Nos. 21-1326 and 22-111

IN THE

Supreme Court of the United States

UNITED STATES, EX REL. TRACY SCHUTTE, *et al.*,

Petitioners,

v.

SUPERVALU INC., *et al.*,

Respondents.

UNITED STATES, EX REL. THOMAS PROCTOR,

Petitioner,

v.

SAFEWAY, INC.,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* SENATOR CHARLES E. GRASSLEY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Page

Page

STATUTES AND OTHER AUTHORITIES:

Cited Authorities

INTEREST OF *AMICUS CURIAE*[1]

Senator Charles E. Grassley was the principal sponsor in the Senate of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, which modernized the False Claims Act ("FCA") and made it a more effective weapon against Government fraud. Senator Grassley was also one of the Senate sponsors of the Fraud Enforcement & Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, which further strengthened the FCA as a weapon against fraud affecting federal programs. In addition to serving as Senate sponsor, Senator Grassley has remained active in Congress in defending the original intent of the legislation. Senator Grassley thus has a strong interest in ensuring that the Court interprets the FCA in accordance with Congress's language and intent. Senator Grassley urges the Court to correct a growing misinterpretation of the language of the FCA that threatens to undermine its critical role in policing those who do business with the government.

SUMMARY OF ARGUMENT

The FCA, which has been law since the Civil War, is the government's most important anti-fraud statute. In the modernization of the statute in 1986, Congress carefully crafted its provisions to catch all those who would defraud the American public. To this end, the statute expressly articulates three distinct mental

1. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than Senator Grassley and his counsel made any monetary contribution to its preparation and submission.

states for which defendants can be held liable. It holds accountable not just those who commit fraud with "actual knowledge," but also those who remain "deliberate[ly] ignoran[t]" of the rules or "reckless[ly] disregard" signs of misconduct a reasonable person would see. 31 U.S.C. § 3729(b)(1)(A). In crafting these three distinct mental states, Congress drew on well-established definitions in the common law of fraud. The statute's text and structure make plain that the three mental states are independent, and that satisfying any one of them is sufficient to support liability.

The opinions below, however, ignored this text and structure. *See United States ex rel. Schutte v. Supervalu Inc.*, 9 F.4th 455, 463 (7th Cir. 2021), *cert. granted*; *see also United States ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649, 657 (7th Cir. 2022), *cert granted.* They held that a defendant who *correctly* knows an act is unlawful is immunized from FCA liability if its lawyer, years later, can cook up an interpretation of the law under which the act was arguably permissible—even if that interpretation is *wrong* and the defendant did not have that interpretation at the time. That test makes a hash of the law of fraud, which focuses on what a defendant understood at the time it undertook a fraudulent act. That review of the defendant's contemporaneous understanding has always included consideration of any supposed ambiguity of the requirements alleged to be violated, as part of the analysis of the totality of circumstances surrounding a defendant's state of mind.

Worse, in turning the consideration of ambiguity from a part of the intent analysis into a threshold *post hoc* defense, the Seventh Circuit collapsed the three separate

routes to liability that Congress laid out into one, finding that such an after-the-fact excuse prevents not only a finding of recklessness, but also "actual knowledge" and "deliberate ignorance." By interpreting these as mere subsets of recklessness, the opinions read out the two subjective scienter terms Congress wrote into the statute, flying in the face of common law and clear statutory language.

Compounding its errors, the Seventh Circuit also crafted from whole cloth a novel and unprecedented requirement for proving scienter, which puts on the government a nearly impossible burden to anticipate and warn off future fraudsters from every colorable misinterpretation of the law.

The Seventh Circuit's radical departure from the statute continues a lamentable tradition of some courts interpreting the FCA in an unduly restrictive fashion, which Congress and this Court repeatedly have stepped in to correct.[2] The Court should repair this tear in the FCA. If it is not set right, it will not be long before

2. The Seventh Circuit's departure from the statute continues an unfortunate tradition of some courts issuing unduly restrictive interpretations of the FCA, adding extra elements not found in the text or distorting language that is. These interpretations largely have been applied to dismiss actions at the pleading stage, and in cases where the government has declined to intervene. Senator Grassley previously explained his concern with this pattern, which suggests that some courts are uncomfortable with relators pursuing matters the United States declines to join, despite the statute being drafted to encourage relators to pursue such actions, and may have been overly aggressive in seeking ways to dismiss them. Senator Grassley Cert. *Amicus* Br. 16-23.

the centerpiece of the government's anti-fraud arsenal becomes unusable.

