**Nos. 21-1326 & 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,
PETITIONERS

*v.*

SAFEWAY INC., RESPONDENT

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

## BRIEF OF CTIA – THE WIRELESS ASSOCIATION AND USTELECOM – THE BROADBAND ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

**Other Authorities**

## INTEREST OF AMICI CURIAE

Amicus CTIA – The Wireless Association is the voice of America's wireless industry. Its members include wireless carriers, device manufacturers, and suppliers, as well as apps and content companies. A vigorous advocate for policies that foster continued wireless innovation and investment, CTIA regularly files amicus briefs in this Court, including in cases involving the False Claims Act (FCA). *See, e.g.*, *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016).[1]

Amicus USTelecom – The Broadband Association is the premier trade association representing service providers and suppliers for the telecommunications industry. Its member companies offer a wide range of services across communications platforms, including broadband, voice, data, and video over wireline and wireless networks. Ranging from large, publicly traded companies to small rural cooperatives, these companies touch every corner of the United States. USTelecom advocates on behalf of its members before Congress, regulators, and the courts for policies that will enhance the economy and facilitate a robust telecommunications industry.

Because telecommunications companies are subject to vast, complex, and often unclear regulation, they have a strong interest in ensuring that the FCA's scienter standard is enforced as written. Grafting a subjective standard onto the FCA would significantly increase the

[1] Pursuant to Rule 37.6, amici represent that no counsel for any party authored this brief in whole or in part. Nor has any person other than amici curiae and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

costs of litigation and the risk of punishing liability for reasonable interpretations of law.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The False Claims Act limits liability to only those who "knowingly" present a false claim to the government. 31 U.S.C. § 3729(a)(1)(A). This scienter requirement is "rigorous" and requires "strict enforcement." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 192 (2016).

This case involves application of that scienter requirement to claims based on reasonable interpretations of ambiguous laws. Applying long-settled precedent, the Seventh Circuit interpreted the FCA's scienter requirement to preclude liability for certifications of legal compliance when the underlying law is ambiguous and lacks authoritative clarification and the defendant's behavior was *objectively* reasonable. Petitioners and the United States ask the Court to depart from that settled law, instead proposing a *subjective* standard that would impose liability when the defendant recognized a risk that a court might later interpret the underlying law differently. But that standard finds no basis in the FCA's text, contradicts this Court's previous pronouncements, and threatens a host of practical problems. This Court should reject Petitioners' novel subjective-belief standard and adhere to its longstanding objectivity-based approach to statutory scienter requirements.

**I.** The FCA's scienter requirement is grounded in the common-law terms "knowing" and "reckless." 31 U.S.C. § 3729(a)(1)(A), (b)(1)(A). The Court has already determined that those terms imposed an objective, not subjective, standard at common law. *See Safeco Ins. Co. of Am.*

*v. Burr*, 551 U.S. 47, 70 n.20 (2007). Expanding FCA liability based on a defendant's subjective beliefs would undermine the FCA's purpose and risk transforming it into a bludgeon for all manner of alleged regulatory violations. The FCA was designed to ferret out fraud against the government, not punish those who wind up on the wrong side of an ambiguous rule or contract language clarified only after the fact. The canons of constitutional avoidance and lenity lend further support for a robust scienter requirement that avoids liability when the law is unclear.

**II.** Petitioners' effort to upend this Court's settled precedents is not only unsound on the law, but it threatens dramatic practical problems. In recent years, federal courts have been inundated with meritless *qui tam* actions that waste enormous judicial and party resources. The subjective standard Petitioners advocate, if adopted, would only exacerbate that trend. A defendant's "state of mind is easy to allege and hard to disprove." *Egbert v. Boule*, 142 S. Ct. 1793, 1807 (2022). Injecting such an inquiry into the FCA in cases involving ambiguous legal obligations introduces a new fact question that can prevent early resolution of meritless FCA claims.

Moreover, Petitioners do not identify any practical problem that needs resolution. Most industries that do business with the government already are closely and intricately regulated. Absent evidence that this Court's longstanding objective approach to statutory scienter requirements is inadequate, there is no justification to upset the current landscape and expose business to an avalanche of claims that target reasonable interpretations of unclear regulations. The specter of massive FCA

liability—and the reduced availability of dispositive motions—would promote *in terrorem* settlements and discourage government contracting. A subjective scienter test would harm businesses, the government, and the public alike.

