No. 15-513

In the Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, EX REL.
CORI RIGSBY; KERRI RIGSBY,
Respondents.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this brief as *amicus curiae* in support of the petitioner in *State Farm Fire and Casualty Company v. United States ex rel. Rigsby*, on petition for writ of certiorari.[1]

The NACDL is a nonprofit voluntary professional bar association working on behalf of criminal defense attorneys to promote justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has approximately 9,200 direct members in 28 countries, and its 90 affiliated state, provincial, and local organizations include up to 40,000 attorneys—including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous *amicus* briefs each year in this Court, the federal courts of appeals, and state high courts. NACDL's mission is to provide *amicus* assistance in cases that present issues of broad importance to criminal and civil defendants, as well as the justice system as a whole.

Of relevance here, NACDL's members frequently defend companies against claims under

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amicus* notified counsel of record for all parties of its intent to file this brief, and all parties have consented to the filing of this brief.

the federal False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), and numerous other federal and state statutes that require proof of a specific type of knowledge or scienter. In this FCA action against petitioner State Farm Fire and Casualty Company ("State Farm"), the Fifth Circuit recognized that violations of the FCA "require intent, or scienter." Pet. App. 36a. But it then determined that the FCA's scienter element did not require proof that at least one State Farm employee had knowledge that the claim at issue was false.

Specifically, the Fifth Circuit held that the evidence was sufficient to support the jury's finding that State Farm "knowingly" presented a single false claim for payment to the government even though there was no proof that the corporate employees submitting the claim knew it to be false. Instead, the court found that State Farm acted knowingly because one employee, without any knowledge of the specific alleged false claim, perpetrated a scheme designed to result in the submission of future—but unknown—false claims. According to the Fifth Circuit, the jury reasonably could have concluded that the employee who perpetrated the scheme caused the subsequent false claim. In other words, under the Fifth Circuit's holding, a corporation can "knowingly" engage in fraud under the FCA even if its employees approving or making the claim—which is the "*sine qua non*" of FCA liability (*Hopper v. Solvay Pharmaceuticals, Inc.*, 588 F.3d 1318, 1328 (11th Cir. 2009) (citation and internal quotation marks omitted))—do not know, ignore, or recklessly disregard facts showing that the claim is false.

The Fifth Circuit's ruling not only is in conflict with the decisions of other circuits—it reduces the FCA's scienter element in cases against corporate defendants to a requirement that can be met so long as one corporate employee has knowledge of some underlying scheme or business misconduct, but does not have knowledge of the claim. The court's ruling disconnects state of mind from proscribed conduct, thus abandoning the bedrock principle that, where scienter is required, it "must concur" with the allegedly unlawful conduct. Wayne LaFave, 1 *Subst. Crim. L.* § 6.3 (2d ed.).

This proof reduction and disconnect is bad law and worse policy. Strict enforcement of the FCA's scienter element, like any other statutory or common law scienter requirement, is intended, and necessary, to protect the rights of corporate defendants against baseless fraud challenges and "limitless [FCA] liability." *See United States ex rel. Jones v. Brigham & Women's Hosp.*, 678 F.3d 72, 85-86 (1st Cir. 2012) (observing that "strict enforcement of the [FCA's] scienter" requirement properly "circumscribe[s]" "FCA liability") (citations and internal quotation marks omitted). It is also necessary to ensure that the FCA—which is not an "all-purpose antifraud statute," *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008)—is not wielded as an "all-purpose anti-negligence" statute to punish inadvertent, good faith mistakes. For these reasons, NACDL urges this Court to grant State Farm's petition and reverse the Fifth Circuit's decision below.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision warrants review because it presents a critically important question of federal law: can a corporation be held liable under the FCA based on the collective knowledge of its employees, even where *none* of its employees has knowledge of the false "claims" for payment at issue? The Fifth Circuit's answer to that question conflicts with decisions from other circuit courts and reflects a seriously flawed application of controlling legal principles.

