Nos. 21-1326, 22-111

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
EX REL. TRACY SCHUTTE & MICHAEL YARBERRY,

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

REPLY BRIEF FOR PETITIONERS

Tejinder Singh
Counsel of Record
SPARACINO PLLC
1920 L Street, NW
Suite 835
Washington, DC 20036
(202) 629-3530
tejinder@sparacinopllc.com

John Timothy Keller
Dale J. Aschemann
ASCHEMANN KELLER LLC
300 North Monroe St.
Marion, IL 62959-2326
(618) 998-9988

Additional Counsel Listed on Inside Cover

Rand J. Riklin
GOODE CASSEB JONES
RIKLIN CHOATE & WATSON
2122 North Main Avenue
P.O. Box 120480
San Antonio, TX 78212
(210) 733-6030

Gary M. Grossenbacher
ATTORNEY AT LAW
402 Vale Street
Rollingwood, TX 78746
(512) 699-5436

Glenn Grossenbacher
LAW OFFICE OF GLENN
GROSSENBACHER
24165 IwH-10 W.
Ste 217-766
San Antonio, TX 78257
(210) 271-3888

C. Jarrett Anderson
ANDERSON LLC
1409 Wathen Avenue
Austin, TX 78703-2527
(512) 619-4549

Paul B. Martins
Julie Webster Popham
James A. Tate
HELMER, MARTINS, TATE
& GARRETT CO., LPA
1745 Madison Road
Cincinnati, OH 45206
(513) 421-2400

Jason M. Idell
IDELL PLLC
6800 Westgate Blvd.
Ste 132 #301
Austin, TX 78745
(512) 689-3081

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Other Authorities

REPLY BRIEF FOR PETITIONERS

Congress strengthened the False Claims Act (FCA) by adopting a three-part definition of "knowingly" that includes the subjective standards of "actual knowledge" and "deliberate ignorance"—as well as "reckless disregard," which in fraud cases can be satisfied by subjective as well as objective proof. 31 U.S.C. § 3729(b)(1)(A). Congress thus compelled an inquiry into the subjective mental state of defendants who present false claims—ensuring that the FCA would not reach honest mistakes but would reach those who cheat the Government or present false claims without first making prudent inquiries.

Respondents do not and cannot argue that the FCA's plain meaning compels an exclusively objective inquiry. Nevertheless, they contend that even if a defendant presented false or fraudulent claims with the scienter required by the FCA's text, that scienter is negated if the defendant's attorneys can subsequently identify an "objectively reasonable" interpretation of the law that would have permitted the defendant's conduct—unless the Government issued "authoritative guidance" foreclosing that interpretation. But these key terms never appear in the FCA; respondents instead derived them from an unrelated discussion of what it means to "willfully" violate the Fair Credit Reporting Act (FCRA) in *Safeco Insurance Company of America v. Burr*, 551 U.S. 47 (2007)—a discussion this Court cabined to that context and that would not apply to the FCA's distinct text in any event. Respondents' rule is untethered from the FCA's text and should be rejected for that reason alone.

Respondents' rule also clashes with the common law of fraud, which looks to a defendant's subjective mental state to determine scienter. At common law, the reasonableness of a defendant's conduct is relevant—but not dispositive—in determining what the defendant actually believed. Respondents' rule treats objective reasonableness as the inquiry's endpoint, and the defendant's actual mental state as "irrelevant," in conflict with centuries of precedent.

Respondents' rule fails a common-sense litmus test, too. Ask: Did Congress enact a statute under which somebody who admits that he intentionally presented false claims could deny that he acted "knowingly"? Obviously not. But that is a necessary result of respondents' legal rule—and so respondents' rule is obviously wrong.

Nothing respondents say redeems their rule. Even if the Court is sympathetic to respondents' policy arguments about the challenges of compliance with ambiguous laws and the need to provide notice to businesses, Congress accounted for those concerns by adopting a subjective scienter rule, which protects everybody who honestly attempts to discern and follow the law (even if they get it wrong). Respondents' concerns do not justify their extreme position allowing unscrupulous contractors to intentionally plunder every ambiguity for maximum gain.

For these reasons, as well as those stated in our opening brief, supporting amicus briefs, and below, this Court should reverse.

ARGUMENT

I. Respondents' Factual Recitation Is Inaccurate and Does Not Support Their Legal Rule

1. Pharmacies must accurately report their usual and customary (U&C) prices to ensure that the Government pays no more for drugs than members of the general public would pay in cash transactions. *See, e.g.*, *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 644 (7th Cir. 2016). Respondents offered lower prices to every member of the cash-paying public without reporting those prices as U&C. Instead, they reported prices that were often much higher—even when the majority of cash sales for a drug were made at lower prices. The district court in *Schutte* held such claims false as a matter of law. JA16-19. Respondents thus unlawfully received over $100 million each from the Government, which they have never paid back.

Respondents did not believe their reports were accurate. Their executives knew that when discounts became the rule rather than the exception, those prices became U&C. Pet'r Br. 10-11. Respondents accordingly ran their programs stealthily to obscure them from the Government. *Id*. at 11-12.

