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No. 13-0552

In the Supreme Court of Texas

SHELL OIL COMPANY AND SHELL INTERNATIONAL, E&P, INC.,
Petitioners,

v.

ROBERT WRITT,
Respondent.

On Appeal from the First Court of Appeals for the
First Judicial District, Houston, Texas, No. 01-11-00201-CV

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE AMERICAN PETROLEUM INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IDENTITY OF AMICI CURIAE

The Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the American Petroleum Institute respectfully submit this brief as amici curiae in support of Petitioners.

The U.S. Chamber of Commerce is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country.

The National Association of Manufacturers is the largest manufacturing association in the United States, representing manufacturers in every industrial sector and in all 50 states. It is the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the nation.

The American Petroleum Institute is a national trade association representing over 600 member companies involved in all aspects of the oil and natural gas industry. Its members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person

[Footnote continued on next page]

SUMMARY OF ARGUMENT

Since 1977, and especially over the last decade, the Foreign Corrupt Practices Act ("FCPA") has played a very significant role in the federal regulation of multinational corporations. By punishing bribery and other illicit influence of foreign officials by U.S. companies, the statute seeks to improve the integrity of American businesses, promote market efficiency, and maintain the reputation of American democracy abroad.

From its very inception, both Congress and the two agencies charged with enforcing the statute—the Department of Justice and the Securities and Exchange Commission—have relied on companies to investigate themselves and voluntarily disclose possible FCPA violations. These regulatory agencies cannot realistically keep tabs on the confidential dealings of U.S. companies acting far from American shores. So they strongly encourage these corporations to self-report any potential FCPA violation as soon as possible.

While companies have undertaken great efforts to prevent FCPA violations from occurring, it is impossible to prevent all possible violations through internal controls and compliance systems. When they do occur, American businesses can temper the consequences of their employees' FCPA violations only if they liberally

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other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Tex. R. App. P. 11.

cooperate with federal authorities, disclosing all relevant information—including the identity of employees potentially complicit in the bribery scheme.

The decision of the court of appeals undermines this carefully constructed regime of corporate cooperation. It denies absolute privilege for a company's confidential voluntary disclosure of potential FCPA violations to government investigators—and by extension, absolute immunity from defamation suits arising out of those disclosures. If left intact, the decision below may force employers to make the difficult decision *not* to disclose all of the details in relation to potential FCPA violations as soon as they are aware of them.

What's more, by extending the immunity conferred by absolutely privileged communications only in *later* stages of the FCPA enforcement process, the court of appeals is virtually guaranteeing that federal investigators will not have the full cooperation of a corporation at the time when they need it most—during the initial investigation.

And because the statements that are now subject to these defamation suits are not widely publicized but, rather, are confidentially made only to government investigators, the court of appeals decision may make Texas a magnet for fishing-expedition suits from employees seeking to discover these reports through litigation against the many companies that have a significant presence in Texas.

The court of appeals expressed concern that absolute immunity would be used as a tool for employers to falsely accuse their employees of violating the FCPA. But those fears are meritless. False accusations risk implicating the corporation itself. Moreover, various federal statutes punish false statements to government investigators.

For all of these reasons, this Court should reverse the court of appeals decision below and hold that companies have absolute immunity against defamation suits for confidential statements made to government investigators.

ARGUMENT

I. The Decision Of The Court Of Appeals Undermines The Corporate Cooperation That Is Necessary For Compliance With And Enforcement Of The FCPA.

The FCPA is a valuable statute that helps to reduce corruption and to reinforce public and investor confidence in the markets here and abroad. In recent years, the number of FCPA enforcement actions has risen dramatically, increasing the significance of this statute both to multinational companies and to the government.

For the FCPA to be effectively and properly enforced, however, the DOJ and the SEC rely heavily on American companies voluntarily disclosing potential FCPA violations to these government agencies. By discouraging such self-reporting, the court of appeals decision in this case serves to obstruct the continued

enforcement of the FCPA and undercuts the policy goals that Congress sought to advance in passing this important anti-bribery statute.

