Nos. 21-1326 & 22-111

IN THE

Supreme Court of the United States

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

v.

SUPERVALU INC., *et al.*,
Respondents.

UNITED STATES, *et al.*, 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 PROFESSIONAL SERVICES COUNCIL AND INTERNATIONAL STABILITY OPERATIONS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Established in 1972, Professional Services Council ("PSC") is an association whose core mission is to ensure that the federal government adopts commonsense policies for how it solicits, acquires, and manages services, technology, and support from contractors. Its more than 400 members provide various government services, ranging from healthcare and national defense solutions to operations and linguistics support to all federal agencies.

PSC represents its members in areas of key acquisition policy and legislation and has a strong record of effective advocacy. PSC and its members have engaged with the Department of Defense ("DOD") on improving contract formation, payment, and close-out processes; negotiated with Congress, the White House, and DOD on rules regarding contract performance and results; and provided expertise to numerous agencies including DOD, the Federal Aviation Administration, and the Department of Health and Human Services. PSC has led reforms to federal procurement protest rules and helped drive revisions to multiple parts of the Federal Acquisition Regulation ("FAR"), including Part 15, as well as the DOD FAR Supplement ("DFARS"). It helps members navigate federal programs requiring contractor support and engage with relevant federal agencies. It also provides its members with information on maintaining effective compliance programs and identifies areas that merit collaboration with the government.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for a party authored this brief in whole or in part and that no person other than amici curiae, its members, or its counsel made a monetary contribution to fund the preparation or submission of this brief.

International Stability Operations Association ("ISOA") was founded more than twenty years ago to foster international stability by codifying principles of transparency and accountability to govern nongovernmental and humanitarian organizations. Today, its members include small consultancies and large government contractors, and offer services that run the gamut from emergency medical staffing to military logistics. ISOA also maintains important partnerships with organizations around the world, such as the Peacekeeping and Stability Operations Institute at the Army War College; the American Business Council in Dubai; and the Afghan-American Chamber of Commerce.

ISOA's members have deep expertise in responding to instability arising from natural disasters, political unrest, military operations, and other events. While its members play an active role in implementing coordinated and rapid responses to such events, they are also involved in long-term development projects. ISOA's advocacy work includes engaging policymakers and government agencies to address issues affecting its members.

Accordingly, PSC and ISOA have a strong interest in the standards governing suits under the False Claims Act ("FCA"). From their work on government contracts and participation in various federal programs, their members have been involved in many FCA lawsuits implicating issues central to the question presented here. As amici, they seek to preserve standards that balance the government's need for effective mechanisms to deter and punish fraud, contractors' need for fair notice of their duties and potential liabilities, and both sides' need for flexibility in serving the complex, ever-evolving public good.

SUMMARY OF THE ARGUMENT

Respondents have it right: the text and structure of the FCA, as well as the constitutional principles of notice and lenity, do not allow for FCA liability when a claimant's representation of compliance with a statutory, regulatory, or contractual obligation was true under a reasonable interpretation of that obligation. In that situation, the claimant's subjective understanding of the obligation is irrelevant. To respondents' persuasive brief, amici add three sets of points: further reasons why petitioners are incorrect regardless of the source of the obligation; special reasons why subjective understanding and even the notion of "authoritative guidance" are irrelevant with respect to ambiguous *contractual* obligations; and important limitations on the role of subjective understanding should the Court nonetheless deem it relevant.

I. There are weighty additional reasons why petitioners' position should be rejected regardless of the source of the ambiguous obligation.

First, petitioners' position that a claimant lacks scienter if it "honestly believed" its interpretation offers a false promise of exculpation and instead exposes claimants to nearly certain liability whenever their reasonable interpretation is later deemed "wrong." Petitioners' assertion that a claimant has scienter if it fails to inquire into the meaning of an ambiguous obligation or to heed the views of virtually anyone with an opinion on the matter means that, in practice, claimants will rarely be able to "honestly believe" anything other than the most government-friendly interpretation.

Second, it would be especially unfair if a company's scienter could be proved under petitioners' approach by aggregating the disparate knowledge, beliefs, and

actions of its individual employees. Individual remarks—often uninformed or exploratory—recognizing some ambiguity will not be uncommon. But such remarks are better viewed as benign or at least not proof of the *organization's* deliberate ignorance or recklessness, let alone actual knowledge of falsity.

II. Ambiguous obligations found in contracts are a special case. Longstanding principles of government contract law place the private contractor on equal footing with the government, and therefore the government has no special privilege to determine the meaning of a contractual obligation. In fact, when a contractual obligation is ambiguous, it is the *contractor's* interpretation that controls: under the ancient rule of *contra proferentem*, ambiguous contract provisions are interpreted against the government, as long as the pro-contractor interpretation is reasonable. The reasonable pro-contractor interpretation prevails regardless of whether the contractor actually believed it was the best interpretation. And correspondingly, there is no duty to inquire into the government's or anyone's view of the meaning of the obligation, let alone to defer to a supposedly authoritative statement by the government, since the contractor is the authority.