Requiring proof of scienter is an essential safeguard against unwarranted punishment. Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 568 (2012). Indeed, before imposing punishment or liability, both the criminal and the civil law often require proof of the defendant's scienter, or state of mind, in undertaking the prohibited conduct. Maintaining this close nexus between state of mind and the prohibited conduct "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)); *see also* Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology at 569 ("[T]he linkage between punishment and blameworthiness is no artifact from a bygone retributivist age."); LaFave, 1 *Subst. Crim. L.* § 6.3.

This same "universal" notion is embodied in the FCA. As discussed below, Congress wrote the FCA expressly to require knowledge of "information" regarding the false claims the statute proscribes. *Infra* at 17-18. This was necessary to carry out Congress's clear intent that the FCA—a "quasi-criminal" statute (*United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006)), that imposes "essentially punitive" remedies (*Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000))—*not* be used as "a vehicle for either 'punish[ing] honest mistakes or incorrect claims submitted through mere negligence[.]'" *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1274 (D.C. Cir. 2010) ("*SAIC*") (quoting S. Rep. No. 99-345, at 6, 19 (1986)).

In its decision below, however, the Fifth Circuit effectively eliminated the requirement in FCA cases against corporate defendants that the government or *qui tam* relators prove that at least one company employee carry out the offending conduct with the statutorily defined scienter. The court found the evidence sufficient to prove that petitioner State Farm had knowingly presented, or caused to be presented, a false claim, even though no State Farm employee knew or recklessly disregarded the possibility that the specific claim at issue—a single claim relating to flood damage to the McIntosh family's home (the "McIntosh claim")—was false. Instead, according to the Fifth Circuit, a reasonable jury could find the FCA's scienter requirement met as to State Farm because it could conclude that at least one employee (Lecky King) had knowledge of a purported scheme but no

knowledge of the McIntosh flood claim, while three others (John Conser, Cody Perry, and Cori Rigsby) had knowledge of the McIntosh flood claim and believed it to be true. Pet. App. 36a-39a.

The Fifth Circuit's ruling departs from the language of the statute, Congress's intent in enacting the FCA's scienter provision, and FCA decisions from two other circuits. It also breaks from numerous appellate precedents rejecting attempts to use the amorphous "collective knowledge" of a corporation's employees to prove the corporation's scienter, even where no one employee had the required state of mind. This Court should grant State Farm's petition so that it can resolve the circuit split and undo the Fifth Circuit's erroneous dilution of the FCA's scienter requirement.

REASONS FOR GRANTING CERTIORARI

I. This Case Presents A Critically Important And Recurring Question Of FCA Scienter That Warrants This Court's Immediate Review.

To plead and prove a valid FCA claim, the government or relators must show that a person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim[.]" 31 U.S.C. § 3729(a)(1)(A)-

(B).[2] Under the statute, "knowingly" means that "a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." *Id.* § 3729(b)(1)(A).

With respect to the FCA's scienter requirement, the government and relators "routinely" argue that "corporate liability [under the FCA] should be found under the 'collective knowledge' theory" of scienter. John T. Boese, *Civil False Claims and Qui Tam Actions*, § 2.08[B] (July 2015); *see also United States v. United Technologies Corp., Sikorsky Aircraft Division*, 51 F. Supp. 2d 167, 197 (D. Conn. 1999) (rejecting "the government's assertion that the application of the collective corporate knowledge doctrine in [FCA] cases like this is well recognized"). In urging the Fifth Circuit to conclude that State Farm could be held liable under the FCA based on the conduct of Ms. Lecky King (the perpetrator of the alleged scheme), the *qui tam* relators here likewise asked the court to attribute her knowledge to the individual who approved the McIntosh claim or, alternatively, to

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[2] Congress amended the provisions at issue here in 2009. *See* Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, § 4(a), May 20, 2009, 123 Stat. 1617, 1621-23. Congress provided that its amendments applied to conduct on or after the enactment date, except that its amendment to the "false record" provision (now § 3729(a)(1)(B)) applied to claims pending on or after June 7, 2008. *See* FERA § 4(f)(1). The 2009 amendments do not affect the issues presented in this case.

conclude that Ms. King's knowledge itself was sufficient to prove State Farm's scienter. Either way, as explained below, its decision raises an important and recurring question of federal law.

