No. 20-3425

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, et al., *ex rel.* THOMAS PROCTOR,
Plaintiffs-Appellants,

v.

SAFEWAY, INC.,

Defendant-Appellee.

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 AND REVERSAL

Jacklyn DeMar
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W.
Suite 501 Washington, DC 20036
Tel: (202) 296-4826
Fax: (202) 296-4838
jdemar@taf.org

David W.S. Lieberman
Whistleblower Law Collaborative LLC
20 Park Plaza, Ste. 438
Boston, MA 02116-4334
Phone: (617) 804-6401
david@thomasdurrell.com

Michael I. Behn
Daniel Hergott
BEHN & WYETZNER,
CHARTERED 17 N. State Street,
Suite 1600 Chicago, IL 60602
mbehn@behnwyetzner.com
dhergott@behnwyetzner.com
Phone: 312.629.0000

Attorneys for Amici Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-3425

Short Caption: United States of America ex rel. Proctor, et al. v. Safeway Inc.

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.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

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:

Whistleblower Law Collaborative, LLC and Behn & Wyetzner, Chtd.

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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: February 16, 2021

Attorney's Printed Name: Dan Hergott

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

Address: 17 N. State St. Suite 1600

Chicago, IL 60602

Phone Number: 312-629-0000 Fax Number:

E-Mail Address: dhergott@behnwyetzner.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-3425

Short Caption: United States of America ex rel. Proctor, et al. v. Safeway Inc.

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.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

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:

Whistleblower Law Collaborative, LLC and Behn & Wyetzner, Chtd.

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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/ Michael I. Behn Date: February 16, 2021

Attorney's Printed Name: Michael I. Behn

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

Address: 17 N. State St. Suite 1600

Chicago, IL 60602

Phone Number: 312-629-0000 Fax Number:

E-Mail Address: mbehn@behnwyetzner.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-3425

Short Caption: United States of America ex rel. Proctor, et al. v. Safeway Inc.

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.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

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:

Whistleblower Law Collaborative, LLC and Behn & Wyetzner, Chtd.

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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/ David W.S. Lieberman Date: February 16, 2021

Attorney's Printed Name: David W.S. Lieberman

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

Address: 20 Park Plaza, Suite 438

Boston, MA 02116

Phone Number: 617-366-2800 Fax Number:

E-Mail Address: david@thomasdurrell.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-3425

Short Caption: United States of America ex rel. Proctor, et al. v. Safeway Inc.

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.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

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:

Whistleblower Law Collaborative, LLC and Behn & Wyetzner, Chtd.

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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/ Jacklyn DeMar Date: February 16, 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** ☑

Address: 1220 19th St. NW, #501

Washington, DC 20036

Phone Number: 202-296-4826 Fax Number: 202-296-4838

E-Mail Address: jdemar@taf.org

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Pursuant to Federal Rule of Appellate Procedure 29, Taxpayers Against Fraud Education Fund ("TAFEF") submits this brief in support of Plaintiffs-Appellants and reversal. All parties have consented to the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

TAFEF is a non-profit public interest organization dedicated to combating fraud against the Government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to educate the public and the legal community about the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, and provided 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.

SUMMARY OF ARGUMENT

Since the 1986 amendments, the term "knowingly" under the FCA has encompassed three separate mental states: actual knowledge, deliberate ignorance, and reckless disregard. 31 U.S.C.A. § 3729(b)(1). The legislative history of that

[1] 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.

definition and subsequent judicial interpretation make clear that each of these standards addresses a different form of knowledge and can be established through different means of proof. A defendant's subjective belief that it is violating the law is not abrogated by a post hoc rationalization about what the defendant might have reasonably believed.

In analyzing a defendant's scienter under the FCA, a court must make an inquiry into the defendant's subjective knowledge. That includes evaluating evidence that the defendant had "actual knowledge" that the claims it submitted were false. Similarly, under the deliberate ignorance standard, a court must consider whether any communications warned the defendant away from an erroneous interpretation of the law. Inherent in the deliberate ignorance standard is a limited duty on the part of a defendant to make a reasonable inquiry into whether it is submitting false claims. That duty is triggered by the receipt of guidance sufficiently authoritative to warn it away from a challenged practice. Guidance triggers this duty when it is sufficiently authoritative to induce a reasonable person to make such an inquiry, and it does not require that the guidance be "binding" or promulgated pursuant to notice and comment.

