Nos. 21-1326, 22-111

In the Supreme Court of the United States

UNITED STATES EX REL. SCHUTTE ET AL.,
Petitioners,

v.

SUPERVALU, INC., ET AL.,
Respondents.

UNITED STATES OF AMERICA, ET AL., EX REL. PROCTOR
Petitioner,

v.

SAFEWAY, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AND COALITION FOR GOVERNMENT PROCUREMENT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals correctly held that a defendant does not "knowingly" submit a false or fraudulent claim, within the meaning of the False Claims Act, when (a) the alleged falsity is an alleged legal (not factual) error, (b) the legal standard applicable to the claim was ambiguous, (c) the defendant's conduct was consistent with an objectively reasonable interpretation of that ambiguous legal standard, and (d) at the time of the claim, no authoritative guidance warned the defendant away from its objectively reasonable course of conduct.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, *amici curiae* the National Defense Industrial Association and Coalition for Government Procurement state that neither has any parent corporation and that no publicly held company owns 10% or more of the stock of either.

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INTRODUCTION

The False Claims Act ("FCA") can be a powerful tool for the federal government to recover money that a defendant obtained by fraud from the public treasury.[1] But the same features that make the Act such a powerful tool also make it—like predecessor *qui tam* statutes—"highly subject to abuse." *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775 (2000).

FCA actions may be brought not only by the government, but also by private relators who "are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). A defendant found liable under the FCA is subject to "essentially punitive" remedies, including treble damages, civil penalties that can exceed $25,000 per violation, and attorney fee-shifting. *Stevens*, 529 U.S. at 784; *see* 31 U.S.C. §§ 3729(a), (b), 3730(d)(1). Moreover, the defendant can be suspended or debarred from government contracting—a corporate "death penalty" for contractors that do substantial business with the government. Ralph C. Nash & John Cibinic, *Suspension of Contractors: The Nuclear Sanction*, 3 Nash & Cibinic Rep. ¶ 24 (Mar. 1989). Given the *in terrorem* effect of these treble damages, civil penalties, and potential debarment, it is unsurprising that defendants often settle even

[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made such a monetary contribution.

meritless FCA cases. *See* John T. Boese & Beth C. McClain, *Why* Thompson *Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 Ala. L. Rev. 1, 18 (1999).

Given the practical realities of modern FCA litigation, "strict enforcement" of the FCA's "rigorous" scienter requirement is essential to curb abuse of the Act. *See Universal Health Servs. v. United States ex rel. Escobar*, 579 U.S. 176, 192 (2016). This is especially true when, as here, a plaintiff alleges that a claim is false because defendant allegedly did not comply with a statute, regulation, or contractual term. *See id.* at 180-81 (discussing "implied false certification theory of liability"). When a defendant acts in accordance with a reasonable interpretation of an ambiguous legal provision and in the absence of authoritative guidance to the contrary, the defendant cannot *knowingly* submit a *false* claim.

Petitioners' proposed subjective standard for assessing when a defendant "knowingly" submits a false claim would open the door to penalizing a government contractor for following an objectively reasonable interpretation of an ambiguous statutory, regulatory, or contract provision, simply because a relator could convince a court or jury that the better interpretation is that the provision means something else and that the contractor knew the provision was ambiguous. Adoption of petitioners' capacious understanding of when a defendant submits a *knowingly false* claim would deprive government contractors of the fair notice to which they are entitled and reduce their ability and willingness to provide the federal government goods and services that are critical to national defense and other core governmental functions.

INTERESTS OF *AMICI CURIAE*

The National Defense Industrial Association and the Coalition for Government Procurement are two nonprofit, nonpartisan organizations that represent thousands of corporations and individuals that do business with the federal government. They submit this brief to apprise the Court of the ill effects that adoption of petitioners' subjective standard for assessing scienter under the civil FCA would have on government contracting, including in the area of national defense.

The National Defense Industrial Association is comprised of more than 1,800 corporations and 65,000 individuals spanning the entire spectrum of the defense industry. Its corporate members include some of the nation's largest military equipment contractors and also companies that provide the U.S. military and other federal departments and agencies with a multitude of professional, logistical, and technological services, both domestically and in overseas combat zones and other dangerous locations. Individual members come from the federal government, the military services, small businesses, corporations, prime contractors, academia, and the international community.

The Coalition for Government Procurement represents a cross-industry group of more than 200 companies that sell products and services to the federal government. Its members include many of the top federal contractors and collectively account for a substantial percentage of sales generated through the General Services Administration Multiple Award Schedules program and to the Department of Veterans Affairs. For more than 40 years, the Coalition has

brought together public- and private-sector procurement leaders to work towards the mutual goal of common-sense acquisition.

Amici have substantial interests in the proper interpretation of the FCA. Their members do business with the federal government and are sometimes named as defendants in FCA actions, and thus face the prospect of treble-damages liability, including based on allegations that they failed to comply with ambiguous statutory, regulatory, or contractual provisions. Proper application of an objective scienter requirement ensures that *amici*'s members are not subjected to the FCA's harsh remedies regime for conduct that was objectively reasonable at the time it occurred, thus avoiding a result that would both be unfair to contractors and unjustifiably interfere with government contracting.

