No. 20-2241

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES *EX REL.* MICHAEL YARBERRY AND TRACY SCHUTTE,

Plaintiffs-Appellants,

v.

SUPERVALU, INC., *ET AL.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of Illinois
(Case No. 3:11-cv-03290-RM-TSH)
(District Judge Richard Mills)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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Appellate Court No: 20-2241

Short Caption: United States ex rel. Yarberry v. Supervalu, Inc.

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Attorney's Signature: /s/ John M. Masslon II Date: 12/7/2020

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n/a

Attorney's Signature: /s/ Cory L. Andrews Date: 12/7/2020

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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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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* in important False Claims Act (FCA) cases. *See, e.g.*, *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089 (11th Cir. 2020). This is an important case because it presents a question of first impression in this circuit about the FCA's scienter requirement. As courts of appeals are unanimous to date on the issue, a ruling for Relators would cause uncertainty for firms doing business both inside and outside the Seventh Circuit.

INTRODUCTION

Congress enacted the FCA during the Civil War to deter war profiteers from intentionally bilking the government out of much-needed funds. Today, the FCA limits similar abuse in the ever-growing

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

healthcare industry. But unlike in the past, today a cottage industry of lawyers pursues actions against companies for innocent mistakes.

A key element of any fraud claim is scienter. That is why the FCA requires the plaintiff prove that the defendant "knowingly present[ed], or cause[d] to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). To act knowingly, a defendant must (1) have "actual knowledge" that the information is false, (2) show "deliberate ignorance of the truth or falsity of the information," or (3) show "reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A)(i-iii). Without this showing of scienter, a government contractor may still be liable for its breach of contract. But a lack of scienter eliminates the threat of criminal penalties, treble damages, attorneys' fees, and costs under the FCA. The scienter requirement therefore serves as a critical due-process protection.

This case presents a straightforward legal question about the scienter requirement: Does the test the Supreme Court outlined in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) for willfulness under the Fair Credit Reporting Act apply to FCA actions? The courts of appeals to have considered this question are unanimous—yes. And the District Court

adopted these courts' rationale when granting Supervalu summary judgment.

Relators and their *amicus*, however, ask this Court to create a circuit split on this important FCA question. They seek to confuse the issues by conflating the three levels of scienter that can support FCA liability. Although failure to show the lowest level of scienter necessarily forecloses proving the higher levels of scienter, Relators argue that the District Court erred by determining that they failed to satisfy the lowest burden.

Relying on this confusion, Relators seek a ruling that would raise serious due-process concerns. They believe that a company's reasonable interpretation of a contract or statutory provision susceptible to competing interpretations should lead to criminal liability without clear guidance away from that objectively reasonable interpretation. In short, they seek a rule that would obliterate the FCA's scienter requirement.

A ruling for Relators would force the Court to address whether the FCA is constitutional. Although that issue may not be present here, it will arise if the scienter requirement is so relaxed. Under the constitutional-doubt canon, this Court should decline to interpret the

FCA in this way. Rather, if the Court finds that the FCA's text is ambiguous, it should give it the meaning that does not raise constitutional concerns. And that construction is the reading Supervalu offers.

ARGUMENT

I. RELATORS' EMPHASIS ON THE THREE TYPES OF SCIENTER SUPPORTING FCA LIABILITY IS A RED HERRING.

Relators insist (Br. 62-72) that the District Court erred by focusing on whether Supervalu exhibited "reckless disregard of the truth or falsity of the" submitted claims. 31 U.S.C. § 3729(b)(1)(A)(iii). According to Relators, the District Court had also to examine whether Supervalu had "actual knowledge" of the falsity of the submitted claims or showed "deliberate ignorance" to the truth or falsity of the submitted claims. 31 U.S.C. § 3729(b)(1)(A)(i-ii). But because Relators could not satisfy the *Safeco* test, it was impossible for them to prove any of the three levels of scienter required for FCA liability.

Under *Safeco*, when deciding whether a defendant acted with reckless disregard of the truth or falsity of a claim, courts consider whether the defendant had "an objectively reasonable" interpretation of a provision susceptible to competing interpretations and whether there

was "interpretive guidance that might have warned the defendant away from the view it took." *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 288 (D.C. Cir. 2015) (brackets and quotation omitted).

