No. 21-1326

In the Supreme Court of the United States

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

v.

SUPERVALU INC., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

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

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

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

A. Legal Background

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, imposes liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment" to a government spending program, or who "knowingly makes, uses, or causes to be made or used" a "false * * * statement" material to such a claim. 31 U.S.C. 3729(a)(1)(A) and (B). The Act defines "knowingly" to "mean that a person, with

respect to information," (i) "has actual knowledge of the information"; (ii) "acts in deliberate ignorance of the truth or falsity of the information"; or (iii) "acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. 3729(b)(1)(A).

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

2. This case concerns claims for payment submitted to government healthcare programs including Medicaid and Medicare Part D.

a. The Medicaid Act, 42 U.S.C. 1396 *et seq.*, establishes a cooperative federal-state program that provides medical assistance to certain low-income individuals. States may offer outpatient prescription-drug coverage as part of a Medicaid plan. 42 U.S.C. 1396d(a)(12). Regulations promulgated by the Centers for Medicare and Medicaid Services (CMS) limit reimbursement for many drugs to the lower of (1) a pharmacy's "usual and customary charges to the general public" or (2) the drug's actual acquisition cost plus a reasonable dispensing fee. 42 C.F.R. 447.512(b)(2).

Consistent with those federal regulations, state Medicaid agencies typically calculate reimbursement amounts to be paid to pharmacies as the lesser of various payment amounts, one of which is often the pharmacy's "usual and customary charge" to the general public. See Medicaid.gov, CMS, *Medicaid Covered Outpatient Prescription Drug Reimbursement Information by State, Quarter Ending September 2022* (last updated

Nov. 16, 2022), https://www.medicaid.gov/medicaid/prescription-drugs/state-prescription-drug-resources/medicaid-covered-outpatient-prescription-drug-reimbursement-information-state/index.html. State Medicaid agencies may further define "usual and customary charges" through program guidance. See D. Ct. Doc. 172-1, at 12 (May 21, 2018).

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

Part D beneficiaries typically obtain prescription drugs from retail or mail-order pharmacies, which then seek reimbursement from the plan sponsors (or from intermediary organizations known as pharmacy benefit managers). Plan sponsors and pharmacies negotiate the prices to be paid for each prescription. See 42 U.S.C. 1395w-111(i); 42 C.F.R. 423.100. In practice, plan sponsors often contract to pay the lesser of a negotiated price or the amount that the pharmacy reports as its "usual and customary" price for non-insurance sales to the general public, with that term sometimes further defined in the contract. See Pet. App. 8a.

B. Facts And Procedural History

1. This qui tam suit arises out of claims submitted to government healthcare programs. Petitioners allege

that respondents—which operate more than 800 retail pharmacies—submitted claims that knowingly overstated respondents' "usual and customary" prices, leading to reimbursement greater than what respondents were lawfully entitled to receive. Pet. App. 6a-8a.

a. Petitioners' allegations pertain to a price-match program that respondents adopted to compete with steep discounts offered by other pharmacies such as Walmart, which offered many prescriptions for just $4. Pet. App. 6a-7a. Under the program, respondents would match a competitor's lower price at the customer's request, and would then automatically apply that price to future refills. *Id.* at 7a. In 2012, a majority of the non-insurance sales for 44 of respondents' 50 top-selling drugs were made at discounted price-matched prices. *Id.* at 8a & n.3; *id.* at 35a (Hamilton, J., dissenting). For 30 of those drugs, more than 80% of non-insurance sales were at the lower price-matched prices. *Id.* at 35a. The discounts were substantial, with customers sometimes paying eight to 15 times less than respondents' retail prices. *Ibid.*

Despite the widespread use of the price-match program, respondents disregarded that program when reporting their "usual and customary" prices to state Medicaid agencies, Medicare Part D sponsors, and other third-party payors. Respondents instead reported only their higher retail prices, even for drugs for which a majority of sales occurred at substantially discounted prices. Pet. App. 35a (Hamilton, J., dissenting).

b. Following discovery, petitioners moved for partial summary judgment, relying on evidence that respondents had attempted to conceal the price-match program even though they knew it should be taken into

account in identifying their "usual and customary" prices.