SUMMARY OF ARGUMENT

1. Contractors play a critical role supporting the federal government as it responds to national-security and other pressing problems. As they fulfill this role, contractors must navigate the uncertain legal landscape governing government contracting. Government contract law and government contracts are riddled with vague and conflicting requirements, which contractors must construe as they fulfill the government's needs. In so doing, contractors have strong incentives to hew to reasonable interpretations of the law, not only to keep their government customer happy, but also to avoid becoming subject to liability under the FCA or to other administrative or contractual remedies at the government's disposal.

2. When a government contractor acts in accordance with an objectively reasonable interpretation of an ambiguous law, it cannot be held liable under the FCA for knowingly submitting a false claim. A claim cannot be false for noncompliance with an ambiguous legal provision that has not otherwise been clarified by authoritative guidance when that claim conforms to an objectively reasonable interpretation of that provision. Nor, for that matter, can a contractor who acts in accordance with a reasonable interpretation of an ambiguous legal requirement *knowingly* submit a false claim just because it was aware that the requirement might be interpreted otherwise. Instead, when the allegation that a claim is false turns on the defendant's noncompliance with some ambiguous legal provision, the defendant can knowingly submit a false claim only if (among other things) it acted objectively unreasonably—and therefore outside the permissible bounds of that ambiguity—or if it was warned away from that interpretation by authoritative guidance.

Petitioners seek to water down the FCA's scienter requirement. They contend that a contractor that acts in accordance with an objectively reasonable interpretation of an ambiguous statute, regulation, or contract provision can nevertheless be subject to treble damages and significant penalties under the FCA if the contractor anticipated that the provision would or even *could* be interpreted another way. But that standard for the FCA would sweep up not only a hypothetical defendant that follows an interpretation it finds implausible, but also contractors that try their best to comply with what they recognize are uncertain legal obligations. Indeed, petitioners' standard would flout the principle of fair notice that underpins so

many of this Court's decisions. An ambiguous law *by definition* fails to provide the public fair notice of what it prohibits or requires, and actions based on a reasonable interpretation of such a law cannot be the basis for the imposition of treble damages and other penalties. Although petitioners suggest that contractors who recognize that a provision is ambiguous should seek clarification from agency staffers, that suggestion ignores reality. Among other things, agency staffers are often unwilling or unable to issue such guidance and, in any event, such guidance lacks the force of law.

Adoption of petitioners' subjective scienter standard would have adverse effects on government contracting. By increasing the risks and burdens of FCA litigation, it would discourage companies from participating in government procurement programs and increase costs to taxpayers. Moreover, allowing relators to second-guess contractors' objectively reasonable actions would chill contractors' ability to aid the government in responding to urgent needs. Requiring government contractors to ask agency staffers about every potential ambiguity or else risk tremendous liability is not workable for contractors or for the government.

3. Under the appropriate, objective scienter standard, only authoritative guidance—i.e., an agency decision having the force and effect of law or a precedential court of appeals decision, that specifically resolves the ambiguity at issue—can "warn away" a defendant from an otherwise objectively reasonable interpretation of an ambiguous legal provision. This conclusion is dictated by *Safeco Insurance*

Co. of America v. Burr, 551 U.S. 47, 70 (2007). Petitioners, however, would effectively treat informal guidance as binding on regulated parties, contrary to numerous decisions of this Court. And that interpretation would create many of the same notice problems as their lax interpretation of the FCA's scienter standard. This Court should reaffirm that a party does not act with reckless disregard by following a reasonable interpretation of an ambiguous statute, regulation, or contract provision unless and until "authoritative guidance" instructs it to do otherwise.

ARGUMENT

I. Petitioners' Subjective Scienter Test Would Impede Government Contracting, Including in the Defense Industry, and Undermine National-Security Interests.

A. Contractors Routinely Confront Ambiguous Legal Requirements When Dealing With the Federal Government.

1. Since the Founding, the federal government has turned to private industry to help it address the most pressing problems facing the nation. During the Revolutionary War, the fledgling national government relied on private merchants to feed and clothe Continental soldiers and on private wagon-drivers to transport those supplies. James F. Nagle, *A History of Government Contracting* 23-53, 46-49 (2d ed. 1999). During the Civil War, contractors furnished the Union military with everything from mules to monitor warships. *Id.* at 139. Private contractors built the Hoover Dam, stocked the Arsenal of Democracy in

World War II, and refined the fissile material that allowed the United States to enter the atomic age. *Id.* at 364-75, 431-44.

The federal government continues to enlist the aid of private contractors to help protect national security and achieve other important goals. Contractors supply the federal government with goods and services worth more than $600 billion each year. GAO, A Snapshot of Government-Wide Contracting for FY 2021 (Aug. 25, 2022), https://perma.cc/JE3L-SF6D. Private companies design and build the next-generation aircraft, armored vehicles, ships, and other vehicles and weapons that enable the U.S. military to maintain its edge against would-be adversaries. Contractors provide logistical support to U.S. military forces overseas and at home, sometimes at considerable personal risk. They support government information technology functions, provide government agencies office space and supplies, and distribute medicines to Veterans Affairs hospitals and Medicare beneficiaries. Recently, private companies were instrumental in rapidly developing and distributing vaccines against Covid-19.