## ARGUMENT

### I. Basic principles of statutory interpretation support the Seventh Circuit's interpretation of the FCA.

To prevail on an FCA action, the relator must show scienter—that is, a "knowing" or "reckless" violation of the law. 31 U.S.C. §§ 3729(a)(1)(A), (b)(1)(A). The parties agree that the FCA incorporates the common-law meaning of those terms. *See* Pet.Br.31-33, 36-38; Resp.Br.31-39; U.S.Br.20-21. Sixteen years ago, this Court resolved that at common law the terms "knowing" and "reckless" incorporated an objective, not subjective, standard. The Seventh Circuit properly applied that settled precedent to hold that the FCA's scienter requirement is objective, not subjective. That holding comports with the FCA's text, purpose, and context. Petitioners' efforts to upend this Court's longstanding approach to statutory scienter requirements is unsound.

#### A. The text, purpose, and context of the FCA confirm the Seventh Circuit's reading.

1. Start with the statute's text—and what this Court has already said about that text. The FCA imposes liability on "any person who … *knowingly* presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the government. 31 U.S.C. § 3729(a)(1)(A) (emphasis added). "[K]nowingly" means "ha[ving] actual

knowledge of the information," "act[ing] in deliberate ignorance of the truth or falsity of the information," or "act[ing] in reckless disregard of the truth or falsity of the information." *Id.* § 3729(b)(1)(A).

In the FCA, those terms carry their common-law meanings. "[T]he general rule" is that "a common law term in a statute comes with a common law meaning, absent anything pointing another way." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 58 (2007). And that rule applies with special force to the FCA. When Congress wanted to depart from the common law, it did so expressly, as with the provision that a plaintiff need not prove "specific intent to defraud." 31 U.S.C. § 3729(b)(1)(B); *see Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 187 n.2 (2016).

In *Safeco*, this Court used "the common law understanding" to interpret the Fair Credit Reporting Act's scienter requirement. 551 U.S. at 69. It specifically rejected the "argu[ment] that evidence of subjective bad faith must be taken into account in determining whether a company acted knowingly or recklessly for purposes of" that statute. *Id.* at 70 n.20. "[I]t would defy history and current thinking to treat a defendant who merely adopts one [reasonable] interpretation as a knowing or reckless violator." *Id.*

So too here. *Safeco* stands for the proposition that common law terms like "knowing" and "reckless" impose objective standards. And since the FCA relies on those very same terms, the Court should naturally conclude that the FCA's scienter requirement is objective.

2. Petitioners offer no sound reason to conclude otherwise.

They first attack *Safeco*'s resolution of the common-law terms "knowing and reckless." Pet.Br.36-38. But this is nothing more than an attempt to relitigate a statutory-construction question this Court has already decided. Petitioners offer nothing to justify such relitigation. This Court has long held that "this Court interprets and Congress decides whether to amend." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 462 (2015). It is not enough to show that this Court "just made the wrong call." *Id.* And, as Respondent's brief explains (at 23-25), *Safeco*'s understanding of the common law is correct.

Petitioners next complain about the difficulty of satisfying an objective test. True, "establishing 'even the loosest standard of knowledge, i.e., acting in reckless disregard of the truth or falsity of the information,' is difficult when falsity turns on a disputed interpretive question." *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 287, 288 (D.C. Cir. 2015) (citation omitted). But that is by design. After all, the FCA is "essentially punitive in nature," *Vt. Agency of Nat'l. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000), and Congress does not lightly impose ruinous liability on defendants for mistaken views of ambiguous regulations. As this Court explained in *Safeco*, "Congress could not have intended" "to treat a defendant who merely adopts one [of multiple reasonable] interpretation[s] as a knowing or reckless violator," "whatever [the defendant's] subjective intent may have been." 551 U.S. at 70 n.20. *A fortiori*, Congress could not have intended that result under the FCA, which imposes much more substantial liability. *See* 31 U.S.C. § 3729(a).

Moreover, the FCA was not designed as "a general 'enforcement device' for federal statutes, regulations, and

contracts." *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010) (citation omitted). Instead, the FCA seeks to "strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 295 (2010).