A. The FPCA Plays A Vital Role In International Business And Corruption Prevention And Prosecution.

In 1977, Congress passed the Foreign Corrupt Practices Act to prohibit U.S. companies and companies listed on U.S. exchanges from paying or offering bribes to foreign officials in order to obtain or retain business opportunities. 15 U.S.C. §§ 78dd-1, dd-2, dd-3, 78m, 78ff. Congress determined that such practices tarnish the image of American democracy abroad, impair confidence in American businesses, hamper the efficiency of the market, anger the citizens of otherwise friendly foreign nations, and, put simply, are "morally repugnant" and "bad business." Foreign Corrupt Practices Act, S. REP. NO. 95-114, at 3-4 (1977).

Moreover, this "strong antibribery statute . . . help[s] U.S. corporations resist corrupt demands," enabling them to "refuse those requests" by citing American law and showing the legal and practical impossibility of acceding to a requested bribe. Unlawful Corporate Payments Act, H.R. REP. NO. 95-640, at 5 (1977) (quoting Bob Dorsey, former Chairman of Gulf Oil Company).

From its very inception, the FCPA has relied upon corporations to report the potentially questionable actions of their employees. *See* Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Succession Liability and Its Consequences*, 7 N.Y.U. J. L. & BUS. 247, 255-61

(2010) (recounting the history of the SEC's Voluntary Disclosure Program that led to the enactment of the FCPA). Congress became aware of the problem of foreign bribery and chose to address it only after hundreds of corporations, "most of them voluntarily," reported that individuals within the companies had made "questionable or illegal payments." H.R. REP. NO. 95-640, *supra*, at 4.

Over the past decade, the FCPA has taken on renewed importance for both the U.S. government and American businesses. For example, in 2005, the DOJ and the SEC initiated just 13 FCPA enforcement actions. In 2010, the agencies commenced 74 FCPA actions.[2] Since 2007, the government has initiated a total of almost 300 enforcement actions.[3] Average fines and penalties for a *single* action exceed $80 million, and the largest single penalty tops $800 million.[4] In 2010, over half of the $2 billion in fines that the DOJ's Criminal Division collected in 2010 was the result of FCPA enforcement actions.[5] DOJ officials have publicly

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2 GIBSON DUNN & CRUTCHER LLP, 2014 Mid-Year FCPA Update, http://www.gibsondunn.com/publications/Pages/2014-Mid-Year-FCPA-Update.aspx (July 7, 2014).

3 *Id.*

4 GIBSON DUNN & CRUTCHER LLP, 2013 Year-End FCPA Update, http://www.gibsondunn.com/publications/Pages/2013-Year-End-FCPA-Update.aspx (Jan. 6, 2014).

5 DEPT. OF JUSTICE, Press Release, *Department of Justice Secures More Than $2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division*, http://www.justice.gov/opa/pr/department-justice-secures-more-2-billion-judgments-and-settlements-result-enforcement (Jan. 21, 2011).

stated that "enforcement of the FCPA is second only to fighting terrorism in terms of priority."[6]

With so much at stake, it is not surprising that FCPA compliance is now "a main focus of concern for U.S. businesses."[7] Compliance programs in American corporations today are "light years ahead of where [they were] circa the mid-to-late 1990s," with companies "implementing more rigorous and sophisticated compliance protocols," including thorough internal investigations and candid self-reporting.[8] Although responsible companies have implemented and enforce strong compliance measures designed to avoid and address infractions, drastically reducing the occurrence of foreign bribery, the reality is that no internal control system can perfectly prevent all potential violations of the FCPA. *See* SEC DIV. OF CORP. FIN., *Staff Statement on Management's Report on Internal Controls Over Financial Reporting*, http://www.sec.gov/info/accountants/stafficreporting.htm, (May 16, 2005) ("[D]ue to their inherent limitations, internal controls cannot prevent or detect every instance of fraud.").

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6 Don Lee, *Avery Dennison Case a Window on the Pitfalls U.S. Firms Face in China*, L.A. TIMES, Jan. 12, 2009, http://articles.latimes.com/2009/jan/12/world/fg-avery12.