In one 2007 email, for example, an executive discussing "price matching" acknowledged that, "[o]nce we deviate to a process that is more 'rule' or routine, we begin to affect the integrity of our U&C price—a slippery slope, as true U&C price is a claim submission requirement for all Medicaid and * * * [pharmacy benefit manager] agreements." Pet. App. 67a. He explained, however, that respondents had chosen to "take[] a 'stealthy' approach" by characterizing price matching as "something that we do as an 'exception' for customer service reasons." *Ibid.*; see D. Ct. Doc. 191-1, at 39 (June 11, 2018) (discussing "damage control" that would be necessary if pharmacy benefit managers learned respondents were widely advertising a price-match program).

Petitioners also pointed to respondents' interactions with Medco Health Solutions, a pharmacy benefit manager for Medicare Part D plans. Pet. App. 81a. Respondents' contract with Medco defined "usual and customary" to include "all applicable discounts," and Medco stated in a 2006 email to respondents that this contractual requirement encompassed a "competitor's matched price." *Id.* at 66a (capitalization omitted). One of respondents' executives forwarded the email and stated: "Note the comment about price matching. Theoretically, they could audit." D. Ct. Doc. 169, at 9-10 (May 21, 2018).

The evidence also revealed respondents' consternation when, in 2008, a different pharmacy benefit manager asked about the price-match program. D. Ct. Doc. 327, at 7 (Dec. 10, 2019). One of respondents' managers stated that she was "concerned about any response where we acknowledge doing it." *Ibid.* An executive

replied that "[w]e should not respond unless we know what they are going to do with this information," and directed the manager to "[m]ake sure [one of respondents' attorneys] can defend our price match policy as not being our U and C if they are pressing for a response." *Ibid.*; D. Ct. Doc. 191-1, at 38-39.

Respondents cross-moved for summary judgment, arguing, *inter alia*, that they had "reasonably believed that individualized price-match concessions did not affect the usual and customary price." D. Ct. Doc. 172-1, at 52. Respondents also submitted evidence that they had sought guidance from certain States' Medicaid programs (though not the programs at issue) and from certain pharmacy benefit managers other than Medco. *Id.* at 53-56.

2. The district court found that respondents' "lower matched prices * * * are the usual and customary prices for their drugs." 2019 WL 3558483, at *8. It accordingly determined that respondents should have reported those prices with their claims for payment from Medicare Part D and Medicaid. *Ibid.*

In a subsequent ruling, however, the district court granted summary judgment to respondents on the ground that they had not acted "knowingly." Pet. App. 59a-87a. Relying on this Court's decision in *Safeco Insurance Co.* v. *Burr*, 551 U.S. 47 (2007), which had interpreted the term "willfully" in the Fair Credit Reporting Act, 15 U.S.C. 1681n(a), the district court construed the FCA to require a showing that respondents' submissions were inconsistent with any "objectively reasonable" interpretation of "usual and customary" price. Pet. App. 75a. Because petitioners could not meet that standard, the court held that respondents were entitled to summary judgment "regardless of

[respondents'] subjective beliefs" about whether their submissions were accurate. *Id.* at 83a.

3. The court of appeals affirmed. Pet. App. 1a-58a.

a. The court of appeals agreed with the district court that *Safeco* controls the interpretation of the FCA term "knowingly." Pet. App. 11a-20a. The court held that an FCA "defendant who acted under an incorrect interpretation" of governing legal requirements will avoid liability "if (1) the interpretation was objectively reasonable and (2) no authoritative guidance cautioned defendants against it." *Id.* at 12a.

