No. _____

In the Supreme Court of the United States

TROY OLHAUSEN,

Petitioner,

v.

ARRIVA MEDICAL, LLC, ALERE, INC., AND ABBOTT LABORATORIES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

KEVIN D. NEAL
KENNETH N. RALSTON
GALLAGHER & KENNEDY, PA
2575 E. Camelback Rd.
Phoenix, AZ 85016

STEPHEN F. ROSENTHAL
Counsel of Record
RICARDO M. MARTINEZ-CID
LEA V. BUCCIERO
CHRISTINA H. MARTINEZ
PODHURST ORSECK, PA
1 SE 3rd Ave., Suite 2300
Miami, FL 33130
(305) 358-2800
srosenthal@podhurst.com

Counsel for Petitioner

October 18, 2022

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether a False Claims Act defendant alleged to have "knowingly" violated a provision of federal law can escape liability by articulating, after the fact, an objectively reasonable interpretation of the provision under which its conduct would have been lawful.

PARTIES TO THE PROCEEDING

Petitioner, Troy Olhausen, was the plaintiff in the district court and the appellant in the court of appeals.

Respondents, Arriva Medical, LLC, Alere, Inc., and Abbott Laboratories, Inc., were the defendants in the district court and appellees in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

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DECISIONS BELOW

The unpublished opinion of the court of appeals (Pet. App. 1-6) is available at 2022 WL 1203023. The court of appeals' decision denying Petitioner's petition for panel rehearing is located at Petitioner's Appendix 40-41. The orders of the district court (Pet. App. 7-31 and 32-39) are available at 482 F. Supp. 3d 1228 (S.D. Fla. 2020), and 511 F. Supp. 3d 1278 (S.D. Fla. 2021).

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3729(a) provides:

> (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);
>
> **…**
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not

> more than $10,000, … plus 3 times the amount of damages which the Government sustains because of the act of that person.
>
> 31 U.S.C. § 3729(b)(1) provides:
>
> (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[.]

INTRODUCTION

The circuit courts are in disarray about how to interpret the scienter provisions of the False Claims Act ("FCA"), 31 U.S.C. § 3729, in cases where a defendant points to an objectively reasonable interpretation of the statutory or regulatory provision under which its conduct would be lawful.

The scienter requirement provides that a defendant must "knowingly" present false claims or make false statements to the government for FCA liability to attach. 31 U.S.C. § 3729(a). Congress specified that to act "knowingly" under the FCA, a defendant must act with: (1) actual knowledge, (2) deliberate ignorance, or

(3) reckless disregard of a statement or claim's falsity. 31 U.S.C. § 3729(b)(1).

Despite that statutory text, three courts of appeals understand the FCA's scienter requirement to implicate an objective assessment of a defendant's mental state while four circuits read it to require a subjective inquiry. In the only other circuit that has addressed the question, the state of the law is opaque.

The three circuits that conduct an objective test, together with the Eleventh Circuit panel in this case, import into the FCA this Court's decision in *Safeco Insurance Company of America v. Burr*, 551 U.S. 47 (2007), to hold that scienter cannot be shown as a matter of law if a defendant's conduct is consistent with a reasonable interpretation of an ambiguous legal requirement, unless authoritative guidance undercuts that interpretation. The four circuits that conduct a subjective inquiry apply the text of the FCA as written to hold that, regardless of any ambiguity, a defendant acts "knowingly" if it actually knew, or had reason to know, that its conduct was unlawful. The other circuit that has considered the question has issued internally conflicting decisions that only underscore the need for this Court's intervention. The panel below broke from binding Eleventh Circuit precedent to align itself with those circuits that have imported the reasoning from *Safeco* into the FCA context to hold that where a defendant can proffer an objectively reasonable, even if incorrect, interpretation of a legal requirement, it "negates the scienter element" necessary for FCA liability. Pet. App. 5-6.

The rule embraced by the Eleventh Circuit panel and at least three other circuits begs for correction. That treatment of the FCA fails to respect the statutory text and its specific, anti-fraud context. Another case highlighting this dilemma is presently on the Court's docket, *United States ex rel. Schutte v. SuperValu Inc.*, No. 21-1326. Whereas *Schutte* involves a summary judgment based on the scienter element, *see* Pet. for Writ of Cert. in *Schutte* at 9, the Eleventh Circuit in this case applied the objective reasonableness test to pretermit Olhausen's FCA claims at the pleading stage. Despite a corporate-insider executive's well-pled allegations that Respondents knew they were violating various Medicare laws, the Eleventh Circuit accepted Respondents' *argument* that the laws could be reasonably interpreted in such a way that their conduct could not satisfy the "knowing" requirement of the FCA.

Left untreated, the gulf between the text of the FCA's scienter provisions and lower courts' application of the objective reasonableness standard will continue to expand. The Court should grant certiorari and reverse to clarify that a *post hoc* assertion of an objectively reasonable interpretation of a federal law does not insulate a defendant who had "actual knowledge" or "act[ed] in deliberate ignorance," 31 U.S.C. § 3729(b)(1)(A), from liability to the United States under the FCA.

STATEMENT OF THE CASE

I. Factual Background

Petitioner, Troy Olhausen, brought this *qui tam* False Claims Act action as a relator on behalf of the United States against Respondents, Arriva and its parent companies (collectively "Arriva"), suppliers of mail-order diabetic testing supplies and other medical products including orthotic braces, heating pads, and erectile disfunction vacuum-therapy devices. Pet. App. 63, 68 (¶¶ 44, 46, 77). He alleges that Arriva falsely certified compliance with legal requirements and made false statements to the Centers for Medicare and Medicaid Services ("CMS") in order to secure lucrative government contracts to supply durable medical equipment, prosthetics, orthotics, and supplies (known as "DMEPOS") to Medicare beneficiaries under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. Olhausen alleges that Arriva's false statements centered on (1) impermissibly channeling some of its functions as a government-contract supplier through undisclosed locations and/or an unauthorized subcontractor, and (2) failing to obtain required assignments of benefits from beneficiaries for the supply of certain non-DMEPOS items.

Arriva acquired Olhausen's company, another supplier of diabetic-testing supplies and equipment, in 2012. Pet. App. 64 (¶ 50). Olhausen stayed on at Arriva in a senior position after the acquisition, and in that capacity, became aware that Arriva was engaging in practices he understood to violate applicable law based on his experience running his own company. Pet. App. 64, 68, 70 (¶¶ 53, 72, 88).