The Supreme Court's decision in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007) does not dictate a different result. While several circuit courts have found the *Safeco* analysis relevant to the reckless disregard prong of the FCA's definition

of "knowingly," none have found that *Safeco* overrides the actual knowledge and deliberate ignorance prongs of the FCA. The district court here ignored evidence of actual knowledge and deliberate ignorance, erroneously applying *Safeco* and its progeny in a manner that would render superfluous the FCA's actual knowledge and deliberate ignorance standards.

Moreover, nothing in *Safeco* suggests that an interpretation of the law that the defendant did not hold at the time of its conduct is relevant to scienter. Indeed, as the Supreme Court explained in *Halo Electronics., Inc. v. Pulse Electronics., Inc.*, "nothing in *Safeco* suggests that we should look to facts that the defendant neither knew nor had reason to know at the time he acted." 136 S. Ct. 1923, 1933 (2016).

ARGUMENT

I. KNOWLEDGE UNDER THE FCA COMPRISES THREE DISTINCT STATES OF MIND: ACTUAL KNOWLEDGE, RECKLESS DISREGARD, AND DELIBERATE IGNORANCE

In 1986, Congress amended the definition of "knowingly" in the FCA to encompass three separate standards of scienter. A party acts "knowingly" when it:

> (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.A. § 3729(b)(1). The well-known history of these amendments and judicial opinions confirm that this statutory language establishes three distinct states of mind that comprise "knowledge" under the FCA. Each of these three states of mind requires a different level of and form of proof and the government can establish liability through proof of any one of them. Conversely, to defeat liability, a defendant must establish that its actions met none of these three states of mind.

A. Congress Amended the FCA in 1986 to Reach Both Objective and Subjective Mental States

Prior to 1986, the FCA did not define the term "knowingly." As a result, some courts interpreted the term to impose a requirement of actual knowledge or specific intent to defraud. *See, e.g.*, *United States v. Ekelman & Associates, Inc.*, 532 F.2d 545, 548 (6th Cir. 1976); *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972); *United States v. Mead*, 426 F.2d 118, 122 (9th Cir. 1970). Others, noting that the purpose of the FCA is fundamentally remedial, concluded that the FCA's knowledge requirement could be met through a finding of recklessness or extreme carelessness. *See, e.g., United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 60 (8th Cir. 1973).

In amending the FCA, Congress reviewed these decisions and concluded that "in judicial districts observing an 'actual knowledge' standard, the Government is unable to hold responsible those corporate officers who insulate

themselves from knowledge of false claims submitted by lower-level subordinates." *See* S. Rep. 99-345 at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272 (citing *Aerodex*, 469 F.2d at 1003). Congress described such corporate behavior as "ostrich-like." *Id.* It concluded that the actual knowledge standard "is inappropriate in a civil remedy and presently prohibits the filing of many civil actions to recover taxpayer funds lost to fraud." *Id.* Congress therefore amended the definition of "knowledge" in the FCA, to define precisely "what type of 'constructive knowledge,' if any, is rightfully culpable." *Id.* at 20, *reprinted in* 1986 U.S.C.C.A.N. at 5285. It therefore added "deliberate ignorance" and "reckless disregard" to the definition of knowingly and expressly provided that no specific intent to defraud is required. 31 U.S.C. § 3729(b)(1986), *codified as presently amended at* 31 U.S.C. § 3729(b)(1).

The legislative history of the amendments makes clear that Congress intended them to expand the reach of knowledge under the FCA:

> to reach what has become known as the 'ostrich' type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted. While the Committee intends that at least some inquiry be made, the inquiry need only be 'reasonable and prudent under the circumstances', which clearly recognizes a limited duty to inquire as opposed to a burdensome obligation. The phrase strikes a balance which was accurately described by the Department of Justice as 'designed to assure the skeptical both that mere negligence could not be punished by an overzealous agency and that artful defense counsel could not urge that the statute actually require some form of intent as an essential ingredient of proof.'