Congress did not intend the FCA to rewrite this long-established law of government contracts or to deter contractors from relying on that law. Therefore, with respect to *contractual* obligations that are plausibly ambiguous, a contractor's subjective understanding of the obligation is irrelevant if its representation of compliance was true under a reasonable interpretation; a contractor has no duty to inquire into its meaning; and a contractor generally need not even heed the "warning" of supposedly "authoritative guidance" issued by the government.

These conclusions are reinforced by the practical complexity of government contracting. Many government contracts, particularly in the defense sector, are voluminous and constantly evolving. It would be impracticable for contractors to maintain the vigilance necessary to identify every contractual ambiguity, conduct an inquiry, and form an educated belief about the best meaning. If they were required to do so in order to avoid FCA treble damages, they would have to employ more people and take longer to perform their duties, undermining the cost savings and speed that make private contracting so advantageous to the government.

III. Even with respondents' approach, scienter under legal-falsity theories could be established where the claimant's interpretation was unreasonable or where the representation was false under any reasonable interpretation. Accordingly, the FCA would still reach intentional fraud. But if the Court were to reject respondents' approach and hold that a claimant's subjective understanding of an ambiguous obligation is relevant to scienter even when the representation of compliance is true under a reasonable interpretation, the Court should nonetheless carefully limit the role of such evidence.

First, the Court should hold that the claimant had scienter only if it either intended to defraud the government or actually believed its representation was false at the time it submitted the claim and did not disclose to the government the interpretation on which its representation relied. Second, the Court should make clear that scienter is not automatically established by evidence that the claimant recognized the government did or might disagree with its interpretation. These qualifications would be vital to minimize the disruption to the longstanding principles and practices of government contracting.

ARGUMENT

I. ADDITIONAL REASONS JUSTIFY THE SEVENTH CIRCUIT'S RULE

Amici agree with respondents' compelling textual, structural, and constitutional reasons why the FCA should be construed not to allow liability when a claimant's representation of compliance with an obligation was true under some reasonable interpretation of that obligation, whatever its source. Rather, "[t]he burden of clarifying ambiguous laws *before* imposing punishment properly rests on the government." Resp. Br. 51. Here, amici amplify two general points regarding petitioners' position.

A. In Practice, Petitioners' Proposed "Honest Belief" Defense Would Rarely, if Ever, Be Available

Although petitioners say that an FCA defendant "who makes a reasonably prudent inquiry and honestly believes its claims were true is not liable," Pet. Br. 20, 37, 54, 57; *see also* U.S. Br. 18, 31-32, it may be nearly impossible to meet that standard. Instead, petitioners' approach would, in practice, impose FCA liability, including treble damages, whenever a claimant expressly or impliedly certified compliance with an ambiguous obligation unless its conduct conformed to the most pro-government reasonable interpretation of the obligation conceivable. In other words, under petitioners' approach, claimants will almost always have scienter if their representation of compliance is false under *some* reasonable interpretation of the obligation. Petitioners' position, therefore, would create a sweeping risk of FCA liability for contractors, far beyond Congress's evident intent.

In petitioners' view (Br. 20-21, 35-37, 51-53), once a claimant recognizes that an obligation may be ambiguous (or, perhaps, is "likely" ambiguous—petitioners are imprecise on this point), it must "inquire" into the obligation's meaning, including consulting a vast array of "sources" on the question, such as "attorneys," "compliance officers," "the Government" and its "agents," "the Government's [other] contractors," and "industry experts." *See also* U.S. Br. 18. The failure to do so would, according to petitioners (Br. 21, 33-36), often constitute "deliberate ignorance," which amounts to scienter. The claimant's duty, however, would not end with inquiry; under petitioners' view, the claimant must then *heed* whatever reasonable government-favoring interpretation it identified or learned of through the inquiry, regardless of whether the government had yet adopted it. Petitioners, however, do not specify whose attorneys or compliance officers or which government officials should be consulted, nor what would qualify those "sources" to speak authoritatively enough on the meaning of obligations that claimants would have to heed their opinion. Petitioners also fail to account for the possible, perhaps likely, event that these "sources" would not all espouse the same interpretation. Still, under petitioners' approach, acting "contrary to" some interpretation that is more favorable to the government offered by *someone* would establish the claimant's supposed "recklessness," which is again to say, its scienter. Pet. Br. 36; *accord* U.S. Br. 18, 32.

Consequently, under petitioners' approach, the only way claimants could confidently avoid FCA liability for representing compliance with an ambiguous obligation would be to make such representations only if their conduct conformed to the most pro-government plausible interpretation of the obligation. Petitioners' notion of a

defense based on an "honest belief" in a less-government-friendly interpretation after a "reasonable inquiry" is an empty promise; such a belief would rarely, if ever, be possible. And even if it were, the threat of treble damages would make maintaining such a belief highly imprudent.