ARGUMENT

A. The Seventh Circuit distorted Congress's straightforward and comprehensive statutory text in favor of a narrow and implausible alternative.

In the 1986 Amendments to the FCA, which Senator Grassley sponsored, Congress drew on the common law of fraud and legislated one of the most detailed definitions of scienter in the federal code. The unmistakable goal of that careful design was to assure that the FCA would be applied liberally and expansively as the government's primary tool to combat fraud. *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968) ("This remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money"); H.R. Rep. No. 99–660, p. 18 (1986) (the FCA "is . . . the primary vehicle by the Government for recouping losses suffered through fraud"). By drafting a broad and comprehensive definition of scienter, Congress sought to anticipate and block every avenue that creative lawyers might use to allow a defendant to escape liability for fraudulent conduct designed to fleece the United States.

To that end, Congress enacted a statute with three separate tests for scienter and made clear that a defendant may be liable if the government can establish *any* one of them. A defendant is liable if it acts with "actual knowledge" of false information, *or* acts in "deliberate ignorance" of the truth or falsity of that information,

or acts in "reckless disregard" of the truth or falsity of that information. 31 U.S.C. § 3729(b)(1)(A). This plain language covers the waterfront of mental states, both objective and subjective, that demonstrate culpability.

Notwithstanding this painstaking textual clarity, the Seventh Circuit ignored Congress's formulation and effectively re-wrote the statute to achieve its result. The court of appeals made two fundamental errors. First, it held that, no matter its knowledge or intent at the time of its alleged fraud, a defendant could negate scienter after the fact by coming up with a "reasonable interpretation" of the law to support its prior behavior. This *post hoc* brainstorming would excuse even the most shocking evidence of deliberate fraud, unless the Government could establish that the interpretation was inconsistent with "authoritative guidance" set forth at a "high level of specificity" by a "circuit court" or the "relevant agency." But Congress attached no such talismanic effect to "reasonable interpretations" of the law. Both in the statute and in the common law of fraud that it drew on, the clarity of the requirement is at most one factor, not the *only* factor, in the scienter analysis of recklessness. And it is not relevant at all to "actual" knowledge or "deliberate" ignorance except insofar as a defendant subjectively believed at the time of the fraud that a supposed reasonable interpretation would permit its behavior.

Second, the Seventh Circuit erroneously held that the defendant's subjective state of mind is categorically irrelevant to scienter, including "actual" knowledge and "deliberate" ignorance. *Supervalu*, 9 F.4th at 470 ("defendant's subjective intent does not matter" for

scienter analysis because "the inquiry is an objective one"); *see also Safeway*, 30 F.4th at 658 ("defendant's subjective intent is irrelevant for purposes of that inquiry"). That interpretation clashes with decades of precedent and common English usage, which uniformly analyze these subjective standards for scienter differently from objective ones. The statute's clear language demands the same here, notwithstanding the Seventh Circuit's tortured interpretation.[3]

1. *Actual Knowledge.* The Seventh Circuit interpreted the phrase "actual knowledge" to exclude subjective understanding. Yet the word "actual" alone precludes any such interpretation, unmistakably pointing to individual belief.