7 Laurence A. Urgenson et al., *New Bumps and Tolls Along the Road to FCPA Settlements*, at 1, BUS. CRIMES BULL. (Nov. 2009).

8 F. Joseph Warin et al., *FCPA Enforcement Trends*, THE CONFERENCE BD., at 2 (Feb. 2013), http://www.gibsondunn.com/publications/Documents/WarinChesleyConnor-FCPATrends.pdf.

In sum, voluntary compliance with the FCPA plays a critical role in the business of multinational corporations and the enforcement of ethical standards. The FCPA was founded on corporate self-reporting. So the invention of new legal rules that discourage businesses from cooperating with authorities attempting to root out bribery schemes undermines the values and policy goals Congress sought to advance in passing this landmark anti-corruption statute.

B. Enforcement Of The FCPA Requires Corporate Cooperation, Internal Investigation, And Self-Reporting.

By their very nature, FCPA violations are difficult to investigate. Potential violations of the FCPA involve conduct that is "harder to detect than [in] domestic cases, because much of the conduct often takes place abroad."[9] It is virtually impossible for the DOJ and the SEC to inquire about the actions of thousands of companies transacting in hundreds of countries across the globe.[10] If, as noted above, even corporations with the best internal controls are unable to detect every

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[9] Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 112th CONG. 37-38 (2011) at 43 (testimony of Greg Andres, Deputy Assistant Att'y Gen., Dep't of Justice); *see also* Grimm, *supra*, at 262 (citation omitted).

[10] *See* Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 731 (2009).

potential FCPA violation, the DOJ and the SEC "cannot hope to ferret out every instance of wrongdoing."[11]

Not surprisingly, then, the government has always relied upon businesses to cooperate with investigations and self-report any potential violations by corporate employees.[12] "Federal enforcement authorities have consistently encouraged, if not as a practical matter demanded, that as to the FCPA companies voluntarily conduct internal investigations, disclose potential violations and cooperate with government investigations."[13] With their vast resources, individualized focus, and access to documents and witnesses, "companies are actually much better positioned to gather more information more quickly overseas than the Justice Department or the SEC."[14] "Business entities possess unparalleled knowledge of and access to their own compliance and management systems, and are optimally

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[11] Grimm, *supra*, at 255 (quoting Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 171 (1990) (alterations omitted)).

[12] *See* Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary, 111th CONG. 15-16 (2010) at 8 (testimony of Greg Andres, Deputy Assistant Att'y Gen., Dep't of Justice) ("Many of our cases rely on the self-disclosure and cooperation of corporations . . . . We are getting a significant number of disclosures from corporations about their own criminal conduct."); *see also* Grimm, *supra*, at 255.

[13] 112th CONG. 37-38, *supra* n.9, at 43 (statement of George J. Terwilliger, Esq.).

[14] *Id.* at 54.

situated to uncover and respond to FCPA risks within their own organizations." Grimm, *supra*, at 254.

Consequently, the federal government often attempts to "incentivize corporations to make sure they have appropriate compliance procedures in place and that they voluntarily disclose violations when a rogue employee violates the law." 111th CONG. 15-16, *supra* n.12, at 7 (statements of Sen. Klobuchar). The official DOJ and SEC guidance places "a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters."[15] The government requires that corporations provide not just information on violations that they are certain of, but rather *any* "relevant information and evidence," as well as identification of "relevant actors inside and outside the company."[16]

Similarly, the U.S. Sentencing Guidelines reduce the offense level for companies that "report[] the offense to appropriate governmental authorities,"

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[15] U.S. Dep't of Justice and Securities and Exchange Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 54 (Nov. 14, 2012); *see also* Paul J. McNulty, *Principles of Federal Prosecution of Business Organizations*, at 7 (July 5, 2007) ("McNulty Memorandum"), http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf (considering "whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation, including senior executives," in deciding whether a corporation should be charged).