S. Rep. 99-345 at 21, *reprinted in* 1986 U.S.C.C.A.N. at 5285; *see also id.* at 7 ("The Committee is firm in its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence. But the Committee does believe the civil FCA should recognize that those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate."); H. Rep. 99-660 at 20-21 (June 26, 1986) ("It is intended that persons who ignore 'red flags' that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim should be held liable under the Act.").

The legislative history also confirms that Congress did not intend to capture ordinary negligence but did intend to provide a remedy for conduct that was grossly negligent, deliberate or intentional. During the 1986 drafting process, the Senate Judiciary Committee at one point replaced the "reckless disregard" language with "gross negligence." *See* S. Rep. No. 99-345, at 20*, reprinted in* 1986 U.S.C.C.A.N. at 5285. After some debate, the original language was restored on the Senate floor, but as part of this debate, Senator Grassley explained Congress's intent that the adoption of the reckless disregard standard:

> is only to assure that mere negligence, mistake, and inadvertence are not actionable under the False Claims Act. In doing so, we reconfirm our belief that reckless disregard and gross negligence define essentially the same conduct and that under this act, reckless disregard does not require any proof of an intentional, deliberate, or willful act.

132 Cong. Rec. S11244 (daily ed. Aug. 11, 1986).

B. Courts Have Appropriately Recognized that the FCA Includes Three Distinct Mental States

Consistent with the text and history of the FCA, courts have recognized that the statute reaches three distinct mental states, any one of which can support a finding of scienter. That conclusion is consistent with the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988). This Court recently invoked this anti-surplusage cannon to reject the D.C. Circuit's interpretation of a different provision of the FCA. *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 844 (7th Cir. 2020) (rejecting D.C. Circuit's interpretation because "it makes surplusage of" portions of two paragraphs in the False Claims Act).

For example, the court in *United States v. Krizek* rejected the argument that "reckless disregard" should be interpreted as willful blindness because were that true, "section (b)(3) would be redundant since section (b)(2) already covers such conduct." 111 F.3d 934, 942 (D.C. Cir. 1997). A Texas District Court was even more explicit:

> The statute expressly reaches three types of knowledge. The first type encompasses actual knowledge. The second type. . . contemplates "constructive knowledge" or "what has become known as the ostrich type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims

> are being submitted." . . . The last type of knowledge has been described as "gross negligence plus."

U.S. ex rel. Longhi v. Lithium Power Techs., Inc., 513 F. Supp. 2d 866, 875-76 (S.D. Tex. 2007) (internal citations omitted). *See also Crane Helicopter Ser., Inc. v. United States*, 45 Fed. Cl. 410, 433 n.26 (1999) ("Many Circuit Courts of Appeal recognize that the plain language of the knowledge requirement does not require "specific intent" but instead incorporates the intent standards of "actual knowledge," "deliberate ignorance" and "reckless disregard.").

While this Court described "reckless disregard" as "the most capacious" of the three states in *United States v. King Vassel*, nothing in that statement suggests that reckless disregard subsumes the other two categories. 728 F.3d 707, 712 (7th Cir. 2013). Rather, that observation related to the Court's conclusion that the whistleblower had offered sufficient evidence of reckless disregard to survive summary judgment, which obviated the need to consider whether the plaintiff had evidence establishing actual knowledge or deliberate ignorance. But that reasoning does not apply in reverse. If evidence *fails* to establish one mental state, the court must evaluate whether it meets the others. Indeed, the *King Vassel* Court *did* separately address evidence going to the defendant's "actual knowledge," observing that an affidavit stated that the defendant "knew that N.B. was on Medicaid and knew that his care was being paid for by Medicaid." *Id.* at 713 n.1.

