Nos. 21-1326 and 22-111

In the Supreme Court of the United States

UNITED STATES, EX REL. TRACY SCHUTTE, ET AL., PETITIONERS

v.

SUPERVALU INC., ET AL.

UNITED STATES, EX REL. THOMAS PROCTOR, PETITIONER

v.

SAFEWAY, INC.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, imposes civil liability on persons who "knowingly" submit false claims for payment to government programs or "knowingly" make false statements in support of such claims. 31 U.S.C. 3729(a)(1)(A) and (B). The FCA defines "knowingly" to mean that a person (i) has "actual knowledge" of the falsity of information in the claim or statement; (ii) "acts in deliberate ignorance of the truth or falsity of" such information; or (iii) "acts in reckless disregard of the truth or falsity of" such information. 31 U.S.C. 3729(b)(1)(A). The question presented is as follows:

Whether a person who submitted a claim or statement that falsely asserted compliance with applicable legal requirements, and who subjectively believed or had strong reason to believe that the claim or statement was false, can establish that he did not act "knowingly" by showing during the FCA litigation that the claim or statement was consistent with an incorrect but objectively reasonable interpretation of those legal requirements.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and regulations—Continued: Page

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INTEREST OF THE UNITED STATES

These cases present important questions concerning the scienter requirements of the False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.* The FCA is the primary tool by which the federal government combats fraud in federal contracts and programs. The United States therefore has a substantial interest in proper

interpretation of the Act. At the Court's invitation, the United States filed a brief at the petition stage in No. 21-1326.

STATEMENT

A. Legal Background

1. The FCA imposes liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment" to a government spending program (whether directly to a federal official or through a third-party contractor or grantee), or who "knowingly makes, uses, or causes to be made or used" a "false * * * statement" material to such a claim. 31 U.S.C. 3729(a)(1)(A) and (B); see 31 U.S.C. 3729(b)(2)(A)(i) and (ii). The Act defines "knowingly" to "mean that a person, with respect to information," (i) "has actual knowledge of the information"; (ii) "acts in deliberate ignorance of the truth or falsity of the information"; or (iii) "acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. 3729(b)(1)(A).

Either the Attorney General or a private party (known as a relator) may sue under the FCA. 31 U.S.C. 3730(a) and (b). When a relator files a "qui tam" suit, the government may "elect to intervene." 31 U.S.C. 3730(b)(2) and (3). If the government declines to intervene, the relator may proceed with the litigation and share in any judgment. 31 U.S.C. 3730(b)(4)(B) and (d).

2. These cases concern claims for payment submitted to government healthcare programs including Medicaid and Medicare Part D.

a. The Medicaid Act, 42 U.S.C. 1396 *et seq.*, establishes a cooperative federal-state program that provides medical assistance to certain low-income individuals. States may offer outpatient prescription-drug coverage as part of their Medicaid plans. 42 U.S.C.

1396d(a)(12). Regulations promulgated by the Centers for Medicare and Medicaid Services (CMS) limit reimbursement for many drugs to the lower of (1) a pharmacy's "usual and customary charges to the general public" or (2) the drug's actual acquisition cost plus a reasonable dispensing fee. 42 C.F.R. 447.512(b)(2).

Consistent with those federal regulations, state Medicaid agencies typically calculate reimbursement amounts to be paid to pharmacies as the lesser of various payment amounts, one of which is often the pharmacy's "usual and customary charge" to the general public. See Medicaid.gov, CMS, *Medicaid Covered Outpatient Prescription Drug Reimbursement Information by State, Quarter Ending September 2022* (last updated Nov. 16, 2022), https://www.medicaid.gov/medicaid/prescription-drugs/state-prescription-drug-resources/medicaid-covered-outpatient-prescription-drug-reimbursement-information-state/index.html. State Medicaid agencies may issue program guidance to further define "usual and customary charges." See 11-cv-3290 D. Ct. Doc. 172-1, at 12 (May 21, 2018).

b. The Medicare Act, 42 U.S.C. 1395 *et seq.*, provides federally funded health-insurance coverage to individuals who are age 65 or older or are disabled. Through Medicare Part D, 42 U.S.C. 1395w–101 *et seq*., beneficiaries can obtain prescription-drug coverage through private plan sponsors. See 42 C.F.R. 423.30, 423.32. CMS makes ongoing payments to a plan sponsor and at the end of the year reconciles those payments with the sponsor's actual costs to determine whether the sponsor is owed additional funds or instead must return excess payments. See 42 C.F.R. 423.315, 423.329, 423.343.

Part D beneficiaries typically obtain prescription drugs from retail or mail-order pharmacies, which then

seek reimbursement from the plan sponsors (or from intermediary organizations known as pharmacy benefit managers). Plan sponsors and pharmacies negotiate the price to be paid for each drug. See 42 U.S.C. 1395w-111(i); 42 C.F.R. 423.100. Plan sponsors often contract to pay the lesser of a negotiated price or the amount that the pharmacy reports as its "usual and customary" price for cash (*i.e.*, non-insurance) sales to the general public, with that term sometimes further defined in the contract. See 21-1326 Pet. App. 8a; 22-111 Pet. App. 4a, 10a-11a.

B. Facts And Procedural History

In these consolidated cases, petitioners filed FCA qui tam suits against respondents, which operate hundreds of retail drug pharmacies nationwide. Petitioners alleged that respondents had submitted to government healthcare programs claims that knowingly overstated respondents' "usual and customary" prices, leading to reimbursements substantially greater than what respondents were lawfully entitled to receive. The cases were assigned to the same district court, which granted summary judgment to respondents in separate decisions. 21-1326 Pet. App. 59a-87a; 22-111 Pet. App. 42a-105a. The court of appeals affirmed both judgments. 21-1326 Pet. App. 1a-58a; 22-111 Pet. App. 1a-41a.

1. Petitioners' allegations pertain to pricing programs that respondents adopted to compete with steep discounts announced in 2006 by other pharmacies such as Walmart, which began offering 30-day supplies of many drugs for just $4. 21-1326 Pet. App. 6a-7a; 22-111 Pet. App. 5a. Respondents in No. 21-1326 (collectively, SuperValu) adopted a price-match program in which SuperValu's pharmacies would match a competitor's lower price at a customer's request, and would then

automatically apply that price to future refills. 21-1326 Pet. App. 7a. Respondent in No. 22-111 (Safeway) adopted a similar price-match program, and also adopted a "membership" discount program that operated during most of the same period. 22-111 Pet. App. 5a-7a. Under Safeway's membership program, customers could receive steeply discounted generic drug prices (typically $4 for a 30-day supply) by filling out a form with basic information (*e.g.*, name, address, date of birth) that petitioner asserts Safeway usually already had. *Id.* at 6a-7a.