Finally, Petitioners offer a policy argument, claiming that application of the *Safeco* standard "encourages exactly the sort of behavior the FCA was enacted to prevent." Pet.Br.50. But the Congress that passed the FCA was concerned with prototypical fraud concerning readily discernible facts, not the ambiguous legal requirements governed by the *Safeco* standard. *See* Resp.Br.41-42. In any event, experience before those courts that have applied the *Safeco* standard—in the FCA context and others—demonstrates that those who set out to flout the law will still face liability. *See* Pet.App.21a-22a. That includes a person who adopts an objectively unreasonable interpretation of the law, *see, e.g.*, *Boyd v. CEVA Freight, LLC*, No. 3:13-CV-00150, 2013 WL 6207418, at *7 (E.D. Va. Nov. 27, 2013); a person who adopts an interpretation contrary to clear law, *see, e.g.*, *Gen. Store, Inc. v. Van Loan*, 560 F.3d 920, 925 (9th Cir. 2009); and a person who adopts an interpretation contrary to authoritative guidance, *see, e.g.*, *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1054 (8th Cir. 2002).

In short, there is no basis to accept Petitioners' invitation to adopt a subjective standard that would transform the FCA into the exact free-ranging, general-enforcement statute that courts have consistently rejected.

### B. Other canons of construction lead to the same result.

Other canons of construction lend further weight to the Seventh Circuit's interpretation of the FCA's scienter standard.

*First*, statutes must be interpreted, "if consistent with the will of Congress, so as to comport with constitutional limitations." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 571 (1973). Petitioners' subjective-belief standard risks running afoul of the Constitution's due process protections. This Court has long recognized the "fundamental principle" that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). That principle is especially important where, as here, defendants are faced with "damages that are essentially punitive in nature." *Vt. Agency of Nat'l Res.*, 529 U.S. at 784.

As courts have noted, "potential due process problems" arise when the government "'penaliz[es] a private party for violating a rule without first providing adequate notice of the substance of the rule.'" *Purcell*, 807 F.3d at 287 (citation omitted). That is precisely what Petitioners' novel gloss on the FCA would do. In the face of an unclear law subject to multiple reasonable interpretations, a party would be subject to massive FCA liability for adopting a reasonable interpretation that a court happens to later reject. Such a standard would not only be unfair, it would also be eminently unworkable. *See infra* 14-20.

Requiring a plaintiff to prove a defendant's subjective beliefs about the relevant legal obligations would not resolve these due-process concerns. For one thing,

Petitioners' standard does not require that the defendant have believed he was violating the law. They would impose liability based on the defendant's "recogni[tion] that there is a chance, more or less great, that" he has misunderstood the law. Pet.Br.36 (citation omitted). That the defendant has noticed the ambiguity that raises due-process concerns should not reduce his due-process rights. Moreover, Petitioners' standard threatens to allow a finding of corporate scienter based on a single employee's subjective (and potentially uninformed) beliefs about the company's legal obligation. *See infra* 16-17. That a company may not know its employees' subjective beliefs on these topics renders liability all the more inconsistent with due-process notions of fair notice. An objective standard, by contrast, "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *see also Purcell*, 807 F.3d at 287.

*Second*, the rule of lenity undercuts Petitioners' effort to penalize companies regardless of whether their positions represented objectively reasonable readings of the governing law. The rule of lenity dictates that "statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals." *Bittner v. United States*, 143 S. Ct. 713, 724 (2023) (plurality) (citation omitted). That encompasses both statutes with criminal penalties (whether interpreted in a civil or criminal context) and those with civil penalties. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 297 (2012); *see also Clark v. Martinez*, 543 U.S. 371, 380 (2005) (explaining that lenity applies to statutes

with both civil and criminal consequences, even when interpreted in a civil setting).

This Court has already invoked principles of lenity in interpreting the False Claims Act. *See United States v. McNinch*, 356 U.S. 595, 598 (1958). That makes sense for two reasons. The first is that the FCA imposes "damages that are essentially punitive in nature." *Vt. Agency of Nat'l. Res.*, 529 U.S. at 784. If a defendant is found liable, they face "treble damages plus civil penalties of up to $10,000 per false claim," not to mention the possibility of attorneys' fees and costs. *Escobar*, 579 U.S. at 182; *see* 31 U.S.C. §§ 3729(a), 3730(d)(4), (g). The FCA's steep civil penalties and essentially punitive nature further weigh in favor of lenity and the Seventh Circuit's reading of the FCA.

