooperative arrangements with the University of Houston and Polyhedron Laboratories"; and that petitioners had "failed to disclose in [their] Air Force SBIR grant proposals that Lithium Power had previously undertaken related work in connection with a BMDO SBIR grant." *Ibid.*; see *id.* at 88-113. The court further found that petitioners' misstate-

ments were "material" to the government's payment decisions because they had a natural tendency to influence, and had in fact influenced, the government's award of SBIR grants. See *id.* at 113-118.

The district court subsequently entered an award of treble damages and civil penalties totaling slightly more than $5 million. Pet. App. 39-68. In calculating that award, the court determined that the government's actual damages were equal to the full amount of the funds it had paid to Lithium Power under the SBIR program. *Id.* at 47-63. Petitioners argued that the damages should be reduced to reflect the benefits that the government had purportedly received from the research conducted by petitioners under the program. In rejecting that contention, the court explained that petitioners' activities had "produced no tangible benefit to the government" because "[t]he batteries developed through the SBIR funding belong to [Lithium Power]—not the government," and Lithium Power "had every intention of marketing those batteries to the government and private industry." *Id.* at 53-54. The court further explained that any intangible benefit the United States might have received from the research was "clearly offset by the lost opportunity for innovation by the eligible deserving small businesses that did not receive the funds which [Lithium Power] fraudulently induced from the government." *Id.* at 61.

5. The court of appeals affirmed. Pet. App. 1-37.

a. The court of appeals explained that a false statement made in connection with a request for federal funds provides a basis for FCA liability only if it is "material" to the government's payment decision. Pet. App. 15. The court further explained that "a false statement is material if it has a natural tendency to influence, or

[is] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* at 18 (quoting *Neder* v. *United States*, 527 U.S. 1, 16 (1999) (internal quotation marks in *Neder* omitted; bracket in original)). The court noted that the "natural tendency" test does not require proof that the false statement actually affected the outcome of a governmental decision. *Id.* at 20. Rather, the court explained, that test requires "only that the false or fraudulent statements either (1) make the government prone to a particular impression, thereby producing some sort of effect, or (2) have the ability to [a]ffect the government's actions." *Id.* at 21. In declining to adopt an "outcome materiality" standard, under which a defendant's misrepresentations or omissions must be shown to have actually affected the government's payment decisions (see *id.* at 19), the court noted (*id.* at 22-23) that Congress had "embraced" the "natural tendency" test in enacting the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4, 123 Stat. 1621.

b. The court of appeals held that the government had met its burden of demonstrating that petitioners had "knowingly provided false or fraudulent statements in the SBIR grant proposals." Pet. App. 24. The court explained that petitioners had "lied in all four SBIR grant proposals regarding a cooperative arrangement with the University of Houston and Polyhedron Laboratories." *Ibid.* The court rejected as "patently absurd" petitioners' argument that, "because members of the public could use labs at the University of Houston and Polyhedron Laboratories for a fee, Lithium Power, as a member of the public, had an 'arrangement' with both institutions." *Ibid.* The court found that petitioners had misled the BMDO and the Air Force by making these

statements "either purposefully, or with reckless disregard to [their] truth or falsity." *Ibid.*

The court of appeals further explained that one of petitioners' grant proposals had claimed that the company was incorporated in 1992, when in fact it was incorporated in 1998. Pet. App. 25. "This was not a mere typographical error," the court observed, because "Lithium Power was not incorporated until five months after it submitted" the application. *Ibid.* "In addition," the court noted, petitioners had "lied about the existence of Lithium Power's facilities." *Ibid.* Petitioners had claimed in one of their grant proposals that they had roughly 4000 square feet of new laboratory and office space, as well as a 500-square-foot dry-room. *Id.* at 96. In fact, these facilities "were under construction at the time the [proposal] was submitted." *Id.* at 25.