The Seventh Circuit sought to ease this obvious incongruity by reasoning that a defendant could not "actually" know whether information was true if there were any theoretical uncertainty around it. In other words, regardless of a defendant's confidence in its

3. The Seventh Circuit's analysis mainly relies on this Court's prior decision in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), which construed the intent requirement in a different federal statute. *Safeco* critically observed that the Fair Credit Reporting Act contained "no indication that Congress had something different in mind" from the definition of "willful" that this Court construed. *Id.* at 69. The same cannot be said of the FCA's meticulously drafted, three-part definition of "knowingly." Rather than deferring to the statutory terms Congress chose, the Seventh Circuit instead ran roughshod over them. Because the Petitioner's opening brief has fully explained how the Seventh Circuit misconstrued and misapplied the *Safeco* decision, Pet. Br. 38-48, Senator Grassley will focus his discussion on the statutory text.

interpretation of the law, and notwithstanding the accuracy of that interpretation, the opinions below held as a matter of law that a defendant cannot "know" something if the defendant could possibly be mistaken. *SuperValu*, 4 F.3d at 468. Under the Seventh Circuit's reasoning, absent definitive and highly specific authoritative guidance, "actual knowledge" is impossible.

This interpretation is wrong as a matter of basic usage. For example, if a person looks out a window, sees rain, and correctly concludes it is raining, we would naturally say she "knew" it was raining. We would not conclude otherwise simply because a lawyer later points out a balcony above her apartment and argues that she could have been mistaken because her upstairs neighbor could have been watering plants. It distorts the ordinary meaning of "actual knowledge" to suggest otherwise.

This simple illustration demonstrates what we mean when we ask if someone "knew" something. We consider only two factors. First, did the person subjectively believe something to be true, and second, was it indeed true? Looking backward, if the person believed it was raining and she was correct in that belief, we would say that the person knew it was raining. It would not matter that other "reasonable" explanations existed for the falling water. We would still say that a person "knew" it was raining, even if plausible alternatives existed. The Seventh Circuit's argument, that "actual knowledge" cannot exist if a reasonable alternative can later be posited, is impossible to reconcile with ordinary usage.[4]

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4. Respondent resisted this obvious linguistic anomaly by claiming a purported distinction between actual knowledge of "facts"

Moreover, as the *SuperValu* dissent correctly observed, the law does not excuse a defendant based on such "epistemological doubt" in any other context, not even in criminal cases. *SuperValu*, 9 F.4th at 476 (Hamilton, J., dissenting). A defendant who correctly interprets the law and subjectively intends to cheat on his taxes cannot escape criminal liability by showing that he *might* have adopted a reasonable, albeit erroneous interpretation under which his actions would not have been criminal. Indeed, the criminal counterpart to the civil FCA, 18 U.S.C. § 287, imposes criminal penalties on anyone who presents a false claim to the United States "knowing such claim to be false, fictitious, or fraudulent . . . ." Criminal courts applying the usual common law rules for a "knowing" violation would not acquit a defendant who admitted his intent to defraud the government, but whose lawyers invented a reasonable *post hoc* interpretation of what the law may have required, which the defendant never entertained. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010) ("We have long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" (quoting *Barlow v. United States,* 7 Pet. 404, 411 (1833) (opinion for the Court by Story, J.)). Congress never imagined it would be more difficult to use the government's primary tool against fraud to find a defendant civilly liable than to convict him of a crime. Yet in many cases, that is the incongruous result *SuperValu* requires.

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and "law." Resp. Cert. Br. 1, 3, 29-35. But knowledge of "facts" is no less subject to "epistemological doubt" than knowledge of "law." Respondents have simply added another arbitrary distinction to the many that the Seventh Circuit appended to Congress's language, with a similar lack of textual support.

Deliberate Ignorance. The Seventh Circuit escalated its assault on plain language when it construed the second test for the statutory term "knowing." Under that test, the government can establish scienter if the defendant "acts in deliberate ignorance of the truth or falsity of the information" submitted to the government. 31 U.S.C. § 3729(b)(1)(A)(ii). The phrase "deliberate ignorance" unquestionably focuses on a person's subjective mental state. Congress used the phrase to reach defendants who *consciously* avoid steps that might reveal the truth.[5] "Deliberate ignorance" has been widely interpreted both before and after Congress inserted that language into the FCA to refer to a subjective state of mind. *See, e.g., United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985) ("subjectively aware"); *United States v. Knight*, 705 F.2d 432, 434 (11th Cir. 1983) ("subjective views"); *United States v. Glick*, 710 F.2d 639, 642 (10th Cir. 1983) ("subjective awareness of facts"); *United States v. Henderson*, 721 F.2d 276, 278 (9th Cir. 1983) ("subjective awareness"); *United States v. Ricard*, 922 F.3d 639, 654-56 (5th Cir. 2019) ("subjective awareness"); *United States v. Kershman*, 555 F.2d 198, 200 (8th Cir. 1977) (upholding jury instructions as properly preserving subjective inquiry into knowledge requirement); *United States v. Ramos–Atondo*, 732 F.3d 1113, 1119 (9th Cir. 2013) ("subjective belief"); *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) ("conscious purpose" to avoid the truth); *United States v. de Francisco–Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991)