[16] DOJ & SEC, *supra* n.15, at 54; *see also id.* at 55 (requiring production of "*all* information *relevant* to the underlying violations") (emphasis added).

but—critically—the reduction hinges on whether the corporation has provided information that is "sufficient for law enforcement to identify . . . the *individual*(s) responsible for the criminal conduct." § 8C2.5(g)(1) & n.13 (emphasis added). Reporting a potential violation while remaining silent about the individuals possibly involved in such actions is not enough.

Moreover, after a company makes a voluntary disclosure following strong encouragement by federal authorities, the DOJ typically "enlists the company to conduct a comprehensive internal investigation which eventually leads to a disclosure of any and all potential violations." 111th CONG. 15-16, *supra* n.12, at 78 (statement of Michael Volkov); *see also* Grimm, *supra*, at 272-80 (discussing the central role of internal investigations in FCPA enforcement).

Indeed, it is only through vigorous corporate self-policing and voluntary disclosures that DOJ's recent success in "pursu[ing] more violations and bring[ing] in more criminal penalties than ever before" has become possible.[17] Voluntary disclosure has been called "The Engine That Fuels FCPA Enforcement," and through it, "the Justice Department has increased its prosecutions, minimized the use of its investigative resources, and increased the Treasury's coffers with substantial fines." 111th CONG. 15-16, *supra* n.12, at 78 (statement of Michael

[17] Alyssa Ladd, *The Catch-22 of Corporate Cooperation in Foreign Corrupt Practices Act Investigations*, 51 HOUS. L. REV. 947, 949-50 (2014).

Volkov). The numbers bear this out. For example, from 2005 to 2008, 50 out of 85 new FCPA investigations were the result of voluntary disclosures by companies to the SEC or the DOJ of possible violations.[18]

Corporate cooperation, internal investigation, and self-reporting thus form the cornerstone of FCPA compliance and enforcement. It is only through candid disclosure of *all* relevant information about *anyone* involved in a potential FCPA violation that American businesses can aid the DOJ and the SEC in this monumental task, while shielding the corporation at large and its shareholders from harsh sanctions resulting from the actions of a few bad apples.

C. The Court Of Appeals Decision Discourages Corporate Cooperation And Self-Reporting Of FCPA Violations, Undermining The Entire Statute And Its Goals.

The court of appeals decision strikes at the foundation of FCPA compliance and enforcement by granting an opportunity for employees to sue corporations if they dare to cooperate with federal authorities in disclosing all potential FCPA violations. By doing so, the court of appeals undercuts the policy goals that Congress sought to advance in passing the FCPA, including fighting corruption,

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[18] SHERMAN & STERLING LLP, *Recent Trends and Patterns in FCPA Enforcement*, at 9, http://www.shearman.com/~/media/Files/Old-Site-Files/LIT_FCPA_Trends_121208.pdf (Oct. 21, 2008).

promoting a healthy market, and improving American standing abroad. It does so in at least three ways.

First, and most obviously, the decision of the court of appeals to remove absolute immunity against defamation suits for corporations self-reporting potential FCPA violations discourages such voluntary disclosure, thus penalizing good corporate citizenship and impeding enforcement of the FCPA. Businesses faced with a difficult situation in which one of their employees may have committed an FCPA violation will be chilled from confidentially disclosing that employee's actions to the DOJ or the SEC, for fear that the employee may later bring suit.

After all, the decision to self-report is by no means an easy one for an American company. To be sure, businesses face stiffer penalties without voluntary disclosure. But even in cases where companies have fully cooperated with authorities, the penalties can climb into the hundreds of millions of dollars, in addition to a costly government investigation, reputational harm, legal and accounting fees, externally imposed monitors or compliance programs, waiver of attorney-client and work product privileges, and drop in stock price. "[W]hether to voluntarily disclose an FCPA violation is a complex decision, dependent upon the facts of each situation, with no guaranteed outcome," since "[a]ny benefit derived from a voluntary disclosure will be impossible to know at the time the disclosure is

made, in part because enforcement agencies do not have clear, formal guidelines on FCPA voluntary disclosures, including the weight they are given in the agency decision-making process." Grimm, *supra*, at 276 (citations and internal marks omitted).