Although the Court rejected that evidence as speculative, it recognized that it merited separate consideration. *Id.*

The Supreme Court itself has recognized that different forms of evidence establish "knowledge" under the separate FCA standards of "actual knowledge" and "reckless disregard." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2001-02 (2016). In *Escobar*, the Court discussed the means by which the government can establish that a defendant has knowledge that the claims at issue were material. *Id.* It explained, using the hypothetical of a defendant supplying inoperative guns to the government, that if the "defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has 'actual knowledge'" of the materiality of its false claims. *Id.* The Court contrasted this with the type of proof establishing "reckless disregard" or "deliberate ignorance" explaining that "because a reasonable person would realize the imperative of a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to 'deliberate ignorance' or 'reckless disregard' of the 'truth or falsity of the information' even if the Government did not spell this out." *Id.* Indeed, the Court located this distinction between "actual" knowledge" and "reckless disregard" in the common law understanding of materiality. *Id.* at 2002-03. (noting that in tort law and in contract law a matter is material if (1) a reasonable person would attach importance, or (2) the defendant

knows or has reason to know the recipient of the representation attaches importance).

C. A Court Cannot Ignore Evidence of Subjective Intent Under the Actual Knowledge and Deliberate Ignorance Standards

Where a defendant knows it is violating the law or acts in deliberate ignorance of whether it is violating the law, the defendant's subjective state of mind at the time of the conduct is highly relevant to the question of "knowledge" under the FCA. Many cases have been established with insider evidence that the defendant actually knew that the claims it was submitting were false. As the United States District Court for the District of Columbia explained in *United States v. Sci. Applications Int'l Corp* (*SAIC*), actual knowledge targets a defendant's "subjective knowledge." 555 F. Supp. 2d 40, 54 (D.D.C. 2008). In that case, the court found that the government had established a triable issue of fact with respect to the defendant's knowledge because it "presented evidence suggesting that there was at least one SAIC employee who knew that SAIC was bidding for the NRC Contracts despite having [prohibited organizational conflicts of interest]." *Id.* at 56; *see also, e.g., United States v. Advance Tool Co*, 902 F. Supp. 1011, 1016 (W.D. Mo. 1995) (scienter established because the defendant "presented invoices to GSA for payment which [the defendant] knew at the time of presentation were false").

Actual knowledge can also be established through circumstantial evidence, such as a defendant's attempts to avoid revealing the truth to the government. As the Fifth Circuit explained in *Aerodex,* the defendants "could easily have requested permission from the Navy to deliver the substitute parts or, at least, could have disclosed to the Navy the manner in which they thought they could comply with the contract. The failure to do so indicates nothing less than an intention to deceive." 469 F.2d at 1008.

Thus, under the "actual knowledge" prong, a district court may only consider a reasonable interpretation of the law if it were contemporaneously held by the defendant. A court cannot ignore evidence that suggests a defendant actually recognized its own actions were in violation of the law. *See id*.

Were the approach endorsed by the district court to prevail, it would undermine the FCA, which seeks to redress fraud in a vast array of government programs. *See Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019,* https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 (describing settlements of cases involving procurement fraud, charging for medically unnecessary goods and services, and grant fraud). Government contractors who had the actual intent to submit false or fraudulent claims for payment could do so with impunity, provided they hired lawyers to come up with after the fact

justifications to argue that they did not act "knowingly." This would resurrect the very loophole the FCA amendments sought to close.

D. Under the FCA, Guidance Need Not Be Binding to Adequately Warn A Defendant That Its Conduct Violates the Law

The FCA's deliberate ignorance standard 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 at 7, *reprinted in* 1986 U.S.C.C.A.N. at 5272. Likewise, Congress "intended that persons who ignore 'red flags' that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim should be held liable under the Act." H. Rep. 99-660 at 20-21.

