No. 21-1326

IN THE

Supreme Court of the United States

UNITED STATES *ex rel.* TRACY SCHUTTE, *et al.*,

Petitioners,

v.

SUPERVALU INC., *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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

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INTEREST OF *AMICUS CURIAE*[1]

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

SUMMARY OF ARGUMENT

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

1. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than Senator Grassley and his counsel made any monetary contribution to its preparation and submission. The parties have been provided proper notice and consented to this filing.

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

The majority below, however, ignored this text and structure. *United States ex rel. Schutte v. Supervalu Inc.*, 9 F.4th 455, 463 (7th Cir. 2021), *rehearing and rehearing en banc denied*. It held that a defendant who *correctly* knows an act is unlawful is immunized from FCA liability if its lawyer, years later, can cook up an interpretation of the law under which the act was arguably permissible—even if that interpretation is *wrong* and the defendant did not have that interpretation at the time. That test makes a hash of the law of fraud, which focuses on what a defendant understood at the time it undertook a fraudulent act.

Worse, in doing so, the opinion collapsed the three separate routes to liability that Congress laid out into one, finding that such an after-the-fact excuse prevents not only a finding of recklessness, but also "actual knowledge" and "deliberate ignorance." By interpreting these as mere subsets of recklessness, the opinion reads out the two subjective scienter terms Congress wrote into the statute.

Compounding its errors, the majority also crafted from whole cloth a novel and unprecedented requirement

for proving scienter, which puts on the government a nearly impossible burden to anticipate and warn off future fraudsters from every colorable misinterpretation of the law.

SuperValu's radical departure from the statute continues a lamentable tradition of some courts interpreting the FCA in an unduly restrictive fashion, which Congress and this Court repeatedly have stepped in to correct. The Court should grant certiorari to repair this tear in the FCA. If it is not set right, it will not be long before the centerpiece of the government's anti-fraud arsenal becomes unusable.

ARGUMENT

A. The *SuperValu* majority distorted Congress's straightforward and comprehensive statutory text in favor of a narrow and implausible alternative.

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

every avenue that creative lawyers might use to allow a defendant to escape liability for fraudulent conduct designed to fleece the United States.

To that end, Congress enacted a statute with three separate tests for scienter and made clear that a defendant may be liable if the government can establish *any* one of them. A defendant is liable if it acts with "actual knowledge" of false information, *or* acts in "deliberate ignorance" of the truth or falsity of that information, *or* acts in "reckless disregard" of the truth or falsity of that information. 31 U.S.C. § 3729(b)(1)(A). This plain language covers the waterfront of mental states, both objective and subjective, that demonstrate culpability.

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

Second, the majority held that the defendant's subjective state of mind is categorically irrelevant to scienter, including "actual" knowledge and "deliberate" ignorance. *Supervalu*, 9 F.4th at 470 ("defendant's subjective intent does not matter" for scienter analysis because "the inquiry is an objective one"). That interpretation clashes with decades of precedent and common English usage, which uniformly analyze these subjective standards for scienter differently from objective ones. The statute's clear language demands the same here, notwithstanding the majority's tortured interpretation.[2]

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

The majority sought to ease this obvious incongruity by reasoning that a defendant could not "actually" know whether information was true if there were any theoretical

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

uncertainty around it. In other words, regardless of a defendant's confidence in its interpretation of the law, and notwithstanding the accuracy of that interpretation, the majority held as a matter of law that a defendant cannot "know" something if the defendant could possibly be mistaken. 4 F.3d at 468. Under the majority's reasoning, absent definitive and highly specific authoritative guidance, "actual knowledge" is impossible.

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

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

Moreover, as the dissent correctly observed, the law does not excuse a defendant based on such "epistemological doubt" in any other context, not even in criminal cases. *SuperValu*, 9 F.4th at 476 (Hamilton, J., dissenting). A defendant who correctly interprets the law and subjectively intends to cheat on his taxes cannot escape criminal liability by showing that he *might* have adopted a reasonable, albeit erroneous interpretation under which his actions would not have been criminal. Indeed, the criminal counterpart to the civil FCA, 18 U.S.C. § 287, imposes criminal penalties on anyone who presents a false claim to the United States "knowing such claim to be false, fictitious, or fraudulent . . . ." Courts applying the usual common law rules for a "knowing" violation would not acquit a defendant who admitted his intent to defraud the government, but whose lawyers invented a reasonable *post hoc* interpretation that the defendant never entertained. Congress never imagined it would be more difficult to use the government's primary tool against fraud to find a defendant civilly liable than to convict him of a crime. Yet in many cases, that is the incongruous result *SuperValu* requires.