The court of appeals explained that, under its approach, "a defendant's subjective intent does not matter." Pet. App. 27a. The court stated that "it is not enough that a defendant suspect or believe that its claim was false" because the standard is "objective" and turns on whether the defendant "*know*[*s*]" that its claims are false. *Id.* at 26a-27a. The court found it "irrelevant" whether the defendant actually "held [an objectively reasonable interpretation] at the time that it submitted its false claim" or instead was "concocting 'post-hoc arguments.'" *Id.* at 26a.

Applying its two-step inquiry, the court of appeals affirmed the grant of summary judgment. Pet. App. 22a-31a. It first held that respondents' conduct was consistent with an objectively reasonable understanding of "usual and customary" price because no statute or regulation squarely foreclosed respondents' approach. *Id.* at 22a-26a. It then determined that no authoritative guidance warned respondents away from that understanding. *Id.* at 27a-31a. The court held that, for these purposes, only "circuit court precedent or guidance from the relevant agency" can qualify as "authoritative guidance," so that any consideration of the

contractual guidance provided by pharmacy benefit managers like Medco was "automatically exclude[d]." *Id.* at 28a.

b. Judge Hamilton dissented. Pet. App. 31a-58a. In his view, the FCA's text, history, and common-law background all indicate that "subjective bad faith" can establish the necessary scienter. *Id.* at 42a. Judge Hamilton accordingly would have followed the Eleventh Circuit's approach in *United States ex rel. Phalp* v. *Lincare Holdings, Inc.*, 857 F.3d 1148 (2017), which "squarely rejected the majority's position here." Pet. App. 47a.

DISCUSSION

The FCA imposes liability on those who "knowingly" submit to the government false claims for payment. 31 U.S.C. 3729(a)(1)(A). Under the statutory definition and common-law background principles, that standard is met where a person (1) subjectively believes that a claim is false; (2) recognizes a substantial risk that the claim is false but deliberately avoids taking readily available steps to obtain clarification; or (3) knows or should know that the claim is probably false but acts with reckless disregard of that danger. The court below viewed *Safeco Insurance Co.* v. *Burr*, 551 U.S. 47 (2007), as controlling the interpretation of the FCA's scienter provision, however, and as dictating that the defendant's subjective beliefs are "irrelevant" if the defendant's lawyers can later show that its conduct was consistent with an "erroneous" but "objectively reasonable" interpretation of the law. Pet. App. 25a-26a.

In dissent, Judge Hamilton correctly recognized that the court of appeals' decision is contrary to the FCA's text, history, and common-law antecedents. Pet. App. 40a-43a. Judge Hamilton further recognized that this case implicates an important conflict about the meaning

of the FCA's scienter requirement. *Id.* at 46a-47a. Because this case provides an appropriate vehicle for resolving that conflict, the Court should grant review and should reverse.

A. The Seventh Circuit Erred In Holding That Subjective Bad Faith Is Never Sufficient To Establish Scienter Under The FCA

1. This Court has "taken [care] to construe" words like "'knowing,' 'intentional,' or 'willful' * * * in their particular statutory context." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L. P. A.*, 559 U.S. 573, 585 (2010). As used in the FCA, the words "knowing" and "knowingly" encompass circumstances in which persons subjectively believe they are submitting false claims to the government; are aware of a substantial risk that their claims are false but deliberately avoid taking readily available steps to obtain clarification; or act in reckless disregard of known or obvious facts indicating a high likelihood of falsity. When a defendant has submitted false claims with one of those culpable states of mind, it cannot escape liability merely by showing that its claims were consistent with an objectively reasonable (but wrong) understanding of the law.

a. Until 1986, the FCA imposed liability for "knowingly" presenting "a false or fraudulent claim for payment or approval," but did not define the term "knowingly." 31 U.S.C. 3729(1) (1982 & Supp. III 1985). Some courts interpreted that provision to require proof of a specific "purpose on the part of [the defendant] to cheat the Government." *United States* v. *Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972) (citation omitted; brackets in original). As part of wide-ranging FCA amendments, Congress rejected that interpretation. See False Claims Amendments Act of 1986 (1986