Likewise, the FCA and its companion criminal statute are interpreted in parallel. The two statutes mirror each other. *Compare* 31 U.S.C. § 3729(a)(1)(A) (imposing liability for "*knowingly* present[ing]" a false claim (emphasis added)), *with* 18 U.S.C. § 287 (prohibiting the making of a false claim while "*knowing* such claim to be false" (emphasis added)). These provisions were originally enacted as part of the same statute, with the same standard for liability, *see* Act of March 2, 1863, ch. 67, 12 Stat. 696, 696-98, though they were later separated through codification, *see Rainwater v. United States*, 356 U.S. 590, 592 n.8 (1958).

The statutes' identical origin and still similar language suggest that they should be interpreted consistently. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943) (FCA civil and criminal provisions are construed together). Interpretation of the FCA's scienter standard

thus has consequences in both the civil and criminal contexts, and the rule of lenity cuts against Petitioners' attempt to expand FCA liability.

## II. A contrary interpretation would create tremendous practical problems.

It is especially important that the Court require an objective approach to the FCA's scienter requirement to stem the swelling tide of meritless *qui tam* actions burdening the lower courts. Petitioners' proposed subjective standard is all but unworkable, as there is no reliable way of determining what a multinational corporation subjectively believes about ambiguous legal obligations. Conducting such an inquiry would significantly increase litigation costs and delay resolution of insubstantial claims—and thereby invite more meritless *qui tam* actions brought by plaintiffs hoping to secure an *in terrorem* settlement. In the end, Petitioners' proposed test would do nothing to combat fraud against the government; it would merely raise unreasonable risk and discourage companies from contracting with the government in the first place.

### A. Meritless *qui tam* suits plague companies dealing with the government.

Petitioners' proposed rule would further burden a judiciary facing an unprecedented volume of FCA cases. FCA litigation has more than doubled in the last 20 years. Dep't of Just., *Fraud Statistics Overview* 1-2 (Feb. 7, 2023), bit.ly/3mN3GsX. Last year, nearly a thousand FCA cases were filed in the federal courts—a new record. *See id.* at 2. Private relators file the vast majority of these suits. *See id.* at 1-3 (more than 15,000 *qui tam* suits have

been filed since 1987, compared to just over 6,000 suits initiated by the government).

It would be one thing if these new FCA actions were uncovering more fraud—but they are not. A large majority of private FCA suits are meritless. "[N]early three-fourths" of *qui tam* cases are resolved "with defendants paying nothing to the government." Ralph Mayrell, *Digging Into FCA Stats: In-House Litigation Budget Insights*, Law360 (July 13, 2021), bit.ly/3JMzC9Y. The numbers get even worse in cases when the government declines to intervene, which happens about three-quarters of the time. *Id.* Ninety percent of those suits result in no recovery. *Id.*

Despite this abysmal track record, private relators have significant financial incentives to keep bringing these suits. The potential payoff—up to 30% of funds recovered, including treble damages and civil penalties—more than offsets the relatively low likelihood of success. 31 U.S.C. §§ 3729(a)(1), 3730(d)(1)-(2). So it is no surprise many of these suits are filed by serial relators who have turned FCA litigation into a business model. *See Here's What the Government and Judiciary Think of Serial Whistleblowers*, Reuters (Oct. 4, 2013), bit.ly/40guK26 (describing a "serial filer of qui tam complaints" who "maintains a business 'partnering' with other relators"); *People ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, 2017 IL App (1st) 152668, ¶ 144 (discussing a relator who "has filed over 600 [FCA] lawsuits in Illinois" alone).