Rather than defend their integrity at trial, respondents offer a revisionist history recasting their conduct as reasonable. But their story is wrong—or at least sufficiently debatable that no court could accept it at summary judgment. It also does not justify respondents' attempted rewriting of the FCA.

2. As respondents tell it, the Government has slept on an ambiguous definition of U&C since 1975. But widespread discounting in the retail pharmacy

market did not emerge until Wal-Mart began offering $4 generics in 2006, prompting competitors to respond. Pet'r Br. 5-6. Discounting really took off several years later. *See id*. at 7. Yet in 2006, CMS issued guidance explaining that "where a pharmacy offers a lower price to its customers throughout a benefit year," as opposed to one-off discounts based on a particular customer's circumstances, that discount price becomes the pharmacy's U&C price. JA222 n.1. Far from tolerating ambiguity, the Government addressed it promptly and in a reasonable manner given the evolving marketplace.

Respondents do not materially address CMS's guidance until page 55, brushing it aside as non-binding and insufficiently specific to price-matching. But just because the Government did not address the issue in the unusually burdensome form respondents desire does not mean that it failed to provide sufficient guidance. *See* Pet'r Br. 51-52.

Respondents also attack straw arguments using out-of-context CMS statements. Thus, respondents argue CMS agreed that "not all discounted prices are U&C prices." Resp. Br. 9. Sure: Individualized, one-off discounts of the sort offered before Wal-Mart's pivot were not U&C prices, and petitioners never argued otherwise. Here, however, respondents offered discounts to the entire cash-paying public, applying (and automatically reapplying) them throughout the benefit year. CMS's 2006 guidance—which conformed to longstanding policy and the common understanding of a pharmacy's "usual" price, *Garbe*, 824 F.3d at 644—shows that such systematic discounts are the U&C price.

Alongside CMS, pharmacy benefit managers (PBMs) and States also alerted pharmacies (including

respondents) that widely available discounts must be accounted for in U&C prices. Respondents understood the import of this guidance. Pet'r Br. 9-11.

To undermine those facts, respondents argue that U&C definitions were inconsistent. Any variations, however, are immaterial in the face of respondents' conduct, *i.e.*, making the majority of cash sales for certain drugs at deeply discounted prices without reporting those prices as U&C. Respondents' claims were false under the definition of U&C adopted by the Seventh Circuit: the cash price offered to the general public, which applies to Medicare and Medicaid programs absent contrary regulations. *Schutte* Pet. App. 4a-6a; JA16-19. They were false under definitions that respondents themselves pressed below. *See Schutte* Dkt. 176-1, at 13 (SuperValu arguing that "[t]he U&C price was also typically considered the price charged to the 'general public,' which was understood within the industry to mean the price charged to a majority of a pharmacy's cash paying customers for a particular drug"). And they were false under contracts requiring pharmacies to report discount prices as U&C. JA37-38.

Respondents counter with declarations sourced from PBMs in 2018 purporting to bless respondents' practices. These are misleading because of how they were obtained. Respondents' counsel solicited signatures (on declarations they drafted) *ex parte* and mostly at or after the close of discovery. Counsel also never disclosed to the declarants that most cash sales for certain drugs occurred at discounted prices that were widely available throughout the benefit year.

After hearing the true facts, PBMs told a different story. For example, one of respondents' declarants provided supplemental declarations stating that her original "Declaration should not be construed as a determination of the Defendants' price matching program operations or the propriety of Defendants' U&C price reporting," JA110; JA258 (similar for Safeway), because she had no personal knowledge of respondents' actual practices, JA109; JA257. Respondents' other PBM declarations are similarly unreliable.

Respondents also cite materials lodged in separate consumer fraud litigation against non-defendant CVS. Those are unpersuasive for several reasons: (1) They were struck from the record in *Schutte*, Dkt. 312, at 2, and presumably would have been in *Proctor* had the court reached the issue; (2) CVS's program, which had membership fees, was more defensible than respondents'; and (3) the Ninth Circuit held that these materials did not negate scienter, *see Corcoran v. CVS Health Corp.*, 779 F. App'x 431, 433 (9th Cir. 2019).

3. Respondents manipulate fractions to argue that discounts accounted for only a small percentage of total sales or cash sales. Resp. Br. 5. The total-sales numbers are irrelevant because U&C prices refer to cash sales. Respondents' cash-sales numbers depend on slicing and dicing the numbers inconsistently with how U&C prices are calculated on a per-drug basis. Using the correct math, over 80% of cash sales for many popular drugs occurred at steep discounts, but respondents unlawfully refused to report those prices as U&C. Pet'r Br. 7-8.

Respondents also assert that they operated transparently, only calling their programs "stealthy" to hide them from customers, not the Government. Actually,

respondents advertised their discounts to the public, while fretting about keeping a "low profile" from Medicaid agencies and "damage control" if third-party payors saw the ads. Pet'r Br. 11-12, 55-56.