A theory of FCA liability based on the collective knowledge of a corporation's multiple employees effectively eliminates the FCA's scienter element, which requires that a person have knowledge of the *claim's* falsity. It enables plaintiffs to prove that critical element without showing that *any employee* within the company had knowledge that a claim for payment made to the government was false, or deliberately ignored or recklessly disregarded that possibility. Instead, under the collective knowledge theory, a relator could prevail with evidence that one employee knowingly implemented fraudulent business practices, while another employee knowingly submitted a claim for payment believing it to be true and correct. The ramifications of the Fifth Circuit's conception of collective corporate knowledge are significant.

For example, the government currently is pursuing FCA cases against companies that provide physical and rehabilitation therapeutic services reimbursed by Medicare and Medicaid, claiming that these companies submitted "false claims" by seeking reimbursement from the government for medically unnecessary therapeutic services. In these cases, the government is purporting to rely on the collective knowledge of corporate managers or executives who allegedly exerted pressure on therapists to provide excessive therapeutic services; unidentified therapists who believed in good faith that the

therapy they provided was medically necessary; and other unidentified employees who submitted claims to the government for reimbursement of those services. *See, e.g.*, *United States ex rel. Michaels v. Agape Senior Community, Inc.*, No. 0:12-CV-03466-JFA (D.S.C.). And the government is pursuing analogous lawsuits against hospice providers, claiming managerial pressure and medically unnecessary hospice services, and alleging scienter based on the collective knowledge of multiple employees. *United States v. AseraCare Inc.*, No. 2:12-CV-245-KOB (N.D. Ala.).

Similarly, the government has filed FCA cases against companies that underwrite and approve home loans backed by Federal Housing Administration ("FHA") insurance in which the government relied on the collective knowledge of companywide "management" who generally knew about quality results and internal programs and processes, even though different employees—those who reviewed and underwrote the loans—certified the loans as eligible for FHA insurance. *See, e.g.*, *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 620 & n.18 (S.D.N.Y. 2013).

Given these ongoing developments, the need for this Court's intervention to resolve the collective knowledge issue presented in State Farm's petition is acute. The government and relators will continue to rely on the collective knowledge theory, and FCA suits are proliferating across all industries. *See U.S. Dep't of Justice, Fraud Statistics—Overview: Oct. 1, 1987–Sept. 30, 2014*, at 1–2 (2015) (noting that in

2013 and 2014, relators initiated over 700 FCA actions per year).[3]

The compulsion for the Court's review is heightened further because the Fifth Circuit's dismantling of the FCA's scienter requirement comes in the wake of a host of legislative changes and judicial decisions that have chiseled away at the pleading and proof requirements that traditionally protected defendants from allegations of fraud under the statute. *See, e.g.*, Fraud Enforcement and Recovery Act of 2009, Pub.L. No. 111-21, § 4(a)(1)-(2), May 20, 2009, 123 Stat. 1617, 1621-23 (broadening scope of liability for making "a false record or statement material to a false or fraudulent claim"); *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 635-36 (4th Cir. 2015) (adopting "implied certification" theory of FCA liability, under which a contract breach or regulatory violation can result in FCA liability even if compliance with the contract or regulation was not expressly designated as a condition of payment), *petition for cert. filed*, No. 14-1440 (U.S. June 8, 2015); *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 126 (D.C. Cir. 2015) (aligning with six other circuits in concluding that relators need not plead a particular false claim for payment to satisfy Rule 9(b)'s requirement to plead fraud with particularity), *petition for cert. filed*, No. 15-363 (U.S. Sept. 23, 2015); *United States ex rel. Ruckh v. Genoa Healthcare, LLC*, No. 8:11-CV-1303-T-23TBM, 2015 WL 1926417, at *2-4 (M.D. Fla. Apr. 28, 2015) (endorsing relator's use of statistical

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[3] *See* www.justice.gov/file/fcastatspdf/download.

sampling and extrapolation to prove broad FCA liability based on a tiny billing sample).