Petitioners' approach also vastly overreaches in that the "sources" it would require claimants to consult and heed are not authoritative at all. *Cf. Heckler* v. *Community Health Services*, 467 U.S. 51, 64 (1984) (private party could not rely on "informal advice given by [government's] agents" and "intermediar[ies]"). With respect to ambiguous statutory and regulatory obligations, an authoritative interpretation can be supplied only by a court or, sometimes, an agency (if its interpretation is reasonable and reflects its "authoritative or official position, rather than a[] more ad hoc statement" (cleaned up)). *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2416 (2019). With respect to ambiguous contractual obligations, it is the contractor's view (if reasonable) that is controlling. *See infra* pp. 13-16. And of course, courts decide whether an obligation is ambiguous or an interpretation is unreasonable. Thus, claimants have significant room—indeed, sometimes the right—to interpret obligations differently from the government and to defend those interpretations, but petitioners' approach would effectively deny them that ability by deeming it fraudulent and imposing FCA liability if they disregard a more government-friendly interpretation offered by virtually anyone. That would be an untenable and unfair regime for claimants.

B. Petitioners' Position Would Be Especially Unfair and Disruptive if Corporate Scienter Could Be Proved by Aggregating Individual Employees' Knowledge

The danger that petitioners' position will yield unfounded and excessive FCA liability is heightened by the problem of *who* within a company could properly be said to "know" what a statutory, regulatory, or contractual obligation means or whether the company complied with that obligation.

Government contractors, especially in the defense sector, are often very large organizations, with diverse specializations among their employees. Legal and contractual obligations require specialized skills and training to interpret, which most employees lack. And it is impossible for qualified employees to identify all potentially relevant ambiguities in advance. Instead, many ambiguities will not surface until the contract is being performed. But the employees who will be in a position to recognize and address an obligation's ambiguity—those who do the contract work or prepare and submit claims to the government—often will not be the ones with the skills and training needed to actually recognize and resolve ambiguity. Or they might recognize ambiguity and casually offer their own opinion on its meaning or the company's compliance with it, without checking with a qualified colleague. Given the scope and scale of many defense contracts, petitioners' position would mean that contractors would be nearly certain to face constant, extensive FCA treble liability for nothing more than ordinary, appropriate, and unavoidable actions consistent with reasonable understandings of their duties.

This danger is compounded by the reality that the information relevant to a company's compliance *vel non* with an obligation will often be fragmented among multiple employees—unavoidably so, because of the scope and scale of many defense projects. For example, the employee who realizes that an obligation is potentially ambiguous might be unaware of the facts that make the ambiguity a ripe question or of facts essential to assessing whether the company complied with one or another interpretation of that obligation, while a different employee might be in the reverse situation, knowing the facts but unaware of the interpretative issues. Or, more likely, this information will be divided among myriad employees, each with only a piece of the puzzle and none seeing the whole picture or necessarily even realizing there is a whole picture to be seen.

Consequently, it would be highly problematic if an FCA plaintiff could prove that a company had scienter by aggregating the knowledge of its individual employees, especially under petitioners' expansive conception of scienter. As the D.C. Circuit has recognized, "under the FCA, 'collective knowledge' provides an inappropriate basis for proof of scienter." *United States* v. *Science Applications International Corp.*, 626 F.3d 1257, 1274 (D.C. Cir. 2010); *see also United States ex rel. Harrison* v. *Westinghouse Savannah River Co.*, 352 F.3d 908, 918 n.9 (4th Cir. 2003) (describing collective knowledge doctrine skeptically in FCA context). That court concluded, rightly, that a plaintiff should not be able to "prove scienter by piecing together scraps of 'innocent' knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds." *Science Applications*, 626 F.3d at 1275 (cleaned up). Otherwise, FCA liability could be based on

nothing more than a simple "communication failure" or, worse, on the benignly conceived structure of the organization. *Id.* This problem is exacerbated by the potential for FCA plaintiffs to cherry pick the employee knowledge they wish to aggregate, while disregarding conflicting employee knowledge.

The D.C. Circuit's wisdom, however, has not deterred some qui tam relators from attempting to prove scienter by cobbling together ad hoc statements by individual, often lower-level employees expressing their personal opinion about the meaning of an obligation or the company's compliance *vel non*, regardless of whether they were qualified to interpret the obligation, aware of all the facts relevant to the company's compliance, or responsible for preparing or submitting the claim. Affirming the Seventh Circuit's position would go a long way toward curbing such overreaches.

II. WITH RESPECT TO CONTRACTUAL OBLIGATIONS, THERE ARE STRONG ADDITIONAL REASONS WHY A CONTRACTOR'S SUBJECTIVE UNDERSTANDING AND EVEN SUPPOSED "AUTHORITATIVE GUIDANCE" SHOULD BE IRRELEVANT

There are additional reasons why petitioners' position is wrong when the ambiguous obligation at issue is contractual. In fact, in the contractual context, even the notion of "authoritative guidance" that "warns away" from an interpretation is inapt.