Respondents' attempts to spin this evidence are audacious. For example, a Safeway executive reacted to Nebraska's direct instruction that discounts needed to be reported as U&C by asking "Does anyone think we have an issue here?" SJA213. Respondents characterize this as a question about "what was required in this complex and uncertain legal area," Resp. Br. 13, but the next sentence of the executive's two-sentence e-mail says, "My question is how the state of Nebraska will know that we offered to match any price out there….." SJA213. This was not a genuine question from a person attempting compliance; it was a naked suggestion to continue illegal conduct. Respondents' spin illustrates our point that clever attorneys are adept at skewing the facts and law to rationalize even clearly culpable acts. Pet'r Br. 53.

4. Respondents claim that SuperValu was audited, and the audits raised no issues relating to U&C prices. Resp. Br. 16. This is a red herring. None of these audits were about U&C reporting. *See Schutte* Dkt. 191-1, at 47-48 (citing testimony from multiple knowledgeable SuperValu witnesses); JA107-08. And auditors could only access limited data relating to their entities' own transactions; they could not see the cash sales that revealed widespread discounting. JA108.

5. Finally, respondents' factual recitation does not support their legal rule. If anything, it supports petitioners because if respondents honestly attempted to

discern and follow unclear laws, they will prevail under petitioners' rule. Under respondents' rule, however, most of the evidence that both sides cited is irrelevant to the scienter inquiry. Respondents have not shown why that makes sense. More pointedly, if petitioners show that respondents did not believe their false U&C prices were accurate, respondents have not explained why they should escape liability as a matter of law.

II. *Safeco* Does Not Support Respondents' Rule

Respondents seek to reinvent the law of fraudulent scienter by resort to *Safeco*'s footnote 20. That is a slender precedential reed on which to rest a massive revision to the well-established law of fraud. Ultimately, the argument doesn't hold up.

1. Most clearly, the texts of the FCA and FCRA differ in that the FCRA did not define "willfully," but the FCA's three-part definition of "knowingly" includes clearly subjective prongs like "actual knowledge." 31 U.S.C. § 3729(b)(1)(A). By using those words, Congress unambiguously deemed subjective scienter sufficient. This Court should not engraft an atextual objective threshold onto that standard.

2. Respondents improperly minimize *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 579 U.S. 93 (2016), which rejected in the patent damages context the same *Safeco*-derived objective threshold respondents press here.

Halo did not merely distinguish *Safeco*, but cabined *Safeco's* footnote 20—the sole authority for respondents' position that subjective scienter is irrele-

vant—to "whether there had been a knowing or reckless violation of the Fair Credit Reporting Act," stressing that "'willfully' is a word of many meanings whose construction is often dependent on the context in which it appears." *Halo*, 579 U.S. at 106 n.* (quoting *Safeco*, 551 U.S. at 57). The Court further clarified that "[n]othing in *Safeco* suggests that we should look to facts that the defendant neither knew nor had reason to know at the time he acted." *Id*. at 106. Instead, "culpability is generally measured against the knowledge of the actor at the time of the challenged conduct." *Id*. at 105.

Respondents relegate *Halo* to a single paragraph. Resp. Br. 42-43. They argue that because enhanced damages are discretionary in patent cases, but mandatory in FCA cases, the FCA's scienter standard must be more demanding. Respondents' distinction fails because enhanced patent damages, although discretionary, are appropriate only in "egregious cases of culpable behavior." *Halo*, 579 U.S. at 104. The Court's goal was not to provide district courts with discretion to impose damages in cases involving less culpability. Instead, the Court rejected an objective threshold because it would wrongly insulate "some of the worst patent infringers from any liability for enhanced damages"—such as those who "intentionally infringe[] another's patent." *Ibid*. The Court was particularly troubled that "someone who plunders a patent" could escape "solely on the strength of his attorney's ingenuity" in concocting a reasonable-but-unsuccessful defense. *Id*. at 105. That reasoning equally condemns respondents' rule, which would allow defendants who intentionally cheat the Government to escape liability based on an attorney's subsequent ingenuity.

More broadly, no rule holds that statutes imposing mandatory damages require an objective threshold in addition to subjective scienter. Instead, subjective standards are typical, and Congress calibrates each statute based on its objectives. Here, Congress exempted only "honest mistakes" and "mere negligence"—but made clear that subjective scienter is sufficient. Pet'r Br. 34 (quoting S. Rep. No. 99-345, at 7 (1986)).

3. *Halo* emphasized that enhanced damages in patent cases were historically based on subjective scienter—unlike FCRA damages, which had no such pedigree. 579 U.S. at 105-06 & n.*. Fraud damages, including under the FCA, have also historically been predicated on subjective scienter. *Safeco* is inapposite because it interpreted common-law rules relating to reckless disregard of physical safety—not fraud. Pet'r Br. 42-44.

Respondents observe that *Safeco* was not about physical safety, Resp. Br. 31-32, but that misses the point—which is that *Safeco* never analyzed the law of fraud, under which recklessness includes a defendant speaking without "the confidence in the accuracy of his representation that he states or implies"—a subjective standard. Restatement (Second) of Torts § 526(b) & cmt. e (Am. L. Inst. 1977, Westlaw March 2023 Update); *see also* Pet'r Br. 28-29. *Safeco* neither limited that rule nor addressed other subjective common-law standards for fraudulent scienter.

