No. 21-1326

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
EX REL. TRACY SCHUTTE & MICHAEL YARBERRY,

Petitioners,

v.

SUPERVALU, INC., ET AL.

Respondents.

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

BRIEF OF THE TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Taxpayers Against Fraud Education Fund ("TAFEF") is a non-profit public interest organization dedicated to preserving effective anti-fraud legislation at all levels. As part of those efforts, TAFEF educates the public and the legal community about the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. TAFEF has provided testimony before Congress regarding each of the proposed amendments to the FCA since 1986, and participates in litigation as *amicus curiae.* TAFEF regularly authors legal publications about the FCA, and presents an annual educational conference. TAFEF's members include *qui tam* relators and their counsel who bring FCA actions around the country on behalf of private citizens and the United States.

TAFEF has a strong interest in ensuring the proper interpretation and application of the FCA, and a depth of experience in how the FCA has been implemented over time. TAFEF's members have wide-ranging knowledge of the distinct factual contexts in which FCA liability may arise as a result of a statutory or regulatory violation. From this unique vantage point, TAFEF submits this brief to explain why the implementation of the Seventh Circuit's decision interferes with the effective application of the FCA and necessitates certiorari.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties were given timely notice and consented to this filing.

INTRODUCTION

TAFEF supports the petition for certiorari, which seeks review of the decision below on the grounds that the Seventh Circuit decision deepens a conflict between the circuit courts, erroneously applies the FCA scienter standard using this Court's decision in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007),[2] and presents serious, practical consequences to the interpretation of the FCA. TAFEF does not restate the Petitioners' arguments herein. Rather, TAFEF submits this *amicus* brief to address the potentially far-reaching consequences of the Seventh Circuit decision in the broader context of FCA enforcement. These consequences raise issues of exceptional importance that merit certiorari.

1. Resolution of the question presented is important because the Seventh Circuit's decision undermines the plain text of the FCA's scienter provision. The statute defines 'knowing" conduct to include three independent standards that may trigger liability: actual knowledge, deliberate ignorance of the truth or falsity of the information; or reckless disregard of the truth or falsity of the information. 31 U.S.C. § 3729(b)(1)(A)(1)-(3). Under any of these standards, "no proof of specific intent to defraud" is required. *Id.,* § 3729(b)(1)(B). The Seventh Circuit turns this provision on its head by providing that evidence of actual knowledge, or even specific intent to defraud, would not be sufficient to establish scienter. Instead, the Seventh Circuit imposes dueling limitations on

[2] The Seventh Circuit wrongly applied *Safeco*'s analysis of willfulness under the Fair Credit Reporting Act to the False Claims Act's distinct knowledge provision, while dismissing the more recent decision of this Court in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 579 U.S. 93, 106 (2016). *Halo* rejected the application of *Safeco* to the scienter standard in the Patent Act. *See* Pet, at 32-34.

the presentation of scienter evidence in scenarios where a contractor urges that an alternative interpretation of a legal requirement exists. First, it precludes evidence of subjective intent in the consideration of whether the alternative interpretation is reasonable. Second, it sharply limits evidence of whether a defendant was warned away from its interpretation, by narrowing such evidence to certain sources of "authoritative" guidance of "sufficient specificity." These limitations conflate the FCA's knowledge standards and potentially preclude courts from considering evidence of what the relevant actors actually believed was important about the requirement at issue, and the factual evidence that informed those beliefs. Because evidence in FCA matters often involves contemporaneous internal discussions of a defendant's choice to ignore red flags regarding the illegality of its behavior, the Seventh Circuit's limitations will narrow the scope of FCA liability in ways that are contrary to Congress's express intent.

2. Resolution of the question presented is also important because the Seventh Circuit's decision potentially undermines the application of the FCA in many contexts. The FCA is a critical tool to the detection of fraudulent schemes employed by government contractors, including those that continually evolve to evade detection or that exploit new legislation. The Seventh Circuit's decision could create loopholes for novel or evolving fraud schemes. The Government cannot predict every iteration of fraudulent conduct employed to profit from a government program nor can agencies issue anticipatory "authoritative guidance" sufficiently specific to address every possible interpretation of a legal requirement. If post-hoc legal interpretations are dispositive, and courts are prevented from looking to what defendants contemporaneously knew about the effect of their conduct on the decision-makers,

contractors will be disincentivized from conducting any reasonable inquiry into their interpretation of a bargain with the Government.