1. Just after the acquisition of his company, Olhausen learned that Arriva had submitted to CMS its first of two applications for a DMEPOS contract under the agency's competitive bidding program. Olhausen alleges both of Arriva's bids for its 2013 and 2016 DMEPOS contracts contained material misrepresentations regarding supplier locations. Pet. App. 132-33 (¶¶ 352-54). There are enormous financial stakes for Arriva and other suppliers to obtain a contract through the competitive bidding program since only those suppliers that obtain a contract are eligible to receive payment for DMEPOS they furnish to Medicare beneficiaries. 42 U.S.C. § 1395w-3(a)(1)(A); 42 C.F.R. § 414.408(e)(1). Arriva "knew it was required to disclose" its subcontracting relationships and each of its locations prior to filing the DMEPOS contract applications. Pet. App. 127, 130-31 (¶¶ 326-27, 342). This information is necessary since all DMEPOS suppliers must be accredited by a CMS-approved accreditation organization and all supplier locations, whether owned or subcontracted, must meet quality standards and possess separate accreditation in order to bill Medicare. *See* 42 C.F.R. §§ 424.57(c)(22), (24). In both applications, however, Arriva disclosed only its Florida headquarters although it conducted additional operations at locations in Arizona, Tennessee, and the Philippines. Pet. App. 126-28, 130-31 (¶¶ 319-20, 325-30, 340-42).

Arriva ultimately obtained DMEPOS contracts with the government in 2013 and 2016. By virtue of obtaining its first contract—as well as its acquisition of Olhausen's company, which had its own DMEPOS contract—Arriva received letters from a CMS

subcontractor that enclosed the copy of its fully executed contract and reiterated the rules with respect to supplier locations. Pet. App. 129-30 (¶¶ 335-38). Arriva also received educational emails from CMS contractors which restated that DMEPOS suppliers need to have valid accreditation to bill. Pet. App. 126 (¶ 321). Both DMEPOS contracts also included a "Subcontracting Arrangements" section, which reiterated those contract services that Arriva could legally subcontract out versus those that it was legally required to perform itself as the "Contract Supplier." Pet. App. 123-26, 131 (¶¶ 313-14, 319, 345).

In executing the contracts, Arriva certified that it would comply with the law and adhere to the DMEPOS contracts' provisions—which themselves incorporated applicable law regarding the use of additional locations and subcontractors. Pet. App. 107, 131-32 (¶¶ 237-38, 347-50). At the time Arriva made those certifications, however, it knew and intended that it would bill CMS for DMEPOS furnished from undisclosed and unaccredited locations and would subcontract DMEPOS services that it had to perform itself, without appropriate disclosure. Pet. App. 126, 132 (¶¶ 318-20, 349). Indeed, Arriva's DMEPOS contracts omitted any references to Arriva's Tennessee, Arizona, and Philippines locations. Pet. App. 127-28, 130-31 (¶¶ 328-33, 340-42).

Arriva had neither obtained accreditation for these locations nor disclosed their existence to CMS. Pet. App. 116, 119 (¶¶ 276, 295-96). It nevertheless continued to perform DMEPOS contract functions from these locations, and actually billed CMS for DMEPOS

furnished from these locations. Pet. App. 116-20 (¶¶ 278, 282-83, 288-300). Starting in 2013, Arriva's Philippines workforce expanded dramatically until it accounted for 80% of Arriva's operations, including most of its material day-to-day operations and also functions that only an accredited DMEPOS contract supplier (not a subcontractor) could perform under the law. Pet. App. 65, 117 (¶¶ 56, 283-84).

Arriva concealed the existence of these locations in part by manipulating its billing software to hide the real locations from which claims were submitted. Pet. App. 116-17, 119-20 (¶¶ 278-80, 297-300). When Arriva submitted any claim to CMS from any location, including the Philippines, the claim incorrectly appeared as though it was processed in Florida. Pet. App. 116-17, 120 (¶¶ 278-80, 300). Although the billing software could be reconfigured to accurately identify the location from which the claim was processed, Arriva directed locations not to use that option, perpetuating the misleading appearance that Arriva's claims all originated in Florida. Pet. App. 116-17 (¶¶ 278-80). Olhausen alleges that Arriva submitted false statements to CMS both because of these misstatements regarding the billing location, as well as because every claim submitted pursuant to Arriva's DMEPOS contracts was born of its false certifications to obtain the DMEPOS contracts. Pet. App. 126, 132-33 (¶¶ 320, 350, 355).

2. In addition to its false statements and certifications regarding undisclosed locations and/or subcontractors, Arriva also submitted claims for payment to CMS which erroneously represented that

Arriva had obtained assignments of benefits from beneficiaries. As a general rule, each claim billed to Medicare must be signed by the beneficiary or on the beneficiary's behalf, but Medicare can pay a supplier for covered services if the beneficiary assigns a claim and the supplier accepts assignment. *See* 42 C.F.R. §§ 424.32(a)(3), 424.36(a), 424.55(a). Although the DMEPOS competitive bidding program absolved "participating suppliers" from providing assignments of benefits for DMEPOS items under the program, items that are not subject to the competitive bidding program continued to require the assignment of benefits. Pet. App. 77 (¶ 122).

Arriva "knew" about these requirements and supplied some of those items outside of the competitive bidding program—heating pads, erectile-disfunction vacuum-therapy devices, and orthotic braces for the back, knee, ankle, and wrist at different periods—but frequently failed to obtain the assignments of benefits for them despite having an official policy to do so. Pet. App. 78, 80 (¶¶ 123, 132). Indeed, Arriva directed its employees not to discuss or ask beneficiaries about the assignment of benefits unless asked, and then advised them to say it was "unnecessary." Pet. App. 78 (¶ 124). Olhausen suggested that Arriva revise its standard telephone call scripts to have employees collect the assignment of benefits on calls with beneficiaries, but his suggestion was rejected since it might cost sales representatives commissions. Pet. App. 78-79 (¶¶ 126-28).