Respondents' discount programs were sufficiently popular that the discounted prices comprised a majority of non-insurance sales for many drugs during the period when respondents offered the discounts. In 2012, a majority of SuperValu's cash sales for 44 of its 50 top-selling drugs were made at discounted price-matched prices. 21-1326 Pet. App. 8a & n.3, 35a (Hamilton, J., dissenting). For 30 of those drugs, more than 80% of cash sales were at the lower price-matched prices. *Id.* at 35a. Discounted prices accounted for 75%-88% of cash sales for Safeway's top 20 drugs during the last five years of the program, and 56%-66% of all such sales. 22-111 Pet. App. 35a (Hamilton, J., dissenting). The discounts were substantial, with customers sometimes paying six to 16 times less than respondents' retail prices. 21-1326 Pet. App. 35a; 22-111 Pet. App. 39a.

Despite the widespread use of respondents' discount programs, respondents disregarded sales under those programs when reporting their "usual and customary" cash prices to state Medicaid agencies, Medicare Part D sponsors, and other third-party payors. Respondents instead reported only their higher retail prices, even for drugs for which a majority of sales occurred at

substantially discounted prices. 21-1326 Pet. App. 35a (Hamilton, J., dissenting); 22-111 Pet. App. 38a-39a (Hamilton, J., dissenting). Between 2008 and 2012, for example, Safeway charged just $10 in 94% of its cash sales for a 90-day supply of lovastatin, a "high-volume drug" used to reduce cholesterol. 22-111 Pet. App. 38a-39a. But rather than reporting $10 as its "usual and customary" price for a 90-day supply of lovastatin, Safeway instead reported prices ranging from $81.42 to $108.99 during that period. *Id.* at 39a (citation omitted).

2. Discovery in both cases revealed evidence that respondents hid their discounted prices from third-party payors (including Medicaid programs and Medicare Part D sponsors) despite respondents' awareness that they were expected to report their discounted prices as their "usual and customary" prices.

a. Petitioner in No. 22-111 identified multiple instances in which third-party payors, including Medicare Part D sponsors and state Medicaid agencies, told Safeway that its "usual and customary" price reporting was required to reflect its discounted prices. In 2006, Safeway received a reminder from Medco Health Solutions, a pharmacy benefit manager working with many Medicare Part D plans, stating that "by contract," the "usual and customary" price is "the lowest net price a cash patient would have paid on the day that the prescription was dispensed inclusive of all applicable discounts. These discounts include . . . a competitor's matched price, or other discounts offered to customers." 22-111 Pet. App. 10a-11a (brackets omitted).[1] Notices from

[1] Much of the evidence concerning Safeway's knowledge of its usual-and-customary price obligations was filed under seal at Safeway's request. See 11-cv-3406 D. Ct. Doc. 189 (Dec. 23, 2019). This

other pharmacy benefit managers in January and February 2007 conveyed similar messages. *Id.* at 11a; see *id.* at 69a (quoting notice from pharmacy benefit manager stating that "usual and customary" prices included "Promotional Pricing program[s]" such as "membership[s]"); see also *id.* at 32a-33a (Hamilton, J., dissenting), 50a-51a, 72a, 82a. Forwarding one such notice, a Safeway director wrote: "Another Example of how plans are reacting, ie, any modified price needs to be offered to the 3rd party if meets U&C definition. Received a similar [notice] from Medco." *Id.* at 33a (Hamilton, J., dissenting).

Several state Medicaid agencies communicated the same message. In 2008, one Safeway pharmacy manager told corporate headquarters that Nebraska's Medicaid program had informed him that "by matching a price, it becomes our usual & customary." 22-111 Pet. App. 33a (Hamilton, J., dissenting) (citation omitted); see *id.* at 52a, 57a (describing similar instructions from other state Medicaid agencies). A few days later, a Safeway executive e-mailed a senior vice president to advise that "[w]e may have some issues with U&C and state medicaids with price matching." *Id.* at 33a (Hamilton, J., dissenting) (citation omitted). That executive explained that "if you [match a] price offer, that becomes your usual and customary for that day and that pricing needs to be extended to medicaid"—something he acknowledged Safeway was not doing. *Ibid.* (citation omitted; brackets in original).

The evidence suggests that Safeway sought to conceal its discount practices from third-party payors rather than change its price reporting. The executive who

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brief accordingly relies on descriptions of that evidence in the lower courts' opinions.

expressed concern about "issues with U&C and state medicaids," for example, indicated that Safeway "need[ed] to keep a low profile" with its discounts, because "[i]f we advertise this price match—it is going to Alert the medicaid programs to start looking." 22-111 Pet. App. 33a-34a (Hamilton, J., dissenting) (citations and emphasis omitted). Another executive responded to the information about the Nebraska Medicaid program's understanding of "usual and customary price" by asking "how the state of Nebraska will know that we offered to match any price out there." *Id.* at 33a (citation and emphasis omitted). And consistent with a desire to maintain "'stealth'" around its discount pricing, *id.* at 29a (citation omitted), Safeway instructed employees not to "'put any of this in writing'" and not to admit to price-matching "if an unidentified customer calls in," so that Safeway could "avoid trouble with the media or competitors." *Id.* at 31a (citation and emphases omitted).

A final example captures Safeway's apparent thinking. In 2009, a Safeway executive inquired about the reason for adopting a membership program rather than simply offering a $4 price, noting that "it seems like * * * this whole thing revolves @ the insurance angle—to get the $10 per item from them vs the $4 cash price." 22-111 Pet. App. 36a (Hamilton, J., dissenting) (citation omitted). A director responded that "[o]ff the record that is exactly the angle," "getting the maximum we can from the insurance." *Ibid.* (citation and emphasis omitted).

b. Petitioners in No. 21-1326 presented similar evidence about SuperValu. SuperValu received the same 2006 notice from Medco about SuperValu's contractual obligation to report "all applicable discounts," including

a "competitor's matched price." 21-1326 Pet. App. 66a. A SuperValu executive forwarded the notice and stated: "Note the comment about price matching. Theoretically, they could audit." 11-cv-3290 D. Ct. Doc. 169, at 9-10 (May 21, 2018) (citation omitted).