4. The FCA and FCRA also differ because the FCA applies specifically to persons seeking Government funds or property. Those who choose to bill government programs "have an affirmative obligation to ascertain the truthfulness of the claims they submit,"

and not "insulate themselves from the knowledge a prudent person should have before submitting a claim to the Government." Pet'r Br. 34 (quotation marks omitted). Such persons are "held to the most demanding standards in [their] quest for public funds," consistent "with the general rule that those who deal with the Government are expected to know the law"—including by "obtain[ing] an interpretation of the applicable regulations" when facing "a doubtful question not clearly covered by existing policy statements." *Heckler v. Cmty Health Servs of Crawford Cnty., Inc.*, 467 U.S. 51, 63-64 (1984).

Respondents don't refute this contention. Instead, they try to flip it, blaming the Government for allowing ambiguity to persist by not enacting specific responsive regulations. As explained *supra*, respondents' smears of the Government are factually inaccurate. But even if the Government could have done more, that does not change that the FCA was enacted against a different backdrop than the FCRA, which weighs against applying *Safeco*. It also does not absolve respondents from attempting to follow the law to the best of their ability[*]—and certainly does not suggest that this Court should adopt a rule that helps intentional fraudsters loot the federal treasury.

Indeed, only petitioners' rule accounts for both the Government's and contractors' interests. Under our rule, contractors that make honest mistakes vis-à-vis

[*] Respondents argue that it is unclear what constitutes the "best" interpretation of a law. Resp. Br. 53. Not so. The best interpretation is the one that a court, applying appropriate tools of construction, would reach.

ambiguous laws have a powerful defense, while contractors that intentionally present false claims do not. Respondents' rule throws out the baby with the bathwater by protecting intentional fraudsters, too.

5. As respondents note, *Safeco*'s analysis was borrowed from qualified-immunity law. Resp. Br. 48. That heritage underscores why *Safeco* does not apply. In addition to having no textual basis in the FCA, none of qualified immunity's justifications—including traditional immunity afforded to government officers, the need to ensure that officers can make spur-of-the-moment decisions, and the need to safeguard public resources—support immunity for FCA defendants. Indeed, it would be truly upside-down to use qualified immunity principles to protect those who seek to raid the public fisc and stymie law enforcement.

6. Finally, even if the Court deems *Safeco* applicable, it should not hold that a defendant's contemporaneous subjective beliefs are irrelevant. *See* Pet'r Br. 45-53. That is not what *Safeco* meant. *See Halo*, 579 U.S. at 106. *Safeco* said instead that willfulness does not exist when a defendant merely "followed an interpretation that could reasonably have found support in the courts." 551 U.S. at 70 n.20. But to "follow" an interpretation, the defendant must have been contemporaneously aware of it; after all, one cannot follow what he did not perceive. Thus, even under *Safeco*, a defendant cannot prevail solely using post hoc rationalizations.

III. The Statutory Text and Common Law Foreclose Respondents' Rule

A. Respondents Have No Good Answer to Petitioners' Lead Statutory Argument

Petitioners explained that the FCA's plain text incorporates the common-law fraudulent scienter standard because even if the word "knowingly" is interpreted narrowly, what must be done knowingly is the presentment of a "false or fraudulent" claim. That phrase takes its meaning from the common law, under which "fraudulent" claims are those made without honest belief in their truth. Pet'r Br. 22-31.

Respondents address this argument in a single paragraph, contending that it ignores the statutory definition of "knowingly." Resp. Br. 39. Respondents misunderstood and/or misconstrued our argument. Petitioners never suggested that the Court ignore the FCA's definition, but instead explained that even under "the narrowest interpretation of the FCA's definition of 'knowingly,'" a person who actually knows that he does not honestly believe in his claims has "knowingly" presented a "fraudulent" claim. Pet'r Br. 30-31.

Respondents also argue that under this Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016), the word "fraudulent" is about falsity, not scienter. Resp. Br. 39. But the Court held that "fraudulent" "incorporates the common-law meaning of fraud," 579 U.S. at 187—which includes a scienter component. The comments to Section 526 of the Restatement (Second) of Torts, entitled "Conditions Under Which Misrepresentation Is Fraudulent (Scienter)," explain that "[t]he word

'fraudulent' is here used as referring solely to . . . 'scienter,'" *id*. § 526 cmt. a.

Petitioners based our common-law argument around Section 526, but respondents never mention it. The closest they come is to argue that misrepresentations of law are not fraudulent under the common law. Resp. Br. 33-39. That is wrong for three reasons.

First, misrepresentations of law differ from other misrepresentations only with respect to whether the recipient may justifiably rely on them. *See* Restatement (Second) of Torts § 545. The logic goes that because anybody can look up the law, a person generally cannot justifiably rely on another's legal opinion. *See id*. § 545 cmt. d. But as respondents concede, "the FCA does not incorporate the common-law element of reliance," Resp. Br. 36—so that principle is irrelevant in FCA cases. *See* Pet'r Br. 23 n.6. The elements of common-law fraud that the FCA does incorporate, including falsity and scienter, apply equally to legal opinions.