Internal audits by an outside consulting firm separately alerted Arriva to the fact that it had

submitted claims, including from its Philippines location, to CMS falsely indicating that it had assignments of benefits from beneficiaries although no such assignments were on file. Pet. App. 80-82 (¶¶ 133-36, 144). Despite its awareness of these audit results, and despite receiving similar audits and results monthly, Arriva persisted in failing to collect assignments of benefits for the non-DMEPOS program items. Pet. App. 80-82 (¶¶ 133, 137, 142-44, 148). Although "Arriva knew it did not have signed [assignments of benefits] for large numbers of beneficiaries," it nonetheless affirmatively checked boxes on claims for payment which indicated that Arriva had assignments on file. Pet. App. 80-81 (¶¶ 132, 138). It knew Medicare would deny claims submitted for the non-DMEPOS items that did not have assignments of benefits on file, so it continued to check the boxes indicating the authorizations were on file. Pet. App. 81-82 (¶¶ 138, 140, 146-47). As with the unaccredited locations, Olhausen's internal warnings and suggestions went ignored. Pet. App. 78-79 (¶¶ 126-28).

II. The Proceedings Below

A. District Court Proceedings

Petitioner Olhausen filed a six-count *qui tam* action for civil damages and penalties under the FCA in the Southern District of Florida. Pet. App. 32. Relevant to this appeal, his second and fourth causes of action alleged that Respondents had made false statements about having assignment-of-benefit signatures on file and that they failed to disclose unaccredited locations and/or subcontractors being used to perform services

for which they were billing Medicare. Pet. App. 136-38, 142-47. Count six alleged a conspiracy among Respondents to submit false claims to the government. Pet. App. 148-49.

Respondents moved to dismiss, challenging the sufficiency of the complaint on multiple fronts. On the element of scienter, Respondents relied primarily on *Safeco* and its progeny to argue that Petitioner could not meet the FCA's "'objective knowledge standard.'" *Olhausen v. Arriva Med., LLC*, No. 19-20190-RNS, at (ECF No. 61) 2 (S.D. Fla. Feb. 18, 2020); *see also id.* at 13, 15, 17. They proffered their own interpretations of the applicable law and insisted that Petitioner was unable establish scienter because he could not show that "the applicable statutes and regulations clearly prohibited the defendant[s'] conduct under every reasonable interpretation or, at minimum, [that] the conduct was contrary to 'authoritative' governmental guidance." *Id.* at 2; *see also id.* at 15, 17-18.

Petitioner, relying on binding Eleventh Circuit authority from *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148, 1155 (11th Cir. 2017), responded that the FCA required relators to show that a defendant acted "knowingly," or with "actual knowledge, deliberate ignorance, or reckless disregard," and a defendant could not avoid liability by a relying on a reasonable interpretation despite having actual knowledge of a different, authoritative one. *See Olhausen v. Arriva Med., LLC*, No. 19-20190-RNS, at (ECF No. 69) 9-10 (S.D. Fla. May 8, 2020). He maintained that Arriva's interpretations were unreasonable and argued that he had alleged they

knew their interpretations were incorrect. *Id.*; *see also id.* at 13, 15-16.

The district court dismissed the operative complaint in its entirety. It dismissed the three counts relevant to this petition on the ground that the claims failed to satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b) with respect to the "presentment" or "submission" element of an FCA claim. Pet. App. 25-30. The district court did not reach Respondents' argument concerning scienter.

B. The Eleventh Circuit's Decisions

On appeal to the Eleventh Circuit, the parties naturally focused their arguments on the presentment issue that formed the basis of the district court's ruling. (Petitioner pointed out, among other things, that the complaint contained particularized allegations about internal audits that Respondents had conducted which revealed that false claims had actually been presented to CMS for payment. Pet'r C.A. Br. at 25-34, 45-48; Pet'r C.A. Reply Br. at 2-8.) Petitioner also protectively addressed scienter. Pet'r C.A. Br. at 34-38, 48, 52-53. Respondents, too, raised their scienter defense (Resp't C.A. Br. at 44-48, 54-55), but urged the court of appeals not to address it (*id.* at 41). Petitioner briefly addressed the scienter issue in reply. Pet'r C.A. Reply Br. at 18-19, 25-26.

A panel of the Eleventh Circuit affirmed in an unpublished opinion that solely addressed the scienter issue. Pet. App. 1-6. The panel recited the elements of an FCA claim and the statutory definitions of "knowing" conduct, but then reframed the scienter

analysis through the prism of *Safeco*, explaining that if relevant textual, judicial, and agency guidance allowed for more than one reasonable interpretation, a defendant who merely adopted one of them could not be considered a knowing or reckless violator. Pet. App. 3-4. Based solely on the perceived ambiguity of the rules regarding assignment-of-benefit signatures and the use of undisclosed locations, and the absence of authoritative contrary interpretation of the rules, the panel held that Respondents' "objectively reasonable interpretation of the rules" "negate[d] the scienter element." Pet. App. 6 (citing *United States ex rel. Hixson v. Health Management Systems*, 613 F.3d 1186, 1190 (8th Cir. 2010), for its determination of the need for a contrary authoritative interpretation).

Petitioner sought panel rehearing based on a direct conflict between the opinion and the precedential decision in *Phalp*, which stressed that the appropriate scienter inquiry under the FCA is whether the defendant "actually knew or should have known that its conduct violated a regulation in light of any ambiguity at the time of the alleged violation." Pet. App. 156 (quoting *Phalp*, 857 F.3d at 1155 (internal quotation marks omitted)). Petitioner also alerted the panel to the fact that the *Phalp* court had received extensive briefing on *Safeco*'s objective standard, but had refused to import it into the False Claims Act. Pet. App. 159-60 (citing U.S. C.A. Br. in *Phalp*, No. 16-10532, at 22-24; Appellee C.A. Br. in *Phalp*, 2016 WL 3098444, at *56).

The Eleventh Circuit panel issued a per curiam denial of the petition for rehearing without explanation

as to its reasoning. Pet. App. 42. The court of appeals' mandate issued on July 28, 2022.

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity neatly to settle the issue of the appropriate scienter standard under the FCA—one that has divided and dogged the courts of appeals and even led to some intra-circuit about-faces. Two distinct camps emerge from this muddle, one adopting an objective scienter standard imported from *Safeco*'s discussion of an entirely different statute, the Fair Credit Reporting Act, and one that embraces the text of the FCA, requiring a subjective, circumstance-specific scienter standard. The uncertain state of the law in the only other circuit court to have grappled with the question underscores the need for this Court's authoritative instruction. The Court's guidance on this question will have far-reaching implications for the government's ability to combat fraud. And the wrong-headed panel decision below offers the Court a clear runway from which to provide that guidance.