Later, when a different pharmacy benefit manager asked about SuperValu's price-match practices, one of SuperValu's managers stated that she was "concerned about any response where we acknowledge doing it." 11-cv-3290 D. Ct. Doc. 327, at 7 (Dec. 10, 2019) (citation omitted). An executive replied that "[w]e should not respond unless we know what they are going to do with this information," and directed the manager to "[m]ake 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." *Ibid.* (citation omitted). And in another exchange, SuperValu executives weighed the risks of running advertisements for its price-match program, noting that "damage control" would be necessary if pharmacy benefit managers saw the ads but determining that it was "[u]nlikely anyone [at a third-party payor] will really see" them. 11-cv-3290 D. Ct. Doc. 191-1, at 39 (June 11, 2018) (citation omitted).

3. The district court granted summary judgment to respondents in both cases.

a. In an initial decision, the district court found that SuperValu's price-matched "prices * * * are the usual and customary prices for their drugs," and therefore should have been reported with SuperValu's claims for payment from Medicare Part D and Medicaid. 2019 WL 3558483, at *8. But in a subsequent ruling, the court held that SuperValu was still entitled to summary judgment on the ground that it had not acted "knowingly." 21-1326 Pet. App. 59a-87a. Relying on this Court's

decision in *Safeco Insurance Co.* v. *Burr*, 551 U.S. 47 (2007), which had interpreted the term "willfully" in the Fair Credit Reporting Act, 15 U.S.C. 1681n(a), the district court construed the FCA to require a showing that SuperValu's submissions were inconsistent with any "objectively reasonable" interpretation of "usual and customary" price. 21-1326 Pet. App. 75a. Because petitioners could not meet that standard, the court held that SuperValu was entitled to summary judgment "regardless of [SuperValu's] subjective beliefs" about the accuracy of its submissions. *Id.* at 83a.

b. The district court applied the same analysis in granting summary judgment to Safeway. 22-111 Pet. App. 42a-105a. The court concluded that, "if a defendant adopts one of multiple reasonable interpretations, its 'subjective intent' is legally irrelevant." *Id.* at 81a (quoting *Safeco*, 551 U.S. at 71 n.20). Despite the evidence of Safeway's subjective understanding that it should report its discounted prices, the court held that "Safeway is entitled to summary judgment under *Safeco*." *Id.* at 103a.

4. The court of appeals affirmed in separate divided decisions.

a. The court of appeals decided SuperValu's case first. 21-1326 Pet. App. 1a-58a. The court held that *Safeco* controlled the interpretation of the FCA term "knowingly." *Id.* at 11a-20a. On that understanding, the court held that an FCA "defendant who acted under an incorrect interpretation" of governing legal requirements will avoid liability "if (1) the interpretation was objectively reasonable and (2) no authoritative guidance cautioned defendants against it." *Id.* at 12a.

The court of appeals explained that, under its reading of *Safeco*, "a defendant's subjective intent does not

matter." 21-1326 Pet. App. 27a. The court stated that "it is not enough that a defendant suspect or believe that its claim was false" because the standard is "objective" and turns on whether the defendant "*know*[*s*]" that its claims are false. *Id.* at 26a-27a. The court found it "irrelevant" to that inquiry whether the defendant had actually "held [an objectively reasonable exculpatory interpretation] at the time that it submitted its false claim" or instead was "concocting 'post-hoc arguments.'" *Id.* at 26a.

Applying its two-step analysis, the court of appeals affirmed the grant of summary judgment. 21-1326 Pet. App. 22a-31a. It first held that SuperValu's conduct was consistent with an objectively reasonable understanding of "usual and customary" price because no statute or regulation squarely foreclosed SuperValu's approach. *Id.* at 22a-26a. It then determined that no authoritative guidance had warned SuperValu away from that understanding. *Id.* at 27a-31a. The court held that, for these purposes, only "circuit court precedent or guidance from the relevant agency" can qualify as "authoritative guidance," so that the contractual guidance provided by pharmacy benefit managers was "automatically exclude[d]." *Id.* at 28a.

Judge Hamilton dissented. 21-1326 Pet. App. 31a-58a. In his view, the majority's reliance on *Safeco* ignored the FCA's text, history, and common-law background, which he viewed as indicating that "subjective bad faith" can establish the necessary scienter. *Id.* at 42a. Judge Hamilton concluded that the district court's grant of summary judgment should be reversed because the evidence would allow "[a] reasonable jury [to] find that SuperValu either actually knew or deliberately

chose to keep itself in ignorance that it was submitting false, hugely inflated claims." *Id.* at 37a-38a.

b. The court of appeals subsequently affirmed the district court's grant of summary judgment to Safeway "[f]or the same reasons" it had identified in SuperValu's case. 22-111 Pet. App. 17a; see *id.* at 1a-41a. The court recognized that "Safeway effectively used its [membership program] as a fig leaf to disguise a Wal-Mart-style generics program without reporting those prices as U&C." *Id.* at 17a. It concluded, however, that no authoritative guidance had rendered that practice "objectively unreasonable at the time." *Id.* at 18a. The court held that the notices from pharmacy benefit managers, as well as definitions in specific contracts, were "irrelevant" to the scienter analysis "because they did not come from the agency." *Ibid.* And because Safeway's actions were consistent with an objectively reasonable understanding of "usual and customary" price, the court refused to consider "evidence of the defendant's subjective awareness that its interpretation might be wrong." *Id.* at 14a-15a (citation omitted).

Judge Hamilton again dissented. 22-111 Pet. App. 25a-41a. In his view, the court of appeals' analysis erroneously disregarded "egregious" facts demonstrating "Safeway's fraudulent intent at the time it was submitting false claims to the government." *Id.* at 26a, 28a (Hamilton, J., dissenting).

SUMMARY OF ARGUMENT

A. The FCA includes a three-pronged definition of "knowingly," which covers a person who (i) has "actual knowledge" of the falsity of information in a claim or statement that the person submits to a government program; (ii) "acts in deliberate ignorance of the truth or falsity of" such information; or (iii) "acts in reckless

disregard of the truth or falsity of" such information. 31 U.S.C. 3729(b)(1)(A). The ordinary meaning of those words, along with their statutory context and the historical background of common-law fraud, makes clear that the FCA's scienter standard encompasses circumstances in which persons subjectively believe they are submitting false claims or statements to the government; are subjectively aware of a substantial risk that their claims or statements are false but deliberately avoid taking readily available steps to obtain clarification; or act in reckless disregard of known or objectively obvious facts indicating a high likelihood of falsity.