5. In its 1986 FCA amendments, Congress expanded the scienter definition in part to address this "ostrich" issue, imposing liability on persons "who ignore 'red flags' that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim." H. Rep. 99-660, at 21 (1986).

("subjective knowledge"); *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 806 (3d Cir. 1994) (referring to the "subjective 'deliberate ignorance'" standard). Congress is presumed to have drafted the "deliberate ignorance" test relying on the courts' uniform interpretation of that phrase. *See Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268 (1992) ("We may fairly credit . . . Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used"; Congress "used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.") (citations omitted).

Moreover, the "epistemological doubt" that the Seventh Circuit conjured to negate "actual knowledge" cannot serve that function where deliberate ignorance is concerned. The existence of some theoretical uncertainty is irrelevant to an assessment of whether a defendant consciously buries her head in the sand to avoid learning the truth. A person can be deliberately ignorant even if that person might have uncovered an interpretation that was "reasonable" if she had looked. Proof that a defendant consciously chose to avert her gaze, without more, establishes deliberate ignorance.

The Seventh Circuit is, ironically, willfully blind to this conundrum that it created. The *SuperValu* opinion states, without elaboration, that willful blindness would satisfy scienter even under its "objective reasonableness" test. *SuperValu*, 9 F.4th at 468 ("Nor does *Safeco*'s standard excuse a company if its executive decisionmakers attempted to remain ignorant of the company's claims processes and internal policies"). In neither opinion

below does the Seventh Circuit ever explain how that statement can possibly be reconciled with *Supervalu*'s holding that "subjective intent does not matter." After all, a defendant fully oblivious to the risk of her actions would not be "deliberate[ly]" ignorant, while the opposite is true of a defendant who consciously avoided asking too many questions. Yet the only difference between the two is subjective belief. If subjective understanding were irrelevant, the statutory test for deliberate ignorance would be impossible to satisfy. The Seventh Circuit's inability to square its new scienter test with the statutory text starkly reveals its fundamental interpretive error.

Reckless Disregard. The third test, "reckless disregard of the truth" (31 U.S.C. § 3729(b)(1)(A)(iii)), may be characterized as objective at least in part. But even here the Seventh Circuit rewrote Congress's language. As discussed *infra* in Part B, the Seventh Circuit grafted numerous judicial requirements as barriers to the establishment of recklessness, precluding any such finding in many cases.

Intent to Defraud. To further close the door on technical scienter defenses, Congress not only set out three alternative means of proving it, but also took pains to make clear that the scienter bar should be lower than in criminal and other specific intent statutes. Congress achieved that outcome by emphasizing that "no proof of specific intent to defraud" would be required under the FCA. 31 U.S.C. § 3729(b)(1)(B).

By including this language, Congress intended the FCA's scienter standard to be less rigorous, not more rigorous, than specific intent statutes. It also drew once

again on common-law principles. *See Braley v. Powers*, 42 A. 362, 364 (Me. 1898) ("A fraudulent purpose may be inferred from a willfully false statement . . . . It is not necessary to prove that the defendant knew that the facts stated by him were false."). Yet the Seventh Circuit opinions move in the opposite direction. Under their formulation, proof of specific intent to defraud would be *insufficient*—even inadmissible—to prove scienter. As long as defense counsel could come up with a "reasonable" *post hoc* interpretation that differed from the defendant's specifically intended (and correct) understanding that her actions were unlawful, liability would not attach. Bizarrely, if Congress had provided that "specific intent to defraud establishes scienter," the statute would be *broader* than the law as interpreted by the Seventh Circuit. That anomaly highlights the chasm between Congress's language and the Seventh Circuit's interpretation.