Defending these meritless *qui tam* suits "requires a tremendous expenditure of time and energy." Todd J. Canni, *Who's Making False Claims, the Qui Tam*

*Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require That All Qui Tam Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 11 n.66 (2007). Companies across the economy already "spend billions each year" litigating these suits. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

FCA cases often involve "extensive investigation and discovery." *United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 844 F. Supp. 2d 78, 91 (D.D.C. 2012); Bentivoglio, *supra*. In their attempt to prove fraud, *qui tam* relators invariably seek sprawling, intrusive discovery into confidential business practices and records. *See, e.g.*, *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1028-29 (D.C. Cir. 2017) (noting the defendant "produced over two million pages of documents" in a case that ultimately failed because the relator "failed to offer any evidence" of an FCA violation); *United States ex rel. Keeler v. Eisai, Inc.*, No. 09-22302, 2012 WL 12842791, at *2-3 (S.D. Fla. Sept. 27, 2012) (directing further discovery in a case in which "more than 2,000,000 pages" of discovery had been produced, while a motion to dismiss was pending). Further increasing costs, the litigation often lasts years. *See, e.g.*, *United States ex rel. Heath v. Wisconsin Bell, Inc.*, 593 F. Supp. 3d 855 (E.D. Wis. 2022) (granting summary judgment to the defendant more than thirteen years after the complaint was filed), *appeal pending* No. 22-1515 (7th Cir.).

The problem is widespread. Telecommunications companies, along with companies in many other sectors, have to defend these expensive, meritless cases. *See, e.g.*, *Prather v. AT&T, Inc.*, 847 F.3d 1097, 1108 (9th Cir. 2017);

*United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923, 926 (D.C. Cir. 2017); *Heath*, 593 F. Supp. 3d at 861; *Knudsen v. Sprint Commc'ns Co.*, No. C13-04476, 2016 WL 4548924, at *1 (N.D. Cal. Sept. 1, 2016).

It is easy to allege subjective suspicion of wrongdoing—and much harder to allege objective knowledge or recklessness of often ambiguous regulations. Petitioners' efforts to relax the FCA's scienter requirement would only invite more litigation—and more meritless suits—further burdening the courts and defendants. And it would invite litigation not only under the federal FCA, but also under many state analogues. *See, e.g.*, *Overstock.com, Inc. v. State ex rel. French*, 234 A.3d 1175, 1184 (Del. 2020) (using federal precedent to interpret the Delaware False Claims and Reporting Act).

### B. Litigation over an artificial entity's subjective belief would make FCA litigation even more complicated and burdensome.

Determining a defendant's subjective beliefs is always difficult, particularly when the defendant is an artificial entity. Proposing to make subjective beliefs relevant in every case, Petitioners do not explain how courts can determine a corporate defendant's beliefs when its employees disagree. However that issue is resolved, though, a subjective test would make FCA litigation longer and more expensive.

1. The law disfavors inquiry into a person's subjective state of mind, and for good reason. There is tremendous "difficulty inherent in ascertaining and describing another person's state of mind with any degree of exactitude," especially "prior to discovery." Wright and Miller, 5A Fed. Prac. & Proc. Civ. § 1301 (4th ed.).

If determining someone else's bottom-line conclusion is difficult, determining that person's degree of confidence will be nearly impossible. Consider a defendant bound by an ambiguous regulation that is the subject of a circuit split. He thinks one side of the split is slightly more persuasive, conducts his business according to that interpretation of the regulation, and certifies his compliance with the regulation when he submits his claims to the federal government. Of course, the defendant recognizes that he may be wrong. After all, it is always possible that this Court will disagree with his analysis and resolve the split the other way.

One might think this would be an obvious case for a finding of no scienter, and under an objective test, it would be. But under Petitioners' subjective test, the outcome is far less clear. Petitioners propose that a defendant should be liable whenever he "recognize[d] that there [was] a chance, more or less great, that the fact may not be as it [was] represented." Pet.Br.36.

If Petitioners mean that *any* degree of uncertainty is enough to satisfy their subjective scienter test, then anyone who recognizes ambiguity in a governing law will automatically satisfy the scienter requirement. Identifying two reasonable interpretations of an ambiguous provision would be paralyzing because, no matter which interpretation one adopted, one would have already recognized the "chance, more or less great, that the" other interpretation was right. *Id.* Characterizing that situation as a "knowing" violation of law would be absurd.

But if Petitioners mean that only uncertainty above some threshold level would satisfy their scienter test, courts would have to specify that level. Petitioners have

not suggested a workable standard for determining what level of uncertainty triggers a "knowing" violation.

If discerning an individual's subjective beliefs about ambiguous legal obligations is fraught, doing so for an artificial entity is even harder. Because companies comprise numerous individuals, they raise additional questions: Which (and how many) employees are relevant to a company's subjective beliefs concerning its legal obligations? If different employees have different understandings—as might be expected when the law is ambiguous—how will courts balance those competing beliefs?