I. The Circuit Courts Are in Disarray Over How to Interpret the Scienter Provision in the False Claims Act

The Court should grant certiorari to resolve the circuit split regarding the meaning of the scienter requirement. Considering published opinions, three circuits employ an objective standard plucked from *Safeco*; four conduct an assessment considering the defendant's subjective state of mind; and one has

issued opinions that leave the state of the law on the scienter question unclear.[1]

A. Three Circuits Have Imported *Safeco*'s Objective Scienter Standard into the FCA

The D.C., Seventh, and Eighth Circuits have, like the Eleventh Circuit panel in this case, extended *Safeco*'s standard into the FCA realm. These courts interpret the FCA's "knowing" standard—which, again, comprises "actual knowledge," "deliberate ignorance," and "reckless disregard," 31 U.S.C. § 3729(b)(1)(A)—by reference to *Safeco*'s interpretation of the term "willfully" in the Fair Credit Reporting Act, 551 U.S. at 56-57. They appear to cling to *Safeco*'s footnote 20, which reasoned that Congress could not have intended to make a knowing or reckless violator out of

[1] The First, Second, Third, and Fifth Circuits have not issued a published opinion on the propriety of *Safeco*'s extension to FCA cases. The discrepancies among decisions by district courts within those circuits, however, mirror the appellate courts' confusion. *See, e.g.*, *United States ex rel. Mackillop v. Grand Canyon Educ., Inc.*, No. CV 18-11192-WGY, 2022 WL 4084444, at *24-25 (D. Mass. Sept. 6, 2022) (acknowledging circuit split as to *Safeco*'s application in FCA context but holding that defendant's actions "would certainly fall under either of the recklessness standards"); *Health Choice Grp., LLC v. Bayer Corp.*, No. 5:17-CV-126-RWS-CMC, 2018 WL 3637381, at *29 (E.D. Tex. Jun. 29, 2018) ("Defendants' reasonable interpretation of the law argument does not warrant recommending dismissal at the motion to dismiss stage."); *U.S. ex rel. Bahnsen v. Boston Scientific Neuromodulation Corp.*, No. CV 11-1210, 2017 WL 6403864, at *8-9 (D.N.J. Dec. 15, 2017) (citing *Phalp*; explaining that "the timing of a defendant's reasonable interpretation is critical" and "an after-the-fact reasonable interpretation of an ambiguous provision" will not avoid liability).

defendants who adopted one of multiple reasonable interpretations permitted by the "statutory text and court and agency guidance," "whatever their subjective intent may have been." *Id.* at 70 n.20. And they construe that footnote and the rest of *Safeco* to mean that a defendant can deploy a reasonable but incorrect interpretation to defeat scienter in an FCA claim unless authoritative guidance warns it away from its interpretation. While these circuits differ with respect to what constitutes "authoritative guidance" or whether a defendant must have believed its interpretation of legal obligations *at the time of* the challenged conduct, each tends to focus on and elevate an objective assessment of the defendant's asserted interpretation of the legal rules over allegations and evidence of its subjective mindset.

The first court of appeals to cite *Safeco* in the FCA context, the D.C. Circuit in *United States ex rel. K & R Limited Partnership v. Massachusetts Housing Finance Agency*, held at summary judgment that there could be no scienter because the defendant, a mortgage lender, had adopted one of two plausible interpretations of an ambiguous term in mortgage notes, and the relator could point to "nothing else 'that might have warned [the defendant] away from the view it took.'" 530 F.3d 980, 984 (D.C. Cir. 2008) (quoting *Safeco*, 551 U.S. at 70).[2]

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[2] Despite citing *Safeco*, *K & R* suggested that the reasonableness or unreasonableness of the defendant's interpretation was "merely evidence, the absence of which does not preclude scienter." *K & R*, 530 F.3d at 983. It is unclear whether that court would have reached a different conclusion or applied a subjective standard if the relator had submitted any evidence of what the defendant

In *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 291 (D.C. Cir. 2015), the D.C. Circuit again followed *Safeco* to preclude scienter based on the defendant's reasonable interpretation of an ambiguous contract term. *Purcell* rejected the defendant's contention that scienter could be decided as a matter of law "so long as [a defendant] has an objectively reasonable interpretation of an ambiguous provision," since factual evidence that a defendant was warned away from its interpretation could establish knowledge. *Id.* at 288. For that reason, "[p]roving knowledge [wa]s in part an evidentiary question," but the question was limited to evidence a defendant had been warned away from its interpretation, and emphatically excluded evidence of subjective intent, which *Safeco* had clarified to be "irrelevant." *Id.* at 290. Indeed, the court ignored testimony that employees of the defendant knew they were applying the wrong definition of the contract because that testimony at most implied that the defendant "did not hew to its reasonable interpretation in good faith." *Id.* In other words, in a case of alleged *fraud* under the FCA, *Purcell* disregarded *even evidence of potential bad faith* because it determined its focus should be on the "objective reasonableness of the defendant's interpretation of an ambiguous term" together with any evidence that an agency had formally warned the defendant away from that interpretation. *Id.*

The Eight Circuit in *Hixson* affirmed dismissal of an FCA complaint, citing *Safeco* to hold that "a statement that a defendant makes based on a reasonable

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knew or should have known.

interpretation of a statute cannot support a claim under the FCA if there is no authoritative contrary interpretation of that statute." *Hixson*, 613 F.3d at 1190. Under such circumstances, the court explained the defendant "could not have acted with the knowledge that the FCA requires." *Id.* The Eighth Circuit later reaffirmed *Hixson*'s rule in *United States ex rel. Ketroser v. Mayo Foundation*, 729 F.3d 825, 832 (8th Cir. 2013).

In *United States ex rel. Donegan v. Anesthesia Associates of Kansas City, PC*, 833 F.3d 874, 880 (8th Cir. 2016), the Eighth Circuit further cemented its rule but clarified that evidence that the defendant was warned away from its interpretation could establish scienter for purposes of summary judgment. While acknowledging *Ketroser*'s holding that an FCA defendant's reasonable interpretation of an ambiguous regulation negates scienter, the *Donegan* court explained that a relator (or the United States) could theoretically "produce[] sufficient evidence of government guidance that 'warn[ed] a regulated defendant away from an otherwise reasonable interpretation' of an ambiguous regulation" to establish FCA liability. *Id.* at 879 (alterations and citations omitted). In so doing, it distinguished and diverged from earlier circuit precedent, *Minnesota Association of Nurse Anesthetists v. Allina Health System Corporation*, 276 F.3d 1032, 1053 (8th Cir. 2002), which stated that "any possible ambiguity of the regulations is water under the bridge" where defendants certified compliance with a regulation despite knowing that an agency interpreted it in a different way, contrary to their actions.

