No. 20-2241

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, et al., *ex rel.* TRACY SCHUTTE and MICHAEL YARBERRY,
Plaintiffs-Appellants,

v.

SUPERVALU, INC., et al

Defendants-Appellees.

On Appeal from the United States District Court for the Central District of Illinois
No. 3:11-CV-03290-RM-TSH
The Honorable Judge Richard Mills

BRIEF OF AMICUS CURIAE TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF THE PLAINTIFFS-APPELLANTS PETITION FOR REHARING *EN BANC*

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2241

Short Caption: United States of America, et al. v. Supervalu Inc., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Taxpayers Against Fraud Education Fund

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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N/A

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N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Dan Hergott Date: September 30, 2021

Attorney's Printed Name: Dan Hergott

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N/A

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Attorney's Printed Name: Michael Behn

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N/A

Attorney's Signature: /s/ Jennifer M. Verkamp Date: September 30, 2021

Attorney's Printed Name: Jennifer M. Verkamp

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Attorney's Signature: /s/ Jillian L. Estes Date: September 30, 2021

Attorney's Printed Name: Jillian L. Estes

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N/A

Attorney's Signature: /s/ Jacklyn DeMar Date: September 30, 2021

Attorney's Printed Name: Jacklyn DeMar

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

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INTEREST OF *AMICUS CURIAE*[1]

TAFEF is a non-profit public interest organization dedicated to combating fraud against the Government and protecting public resources through public-private partnerships. 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, and provides testimony to Congress about ways to improve the FCA. It regularly participates in litigation as *amicus curiae*. TAFEF is supported by *qui tam* relators and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

ARGUMENT

TAFEF supports Plaintiffs-Appellants' petition for rehearing *en banc*, and supports the petitioners' arguments that the divided panel decision conflicts with decisions of the Supreme Court, other decisions of this Circuit Court, and other Courts of Appeal. Doc. 61; *see also* Doc. 25, TAFEF *amicus curiae* brief. Doc. 25. TAFEF does not restate these arguments herein. Rather, consistent with this Court's guidance in *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020), TAFEF submits this *amicus* brief to address the potentially far-reaching consequences of the panel decision in the broader context of FCA

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No person other than *amicus* and its counsel contributed any money intended to fund preparing or submitting this brief.

enforcement. These consequences raise issues of exceptional importance that merit *en banc* review under Fed. R. App. P. 35.

The divided panel decision determined that, based on *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007):

> … a defendant's subjective intent does not matter for its scienter analysis—the inquiry is an objective one. This standard reflects the limits of FCA liability.

Doc. 55 at 25. That statement could be interpreted to mean that a defendant's contemporaneous, subjective, and *correct* belief as to how the United States interprets a term of the bargain would not shed any light on whether any other inconsistent, *post hoc* interpretation is in fact reasonable. Thus, reasonableness would be 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. Coupled with the panel's narrow description of "authoritative guidance" deemed "sufficiently specific" to "caution[] defendants against" an alternate interpretation (Doc. 55 at 12, 26-27), the panel's holding poses potentially significant limits on a district court's ability to assess whether a defendant's knowledge was reasonable.

This language could be construed to as tying the hands of a district court to prevent it from considering the contemporaneous intent of FCA defendants in a range of circumstances. For example, if the FCA defendant were able to deduce what

the words "usual and customary" meant, given its experience in the industry, the context clues to which the defendant had been exposed, and the defendant's understanding of the purpose of the rule, those facts, of course, bear on whether an alternative interpretation is objectively reasonable. Putting aside whether the defendant's subjective belief is dispositive, the divided panel's assertion that it "does not matter" (Doc. 55 at 25) could be read to prevent a district court from considering the facts that formed the basis for such a belief when determining whether an alternate interpretation is permissible.

In addition, such a limited inquiry may prevent district courts from considering how the relevant actors actually think and behave in real life, including whether their subjective beliefs were informed in ways other than through what the panel defined as "authoritative guidance." *E.g.*, Doc. 55 at 26.[2] The panel's decision could be misinterpreted to preclude a district court from considering communications with the Government by the relevant actors, notice of the regular enforcement of the subject provisions by the Government in a similar way, or the defendants' past experiences in the provision of similar services paid by the United States.

[2] The majority stated: "The Supreme Court did not flesh out the boundaries of authoritative guidance, but at minimum, *Safeco* supports that it must come from a governmental source—either circuit court precedent or guidance from the relevant agency." Doc. 55 at 26.