Finally, the court found "troubling" petitioners' failure to apprise the Air Force of its prior receipt of a grant for similar work from BMDO. Pet. App. 25. Although the SBIR application required applicants to describe "significant activities directly related to the proposed effort and previous work not directly related to the proposed effort but similar," *ibid.* (internal quotation marks omitted), petitioners had not disclosed the work they had undertaken in connection with the previous grants from BMDO, see *id.* at 25-26. The court found that this "omission, again when coupled with the misrepresentations regarding Lithium Power's cooperative agreements, establish that [petitioners] had no intention to perform according to the terms of the SBIR." *Id.* at 26.

c. The court of appeals held that petitioners' false statements were material to the government's funding decisions because those statements "had the potential to

influence the BMDO and Air Force's decisions to award Lithium Power the SBIR grants." Pet. App. 26. The court explained that petitioners had "painted a picture of an established company, that was so well-respected in the community that it had developed a strong relationship with two notable research organizations. In reality, Lithium Power was a company that was in its preliminary stages of development that had yet to demonstrate any proven success." *Ibid.*

The court of appeals further explained that the record contained evidence that petitioners' "false statements actually influenced the decision to award" the grants to petitioners. Pet. App. 26-27. One of the BMDO evaluators had "recommended approving [petitioners'] proposal because Lithium Power had adequate facilities to conduct the project—in actuality Lithium Power had no such facilities." *Id.* at 27. Another BMDO evaluator stated that his recommendation to fund petitioners' proposal "was greatly influenced by the false statements," and an Air Force evaluator "stated that he would not have approved funding the Air Force proposals if [petitioners] had included information regarding" the previous grants secured from BMDO. *Ibid.* The court concluded that, "even if [it] were to apply the 'outcome' materiality standard, [it] would still conclude that Lithium Power's false statements were material." *Id.* at 27 n.8.

d. The court of appeals also upheld the district court's damages award. Pet. App. 28-30. The court held that, "[i]n a case such as this, where there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to [petitioners]." *Id.* at 30. The court rejected petitioners'

contention that the damages should be reduced because the government had received the tangible benefit of Lithium Power's research. The court explained that the relevant contracts "did not produce a tangible benefit to the" government because "[t]he end product" of petitioners' research "did not belong to the BMDO or the Air Force." *Id.* at 29. Rather, the court concluded, "[t]he Government's benefit of the bargain was to award money to eligible deserving small businesses," and that benefit "was lost as a result of [petitioners'] fraud." *Id.* at 30.

ARGUMENT

With respect to the first three questions presented in the petition for a writ of certiorari, the court of appeals' decision is correct and does not conflict with any decision of this Court or of any court of appeals. Further review of those issues therefore is not warranted.[2]

1. a. The FCA provision under which petitioners were held liable prohibits the knowing submission to a federal officer or employee of "a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). A false statement submitted in connection with a request for payment will render the claim "false or fraudulent" if the false statement is material to the government's funding decision. As the court of appeals held

[2] In addition to the holdings described above, the district court also determined that a release clause in a contract that relator Longhi had entered into shortly after filing his *qui tam* suit was unenforceable on grounds of public policy. Pet. App. 125-139. The court of appeals affirmed that determination. *Id.* at 30-33. The government did not address that issue in the court of appeals and takes no position on it here. As petitioner recognizes (Pet. 30-31), the resolution of that issue "do[es] not affect any of the claims by the government" but rather bears only on the potential liability to each other of petitioners and the relator.

(Pet. App. 18), and as petitioners acknowledge (Pet. 7-8), the appropriate standard for gauging whether a false statement is "material" for purposes of the FCA is whether that statement "has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it is addressed." *Neder* v. *United States*, 527 U.S. 1, 16 (1999) (internal quotation marks and bracket omitted).

Under that standard, the false statements that petitioners submitted to secure research grants from the federal government were material to the government's funding decisions. Petitioners averred in their proposals that Lithium Power had "cooperative arrangements" with a university and a private facility for use of laboratory space, when in fact the company had no such arrangements, informal or otherwise. Pet. App. 98-99. Petitioners claimed that Lithium Power had been incorporated since 1992, when the company was not actually incorporated until May 1998—five months *after* petitioners submitted their first SBIR proposal. *Id.* at 88-89. Before their facilities were built, petitioners falsely asserted that Lithium Power had thousands of square feet of laboratory and office space and a large "dry room" for developing battery technology. *Id.* at 96. And when asked to disclose their related work, petitioners failed to inform the Air Force that they had undertaken related work financed by grants from its sister agency. *Id.* at 25.

As the court of appeals correctly concluded (Pet. App. 25), petitioners' misrepresentation of their business credentials and research capacity gave the impression that Lithium Power was an established and experienced business with ties to the research community rather than a fledgling start-up company with no proven

history of research. The false impression that petitioners gave the government enhanced the likelihood that their proposals would be chosen in a highly competitive application process. The false statements therefore had a "natural tendency" to influence the government's funding decisions.