Second, respondents' statements were not legal opinions. "A statement of law may have the effect of a statement of fact or a statement of opinion." Restatement (Second) of Torts § 525, cmt. d. The difference between a statement of fact and one of opinion "is one between 'This is true,' and 'I think this is true, but I am not sure.'" *Id*. § 538A, cmt. b. Thus, a legal opinion exists when "all the pertinent facts are known," and the speaker opines only as to "the legal consequences of those facts." *Id*. § 545 cmt. a. For example, a legal opinion would be, "We believe the definition of U&C prices does not include discounts unless those discounts are actually provided to everybody," or, "We charge the majority of our cash-paying customers $4

for this drug under our discount program, but the nominal retail price is $20, which is what we are reporting as U&C." Respondents made no such statement. Instead, their claims stated unequivocally that the U&C price for a drug was a certain amount, *e.g.*, $20, when it should have been less, *e.g.*, $4. That figure has factual and legal inputs. But the figure itself is a statement of fact, as respondents never expressed any doubt about it, nor supplied the facts behind it (which were known only to them).

The Government and its agents evaluating respondents' claims also understood these statements as factual. The Government expects contractors to claim no more than they legally can. Pet'r Br. 44-45; 33 States Br. 1, 12-13; U.S. Br. 31-32. Thus, when a contractor reports a specific U&C price, the Government receives that number as a factual representation—not as a legal argument.

Third, factual statements implicit in legal opinions are actionable like any other factual statement. *See* Restatement (Second) of Torts § 545 cmt. b. This Court addressed this principle in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175, 188 (2015), explaining that "an unadorned statement of opinion about legal compliance," like "We believe our conduct is lawful" could be misleading if the speaker "makes that statement without having consulted a lawyer," or "made the statement in the face of its lawyers' contrary advice, or with knowledge that the Federal Government was taking the opposite view." And "every such statement explicitly affirms one fact: that the speaker actually holds the stated belief"—such that an opinion about legal compliance would be false if the speaker "thought her

company was breaking the law." *Id*. at 184. Thus, if respondents did not believe their U&C figures, or knew they were improperly calculated, they made actionable factual misrepresentations.

A leading torts treatise similarly observes that "[t]he present tendency is strongly in favor of . . . recognizing that a statement as to the law, like a statement as to anything else, may be intended and understood either as one of fact or one of opinion only, according to the circumstances of the case." W. Page Keeton, et al., Prosser & Keeton on the Law of Torts § 109, p.759 (5th ed. 1984) (footnote omitted). Indeed, "representations of law almost never are made in such a vacuum that supporting facts are not to be implied." *Id*. at p.760 (cleaned up).

Respondents' authorities support the above propositions. Respondents lead with a legal encyclopedia—which recognizes that "[m]isrepresentations involving a point of law will be regarded as actionable misrepresentations of fact if it appears they were so intended and understood." 37 C.J.S. Fraud § 96 (2023). The cases respondents cite (at 34-36) likewise do not imply that reports of U&C prices should be treated as legal opinions—or that such statements can never be made falsely with scienter. Instead, these cases principally speak to justifiable reliance, which is not part of the FCA; and some are not about statements of law at all.

It follows that if a defendant knows he is presenting a claim he does not subjectively believe, he "knowingly presents" a "fraudulent claim"—which is all the FCA's text requires. *See* 31 U.S.C. § 3729(a)(1)(A).

B. Respondents' Interpretation of the False Claims Act's Definition of "Knowingly" Is Unpersuasive

Respondents' discussion of the statutory definition (at 23-25) does not refute the contentions advanced by petitioners and our amici. *See* U.S. Br. 17-21; Grassley Br. 6-12. Most clearly, respondents have not shown that the FCA's text includes an objective threshold scienter requirement in cases involving legal ambiguity.

1. Respondents argue that "actual knowledge" of a legal violation cannot exist when legal obligations are unclear. Resp. Br. 24. But for scienter purposes, a true belief that one is breaking the law is the same as knowledge—because anybody who acts pursuant to such a belief has the same culpable mindset as a person who knows he is breaking the law. Pet'r Br. 31-33; U.S. Br. 28, 31; Grassley Br. 6-8. Thus, in fraud cases, it has always been "enough that [the speaker] believes the representation to be false." Restatement (Second) of Torts § 526 cmt c.

The cases respondents cite do not address this issue in the context of civil scienter, let alone fraud. In *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020), the question was whether a plaintiff who received but did not read certain notices had "actual knowledge" of the information therein for purposes of triggering an accelerated statute of limitations; the answer was "no" because the term "actual knowledge" has traditionally meant awareness. *Id*. at 776. But the Court had no cause to comment on whether true belief is sufficient for scienter purposes.

Instead, the language respondents cite (at 24) was contrasting *subjective* actual knowledge with *objective* constructive knowledge, *i.e.*, "something that a reasonably diligent person would have learned"—not with subjective belief. *Ibid. Intel* thus hurts respondents' argument because it establishes that "actual knowledge" is not an objective standard.