These legislative and judicial trends mean that "strict enforcement" of the scienter requirement to prevent "limitless FCA liability" and "circumscribe[ ]" the statute's scope has never been more critical. *Jones*, 678 F.3d at 86 (citations and internal quotation marks omitted); *see also United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 388 (1st Cir. 2011) (FCA's scienter element "cabin[s] the breadth" of FCA liability); *SAIC*, 626 F.3d at 1271 (same); *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 211 (5th Cir. 2013) (Higginson, J., concurring) ("strict enforcement" of FCA's scienter requirement helps "to maintain the 'crucial distinction' between punitive FCA liability and ordinary breaches of contract") (citations and internal quotation marks omitted). The Fifth Circuit's decision, however, does anything but "strict[ly] enforce[ ]" the statute. This Court's review is, accordingly, urgently called for.

II. The Fifth Circuit's FCA Scienter Ruling Conflicts With Decisions From Other Circuits And Departs From Numerous Other Relevant Authorities.

As the petition correctly points out, the Fifth Circuit's decision created a circuit split. Pet. 29-30. Until now, no federal court of appeals had upheld FCA liability imposed on a corporation based on the collective knowledge of the corporation's employees. *See SAIC*, 626 F.3d at 1275 ("We know of no circuit that has applied the 'collective knowledge' theory to

the FCA."). The Fifth Circuit's holding also widens a growing division among federal courts over the propriety of using the "collective knowledge" theory to prove the requisite scienter under a variety of federal statutes.

To begin with, both the D.C. and Fourth Circuits have concluded that the FCA does not impose liability on a corporation based on the collective knowledge of its employees. *See SAIC*, 626 F.3d at 1273-76; *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 918 n.9 (4th Cir. 2003). In *SAIC*, the district court had instructed the jury that "if a corporation has many employees or agents, you must consider the knowledge possessed by those employees and agents as if it was added together and combined into one collective pool of information." 626 F.3d at 1273. The jury found that the defendant had violated the FCA, but the D.C. Circuit vacated the judgment, holding that "under the FCA, 'collective knowledge' provides an inappropriate basis for proof of scienter because it effectively imposes liability, complete with treble damages and substantial civil penalties, for a type of loose constructive knowledge that is inconsistent with the Act's language, structure, and purpose." *Id.* at 1274. In *Harrison*, the Fourth Circuit likewise rejected the "collective knowledge" doctrine, though it found sufficient evidence of corporate scienter because a single employee did have knowledge of the relevant false information (but did not know that the corporation would make a

claim or certification based on that information). *See* 352 F.3d at 918-19 & n.9.[4]

Next, the Fifth Circuit's decision departs from the decisions of other courts of appeals that have considered whether the collective knowledge of employees may be attributed to the corporation for the purpose of imposing liability under other laws. Indeed, the Fifth Circuit's decision here conflicts with its own prior decision in *Southland Securities Corp. v. INSpire Insurance Solutions, Inc.*, which held that a plaintiff could not rely on the collective knowledge doctrine to allege corporate scienter under the Securities and Exchange Act of 1934. 365 F.3d 353, 366 (5th Cir. 2004). In reaching this conclusion, the court relied on the common-law principle that where, as in fraud cases, the cause of action involves engaging in conduct with a particular