2. Contractors' dealings with the federal government are "subject to the most extraordinary number of laws and regulations." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 691 (1996) (Scalia, J., dissenting). Government contracting statutes comprise an entire title of the United States Code, 41 U.S.C. (2018), and a significant portion of the title governing the Armed Forces, 10 U.S.C. subtitle A, part V.

Federal regulations governing contracting are even more extensive. Contracting by federal agencies

is generally subject to the Federal Acquisitions Regulation System, which combines the more than 1,500-page Federal Acquisition Regulation, 48 C.F.R. ch. 1 ("FAR"), with detailed Cost Accounting Standards, *id.* ch. 99, procedures for contract appeals, *id.* ch. 61, and 29 different chapters of supplemental procurement regulations issued by individual agencies, from the Department of Defense, *id.* ch. 2, to the U.S. African Development Foundation, *id.* ch. 57. All told, these regulations make up more than 4,000 pages of the published Code of Federal Regulations.

3. Government contracting statutes and regulations are riddled with contradictions and uncertainties. These ambiguities may result from the complicated drafting and revision process, from "the well-known limits of expression or knowledge," or from application of the law to a problem that its drafters could not have anticipated in advance. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2410 (2019) (plurality op.).

Ambiguities can also be intentional. By leaving a term undefined, drafters may attempt to forge compromise by papering over a disputed point. *See* John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 445 (2005). Agencies may leave regulatory language ambiguous to allow enforcement flexibility or to preserve the ability to clarify the ambiguity through less formal procedures. *See Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part). Drafters may also hope to discourage conduct that treads close to the "boundary of permissible conduct." *See, e.g.*, Pierre J. Schlag, *Rules and Standards*, 33 U.C.L.A. L. Rev. 379, 384-85 (1985). But such failure to provide clarity comes at

the cost of "confusion about what is or is not permissible," *id.*—i.e., potentially depriving regulated parties of fair notice.

4. Government contracting laws are not only lengthy and complicated, but also ambiguous in important respects.

For example, the Department of Defense has adopted cybersecurity regulations that require contractors and subcontractors to provide "adequate security" on systems that store, transmit, or process contract-related "controlled technical information," which can include anything from patent applications to details about farmers' conservation practices. 48 C.F.R. § 252.204-7012(a), (b); Nat'l Archives, Controlled Unclassified Information Registry, https://perma.cc/CZH9-F9V9 (updated Apr. 13, 2020).

The regulations define "adequate security" tautologically and offer contractors little warning about when their cybersecurity measures may be deemed inadequate. *See* 48 C.F.R. § 252.204-7012(a), para. 1 ("*Adequate security* means protective measures that are commensurate with the consequences and probability of loss, misuse, or unauthorized access to, or modification of information."). Although commenters noted the uncertain scope of these rules, the Department of Defense has chosen to follow a nebulous standards-based approach rather than providing what it called "unnecessary specificity." *See* 81 Fed. Reg. 72,986, 72,987 (Oct. 21, 2016). The government has signaled that it intends to enforce the regulations through FCA litigation. Dep't of Justice, *FYs 2022-2026 Strategic Plan* 30 (2022), https://perma.cc/RSP9-

8VRJ; White House, *National Cybersecurity Strategy* 22 (2023), https://perma.cc/YSH8-245W.

Similarly, the Buy American Act, 41 U.S.C. §§ 8301-05, creates a preference in federal procurement for U.S.-made goods. *Id.* § 8302(a)(1). The Act and its implementing regulations distinguish between "unmanufactured" end products, which must be wholly "produced in the United States," and end products "manufactured in the United States," which can receive the preference if the cost of their "components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all [their] components." 48 C.F.R. § 25.003 ("domestic end product"). For decades, neither the Act nor its regulations have defined "manufacturing," and the law has likewise left considerable ambiguity about how to distinguish components from end products. *See United States v. Rule Indus., Inc.*, 878 F.2d 535, 538 (1st Cir. 1989).

Another example is the FAR's provision allowing costs only if they are "reasonable[]." 48 C.F.R. §§ 31.201-2(a)(1). But a cost is "reasonable" only if it "would be incurred by a prudent person in the conduct of competitive business," an assessment that depends on a non-exclusive four-factor test. *Id.* § 31.201-3. The definition of when costs are "material" is no clearer. *See id.* § 9903.305. Such open-ended multifactor tests provide "notoriously little guidance" about how contractors should conduct their businesses. *See Wooden v. United States*, 142 S. Ct. 1063, 1080 (2022) (Gorsuch, J., concurring in judgment).

Despite longstanding criticism of confusing and vague language in the FAR, the FAR Council, which promulgates the regulation, has declined to resolve

many of the ambiguities. *See, e.g.*, Ralph C. Nash, Jr., & Vernon J. Edwards, *Mysteries of the FAR: Investigation & Recommendations*, 21-4 Briefing Papers 1 (Mar. 2021); Ralph C. Nash, *The Federal Acquisition Regulation: It Doesn't Solve Problems*, 20 No. 1 Nash & Cibinic Rep. ¶ 6 (Jan. 2006). By relying on vague language and open-ended multi-factor tests, the government has avoided providing clear guidance in many instances about what the law requires.

5. Because of uncertainties in both government contract law and government contracts, contractors must frequently make difficult decisions while bidding for, performing, and billing under contracts to provide goods and services to the federal government. In making those decisions, contractors appropriately turn to the text of applicable law or contract, advice of legal counsel, industry custom, and other sources that may shed light on the meaning of ambiguous legal language.

