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 WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(i) What standard governs the decision whether to dismiss a relator's claim for violation of the False Claims Act's (FCA) seal requirement under 31 U.S.C. § 3730(b)(2)?

(ii) Whether and under what standard a corporation or other organization may be deemed to have "knowingly" presented a false claim, or used or made a false record, in violation of § 3729(a) of the FCA based on the purported collective knowledge or imputed ill intent of employees other than the employee who made the decision to present the claim or record found to be false, where (1) the employee submitting the claim or record independently made the decision to present the claim or record in good faith after reviewing the available information and (2) there was no causal nexus between the submission of the false claim or record and the purported collective knowledge or imputed intent of those other employees?

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INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in this and other federal courts in cases concerning the appropriate scope and application of the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*. *See, e.g., Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010); *Allison Engine Co. v. United States ex rel. Sanders*, 128 U.S. 2123 (2008); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007).

Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), more than 10 days prior to the due date for this brief, counsel for WLF notified counsel of record for all parties of WLF's intention to file. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Court.

In recent decades, excessive FCA liability has spawned abusive litigation against businesses, both large and small, to the detriment of free enterprise, employees, shareholders, and consumers. *Amici* fear that the decision below, by not requiring dismissal of FCA claims where deliberate *qui tam* seal violations occur, further incentivizes such abuses by relators who seek to damage a defendant's public reputation in an effort to improperly pressure the defendant to settle. *Amici* are also concerned that the panel's "collective knowledge" approach to establishing scienter will, if allowed to stand, make it nearly impossible for those defendants to defend against FCA claims, thereby creating the potential for wide-ranging, expansive liability for claims submitted to the Government in good faith.

STATEMENT OF THE CASE

The FCA's *qui tam* provisions allow private individuals with knowledge of fraud perpetrated against the United States Treasury to come forward and sue on behalf of the United States. To incentivize *qui tam* relators to come forward and expose such fraud, the Government pays a bounty of up to 30% on all recoveries. In authorizing that private right of action, the FCA requires that a relator's complaint, including a written evidentiary disclosure, "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2).

The FCA also imposes a strict scienter requirement whereby liability is limited to those who "knowingly" present, or cause to be presented, a false

claim, or who "knowingly" make, or cause to be made, a false statement to get a false claim paid. *See* 31 U.S.C. § 3729(a)(1)(A) & (B). The FCA defines "knowingly" to mean 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." 31 U.S.C. § 3729(b)(1)(A).

Petitioner State Farm Fire and Casualty Company (State Farm) is a leading provider of property insurance to homeowners throughout the United States. Respondents Cori and Kerri Rigsby are former independent claims adjusters who provided third-party adjustment services to State Farm's policy holders in the wake of Hurricane Katrina in 2005. In April 2006, respondents filed suit against State Farm under the FCA, alleging that the company defrauded the federal government by instructing claims adjusters to mischaracterize wind damage caused by Hurricane Katrina (and covered under State Farm's homeowner policies) as flood damage (covered by the federal government under the National Flood Insurance Program). Pet. App. 113a-114a.

After filing their FCA complaint under seal with the U.S. District Court for the Southern District of Mississippi, respondents and their then-counsel, Dickie Scruggs, repeatedly violated the seal provision by notifying news organizations and others about the existence and nature of the *qui tam* suit. Before the lifting of the seal, respondents and Scruggs hired a prominent public relations firm and disclosed the details of their suit to national media

outlets, including ABC, CBS, the Associated Press, and the *New York Times*, resulting in nationwide print and television coverage. Pet. App. 45a-50a. In September 2006, respondents also provided sealed information to U.S. Congressman Gene Taylor of Mississippi, who publicly excoriated State Farm from the well of the House of Representatives for "violat[ing] the False Claims Act by manipulating damage assessments to bill the federal government instead of the companies." *Id.* at 49a-50a.

The district court lifted the seal on August 1, 2007. *Id.* at 62a. The district court denied State Farm's motions to dismiss and for judgment as a matter of law based on respondents' violations of the FCA seal requirement. Pet. App. 44a-69a; 72a-77a. The district court concluded that State Farm had failed to show that respondents' "disclosures hampered the government's investigation or otherwise compromised the government's ability to make its investigation." *Id.* at 67a.

Although the operative complaint alleged a "wholesale scheme to shift wind claims to water claims," respondents proceeded to trial based on a single flood claim for damage to Thomas and Pamela McIntosh's waterfront home in Biloxi, Mississippi. Pet. App. 7a. Respondents contended that the McIntosh claim was false not because there was no flood damage, but because there was no *covered* flood damage as the house was purportedly rendered a "total loss" by wind before the floodwaters arrived. At trial, however, State Farm introduced overwhelming video, photographic, and testimonial evidence showing that the McIntosh house was overrun with water from Hurricane Katrina, which

produced the largest storm surge ever recorded in the United States. That evidence revealed extensive structural damage to the house below the five-foot flood line, whereas above the flood line, chandeliers hung undisturbed, windows remained intact, and items stayed in place in cabinets and on shelves.