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[4] District courts frequently have rejected the use of collective knowledge under the FCA as well. *See United States ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9, 52 (D.D.C. 2014) (following *SAIC*, which had "rejected" the "collective knowledge" theory for FCA claims); *United States v. Fadul*, No. CIV.A. DKC 11-0385, 2013 WL 781614, at *9 (D. Md. Feb. 28, 2013) ("When the Government seeks to hold an entity liable under the False Claims Act, it cannot rely on the collective knowledge of the entity's agents to establish scienter."); *United States ex rel. Dyer v. Raytheon Co.*, No. CIV.A. 08-10341-DPW, 2013 WL 5348571, at *26 (D. Mass. Sept. 23, 2013) ("The 'collective knowledge' doctrine does not apply to FCA claims, therefore Dyer must show that a single individual, acting on behalf of Raytheon had the requisite knowledge and approved the false claims."), *appeal dismissed* (Jan. 31, 2014); *United States v. United Techs. Corp., Sikorsky Aircraft Div.*, 51 F. Supp. 2d at 199 (rejecting application of collective knowledge theory under FCA).

state of mind, the required state of mind must exist in the person engaging in the prohibited conduct. *See id.* at 366 (citation omitted); *see also Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 241 (5th Cir. 2010) (noting that plaintiff could not establish corporation's "deliberate ignorance" of money laundering under the federal money laundering statute through its employees' "collective knowledge"); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009) (in a RICO action, explaining the "dubious" nature of aggregating states of mind); *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 708 (7th Cir. 2008) (citing common-law principle that person who engages in prohibited acts must also have the requisite state of mind).

One federal court of appeals—the First Circuit—has endorsed a "collective knowledge" theory under the federal Currency Transaction Reporting Act. *See United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987) ("A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability."); *see also In re WorldCom, Inc. Securities Litigation*, 352 F. Supp. 2d 472, 497 (S.D.N.Y. 2005) (following *Bank of New England* in securities fraud case). And still other courts have indicated that a plaintiff may rely on the doctrine of "collective scienter" at the pleading stage of a securities fraud action, if not at trial. *See In re NVIDIA Corp. Securities Litigation* (*Cohen v. NVIDIA Corp.*), 768 F.3d 1046, 1063 (9th Cir. 2014); *Rahman v. Kid Brands, Inc.*, 736 F.3d 237, 246 (3d Cir. 2013).

Thus, although the Fifth Circuit is the first appellate court to uphold corporate liability under the FCA based on collective knowledge, its ruling has deepened an existing divide as to whether one employee's knowledge may be attributed to another employee who performs the prohibited act—or to the corporation as a whole. Certiorari thus is warranted to resolve this growing disagreement among lower courts over the propriety of proving corporate scienter via a "collective knowledge" theory.

III. The Fifth Circuit's Finding That An Employee's Knowledge Of A Scheme Was Sufficient To Prove Scienter Conflicts With Established Precedent.

The Fifth Circuit concluded that "[e]ven if we were to agree with State Farm that one individual must have knowledge that a claim is false, the jury could have reasonably believed that [Ms.] King alone, 'act[ing] in reckless disregard of the truth or falsity' of the information, 1) caused a false claim to be presented for payment, and 2) caused a false record material to a false claim to be made or used." Pet. App. 39a. This ruling further amplifies the need for this Court's review.

In reaching its conclusion as to Ms. King's knowledge, the Fifth Circuit did not, and could not, say that the evidence was sufficient to permit a reasonable jury to find that Ms. King knew or recklessly disregarded information relating to the only claim at issue—the McIntosh claim. Pet. App. 36a-39a. Neither did the district court. Pet. App. 125a-133a. That is because Ms. King's knowledge at

or prior to the time the McIntosh claim was made was limited to her knowledge of the purported underlying scheme to find that properties sustained flood, but not wind, damage from Hurricane Katrina—she had no knowledge of the McIntosh flood claim until *after* that claim had been made. Pet. 35-36; *see also* Pet. App. 38a n.15.