A. Under Longstanding Legal Principles, the Government Cannot Determine the Meaning of a Contract Provision Unilaterally

Although the meaning of an ambiguous statutory or regulatory obligation is determined by the court or, sometimes, by the government agency (as long as its

interpretation is reasonable), *see Kisor*, 139 S. Ct. at 2406, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals," *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604, 607 (2000) (cleaned up); *see also, e.g.*, *Lockheed Martin IR Imaging Systems, Inc.* v. *West*, 108 F.3d 319, 322 (Fed. Cir. 1997) ("General rules of contract interpretation apply to contracts to which the government is a party."). Hence, the meaning of public contracts is determined by "the mutual intentions of the parties," i.e., the government *and* the private contractor. *NRM Corp.* v. *Hercules, Inc.*, 758 F.2d 676, 681 (D.C. Cir. 1985); *accord Alvin Ltd.* v. *U.S. Postal Service*, 816 F.2d 1562, 1565 (Fed. Cir. 1987) ("'the avowed purpose and primary function of the court is the ascertainment of the intention of the parties'" (quoting 4 Williston, *A Treatise on the Law of Contracts* § 601 (3d ed. 1961))).

When the expression of the contracting parties' intent is ambiguous, ordinary principles of contract law also supply a solution: the rule of *contra proferentem*, which provides that "as between two reasonable and practical constructions of an ambiguous contractual provision, … the provision should be construed less favorably to that party which selected the contractual language." *United States* v. *Seckinger*, 397 U.S. 203, 216 (1970). This rule governs even where the drafter "was the United States." *Id.* at 210; *see also, e.g.*, *States Roofing Corp.* v. *Winter*, 587 F.3d 1364, 1369 (Fed. Cir. 2009) ("It is well established that if a drawing or specification is ambiguous and the contractor follows an interpretation that is reasonable, this interpretation will prevail over one advanced by the Government, even though the Government's interpretation may be a more reasonable

one, since the Government drafted the contract." (cleaned up)); *Norwood Manufacturing, Inc.* v. *United States*, 21 Cl. Ct. 300, 305 (1990), *aff'd*, 930 F.2d 38 (Fed. Cir. 1991) (per curiam) (table); *Keeter Trading Co.* v. *United States*, 79 Fed. Cl. 243, 257 (2007).

Contra proferentem is "accorded considerable emphasis" against the government "because of the Government's vast economic resources and stronger bargaining position in contract negotiations." *Seckinger*, 397 U.S. at 216. The "oft-repeated and much-applied rule" of *contra proferentem* "puts the risk of ambiguity, lack of clarity, and absence of proper warning on the [government as] drafting party which could have forestalled the controversy … and it saves contractors from hidden traps not of their own making." *Sturm* v. *United States*, 421 F.2d 723, 727 (Ct. Cl. 1970). *Contra proferentem* is particularly important given the sprawling, complex, and ever-evolving nature of many defense contracts, as discussed below, *see infra* pp. 22-25. After all, "[i]f the Government wants a particular interpretation to be made of a contract provision, it can write the provision to make that meaning clear." *Neal & Co.* v. *United States*, 945 F.2d 385, 390 (Fed. Cir. 1991).

Thus, to prevail in an ordinary dispute over the meaning of an ambiguous contractual obligation, the "contractor need not demonstrate that its interpretation of the contract is the *only* reasonable one, … [but merely] that its construction is at least a reasonable reading." *P.J. Maffei Building Wrecking Corp.* v. *United States*, 732 F.2d 913, 917 (Fed. Cir. 1984); *see also, e.g.*, *States Roofing*, 587 F.3d at 136; *United States ex rel. Purcell* v. *MWI Corp.*, 807 F.3d 281, 291 (D.C. Cir. 2015) ("That [a contractor's] interpretation may not be the best interpretation does not demonstrate that

[its] interpretation was necessarily unreasonable."). Moreover, when applying *contra proferentem* against the government, courts inquire only whether the contractor's interpretation is objectively reasonable, without considering whether, at the time of its performance, the contractor realized the obligation was ambiguous, recognized potential alternative interpretations, or subjectively believed that its interpretation was the best one. *See, e.g.*, *Seckinger*, 397 U.S. at 213-214, 216 (where government offered "two reasonable … constructions," selecting the one "less favorabl[e]" to government even though contractor did not espouse it); *NOAA Maryland, LLC* v. *Administrator of General Services Administration*, 997 F.3d 1159, 1166-1170 (Fed. Cir. 2021) (applying private party's interpretation simply because it "accord[ed] to standard principles of construction" and was therefore "at least a reasonable reading"); *Neal & Co.*, 945 F.2d at 389-390 (applying contractor's interpretation simply because it was "not unreasonable").