2. *Deliberate Ignorance.* The majority escalated its assault on plain language when it construed the second test for the statutory term "knowing." Under that test, the government can establish scienter if the defendant "acts in deliberate ignorance of the truth or falsity of the information" submitted to the government. 31 U.S.C. § 3729(b)(1)(A)(ii). The phrase "deliberate ignorance" unquestionably focuses on a person's subjective mental state. Congress used the phrase to reach defendants

who *consciously* avoid steps that might reveal the truth.[3] Deliberate ignorance has been widely interpreted both before and after Congress inserted that language into the FCA to refer to a subjective state of mind. *See, e.g., United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985) ("subjectively aware"); *United States v. Ricard*, 922 F.3d 639, 654-56 (5th Cir. 2019) ("subjective awareness"); *United States v. Kershman*, 555 F.2d 198, 200 (8th Cir. 1977) (upholding jury instructions as properly preserving subjective inquiry into knowledge requirement); *United States v. Ramos–Atondo*, 732 F.3d 1113, 1119 (9th Cir. 2013) ("subjective belief"); *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) ("conscious purpose" to avoid the truth); *United States v. de Francisco–Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991) ("subjective knowledge"); *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 806 (3d Cir. 1994) (referring to the "subjective 'deliberate ignorance'" standard). Congress is presumed to have drafted the "deliberate ignorance" test relying on the courts' uniform interpretation of that phrase. *See Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268 (1992) ("We may fairly credit . . . Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used"; Congress "used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.") (citations omitted).

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

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

The majority is, ironically, willfully blind to this conundrum. The opinion states, without elaboration, that willful blindness would satisfy scienter even under its "objective reasonableness" test. *SuperValu*, 9 F.4th at 468 ("Nor does *Safeco*'s standard excuse a company if its executive decisionmakers attempted to remain ignorant of the company's claims processes and internal policies"). The majority never explains how that statement can possibly be reconciled with its holding that "subjective intent does not matter." After all, a defendant fully oblivious to the risk of her actions would not be "deliberate[ly]" ignorant, while the opposite is true of a defendant who consciously avoided asking too many questions. Yet the only difference between the two is subjective belief. If subjective understanding were irrelevant, the statutory test for deliberate ignorance would be impossible to satisfy. The majority's inability to square its new scienter test with the statutory text starkly reveals its fundamental interpretive error.

3. *Reckless Disregard*. The third test, "reckless disregard of the truth," 31 U.S.C. § 3729(b)(1)(A)(iii),

may be characterized as objective at least in part. But even here the majority persisted in rewriting Congress's language. As discussed *infra* in Part B, the majority grafted numerous judicial requirements as barriers to the establishment of recklessness, precluding any such finding in many cases.

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

By including this language, Congress intended the FCA's scienter standard to be less rigorous, not more rigorous, than specific intent statutes. Yet the *SuperValu* opinion again moves in the opposite direction. Under the majority's formulation, proof of specific intent to defraud would be *insufficient* to prove scienter. As long as defense counsel could come up with a "reasonable" *post hoc* interpretation that differed from the defendant's specifically intended (and correct) understanding that her actions were unlawful, liability would not attach. Bizarrely, if Congress had provided that "specific intent to defraud establishes scienter," the statute would be *broader* than the law as interpreted by the majority. That anomaly highlights the chasm between Congress's language and the majority's interpretation.

B. The majority created its new scienter test from whole cloth.

The *SuperValu* majority did not limit its judicial activism to ignoring the plain meaning of the words Congress used. It went further, creating an entirely new test to establish scienter, no part of which appears in the statute or legislative history of the FCA. It undermined a clear and comprehensive definition of scienter by importing a defense from a different statutory framework.

In doing so, the majority cut an enormous hole through Congress's carefully fashioned net. According to the majority, to establish scienter "it is not enough that a defendant . . . believe that its claim was false." *SuperValu*, 9 F.4th at 470. A defendant can escape a finding of scienter despite having correctly interpreted the law and deliberately chosen to violate it if it can posit a reasonable, albeit incorrect, *post hoc* interpretation of the law that would not proscribe the defendant's conduct.