The court of appeals erred in adopting a narrower scienter standard, under which a defendant's subjective bad faith at the time the defendant acted becomes irrelevant if the defendant (or the defendant's lawyers) can later identify an exculpatory theory that is wrong but objectively reasonable. That approach disregards Congress's three-pronged statutory definition, which focuses on a defendant's subjective state of mind when submitting the false claims or statement. See 31 U.S.C. 3729(b)(1)(A) (referring to "actual knowledge" and "deliberate ignorance"). It likewise ignores common-law principles of fraudulent misrepresentation that Congress drew on in enacting the FCA, which focus on a defendant's subjective bad faith. And it would allow defendants who *intentionally* submit false claims for payment to the government to escape FCA liability based on concededly incorrect post hoc justifications, flouting the principle that "those who seek public funds" must "act with scrupulous regard for the requirements of law." *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 63 (1984).

B. This Court's decision in *Safeco Insurance Co.* v. *Burr*, 551 U.S. 47 (2007), does not support the court of appeals' result. *Safeco* involved a provision of the Fair Credit Reporting Act that imposed penalties for "willfully" violating that statute's requirements. 15 U.S.C. 1681n(a). In interpreting the "willfully" requirement there to establish an objective-reasonableness defense, *ibid.*, the Court did not address a three-pronged statutory definition, like the one in the FCA, that expressly focuses on a defendant's subjective state of mind. Moreover, the Court relied on common-law standards relating to physical safety, not the common law of fraud that is relevant here. And *Safeco* concerned a general regulatory requirement, rather than conditions specifically imposed on those who choose to do business with the government. Just as this Court has declined to extend *Safeco* to the patent context, see *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U.S. 93 (2016), so too should the Court decline to extend it here to protect those who intentionally submit false claims for payment to the government.

The other arguments put forward by the court of appeals or respondents likewise lack merit. The fact that a defendant who believes she is submitting false claims might not be *certain* about the claims' falsity does not absolve her of culpability under the FCA's statutory standard. Similarly, defendants who intend to submit false claims, or who deliberately avoid inquiries that would confirm whether their claims are false, cannot complain about a lack of fair notice.

C. The court of appeals further erred in holding that only circuit-court precedents or guidance from the relevant agency is sufficiently authoritative to give notice of a claim's falsity. That standard, which the court

purported to derive from *Safeco*, would be particularly inappropriate under the FCA. The FCA applies to claims submitted under contracts with non-federal intermediaries who help to administer federal spending programs like Medicare Part D and Medicaid. No sound basis exists for allowing participants in those programs to disregard guidance from, or contracts with, the very entities that Congress has designated to administer their claims.

D. Under the appropriate scienter standard, respondents are not entitled to summary judgment in either case. The evidence petitioners presented would allow a reasonable factfinder to conclude that respondents "knowingly" submitted false claims or statements to government healthcare programs. 31 U.S.C. 3729(a)(1)(A) and (B). The Court therefore should reverse the court of appeals' judgments and remand for further proceedings.

ARGUMENT

THE SEVENTH CIRCUIT ADOPTED AN OVERLY DEMANDING STANDARD FOR PROVING SCIENTER UNDER THE FCA

The FCA imposes liability on those who "knowingly" present false claims for payment to government programs, or who "knowingly" submit false statements in support of such claims. 31 U.S.C. 3729(a)(1)(A) and (B); see 31 U.S.C. 3729(b)(4). Under the Act's definition, construed in light of common-law background principles, that standard is satisfied when a person (1) is subjectively aware that a claim or statement is false; (2) subjectively recognizes a substantial risk that the claim or statement is false but deliberately avoids taking readily available steps to obtain clarification; or (3) acts with reckless disregard of known or objectively obvious

facts indicating a high likelihood that the claim or statement is false. See 31 U.S.C. 3729(b)(1)(A).

The court of appeals adopted a substantially narrower view of the Act's scienter requirement, under which a person who submits false claims or statements can categorically escape liability by identifying a post hoc rationale for its prior representations that, while legally wrong, is "objectively reasonable." *E.g.*, 21-1326 Pet. App. 22a. That standard, which respondents liken to "qualified immunity" for FCA defendants, 21-1326 Resp. Supp. Br. 4, is untethered to the statute's text, context, or history. Under the proper standard, the relators in both cases here presented sufficient evidence that respondents knowingly submitted false claims and statements. The court of appeals' judgments should be reversed.

A. The FCA's Text, History, And Common-Law Background Demonstrate That Scienter Under The Act Turns On The Defendant's State Of Mind At The Time Of Its False Claims Or Statements

1. This Court has "taken [care] to construe" words like "'knowing,' 'intentional,' or 'willful' * * * in their particular statutory context." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L. P. A.*, 559 U.S. 573, 585 (2010). Until 1986, the FCA imposed liability for "knowingly" presenting "a false or fraudulent claim for payment or approval," without defining the term "knowingly." 31 U.S.C. 3729(1) (1982 & Supp. III 1985). Some courts interpreted that provision to require proof of a specific "purpose on the part of [the defendant] to cheat the Government." *United States* v. *Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972) (citation omitted; brackets in original). As part of wide-ranging FCA amendments, Congress rejected that interpretation as

unduly narrow. See False Claims Amendments Act of 1986 (1986 Amendments), Pub. L. No. 99-562, § 2(7), 100 Stat. 3153-3154. The 1986 Amendments stated that "no proof of specific intent to defraud is required," and added a new three-pronged definition of "knowingly." § 2(7), 100 Stat. 3154; see 31 U.S.C. 3729(b)(1)(B). Under that definition, a person acts "knowingly" if she (i) has "actual knowledge" of the falsity of information in a claim or statement the person submits to the government or a designated intermediary; (ii) "acts in deliberate ignorance of the truth or falsity of" such information; or (iii) "acts in reckless disregard of the truth or falsity of" such information. 31 U.S.C. 3729(b)(1)(A).