In *Iron Silver Mining Co. v. Reynolds*, 124 U.S. 374, 383 (1888), the Court considered whether a vein or lode of minerals could be "known to exist" for purposes of determining property rights over those minerals. In that context, the Court held that there was a material difference between knowledge and belief. *Id*. at 384. But the statute in *Reynolds* had nothing to do with scienter or fraud.

Respondents also cite the Court's plurality opinion in *Screws v. United States*, 325 U.S. 91 (1945), interpreting the criminal civil rights statute. There, defendants challenged the statute's constitutionality, contending that due process violations are too amorphous to support criminal liability. The plurality applied the canon of constitutional avoidance, *id*. at 97-98, reading in "a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law," *id*. at 103.

Screws is distinguishable. First, and most importantly, the plurality did not distinguish between knowledge and true belief. A defendant who correctly believed that he was violating a victim's rights would have the intent required by *Screws*. Second, *Screws* was a criminal case involving a judicially created specific intent requirement; the FCA is a civil statute that eschews any such requirement. 31 U.S.C. § 3729(b)(1)(B). Third, *Screws* addressed a specific

problem, which is that due process rights are amorphous and can only be defined by courts. The plurality never held, however, that any law potentially subject to multiple interpretations can never be a predicate for civil liability when the defendant correctly believes he is violating that law.

The only other decision respondents cite is *Safeco*, but the FCRA did not define "willfully" at all, let alone include an "actual knowledge" prong. *Safeco* is also inapposite for additional reasons stated *supra*.

Elsewhere, respondents argue that knowledge is not the same as true belief in the field of epistemology, citing a 1963 paper by Gettier. Resp. Br. 43. But Gettier merely proved that true beliefs may sometimes be coincidence (for example, a person could believe the correct conclusion for an incorrect reason). Such marginal hypotheticals notwithstanding, true belief "remains the default definition of knowledge, and a pretty good one at that." Joseph Blocher, *Free Speech & Justified True Belief*, 133 Harv. L. Rev. 439, 464 (2019). Indeed, Gettier's critique fizzles in the scienter context because a defendant who correctly believes he is breaking the law and does it anyway acts culpably—even if his reasoning was flawed. *See* Pet'r Br. 33 n.10. And here, respondents' claims were found to be false for the very reason respondents believed them false: Their reported U&C prices were much higher than the prices most cash customers paid.

2. Deliberate ignorance turns on the defendant's subjective awareness of a high risk that a fact exists. Pet'r Br. 35-36. Respondents never dispute that the test is subjective, which is the most important point in deciding whether an objective *Safeco*-derived standard could apply (it can't).

Instead, respondents argue that when the law is unsettled, deliberate ignorance is impossible because "there are no places to look to get an authoritative answer." Resp. Br. 25. That is wrong. When confronted with "a doubtful question not clearly covered by existing policy statements," contractors seeking public funds should "obtain an interpretation of the applicable regulations" from the Government—or at least *try*. *Heckler*, 467 U.S. at 63; *see also* Pet'r Br. 34-35, 37-38, 44-45; U.S. Br. 30-32.

As a practical matter, contractors have many avenues to seek clarification. *See, e.g.*, States Br. 6-8. Contractors then have options: they can follow the Government's view (which often favors contractors); lobby for a change; or invoke administrative or judicial dispute-resolution mechanisms. Contractors cannot, however, bury their heads in the sand. And they certainly cannot ignore the Government's guidance and present false claims they did not honestly believe to be true.

Respondents' attempt to distinguish law and facts is also unpersuasive. With respect to law as well as facts, it will sometimes be easy to find answers, and sometimes difficult. Deliberate ignorance doctrine does not require defendants to obtain answers when none are available; it holds that a defendant who tries not to learn answers despite subjective awareness of risk acts culpably. In other words, it imposes an obligation to make an honest attempt to learn the truth when facing risk. That is just as feasible with respect to ambiguous law as with unclear facts.

3. Respondents' description of recklessness (at 25) relies solely on *Safeco*. But recklessness in fraud cases (defined by Restatement § 526(b) & cmt. e) has a different meaning than the standard the Court analyzed

in *Safeco* (Restatement § 500). Under the fraud standard, recklessness occurs when a defendant makes an unequivocal statement without subjective confidence in its accuracy. Respondents never address this authority.

Respondents also incorrectly describe objective recklessness insofar as they suggest that it can be negated by post hoc rationalizations the defendant did not rely on. *See* Pet'r Br. 36-38; U.S. Br. 29-30. Even in cases involving physical safety, recklessness turns on what the defendant knew at the time. For example, if a driver recklessly swerved into the oncoming lane around a blind corner, his recklessness would not be negated by the subsequent discovery that nobody was coming the other way.

4. Casting about for a textual hook, respondents argue that the FCA's scienter test must be objective because the definition of "knowingly" refers to "information," which respondents argue must be "objectively falsifiable" or "objectively discernible." Resp. Br. 26-29. No court has placed any weight on the inclusion of "information" in the definition—and although respondents now describe it as "pivotal," *id*. at 26 n.5, they never mentioned it before. The word cannot bear the new weight respondents place on it.