To the extent the Fifth Circuit relies on Ms. King's knowledge of the purported underlying "scheme"—which did not include any knowledge of the McIntosh claim—that ruling departs from settled precedent.[5] The FCA imposes liability based on false *claims*—indeed, "the submission of a false claim is the '*sine qua non* of a False Claims Act violation.'" *Hopper*, 588 F.3d at 1328 (citation omitted). "Liability under the FCA attaches 'not to the underlying fraudulent activity, but to the claim for payment.'" *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 916 (8th Cir. 2014) (citations omitted); *see also United States ex rel. Longhi v. United States*, 575 F.3d 458, 467 (5th Cir. 2009) (same); *United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir. 2002) ("The False Claims Act ...

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[5] As State Farm's petition shows, it is conceivable that the Fifth Circuit relied on Ms. King's knowledge of the McIntosh claim after it was submitted. If so, as State Farm correctly explains, that ruling departs from decisions in other circuits which forbid reliance on after-the-fact knowledge to prove FCA scienter. Pet. 35-36 (citing, *inter alia*, *United States ex rel. Folliard v. Gov't Acquisitions, Inc.*, 764 F.3d 19, 30 (D.C. Cir. 2014) (holding that after-the-fact evidence "cannot . . . show that [a defendant] acted knowingly, at the time of [the claim]")).

focuses on the submission of a claim, and does not concern itself with whether or to what extent there exists a menacing underlying scheme."). Thus, the "proper focus of the scienter inquiry … must always rest on the defendant's 'knowledge' of whether the *claim* is false" (*United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 952-53 (10th Cir. 2008) (emphasis added))—not on mere knowledge of some underlying scheme or misconduct.

Here, whether the Fifth Circuit's decision is read to provide that a reasonable jury may infer that a person knew facts at the time a claim was submitted because she learned those facts later, or instead means that knowledge of a scheme is sufficient to establish liability under the FCA, its reasoning creates a circuit split warranting this Court's review.

IV. The Fifth Circuit's FCA Scienter Ruling Is Wrong.

The Fifth Circuit's scienter ruling is wrong because it departs from the text of the statute, the settled principles of agency law that form the backdrop of the FCA's scienter element, and Congress's intent.

The FCA prohibits the "knowing" submission of false claims for payment to the government. And it defines "knowing" or "knowingly" as a state of mind with respect to "information." That "information," as State Farm's petition explains, is information that relates to the false claim itself—not some underlying corporate misdeed or purported

scheme. Pet. 31-32; *see also Burlbaw*, 548 F.3d at 952-53 (defendant must have "knowledge" of the false claim); *United States ex rel. Hefner v. Hackensack Univ. Med. Ctr.*, 495 F.3d 103, 109 (3d Cir. 2007) (noting that FCA defines "knowing" by reference to "information in the defendant's claim to the government").

No other construction of the statute is plausible. If the term "knowingly" applied only to some underlying business misconduct or even the mere presentation of a claim or the making of a record—but not to the falsity of the claim or record itself—a person could be held liable for treble damages and civil penalties without knowing, ignoring, or recklessly disregarding any facts showing that the claim was false. Indeed, the proposition that a person could act recklessly in presenting a claim makes no sense unless the term "knowingly" encompasses falsity of information in the claim. Construing the term "information" as relating to the purported false claim for payment also comports with the settled understanding that a false claim is the *sine qua non* of an FCA action, *Hopper*, 588 F.3d at 1328, and that corporate malfeasance or fraudulent schemes alone do not violate the statute, *see Thayer*, 765 F.3d at 916; *Aflatooni*, 314 F.3d at 1002.