The first two terms within that statutory definition cover distinct species of subjective bad faith. The first, "actual knowledge," 31 U.S.C. 3729(b)(1)(A)(i), refers to a "state of mind that one considers that he knows." *Black's Law Dictionary* 784 (5th ed. 1979) (defining "knowledge"). That generally means that the defendant was subjectively "aware of" a violation. *Intel Corp. Investment Policy Committee* v. *Sulyma*, 140 S. Ct. 768, 776 (2020). The second, "deliberate ignorance," 31 U.S.C. 3729(b)(1)(A)(ii), covers a defendant who is "subjective[ly] aware[]" of a substantial risk that his statement may be false, and intentionally avoids taking steps to confirm the statement's truth or falsity. *United States* v. *Ricard*, 922 F.3d 639, 656 (5th Cir. 2019); see *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U.S. 754, 769 (2011) (same definition for "willful blindness"); *Black's Law Dictionary* 672 (5th ed. 1979) ("Voluntary ignorance exists when a party might, by taking reasonable efforts, have acquired the necessary knowledge.") (emphasis omitted). The third term, "reckless disregard," 31 U.S.C. 3729(b)(1)(A)(iii),

describes circumstances in which a defendant disregards a "high risk" of falsity "that is either known or so obvious that it should be known," *Farmer* v. *Brennan*, 511 U.S. 825, 836 (1994). Unlike the first two clauses, the third clause does not require proof of the defendant's subjective awareness, but can be satisfied through evidence that the risk of falsity was objectively apparent.

By covering all three states of mind, Congress cast a net broad enough to reach those who act in subjective bad faith with respect to claims that implicate ambiguous legal conditions, as well as those who act with a grossly substandard degree of care. If a defendant believes (correctly) that it is violating a legal requirement that makes its claims false and ineligible for payment, the defendant acts with "actual knowledge" if it submits the false claims—even if its lawyers later identify an objectively reasonable (but incorrect) exculpatory interpretation. See *United States ex rel. Phalp* v. *Lincare Holdings, Inc.*, 857 F.3d 1148, 1154-1156 (11th Cir. 2017) (considering evidence of defendant's belief in illegality). If a defendant is subjectively aware of a substantial risk that its submissions are false, but chooses not to make readily available inquiries that could clarify their accuracy, that defendant acts with "deliberate ignorance" even if the underlying law is ambiguous. *Godecke* v. *Kinetic Concepts, Inc.*, 937 F.3d 1201, 1212 (9th Cir. 2019). And if a defendant disregards warnings about likely falsity from knowledgeable sources such as attorneys, internal compliance officers, or government contractors, or fails to consult objectively obvious sources that would have provided such warnings, that defendant acts with "reckless disregard" of the truthfulness of its claims. See *United States ex rel. Polukoff*

v. *St. Mark's Hospital*, 895 F.3d 730, 744 (10th Cir. 2018), cert. dismissed, 138 S. Ct. 2690 (2019).

2. Each of the three prongs of the FCA's definition of "knowingly" addresses the "culpability" of the person's state of mind "at the time of the challenged conduct." *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U.S. 93, 105 (2016). Each prong uses the present tense, with the first prong looking to what knowledge the person "has," while the second and third look to whether the person "acts in" the specified mental states. 31 U.S.C. 3729(b)(1)(A)(i)-(iii). Within the Act's operative prohibitions, the adverb "knowingly" modifies such verbs as "presents," "makes," and "uses." 31 U.S.C. 3729(a)(1)(A) and (B). That phrasing makes clear that the state of mind that matters is the person's state of mind when she "presents," "makes," or "uses" the false claim or statement. The ability of that person (or her lawyer) to identify wrong-but-reasonable exculpatory theories or interpretations after those events occur cannot retroactively alter the state of mind with which the person engaged in the specified conduct.[2]

The Act's focus on the defendant's state of mind at the time of the challenged conduct is essential to protect potential defendants from unwarranted FCA liability. After a person submits claims for payment that it reasonably believes are legitimate, new agency guidance or

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[2] The Dictionary Act, 1 U.S.C. 1, provides that "unless the context indicates otherwise * * * words used in the present tense include the future as well." *Ibid.* Here, however, "context indicates otherwise." *Ibid.* A defendant who submits a false claim that she reasonably believes to be true, for example, is not subject to FCA liability merely because she later acquires "actual knowledge" that the claim was false, though that defendant may become liable if she then "knowingly conceals" an obligation to return funds. 31 U.S.C. 3729(a)(1)(G) and (b)(1)(A)(i); see pp. 19-20, *infra*.

intervening judicial decisions may make clear that the claims rested on an incorrect view of the law. New information likewise may make clear that previously submitted claims rested on factual misunderstandings. If the defendant's knowledge at the time of the FCA litigation were decisive, the government or qui tam relators could seek treble damages and civil penalties in those circumstances. The pertinent FCA provisions are carefully worded to preclude that untoward result. But just as such intervening developments cannot support the imposition of FCA liability on persons who acted without the requisite knowledge, post hoc identification of wrong-but-reasonable exculpatory legal theories cannot negate scienter.[3]

3. The FCA's primary focus on a defendant's subjective bad faith at the time of the relevant act is consistent with the Act's common-law background. Cf., *e.g.*, *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 187 (2016) (construing the FCA term "false or fraudulent claims" to incorporate the common-law rule that "fraud" includes some "misrepresentations by omission"). As Judge Hamilton observed below, "the most authoritative summary of the common law's treatment of fraudulent scienter," found in Section 526 of the Restatement (Second) of Torts, "makes subjective bad faith central." 21-1326 Pet. App. 41a-42a

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[3] A claimant who intends to cheat the government *can* escape FCA liability if his trial attorney identifies a post hoc legal rationale for the claims that is not only reasonable but correct. Such a showing would mean that the defendant did not submit "*false or fraudulent* claims" in the first place. 31 U.S.C. 3729(a)(1)(A) (emphasis added). That would preclude FCA liability, even if the defendant in submitting his claims had acted with one of the forms of scienter identified in 31 U.S.C. 3729(b)(1)(A).

(Hamilton, J., dissenting). That summary explains that, for purposes of the common-law tort of fraudulent misrepresentation, a speaker acts with a culpable state of mind if he "(a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies." Restatement (Second) of Torts § 526 (1977) (emphasis omitted); accord, *e.g.*, 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 193 (6th ed. 1853). Each of those categories focuses unmistakably on the speaker's subjective bad faith.

Given the subjective criteria that historically were used to identify "common-law fraud," *Escobar*, 579 U.S. at 187, Congress could be expected to speak clearly if it wished to make the defendant's subjective intent irrelevant to scienter under the FCA. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012) ("[S]tatutes will not be interpreted as changing the common law unless they effect the change with clarity."). By enacting the third ("reckless disregard") prong of the FCA's definition of "knowingly," Congress made clear that an extreme lack of due care can provide an *additional* basis for liability, even when subjective bad faith is absent. But nothing in the FCA's text, context, history, or structure suggests that Congress intended to displace the common-law approach altogether.

B. The Court Of Appeals Erred In Treating Respondents' Post Hoc Rationales For Their Conduct As Negating Scienter Under The FCA

The contrary arguments adopted by the court of appeals or advanced by respondents lack merit.