Not only does the majority ignore the statutory language, misinterpreting it to permit this kind of after-the-fact excuse-making, but the opinion also creates a tortured and narrow path to refute the defense. To defeat a *post hoc* reasonable interpretation defense, the government must jump through four separate hoops that the majority conjures from thin air. The government must prove that the defendant

1. was "warned off" its alternative interpretation;

2. through publication of "authoritative guidance";

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

4. with "a high level of specificity."

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

Moreover, the majority disregards the common law of fraud in fashioning its new scienter defense, which is entirely absent from common law jurisprudence. It ignores this Court's decision in *Universal Health*, which held that aside from eliminating the requirement of specific intent, "Congress retained all other elements of common-law fraud that are consistent with the statutory text" of the FCA. *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 187 n.2 (2016). Without citing *Universal Health*, the *SuperValu* majority spurned this guidance from the Court. It ignored the Restatement's discussion of common law fraud, which relies heavily on subjective understanding (*see* Restatement (Second) of Torts, § 526, "Conditions Under Which Misrepresentation is Fraudulent (Scienter)"), in favor of the Restatement's discussion of reckless driving, which contains no subjective element. *SuperValu*, 9 F.4th at 465-66. It defies logic to suggest that Congress had the definition of reckless driving in mind, rather than fraud, when it drafted the language of the government's primary fraud-fighting tool.[4]

4. The majority woodenly looked to *Safeco* to support this anomalous choice, ignoring the difference between the Fair Credit

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

As the Justice Department noted in its amicus brief supporting *en banc* review below, the majority's test "places the burden on the government to anticipate every possible fraud" and endlessly issue "definitive guidance" to proscribe it. (United States Rehearing Br. at 5, 12.) Placing such a burden on the government is especially inappropriate for a statute that was conceived in response to a crisis, the Civil War. The government often expends funds on an emergency basis, such as during the COVID pandemic, without any opportunity to issue definitive guidance to "warn off" fraudsters. Congress did not envision that the courts would impose this onerous requirement as a prerequisite to recovering money stolen by fully culpable defendants. Those accepting government funds are expected to "turn square corners," not hope the government will fail to anticipate their deceptive scheming.

The consequences of this free pass to fleece the public fisc have become immediately apparent. In the Seventh Circuit's most recent decision applying its new scienter

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Reporting Act, a consumer protection statute, and the FCA, a fraud statute.

rules, *United States ex rel. Proctor v. Safeway, Inc.*, --- F.4th ---, No. 20-3425, 2022 WL 1012256 (7th Cir. Apr. 5, 2022), the court considered the same underlying type of alleged fraud as *SuperValu*, the failure to report a company's true "best price" for prescription drugs. As the dissent pointed out—and the majority never disputed—the record clearly showed that "Safeway knew and had good reason to know that the differences between its actual prices and its reported prices meant it was defrauding the government." *Id* at *12 (Hamilton, J., dissenting) (citation omitted). Judge Hamilton also observed, again without contradiction from the majority, that

> Safeway's initial response was to match prices in a few divisions, *but to keep that a secret from the government.* From the beginning, Safeway chose to claim on paper that it had one "official company stance" that it would not "change our [ ] usual and customary price on" price-matched prescriptions, but to change its practices and to keep that secret: "*We cannot put any of this in writing to stores*," Safeway said.

Id. Judge Hamilton correctly concluded that, "If the False Claims Act cannot reach Safeway's conduct here, the Act will neither deter nor remedy many frauds that loot the federal treasury." *Id.* at *10.

Finally, if the decisions adopting the majority's framework are any guide, it appears likely that courts, not juries, will decide whether an alternative interpretation is "reasonable," whether guidance is "authoritative," whether it is issued by the appropriate court or agency, and whether it is adequately "specific." Historically,

scienter is a quintessential jury question, typically turning on case-specific facts, circumstances, and inferences. But the majority's elaborate loophole will likely be applied most often by judges, as it was in *SuperValu* and *Safeway*.[5] Congress could not have envisioned that decades of jurisprudence establishing that scienter must be determined by the trier of fact would be swept aside.