Contractors have strong incentives to discern and follow reasonable interpretations of these ambiguities. If the government believes that a contractor is misinterpreting the law, it has no shortage of remedies it can attempt to use against the contractor, including withholding further payments under the contract, 48 C.F.R. § 52.232-16(c); terminating for default, *id.* § 52.249-8; claiming damages for breach of contract, 41 U.S.C. § 7103(a)(3); or even treating a fraudulent claim as forfeit, 28 U.S.C. § 2514; 41 U.S.C. § 7103(c). Those remedies are available regardless of the standard for analyzing scienter under the FCA.

Moreover, government contractors are often involved in multiple government contracting opportunities over time and thus have good reasons to avoid gaining a bad reputation with government purchasing officers. For example, contractors' past performance (including their records of integrity and business ethics) is documented in a federal database and must be considered in negotiated procurements above a certain threshold. 48 C.F.R. §§ 15.304(c)(3)(i), 42.1502(a). Developing a reputation as unreasonable or opportunistic could undermine the contractor's ability to continue winning business from the federal government, "the largest customer in the world." Small Bus. Admin., Contracting Guide, https://perma.cc/6NJP-93GP (last visited Mar. 8, 2023).

In addition, the possibility of FCA litigation incentivizes government contractors to hew to reasonable statutory, regulatory, and contractual interpretations. *See Escobar*, 136 S. Ct. at 186-87 (contractors potentially liable for not disclosing material noncompliance with statutory, regulatory, or contractual requirements). That is so even according to the Seventh Circuit's approach, under which contractors may be liable if their conduct was inconsistent with an objectively reasonable interpretation of the legal requirement or there was authoritative guidance to the contrary. A contractor that seeks to push the objectively reasonable bounds of an ambiguous legal provision runs a greater risk that a court may conclude that the provision in question was unambiguous in a manner adverse to the contractor or that the contractor's interpretation was not objectively reasonable. The threat of *qui tam* FCA litigation thus

encourages contractors to adopt reasonable interpretations. That is particularly true because of the "essentially punitive" remedies available against defendants under the FCA, including treble damages, civil penalties of more than $25,000 per violation, attorney fee-shifting in *qui tam* actions, and possible debarment or suspension from future contracting opportunities. 31 U.S.C. §§ 3729(a), 3730(d); 48 C.F.R. §§ 9.406-2, 9.407-2.

B. Petitioners' Proposed Scienter Standard Would Impose Liability for Claims That Are *True* and Without Fair Notice.

When an allegation of FCA liability is premised on alleged noncompliance with an ambiguous statutory, regulatory, or contractual requirement, a contractor does not submit a *knowingly false* claim if their conduct comports with an objectively reasonable interpretation of that requirement. Not only is that claim not *false* at the time it is submitted, it cannot be *knowingly* so.

Petitioners assert, however, that a contractor can "knowingly" submit a false claim, apparently despite believing that the claim complies with legal requirements, if the contractor "recognizes that there is a chance, more or less great," that the claim is noncompliant. Petrs. Br. 36. It is unsurprising that petitioners are circumspect about the implications of their subjective-recklessness standard. Under that standard, a defendant could be liable under the FCA for "knowingly" submitting a false claim based merely on evidence it was aware that the claim implicated an ambiguous legal provision. Holding contractors liable

on such a showing would deprive them of fair notice of what the law requires before imposing government sanctions for violation of that law, and would seriously harm government contractors and contracting alike.

1. A claim based on a reasonable interpretation of an ambiguous provision is not "knowingly" "false."

By definition, an "ambiguous" statute, regulation, or contractual provision is reasonably susceptible to more than one interpretation. *Ambiguity*, *Black's Law Dictionary* (11th ed. 2019). If a defendant's interpretation is objectively reasonable, then it is necessarily among those valid interpretations. *See Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983-84 (2005). And a claim submitted to the government that is consistent with an objectively reasonable interpretation of that ambiguous provision is therefore not "false"; it complies with a valid interpretation of the legal provision. Authoritative guidance (in the form of agency guidance that has the force and effect of law, or a precedential appellate decision, *see infra* Part II) may thereafter resolve that ambiguity and preclude a contractor from continuing to rely on its prior reasonable interpretation. But that guidance cannot retroactively render "false" a claim that accorded with what was, at the time, a reasonable interpretation of ambiguous law.

Consider, for example, if during a war the Army terminated for convenience a contract for the purchase of a commercial product that it had awarded prior to the war's outbreak. The FAR calls for the contractor to be paid a portion of the contract price plus "reasonable charges" the contractor can demonstrate

resulted from the termination. 48 C.F.R. § 52.212-4(*l*). The regulations do not define what constitutes a "reasonable charge" or clarify whether the charge should be measured by pre-war or wartime market prices. *Cf. Red River Holdings, LLC v. United States*, 802 F. Supp. 2d 648, 655 (D. Md. 2011) (noting ambiguity of FAR regarding which charges are "reasonable"). A contractor that submits a claim that is reasonable in light of the higher, wartime prices does not submit a "false" claim, because there is no single correct way to determine which charges were "reasonable." Nor would that claim become "false" if a rule published following notice and comment subsequently stated that the reasonableness of charges is judged by pre-war prices. Indeed, the claim would become "true" even under petitioners' understanding if the ambiguity were resolved in the contractor's favor. But such after-the-fact resolution of legal ambiguity cannot provide the necessary fair notice before imposing FCA liability.