B. The Seventh Circuit created its new scienter test from whole cloth.

The Seventh Circuit did not limit its judicial activism to ignoring the plain meaning of the words Congress used. It went further, creating an entirely new, multi-part test to establish scienter, no part of which appears in the statute or legislative history of the FCA. Respondents seek to justify this judicial legislating by reference to the FCA's substantial penalties, arguing that "it is not too much to ask the government to speak clearly when establishing rules it enforces with punitive liability." Resp. Supp. Br. 8 (quotation marks omitted). But Congress, not the judiciary, decides the elements that must be established to prove FCA liability. When Congress has drafted a detailed scienter requirement, it is not the role of courts

to decide whether it is "too much to ask" that Congress provide further protections for defendants.

By doing so here, the Seventh Circuit undermined a clear and comprehensive definition of scienter by importing a defense from a different statutory framework, cutting an enormous hole through Congress's carefully fashioned net. According to its views, to establish scienter "it is not enough that a defendant . . . believe that its claim was false." *SuperValu*, 9 F.4th at 470; *see also Safeway*, 30 F.4th at 658 ("[an] FCA claim fails, regardless of whether the relator can point to evidence of the defendant's subjective awareness that its intepretation might be wrong"). A defendant can escape a finding of scienter despite having correctly interpreted the law and deliberately chosen to violate it if it can posit a reasonable, albeit incorrect, *post hoc* interpretation of the law that would not proscribe the defendant's conduct.

Yet the Seventh Circuit ignores the statutory language that heads off this kind of after-the-fact excuse-making and not only permits it but creates only a tortured and narrow path to refute it. To defeat a *post hoc* reasonable interpretation defense, the government must jump through four separate hoops that the Seventh Circuit conjures from thin air. The government must prove that the defendant:

1. was "warned off" its alternative interpretation;

2. through publication of "authoritative guidance";

3. issued by a "circuit court" or the "relevant agency";

4. with "a high level of specificity."

SuperValu, 9 F.4th at 471-72; *see also Safeway*, 30 F.4th at 660-61. While the Seventh Circuit's intricate test is one that Congress might have created, it plainly did no such thing with the FCA. None of these judicially constructed hurdles can be found in the language of the statute; the Seventh Circuit's work more closely resembles statutory drafting than statutory interpretation.

Nowhere does the statute say that ambiguity is a defense or that a requirement must be unambiguous to support liability. The FCA, and the common law of fraud on which it was based, have always addressed potential ambiguity in requirements by reviewing it as part of the traditional scienter inquiry. It has always been relevant to the subjective states of mind whether a defendant thought at the time that a requirement, whether based in statute, regulation, contract, or otherwise, was ambiguous. The subjective states of mind consider the totality of the circumstances, and the clarity and specificity of the requirement is necessarily part of that.

To elevate it to a threshold inquiry, however, gives it outsize importance. It would permit defendants to avoid contemporaneous evidence of subjective bad faith based on a *post hoc* maneuver. A contemporaneous belief based on an honest inquiry that a requirement was ambiguous should excuse a violation, but there is no grounds in the statute for excusing a defendant's deliberate intent to violate a requirement that it correctly understood at the time.