Thus, under the "deliberate ignorance" standard, courts interpret the FCA to impose a limited duty to make reasonable inquiries to clarify any perceived ambiguities. *See, e.g., United States v. Sci. Applications Int'l Corp.* (*SAIC*), 626 F.3d 1257, 1274-75 (D.C. Cir. 2010) (noting that Congress intended to impose a limited duty to inquire and imposed liability when a defendant deliberately avoided learning the truth); *United States v. Taber Extrusions, LP*, 341 F.3d 843, 846 n.2 (8th Cir. 2003) (noting that if the defendant established that it had "no actual knowledge of what the government's progress payment regulations required,

whether Taber as a second-tier supplier had a duty to inquire is clearly an issue for the ultimate fact-finder.").

For example, in a case involving the proper calculation of prevailing wage, the Ninth Circuit rejected the defendant's assertion that it believed it was properly interpreting the rules. *U.S. ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Const. Co.*, 183 F.3d 1088, 1094–95 (9th Cir. 1999). As the court explained, the defendant Roen "could have sought clarification," but instead "without making any effort to obtain such clarification," certified its rates as complying with prevailing wage. *Id.* This failure to make reasonable inquiry, the court found, "suggests that Roen's certification may well have risen at least to the level of 'deliberate ignorance' or 'reckless disregard.'" *Id.*

So long as guidance is sufficiently authoritative to suggest a need for further inquiry, a defendant who ignores it remains deliberately ignorant to the truth or falsity of its claims. *Safeco* does not require that guidance be "binding" to warn a defendant away from an erroneous interpretation, only that it be "authoritative." 551 U.S. at 70.[2] Later in *United States ex rel Purcell v. MWI Corp.,* which applied

[2] *Safeco* does distinguish a letter in that case as insufficiently authoritative because it "did not canvass the issue, and it explicitly indicated that it was 'merely an informal staff opinion . . . not binding on the Commission.'" *Safeco*, U.S. 70 n.19. It is clear from context that the Court looked to the lack of breadth and informality as evidence of lack of authoritativeness, not that it quoted the letter to suggest a requirement that authoritative guidance be "binding" on third parties.

Safeco to an FCA case, the D.C. Circuit did mention in dicta that "[s]trict enforcement of the FCA's knowledge requirement helps to ensure that innocent mistakes made in the absence of binding interpretive guidance are not converted into FCA liability." 807 F.3d 281, 287 (D.C. Cir. 2015). But later D.C. Circuit cases explicitly reject any suggestion that *Safeco* or *Purcell* imposed a requirement that guidance be "binding." *See Ipsen Biopharmaceuticals, Inc. v. Azar,* 943 F.3d 953, 958 (D.C. Cir. 2019) (concluding that a "CMS letter" rejecting plaintiff's interpretation of governing regulations "could be potentially dispositive proof [of knowledge] in an enforcement action, consistent with *Safeco* and *US ex rel. Purcell*"). Neither *Safeco* nor *Purcell* support the rule relied on by the district court here: that "authoritative guidance" must be promulgated pursuant to notice and comment. SA-62.[3]

Indeed, it is logically inconsistent to speak of "binding guidance" that would "warn" defendants. If an interpretation is binding, then it provides the governing rule, not guidance, and it does not warn defendants, it sets the rule. The Department of Justice has likewise recognized that agency guidance may provide evidence of a party's awareness of, and deliberate ignorance to, a requirement. Justice Manual §1-20.201. Restricting such warnings to "binding" guidance would result in the rejection of precisely the kinds of evidence that have historically

[3] SA References are to the Short Appendix of Plaintiff-Appellant Thomas Proctor.

established knowledge in FCA cases. *See e.g., United States ex rel. Donegan v. Anesthesia Assocs. of Kansas City, PC*, 833 F.3d 874, 880 (8th Cir. 2016)(noting that in earlier case, *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1056 (8th Cir.), the court had concluded that "a Medicare agency memorandum" had provided adequate warning.); *United States ex rel. Streck v. Bristol-Myers Squibb Co.*, 370 F. Supp. 3d 491, 497 (E.D. Pa. 2019) (proposed CMS rule, CMS Manufacturer Releases, and an HHS report deemed sufficiently authoritative).