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

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

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5. A recently decided case in the Fourth Circuit had followed this same pattern, but rehearing *en banc* was granted. *United States ex rel. Sheldon v. Allergan Sales, LLC,* 24 F.4th 340 (4th Cir. 2022), *reh'g en banc granted*, No. 20-2330, 2022 WL 1467710 (4th Cir. May 10, 2022).

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

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

D. Courts have a history of judicial activism that has erected improper barriers to the FCA.

The *SuperValu* court's departure from the statute continues an unfortunate tradition of some courts issuing

unduly restrictive interpretations of the FCA, adding extra elements not found in the text or distorting language that is. These interpretations largely have been applied to dismiss actions at the pleading stage, and in cases where the government has declined to intervene. The pattern suggests that some courts are uncomfortable with relators pursuing matters the United States declines to join and may have been overly aggressive in seeking ways to dismiss them, despite the statute being drafted to encourage relators to pursue such actions. Senator Grassley is concerned that this alarming tendency may be repeating in the *SuperValu* case below.

This pattern of textual infidelity to the FCA began in the 1990s with two lines of cases regarding the public disclosure bar. Prior to 2010, that provision stated that courts lacked jurisdiction over a *qui tam* action that was "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (1986). During the 1990s, some courts distorted this language and even imposed extra-textual requirements for relators to meet beyond those set forth in the statute, all in an apparent effort to dismiss non-intervened cases.

One line of cases tortured the word "public." In *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000 (10th Cir. 1996), a case in which the government declined to intervene, relator Harold Fine had "met with Donald Sikora of the American Association of Retired Persons, Fine's designated representative for his age discrimination

case," and provided him with material disclosing the fraud Fine had uncovered. *Id*. at 1002. The Tenth Circuit affirmed a motion to dismiss, holding that this disclosure from one private person to another constituted a "public" disclosure that "affirmatively released the allegations of fraud and fraudulent transactions into the public domain." *Id*. at 1005.

By referring to an apparently confidential disclosure to the relator's AARP counselor as a disclosure into the "public domain," the court ignored the plain language Congress used. Congress restricted "public disclosures" to those occurring "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media . . . ." 31 U.S.C. § 3730(e)(4)(A) (1986). Such disclosures do not resemble a purely private exchange of information. When Congress defined a "public" disclosure, it meant what it said. The *Fine* court also ignored the purpose of the public disclosure bar: to preclude "parasitic" actions in which relators revealed fraud that was readily accessible to the "public." *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 559 U.S. 280, 281 (2010) (bar "was enacted to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits."); *Schindler Elevator Corporation v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011). Yet other circuits followed *Fine*, generally in non-intervened cases, in holding that disclosure to a single person could be deemed "public."[6]

6. *See, e.g.*, *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991) (disclosure to private party in litigation, not filed with

Next, some courts unduly broadened the public disclosure bar by re-writing the "original source" exception. As noted above, a relator may maintain an FCA action even where the allegations have been publicly disclosed, as long as the relator qualifies as an "original source." The pre-2010 statute provided that "'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B) (1986). Congress thus created only two requirements for an original source: direct and independent knowledge, and voluntary disclosure to the government before filing an action. Yet a number of non-intervened cases added a third requirement to those that Congress wrote into the law.

In *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), in which the government declined to intervene, the court did not question that the relator met the explicit statutory criteria to qualify as an "original source," *i.e.*, that he had "direct and independent knowledge of the fraud." *Id.* at 1417. But the court nonetheless held that the relator failed to qualify as an original source because he did not cause the public disclosure himself. *Id.* at 1418. Finding "ambiguity" in the statutory text, the court turned to the "history of the False Claims Act and the legislative history" and concluded that "*qui tam* jurisdiction was

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the court, is "public" disclosure); *United States ex rel. Matthews v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999) (disclosure to a single "competent public official" was "public" disclosure); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992) (disclosure to defendant's employees was a "public" disclosure).

meant to extend only to those who had played a part in publicly disclosing the allegations and information on which their suits were based." *Id.* Thus, the court added its own disclosure requirement (disclosure to the source of the public disclosure) to the only one Congress actually enacted (disclosure to the government must occur "before filing an action"). Despite the lack of textual support, other courts followed suit, typically in non-intervened cases and at the pleading stage.[7]

Eventually, to return the statutory language to what was originally drafted, Congress had to amend the public disclosure and original source provisions to overrule these decisions. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010) (expressly limiting the means by which allegations can be made "public," and redefining an original source as a person who *either* reveals information to the government prior to a public disclosure *or* "materially adds to the publicly disclosed allegations").