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

Each of those terms addresses the "culpability" of the person's state of mind "at the time of the challenged conduct." *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U.S. 93, 105 (2016). "Actual knowledge" means a "state of mind that one considers that he knows." *Black's Law Dictionary* 784 (5th ed. 1979) (defining "knowledge"). That generally means that the defendant was subjectively "aware of" a violation. *Intel Corp. Investment Policy Committee* v. *Sulyma*, 140 S. Ct. 768, 776 (2020). "[D]eliberate ignorance" means that a defendant is "subjective[ly] aware[]" of a substantial risk that his statement may be false, and avoids taking steps to confirm the statement's truth or falsity. *United States* v. *Ricard*, 922 F.3d 639, 656 (5th Cir. 2019); see *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U.S. 754, 769 (2011) (same definition for "willful blindness"); *Black's Law Dictionary* 672 (5th ed. 1979) ("Voluntary ignorance exists when a party might, by taking reasonable efforts, have acquired the necessary knowledge.") (emphasis omitted). And "reckless disregard" means an "aggravated form of gross negligence," *United States ex rel. Prather* v. *Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 837 (6th Cir. 2018) (citation

omitted), cert. denied, 139 S. Ct. 1323 (2019), in which a defendant disregards a "high risk" of falsity "that is either known or so obvious that it should be known," *Farmer* v. *Brennan*, 511 U.S. 825, 836 (1994); see *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 332 (1974) (reckless-disregard standard satisfied where a defendant "act[s] with a 'high degree of awareness of . . . probable falsity'") (citation omitted).

By covering all three states of mind, Congress cast a net broad enough to reach those who act in bad faith or without an appropriate degree of care, even where claims for payment implicate ambiguous legal conditions. If a defendant believes (correctly) that it is violating a legal requirement that makes its claims false and ineligible for payment, the defendant acts with "actual knowledge" if it submits the false claims—even if its lawyers subsequently identify an objectively reasonable (but incorrect) exculpatory interpretation. See *United States ex rel. Phalp* v. *Lincare Holdings, Inc.*, 857 F.3d 1148, 1154-1156 (11th Cir. 2017) (considering evidence of defendant's belief in illegality); cf. *Omnicare, Inc.* v. *Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175, 184 (2015) (A CEO's statement that "'I believe our marketing practices are lawful'[] would falsely describe her own state of mind if she thought her company was breaking the law.").

If a defendant is aware of a substantial risk that its submissions are false, but chooses not to make readily available inquiries that could clarify their truthfulness, that defendant acts with "deliberate ignorance." *Godecke* v. *Kinetic Concepts, Inc.*, 937 F.3d 1201, 1212 (9th Cir. 2019). And if a defendant disregards warnings about likely falsity from knowledgeable sources such as

attorneys, internal compliance officers, or government contractors, that defendant acts with "reckless disregard" of the truthfulness of its claims. See *United States ex rel. Polukoff* v. *St. Mark's Hospital*, 895 F.3d 730, 744 (10th Cir. 2018), cert. dismissed, 138 S. Ct. 2690 (2019).

A defendant who submits false claims for payment in such circumstances cannot escape liability by identifying wrong-but-reasonable justifications after the fact. Within the FCA's operative prohibitions, the adverb "knowingly" modifies such verbs as "presents," "makes," and "uses." 31 U.S.C. 3729(a)(1)(A) and (B). The Act thus focuses on the defendant's state of mind when she submits false claims or makes false statements. The second and third prongs of the FCA's definition of "knowingly," which refer to persons who "*act[] in* deliberate ignorance" or "*act[] in* reckless disregard," 31 U.S.C. 3729(b)(1)(A)(ii) and (iii) (emphases added)), reinforce that conclusion. An attorney's subsequent identification of a possible exculpatory argument has no logical bearing on the defendant's state of mind when she committed the acts that are alleged to have violated the FCA.

b. Interpreting the FCA's scienter element to focus on a defendant's culpability at the time of the alleged violation is consistent with the common-law background this Court has considered in construing the Act. See, *e.g.*, *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 187 (2016).