Finally, a divided panel of the Seventh Circuit has articulated arguably the most rigid FCA scienter standard. *United States ex rel. Schutte v. SuperValu Inc.*, 9 F.4th 455, 467 (7th Cir. 2021), held that "[f]ailure to meet the *Safeco* standard precludes liability" under the FCA regardless of whether scienter is based on a defendant's actual knowledge, deliberate ignorance, or reckless disregard.[3] *See also id.* at 468. Even though it acknowledged that "'knowingly' and 'reckless disregard' remain distinct terms" in the FCA, *id.* at 465 (citing *Safeco*, 551 U.S. at 60, 70 n.20), the *Schutte* majority insisted that "the *Safeco* standard reaches all three of the scienter terms that define 'knowingly'" under the FCA, *id.* at 467. The court extracted "two distinct questions" from *Safeco*'s standard: (1) whether the defendant had a permissible reading of a legal requirement, and (2) whether authoritative guidance warned it away from that reading. Those inquiries led it to conclude the defendant was entitled to summary judgment. *See id.* at 468; *see also id.* at 468-72.[4] A withering dissent in *Schutte* attempted to refocus the inquiry to the relators' proffered evidence of knowing fraud, but ultimately did

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[3] A petition for a writ of certiorari has been filed in *United States ex rel. Schutte v. SuperValu Inc.*, No. 21-1326 (U.S.), and this Court has invited the view of the Solicitor General in that case.

[4] The *Schutte* court also noted that the Eleventh Circuit in "*Phalp* did not reject *Safeco*—it did not even cite *Safeco*." *Id.* at 465-66 (citing *Phalp*, 857 F.3d at 1155). Although *Phalp* did not explicitly discuss *Safeco*, as discussed below, the *Phalp* court was aware of *Safeco* and its progeny, and its reasoning deliberately breaks from the objective scienter standard in those cases to forge a scienter inquiry rooted in the FCA text.

not sway the majority. *See id.* at 473-75 (Hamilton, J., dissenting).

Another divided Seventh Circuit panel applied this inflexible approach to hold *at the motion to dismiss stage* that "if a relator cannot show that a defendant acted with reckless disregard under *Safeco*'s objective standard, then the FCA claim fails, regardless of whether the relator can point to evidence of the defendant's subjective awareness that its interpretation might be wrong." *United States ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649, 658 (7th Cir. 2022). That means "'[a] defendant might suspect, believe, or intend to file a false claim, but it cannot *know* that its claim is false if the requirements for that claim are unknown.'" *Id.* (emphasis in original) (quoting *Schutte*, 9 F.4th at 468). And while the *Proctor* court acknowledged that evidence a defendant was warned away from a certain interpretation may provide the grounds to establish scienter, it required that the warning come from a governmental source in the form of binding circuit court precedent or specific agency guidance; agency communications or warning letters would not suffice. *Id.* at 660-61 & nn.13, 14.

The *Proctor* majority claimed that "[n]o court of appeals majority opinion—before or after *Schutte*—has agreed with the dissent's position that *Safeco* does not apply in the FCA." *Id.* at 658 n.10. While it is true that no appellate court has *expressly* rejected the applicability of *Safeco* to the FCA, the Seventh Circuit viewed the question through blinders. As the cases below demonstrate, multiple circuits have interpreted the FCA scienter requirement to demand an evaluation

of a defendant's subjective mindset—despite the D.C., Seventh, and Eighth Circuits' unchecked expansion of *Safeco* into FCA jurisprudence.

B. Four Circuits Use a Subjective Standard to Determine Scienter Under the FCA

The Eleventh, Sixth, Ninth, and Tenth Circuits apply a subjective standard to determine whether a defendant actually knew or should have known that it was committing an FCA violation despite the ability to proffer a reasonable interpretation of an ambiguous legal requirement.

The law in the Eleventh Circuit—despite the unpublished, non-precedential opinion below—continues to mandate a subjective scienter standard in FCA cases—in which scienter does not depend on the ambiguity of a legal requirement "and can exist even if a defendant's interpretation [of the law] is reasonable." *Phalp*, 857 F.3d at 1153, 1155. In *Phalp*, the Eleventh Circuit implicitly rejected the applicability of *Safeco*'s scienter standard, holding that the defendants' post-hoc rationalizations could not trump evidence of their subjective mindset at the time of the alleged FCA violation. *Id.* The *Phalp* court stressed that the central scienter inquiry is a determination of "whether the defendant *actually knew or should have known* that its conduct violated a regulation in light of any ambiguity at the time of the alleged violation …." *Id.* (emphasis added). The court expressed concern that a contrary rule would allow a defendant to "avoid liability by relying on a 'reasonable' interpretation of an ambiguous regulation manufactured post hoc, despite having actual knowledge of a different authoritative

interpretation," *id.*—much like Respondents here did below.

While *Phalp* did not cite *Safeco*, the court's omission must have been deliberate. The parties, including the United States, extensively briefed the *Safeco* recklessness standard, but the court spurned the defendant[s'] invitation to adopt that standard, focusing instead on the actor's subjective state of mind and maintaining that while legal "ambiguity may be relevant to the scienter analysis," it "does not foreclose a finding of scienter." *Phalp*, 857 F.3d at 1155; *see also* U.S. C.A. Br. in *Phalp*, No. 16-10532, at 22-24 (arguing the *Safeco* standard is a poor fit for the FCA and urging against its adoption); Appellee C.A. Br. in *Phalp*, 2016 WL 3098444, at *56 (arguing that the government's reading of *Safeco* was "too narrow" and that *Safeco* was "instructive" on FCA scienter where defendants adopted reasonable interpretations of regulations and in the absence of contrary authorities).

Yates v. Pinellas Hematology & Oncology, P.A., reinforces the Eleventh Circuit's adherence to the FCA's text in evaluating scienter by reviewing evidence of a defendant's subjective mindset rather than conducting a prophylactic objective-reasonableness inquiry. 21 F.4th 1288, 1303 (11th Cir. 2021) (explaining that the defendant's argument about its "belief (mistaken or not)" "misses the point" since the operative question is whether it acted with reckless disregard of the truth or falsity of a certification it made to the government) (cleaned up); *see also id.* (summarizing trial evidence sufficient to indicate the defendant's "reckless disregard" of legal requirements).