Here, Plaintiffs-Relators identified several instances of authoritative guidance available to Defendants. The most notable of these was the CMS Memorandum describing the "Lower Cash Price Policy" later incorporated into CMS Medicare Prescription Drug Benefit Manual. *See* Plaintiffs-Appellants Br. at 55. This Court relied on the same language in the same document in interpreting the meaning of U&C in *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 644-45 (7th Cir. 2016), cert. denied, 137 S. Ct. 627 (2017). That alone suggests the manual is sufficient to at least raise "red flags" for a program participant.

Moreover, a defendant's claims may be false or fraudulent under the FCA not simply if they violate the federal government's regulations, but also if they violate the corresponding provisions of the defendant's contracts with government intermediaries. *See, e.g., id.* at 636–37 (plaintiff-relator introduced evidence that

under "the terms of over 1,000 contracts between Kmart and Medicare Part D Benefit Managers and Plan Sponsors, Kmart should have based its reimbursement requests to the insurance companies handling Medicare Part D on its 'discount program' prices"); *United States ex rel. Yannacopoulos v. Gen. Dynamics,* 652 F.3d 818, 824 (7th Cir. 2011) ("a mere breach of contract does not give rise to liability under the False Claims Act," but "if the breaching party falsely claims to be in compliance with the contract to obtain payment . . . there may an actionable false claim."); *see also* S. Rep. No. 99-345, at 9, *reprinted in* 1986 U.S.C.C.A.N. 5274 (most common form of false claims is "goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation"). Thus, when contractual provisions or communications with the counterparty expressly inform a defendant as to the meaning of the terms of those contracts, that warning is unquestionably authoritative as to the understanding of the contract, even if not "binding" as to the regulatory definition.

The purpose of the deliberate ignorance definition of "knowledge" under the FCA, is to ensure that a government contractor not avoid "red flags" that their claims may be false. In this case, there were several red flags and warnings including CMS guidance and contractual provisions that a reasonable jury could conclude sufficed to warn the defendant away.

II. *SAFECO* AND ITS PROGENY DO NOT ALTER THE MEANING OF "KNOWINGLY" UNDER THE FCA

The FCA expressly defines "knowingly," and this Circuit has not held that the Supreme Court's decision in *Safeco* applies to the FCA. *Safeco* does not change the well-defined meaning of the term "knowingly," and even if it had any application to the FCA, it would be only with respect to "reckless disregard," not "actual knowledge" or "deliberate ignorance." Several circuits have cited *Safeco* as relevant to the interpretation of "reckless disregard" under the FCA.[4] However, most do so only in passing and for the uncontroversial proposition that reasonable interpretations of ambiguous rules do not give rise to liability.[5] As explained *infra*, well before *Safeco,* that was the law in many circuits, including this one. *See, e.g., Yannacopoulos,* 652 F.3d at 836 (rejecting "mere 'differences in interpretation growing out of a disputed legal question'" as basis for FCA liability (*quoting U.S.*

---

[4] *See United States v. Allergan, Inc.,* 746 F. App'x 101, 106 (3d Cir. 2018); *United States ex rel. McGrath v. Microsemi Corp.*, 690 F. App'x 551, 552 (9th Cir. 2017); *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 657-58 n.39 (5th Cir. 2017); *Donegan* 833 F.3d at 880; *Purcell*, 807 F.3d at 289-90.

[5] *See Allergan Inc.*, 746 F. App'x at 106 (citing *Safeco* for "recognizing defense of reasonable, but erroneous, interpretation of ambiguous statute"); *Microsemi Corp.*, 690 F. App'x at 552 (citing *Safeco* for proposition that "good faith interpretation . . . at that time was reasonable"); *Trinity Indus. Inc.*, 872 F.3d at 657-58 n.39 (citing Eighth Circuit case for proposition that reasonable interpretation of ambiguous statute "belies" a finding of scienter, and noting that the defendant also cited *Safeco* for that proposition); *Donegan*, 833 F.3d at 880 (noting that *Purcell* and *Safeco* are consistent with prior Eighth Circuit law on scienter).

ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999))) . Thus, while courts unsurprisingly cite *Safeco* for this proposition, it hardly reflects the sea-change in interpretation suggested by the district court. SA-36.