3. Resolution of the question presented is also important to prevent a result that not only misapplies this Court's decision in *Safeco*, but also contradicts this Court's decision in *Universal Health Servs. v. United States ex rel. Escobar*, 579 U.S. 176 (2016). Under *Escobar*, the Court clarified that FCA liability for material misrepresentations of compliance with an underlying violation of a statutory, regulatory, or legal requirement included consideration of evidence of whether "the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter 'in determining his choice of action,' even though a reasonable person would not." 579 U.S. at 193, *citing* Restatement (Second) of Torts §538, at 80. Under the Seventh Circuit's decision, the same evidence that would establish knowledge under *Escobar* that the defendant was making material misrepresentations would not be permissible to consider in evaluating whether the defendant's post-hoc interpretation of that provision was reasonable.

TAFEF urges review of the question presented to resolve these important potential implications of the Seventh Circuit's decision.

ARGUMENT

I. The Question Presented Raises Critically Important Issues Regarding the Correct Application of the FCA Knowledge Standard Congress Enacted.

A. The Seventh Circuit's Narrowed Standard Precludes Consideration of Contemporaneous Evidence of Knowledge that a Claim is False or Fraudulent.

The Seventh Circuit decision runs counter to the text of the knowledge provision of the FCA. In the scenario where a defendant identifies an alternative interpretation of the law *post hoc*, the Seventh Circuit drastically limits the types of scienter evidence a jury may consider by precluding consideration of subjective intent and drastically limiting consideration of facts that may have formed that intent. These limitations conflate the type of evidence that a *qui tam* plaintiff may present under the three independent pathways to establish FCA knowledge. [3]

First, the Seventh Circuit held that a district court must determine as a matter of law whether an alternative interpretation is "objectively reasonable," by looking only to the text of the legal requirement at issue to the exclusion of any other contextual facts, including whether the defendant actually held that view at the time it presented a claim or statement to the government. The Seventh Circuit specified that "a defendant's subjective intent does not matter for its scienter analysis—the inquiry is an objective one." Pet. App. at 27a.

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[3] As Judge Hamilton observed in his dissent, the Seventh Circuit's decision "effectively nullifies two thirds of the statutory definition of 'knowing'" by reducing the requirement to recklessness alone. Dissent, Pet. App. at 49a.

Second, the Seventh Circuit holds that once a court determines that the text of a legal requirement is susceptible to an alternative interpretation, scienter cannot be established unless authoritative guidance has warned the defendant away from that interpretation. Under the second step of this analysis, the Seventh Circuit further narrowed the evidence that may be weighed by limiting the relevant authoritative guidance to certain sources (must come from either circuit court precedent or guidance from the relevant agency) and to those that are "sufficiently specific" to the scheme at issue. Pet. App. at 27a-28a.

These twin limitations by the Seventh Circuit pose potentially significant limits on a district court's ability to assess whether a defendant's knowledge was objectively reasonable. For example, under this paradigm, a defendant's contemporaneous, subjective, and *correct* belief about how the United States interprets a term would not shed any light on whether any other inconsistent, *post hoc* interpretation is objectively reasonable. Nor would evidence of the reasons a defendant held that belief be considered relevant to whether its *post hoc* interpretation was reasonable. By precluding evidence of a defendant's contemporaneous intent, and limiting the categories of evidence that may provide relevant notice of the United States' expectations, the Seventh Circuit's holding could prevent district courts from considering how the relevant actors actually think and behave in real life.

These limitations may tie the hands of a district court from considering facts supporting the contemporaneous knowledge of FCA defendants in a range of circumstances that arise frequently in FCA matters. For example, application of the Seventh Circuit's analysis could preclude consideration of the relevant actors' communications with the Government to assess either reasonableness or

whether it had been "warned away" from its conduct. This approach could also foreclose consideration of the regular enforcement of the subject provisions by the Government, or even a defendant's specific past experiences in the provision of similar services paid by the United States. It could also preclude consideration of whether any other actor held the same view. In this context, for example, if the facts showed that an FCA defendant was able to deduce what the words "usual and customary" meant from its experience in the industry, from context clues to which the defendant had been exposed, including its own understanding of the purpose of the rule, the Seventh Circuit's decision specifically holds that those facts "do not matter" – do not bear at all -- on whether an alternative interpretation is objectively reasonable.

Review of the question presented is important to resolving whether the standard introduced by other circuit courts and taken to its extreme by the Seventh Circuit precludes consideration of factual evidence of subjective intent, which is critical in assessing the types of fraud schemes that commonly arise in FCA matters.