As Judge Hamilton observed below, "the most authoritative summary of the common law's treatment of fraudulent scienter," found in Section 526 of the Restatement (Second) of Torts, "makes subjective bad faith central." Pet. App. 41a-42a. That summary

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

2. The court of appeals viewed this Court's decision in *Safeco*, *supra*, as dictating that a defendant's subjective state of mind is "irrelevant" under the FCA. Pet. App. 26a. The court held that an FCA defendant cannot be found to have acted "knowingly" if its conduct was consistent with an objectively reasonable interpretation that had not previously been rejected by an appellate court or agency guidance. *Ibid.* That approach is erroneous.

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

Based on "clue[s] in the text" and statutory context, the Court held that FCRA violations committed "willfully" included both knowing and reckless violations. *Safeco*, 551 U.S. at 59. The Court further held that Safeco had not acted recklessly because its interpretation of the notice provisions was "not objectively unreasonable." *Id.* at 69. The Court stated that Safeco had not had "the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took," and observed that an "'informal staff opinion'" suggesting that Safeco's practice was incorrect had explicitly stated it was not "'binding.'" *Id.* at 70 & n.19 (citation omitted). Under those circumstances, the Court concluded that Safeco had not run an "unjustifiably high risk of violating the statute." *Id.* at 70 (internal quotation marks omitted).

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

b. As discussed, p. 9, *supra*, terms like "knowing" and "willful" must be "construe[d] * * * in their particular statutory context." *Jerman*, 559 U.S. at 585.

Indeed, the *Safeco* Court emphasized that a recklessness standard is "not self-defining" and depends on the context in which it applies. 551 U.S. at 68 (quoting *Farmer*, 511 U.S. at 836). For three reasons, this Court's interpretation of FCRA's scienter requirement cannot properly be transplanted to the present statutory context.

First, the two statutes' scienter provisions contain significantly different language. FCRA imposes penalties on anyone who "willfully fails to comply" with the statute's requirements, without defining the term "willfully." 15 U.S.C. 1681n(a). The FCA, in contrast, imposes liability on persons who "knowingly" submit false claims or statements, and its three-pronged definition of that term focuses on the defendant's state of mind at the time of those submissions. 31 U.S.C. 3729(a)(1)(A) and (B); see p. 12, *supra*.

Second, *Safeco* involved a consumer-protection statute, and this Court relied on the section of the Restatement (Second) of Torts that "define[d] reckless disregard of a person's physical safety." *Safeco*, 551 U.S. at 69. The Court concluded that, in that context, "the essence of recklessness at common law" was a "high risk of harm, *objectively* assessed." *Ibid.* (emphasis added). But as discussed, pp. 12-13, *supra*, common-law decisions addressing fraudulent misrepresentation—the foundation for the FCA—have long recognized the independent sufficiency of *subjective* intent in the context of that distinct tort. See Pet. App. 41a-42a & n.1 (Hamilton, J., dissenting).

Third, the FCA applies specifically to claims for government money or property. "[T]hose who seek public funds" have a heightened duty to "act with scrupulous regard for the requirements of law." *Heckler* v.

Community Health Services of Crawford County, Inc., 467 U.S. 51, 63 (1984). As this case illustrates, moreover, companies that seek funds from the government (particularly on a recurring basis) often have avenues for resolving ambiguity about payment rules—for example, by seeking guidance from their contractual partners in state Medicaid agencies or from contractual intermediaries like pharmacy benefit managers—that might not be available with respect to more generally applicable requirements. See Br. in Opp. 8-9 (arguing that respondents asked for clarification from certain state Medicaid agencies and pharmacy benefit managers). When such avenues for clarification are readily available, a contractor's failure to invoke those mechanisms may be evidence of deliberate ignorance or recklessness under the FCA. Holding contractors liable in those circumstances is consistent with "history and current thinking" about the obligations of those who do business with the government, *Safeco*, 551 U.S. at 71 n.20, in a way that imposing liability for the credit-report-related violations in *Safeco* was not.

c. This Court's decision in *Halo Electronics*, *supra*, confirms that *Safeco* cannot be mechanically applied to other, materially different statutes.