1. This Court's decision in Safeco *provides no sound basis for the court of appeals' construction of the FCA's scienter requirement*

The court of appeals viewed this Court's decision in *Safeco Insurance Co.* v. *Burr*, 551 U.S. 47 (2007), as dictating that a defendant's subjective state of mind is "irrelevant" under the FCA. 21-1326 Pet. App. 26a. Based on its reading of *Safeco*, the court held that an FCA defendant cannot be found to have acted "knowingly" if its conduct was consistent with an objectively reasonable interpretation that had not previously been rejected by an appellate court or agency guidance—whether or not "the defendant * * * held that view at the time that it submitted its false claim." *Ibid.* That approach is erroneous.

a. In *Safeco*, several insurers failed to notify consumers that the insurers had taken "adverse action[s]" based on the consumers' credit reports. 551 U.S. at 52 (quoting 15 U.S.C. 1681m(a)). A provision of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, imposed penalties for "willfully" failing to provide such notifications. 15 U.S.C. 1681n(a). This Court granted review to decide whether that provision "reache[d] reckless disregard of" FCRA's requirements and, if so, whether the insurers' violations had been "reckless." *Safeco*, 551 U.S. at 52, 56.

Based on "clue[s] in the text" and statutory context, the Court held that FCRA violations committed "willfully" included both knowing and reckless violations. *Safeco*, 551 U.S. at 59. The Court further held that Safeco had not acted recklessly because its interpretation of the notice provisions was "not objectively unreasonable." *Id.* at 69. The Court stated that Safeco had not had "the benefit of guidance from the courts of

appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took," and observed that an "'informal staff opinion'" suggesting that Safeco's practice was incorrect had explicitly stated it was not "'binding.'" *Id.* at 70 & n.19 (citation omitted). Under those circumstances, the Court concluded that Safeco had not run an "unjustifiably high risk of violating the statute." *Id.* at 70 (internal quotation marks omitted).

In a closing footnote, the Court addressed an argument that, "for purposes of [Section] 1681n(a)," "evidence of subjective bad faith must be taken into account." *Safeco*, 551 U.S. at 70 n.20. The Court stated that "[w]here, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Ibid.* The Court concluded that "Congress could not have intended such a result for those who followed an interpretation that could reasonably have found support in the courts, whatever their subjective intent may have been." *Id.* at 71 n.20.

b. As discussed, p. 16, *supra*, terms like "knowing" and "willful" must be "construe[d] * * * in their particular statutory context." *Jerman*, 559 U.S. at 585; see *Safeco*, 551 U.S. at 68 (emphasizing that a recklessness standard is "not self-defining" and depends on the context in which it appears) (quoting *Farmer*, 511 U.S. at 836). For four reasons, *Safeco*'s analysis of willfulness under FCRA does not support the Seventh Circuit's holding that a wrong-but-reasonable post hoc exculpatory theory precludes a finding of scienter under the FCA.

First, it is far from clear that such post hoc rationales are sufficient to defeat willfulness even under FCRA. The *Safeco* Court stated that "Safeco did not give [the plaintiffs] any notice because it thought [the notice requirement] did not apply to initial applications." 551 U.S. at 68. That description indicates that the Court understood Safeco to have actually based its decision not to send notices on the specific legal rationale that the Court described as "not objectively unreasonable." *Id.* at 69.

Second, and in any event, the FCRA and FCA scienter provisions contain significantly different language. FCRA imposes penalties on anyone who "willfully fails to comply" with the statute's requirements, without defining the term "willfully." 15 U.S.C. 1681n(a). The FCA, in contrast, imposes liability on persons who "knowingly" submit false claims or statements, and it defines that term to include mental states that turn on the defendant's subjective knowledge or intent at the time of those submissions. 31 U.S.C. 3729(b)(1)(A)(i) ("actual knowledge"); 31 U.S.C. 3729(b)(1)(A)(ii) ("deliberate ignorance"); see pp. 17, 19, *supra*. Mechanically importing into the FCA's scienter provision an approach that incorporates new legal theories developed after the claims were submitted would disregard that statutory language. Indeed, the *Safeco* Court emphasized the need to give distinct meaning to different terms like "knowing" and "willfully," and it noted that "knowing" action does "not simultaneously fall within * * * reckless[ness]." 551 U.S. at 59-60.

Third, *Safeco* involved a consumer-protection statute unrelated to the FCA's common-law antecedents. Lacking a common-law tradition directly analogous to FCRA's consumer-protection objectives, this Court

looked to the section of the Restatement (Second) of Torts that "define[d] reckless disregard of a person's physical safety." *Safeco*, 551 U.S. at 69. The Court concluded that, in that context, "the essence of recklessness at common law" was a "high risk of harm, *objectively* assessed." *Ibid.* (emphasis added). But as discussed, pp. 20-21, *supra*, common-law decisions addressing fraudulent misrepresentation—the foundation for the FCA—have long recognized the sufficiency of *subjective* intent in the context of that distinct tort. See 21-1326 Pet. App. 41a-42a & n.1 (Hamilton, J., dissenting). The court of appeals' approach does not account for those materially different background legal standards.

Fourth, the FCA applies specifically to claims for government money or property, and accordingly implicates the principle that "those who seek public funds" have a heightened duty to "act with scrupulous regard for the requirements of law." *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 63 (1984). Holding contractors liable when they submit claims in subjective bad faith is thus consistent with "history and current thinking" about the obligations of those who do business with the government, *Safeco*, 551 U.S. at 71 n.20, in a way that imposing liability for the credit-report-related violations in *Safeco* was not.[4]

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[4] As these cases illustrate, moreover, companies that seek funds from the government (particularly on a recurring basis) often have ready avenues for resolving ambiguity about payment rules—for example, by consulting their contacts in state Medicaid agencies, or contractual intermediaries like pharmacy benefit managers. See, *e.g.*, 21-1326 Br. in Opp. 8-9 (arguing that SuperValu asked for clarification from certain state Medicaid agencies and pharmacy benefit managers). When such avenues for clarification are readily available, a contractor's failure to invoke those mechanisms while seeking

c. This Court's decision in *Halo Electronics*, *supra*, confirms that a claimant's wrong-but-reasonable post hoc rationale for its billing practices cannot negate scienter under the FCA.