Under respondents' definitions—*i.e.*, that "information" means "facts," "data," or "figures," Resp. Br. 26—respondents' reported U&C prices qualify because they are "figures." The dictionaries never suggest that a figure calculated, in part, by reference to a law ceases to be a "figure"—and therefore ceases to be "information"—if the meaning of the law is debatable; respondents just made that part up. Instead, some "in-

formation . . . incorporates legal conclusions." *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 945 (2022). Consequently, "information" applies to reported U&C prices. In fact, SuperValu itself asserted that the U&C price was a necessary "piece of information" in its claims. JA106.

Respondents are also wrong to argue that when multiple legal interpretations are possible, none is discernible or falsifiable. For example, when district courts first construe statutes or regulations, they do not declare the law indeterminate in the absence of circuit precedent or agency rules. Instead, courts apply tools of construction to determine the best reading. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2430 (2019) (Gorsuch, J., concurring). Courts do not thereby create new law, but instead state what the law has always meant. *See, e.g.*, *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 & n.12 (1994). In other words, courts regularly discern which legal interpretations are true and false.

Moreover, statements of opinion communicate implicit facts—including that the defendant believes the opinion, or knows no facts that contradict it. *See supra* pp.15-16. Such facts are "information," and the FCA's scienter provision applies to them, too.

It also is not clear that respondents' "information" argument helps them. To the extent the FCA's scienter provision applies only to knowledge of facts, scienter is established if the defendant knew the facts that made claims false—*e.g.*, that most cash sales occurred at discounted prices—as opposed to, *e.g.*, the claims' legal falsity. Respondents had the requisite awareness because they knew their sales data.

5. Respondents also invoke the rule of lenity to support their preferred interpretation. But as this Court has explained, lenity is last in line among the canons, kicking in only when, after other tools have been exhausted, a statute still contains a "grievous ambiguity or uncertainty," such that the Court "can make no more than a guess as to what Congress intended." *Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (quoting *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998)). Here, other canons—including the plain text and the common law—foreclose a purely objective scienter inquiry.

6. Another flaw in respondents' interpretation is its use of different scienter standards for legal and factual questions. To mitigate the harmful impact of their rule, respondents contend that it applies only to ambiguous laws—not facts. Resp. Br. 52. But the FCA's text uses one definition for everything. If subjective scienter is sufficient vis-à-vis facts (as respondents concede it is), it remains so vis-à-vis laws. Respondents' attempted bifurcation of the FCA's scienter standard requires the same words to simultaneously hold multiple divergent meanings—which they cannot do. *See, e.g.*, *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019).

IV. Respondents' Policy Arguments Lack Merit

Respondents' policy arguments cannot override the statutory text. They are also wrong.

1. Respondents contend that because the Government can audit, the Court should interpret the FCA narrowly, reserving liability for egregious cases. No rule of statutory construction compels that approach—

but petitioners agree generally that FCA liability should not be imposed lightly. Our rule is rigorous because it recognizes that honest mistakes of law may provide a defense in FCA cases. Pet'r Br. 53; Grassley Br. 17-18. Administrative remedies are an appropriate tool to redress such mistakes.

On the other hand, when, as here, a defendant unlawfully claims public funds *without an honest belief that it was behaving lawfully*, that is the sort of exceptional case that warrants a strong remedy. Audits are inadequate because bad-faith fraudsters may deceive the auditors. And the FCA will not provide an adequate deterrent if persons whose deliberate misrepresentations are detected are simply placed in the position they would have occupied had they behaved honestly. Fraud will persist, and vital public programs will suffer. A robust FCA is accordingly a critical complement to administrative remedies.

2. Respondents argue that their interpretation is better at providing notice to defendants. Resp. Br. 44-54. This argument is effectively being made for the first time to this Court, and respondents struggle to ground it in law, as opposed to policy. Some precedents they cite discuss lenity; others administrative deference; and others the void-for-vagueness doctrine. But none compel respondents' construction. Lenity is addressed *supra*; petitioners are not asking courts to defer to administrative construction; and respondents do not argue that a subjective scienter standard would render the FCA unconstitutionally vague—because it would not, *cf. United States v. Williams*, 553 U.S. 285, 306 (2008) (explaining that "[w]hether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment" that might render a statute

vague). Respondents' fair-notice arguments thus boil down to a policy preference: they believe their interpretation would provide *more* notice than the FCA's plain text and the common law. But statutory interpretation is not a vehicle to enact policy preferences.

Respondents also have not shown that petitioners' rule is bad from a notice perspective. Under petitioners' rule, only defendants who lack honest belief in the lawfulness of their conduct face liability. In that situation, complaints about insufficient notice are unsound because the defendant has already demonstrated (at least) indifference to the law as the defendant understood it, thus engaging in exactly the conduct Congress targeted. Indeed, this Court has repeatedly recognized that subjective scienter requirements "mitigate a law's vagueness, especially with respect to the adequacy of notice." *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994) (quotation marks omitted); *McFadden v. United States*, 576 U.S. 186, 197 (2015) (similar).

Nor can respondents fairly suggest that they are being penalized for failing to predict which interpretation of U&C courts would adopt. First, the evidence does not show that respondents made any such prediction. But had they followed an interpretation they honestly believed at the time was correct, they would not be penalized; they would win at trial.