It is impossible to have "actual knowledge" of the falsity of a claim if these requirements are satisfied. If the defendant had "actual knowledge" that a claim was false, it could not have had an objectively reasonable interpretation of a provision open to differing interpretations. Similarly, a defendant could not have acted with "deliberate ignorance" absent guidance warning away from the defendant's objectively reasonable interpretation.

To be liable under the FCA a defendant must have "knowingly present[ed], or cause[d] to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). As the D.C. Circuit has aptly explained, the "loosest standard of knowledge" is "acting in reckless disregard of the truth or falsity of the information." *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000) (quotation omitted). Other circuits agree that this is the lowest level of scienter under the FCA. *See United States ex rel. Complin v. N.C. Baptist Hosp.*, 818 F. App'x 179, 184 (4th Cir. 2020) (*per curiam*) (citation

omitted); *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 (8th Cir. 2010) (citation omitted).

These FCA-specific decisions confirm that Relators' failure to show reckless disregard under *Safeco* is fatal to their claims. But this hierarchy of scienter is not unique to the FCA. It is familiar to all areas of law. For example, in the deliberate indifference context, "recklessness, [] is 'more blameworthy than negligence,' yet less blameworthy than purposefully causing or knowingly." *Schaub v. VonWald*, 638 F.3d 905, 914-15 (8th Cir. 2011) (quoting *Farmer v. Brennan*, 511 U.S. 825, 839-40 (1994)).

The Model Penal Code similarly recognizes three types of scienter in most cases: purposefully, knowingly, and recklessly. Model Penal Code §§ 2.02(2), (3). And "[w]hen recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly." *Id.* § 2.02(5). So if a jury finds that a defendant acted with actual knowledge it must find that the defendant also satisfied a reckless disregard standard. The same applies for a defendant who acted purposefully. Acting purposefully satisfies a recklessness standard.

In the civil arena, courts often apply "the traditional 'sliding scale' encompassing mere negligence, gross negligence, recklessness, bad faith,

and intentional misconduct." Lauren R. Nichols, *Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery*, 99 Ky. L.J. 881, 882 (2011) (citing Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. Rev. 319, 325 (1996)). The "traditional sliding scale" of scienter in civil cases thus mirrors that in the Model Penal Code. It also tracks the three-level scienter scale in the FCA. The only difference is that under the FCA negligence cannot support liability. *See United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999). If a company negligently submits false claims, it must reimburse the government. But it is not subject to treble damages or criminal liability. That is what separates the FCA from a strict-liability statute.

Disparate authority—from FCA-specific to criminal to civil—highlights this basic principle of scienter. Relators' failure to satisfy the reckless disregard standard is fatal to their FCA claim. Yet Relators devote ten pages of their brief dwelling on the difference between actual knowledge and reckless behavior. They do so as a distraction because

they should understand that the District Court properly held that failure to satisfy the *Safeco* test was fatal to their claims.

*   *   *

Relators' attempt at painting the three standards of scienter on the same plane fails. If Relators cannot satisfy the "loosest" standard of knowledge, they cannot—by definition—satisfy a higher standard of knowledge. Their attacks on the District Court for failing to analyze the other two types of scienter supporting FCA liability should thus be seen for what it is—a red herring. The District Court properly determined that Relators' failure to satisfy the "reckless disregard" scienter standard forecloses any chance at proving knowledge.

II. THE CONSTITUTIONAL-DOUBT CANON RESOLVES ANY QUESTION ABOUT *SAFECO*'S APPLICABILITY TO FCA CLAIMS.

"The canon of constitutional doubt teaches that when two interpretations of a statute are 'fairly possible,' one of which raises a 'serious doubt' as to the statute's constitutionality and the other does not, a court should choose the interpretation 'by which the question may be avoided.'" *United States v. UCB, Inc.*, 970 F.3d 835, 846 (7th Cir. 2020) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)). Here, even if two reasonable interpretations exist for the FCA's scienter requirement, this

Court should adopt the interpretation incorporating *Safeco*'s test. The other possible interpretation—advanced by Relators—would raise serious doubt about the FCA's constitutionality.

A. Treble Damages Trigger Heightened Due-Process Protections.

Before 1986, an FCA violation subjected companies to only double—not treble—damages. *United States v. Bornstein*, 423 U.S. 303, 305 (1976). The Supreme Court therefore said that FCA damages were "compensat[ory]." *Id.* at 315. But "evidence of fraud in Government programs and procurement [wa]s on a steady rise." S. Rep. No. 99-345, 2, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5267. So Congress amended the FCA to provide for treble damages. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2, 100 Stat. 3153, 3153.