In *Halo Electronics*, the defendant in a patent-infringement suit had "all-but instructed its design team to copy" existing patented technology, "opting to worry about the potential legal consequences later." 579 U.S. at 102 (brackets and citations omitted). This Court ultimately considered whether the defendant could be held liable for enhanced damages for "willful" patent infringement. *Id.* at 103; see *id.* at 97. Relying on *Safeco*, the Federal Circuit had required plaintiffs seeking enhanced patent-infringement damages to make two distinct showings. The first, which the Federal Circuit had described as a showing of "[o]bjective recklessness," required "clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent." *Id.* at 100 (citations omitted). The Federal Circuit had made clear that a finding of "objective recklessness" was precluded if the defendant offered a wrong-but-reasonable defense at trial, "even if the defendant was unaware of the arguable defense when he acted." *Ibid.* "Second, after establishing objective recklessness," the plaintiff was required to "show—again by clear and convincing evidence—that the risk of infringement 'was either known or so obvious that it should have been known to the accused infringer.'" *Id.* at 101 (citation omitted).

Applying that standard in *Halo Electronics*, the Federal Circuit held that enhanced damages were

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public funds may be evidence of deliberate ignorance or recklessness under the FCA.

unavailable because the defendant could identify, after the fact, an objectively reasonable argument that the patent-in-suit was invalid. 579 U.S. at 100; see *id.* at 100-102. This Court reversed, explaining that "culpability is generally measured against the knowledge of the actor at the time of the challenged conduct." *Id.* at 105 (citing, *inter alia*, Restatement (Second) of Torts § 8A (1965)). The Court explained that the Federal Circuit had strayed from that principle by allowing "someone who plunders a patent * * * without any reason to suppose his conduct is arguably defensible" to "nevertheless escape any comeuppance * * * solely on the strength of his attorney's ingenuity." *Ibid.* The Court clarified that, in determining whether a particular defendant's conduct was sufficiently egregious to justify enhanced damages, "[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. The Court also rejected an expansive reading of *Safeco*'s footnote 20, explaining that while "a showing of bad faith" is not relevant under FCRA, courts in patent-infringement suits had long recognized that subjective bad faith could warrant "enhancing patent damages." *Id.* at 106 n.*.

Respondents attempt to distinguish *Halo Electronics* by arguing that it arose "[i]n the historical context of patent law," where proof of "bad-faith infringement" was sufficient to establish the necessary scienter. 21-1326 Resp. Supp. Br. 7 (citation omitted). But that argument simply reinforces the oddity of transplanting FCRA's scienter standard into the current statutory setting. As discussed above, pp. 17, 20-21, *supra*, the FCA's text and the traditional contours of common-law fraud strongly indicate that proof of "subjective bad

faith" is sufficient to establish scienter under the Act, just as it is in patent cases. *Halo Electronics*, 579 U.S. at 105.

2. Additional arguments advanced by the court of appeals and respondents do not support adoption of an "objective reasonableness" standard here

a. The court of appeals concluded that, even if a defendant "suspect[s], believe[s], or intend[s]" that its claim is false, the defendant "cannot *know* that its claim is false" unless the position it adopts is objectively unreasonable in light of statutory or regulatory text and "authoritative guidance." 21-1326 Pet. App. 21a-22a.

That sort of "radical epistemological doubt" provides no defense in "any other areas of law," and it would be particularly inappropriate in construing a fraud statute. 21-1326 Pet. App. 39a (Hamilton, J., dissenting). A courier who correctly believes he is transporting drugs cannot disprove his knowledge of that fact by showing that he never opened the package (or performed a field test) to be sure. See *ibid.* A chief financial officer who intends to cook the books does not escape liability by insisting that she never double-checked the math herself and therefore "did not 'know'—not *really*—that the earnings reports were inflated." *Ibid.*; cf. pp. 20-21, *supra* (discussing common-law fraud). The same principle applies here.

b. At the certiorari stage, SuperValu stated that, under the third prong of the FCA's definition of "knowingly," a defendant can defeat a showing of recklessness—"the most capacious form of scienter"—by establishing that its conduct was "objectively reasonable." See 21-1326 Resp. Supp. Br. 4. SuperValu argued that a showing of objective reasonableness should likewise be sufficient to disprove the additional forms of

scienter (actual knowledge and deliberate ignorance) set out separately in the FCA. *Id.* at 4-5; see 21-1326 Pet. App. 16a (similar). SuperValu described that approach to the FCA's "knowingly" standard as creating a defense "analogous to qualified immunity." 21-1326 Resp. Supp. Br. 4.

Even under the third prong of the FCA's definition, SuperValu is mistaken in suggesting that a wrong-but-reasonable post hoc rationale can defeat a finding of scienter. That third prong encompasses a claimant who "acts in reckless disregard of the truth or falsity of the information" contained in a claim or statement. 31 U.S.C. 3729(b)(1)(A)(iii). The "reckless disregard" prong is partly objective, since it encompasses circumstances where a reasonable person would perceive a high risk of falsity, even if the actual claimant does not. But the present-tense phrase "acts in," and the definition's relationship to the Act's operative prohibitions, make clear that "reckless disregard" depends on the information available to the defendant at the time false claims or statements are submitted, not later-acquired information. See p. 19, *supra*; cf. *Black's Law Dictionary* 594 (11th ed. 2019) (definitions of "reckless disregard" that focus on the defendant's actual or constructive knowledge at the time of the relevant act).

The *Halo Electronics* Court drew the term "objective recklessness" from the Federal Circuit's own opinions, see 579 U.S. at 100, and the Court used the term as shorthand to distinguish that requirement from the second prong of the Federal Circuit's two-part test for enhanced patent damages, see *id.* at 101; p. 26, *supra*. But this Court's reference to (and rejection of) the particular conception of "objective recklessness" that the Federal Circuit had adopted does not suggest that a

post hoc rationale for challenged conduct can *generally* preclude a finding of recklessness. To the contrary, the *Halo Electronics* Court observed that "culpability is generally measured against the knowledge of the actor at the time of the challenged conduct." 579 U.S. at 105.

In any event, extending SuperValu's proposed "qualified immunity" defense to the first two prongs of the FCA's scienter definition would be particularly unsound. In *Halo Electronics*, the Court held that the Federal Circuit was wrong to "require[] a finding of objective recklessness in every case" because "intentional or knowing" conduct can exist "without regard to whether [the] infringement was objectively reckless." 579 U.S. at 104-105. The Court found that subjective bad faith could be a sufficient predicate for enhanced damages even though "such damages are generally reserved for egregious cases of culpable behavior." *Id.* at 104. Where defendants subjectively intend to submit false claims for payment, their conduct is highly culpable even if a later-identified ambiguity in the governing requirements could plausibly be resolved in their favor. The same is true of defendants who submit claims that they strongly (and correctly) suspect are false, rather than invoking readily available avenues for obtaining clarification.

c. Respondents also defend the court of appeals' approach as necessary to force "agencies to speak clearly," contending that "considerations of due process and fair notice" preclude liability for conduct that is consistent with an objectively reasonable reading of the applicable statute, regulation, or contract. 22-111 Br. in Opp. 27-28; see 21-1326 Resp. Supp. Br. 8-9 (similar). That contention fails for two reasons.