Petitioners contend (Pet. 11-12) that the court of appeals' description of the materiality standard conflicts with the context-sensitive approach taken by this Court in *Kungys* v. *United States*, 485 U.S. 759, 770 (1988).[3] That argument lacks merit. In explaining that a false statement has a "natural tendency to influence" a government decision when it "either (1) make[s] the government prone to a particular impression, thereby producing some sort of effect, or (2) ha[s] the ability to [a]ffect the government's actions," the court of appeals adopted precisely the sort of context-driven inquiry that petitioners claim it eschewed. Pet. 12 (quoting Pet. App. 21). Rather than "analyz[ing] materiality in the abstract" (Pet. 9), the court of appeals examined whether petitioners' specific false statements would have had a tendency to affect the decision to distribute SBIR grant money.

---

[3] Petitioners also suggest that variations among the courts of appeals' understanding and application of the materiality standard constitute a circuit split that warrants this Court's review. Pet. 8. Any such divergence is minor and undeserving of this Court's attention. Moreover, Congress eliminated any confusion that previously may have existed when it enacted FERA § 4(a)(2), 123 Stat. 1623. The Act clarified that the "natural tendency" test from *Neder* supplies the appropriate governing standard. In any event, this case would be an unsuitable vehicle for deciding whether the "natural tendency" or the "'outcome' materiality" standard governed under prior law, since the record indicates (and the courts below found) that petitioners' misrepresentations had an *actual* effect on the government's funding decisions. See Pet. App. 26-27 & n.8, 114-118; pp. 13-14, *infra*.

Because those statements falsely inflated petitioners' credentials and enhanced the likelihood that petitioners' grant proposals would be selected in a competitive application process, the court held that they were material. Pet. App. 26.

The court of appeals' application of the "natural tendency" test is fully consistent with this Court's decision in *Kungys*. The Court in that case held that several trivial misrepresentations that an alien had made in his naturalization proceedings (including misrepresentations as to his precise age and city of birth) were not material because they had no bearing on the government's decision to grant him citizenship. 485 U.S. at 774-776. In contrast to the irrelevant biographical details in *Kungys*, this case involves misrepresentations about a business's credentials made to government officials who distributed federal funds based in part on the relevant federal agencies' assessment of those credentials.

b. The court of appeals concluded not only that petitioners' false statements could have affected the government's decisionmaking processes, but also that those statements had an actual effect on the government's funding decisions. See Pet. App. 26-27 & n.8. Petitioners' fact-bound challenge to that holding (Pet. 12-15) lacks merit and does not warrant this Court's review. As the court of appeals explained, several SBIR evaluators stated without contradiction in the record that their recommendations to fund petitioners' proposals were greatly influenced by the false statements. Pet. App. 27. Petitioners assert (Pet. 13) that testimony of a former administrator of BMDO's SBIR program called the evaluators' statements into question. That individual testified, however, that primary responsibility for evaluating grant proposals fell to a pool of about 300 evaluators,

and that he "relied strictly on his evaluators with respect to funding" Lithium Power's proposal. Pet. App. 116. Thus, even if some of the false statements would not have mattered to the administrator had *he* been the primary evaluator, his testimony leaves undisturbed the conclusion that the false statements actually affected "the decision of the decisionmaking *body* to which [they were] addressed." *Kungys*, 485 U.S. at 770 (emphasis added; internal quotation marks omitted).

2. The court of appeals concluded (Pet. App. 24-26) that a pattern of false statements contained in four separate SBIR proposals demonstrated, at a minimum, that petitioners had acted with "reckless disregard of the truth or falsity" of the information contained in their proposals. 31 U.S.C. 3729(b)(3). Petitioners contend (Pet. 16-21) that the question of scienter is a factual matter that the lower courts could not properly resolve on summary judgment.

Petitioners are mistaken. The FCA defines the terms "knowing" and "knowingly" to include "actual knowledge of [particular] information," "deliberate ignorance of the truth or falsity of the information," and "reckless disregard of the truth or falsity of the information." 31 U.S.C. 3729(b)(1)-(3). The determination whether a defendant possessed "actual knowledge" or acted with "deliberate ignorance" requires an inquiry into the defendant's subjective state of mind. The civil standard for recklessness, by contrast, includes an objective test that is met when the actor "does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so." Restatement (Second) of Torts § 500 cmt. a (1965); see *Farmer* v. *Brennan*, 511 U.S. 825, 836 (1994) ("The civil law generally calls a person reckless who acts * * * in the face

of an unjustifiably high risk of harm that is either known or so obvious that it should be known."). Consistent with that understanding, the FCA states that "no proof of specific intent to defraud is required" in order to establish liability under the Act. 31 U.S.C. 3729(b). Although ascertaining whether a party acted with an "improper motive" can raise questions of fact for a jury to resolve, *Crawford-El* v. *Britton*, 523 U.S. 574, 589 (1998), no such inquiry was needed for the courts below to determine that petitioners were at least reckless with regard to the truth or falsity of their statements.