The Sixth Circuit in *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 837-38 (6th Cir. 2018), adopted a similar approach at the motion-to-dismiss stage, looking to the relator's allegations that the defendants acted in reckless disregard of their compliance obligations. The court noted allegations that the relator and other employees raised concerns about compliance with regulations, that the defendants sent an email indicating they knew their conduct was potentially noncompliant, and that defendants told the relator on multiple occasions that they could "'just argue in our favor if we get audited' as a solution to any compliance issues." *Id.* Although the court acknowledged that discovery might reveal the defendants had conducted an inquiry into their compliance with regulations, it deemed these allegations sufficient to demonstrate scienter and reversed the dismissal of the relator's case. *Id.* at 838.

The Ninth Circuit has similarly endorsed a subjective scienter requirement in FCA cases. In *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 460 (9th Cir. 1999), the court anchored the scienter inquiry to the text of the FCA, concluding that evidence of the defendant's mindset, including the relator's affidavit explaining the defendant's noncompliance, precluded summary judgment on scienter. *Id.* at 465. Discussing scienter in tandem with the FCA's falsity requirement, the court rebuffed the defendant's argument "that the sky will fall upon government contractors if they are precluded from relying on a 'reasonable interpretation'" to avoid FCA liability. *Id.* at 464. "A contractor relying on a *good faith* interpretation of a regulation is not subject to

liability," the Ninth Circuit explained, "*not* because his or her interpretation was correct or 'reasonable' but because the good faith nature of his or her action forecloses the possibility that the scienter requirement is met." *Id.* (emphasis added). The Ninth Circuit has subsequently reaffirmed this subjective approach to FCA scienter and also emphasized regulated players' "duty to familiarize themselves with the legal requirements for payment." *United States v. Mackby*, 261 F.3d 821, 828 (9th Cir. 2001). Though *Oliver* and *Mackby* were decided before *Safeco*, their reasoning seemingly remains good law in the circuit.[5]

The Tenth Circuit likewise focuses the scienter inquiry on evidence of the defendant's subjective state of mind, even as it admits consideration of the reasonableness of a defendant's interpretation of governing legal requirements. In *United States v. The*

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[5] *See, e.g.*, *United States v. Chen*, 402 F. App'x 185, 188 (9th Cir. 2010) (citing *Oliver*). More recently, a precedential opinion in *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1178 (9th Cir. 2016), cited *Safeco* in evaluating defendants' argument that certifications submitted to the government could not have been knowingly false because they represented an objectively reasonable interpretation of their obligations. At times, the *United Healthcare* opinion appears to consider evidence of the defendants' subjective states of mind. *Id.* at 1174 (referencing the relator's legal theory, "which focuse[d] on the defendant's conduct," and CMS guidance that defendants "would be 'responsible for making good faith efforts to certify the accuracy, completeness, and truthfulness'" of data submitted to the government). It also discusses, however, the "objective reasonable[ness]" of ignoring good faith and due diligence requirements in the regulation. *Id.* at 1178. Ultimately, *United Healthcare* may not play a role in the circuit split given that the court determined the regulations were unambiguous.

Boeing Company, 825 F.3d 1138, 1149 (10th Cir. 2016), the court ultimately affirmed summary judgment in favor of the defendants but was swayed not by either party's interpretation of relevant legal requirements, but by the absence of any record evidence that anyone working for the defendants "knew … or, alternatively, was deliberately ignorant of, or acted with reckless disregard to, [regulatory] violations—yet submitted a claim to the government for payment anyway." It was not the defendant's legal rationalization of its behavior that won the day, but that "the relators' naked assertions, devoid of any evidence of scienter" could not survive summary judgment. *Id.*

The above cases represent a scienter analysis properly rooted in the FCA's text, which acknowledges that regulatory ambiguity and a defendant's honest mistake may play a role in the inquiry, but which places paramount importance on allegations and evidence related to what a defendant actually knew or should have known (in light of its actual knowledge) regarding the truth or falsity of information it submitted or certified to the government.

C. In Another Circuit, the Standard for Determining Scienter Under the FCA Remains Unclear

The Fourth Circuit's topsy-turvy handling of the FCA scienter requirement over the last two years affords a window into how nettlesome this issue has become and showcases the divergent views on the question.

Last year, in *United States v. Mallory*, 988 F.3d 730, 736 (4th Cir. 2021), the Fourth Circuit appeared to embrace a subjective FCA scienter standard, considering "abundant evidence as to [the] [d]efendants' knowledge and intent." The *Mallory* court was unconvinced by the defendants' argument that, because of a purported statutory ambiguity, "they could have reasonably concluded that the statute did not prohibit their conduct," finding that "ample evidence" supported the jury's determination that defendants had knowingly violated the FCA. *Id.* at 737.

Less than a year later, a sharply divided panel of the Fourth Circuit seemingly reversed course, holding that, because a defendant's reading of a statute was objectively reasonable and because it was not warned away from that reading by authoritative guidance, it did not act "knowingly" under the FCA. *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340, 347-48 (4th Cir. 2022), *opinion vacated on reh'g en banc,* No. 20-2330, 2022 WL 4396367 (4th Cir. Sept. 23, 2022). The panel majority explicitly held that *Safeco*'s reasoning applied to the FCA's scienter analysis, *id.* at 348, and it dismissed the relator's evidence of agency guidance that "should have warned [the defendant] away" from particular conduct because, the majority explained, *Safeco*'s focus on objective reasonableness "precludes inquiry into a defendant's subjective intent" and renders evidence of a defendant's subjective state of mind "simply irrelevant," *id.* at 354 & n.5.

That panel opinion prompted a vehement dissent, which accused the majority of "neuter[ing] the False

Claims Act … by eliminating two of its three scienter standards (actual knowledge and deliberate ignorance) and replacing the remaining standard with a test (objective recklessness) that only the dimmest of fraudsters could fail to take advantage of." *Sheldon*, 24 F.4th at 357 (Wynn, J., dissenting).

The Fourth Circuit took up the case en banc, but instead of vindicating the *Sheldon* dissent or endorsing the panel majority's reasoning—"an equally divided court" issued a one-sentence opinion which vacated the panel opinions below and affirmed the judgment of the district court. *Sheldon*, 2022 WL 4396367, at *1. Given *Mallory* and a decision which had cited the *Sheldon* panel opinion approvingly, *United States ex rel. Gugenheim v. Meridian Senior Living, LLC*, 36 F.4th 173 (4th Cir. 2022), the state of the law on FCA scienter within the Fourth Circuit remains unclear.