B. The Seventh Circuit's Narrowed Standard Erects Serious Obstacles to Congress's Efforts to Make the FCA a More Effective Fraud Enforcement Tool.

The cumulative effect of this narrowed standard could significantly undermine the application of the FCA in a range of circumstances that it is intended to address. The FCA is the country's most effective tool for combatting fraud.[4] And, as this Court has elaborated, "Congress wrote

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[4] *Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021, Second Largest Amount Recorded, Largest Since 2014* (Feb. 1, 2022),

expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003) (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)). This broad view of the FCA has been critical to addressing the evolution of fraudulent schemes over time, including those where defendants change their modus operandi to avoid detection or that exploit new legislation for profit. Yet the Seventh Circuit's decision may sharply curtail the FCA's intended reach.

For example, the FCA has also been vital to preventing second-generation fraud, such as the proliferation of schemes that declined after initial enforcement actions or the issuance of guidance targeted to "warn away" defrauders, only to rise again when contractors evolved the method or manner of implementing the fraud.[5] Under the Seventh Circuit's analysis, in any scenario where a contractor, or a contractor's counsel,[6] can devise an

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https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year (the FCA "serves as the government's primary civil tool to redress false claims").

[5] For example, in scenarios where a prior fraud has been disclosed, whistleblowers may identify when "a more sophisticated, second-generation method" of fraud has evolved. *Leveski v. ITT Educ. Servs.*, 719 F.3d 818, 832 (7th Cir. 2013); *see also United States ex rel. Sturgeon v. Pharmerica, Inc.*, 438 F.Supp.3d 246, 267 (E.D. Pa. 2020) (declining to find the relator's allegations were precluded by the public disclosure bar, because while both relators alleged that the defendant dispensed drugs without a valid prescription, "there are many different ways a pharmacy might accomplish that" and the relator identified "a more sophisticated, second-generation method" of fraud").

[6] As Judge Hamilton observed in his dissent, the Seventh Circuit's decision "creates a safe harbor for deliberate or reckless fraudsters

alternative "permissible interpretation" of a statutory or contractual provision, contractors may construct an effective loophole unless the Government has a crystal ball to issue "sufficiently specific" written guidance on every wrong turn or cut corner that a contractor *may* make, even before the contractor itself has steered in that direction. It would be practically impossible for agencies to create specific authoritative guidance on every possible future evolution of fraudulent schemes, which by their nature involve concealed conduct.

The FCA is also important to detecting fraudulent schemes relating to new legislation. For example, after the $2.2 trillion CARES Act was implemented during the Covid-19 pandemic, FCA enforcements ensued for individuals who made claims or assisted others in obtaining funds to which they were not entitled.[7] Under the Seventh Circuit decision, many of those fraud schemes would be effectively immunized until the affected agencies issued "authoritative guidance" covering all potential fraud schemes.

The FCA is also key to detecting new ways that contractors are materially deviating from their bargains with the Government. For example, the Department of Justice ("DOJ") recently announced a new Cyber-Fraud Initiative under the FCA, to address, among other things,

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whose lawyers can concoct a *post hoc* legal rationale that can pass a laugh test." Dissent, Pet. App. at 32a.

[7] *Justice Department Takes Action Against Covid-19 Fraud*, *Historic level of enforcement action during national health emergency continues* (Mar. 26, 2021), https://www.justice.gov/opa/pr/justice-department-takes-action-against-covid-19-fraud

the proliferation of cyber intrusions through contractors.[8] Under this initiative, the Government will pursue government contractors who fail to follow required cybersecurity standards because "[f]or too long, companies have chosen silence under the mistaken belief that it is less risky to hide a breach than to bring it forward and to report it…."[9] This initiative has already borne fruit, with the DOJ announcing a settlement to resolve claims that the defendant violated the FCA by falsely certifying to the State Department and the Air Force that it had properly safeguarded the medical records for U.S. service members, diplomats, officials, and contractors working in Iraq.[10] Yet, under the Seventh Circuit decision, evidence of a contractor's knowledge of this cybersecurity enforcement initiative (and its lack of reasonable inquiry) would not be relevant to its arguments of ambiguity relating to cybersecurity requirements.