In *Halo Electronics*, the defendant in a patent-infringement suit had "all-but instructed its design team to copy" existing patented technology, "opting to worry about the potential legal consequences later." 579 U.S. at 102 (brackets omitted). This Court ultimately considered whether the defendant could be held liable for enhanced damages for "willful" patent violations. *Id.* at 103; see *id.* at 97. Following *Safeco*, the Federal Circuit had adopted a "two-part" objective test much like the Seventh Circuit's approach here, and had

held that enhanced damages were unavailable because the defendant could identify, after the fact, an objectively reasonable argument that the patent-in-suit was invalid. *Id.* at 100; see *id.* at 100-102.

This Court reversed, explaining that "culpability is generally measured against the knowledge of the actor at the time of the challenged conduct." *Halo Electronics*, 579 U.S. at 105 (citing, *inter alia*, Restatement (Second) of Torts § 8A (1965)). The Court explained that the Federal Circuit had strayed from that principle by allowing "someone who plunders a patent * * * without any reason to suppose his conduct is arguably defensible" to "nevertheless escape any comeuppance * * * solely on the strength of his attorney's ingenuity." *Ibid.* The Court clarified that "[n]othing in *Safeco* suggests that we should look to facts that the defendant neither knew nor had reason to know at the time he acted." *Id.* at 106. The Court also rejected an expansive reading of *Safeco*'s footnote 20, explaining that while "a showing of bad faith" is not relevant under FCRA, courts in patent-infringement suits had long recognized that subjective bad faith could warrant "enhancing patent damages." *Id.* at 106 n.*; cf. pp. 12-13, *supra* (discussing precedent treating subjective bad faith as central in the fraud context).

d. The court below concluded that, when FCA defendants can ultimately articulate an objectively plausible exculpatory argument, so that the government's proof does not satisfy "the *Safeco* scienter standard," then it is not "possible for [the] defendants to actually know that they submitted a false claim." Pet. App. 21a. This Court rejected similar reasoning in *Halo Electronics*, holding that the Federal Circuit was wrong to "require[] a finding of objective recklessness in every case"

because "intentional or knowing" conduct can exist "without regard to whether [the] infringement was objectively reckless." 579 U.S. at 104-105. The Court found that subjective bad faith could be a sufficient predicate for enhanced damages even though "such damages are generally reserved for egregious cases of culpable behavior." *Id.* at 104.

The same is true under the FCA. Where defendants subjectively intend to submit false claims for payment, their conduct is highly culpable even if a later-identified ambiguity in the governing requirements could plausibly be resolved in their favor. The same is true of defendants who submit claims that they strongly (and correctly) suspect are false, rather than avail themselves of readily available avenues for obtaining clarification. See pp. 11-12, *supra*.

Respondents would treat such defendants as no different from contractors who sincerely "adopt[] a reasonable interpretation of an uncertain legal obligation later determined to be erroneous." Br. in Opp. 30. But contrary to respondents' view (*ibid.*), it is consistent with "basic principles of fairness and due process" to distinguish between such parties based on their subjective state of mind—imposing liability on defendants who were reckless or deliberately ignorant, or who affirmatively intended to submit false claims, but not on contractors who reasonably believed their claims were accurate. That distinction has a venerable history in the common law of fraudulent misrepresentation, see pp. 12-13, *supra*, and the panel majority erred in treating it as "irrelevant" under the FCA, Pet. App. 26a.