This changed the nature of FCA damages. After the 1986 amendments, the Court held "the current version of the FCA imposes damages that are essentially punitive in nature." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). This transformation of FCA damages from compensatory to punitive means that FCA defendants have greater due-process protections than they did before 1986.

The "Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) (citing *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)). Purely compensatory damages cannot violate substantive due-process protections if supported by sufficient evidence. Yet FCA damages can violate the Due Process Clause because they are punitive. Besides procedural due-process protections, then, courts consider substantive due-process principles when analyzing the FCA's scienter requirement. *See Purcell*, 807 F.3d at 287 (citing *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)).

B. Criminal Penalties Trigger Heightened Due-Process Protections.

Along with punitive treble damages, FCA violations may carry criminal penalties. 18 U.S.C. § 287. This also has important implications for the due-process protections afforded defendants in FCA actions. "[T]he relative importance of fair notice and fair enforcement" mandated by the Due Process Clause "depends in part on the nature of the enactment." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). The Court has "greater tolerance of enactments

with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 498-99 (citing *Winters v. New York*, 333 U.S. 507, 515 (1948)).

Although this is a civil action, for statutes like the FCA with both criminal and civil penalties, courts "must interpret the statute consistently, whether [courts] encounter its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004). "[T]he rule of lenity" therefore applies so civil and criminal provisions are interpreted consistently. *Id.* (citing *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality)).

C. Relators' Interpretation of the FCA Flouts These Heightened Due-Process Protections.

The FCA therefore requires heightened due-process protections for two reasons. Both the punitive nature of the FCA's treble damages and the criminal penalties for FCA violations require enhanced due-process protections. Yet Relators ask this Court to sidestep Supervalu's due-process rights and hold it liable despite Relators' failure to satisfy the *Safeco* test.

The key constitutional problem with Relators' proposed standard is that it deprives Supervalu of the right to fair notice of the conduct that

could lead to criminal penalties and punitive civil sanctions. This "fair notice of what conduct is prohibited" is at the core of the Due Process Clause. *United States v. Cook*, 970 F.3d 866, 872 (7th Cir. 2020) (citation omitted).

1. History shows the importance of scienter for a statute to satisfy due-process principles.

The Supreme Court has long recognized the importance of fair notice under the Due Process Clause. It explained that "[e]very man should be able to know with certainty when he is committing a crime." *United States v. Reese*, 92 U.S. 214, 220 (1875). In the early-20th Century, the Court described the fair notice requirement as "the first essential of due process of law." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (citing *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 221 (1914)).

General Construction Company highlights why disregarding *Safeco* violates Supervalu's due-process rights. There, an Oklahoma statute required that firms performing under contract with the State pay their workers "the current rate of per diem wages in the locality where the work is performed." Okla. Stat. § 7255 (1921). Finding that the statute violated the Due Process Clause, the Court explained that the term "current rate of wages" was "indeterminate[]" and obscure. *Gen. Const.*

Co., 269 U.S. at 394. And because the statute was "so uncertain that" it could "reasonably admit of different constructions," it violated the Due Process Clause. *Id.* at 393.

The FCA regulates economic agreements between private companies and the federal government: To participate in government-funded programs, businesses must agree not to submit false claims. *General Construction Company* is not the only case in which the Court considered whether economic regulations provided insufficient notice of what was illegal. *See generally*, *e.g.*, *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210 (1932) (Oklahoma Curtailment Act); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) (Colorado antitrust law); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) (Lever Act). These early 20th-Century cases show that the Court has long guaranteed the right to fair notice.

The Court continued recognizing the importance of fair notice during World War II. It explained that "[t]he constitutional requirement that a criminal statute be definite serves a high function. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition." *Screws v. United States*, 325 U.S. 91, 103-04

(1945). The next decade, the Court reiterated that "a criminal statute" which fails to give "fair notice that his contemplated conduct is forbidden by the statute" violates the Due Process Clause. *United States v. Harriss*, 347 U.S. 612, 617 (1954).

The trend continued at the end of the 20th Century. The Court said that "the fair notice requirement" ensures individuals are not placed "at peril of life, liberty or property" because they must "speculate as to the meaning of penal statutes." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (quotation omitted).