Other recent practical applications of the FCA to modern schemes have had tremendous impact. For example, the FCA has helped combat the opioid epidemic ($2.8 billion settlement),[11] prohibited false risk adjustment

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[8] *Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative* (Oct. 6. 2021), https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-new-civil-cyber-fraud-initiative

[9] *Id.*

[10] *Medical Services Contractor Pays $930,000 to Settle False Claims Act Allegations Relating to Medical Services Contracts at State Department and Air Force Facilities in Iraq and Afghanistan,* https://www.justice.gov/opa/pr/medical-services-contractor-pays-930000-settle-false-claims-act-allegations-relating-medical

[11] *Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family* (Oct. 21, 2020),

scores in the Medicare Advantage managed care system ($90 million settlement),[12] demanded accountability for the technology companies housing patient information in electronic medical records systems ($155 million settlement),[13] and protected the military from artificially inflated pricing on MRAP vehicles ($50 million settlement).[14] If interpreted broadly, the Seventh Circuit's decision may be used to escape liability by crafting *post hoc* interpretations of statutes or contract provisions that they never contemporaneously held, and that may be belied by their own actual interactions with the Government.

Finally, the Seventh Circuit's narrowed standard may create an additional detrimental real-world result: government contractors may be disincentivized from diligent inquiry into potentially ambiguous rules and to instead further conceal their missteps. If a *post hoc* alternative explanation could rule out subjective intent, a contractor looking to profit (and who knows from contemporaneous facts that the Government views its

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https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid

[12] *Sutter Health and Affiliates to Pay $90 Million to Settle False Claims Act Allegations of Mischarging the Medicare Advantage Program* (Aug. 30, 2021), https://www.justice.gov/opa/pr/sutter-health-and-affiliates-pay-90-million-settle-false-claims-act-allegations-mischarging

[13] *Electronic Health Records Vendor to Pay $155 Million to Settle False Claims Act Allegations* (May 31, 2017), https://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-155-million-settle-false-claims-act-allegations

[14] *Navistar Defense Agrees to Pay $50 Million to Resolve False Claims Act Allegations Involving Submission of Fraudulent Sales Histories* (May 27, 2021), https://www.justice.gov/opa/pr/navistar-defense-agrees-pay-50-million-resolve-false-claims-act-allegations-involving

interpretation otherwise) may conclude it is better off avoiding reasonable inquiry. This runs exactly counter to the FCA's deliberate ignorance standard, which was chosen precisely to "recognize that those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate." S. Rep. 99-345 (1986) at 7, reprinted in 1986 U.S.C.C.A.N. 5266, at 5272; *cf. Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 63-64 (1984) (discussing "scrupulous regard" required of contractors, including to inquire if "doubtful question not clearly covered by existing policy statements"). Far from enforcing "square corners when [contractors] deal with the Government,'"[15] the Seventh Circuit decision would encourage contractors to take advantage of perceived loopholes created by the limited inquiry into intent described in the opinion.

III. The Seventh Circuit's Evidentiary Limitations Conflict With this Court's Decision in *Universal Health Servs. v. United States ex rel. Escobar.*

The Seventh Circuit's decision conflicts with this Court's decision in *Universal Health Servs. v. United States ex rel. Escobar*, 579 U.S. 176 (2016). In *Escobar*, the Court evaluated the materiality standard under the FCA in matters, like here, involving an underlying violation of a statutory, regulatory, or legal requirement. The Court provided guidance regarding the application of materiality, clarifying that no single fact is dispositive. 579 at 191. Rather, a court should consider evidence of the likely or actual effect of the violation at issue on the Government's decision-making, including whether "the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter

[15] *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008), citing *Rock Island, AR & LA R.R. v. United States*, 254 U.S. 141, 143 (1920).

'in determining his choice of action,' even though a reasonable person would not." 579 U.S. at 193, *citing* Restatement (Second) of Torts §538, at 80.

The Seventh Circuit applied a much different standard to scienter. Its decision foreclosed a holistic analysis of subjective scienter evidence or what facts may have contemporaneously informed a contractor's conclusions. Thus, the reasonableness of an FCA defendant's interpretation of a legal requirement is then defined in a vacuum, without any reference to what an industry participant actually believed regarding the impact of its representations to the Government when submitting a claim.

Under the Seventh Circuit's decision, defendants may argue that evidence held to be relevant to whether a defendant's misrepresentation was material under *Escobar* may not be considered in evaluating scienter. Thus, facts known to the relevant actors, which inform their subjective belief as to the truthfulness of a claim submitted to the Government, would be relevant under *Escobar* to whether a reasonable person understood the representation to be material but specifically precluded for assessing scienter under the Seventh Circuit's decision. This contradiction is unresolved by the split standards in the circuit courts, and raises important issues to the correct interpretation of the FCA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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