B. The Question Presented Warrants Review In This Case

The question presented has generated disagreement in the courts of appeals and is important to efforts to

fight fraud involving the public fisc. This case provides an appropriate vehicle to clarify the governing standard.

1. a. As Judge Hamilton recognized (Pet. App. 47a), the Eleventh Circuit previously rejected the approach to scienter that is reflected in the decision below. In *Phalp*, *supra*, the Eleventh Circuit overturned a "district court's conclusion that a finding of scienter can be precluded by a defendant's identification of a reasonable interpretation of an ambiguous regulation that would have permitted its conduct." 857 F.3d at 1155. The Eleventh Circuit explained that "scienter is not determined by the ambiguity of a regulation, and can exist even if a defendant's interpretation is reasonable." *Ibid.* The court therefore found it necessary to consider the relator's evidence that the defendants' "employees believed or had reason to believe they were violating Medicare regulations." *Id.* at 1156. The court affirmed the district court's judgment only after concluding that the "evidence proffered * * * as to Defendants' state of mind * * * was insufficient to survive summary judgment." *Id.* at 1151.

The court below observed that the Eleventh Circuit in *Phalp* did not "cite *Safeco*." Pet. App. 16a. But the salient point is that the legal rule adopted in *Phalp* conflicts with the rule adopted in this case. The Eleventh Circuit found it necessary to examine evidence of the defendants' subjective state of mind even where their conduct was consistent with a reasonable interpretation of the governing regulation, *Phalp*, 857 F.3d at 1155-1156, while the Seventh Circuit declared such evidence "irrelevant," Pet. App. 26a.*

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* In a later unpublished, per curiam decision, an Eleventh Circuit panel relied on *Safeco* in holding that a defendant lacked the

The decision below is likewise inconsistent with other circuits' understandings of the FCA's scienter requirement. In *Prather*, *supra*, the Sixth Circuit held that the defendants' subjective awareness "that their conduct was, at least, perilously close to noncompliance," combined with their failure "to inquire into whether they were actually in compliance," was sufficient to show "'reckless disregard' as to the truth of their certification." 892 F.3d at 838. The court reached that conclusion despite the dissent's observation that no authoritative interpretation foreclosed the defendants' understanding at the time they acted. *Id.* at 851-852 (McKeague, J., dissenting). Under the Seventh Circuit's approach, however, that absence of authoritative guidance would have been dispositive.

Similarly, in *United States* v. *Chen*, 402 Fed. Appx. 185 (9th Cir. 2010), the defendant claimed that "he lacked knowledge because he based his claims on a reasonable interpretation" of the governing requirements. *Id.* at 188. Without addressing whether the interpretation was objectively reasonable, the Ninth Circuit affirmed the judgment against him based on evidence that his interpretation was not held "in good faith"—*i.e.*, that he did not subjectively believe it. *Ibid.* Under the Seventh Circuit's approach, however, it would have made no difference whether the defendant actually believed the proffered interpretation.

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scienter necessary to violate the FCA. *Olhausen* v. *Arriva Medical, LLC*, No. 21-10366, 2022 WL 1203023, at *1-*2 (Apr. 22, 2022), petition for cert. pending, No. 22-374 (filed Oct. 18, 2022). That unpublished decision does not disturb *Phalp*'s status as binding circuit precedent, but it reinforces the need for guidance on the question presented.

b. Other courts of appeals have applied *Safeco* to FCA cases, but have not clearly determined whether *Safeco* categorically precludes consideration of a defendant's subjective state of mind.

The decision below took the most extreme position, holding that an FCA defendant can escape liability by identifying an objectively reasonable (but wrong) exculpatory interpretation of the governing requirements after the fact, even if the defendant was unaware of that interpretation at the time it acted. See Pet. App. 26a-27a.