Cases alleging that a claim is false because the claim misinterprets ambiguous legal provisions thus differ meaningfully from ones in which the plaintiff alleges that the defendant misrepresented material facts or erroneously certified its compliance with clear legal obligations. For example, if a contractor sold the government artillery shells knowing that they were filled with sawdust, the claim would be false because the contractor failed to provide the product it promised. The contractor could not evade liability by arguing that the definition of "shells" was ambiguous, because in that context that term could not be reasonably construed to refer to projectiles uniformly incapable of firing. But a claim that reflects one

reasonable reading of an unsettled legal requirement cannot be "false," even if an agency or court subsequently establishes a binding legal rule based on a different reading.

Furthermore, a contractor that acts in accordance with an objectively reasonable interpretation of an ambiguous statute, regulation, or contract provision cannot *knowingly* submit a false claim. *See* Resps. Br. 23-26. As the Seventh Circuit observed, such a defendant cannot have "actual knowledge" that its claim is false if "the requirements for that claim are unknown." Schutte Pet. App. 21a; *see also United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 (8th Cir. 2010). So long as the legal premise for the claim remains unsettled, a contractor that acts in accordance with an objectively reasonable interpretation of that premise cannot be deliberately ignorant that the claim is false or act in reckless disregard of the truth or falsity of the claim, even if Congress, the agency, or a court later determines that that the provision should be interpreted differently. *See* Resps. Br. 41. *But see* Petrs. Br. 36.

Thus, under the example given above of the terminated contractor seeking payment of a portion of the contract price plus "reasonable charges," the contractor would not have "knowingly" submitted a false claim by seeking the higher "reasonable" charge. Only when that legal ambiguity ceased to exist—i.e., once an authoritative agency regulation or appellate decision definitively resolved how reasonableness should be assessed for purposes of the governing regulation—might claims that rely on a different interpretation be deemed "false" *and* might a defendant be deemed to have acted "knowingly."

2. Petitioners' reading would create grave fair-notice problems.

Petitioners' reading of the FCA would enfeeble the statute's scienter requirement. It would unfairly subject a contractor to retroactive, punitive liability for "knowingly" submitting a "false" claim even though the claim comported with an objectively reasonable interpretation of an ambiguous legal provision, anytime an agency, court, or perhaps even jury *subsequently* concludes that a different interpretation is better and the contractor either was aware that the provision was ambiguous or *should have known* that the agency or a court might choose another interpretation. *E.g.*, *Rule Indus.*, 878 F.2d at 538. *See generally* Petrs. Br. 35-38.

1. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). That principle animates many of this Court's decisions, including under the Ex Post Facto Clauses, U.S. Const. art. I, § 9, cl.3, and § 10, cl.1; the Due Process clauses, U.S. Const. amend. V, cl. 4, and amend. XIV, § 1, cl. 3, *e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); First Amendment vagueness and overbreadth doctrine, *Fox Television*, 567 U.S. at 254-55; *Reno v. ACLU*, 521 U.S. 844, 872-74 (1997); the "deeply rooted" presumption against retroactive legislation, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994); the rule of lenity, *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019); and limitations on when (if ever) courts should defer to an agency's changed interpretation of law that fails to account for

reliance interests created by a prior interpretation, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220-21 (2016), or would subject regulated entities to retroactive liability, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012).

The FCA presents especially pronounced fair-notice concerns. Given the FCA's harsh remedies, it is all the more important that parties know in advance how to structure their affairs to comply with the law. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). And it would be especially unfair if the government, having drafted ambiguous legal requirements (sometimes intentionally) and allowed those ambiguities to persist, could turn around and "recover treble damages and penalties based on its own poor draftsmanship." John T. Boese & Douglas W. Baruch, *Civil False Claims and* Qui Tam *Actions* § 2:03 (5th ed. 2022 update). Although petitioners and the Solicitor General invoke the principle that people "must turn square corners when they deal with the Government," Petrs. Br. 32, U.S. Br. 44, "it is also true ... that the Government should turn square corners in dealing with the people." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). This Court's recognition that "strict enforcement" of the FCA's "rigorous" scienter standard is necessary to "effectively address[]" fair-notice concerns implicitly acknowledged that the FCA presents special notice problems for those that do business with the United States. *Escobar*, 136 S. Ct. 1989.

2. Petitioners' proposed scienter standard flouts this foundational principle. Under petitioners' theory,

a government contractor that acts in accordance with an objectively reasonable interpretation of an ambiguous statute, regulation, or contractual provision and was not warned away from that interpretation by authoritative guidance could nevertheless be subject to treble-damages liability and other remedies under the FCA for purportedly "knowingly" submitting a "false" claim. Petrs. Br. 35-38; Br. for *Amicus Curiae* United States 18-19.