The Supreme Court's decision in *Safeco* interpreted the term "willfully" as used in the Fair Credit Reporting Act (FCRA), which that statute did not define. 551 U.S. at 56-57, 70. In *Safeco*, the Court determined that the term "willfully" encompassed "reckless disregard," and acknowledged that its interpretation of the standard was imposed in part because there was "no indication that Congress had something different in mind." *Id.* at 68. The Court concluded that the defendant, interpreting a relatively recent statute that had undergone sparse analysis, relied on a reasonable, albeit erroneous, interpretation of the statute and had not acted recklessly. *Id.* at 57, 68, 70.

Unlike the FCRA, the FCA does not use the term "willfully." Moreover, the FCA expressly defines the term "knowingly," *see supra*, and the extensive legislative history and judicial interpretation of the FCA's scienter requirements explains Congress's purpose in adopting that precise definition. Thus, *Safeco's* interpretation of the meaning of "willfully" under the FCRA has no bearing on the interpretation of "knowingly" under the FCA. To the extent that *Safeco* has any relevance, it can only be with reference to the FCA's "reckless disregard" standard and not the FCA's separate categories of "knowingly," "actual knowledge" and

"deliberate ignorance." *See United States ex. rel. Colquitt v. Abbott Labs.*, No. 3:06-cv-1769-M, 2016 WL 3571329, at *2 (N.D. Tex. Mar. 8, 2016) ("To the extent the Supreme Court's decision in *Safeco* applies to any question presented by this case, the Court determines its reach is limited to the issue of whether Defendants' reliance on a reasonable interpretation of an ambiguous requirement precludes a finding of 'reckless disregard' under 31 U.S.C. § 3729 (b)[(1)(A)(iii)]") (citations omitted).

Moreover, even with respect to reckless disregard, the *Safeco* decision should have little relevance. Courts have long recognized that the meaning of the term "reckless disregard" is context specific. As the D.C. Circuit observed, in one category of "cases, recklessness serves as a proxy for forbidden intent," while in "another category of cases, we noted, reckless disregard is 'simply a linear extension of gross negligence, a palpable failure to meet the appropriate standard of care.'" *Krizek*, 111 F.3d at 941. Thus, a decision by the Supreme Court defining recklessness under the FCRA does not redefine the many uses of recklessness in other federal laws, including the FCA.

In any event, *Safeco*'s conclusion that a defendant is not reckless if it relies on a reasonable, but erroneous, interpretation of an ambiguous statute comports with the interpretation of "reckless disregard" under the FCA. *See United States ex rel. Chilcott v. KBR, Inc.,* No. 09-CV-4018, 2013 WL 5781660, at *9 (C.D. Ill.

Oct. 25, 2013) ("*Safeco* is not in conflict with the analysis laid out in" prior cases). The FCA's reckless disregard standard provides protection for a party who has actually followed a reasonable interpretation of an ambiguous regulatory scheme. *See, e.g., Yannacopoulos,* 652 F.3d at 836. However, a court must determine that the defendant's proffered interpretation was held at the time based on the facts as they existed at the time, and is not a post hoc rationalization. *See United States ex rel. Oliver v. Parsons Co*., 195 F.3d 457, 464 (9th Cir. 1999). "A court must determine 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." *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148, 1155 (11th Cir. 2017). And even then, the defendant may not ignore "red flags," such as agency guidance, that would put it on notice that its interpretation may be wrong, rather, a defendant must inquire as to the appropriate interpretation. *SAIC*, 626 F.3d at 1274-75.

Although some courts have extended *Safeco* to the FCA to support the conclusion "that subjective intent—including bad faith—is irrelevant" to analyzing "reckless disregard" under the FCA, *see, e.g., Purcell*, 807 F.3d at 289-90, those courts have not held that *Safeco* writes the other scienter categories – "actual knowledge" and "deliberate ignorance" – out of the FCA. Indeed, some implicitly reject this conclusion. *See Allergan,* 746 F. App'x at 106 n.4 (noting that

"[a]llegations of deliberate ignorance demonstrate conduct and knowledge particularized to a given defendant" but refusing to consider them because the complaint did not contain specific allegations about the defendants' negotiation process).