Two other circuits have agreed that objective reasonableness can preclude FCA liability in some circumstances, but have not clearly decided whether those circumstances include *post hoc* interpretations. The D.C. Circuit cited *Safeco* for the proposition that "subjective intent—including bad faith—is irrelevant" when an FCA defendant invokes a reasonable interpretation, but did not clearly resolve whether the defendant must have relied on the interpretation when it submitted its claims. *United States ex rel. Purcell* v. *MWI Corp.*, 807 F.3d 281, 290 (2015), cert. denied, 137 S. Ct. 625 (2017); see *United States ex rel. Morsell* v. *NortonLifeLock, Inc.*, 560 F. Supp. 3d 32, 45 (D.D.C. 2021) ("*Purcell* does not explicitly state whether a reasonable interpretation must have been held contemporaneously. Its language, however, indicates that contemporaneity is necessary."). The Eighth Circuit's decisions reflect the same ambiguity. While that court has disavowed a "sweeping rule that" ignores "the defendant's state of mind," it has seemingly applied a *Safeco*-based approach to FCA cases. *United States ex rel. Donegan* v. *Anesthesia Associates of Kansas City, PC*, 833 F.3d 874, 879 (8th Cir. 2016).

c. Finally, the en banc Fourth Circuit recently deadlocked in a case raising the question presented, leaving the governing law there uncertain. In *United States ex rel. Sheldon* v. *Allergan Sales, LLC*, 24 F.4th 340 (2022), the panel majority endorsed the approach adopted by the Seventh Circuit here. See *id.* at 348 (discussing decision below). The full court subsequently granted rehearing en banc and vacated the panel opinion, but the court ultimately affirmed the district court's judgment by an equally divided vote. See *United States ex rel. Sheldon* v. *Allergan Sales, LLC*, 49 F.4th 873 (4th Cir. 2022) (per curiam). That court's inability to agree upon a governing standard highlights the need for this Court's review.

2. The importance of the question presented also supports further review.

In the 1986 Amendments, Congress abrogated prior FCA decisions requiring proof of a specific intent to defraud. See pp. 9-10, *supra*. The decision below, however, goes even further than those pre-1986 rulings. Under the Seventh Circuit's reasoning, even proof that a defendant "intend[ed] to file a false claim" is not always sufficient to establish the FCA's scienter requirement. Pet. App. 21a.

That holding could significantly disrupt government programs involving everything from medical insurance to military equipment. Limited resources and administrative complexity make it impossible to preemptively address every potential ambiguity that motivated attorneys might later identify. The government therefore relies on its contracting partners to approach the inevitable ambiguities in good faith, following what they understand to be the best interpretation and seeking clarification when necessary. The decision below, however,

allows claimants for government funds to submit claims they believe to be false without incurring FCA liability, so long as their attorneys can later identify a legal rationale that a court concludes is plausible.

By holding that only courts of appeals and government agencies can warn contractors away from wrong-but-reasonable interpretations, Pet. App. 27a-28a, the decision below creates special problems for programs like Medicare Part D that operate through private intermediaries like plan sponsors or pharmacy benefit managers. The FCA covers claims submitted to such intermediaries, see 31 U.S.C. 3729(b)(2)(A)(ii), but under the Seventh Circuit's view, claimants can flout the intermediaries' guidance regarding conditions of payment. See Pet. App. 28a.

3. This case provides an appropriate vehicle in which to clarify the FCA's scienter requirement. The majority and dissenting opinions below both discussed whether *Safeco* applies to the Act, and both opinions recognized that the majority's resolution of that question was dispositive here. See Pet. App. 26a-27a, 31a; *id.* at 58a (Hamilton, J., dissenting). If this Court holds that the majority erred in extending *Safeco* to the FCA, it could remand to the court of appeals to apply the proper scienter standard in the first instance. Alternatively, the Court could hold that petitioners' evidence, see pp. 4-6, *supra*, would allow a reasonable jury to conclude that respondents "knowingly" misreported their "usual and customary" prices by excluding the widely utilized and substantially lower prices offered through their price-match program. Using either approach, the Court could provide much-needed guidance on this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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