A recent case reveals what fair notice requires when heightened due-process protections apply. In *Skilling v. United States*, the Court held that the defendant received fair notice that bribery and kickbacks violated the honest-services statute. 561 U.S. 358, 412 (2010). The Court explained that this was "as clear as a pikestaff." *Id.* (quotation omitted). But other behavior was not so clear. And since the defendant did not receive fair notice that that conduct violated the statute, the Court vacated the conviction. *Id.* at 413-14.

Yet under Relators' proposed standard, it is immaterial if there is an objectively reasonable interpretation of contracts that could

"reasonably admit of different constructions." *Gen. Const. Co.*, 269 U.S. at 393. If this Court were to adopt Relators' proposed standard, it would raise serious questions about the FCA's constitutionality.

Although it was "clear as a pikestaff" that submitting the wrong prices for prescription drugs violated the FCA, that is not what happened here. Instead, it was unclear what constituted a drug's usual and customary price. No binding guidance counseled against Supervalu's objectively reasonable interpretation of the term. It therefore lacked fair notice that it was overbilling the government at least until *United States ex rel. Garbe v. Kmart Corp*. interpreted the term. 824 F.3d 632, 643-45 (7th Cir. 2016).

For 150 years the Supreme Court has repeatedly returned to the idea of fair notice. Each time, the Court has explained why this fair-notice requirement is critical to due process of law. As explained above, the FCA's civil provisions are punitive. An FCA violation also carries potential criminal liability. So the Supreme Court's heightened fair-notice requirements should also govern in FCA cases. Otherwise, the FCA's constitutionality would be in doubt. Because Supervalu's construction of the FCA—employing the *Safeco* standard—avoids these

constitutional concerns, this Court should reject Relators' proposed standard.

2. Relators' proposed standard transforms the FCA into a strict-liability statute subjecting defendants to penal sanctions for negligent behavior.

As described above, the FCA's treble damages provision and the potential for criminal liability means that FCA defendants receive heightened due-process protections. Many cases show that fair notice is at the core of these heightened due-process protections. Unsurprisingly, therefore, both this Court and the Supreme Court have acknowledged that the scienter requirement is critical in FCA litigation.

"[C]oncerns about fair notice and open-ended liability in FCA cases" are "effectively addressed through strict enforcement of the" FCA's "scienter requirement[]." *United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834, 842 (7th Cir. 2018) (quoting *Universal Health Servs.*, 136 S. Ct. at 2002); *see United States v. Sci. Apps. Int'l Corp.*, 626 F.3d 1257, 1270 (D.C. Cir. 2010). Allowing for lax application of the scienter requirement causes serious due-process concerns. And that is what Relators ask this Court to do by rejecting the *Safeco* test in FCA cases.

Due-process concerns are why "[t]he scienter requirement is critical to the operation of the [FCA]." *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir. 1998). As this Court has explained, "[i]nnocent mistakes or negligence are not actionable under" the FCA. *Hindo v. Univ. of Health Scis./Chi. Med. Sch.*, 65 F.3d 608, 613 (7th Cir. 1995) (citing *United States ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1420 (9th Cir. 1991)).

Courts are unanimous that negligent submission of claims does not trigger FCA liability. *See, e.g.*, *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 657 (5th Cir. 2017) (FCA's scienter "requirement is not met by mere negligence" (quotation omitted)); *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148, 1155 (11th Cir. 2017) (citation omitted). These decisions flow naturally from the FCA's plain language which requires that a defendant "knowingly" submit a false claim. 31 U.S.C. § 3729(a)(1)(A). This language reflects Congress's acknowledgment that serious due-process concerns would arise if the FCA imposed treble damages and criminal penalties for the mere negligent submission of false claims.

The legislative history of the FCA's current scienter requirement reflects this well-settled due-process principle. First, Congress amended the FCA's scienter requirement in the same enactment that provided for treble damages. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2, 100 Stat. at 3153-54. When it increased FCA damages to a punitive level, Congress knew that not defining the level of scienter would cause due-process problems.