Finally, consistent with these contracting principles, the government generally has no privilege to unilaterally determine the meaning of ambiguous contract provisions even when they incorporate a regulatory provision by reference. "[M]atters of regulatory interpretation when regulations are incorporated into contracts" are resolved "independently and without deference" to the government. *Southern California Edison Co.* v. *United States*, 226 F.3d 1349, 1356, 1358 (Fed. Cir. 2000). This places private parties "on equal legal footing with the government should a dispute over the contract arise," which is appropriate because the incorporated obligations apply by virtue of the contracting parties' mutual assent, not by virtue of the regulator's imposition upon the regulated. *Id.* at 1357. "It would be unfair to give the government such a distinct advantage [as

interpretative deference] during an ordinary breach of contract litigation." *Id.* Indeed, consistent with the ordinary rule of *contra proferentem*, even ambiguous regulatory provisions made binding by their incorporation into a contract should be construed *against* the government.[2]

B. These Contract Principles Render the Contractor's Subjective Understanding and Any "Authoritative Guidance" Irrelevant When There Is a Reasonable Interpretation

The principles of contract law just described imply that there is no FCA liability if a representation of compliance with an ambiguous contractual obligation was true under a reasonable interpretation, regardless of the contractor's subjective understanding of the obligation at the time and regardless of any supposed "authoritative guidance" about its meaning. Contractors should not incur FCA liability for acting consistent with longstanding contract principles; instead, they should have a wide berth to do that, and thus should not generally have a duty to inquire into the meaning of potentially ambiguous contract provisions. There is no

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[2] Even apart from these contract principles, courts "do not defer" to an individual agency's interpretation of the FAR, 48 C.F.R. §§ 1.000 *et seq.*—the principal regulation incorporated into public contracts. *Novicki* v. *Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991); *see also, e.g.*, *Newport News Shipbuilding & Dry Dock Co.* v. *Garrett*, 6 F.3d 1547, 1551 (Fed. Cir. 1993). Judicial deference is appropriate only if "[t]he interpretation … at the least emanate[s] from those actors, using those vehicles, understood to make authoritative policy in the relevant context." *Kisor*, 139 S. Ct. at 2416. But the FAR "was the joint product of, and must be interpreted by, three different agencies." *Novicki*, 946 F.2d at 941.

indication that Congress intended the FCA to abrogate those contract principles.

Under petitioners' view, contractors violate the FCA unless they "honestly believed" their interpretation of an ambiguous obligation at the time of their claim for payment after making "appropriate inquir[ies]" into the meaning of the ambiguous obligation. Pet. Br. 20, 37, 54, 57. That view rests on the notion that the government-favoring interpretation is authoritative and correct.

But that framework contradicts longstanding contract law, as described above, *supra* pp. 12-16. Private contractors are on equal footing with the government. Accordingly, the government's interpretation of ambiguous contractual obligations is owed no deference—by courts or contractors. In fact, when it comes to ambiguous contractual obligations, the rule of *contra proferentem* establishes that a reasonable interpretation favoring the *contractor* is the authoritative and correct one.

Therefore, as long as the contractor's conduct complied with a reasonable interpretation of an ambiguous contractual obligation, the contractor discharged its contractual duty—and correspondingly, a representation of compliance in such circumstances is true and cannot be knowingly false under the FCA. *See* Boese & Baruch, *Civil False Claims and Qui Tam Actions* § 2.03[C][5] (5th ed. updated 2022) ("[A]mbiguous regulations and contract provisions should be … strictly construed under the civil and criminal false claims statutes for purposes of attaching liability … accord[ing to] the … principle that an ambiguous provision should be interpreted against the drafter of the provision, … plac[ing] the burden of proving that the defendant's interpretation of an

ambiguous provision is unreasonable on the party attempting to enforce the provision."). And further, consistent with ordinary contract law, the FCA cannot require contractors to believe their interpretation was the *best* one at the time or even to *have had* a belief about how to resolve the ambiguity; contractors are under contract law, and therefore must be under the FCA, free to act as they wish and then, if the government claims a breach or default, defend on the ground that their performance complied with *a reasonable* interpretation. *See supra* pp. 13-15.

Further, respect for established contract law warrants a protective zone for contractors against the risk of FCA liability. Because the government's interpretation of an ambiguous contractual obligation does not determine the obligation's meaning, contract law imposes no duty on private contractors to inquire into, ascertain, or predict the government's actual or likely interpretation, and thus neither should the FCA. Petitioners' contrary approach is particularly bizarre when it comes to contractual obligations, for it requires the one actor whose view is actually controlling under contract law—the contractor—to seek out and then defer to the opinion of virtually anyone else on the matter. Accordingly, there should be a high bar under the FCA, where the contractor has no liability even when a court ultimately concludes that the contract is *not* ambiguous, at least if the provision could plausibly have been thought ambiguous. Otherwise, the specter of FCA liability—and the attendant exposure to treble damages—would chill contractors' exercise of their rights under established contract law, causing them to yield to the government the power to determine the meaning of contract provisions that the government lacks under contract law and

thereby undermining the equal footing contractors should have.