It is safe to say that the issue of whether and to what extent to apply *Safeco* to scienter in the FCA has riven the lower courts. This Court's decisive ruling on the matter can eliminate that confusion and ensure that the federal government's right to recoup damages for fraud on the treasury does not vary materially depending on which part of the country the alleged fraudster is haled into court.

II. This Case Was Wrongly Decided and Presents a Good Vehicle to Decide the Question Presented

The decision below—like those of all the circuits transplanting *Safeco*'s scienter standard into the FCA—is inconsistent with the text of the FCA and warrants correction. Because the scienter issue was the sole basis of the Eleventh Circuit's opinion *on a motion to dismiss*, the issue is also presented squarely and cleanly here for the Court's resolution, making it an ideal vehicle to clarify the scienter standard under the FCA.

A.

In the Eleventh Circuit panel's view, allegations that Respondents were aware of their potential noncompliance with applicable law—through, among other things, agency mailings, internal audit results, and Petitioner's own warnings—are meaningless when stacked against their ability to articulate a post-hoc, reasonable interpretation of Medicare law. *See* Pet. App. 158. This approach is anti-textual and contravenes Court precedent.

First, the panel's approach somersaulted over the FCA's text. Although it cited *Phalp* for its recitation of the FCA's tripartite definition of "knowing," the court ignored *Phalp*'s close, textual reading of the FCA. Pet. App. 4. Instead, jumping to *Purcell* and to *Safeco*'s oft-cited footnote 20, it reduced the definition to a one-part objective test that eliminated the "actual knowledge" and "deliberate ignorance" standards. Pet. App. 4. For even if "reckless disregard" contemplates an objective

standard or involves consideration of defendants' reasonable interpretations, courts have typically taken the ordinary meaning of "actual knowledge" and "deliberate ignorance" to require making a *subjective* inquiry into what a defendant actually knew or should have known had it not intentionally kept itself in the dark. *See, e.g.*, *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 947 (2022) (indicating that "ordinary meaning" of the word "knowledge" as used in the Copyright Act is an "actual, subjective awareness of both the facts and the law"); *Unicolors*, 142 S. Ct. at 950 (Thomas, J., dissenting) (defining "actual knowledge" as a circumstance where "an applicant subjectively knew of an inaccuracy"); *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985) (deliberate ignorance does not suggest a reasonableness standard and means "subjectively aware"); *United States v. Ricard*, 922 F.3d 639, 654-56 (5th Cir. 2009) (deliberate ignorance involves showing "subjective awareness"); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1409-10 (10th Cir. 1991) (explaining that a "deliberate ignorance" instruction requires circumstantial evidence to establish that the defendant had "subjective knowledge of his criminal behavior" and the "knowledge may not be evaluated under an objective, reasonable person test").

Common-law sources related to the law of fraud confirm the terms' plain meaning. *Cf. Univ. Health Servs., Inc. v. U.S. ex rel. Escobar*, 579 U.S. 176, 187 (2016) ("[I]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses.") (citation, internal quotation marks

omitted). While the Court has observed that the FCA abrogated the common law in certain respects by, for example, expanding scienter to include more than just the specific intent to defraud, it concluded that, there being "no textual indicia to the contrary," "Congress retained all other elements of common-law fraud that are consistent with the statutory text." *Id.* at 187 n.2. And common-law fraud generally centers upon a defendant's subjective belief. *See* Restatement (Second) of Torts § 526 (defining circumstances when a misrepresentation is fraudulent); *id.* cmts. c, e (noting scienter for fraud can be established when a defendant has actual "knowledge of falsity," "believes the representation to be false," or makes a false representation with "careless [disregard] of whether it is true or false").

Thus, the ordinary meanings of these terms, particularly in a statute creating claims to combat *fraud*, are inconsistent with a prophylactic objective recklessness standard which would allow someone who knowingly defrauded the government to evade responsibility by proffering a reasonable post-hoc interpretation of the law they knew or believed they were violating.

That the Eleventh Circuit employed this artificial scienter standard to affirm a *dismissal* of an FCA claim is particularly alarming. Aside from the ease with which a defendant can, through able counsel, formulate an objectively reasonable interpretation of a Medicare regulation, and thereby escape any inquiry into its actual state of mind at the time it acted, the objective approach to scienter also conflicts with established

rules of pleading. Even though a plaintiff must "state the circumstances constituting fraud with particularity," "intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "Congress … has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010). Despite having amended the FCA on multiple occasions, Congress has never inserted into it any carve-out from Rule 9(b)'s pleading standard. Indeed, the clear intent behind the 1986 amendments that expanded the definition of "knowingly" in the FCA was to capture more fraud, not to better insulate defendants from fraud claims. Sen. Rep. No. 99-345, at *6-7 (1986). The complaint in this case plausibly alleges that Respondents acted with knowledge that they were violating applicable law. *See, e.g.*, Pet. App. 78, 81-82, 122-27, 129-30 (¶¶ 123, 140, 145, 310-17, 321-27, 335-38). At the motion to dismiss stage, those allegations must be taken as true. Yet the Eleventh Circuit instead relied on Respondents' *arguments* regarding their potential knowledge, looking solely at a proffered interpretation of the Medicare provisions they are alleged to have knowingly violated.

Giving effect to the plain text of the FCA to derive an organic scienter standard—instead of borrowing the objective standard from *Safeco*—also advances the statute's broad anti-fraud goals. Looking to the overarching purposes of a particular legislative act is an appropriate consideration in evaluating whether a

judicial interpretation of a scienter standard fits the statutory text. *See, e.g.*, *Safeco*, 551 U.S. at 62 (concluding that one party's textual reading had "the better fit with the ambitious objective set out in the Act's statement of purpose"). Congress' objectives in the FCA were and remain to provide an effective "litigative tool for combatting fraud" against the government. Sen. Rep. No. 99-345, at *2 (1986). In 1986, Congress amended the Act to reach not only those acting with actual knowledge of fraud but also those who do so with constructive knowledge—that is, the FCA's "deliberate ignorance" or "reckless disregard" standards. *Id.* at *6-7 (describing "litigative hurdles" associated with some courts' interpretation that the former version of the Act demanded the government to prove scienter only by showing actual knowledge of fraud or specific intent). As discussed, the resulting three-part "knowingly" definition thus runs the gamut of mental states, objective and subjective, that demonstrate culpability. And because *Safeco*'s objective test eschews subjective indicators of a defendant's state of mind, it excises at least the "actual knowledge" and "deliberate ignorance" definitions of knowing conduct.