Consider an issue regularly faced by telecommunications providers: the appropriate rate of government fees and surcharges. *Cf. Hamilton Cnty. Emergency Commc'ns Dist. v. BellSouth Telecomms. LLC*, 852 F.3d 521 (6th Cir. 2017). Imagine a regulation that sets the rate of a surcharge telecommunications providers must collect from customers on behalf of the government and then remit to the government.[2] The regulation is ambiguous and subject to two reasonable interpretations—one that would result in a lower surcharge, and one that would result in a higher surcharge. Consistent with his training, the employee preparing customer bills adopts the lower-surcharge interpretation, even though he personally thinks the higher-surcharge interpretation is better. The manager who provided the training genuinely believes the lower-surcharge interpretation is correct. The executive

[2] The FCA covers not only situations in which an entity acts improperly to get money from the government but also situations in which an entity acts improperly to prevent the government from getting money (known as a "reverse false claim"). *See* 31 U.S.C. § 3729(a)(1)(G).

overseeing this operation thinks it is a close question and does not have a strong view one way or the other. Would these facts satisfy Petitioners' subjective-scienter test?

Petitioners' brief does not say. It does not explain how courts should determine a company's subjective belief when different individuals have different views. But if this Court adopted Petitioners' subjective-scienter proposal, lower courts would not be able to duck the issue. The confusion Petitioners' position would create counsels against adopting it. *See Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1106 (1991) (rejecting a test because "[t]he issues would be hazy, their litigation protracted, and their resolution unreliable").

Companies cannot avoid these problems by simply adopting the most government-friendly interpretation of their legal obligations. In a surcharge case, the higher-surcharge interpretation might avoid FCA liability, but it would risk customer lawsuits for overbilling.

The problems with Petitioners' position do not end there. As Respondents point out, determining a company's subjective beliefs about ambiguous legal requirements raises significant "privilege issue[s]." Resp.Br.53-54. It may be difficult to discern a company's beliefs about the law without discovering attorney-client communications and internal legal analyses, which will increase lower courts' temptations to breach privilege. *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 141 (D.C. Cir. 2015).

2. Even if there were clear rules for how to determine the subjective beliefs of a company, the burdens of litigating that question would be immense.

"'[S]ubjective' inquiries of this kind" impose "special costs." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). The Court removed "subjective good faith" from the qualified-immunity analysis because it could only "rarely … be decided by summary judgment." *Id.* Often, there would be "no clear end to the relevant evidence," leading to "broad-ranging discovery and the deposing of numerous persons," which "can be peculiarly disruptive of effective government." *Id.* at 817. By contrast, analyzing "objective reasonableness" would "permit the resolution of many insubstantial claims on summary judgment." *Id.* at 818.

In *Safeco*, the United States recognized this as a powerful reason to treat "recklessness" as an "objective" and "purely legal inquiry." U.S. Br. 23, *Safeco*, 551 U.S. 47. It wanted to ensure that "insubstantial claims" could be resolved "on summary judgment." *Id.* (quoting *Harlow*, 457 U.S. at 818).[3]

The same is true for a company's subjective beliefs regarding its legal obligations. Lower courts will often treat a defendant's subjective understanding as a fact question that precludes dismissal or summary judgment. Defeating these claims before trial is difficult because a defendant's "state of mind is easy to allege and hard to disprove." *Egbert v. Boule*, 142 S. Ct. 1793, 1807 (2022) (citation omitted).

That is Petitioners' goal. They frankly admit that summary judgment would rarely be available because, under their test, "[s]cienter is ordinarily a jury question" that can be decided as an "inference from circumstantial evidence." Pet.Br.54-55.

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[3] In this case, however, the United States supports a subjective standard. *See* U.S.Br.13.