Even the Seventh Circuit's position partially contravenes contract law and, to that extent, should not be adopted in the contract context. The Seventh Circuit holds that there is scienter if there was "authoritative guidance" from an appellate court or "the relevant agency" that "warned … away" from the claimant's "erroneous interpretation," even if that interpretation was otherwise reasonable. No. 21-1326 Pet. App. 27a-28a. But again, whereas the courts or an agency may have the authority to determine the meaning of an ambiguous statutory or regulatory provision under certain circumstances, the *contractor* determines the meaning of ambiguous contract provisions (within reason). The notion of "authoritative guidance" that "warns away" from a reasonable contractor-favoring interpretation of an ambiguous *contractual* obligation makes no sense. Imposing FCA liability for the failure to look for, find, or follow governmental statements about the meaning of a potentially ambiguous contract provision would upend settled contract law to the detriment of contractors and, ultimately, the government.[3]

Nothing in the FCA's text or legislative history, nor in judicial precedent, indicates that Congress intended the FCA to alter established rules of government contracting. *See* Boese & Baruch § 2.03 ("Broadening FCA liability to include ambiguous regulations and contract terms misinterprets the history and the nature of the

[3] The only situation where the government's guidance could be binding is where it officially purported to resolve an ambiguity *before* the formation of the contract. In that situation, the contractor arguably would have agreed to that meaning, absent indications otherwise.

statute ….”). To the contrary, this Court has held that the FCA is neither “an all-purpose antifraud statute” nor “a vehicle for punishing garden-variety breaches of contract or regulatory violations.” *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 194 (2016) (cleaned up). Rather, the FCA reaches only certain types of fraud about breaches of contract—that is, the FCA rests atop traditional government-contract rules and imposes liability only for a narrow subset of violations within the scope of those rules.

To summarize in petitioners’ terms, the FCA sits on top of rather than displaces ordinary contract law, and therefore, the FCA, reflecting that law, does not require contractors to subjectively or honestly believe that their interpretation was correct at the time of their representation, at least as long as their conduct reflected a reasonable interpretation at the time; does not generally require contractors to inquire into the correct meaning of a potentially ambiguous contractual obligation or into the government’s actual or predicted interpretation of such an obligation; and does not accord the government (or anyone else) the authority to warn a contractor away from a reasonable interpretation. Imposing FCA liability in such situations, as petitioners’ approach would do, would in effect rewrite longstanding legal precedent applicable to government contracts.[4]

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[4] To be sure, under contract law “[t]he doctrine of patent ambiguity is an exception to the general rule of *contra proferentem*” against the government. *Blue & Gold Fleet, LP* v. *United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007). “A patent ambiguity is one that is obvious, gross, glaring.” *States Roofing*, 587 F.3d at 1372. If the ambiguity is patent, the contractor may have “a duty to inquire about it at the start.” *Id.* But that exception does not mean that contractors have a duty to inquire for purposes of FCA scienter.

C. The Complexity of Defense Contracting Reinforces the Irrelevance of the Subjective Understanding of an Ambiguous Obligation

"Without contractor support, the United States would not be able to arm and field an effective fighting force." CRS, *Defense Acquisitions: How and Where DOD Spends Its Contracting Dollars* 1 (updated July 2, 2018); *see also* Joint Chiefs of Staff, *Joint Publication 4-05: Mobilization Planning* I-7 (Oct. 23, 2018) ("The total force includes … contractors …."); DOD, *Report of the Defense Science Board Task Force on Contractor Logistics in Support of Contingency Operations* ("*Contractor Logistics Report*") 23 (June 2014) ("contractors should be considered as one of the essential components of the Department's total force").[5] In recognition of this fact, a

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First, for all the other reasons that the Seventh Circuit's rule should be affirmed irrespective of the source of the obligation—discussed in respondents' brief and above, *supra* pp. 8-9—there should be no duty of inquiry under the FCA even as to patently ambiguous obligations. Second, even the contract-law exception to *contra proferentem* would not apply in the context of breach, which undergirds FCA claims. The contractor's "failure" to "seek clarification from the government" about a patent ambiguity "precludes acceptance of its interpretation"—but only "in a subsequent action [by the contractor] against the government," such as in a "bid protest action," *Blue & Gold*, 492 F.3d at 1313, or an "equitable adjustment" action, *Dalton* v. *Cessna Aircraft Co.*, 98 F.3d 1298, 1304-1306 (Fed. Cir. 1996). There is no reason to construe this limited exception to preclude a contractor from relying on *contra proferentem* defensively with respect to a patent ambiguity in the FCA context, where the contractor is not seeking to recover funds but instead is refuting an accusation that its representation of compliance with an ambiguous obligation was knowingly false.