Thus, "[f]or many companies, it is a difficult choice – does the company disclose the problem with no certainty as to the result or punishment, or does the company fix the problem internally and implement new programs to ensure compliance while running the risk that law enforcement may learn of such past violations." 111th CONG. 15-16 , *supra* n.12, at 79 (statement of Michael Volkov); *see also id.* at 92 (companies fear that self-reporting "will serve only to expose the company to increased liability, and will do little to actually protect the company"). Because "[t]he benefits of self reporting are not always clear," SHERMAN & STERLING, *supra* n.18, commentators have recognized that the court of appeals decision in this case, which has added liability for defamation to the list of reasons *not* to self-report, has put companies in a "Catch-22." *See* Ladd, *supra* n.17. And as a consequence of deterring companies from voluntary disclosure of potential FCPA violations, the government is severely hampered in its ability to detect and prosecute bribery and corruption scandals.

Second, the decision of the court of appeals encourages *delay* in voluntary disclosure of potential FCPA violations, rather than prompt reporting.

Specifically, the court held that absolute immunity from defamation suits for cooperating with authorities should be denied unless the speaker *waits* until authorities have commenced "judicial proceedings" or are in "serious contemplation of a judicial proceeding." *Writt v. Shell Oil Co.*, 409 S.W.3d 59, 72-73 (Tex. App.—Houston [1st Dist.] 2013). The "paradox" of this ruling is that "a proactive company that brings the violation to the DOJ's attention only receives a qualified privilege, while a company that waits to be discovered by the DOJ and delays cooperation receives an absolute privilege for the same communication." Ladd, *supra* n.17, at 978.

Moreover, as explained by the former Attorneys General of the United States in their letter brief to this Court, the court of appeals decision reduces the incentive to cooperate with law enforcement at precisely the moment when the authorities need it most. Withholding absolute immunity at early stages means that evidence may be denied, or production of evidence impeded, to DOJ or SEC officials during their investigations, at the time when that information is most valuable. Determining first if an employee is guilty before turning over any information about him, as the court of appeals would have businesses do, puts the cart before the horse—the whole point of investigation, which cannot proceed without the evidence, is to determine liability. Accordingly, contrary to the ruling below, the U.S. Sentencing Guidelines provide sentencing reductions only to those

corporations that cooperate *early*—namely, "at the same time as the organization is officially notified of a criminal *investigation*." § 8C2.5(g)(1) & n.13 (emphasis added).

Third, the court of appeals decision makes Texas a magnet for litigation while providing little benefit to employees of Texas companies. Because the disclosures at issue in this case are confidential and seen only by authorities vested with the public trust and an independent duty to evaluate the truth of any criminal allegation, the harm of any alleged defamation is minimal. Moreover, because the disclosures are confidential, Texas may become a venue for plaintiffs and their attorneys to engage in fishing expeditions seeking to uncover corporate self-reporting through use of court-imposed discovery mechanisms in hopes of manufacturing a defamation claim and extorting settlement. Indeed, in this case, Writt only discovered the alleged defamation when his now-defunct wrongful termination suit turned up Shell's report to the DOJ in discovery. *See* II C.R. 154.

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The negative impacts of the court of appeals decision are likely to be wide-ranging. Texas ranks second in the nation for the most number of Fortune 500 companies headquartered in a state—with 23 headquartered within the jurisdiction of the court of appeals alone. Thousands of other companies do a significant amount of business in Texas.

Moreover, the FCPA is not the only statute in which the government relies on corporate cooperation and self-reporting for enforcement. Voluntary disclosure is crucial to detection and prosecution in the areas of antitrust, fraud, false claims, and numerous other federal and state prohibitions. Taken together, DOJ enforcement actions resulted in more than $8 billion in penalties last year.[19] If the court of appeals decision is extended to these contexts as well, that would undermine enforcement of a wide variety of laws.