If FCA defendants must routinely defend tenuous cases that would have previously been resolved at the motion to dismiss stage, the costs will be enormous. Discovery is "a weapon capable of imposing large and unjustifiable costs on one's adversary." Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 636 (1989); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (noting that "discovery accounts for as much as 90 percent of litigation costs" (citation omitted)). And, as stated above, FCA cases often involve millions of pages of discovery. *See, e.g.*, *Halliburton Co.*, 848 F.3d at 1028-29 (noting the defendant "produced over two million pages of documents" in a case that ultimately failed because the relator "failed to offer any evidence" of an FCA violation); *Eisai*, 2012 WL 12842791, at *2-3 (directing further discovery in a case in which "more than 2,000,000 pages" of discovery had been produced). And jury trials are even more expensive, especially because relators can recover their attorneys' fees and costs if successful. *See, e.g.*, *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 793 F. Supp. 2d 1260, 1263 (D. Colo. 2011) ($2,178,632.25 in attorneys' fees plus another $109,341.79 in costs); *Ramones v. AR Res., Inc.*, No. 19-62949, 2022 WL 1443062, at *8 (S.D. Fla. May 6, 2022) ($206,424.05 in attorneys' fees plus $5,967.17 in costs).

By contrast, none of these problems arises under an objective scienter standard. Rather than attempt to divine what a defendant was thinking, the court could simply determine whether the law was ambiguous and whether a particular interpretation was reasonable. The objective scienter standard thus allows courts to stick to the sort of

objective legal analysis to which they are accustomed and for which they are well suited.

### C. Petitioners' rule would harm, not protect, the government.

Petitioners' subjective approach to scienter would increase the pressure on FCA defendants to settle meritless claims. Increased costs to business are bad enough, but in this context, increased costs result in decreased willingness to work with the government. That undermines the public interest.

Under Petitioners' approach, serial relators would have a new weapon in their arsenals: allege that a company did not *really* believe it was complying with its legal obligations, use discovery as a fishing expedition to identify an employee who can be characterized as disagreeing with the company's position, and argue that there is a fact dispute that requires a trial. This would allow them to extract settlements in two ways.

*First*, as discussed above, the process would be expensive. *See supra* 13. "[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases … ." *Twombly*, 550 U.S. at 559. And the risk of relators using "baseless allegations … to extract settlements" is "especially" problematic "in cases involving the False Claims Act." *United States ex rel. Clausen v. Lab'y Corp. of Am.*, 290 F.3d 1301, 1313 n.24 (11th Cir. 2002).

*Second*, the enormous consequences of losing an FCA suit incentivize settlement whenever a defendant cannot prevail on a dispositive motion, regardless of any weaknesses in the relator's claims. "Faced with even a small chance of a devastating loss, defendants will be

pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

As Respondents note, liability in this case "could stack well into the billions." Resp.Br.2. FCA settlements often reach eight or even nine figures. *See, e.g.*, Dep't of Just., *Biogen Inc. Agrees to Pay $900 Million to Settle False Claims Act Allegations Related to Improper Physician Payments* (Sept. 26, 2022), bit.ly/3FuBYI3; Dep't of Just., *Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis* (Aug. 21, 2014), bit.ly/3YUtrow; Dep't of Just., *United States Obtains $140 Million in False Claims Act Judgments Against South Carolina Pain Management Clinics, Drug Testing Laboratories and a Substance Abuse Counseling Center* (Sept. 3, 2021), bit.ly/3JNe8tN; Dep't of Just., *Mail-Order Diabetic Testing Supplier and Parent Company Agree to Pay $160 Million to Resolve Alleged False Claims to Medicare* (Aug. 2, 2021), bit.ly/3Jp9wbz.

Worse yet, the government might withhold future contracts. "Where the contractor depends upon repeat business from the same government agencies, the mere presence of allegations of fraud may cause those agencies to question the contractor's business practices." Canni, *supra*, at 11. For many companies, "even a temporary debarment" from government contracting can be "irreparably crippl[ing]." Michael Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev. 1559, 1571 (2015).

The *in terrorem* effects of these punishments are significant. So a subjective test that limits the viability of

dispositive motions would increase settlement pressure, regardless of a claim's validity.

Of course, settling meritless FCA claims simply adds to the costs of working with the government. When the "cost of doing federal government business" increases, it can "result in the government's being charged higher, not lower, prices." *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1262 (1st Cir. 1992) (Breyer, J.). At worst, increased liability under the FCA could discourage companies from contracting with the government at all. *See* Michael D. Granston, *Memorandum about Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)* at 5, U.S. Dep't of Just., to Attorneys (Jan. 10, 2018) ("[T]here may be instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exit the government program or industry.").

By making it too easy for private relators to impose litigation costs on and extract settlements from businesses serving the government, a subjective standard for scienter would undermine public contracting and the public interest.

## CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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