[5] https://crsreports.congress.gov/product/pdf/R/R44010; https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp4_05.pdf; https://dsb.cto.mil/reports/2010s/CONLOG_Final_Report_17Jun14.pdf.

DOD directive requires its components to use contractors "in appropriate situations." DOD, Directive 3020.49 § 1.2(d) (updated Mar. 18, 2022).[6]

"[O]perational contract support strengths that have proved critical to [military] operations include flexibility, adaptability to unknown requirements, ability to rapidly adapt to change, surge capacity, access to experienced workers, and individual continuity in-theater." *Contractor Logistics Report* 23; *see also*, *e.g.*, National Research Council of the National Academies, *Force Multiplying Technologies for Logistics Support to Military Operations* 129 (2014) ("In areas where distance plays a large factor, contractors can become available days, if not weeks, before military units can carry out critical sustainment operations.").[7] And contractors often provide these advantages at a small fraction of what the government would spend to provide them itself. *See*, *e.g.*, DOD, *Report of the Defense Science Board Task Force on Improvements to Services Contracting* 12 (Mar. 2011) ("For expeditionary logistics support, when considering all costs over a 20-year period, private sector competitive procurement was projected to be roughly 90 percent less costly than using federal workers.").[8]

The dynamics of defense contracting can be complex. Defense contracts often have long or indefinite duration and innumerable provisions spread across a base contract and various subcontract documents that are

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[6] https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/302049d.pdf?ver=2020-08-14-151206-757.

[7] https://nap.nationalacademies.org/read/18832/chapter/1.

[8] https://dsb.cto.mil/reports/2010s/ADA550491.pdf.

issued at various times over the contract's life. Further, such contracts typically incorporate various provisions of the FAR, a lengthy regulation whose "terms are confusing, poorly defined, or undefined altogether," Section 809 Panel, 1 *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations* 18 (Jan. 2018),[9] as well as various provisions of FAR supplements, such as the Defense Department's DFARS, *see* 48 C.F.R. §§ 201.101 *et seq*.

The Army's Logistics Civil Augmentation ("LOGCAP") contracts are typical. Since 1992, the Army has used these contracts to provide civilian support for its military operations in Somalia, Haiti, Iraq, Afghanistan, and other foreign theaters. *Contractor Logistics Report* 12-13 & fig. 3. The duties under each LOGCAP contract (there have been five so far) are specified through a cascade of subcontract documents. The cascade begins with the prime (or base) contract, which is often more than 100 pages long and which defines the basic framework for the relationship. *See* CBO, *Logistics Support for Deployed Military Forces* ("*Logistics Support*") 2-3 (Oct. 2005); Department of the Army, *Logistics Civil Augmentation Program Support to Unified Land Operations* § 1-1 (Aug. 2016).[10] Next are a set of "task orders," which broadly "specify a schedule for the number of troops to be supported at various future dates, their geographic location and dispersion within a theater, the mix of services provided (within the overall menu

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[9] https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Volume1/Sec809Panel_Vol1-Report_Jan2018.pdf.

[10] https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/reports/10-20-militarylogisticssupport.pdf; https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN2624-ATP_4-10.1-000-WEB-1.pdf.

delineated in the contract), and the duration of the effort." *Logistics Support* 6. It is common for the Army to issue more than 100 task orders—often 10-15 pages each—for a single base contract. Task orders might cover, among other things: supply operations, such as food, water, fuel, and spare parts; field operations, such as dining and laundry facilities, housing, sanitation, waste management, postal services, and activities for morale and recreation; engineering and construction; and support for communication networks, transportation and cargo services, and facilities maintenance and repair. *See id.* at 6-7 & box 1.1; *Contractor Logistics Report* 13.

Within the LOGCAP task orders, the Army further defines the contractor's duties by issuing statements of work and various modifications thereto, specified through change orders and letters of technical direction. *See, e.g.*, *Logistics Support* 35. Modifications, which often range from 20 to 150 pages, are made frequently; a single task order or statement of work might have hundreds of change orders and potentially thousands of letters of technical direction, *see, e.g.*, *id.*

Petitioners' approach to scienter would impose unmanageable burdens on contractors and jeopardize their ability to provide the kind of operational support that the military relies on. Given the volume, complexity, and changing nature of the duties specified in many defense contracts, it would be impractical for contractors to identify every ambiguity that is material to their claims for payment and then conduct an "appropriate inquiry" into the meaning of each such term. In many instances, a contractor will simply not have the time or resources to recognize or fully appreciate the potential ambiguity, let alone to conduct an "inquiry" by consulting with various "sources" on the meaning of the obligation.

The ambiguity and alternative interpretations might not occur until the government or, more likely, a motivated qui tam relator decides to assert an FCA violation, by which point it will be too late: the contractor will already have unwittingly established scienter under petitioners' approach.