Petitioners also suggest (Pet. 18-19) that their false statements were the result of mere inadvertence. When they submitted their proposals, petitioners surely knew that Lithium Power was not yet incorporated, that its facilities had not been built, that it had no "cooperative arrangements" with research facilities in place, and that it had previously undertaken related work with a BMDO grant. Yet petitioners' applications made false statements about their qualifications with respect to each of these known facts—indeed, petitioners repeated most of these false statements several times over. The court of appeals therefore correctly concluded that petitioners were at least reckless in failing to verify the information they submitted to the federal government. Petitioners' fact-bound challenge to that conclusion does not warrant this Court's review.

3. Petitioners also challenge the damages award. See Pet. 21-30. The court of appeals held that, "[i]n a case such as this, where there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to [petitioners]." Pet. App. 30. The court rested its conclusion in part on

the fact that the government administers the SBIR program not to secure for itself a tangible good, such as the batteries that Lithium Power developed, but to provide benefits to "deserving small businesses." *Ibid.*; see 15 U.S.C. 638(a) (SBIR program serves "to maintain and strengthen the competitive free enterprise system and the national economy"); 15 U.S.C. 631(a); 67 Fed. Reg. at 60,072 ("The statutory purpose of the SBIR Program is to strengthen the role of innovative small business concerns (SBCs) in Federally-funded research and research and development."). As the court explained, "[t]he BMDO and the Air Force's intangible benefit of providing an 'eligible deserving' business with the [SBIR] grants was lost as a result of [petitioners'] fraud." Pet. App. 30. Cf. *United States* v. *TDC Mgmt. Corp.,* 288 F.3d 421, 428 (D.C. Cir.) (holding that it would be reasonable to conclude that, when a middleman fraudulently concealed a financial interest in a transaction, a government program to pay middlemen for their services "no longer had any value to the government"), cert. denied, 537 U.S. 1048 (2002).

Petitioners contend (Pet. 24-27) that the decision below conflicts with the Fourth Circuit's ruling in *United States ex rel. Harrison* v. *Westinghouse Savannah River Co.*, 352 F.3d 908 (2003). *Harrison*, however, is distinguishable on its facts. That case involved a conventional service contract—specifically, to design and implement a training program. *Id.* at 911. Because the government in fact received the services for which it had contracted, the Fourth Circuit held that, "under the particular facts of this case, the district court properly required the plaintiff to prove damages by showing how much more the government paid [the defendant] to per-

form the subcontract than it would have paid another firm absent the false * * * certification." *Id.* at 923.

By contrast, the principal purpose of the SBIR program is not to secure services or procure a deliverable product. See Pet. App. 54 (district court explains that "[t]he batteries developed through the SBIR funding belong to [Lithium Power]—not the government," and that Lithium Power "had every intention of marketing those batteries to the government and private industry"); *id.* at 29. It is instead to give deserving small businesses a realistic chance to compete against their larger, more established competitors. See 15 U.S.C. 638(a); Pet. App. 29-30. That purpose was entirely thwarted when a company with dubious qualifications received SBIR funding that should have gone to a more deserving candidate. Neither *Harrison* nor any other case cited by petitioners casts doubt on the court of appeals' damages analysis under the program at issue here. And, for the same reasons, this case would provide an unsuitable vehicle for determining the proper method of calculating damages in situations where the government receives significant benefits under a procurement contract despite the defendant's false statements.

Petitioners also contend (Pet. 27) that Lithium Power provided "a tangible benefit" to the government by "perform[ing] research and development services." As explained above, however, the government's benefit of the bargain was not the research services that petitioners claim they undertook. It was instead the opportunity to support deserving small businesses, and petitioners thwarted the purpose of the SBIR program by taking money that should have gone to a different candidate. The court of appeals correctly concluded that the government was damaged in the amount that, but for

petitioners' false statements, could have been directed to a more deserving applicant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MICHAEL S. RAAB
NICHOLAS BAGLEY
Attorneys

MARCH 2010