Not only does the panel's graft of a scienter standard from *Safeco* based on different statutory language from a different statute clash with the text and purpose of the FCA, it conflicts with this Court's precedent. *Safeco* itself cautioned that its fashioning of the recklessness standard from its construction of the FCRA's use of the word "willfully" was context-dependent. *See* 551 U.S. at 57 (explaining that "'willfully' is a 'word of many meanings whose

construction is often dependent on the context in which it appears'"); *id.* at 62 (evaluating one proffered reading of the text against the FCRA's objectives); *id.* at 59 (analyzing surrounding provisions of the FCRA to arrive at a reasonable interpretation of the term "willfully"); *id.* at 68 (observing that "'the term recklessness is not self-defining'").

More broadly, this Court has advised against transplanting judicial constructions of one statutory term into a distinct, foreign statutory environment. *See, e.g.*, *Jerman v. Carlisle, McNellio, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 585 (2010) (criticizing the dissent's "'misstep[]'" in relying on cases involving the phrase "willful violation" from other statutes to interpret the words "violation" and "not intentional" in the Fair Debt Collection Practices Act, stating: "The dissent's theory draws no distinction between 'knowing,' 'intentional,' or 'willful' and would abandon the care we have traditionally taken to construe such words in their particular statutory context") (citing *Safeco*, 551 U.S. at 57).

In *Halo Electronics Inc. v. Pulse Electronics, Inc.*, 579 U.S. 93, 104 (2016), the Court rejected importing into the Patent Act *Safeco*'s interpretation of the word "willfully" from the FRCA. The decision under review, *In re Seagate Technology, LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007), had fashioned a willful blindness test based on *Safeco*'s definition as the threshold step to determining whether enhanced damages could be awarded for patent infringement. Although the Patent Act does not include a scienter standard for such damages, this Court has consistently interpreted it to

require "willful misconduct" for enhanced damages. *Halo*, 579 U.S. at 106. Despite the fact that the FCRA and the Patent Act both involve a "willfulness" standard, the *Halo* Court rejected *Seagate*'s "unduly rigid" test. *Halo*, 579 U.S. at 106. The Court reasoned that the Federal Circuit's approach "excludes from discretionary punishment many of the most culpable offenders, such as the 'wanton and malicious pirate' who intentionally infringes another's patent—with no doubts of about its validity or any notion of a defense[.]" *Id.* at 104 (citation omitted). That test, the Court observed, "makes dispositive the ability … to muster a reasonable (even though unsuccessful) defense at the infringement trial …. *even if [the defendant] did not act on the basis of the defense or was even aware of it* … escap[ing] any comeuppance … solely on the strength of his attorney's ingenuity." *Id.* at 105 (emphasis added). This reasoning from *Halo* illuminates why the Eleventh Circuit's splice of the *Safeco* scienter standard into a distinct statutory scheme is problematic.

B.

The case provides a clean path to clarify the appropriate scienter standard under the FCA because the scienter question stands naked, unencumbered by the typical fact-intensive layers of evidence in FCA cases of who knew what when. This case was dispatched on a motion to dismiss, and the Eleventh Circuit focused exclusively on the scienter issue. This petition therefore presents the Court with a single, pure question of law, without the need to navigate an extensive record. And because Rule 9(b) allows

knowledge to "be alleged generally," as Petitioner did, the Court can jump straight to the bare legal question dividing the circuits.

III. The Question Presented Is Important

As if the fractured viewpoints of the circuit courts of appeals were not enough to warrant this Court's action, the question presented has far-reaching implications for the government's anti-fraud efforts.

Qui tam FCA cases like these are frequently litigated. *See* U.S. Dep't of Justice, Fraud Statistics – Overview: Oct. 1, 1986 – Sept. 30, 2021, https://www.justice.gov/opa/press-release/file/1467811/download (reflecting 801 new FCA cases in 2021). The Court has not hesitated to grant certiorari to resolve even relatively narrow splits regarding interpretation of this important statute. *See, e.g., Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019) (resolving split about application of statute of limitations); *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 580 U.S. 39 (2016) (resolving split about consequences for violating requirement to keep case under seal); *Escobar*, 579 U.S. at 180-81 (resolving split about materiality); *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650 (2015) (resolving split about when a case is "pending" for purposes of first-to-file bar). The specific issue this case presents is among the more consequential ones affecting FCA litigation, given that scienter is an element of every FCA claim, and is often wrapped in considerations of another element, falsity. And, while the scienter issue often gets resolved at later stages of litigation, the Eleventh Circuit panel here is not the

only circuit court to have sanctioned *dismissing* FCA claims at the pleading stage for failure to demonstrate scienter. *See, e.g.*, *Hixson*, 613 F.3d at 1190; *Proctor*, 30 F.4th at 658.

The Court's decision—or its silence—will also have serious impacts on the federal government's ability effectively to combat fraud. An objective standard for establishing FCA scienter ignores the reality that a byzantine web of administrative regulations frequently governs any given federal contractor's conduct vis-à-vis the government. Ambiguity inheres in that system, but making it easier for contractors to exploit those ambiguities—as the Eleventh Circuit's opinion below does—harms the government and the public. The persistence of the objective standard may also burden administrative agencies unnecessarily to devise and promulgate increasingly complex rules in a fruitless effort to capture and eliminate every conceivable ambiguity.

The circuits that confine "authoritative guidance" to only certain types of agency or judicial sources also miss that some government contracts, like those entered into by Respondent Arriva here, are often administered and enforced by private CMS-contracted "independent accreditation organizations." *See* 42 C.F.R. § 424.58. Precluding consideration of materials from those independent organizations would further insulate a bad-acting contractor from liability.

CONCLUSION

The circuit split and strong differences of opinion among judges within circuits on the proper scienter standard under the FCA require this Court's intervention. Certiorari should be granted.

Respectfully submitted,

KEVIN D. NEAL
KENNETH N. RALSTON
GALLAGHER & KENNEDY, PA
2575 E. Camelback Rd.
Phoenix, AZ 85016

STEPHEN F. ROSENTHAL
Counsel of Record
RICARDO M. MARTINEZ-CID
LEA V. BUCCIERO
CHRISTINA H. MARTINEZ
PODHURST ORSECK, PA
1 SE 3rd Ave., Suite 2300
Miami, FL 33130
(305) 358-2800
srosenthal@podhurst.com

Counsel for Petitioner