That scenario, by definition, involves a deprivation of fair notice. To give "fair notice," the law must apprise "ordinary people" of what the law permits and prohibits. *See Johnson v. United States*, 576 U.S. 591, 595 (2015). An ambiguous legal provision, however, is by definition reasonably susceptible to more than one interpretation. *See, e.g.*, *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 765 (2018) (per curiam); *U.S. Fid. & Guar. Co. v. Guenther*, 281 U.S. 34, 37 (1930). If a contractor acts in accordance with one of those reasonable interpretations of the law and is not warned away by authoritative contrary guidance, the contractor necessarily lacks fair notice that it could be held liable for knowingly submitting a false claim.

Petitioners' proposed scienter standard would not alleviate these fair-notice problems. Petitioners imagine a hypothetical bad-faith contractor that knowingly submits claims to the government relying on an interpretation it subjectively believes to be incorrect. *E.g.*, Petrs. Br. 30. That hypothetical is implausible. Reliance on an interpretation that the contractor subjectively believes is definitely incorrect would be extraordinarily risky, because the same factors that lead the contractor to *subjectively* believe that interpretation is wrong could well lead a court to conclude that

the interpretation is not *objectively* reasonable. *See supra*, pp. 13-14. Moreover, it is irrelevant. Even that contractor did not receive fair notice that its conduct was definitively prohibited. And *Safeco* rejected the argument that "a defendant who merely adopts one [reasonable] interpretation" could nevertheless be tarred as a "knowing or reckless violator." 551 U.S. at 70 n.20.

Petitioners' proposed standard is also overbroad. It would apply not only to their hypothesized bad-faith actors but also to contractors who in good faith rely on reasonable, but ultimately rejected, interpretations of the law so long as those contractors "recognize that there is a chance, more or less great," that their interpretation could be rejected later. Petrs. Br. 36. Although petitioners purport to agree that a defendant with "an honest subjective belief in [its] claim's truth" cannot be liable under the FCA, *id.* at 38, their proposed standard would also treat these good-faith actors as culpable. In cases involving ambiguous legal provisions, petitioners' standard would impose something close to strict liability. There is, however, "no 'strict liability' under the [FCA]." Boese & Baruch, *supra*, § 2:06.

3. Petitioners and the government contend that contractors act "knowingly" if they are aware that a statute, regulation, or contractual provision is susceptible to multiple interpretations but do not ask the relevant agency for clarification. *E.g.*, Petrs. Br. 35-36, 50; U.S. Br. 13, 15, 18, 25 n.4, 30, 31-32. Even if there were reason to think a contractor needs to ask the government for permission to comply with an objectively reasonable interpretation of applicable law—and there is not, *see* Resps. Br. 38—the suggestion that

contractors must "seek clarification" of every ambiguity "before claims are submitted," U.S. Br. 32, is profoundly unrealistic.

In practice, agency staff are generally reluctant to advise contractors and their counsel about how to interpret ambiguous legal provisions or apply them to particular facts. Asking an agency that has chosen to promulgate vague standards to provide clear, rule-like guidance clarifying those standards will likely prove futile. Agencies are ill-equipped to handle the deluge of requests for clarification that adoption of petitioners' proposed standard would likely trigger. And even in the doubtful event an agency staffer provided informal guidance about the meaning and application of an ambiguous legal requirement, that guidance would not have the force of law or bind the agency. *See Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014) (Kavanaugh, J.).

Moreover, requiring contractors to seek clarification from agencies about the meaning of ambiguous legal provisions would lead to difficult questions about how to reconcile inconsistent informal guidance. Different "attorneys, compliance officers," or "contractors," Petrs. Br. 36, may all interpret an ambiguous provision differently. Agency officials in different Administrations may provide different guidance. Or they may issue informal guidance that a contractor believes wholly misinterprets the regulation in question, forcing the contractor to choose between following its own view or following the agency's misguided view. Contractors also may need to submit claims after requesting clarification from an agency but before the agency responds to the request. In any of these

situations, it will be difficult or impossible for contractors to determine how to conduct their businesses so as to avoid the threat of retroactive FCA liability. Affirming that, in the absence of authoritative guidance, contractors cannot be liable for knowingly submitting a false claim if they act in accordance with an objectively reasonable interpretation of an ambiguous legal provision would obviate these concerns and ensure that contractors receive fair notice before being punished for violating the FCA.

C. Petitioners' Proposed Test Would Threaten Predictability and Stability of Government Contracting and Harm the Public Fisc.

The federal government has repeatedly called on the assistance of private contractors in addressing some of the most pressing issues facing our Nation. Time and time again, private industry has responded promptly and with vigor. Adopting petitioners' proposed scienter standard would chill contractors' willingness and ability to help the government address these pressing issues, undermine the predictability and stability of government contracting, and harm contractors and the public alike.

1. Adoption of petitioners' proposed scienter standard would substantially increase the burdens that FCA litigation imposes on government contractors. By relaxing a *qui tam* relator's duty to prove that the defendant acted with scienter, petitioners would make it easier to establish liability even in cases in which relators allege noncompliance with impenetrably ambiguous regulations. Under petitioners' standard, a contractor that tried its best to comply with an

ambiguous legal provision could still be found liable under the FCA if a relator could convince a court and jury that its interpretation of that provision was better and that the contractor was aware that the provision was susceptible to other interpretations.