Moreover, the Seventh Circuit disregards the common law of fraud in fashioning its new scienter defense, which is entirely absent from the common-law jurisprudence that formed the backdrop of Congress's legislation. That ignores this Court's decision in *Universal Health*, which held that aside from eliminating the requirement of specific intent, "Congress retained all other elements of common-law fraud that are consistent with the statutory text" of the FCA. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 187 n.2 (2016). Without citing *Universal Health*, the Seventh Circuit spurned this guidance from the Court. It ignored the Restatement's discussion of common-law fraud, which relies heavily on subjective understanding (*see* Restatement (Second) of Torts § 526, "Conditions Under Which Misrepresentation is Fraudulent (Scienter)"), in favor of the Restatement's discussion of reckless driving, which contains no subjective element. *SuperValu*, 9 F.4th at 465-66; *see also Safeway*, 30 F.4th at 652-53. Congress's decision to impose liability on any person who knowingly presents a "false *or fraudulent*" claim for payment, 31 U.S.C. § 3729(a)(1)(A) (emphasis added), makes especially clear that the common law of fraud bears on an interpretation of the FCA (and that, conversely, *Safeco*'s analysis of a statute that has nothing to do with fraud is far afield). It defies logic to suggest that Congress had the definition of reckless driving in mind, rather than fraud, when it drafted the language of the government's primary fraud-fighting tool.[6]

6. The Seventh Circuit woodenly looked to *Safeco* to support this anomalous choice, ignoring the difference between the Fair Credit Reporting Act, a consumer protection statute, and the FCA, a fraud statute.

That is especially implausible because Congress deliberately incorporated the traditional three-part scienter test for fraud when it drafted the statute. Both American and English courts have well-established jurisprudence setting out the three distinct mental states that triggered liability for fraud: "when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it to be true of false." *Derry v. Peek,* 14 A.C. 337 (1889); *see also Kountze v. Kennedy*, 147 N.Y. 124, 129, 41 N.E. 414 (1895) ("defendant, *when he made it*, knew that it was false, or, not knowing whether it was true or false, and not caring what the fact might be, made it recklessly") (emphasis added); Restatement (Second) of Torts § 526 (Am. Law Inst. 1977, Oct. 2022 update). Casting those aside in favor of common law from a different kind of inquiry—a specific tort with a single mental state—is unpersuasive.

The Seventh Circuit's newly fashioned defense to scienter is especially troubling because it provides such a robust liability shield for plainly culpable defendants. The Seventh Circuit rejected abundant compelling contract language as well as federal and state regulations that supported liability, because none of these were issued by a "circuit court" or the "relevant agency." *SuperValu*, 9 F.4th at 471; *Safeway*, 30 F.4th at 660. It then rejected the CMS agency manual because its guidance was not at a sufficiently "high level of specificity." *SuperValu*, 9 F.4th at 471; *Safeway*, 30 F.4th at 660-62.

As the Justice Department noted in its amicus brief supporting *en banc* review of *SuperValu* below, the Seventh Circuit's test "places the burden on the government

to anticipate every possible fraud" and endlessly issue "definitive guidance" to proscribe it. U.S. Rehearing Br. 5, 12. Placing such a burden on the government is especially inappropriate for a statute that was conceived in response to a crisis, the Civil War. The government often expends funds on an emergency basis, such as during the COVID pandemic, without any opportunity to issue definitive guidance to "warn off" fraudsters. Congress did not envision that the courts would impose this onerous requirement as a prerequisite to recovering money stolen by fully culpable defendants. Those accepting government funds are expected to "turn square corners," not hope the government will fail to anticipate their deceptive scheming.

While respondents attempt to justify the Seventh Circuit's radical rule—that an FCA defendant can never be liable for violating a law that contains an unresolved ambiguity—as a requirement of "basic [] fairness and due process," Resp. Cert. Br. 30, they ignore that Congress has *already* provided FCA defendants with heightened due-process protections. Respondents reason that because "the FCA imposes damages that are essentially punitive in nature," *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000), they must receive heightened due-process protections to shield them from liability.

But the statute's scienter requirement, which requires a defendant to "knowingly" submit a false claim to be liable, 31 U.S.C. § 3729(a)(1)(A), already shields an FCA defendant from punitive damages if she makes an innocent mistake or is merely negligent. *See, e.g.*, *Hindo v. Univ. Health Sci./The Chicago Med. Sch.*, 65 F.3d 608, 613 (7th