First, those who affirmatively believe that they are submitting false claims, or who deliberately avoid inquiries that would either confirm or dispel that suspicion, cannot justifiably complain about a lack of fair notice. Such a state of mind has always been sufficient to establish scienter under the common law of fraudulent misrepresentation, even in circumstances where the falsity of the defendant's representation was not objectively clear at the time of the challenged conduct. And those who act based on a subjective, good-faith belief in a "reasonable interpretation of an uncertain legal obligation later determined to be erroneous," 21-1326 Br. in Opp. 30, will not be liable under any prong of the FCA's "knowingly" definition. Adoption of respondents' proposed defense is thus unnecessary to protect the due-process values they invoke.

Second, respondents' argument ignores the specific context in which all FCA claims arise. Respondents object to any standard that would require companies to "affirmatively seek 'clarification' * * * from the government when the law is ambiguous," insisting that due-process principles make the government responsible for "proactively clarif[ying] regulatory ambiguities." 21-1326 Resp. Supp. Br. 8-9 (citation omitted). But whatever force that objection might have in the context of general regulatory laws, it does not apply to those who request federal funds. "[W]hen a private party seeks to spend the Government's money," it can "expect no less than to be held to the most demanding standards." *Heckler*, 467 U.S. at 63.

Given its limited resources and the administrative complexity of many federal funding programs, the government cannot feasibly address in advance every potential ambiguity that motivated attorneys might later

identify. The government therefore relies on its contracting partners to approach the inevitable ambiguities in good faith, following what they understand to be the best interpretation and seeking clarification when necessary. By allowing claimants for government funds to escape FCA liability simply by identifying wrong-but-reasonable post hoc justifications for their conduct if and when litigation occurs, the decisions below substantially reduce contractors' incentives to seek clarification before claims are submitted. That approach cannot be reconciled with this Court's longstanding recognition that "[m]en must turn square corners when they deal with the Government." *Rock Island, Arkansas & Louisiana Railroad Co.* v. *United States*, 254 U.S. 141, 143 (1920).

C. The Court Of Appeals Erred In Treating Contractual Language And Warnings From Non-Governmental Actors As Irrelevant To The Scienter Analysis

The court of appeals further erred in holding that only "circuit court precedent or guidance from the relevant agency" is sufficiently "authoritative" to give notice of a claim's falsity. 21-1326 Pet. App. 28a; see 22-111 Pet. App. 18a ("[W]e may only consider binding precedent from the courts of appeals or appropriate guidance from the relevant agency."). On the court's view, even "contract definitions" in the very contract under which a defendant seeks payment are apparently irrelevant to the reasonableness of the defendant's interpretation if they originate from a source other than the agency itself. 21-1326 Pet. App. 28a. The Court should reject that unwarranted limitation on the types of evidence that may bear on whether an FCA defendant acted with a culpable state of mind.

The court of appeals derived its "authoritative guidance" limitation from a single paragraph in *Safeco*. See 21-1326 Pet. App. 27a-28a. There, this Court observed that "no court of appeals had spoken" on the disputed legal question when the defendant insurance companies acted, and "no authoritative guidance ha[d] yet come from the" relevant agency. *Safeco*, 551 U.S. at 70. "Given this dearth of guidance and the less-than-pellucid statutory text," the Court held that "Safeco's reading was not objectively unreasonable." *Ibid.*

That short discussion of the specific circumstances present in *Safeco* provides no basis for categorically foreclosing courts and juries from considering additional materials in assessing scienter under the FCA. The *Safeco* Court did not expressly adopt such limits even with respect to FCRA. And in any event, the FCA differs from FCRA in ways that would make the extension of such a rule particularly inappropriate.

The FCA applies not just to claims submitted directly to federal officials, but also to claims submitted "under a contract or otherwise" to a government "contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest." 31 U.S.C. 3729(b)(2)(A)(ii). The Act thus contemplates that deceptive conduct vis-à-vis non-federal intermediaries can give rise to FCA liability. Such non-federal actors play an integral role in the implementation of many federal funding programs, including Medicare Part D and Medicaid, in a way that has no usual analogue under ordinary regulatory laws. It would flout the congressional design to grant claimants in such programs *carte blanche* to ignore guidance from, or

contracts with, the very entities that Congress has designated to administer their claims.[5]

D. Petitioners' Evidence Demonstrates Material Disputes Of Fact Regarding Knowledge

Under the appropriate standard, the district court should not have granted summary judgment to respondents in either case. As discussed above, petitioners identified evidence indicating that respondents were subjectively aware of a high risk that they were misleading government-funded healthcare programs by submitting false "usual and customary" prices, but chose to hide their conduct for as long as possible rather than make inquiries to ensure compliance. See pp. 6-9, *supra*. Petitioners pointed to emails from executives and managers demonstrating awareness of likely illegality and a desire to keep government-funded programs from learning of their practices. *Ibid.* Petitioners also offered notices from pharmacy benefit managers and contract language strongly suggesting that respondents were reporting false "usual and customary" prices to at least some of those programs. *Ibid.* Finally, petitioners identified a stark disconnect between the amounts that respondents claimed were "usual and customary" prices for cash sales of particular prescription drugs and the amounts that respondents actually charged for most such cash sales. *Ibid.* That evidence would allow reasonable factfinders to conclude that respondents "knowingly" submitted false claims or

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[5] More generally, no textual or logical reason exists why the FCA's scienter provisions would preclude a factfinder from considering warnings that a defendant received from other knowledgeable non-governmental sources, such as attorneys, compliance officers, or government-contracting experts.

statements to government healthcare programs. 31 U.S.C. 3729(a)(1)(A) and (B).

The Court therefore should reverse the court of appeals' decisions affirming the grants of summary judgment as to knowledge, and remand for further proceedings. At a minimum, the Court should vacate and remand for the court of appeals to evaluate petitioners' evidence of scienter under the appropriate legal standard.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

31 U.S.C. 3729 provides in pertinent part:

False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to

an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

* * * * *

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

* * * * *

[1] So in original. Probably should be "101-410".