Adoption of petitioners' standard would also increase the costs of FCA litigation even short of an ultimate damages award. Focusing the scienter inquiry on details of the defendant's subjective belief would involve communications among company officers or employees and would embolden relators to seek broad fishing-expedition discovery in hopes of finding communications from which they could wring inferences about what defendants believed about their legal obligations. It would breathe new life into relators' "unsupported and unsupportable" efforts to show that claims are knowingly false based on evidence that someone, somewhere in a company had information or beliefs inconsistent with a claim. *See* Boese & Baruch, *supra*, § 2.08[B]. And by basing scienter on historical facts, petitioners' approach would make it more difficult to obtain pretrial dismissal of FCA claims, even in a case in which the relevant legal obligation was ambiguous and the defendant's actions were objectively reasonable.

Adoption of petitioners' standard would also more frequently draw courts into disputes over attorney-client privilege. To understand and navigate ambiguous legal requirements, companies often seek advice of counsel. Adoption of petitioners' standard, which focuses on a defendant's subjective belief about the legality of its actions, would likely lead to greater intrusions on these privileged communications. Rela-

tors would seek to compel production of communications with or among attorneys, and defendants would be pressured to waive attorney-client privilege over communications relating to regulatory compliance if they planned to demonstrate subjective good faith. *See, e.g.*, *United States v. Bilzerian*, 926 F.2d 1285, 1292-93 (2d Cir. 1991) (assertion of advice-of-counsel defense waived privilege); Boese & Baruch, *supra*, § 2:06.

The likely consequences of making it easier for relators to bring FCA actions and for those actions to survive dispositive pretrial motions are not difficult to predict. Defendants already face significant pressure to settle meritless FCA actions. *See* Boese & McClain, *supra*, at 18. Tilting the balance of power further towards relators will add to both this bias in favor of settlement and the price tag for settling these actions. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (with "even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). Adoption of petitioners' standard will thus harm contractors, even in cases that never result in a jury verdict.

2. Increasing the litigation risks inherent in doing business with the federal government will undermine the predictability and stability of government contracting. Faced with an increased likelihood of incurring treble-damages liability, some contractors may rationally decide not to do business with the government at all, at least in any areas of significant legal uncertainty. *Cf.* 3 Section 809 Panel, *Report on Streamlining and Codifying Acquisition Regulations* 324 (2019) (discussing impact of government compliance obligations on supplier base). Withdrawal by

such contractors from the market will deprive the government of those companies' distinctive capabilities and resources, reduce competition in the market to serve the government's needs, and increase the cost of fulfilling those needs. Meanwhile, companies that will not or cannot cease doing business with the United States may increase their bids to offset their potentially increased expenses, adding to the costs to taxpayers of government procurement. Thus, what petitioners claim could be recovered for the public fisc with one hand would be taken away with the other.

For example, the Department of Defense has repeatedly called for increasing the number of offerors for contracts, both to improve the resilience of the Defense Industrial Base and to increase competition for individual contracts. Dep't of Def., *Guidebook for Acquiring Commercial Items, Part A: Commercial Item Determination* 1 (2019 update) ("DoD needs to increase access to an expanded supplier base—bringing new and emerging technologies to bear in support of our national defense objectives."). It has particularly encouraged participation by "non-traditional" offerors, especially small technology firms. *E.g.*, 48 C.F.R. § 212.102(a)(iv). Such firms typically lack experience of contracting with the federal government and sophisticated contracting organizations, and would be particularly sensitive to the risk of substantial FCA liability when operating in areas with significant legal ambiguity. *See* 1 Dep't of Def., *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations* 177-78 (2018). Adoption of petitioners' expansive proposed scienter standard will likely lead

some companies to cease contracting with the government or to decline to enter the field because of the increased risk of potential liability.

3. Petitioners' standard for the FCA would threaten more insidious harms to the federal government's ability to tackle important public problems. Exemplary private-sector responses to national emergencies from Pearl Harbor to September 11 and beyond have been marked by their speed. But petitioners' standard would hamstring contractors from aiding the government in future crises.

The anticipation that relators will scrutinize contractors' actions after the fact with whatever new legal interpretation they can try to bring to bear on an ambiguous legal provision in hopes of gaining a share of any recovery may discourage contractors from responding as promptly and as vigorously to new challenges. The prospect that their objectively reasonable actions will nevertheless be reconsidered after the fact under a different legal interpretation could inhibit government contracting, in much the same way that this Court has recognized that the prospect of being sued for damages over conduct that was not clearly unlawful can discourage public officials from "the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807-08 (1982); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009); *Safeco*, 551 U.S. at 70 (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

In addition, under petitioners' standard, attempts at action could be completely halted while the contractor waits for agency staffers to clarify every actual or potential legal ambiguity. Or, to move forward, the contractor would have to decide to accept the risk of

punitive liability. A contractor cannot wait for months or years for an agency to respond to its requests for clarification of all applicable legal provisions before taking action under a contract or submitting a claim. Requiring the contractor to clarify any legal ambiguities before submitting its claim would be a recipe for putting projects on hold for months or years while waiting for an agency response that might never come. By limiting liability under the FCA to *knowing* misconduct, Congress could not have intended to create a standard that would so threaten the federal government's ability to fill urgent defense and national-security needs in a timely manner.

II. Only Guidance Carrying the Force of Law Can "Warn[] Away" a Contractor From an Objectively Reasonable Interpretation of an Ambiguous Legal Provision.