Such a result directly contradicts the Supreme Court's observation that a contractor could make a material misrepresentation to the Government if "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." *Universal Health Servs. v. United States ex rel. Escobar*, 579 U.S. 176, 136 S. Ct. 1989, 2002-03 (2016), *citing* Restatement (Second) of Torts §538, at 80. Thus, under the divided panel's decision, defendants may argue that evidence held to be relevant to whether a defendant's misrepresentation was material under *Escobar* could not be considered in evaluating scienter.

Because of this, the divided panel's decision may foreclose FCA liability in a range of circumstances that it is intended to address. The FCA is the country's most effective tool for combatting fraud,[3] and has been particularly critical in addressing novel fraud schemes, including those that exploit new legislation or manipulate the terms of contractual language. 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

[3] *Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in FY 2020*, https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020

the fraud.[4] Under the panel's analysis, in any scenario where a contractor can devise an alternate "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.

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.[5] Under the panel decision, many of those fraud schemes would be effectively immunized until the agencies issued "authoritative guidance" covering all potential fraud schemes.

Other recent applications of the FCA have also helped combat the opioid epidemic ($3.025 billion settlement),[6] prohibited false risk adjustment scores in the

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[4] 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).

[5] *Justice Department Takes Action Against Covid-19 Fraud*, https://www.justice.gov/opa/pr/justice-department-takes-action-against-covid-19-fraud

[6] *Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family*, https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid

Medicare Advantage managed care system ($90 million settlement),[7] demanded accountability for the technology companies housing patient information in electronic medical records systems ($155 million settlement),[8] and protected the military from artificially inflated pricing on MRAP vehicles ($50 million settlement).[9] If interpreted broadly, the panel 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.

The divided panel's decision would even incentivize government contractors to further conceal their missteps and avoid inquiry into potentially ambiguous rules, to avoid the issuance of guidance. 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

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

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

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

the claims they submit are accurate." S. Rep. 99-345 (1986) at 7, reprinted in 1986 U.S.C.C.A.N. 5266, at 5285; *cf. Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 63 (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,"[10] the panel decision would encourage contractors to take advantage of perceived loopholes created by the limited inquiry into intent described in the opinion.

Finally, the divided panel decision misreads the statute itself. The majority supports its decision as faithful to the text in part because "the only reference to intent is an express disclaimer that 'specific intent to defraud' is irrelevant." Doc. 55 at 17, citing 31 U.S. C. § 3729(b)(1)(B). The statute actually states that the terms knowing and knowingly "*require* no proof of specific intent to defraud," *id.* at 11 (emphasis added), which means only that the Government need not prove the defendant specifically intended fraud, not that intent is irrelevant. Certainly, proof of specific intent to defraud – a higher level of proof than required in all three prongs of the scienter definition – is not just relevant to scienter, but would establish the

[10] *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).

necessary scienter under the FCA. Yet, under the divided panel decision, an FCA defendant may argue that a district court is bound not to consider such proof.

TAFEF believes that these issues of exceptional importance compel the Circuit Court to grant the Plaintiffs-Appellants' petition for rehearing *en banc*. But if not granted, TAFEF asks the Court to modify the decision to eliminate language that the consideration of subjective intent "does not matter" at all in an FCA scienter analysis, and to clarify that district courts have the discretion to consider not just subjective intent, but also the facts that informed an FCA defendant's subjective belief that it is defrauding the United States. Just as the Supreme Court in *Escobar* explained with respect to materiality, facts known to the relevant actors, which inform their subjective belief as to the truthfulness of a claim submitted to the United States, are relevant to a reasonable person analysis. Moreover, such evidence, when weighed by a district court in the context of the specific facts known contemporaneously by the relevant actors, could, in and of themselves, be held to satisfy the FCA scienter analysis.

CONCLUSION

TAFEF respectfully supports the Plaintiffs-Appellants' petition for rehearing *en banc*. Should the petition be denied, however, TAF requests that the panel decision be modified to eliminate the suggestion that evidence of subjective intent is irrelevant under the FCA, and clarify that a district court has discretion to find that

specific facts known contemporaneously by the relevant actors (1) are relevant to the determination of whether an alternate interpretation of a requirement is reasonable; (2) can alone satisfy the FCA scienter analysis.

Dated: September 30, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that: (i) this *amicus* brief complies with the type-volume limitation prescribed by Federal Rules of Appellate Procedure 29(a)(5) because it contains 1847 words, excluding the parts of the *amicus* brief exempted by Federal Rule of Appellate Procedure 32(f); and (ii) this *amicus* brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this *amicus* brief has been prepared using Microsoft Word in 14-point Times New Roman.

/s/ Dan Hergott
Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2021, I electronically filed the foregoing Brief of *Amicus Curiae* of Taxpayers Against Fraud Education Fund in Support of Plaintiffs-Appellants' Petition for Rehearing *En Banc* using the CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Dan Hergott
Attorney for *Amicus Curiae*