Cir. 1995). This Court has recognized the due-process-protective role of the mental state Congress required. *Universal Health Servs.*, 136 S. Ct. at 2002 ("concerns about fair notice and open-ended liability in FCA cases" are "effectively addressed through strict enforcement of the" FCA's "scienter requirement"). Moreover, in legislating a heightened intent requirement to cabin liability under a statute with "essentially punitive" damages, Congress "imported common law principles governing this form of relief." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 537 (1999). Under those principles, "eligibility for punitive awards is characterized in terms of a defendant's motive or intent"; their "justification [] lies in the evil intent of the defendant." *Id.*

In sum, the FCA already reflects Congress's judgment, grounded in common-law practice, about the appropriate safeguards an FCA defendant needs. Concocting a separate layer of protections by reading into the statute an atextual "no-ambiguity" requirement ignores how Congress and courts have long shielded defendants from liability under punitive laws like the FCA.

Finally, if the decisions adopting the Seventh Circuit's framework are any guide, it appears likely that courts, not juries, will decide whether an alternative interpretation is "reasonable," whether guidance is "authoritative," whether it is issued by the appropriate court or agency, and whether it is adequately "specific." Historically, scienter is a quintessential jury question, typically turning on case-specific facts, circumstances, and inferences. But the Seventh Circuit's elaborate loophole will likely be applied most often by judges, as it was in *SuperValu*

and *Safeway*.[7] Congress could not have envisioned that decades of jurisprudence establishing that scienter must be determined by the trier of fact would be swept aside.

C. The Seventh Circuit improperly reasoned that Congress intended the separate categories of scienter as subsets of one another.

A final centerpiece of the Seventh Circuit's reasoning was its flawed assumption about the relationship among the three scienter tests of the FCA. According to its view, "reckless disregard" is the "most capacious" of the three mental states, effectively encompassing "actual knowledge" and "deliberate ignorance." *SuperValu*, 9 F.4th at 465; *see also Safeway*, 30 F.4th at 653. In other words, if the government cannot establish recklessness, *a fortiori* it cannot establish either actual knowledge or deliberate ignorance. Completing its faulty logic, the Seventh Circuit held that because a "reasonable interpretation" precludes a finding of recklessness, it also precludes a finding of the "less capacious" states of mind. The Circuit relied on this conclusion to bolster its erroneous assertion that subjective understanding is irrelevant to scienter.

Contrary to the Seventh Circuit's false syllogism, however, the mental states Congress created are not subsets of one another. Congress took pains to enact *separate* paths to scienter precisely because *each one*

7. A recently decided case in the Fourth Circuit had followed this same pattern, but on rehearing *en banc,* the panel decision was vacated and the lower court opinion reinstated. *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340 (4th Cir. 2022), *vacated by* 49 F.4th 873 (4th Cir. 2022).

alone would capture a culpable mental state that the others might not. Congress sought to be expansive, not duplicative. It would have been pointless for Congress to spell out three paths to scienter if proof of one would necessarily establish the other two. The FCA's three mental states are not Russian Dolls, in which actual knowledge and deliberate ignorance neatly nest within reckless disregard. That approach creates a narrow rather than a broad base for liability, where a defendant who defeats one test would defeat them all.

In the words of the *SuperValu* dissent, "The three prongs may overlap in many cases, but the adoption of the three distinct prongs in the same paragraph of the statutory text was unmistakably an effort to be both thorough and broad." 9 F.4th at 484. That is exactly right. A defendant who knowingly intended to violate a provision of the law that they correctly interpreted should not be excused by an after-the-fact, plausible but incorrect reading that would have permitted their deliberate behavior. Absent the Seventh Circuit's logical nesting fallacy, its conclusion about the irrelevance of subjective understanding collapses. With the FCA's scienter standard Congress created a solid three-legged stool, not an unstable Russian Doll.

CONCLUSION

The Seventh Circuit badly distorted Congress's plain language in reaching a result that opens a gaping hole in the government's primary fraud-fighting tool. The Seventh Circuit ignored the statutory text, ignored the common law, and ignored this Court's precedents. Such judicial activism cannot be justified by the penalties Congress imposed in the FCA, nor by an aversion to allowing relators to proceed without government intervention, as Congress intended. This Court should reverse the Seventh Circuit's decisions in these consolidated cases.

Respectfully submitted,

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