Petitioners contend that even if a contractor has a good-faith belief in its interpretation of an ambiguous statute, regulation, or contractual provision, its reliance on that interpretation can be reckless if it receives a warning from any quarter that its interpretation may be incorrect. Petrs. Br. 49-54. But *Safeco,* other decisions of this Court, and common sense dictate that informal guidance or even mere industry gossip cannot "warn[] away" a contractor from an objectively reasonable interpretation of an ambiguous legal provision. As the Seventh Circuit correctly held, only an authoritative interpretation—i.e., an agency's notice-and-comment rule or the precedential decision of a court of appeals that specifically resolves the ambiguity in question—can so resolve the provision's ambiguity as to make it knowingly false to rely

on an otherwise-reasonable but contrary interpretation. Schutte Pet. App. 28a-29a.

1. This Court confirmed in *Safeco*, 551 U.S. 47, that a regulated party is not warned away from an objectively reasonable interpretation of an ambiguous legal provision without an agency's or a court of appeals' contrary authoritative guidance. Although this Court rejected the defendant's statutory interpretation, it observed that the interpretation was sufficiently grounded in statutory text that, although that interpretation was "erroneous," it "was not objectively unreasonable," and the defendant did not act recklessly. *Id.* at 69. The defendant did not "ha[ve] the benefit of guidance from the courts of appeals or the [relevant agency] that might have warned it away from the view it took." *Id.* at 70. Indeed, the Court expressly rejected the argument that an agency staffer's informal opinion warned the defendant away from its own objectively reasonable interpretation. *Id.* *Safeco* thus refutes petitioners' assertion that a contractor that conducts its business in accordance with an objectively reasonable interpretation of ambiguous law nevertheless acts recklessly by not following private attorneys, prime contractors, or "government-contracting experts" in reading the law a different way. Petrs. Br. 36; U.S. Br. 32-34 & n.5.

2. For decades, this Court has refused to treat non-authoritative agency interpretations as binding. Policy manuals and informal guidance from agencies do not control the meaning of ambiguous statutes. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587

(2000). Agency guidance not issued through "vehicles[] understood to make authoritative policy" also do not determine the meaning of ambiguous regulations. *Kisor*, 139 S. Ct. at 2416 (plurality op.); *accord id.* at 2424 (Roberts, C.J., concurring in part); *id.* at 2434 (Gorsuch, J., concurring in the judgment). And it is black-letter law that "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 (2011) (quotation marks omitted).

Petitioners do not contend that informal interpretations should receive controlling legal deference. But the practical effect is much the same. If non-authoritative guidance "warned away" a government contractor from a particular interpretation, then departing from that non-authoritative guidance could result in punitive FCA liability. Under petitioners' standard, this would be true even if the contractor was acting consistent with an objectively reasonable interpretation of the actual legal or contractual language. Just as this Court has refused to give controlling effect to informal agency guidance in other contexts and does not treat district court opinions as binding, it should likewise conclude that neither an agency's policy manual nor a district court's order is grounds for imposition of treble damages on a contractor that has acted in accordance with an objectively reasonable interpretation of the law.

3. Petitioners' standard flies in the face of this Court's precedents about fair notice. It strains belief to presume that contractors are cognizant of every communication received from "attorneys, compliance

officers, the Government, or the Government's contractors," Petrs. Br. 36, about how a particular legal provision should be interpreted. Moreover, this approach would exacerbate the notice problems inherent in requiring contractors to conform their conduct to agencies' sometimes shifting informal interpretations of ambiguous legal provisions. "[T]hese days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations." *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., concurring in the denial of certiorari). Treating each iteration of an agency's non-authoritative interpretation of an ambiguous legal provision as sufficient to "warn off" a contractor from following other reasonable interpretations would create havoc for businesses that would be required to abide by these flip-flopping positions for fear of treble-damages liability. Moreover, petitioners' standard would raise challenging questions about how a contractor is supposed to conduct its business when various non-authoritative sources—agency staffers, district courts, other private contractors, private lawyers—issue conflicting interpretations of the same legal provision. *See supra* pp. 22-23.

4. Giving effect only to authoritative agency interpretations of legal provisions—i.e., regulations having the force and effect of law—minimizes disruption from requiring contractors regularly to change how they do business to keep up with the churn of informal guidance. *See Encino Motorcar*, 579 U.S. at 220-21. It alleviates notice problems stemming from having to sort out conflicting informal guidance. And it increases the likelihood that the agency's interpretation is reasonable and persuasive, because that interpretation

results from a notice-and-comment process that "gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes" and "affords the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019).

Treating only precedential court of appeals decisions as sufficiently authoritative has similar benefits. Stability in government contracting rules that contractors must follow is enhanced because appellate courts typically follow the precedential decisions of prior panels. The possibility that contractors would have to reconcile conflicting decisions that could emerge from any of the many hundreds of district judges is eliminated. And focusing only on appellate decisions increases the likelihood that the legal interpretation that results from multiple judges' consideration of the issue is the best one, even if other interpretations are still reasonable.

Consistent with *Safeco*, this Court should conclude that only authoritative guidance—agency actions having the force of law and precedential court-of-appeals decisions that specifically resolve the legal ambiguity in question—can "warn off" contractors from their own objectively reasonable interpretations of ambiguous legal provisions.

CONCLUSION

The judgments of the Court of Appeals should be affirmed.

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