II. American Companies Have No Incentive To Falsely Accuse Their Employees Of FCPA Violations.

The court of appeals based its decision in part on the fear that granting companies absolute immunity against defamation suits arising out of voluntary disclosures to federal investigating authorities would "have the very dangerous effect of actually discouraging parties from being truthful with law-enforcement agencies and instead encourage them to deflect blame to others without fear of consequence." *Writt*, 409 S.W.3d at 61. This fear is unfounded.

For one, corporations are not tempted to falsely accuse their own employees of committing FCPA violations, because such accusations risk implicating the corporation itself. Corporations may be liable for the acts of their employees when

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19 DEPT. OF JUSTICE, Press Release, *Justice Department Collects More Than $8 Billion in Civil and Criminal Cases in Fiscal Year 2013*, http://www.justice.gov/opa/pr/justice-department-collects-more-8-billion-civil-and-criminal-cases-fiscal-year-2013 (Jan. 9, 2014).

employees, "acting within the scope of their employment, commit FCPA violations intended, at least in part, to benefit the company," and the company itself has acted with "corrupt intent." *See* DOJ & SEC, *supra* n.15, at 14, 27. Corrupt intent, in turn, "means an intent or desire to wrongfully influence the recipient" and requires at least corporate knowledge of the violation before or during its occurrence. *Id.* at 14.

As noted, the consequences for a company implicating itself in an FCPA violation are significant. Monetary penalties in the form of fines or disgorgement often reach into the tens of millions, if not hundreds of millions, of dollars.[20] In fact, in this very case, Shell eventually agreed to pay over $48 million in fines and penalties following its voluntary disclosures and self-reporting of the bribery scheme in which Writt was allegedly complicit.[21]

Moreover, regulators often demand that the company follow up a voluntary disclosure with a comprehensive internal investigation, resulting in millions of

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20 *See, e.g.*, DEPT. OF JUSTICE, Press Release, *Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay $223 Million in Fines and Forfeiture*, http://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and (Jan. 9, 2014) (company fined a total of over $384 million by the DOJ and the SEC despite "extensive cooperation with the department, including conducting an extensive internal investigation, making proffers to the government, voluntarily making current and former employees available for interviews, and providing relevant documents to the department").

21 DEPT. OF JUSTICE, Press Release, *Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties*, http://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery (Nov. 4, 2010).

dollars in legal and accounting services fees, in addition to legal fees associated with anticipated or actual litigation. Self-reporting is also an invitation for the government to conduct its own costly investigation, demanding production of millions of pages of documents and requiring waiver of confidentiality and attorney-client privileges. And settlement of FCPA violations typically requires implementation of government-imposed compliance programs and external monitors. Finally, the reputational harm to a company for admitting its employees were complicit in an illegal bribery scheme are immeasurable.

A business would be ill advised if it falsely accused one of its employees of violating the FCPA, not only because of the *respondeat superior* liability it may bring upon itself, but also because of the numerous consequences for lying to the government. Federal law punishes making "materially false, fictitious, or fraudulent statement[s]" by up to five years in prison and a fine of up to $500,000 for each statement. 18 U.S.C. §§ 1001, 3571(c). The company or responsible individuals may face the same punishments under the federal perjury or obstruction of justice statutes, as well as the statute punishing conspiracies to defraud the United States. *See* 18 U.S.C. §§ 371, 1505, 1510, 1621. Beyond the formal legal penalties, companies that provide federal investigators with a false scent may invite increased scrutiny and a reduced willingness to enter into a favorable plea, deferred prosecution agreement, or non-prosecution agreement.

Accordingly, this Court should not be concerned about the misplaced apprehension of the court below that maintaining absolute immunity for companies who voluntarily disclose potential FCPA violations committed by their employees would tempt businesses to falsely shift the blame onto their employees. Such a fear ignores that, legally, the blame may not be "shifted" at all since the company may be held liable for acts of its employees and, realistically, businesses face far greater consequences for making false statements to government investigators than any deterrence provided by potential defamation suits.

CONCLUSION

The court of appeals decision undermines corporate cooperation with federal government investigators and does little to discourage companies from making false statements to the government. In doing so, it impedes the government's investigation of FCPA violations and negatively impacts American businesses. Accordingly, the decision of the court of appeals should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

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