3. Respondents argue that only rules with the force of law can provide adequate notice. That makes no sense. Notice comes from having information—not from information being legally binding. Advice from the Government, counsel, industry experts, and others provides ample notice of what laws require. Pet'r Br. 51-52. Requiring agencies to use rulemaking will only

delay the delivery of notice, and produce notice that is less specific to individual defendants' situations. It will also inefficiently create incentives for the Government to over-regulate using clunky and laborious processes. That will tax agency resources and thicken the Code of Federal Regulations without any concomitant benefit to industry. As the thirty-three amicus States explain, the burden to regulate in this manner will overwhelm their limited resources, inhibiting the functioning of key programs. States Br. 8-11.

In their discussion of non-authoritative guidance, respondents concede (at 51) that such authorities bear on whether a defendant's conduct falls within an objectively reasonable interpretation. That is different from the Seventh Circuit's rule, which ignores such guidance altogether. Applying respondents' rule, the text and purpose of the definition of U&C, CMS's guidance, and guidance from PBMs and States collectively show that respondents could not reasonably have refused to report the prices they charged to a majority of cash customers for a particular drug as their U&C prices. If the Court reaches whether respondents' conduct fell within an objectively reasonable interpretation, it should hold that the answer is "no."

4. Respondents and their amici bemoan the costs of discovery and trial. But no plaintiff wants to invest in a losing case—and the Government has broad powers to dismiss relators' cases, *see* 31 U.S.C. § 3730(c)(2)(A). Cases involving honest mistakes will likely be dismissed quickly after the defendant presents its scienter evidence to the relator and/or the Government. And if plaintiffs pursue frivolous actions,

they may become liable for defendants' costs in addition to their own. 31 U.S.C. § 3730(d)(4), (g). Other defenses may also sink FCA cases early.

Ultimately, a trial will only occur if (1) the defendant presented false claims (otherwise the defendant will prevail at the pleading stage); (2) the scienter evidence would permit a jury to conclude that the defendant had no honest belief in the truth of those claims; and (3) no other legal defense applies. It is neither punitive nor unfair for defendants to face trial in those narrow circumstances. Instead, it embodies the rule that "[k]nowledge and belief are characteristically questions for the factfinder, in this case the jury." *Cheek v. United States*, 498 U.S. 192, 203 (1991).

5. Finally, respondents argue that intra-company deliberation about ambiguous questions is inevitable, and such deliberation is not evidence of wrongdoing. This is a garden-variety corporate scienter issue that arises in every context whether an issue is legal or factual. Although companies will have internal debates, the mere existence of disagreement does not establish that an ultimate decision was not honestly made. Instead, whether such internal discussions cast doubt on the sincerity (or recklessness) of the company's belief is a case-by-case question. *Cf. Omnicare*, 575 U.S. at 190 (explaining that if "a single junior attorney expressed doubts about a practice's legality, when six of his more senior colleagues gave a stamp of approval," omitting that information "would not make the statement of opinion misleading, even if the minority position ultimately proved correct").

Respondents' point about privilege is also immaterial. Privilege creates options—not burdens. Compa-

nies can waive privilege if privileged conversations exculpate them. If privileged information condemns them, they may be able to protect it from disclosure (unless an exception like crime-fraud applies). The fact that defendants may sometimes choose to waive privilege is no reason to reject a subjective rule or ignore the FCA's text.

The bottom line is that policy concerns, to the extent relevant, decisively favor petitioners. Our rule protects the innocent and punishes the culpable—while respondents' rule shifts the scienter lens away from a defendant's mental state altogether, arbitrarily allowing some of the most culpable violators to escape liability. The Court should embrace petitioners' rule without hesitation.

CONCLUSION

The decisions below should be reversed.

Respectfully submitted,

Tejinder Singh
Counsel of Record
SPARACINO PLLC
1920 L Street, NW
Suite 835
Washington, DC 20036
(202) 629-3530
tejinder@sparacinopllc.com

Rand J. Riklin
GOODE CASSEB JONES RIKLIN CHOATE & WATSON
2122 North Main Avenue
P.O. Box 120480
San Antonio, TX 78212
(210) 733-6030

Gary M. Grossenbacher
ATTORNEY AT LAW
402 Vale Street
Rollingwood, TX 78746
(512) 699-5436

Glenn Grossenbacher
LAW OFFICE OF GLENN GROSSENBACHER
24165 IwH-10 W.
Ste 217-766
San Antonio, TX 78257
(210) 271-3888

John Timothy Keller
Dale J. Aschemann
ASCHEMANN KELLER LLC
300 North Monroe St.
Marion, IL 62959-2326
(618) 998-9988

Paul B. Martins
Julie Webster Popham
James A. Tate
HELMER, MARTINS, TATE & GARRETT CO., LPA
1745 Madison Road
Cincinnati, OH 45206
(513) 421-2400

Jason M. Idell
IDELL PLLC
6800 Westgate Blvd.
Ste 132 #301
Austin, TX 78745
(512) 689-3081

C. Jarrett Anderson
ANDERSON LLC
1409 Wathen Avenue
Austin, TX 78703-2527
(512) 619-4549

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