A similar pattern played out when other courts erected new barriers to relators in non-intervened cases by narrowly construing Rule 9(b) of the Federal Rules of Civil Procedure. That rule requires that "fraud" be alleged "with particularity." Through decades of decisions, this admonition has been construed to refer to the elements of the fraudulent *scheme*. But in FCA cases,

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7. *See, e.g., United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993) ("plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations") (citation omitted); *United States v. New York Med. Coll.*, 252 F.3d 118, 120 (2d Cir. 2001) (same).

courts began holding that even if a relator presented reams of exquisitely detailed, well-supported allegations of a fraudulent scheme, Rule 9(b) required the relator to allege in similar detail the specific "false claims" the defendant submitted to the government. In many cases this was a reference to claims for payment sent to the government, *i.e.*, invoices. Particularly in Medicare and Medicaid cases against large defendants, these invoices could number in the tens of thousands, typically issued in mechanical fashion by a computer system entirely unconnected to persons involved in the fraud. Most often, the persons with knowledge of the fraud itself have little understanding of the intricacies of a large healthcare company's billing practices (and vice versa).

For example, in *United States. ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2002), the relator alleged a scheme by a laboratory chain to conduct medically unnecessary tests. While the district court found that the "complaint makes relatively detailed statements," it granted a motion to dismiss because the complaint "did not 'identif[y] a single fraudulent claim by date filed, amount or claim number'" and "no copies of a single actual bill or claim or payment were provided." *Id*. at 1305, 1306, 1307. Affirming the dismissal, the Eleventh Circuit reasoned that Rule 9(b) does not permit a relator to "describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted to the Government." *Id.* at 1311. As the dissent pointed out, however, the "impossible" detail the majority required only made sense "if we were willing to attribute to LabCorp a highly unusual business model that consisted in arranging for the systematic administration

of medically unnecessary tests for which it never intended to be paid." *Id.* at 1317. The dissent correctly concluded that "the majority simply asks for the obvious" and fairly surmised that it "may be . . . because it suspects that Clausen's [non-intervened] lawsuit is without merit." *Id.* at 1317-18. The dissent's hunch appears to be corroborated by non-intervened cases that followed *Clausen*, which have imposed similarly impossible and unwarranted requirements that relators must arrive at court with invoices in hand.[8]

In sum, there is a pattern in some quarters of the judiciary to misinterpret and misapply the FCA in non-intervened cases, especially at the pleading stage. Senator Grassley does not suggest that judges consciously circumvent the law to dismiss FCA cases they perceive to lack merit, where the real "victim" has chosen not to

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8. *See, e.g., United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006) (dismissing complaint for failure to identify specific claims, despite allegations of "a systematic practice of [defendants] submitting and conspiring to submit fraudulent claims over a sixteen-year period," noting that relator "was an anesthesiologist at St. Luke's, not a member of the billing department"); *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 875, 877 (6th Cir. 2006) (complaint alleged "at some length" false cost reports misallocating "the largest portions of [corporate] debt . . . [to] those hospitals that had the highest Medicare service rates," dismissed because "the plaintiff's complaint 'does not identify any specific claims that were submitted to the United States or identify the dates on which those claims were presented to the government'") (*quoting Clausen*, 290 F.3d at 1311). The Fourth Circuit excuses the need to present actual false claims in the complaint only if such claims were "necessarily" submitted, a certainty not required even to get to a jury. *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013).

pursue them. Irrespective of intention, however, these decisions undermine the effectiveness of the FCA, in both intervened and non-intervened cases, and thwart the will of Congress. Unfortunately, the *SuperValu* decision continues that pattern in an alarming and dangerous way.

CONCLUSION

The *SuperValu* majority badly distorted Congress's plain language in reaching a result that opens a gaping hole in the government's primary fraud-fighting tool. The majority ignored the statutory text, ignored the common law, and ignored this Court's precedents. Such judicial activism cannot be justified by the severity of the penalties imposed by Congress in the FCA, nor by an aversion to allowing relators to proceed without government intervention, as Congress intended. This Court accordingly should grant the petition for certiorari and reverse the *SuperValu* decision.

Respectfully submitted,

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