The threat of treble damages under the FCA for such "failures" would compel defense contractors to fundamentally alter how they perform their duties. Contractors might need to assign numerous additional personnel to each contract to be hyper-vigilant for ambiguity arising under new terms or in new circumstances and then, upon identifying potential ambiguity, to conduct thorough inquiries into their meaning. That extra work would increase the government's contract costs and impede contractors' performance, harming contractors' ability to support the government's operational needs. Sometimes, performance might grind to a halt, as a contractor might be reluctant to undertake a certain action until it resolved the ambiguity with the government—lest it position itself either to not be paid later or to incur FCA liability for the payment. Petitioners' approach would thus either undermine some of the primary benefits the government derives from relying on defense contractors or put contractors to a Hobson's choice between the risk of the government terminating the contract for default and the risk of treble FCA liability. At that point, the combined risks might begin to deter private companies from contracting with the government entirely, to the public's detriment.

III. IF THE COURT REJECTS THE SEVENTH CIRCUIT'S POSITION, IT SHOULD CAREFULLY LIMIT THE RELEVANCE OF SUBJECTIVE UNDERSTANDING

For all the reasons discussed above and in respondents' brief, subjective understanding should be irrelevant where a representation of compliance with an ambiguous statutory, regulatory, or contractual obligation is true under a reasonable interpretation of that obligation. Contrary to petitioners' and the government's claims, such a position would not permit claimants to violate the FCA with impunity. Representations of compliance with an ambiguous obligation could still violate the FCA where the claimant's interpretation was unreasonable or where the representation was false under any reasonable interpretation. In those circumstances, the unreasonableness of claimant's interpretation or the utter falsity of the representation may make the claimant's subjective understanding of the obligation pertinent. Thus, even under respondents' approach, the FCA would reach intentional fraud.

But even if the Court were to disagree and deem subjective understanding relevant even when the representation of compliance was true under a reasonable interpretation, the Court should hold that, in that situation, scienter is established only if the claimant (1) intended to defraud the government or (2) *believed* its representation was *false* at the time it submitted the claim *and* did not disclose to the government the interpretation on which its representation relied. *See Commercial Contractors, Inc.* v. *United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998) ("If a contractor submits a claim based on a plausible but erroneous contract interpretation, the contractor will not be liable [under the FCA], absent some specific evidence of knowledge that the claim is

false or of intent to deceive. … [W]hen the contractor's purported interpretation of the contract borders on the frivolous, the contractor must either raise the interpretation issue with the government contracting officials or risk liability under the FCA ….''). That rule would minimize disruption of the existing contract principles discussed above and at least recognize that contractors will rarely be able to develop the educated view of every ambiguous obligation that petitioners demand.

Moreover, the Court should also make clear that scienter is not automatically established by evidence that the claimant recognized the government did or might disagree with its interpretation. As explained above, private parties can and must continue to be able to disagree with the government. *See supra* pp. 13-15. An awareness that there is disagreement about the interpretation of an obligation does not equate to knowledge that a representation of compliance is false. Indeed, "[i]n the face of an undefined and ambiguous regulatory requirement, it is no wonder that employees of the regulated entity [might be] concerned." *Purcell*, 807 F.3d at 290.

To that point, the evidence adduced against respondents shows only a prediction that the government would disagree. For example, the record includes one directive that a SuperValu Vice President sent another executive to "make sure one of SuperValu's attorneys can defend our price match policy as not being our U and C if they are pressing for a response." Pet. Br. 11 (cleaned up). In other words, the SuperValu executive wanted to make sure they were relying on a *reasonable* interpretation of the "usual and customary" pricing standard, even if not the interpretation SuperValu thought the government might insist on. Another

remark "ask[ed] legal to 'please chime in.'" Resp. Br. 13. Such evidence refutes, rather than supports, scienter.

CONCLUSION

The decisions below should be affirmed. As respondents showed, proper interpretation of the FCA and the constitutional principles of notice and lenity preclude punitive FCA liability when a claimant's representation of compliance with an obligation was true under a reasonable interpretation of that obligation, regardless of the claimant's subjective understanding. Separately, longstanding contract principles—which Congress did not intend the FCA to override—reinforce and expand the leeway that government contractors must have under the FCA. Respect for those principles not only renders contractors' subjective understanding of ambiguous contractual obligations irrelevant as long as their conduct conformed to a reasonable interpretation of the obligation, but also relieves contractors of any duty to heed any supposedly "authoritative guidance" about or to otherwise inquire into, ascertain, or predict the government's actual or likely interpretation of those obligations. Even if the Court were to deem subjective understanding relevant, however, it should at least hold that FCA scienter is established only if the claimant actually believed its representation was false at the time it submitted the claim and did not inform the government of the interpretation on which its representation relied, and should emphasize that a claimant's awareness that the government might disagree with its interpretation does not automatically show scienter.

Respectfully submitted.

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