The required state of mind under the FCA with respect to a *claim* operates to limit exposure to the statute's draconian treble damages and civil penalties to those circumstances in which the defendant corporation has knowledge that it has made a misrepresentation to the government—as

contrasted with circumstances in which a manager merely directs subordinates to "presume flood damage" or ignore an agency rule (Pet. App. 38a), but does not know whether these internal directives will result in any particular claim for payment. By requiring knowledge of the false *claim*, Congress ensured that the FCA reaches only those persons who knowingly cause the government to pay money to an undeserving claimant. And it preserved the necessary nexus between the requisite scienter and the conduct prohibited by the statute.

Separately, interpreting the FCA's scienter provision as requiring an employee's knowledge, deliberate ignorance, or reckless disregard of information showing that a claim for payment is false aligns with the "background" principles of agency law against which the statute was enacted. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 418 (2011) ("consult[ing]" principles of "agency law," "which form the background against which federal tort laws are enacted," and characterizing the FCA as a "federal tort law"). Under the common law, "the malicious mental state of one agent cannot generally be combined with the harmful action of another agent to hold the principal liable for a tort that requires both." *Id.* (citing Restatement (Second) of Agency § 275, Illustration 4 (1958)). As the Restatement (Third) of Agency § 5.03 cmt. d(2) (2006), puts it:

> [A] claim of fraud may require that a person who misstated a material fact have made the misstatement intending to defraud the person to

> whom the statement was made. If so, a principal may not be subject to liability for fraud if one agent makes a statement, believing it to be true, while another agent knows facts that falsify the other agent's statement. Although notice is imputed to the principal of the facts known by the knowledgeable agent, the agent who made the false statement did not do so intending to defraud the person to whom the statement was made.

Although the FCA does not require "proof of specific intent to defraud," 31 U.S.C. § 3729(b)(1)(B), following common-law principles that forbid attribution of one employee's knowledge to another employee who made a false claim is wholly appropriate in an FCA action. *SAIC*, 626 F.3d at 1273-75 (following reasoning reflected in Restatement (Second) of Agency provision); *cf. Chaney*, 595 F.3d at 241 (same in applying "deliberate ignorance" standard under federal money laundering statute) (citing Restatement (Second) of Agency § 275, cmt. b); *see also Staub*, 562 U.S. at 418 (observing that *SAIC*, *Chaney*, and *Philip Morris*, 566 F.3d at 1122, "apply th[e] rule" forbidding the combination of agents' knowledge). Moreover, as the D.C. Circuit reasoned, imposing quasi-criminal FCA liability on a corporation based on the collective knowledge of its employees would be inconsistent with the Act's "language, structure, and purpose." *SAIC*, 626 F.3d at 1274.

Finally, the Fifth Circuit's reasoning overlooks Congress's intent in enacting the FCA's scienter provision. Congress enacted the present-day FCA and its scienter requirement in light of experience showing that some corporations might seek to avoid FCA liability by "compartmentalizing" knowledge; *e.g.*, by preventing the employee who submitted the claim from learning facts that made the claim false. *SAIC*, 626 F.3d at 1275-76. To close this potential loophole, Congress provided that a person may be held liable where he acts with deliberate ignorance or reckless disregard of the truth or falsity of his claims. *See id.* at 1276. This enacted "recklessness" standard, not a theory of collective knowledge, addressed the perceived compartmentalization problem.

Yet, the Fifth Circuit resurrected the "compartmentalization" concern as the driving rationale behind its ruling. In rejecting State Farm's argument that "one individual must have knowledge that a claim is false" (Pet. App. 39a), the court reasoned that "State Farm's constricted theory of FCA liability would enable managers at an organization to concoct a fraudulent scheme—leaving it to their unsuspecting subordinates to carry it out on the ground—without fear of reprisal" (Pet. App. 37a). But the Fifth Circuit did nothing more than identify a problem that Congress already had solved. And its articulated policy concern was no basis to run roughshod over the FCA's text and the background agency law principles against which that text should be construed.

CONCLUSION

For the foregoing reasons, this Court should grant State Farm's petition for a writ of certiorari.

Respectfully submitted,

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