During hearings on the FCA amendments, the "Department of Justice" understood the proposed scienter standard to mean "that mere negligence could not be punished by an overzealous agency." S. Rep. No. 99-345 at 21, 1986 U.S.C.C.A.N. at 5286. The Senate Judiciary Committee agreed with this statement. *See id.*

Both DOJ and the Senate focused on government-initiated actions. They did not consider the possibility of overzealous *qui tam* counsel and litigants seeking windfalls for a company's negligence. This is because the vast *qui tam* bar did not exist in 1986. Today, however, it is hard not to encounter advertisements promising big rewards for those willing to serve as clients for *qui tam* counsel.

Courts of appeals often look to this legislative history when discussing the FCA's scienter requirement. *See*, *e.g.*, *United States v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 837 (6th Cir. 2018); *Lincare Holdings, Inc.*, 857 F.3d at 1155. This Court should do the same when deciding whether the *Safeco* test applies in FCA actions.

The legislative history also shows why the *Safeco* test furthers Congress's other goals in defining "knowingly." The House Judiciary Committee explained that "those who play 'ostrich'" would be held liable under the new definition. H.R. Rep. No. 99-660, 21 (1986). The Senate echoed these sentiments. S. Rep. No. 99-345 at 21, 1986 U.S.C.C.A.N. at 5286 ("an individual [who] has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted" would be liable under the knowingly definition).

The *Safeco* test ensures that companies cannot bury their heads in the sand to avoid FCA liability. It does so by asking whether the relevant governmental agency or courts of appeals issued binding guidance warning away from the objectively reasonable interpretation. Here, for example, if CMS or another body promulgated regulations showing that the usual and customary price for prescription drugs must include price-

matching programs, Supervalu could not plead ignorance. Rather, under *Safeco*, Supervalu could be held liable under the FCA because it acted with reckless disregard. The same holds true if Supervalu continued to submit claims after this Court clarified the effect of price matching on usual and customary prices.

But that is not what happened here. No guidance led Supervalu away from its objectively reasonable interpretation of the contractual terms. *Safeco* provides Supervalu with due process by not penalizing it for mere negligence. *Safeco* does so while accomplishing Congress's goal of ensuring that companies do not bury their heads in the sand when submitting claims for reimbursement.

Relators and their *amicus* do not explain why using the *Safeco* test fails to accomplish both goals. They stress the importance of deterring companies from burying their heads in the sand. But the *Safeco* test accomplishes this goal. Relators and their *amicus* avoid meaningful discussion of Congress's first stated goal—ensuring due process by not imposing FCA liability for negligent acts. Applying *Safeco* is the best way to satisfy this objective. In contrast, Relators' proposed standard raises

serious constitutional concerns that can be avoided by adopting *Safeco* in FCA actions.

3. The maze of federal medical regulations shows the need for the *Safeco* test to protect companies' due-process rights.

This Court has noted that "the complex and technical Medicare and Medicaid programs . . . are among the most completely impenetrable texts within human experience." *Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 540-41 (7th Cir. 2012) (quotation omitted). Reading and understanding the regulations is "tortur[e]." *Id.* at 541 (quotation omitted). This maze of statutes and regulations is important because it shows that Relators' proposed standard would wreak havoc on the medical industry.

Even the largest, well-resourced companies in the world will make mistakes when submitting Medicare or Medicaid claims. Most errors are just negligence. Despite rigorous checks, companies will read a complex regulation in a manner that courts will eventually reject. But if the regulation is amenable to multiple interpretatons, the interpretation is objectively reasonable, and no binding guidance cautions against that objectively reasonable interpretation, the company has not committed

fraud. Rather, it has committed negligent acts for which it should reimburse the government.

The company should not have to pay treble damages and face criminal liability for negligence. That, however, is what Relators want. They ask this Court to reject the *Safeco* standard, which is critical to meaningful due-process protections. They seek a standard that would severely punish companies for mere negligence.

*   *   *

The FCA's plain language supports application of *Safeco*'s test. But even if the FCA is ambiguous, this Court should use the constitutional-doubt canon and apply *Safeco* here. The criminal penalties and treble damages accompanying FCA liability mean that FCA defendants are entitled to heightened due-process protections. The Supreme Court has long recognized that this incudes fair notice of what conduct is prohibited. The legislative history shows that Congress acknowledged this right to heightened due-process protections when amending the FCA in 1986. Applying *Safeco* in FCA cases therefore accomplishes the FCA's goals while providing constitutionally mandated due-process protections.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Seventh Circuit Rule 29 because it contains 4,201 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Seventh Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(a)(6) because it uses 14-point Century Schoolbook font.

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