Overriding the statutory language and replacing it with one uniform mental state would defeat Congress's intent in passing the 1986 amendments. Congress implemented the 1986 amendments to reinvigorate the FCA after decades of dormancy. Recognizing a "severe" problem of fraud on the Government, Congress determined that "only a coordinated effort of both the Government and the citizenry" could solve the problem. S. Rep. No. 99-345, at 1 *reprinted in* 1986 U.S.C.C.A.N. 5266. Eliminating evaluation of subjective states of mind would not only immunize a broad swath of fraudulent behavior, it would essentially turn Congress's intent on its head. As explained, Congress amended the FCA to reach intentional wrongdoing, as well as "ostrich-like" behavior and to create a limited duty to inquire when seeking government money. Eliminating inquiry into subjective intent would eliminate this duty and incentivize government contractors to avoid inquiry into ambiguous rules, knowing they could later fabricate "reasonable" interpretations designed to justify their behavior. *Compare Parsons*, 195 F.3d at 463 n.3 (noting potential problem created by embracing a "reasonable interpretation" standard of falsity in that "[a] defendant could submit a claim,

knowing it is false or at least with reckless disregard as to falsity, thus meeting the intent element, but nevertheless avoid liability by successfully arguing that its claim reflected a 'reasonable interpretation' of the requirements.").

The Supreme Court subsequently made this clear in *Halo Electronics*, which addressed enhanced damages under the Patent Act for "willful" conduct and explained that *Safeco* did not hold that in judging intent, courts should look to "facts that the defendant neither knew nor had reason to know at the time he acted." 136 S. Ct at 1933. Rather, the Court explained, culpability is generally "measured against the knowledge of the actor at the time of the challenged conduct." *Id.* *Halo Electronics* emphasized that a contrary rule would allow a party to suppose his conduct was arguably defensible without reason, but nevertheless "escape any comeuppance" based "solely on the strength of his attorney's ingenuity" in justifying conduct after the fact. *Id*.

The Eleventh Circuit has explained that the FCA's knowledge standard requires a court to reject just such post hoc rationalizations. *Lincare*, 857 F.3d at 1155. As the court observed in *Lincare*, under such an "interpretation, a defendant could 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.* Such an interpretation is contrary to the intent and purpose of the scienter provisions of the FCA and should be rejected.

CONCLUSION

For the reasons set forth herein, this Court should set aside the district court's order granting Defendants' summary judgment motions.

Dated this 16th of February 2021

Respectfully submitted,

*/s/*David W.S. Lieberman

David W.S. Lieberman
Whistleblower Law Collaborative LLC
20 Park Plaza, Ste. 438
Boston, MA 02116-4334
Phone: (617) 804-6401
david@thomasdurrell.com

Jacklyn DeMar
TAXPAYERS AGAINST FRAUD EDUCATION FUND
1220 19th Street, N.W.
Suite 501 Washington, DC 20036
Tel: (202) 296-4826
Fax: (202) 296-4838
jdemar@taf.org

Michael I. Behn
Daniel Hergott
BEHN & WYETZNER, CHARTERED 17 N. State Street,
Suite 1600 Chicago, IL 60602
mbehn@behnwyetzner.com
dhergott@behnwyetzner.com
Phone: 312.629.0000

CERTIFICATE OF COMPLIANCE

I certify that: (i) this *amici* brief complies with the type-volume limitation prescribed by Federal Rules of Appellate Procedure 29(a)(5) because it contains 5,323 words, excluding the parts of the *amici* brief exempted by Federal Rule of Appellate Procedure 32(f); and (ii) this *amici* 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 *amici* brief has been prepared using Microsoft Word in 14-point Times New Roman.

*/s/*David W.S. Lieberman
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2021, I electronically filed the foregoing Brief *Amici Curiae* of Taxpayers Against Fraud Education Fund 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.

Dated: February 16, 2021

*/s/*Daniel Hergott_____
Attorney for *Amicus Curiae*