It was undisputed at trial that supervisor John Conser was the only State Farm employee involved with the payment of the McIntosh flood claim. State Farm presented unrefuted evidence that Conser made a reasonable, good-faith decision—based on the recommendations of two FEMA-certified claims adjusters (including Kerri Rigsby) and his own independent review of the claim file and the available evidence—that the McIntosh house suffered significant flood damage well in excess of policy limits. Pet. App. 37a. The jury ultimately ignored this evidence, finding that the McIntosh house sustained *no* flood damage and that State Farm's submission of a claim for the $250,000 flood policy limits was fraudulent. *Id.* at 7a. Contending that respondents had failed to proffer sufficient evidence that State Farm paid the McIntosh flood claim with the requisite scienter, State Farm moved post-verdict for judgment as a matter of law, which was denied. *Id.* at 8a.

On appeal, the Fifth Circuit affirmed. Expressly acknowledging the existence of a circuit split on the question of the seal violation, the panel adopted and applied the balancing test articulated by the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995). Pet. App. 19a-21a. Although conceding that respondents violated the seal requirement, the Fifth Circuit

nonetheless concluded that such violations did not warrant dismissal of respondents' FCA suit. *Id.* at 22a-23a. Even presuming bad faith on the part of the respondents, the Fifth Circuit concluded that the Government was not likely harmed and that "a fundamental purpose of the seal requirement" was therefore "not imperiled." *Id.* at 22a.

Affirming the jury's finding of liability, the Fifth Circuit also held that the FCA's scienter requirement was satisfied. Pet. App. 36a-40a. Rather than require a showing that any State Farm employee actually knew that the McIntosh flood claim was false when it was submitted to the Government, the Fifth Circuit improperly relied on the post-hoc actions and statements of Lecky King, a mid-level State Farm employee who took no part in the flood coverage decision for the McIntosh house. *Id.* at 38a. Unable to identify any evidence suggesting that King or any other State Farm employee knew (or should have known) that the McIntosh house was rendered a "total loss" by wind before any flood damage occurred, the appeals court nonetheless upheld State Farm's FCA liability on the purportedly *collective* knowledge of various employees who were said to have engaged in an alleged scheme to submit false flood claims for damage that actually resulted from hurricane-force winds. *Id.* at 38a-40a. Yet nothing in the panel opinion or the record even remotely suggests that Conser—the only State Farm employee to authorize payment of the McIntosh flood claim—ever took part in any alleged scheme.

State Farm's petitions for rehearing and rehearing en banc were denied. Pet. App. 42a.

SUMMARY OF ARGUMENT

Although it is undisputed that respondents in this case repeatedly and flagrantly violated the FCA's seal provision by informing news organizations and others about the existence and nature of their *qui tam* suit, the Fifth Circuit panel affirmed the district court's refusal to dismiss respondents' suit for those egregious violations. That holding not only exacerbates a widening split among the federal appeals courts, as the petition makes clear, but it is also inconsistent with the plain language and structure of the FCA.

As the Sixth Circuit has rightly held, 31 U.S.C. § 3730(b)(2)'s seal requirement is not merely a discretionary procedural formality—it is a mandatory prerequisite to filing and maintaining a *qui tam* suit. That understanding flows from Congress's repeated and unambiguous use of the word "shall" in § 3730(b)(2)'s seal provision. It also follows from the fact that Congress enacted the *qui tam* seal requirement as part of the private right of action, thereby making the seal a "mandatory, not optional condition precedent" to the private right of action. Accordingly, this Court's review is warranted to clarify that a relator's failure to comply with the FCA's seal requirement is a fatal deficiency that warrants dismissal with prejudice of a *qui tam* suit.

Review is also warranted because the Fifth Circuit panel imposed corporate FCA liability in the absence of *any* evidence that a single State Farm employee knew (or had reason to know) the relevant claim was false when it was submitted to the Government. Instead, the panel below improperly

relied on the post-hoc actions and statements of a mid-level employee who took no part in the coverage decision for, or the submission of, the claim in question. In doing so, the appeals court allowed the respondents to establish scienter on the basis of the "collective knowledge" and actions of State Farm's employees. That novel shortcut to proving FCA liability lacks any basis in the law. By allowing for corporate liability (including treble damages and civil penalties) based on the supposed cumulative knowledge of a company's employees, the decision below constitutes a dramatic relaxation of the FCA's scienter requirement warranting this Court's review.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO CLARIFY THAT DISMISSAL IS MANDATORY FOR A RELATOR'S WILLFULL VIOLATION OF THE FCA'S SEAL REQUIREMENT

As the petition ably demonstrates, the Fifth Circuit's affirmance of the district court's refusal to dismiss respondents' FCA suit for willfully violating the FCA's seal provision exacerbates an acknowledged split among the circuits regarding the consequence for relators who willfully violate the FCA's seal requirement for *qui tam* actions.[2] As a

[2] In affirming the district court, the Fifth Circuit panel adopted the Ninth Circuit's balancing test for determining when an FCA lawsuit should be dismissed following a seal violation. *See Lujan*, 67 F.3d at 245. The Sixth Circuit, on the other hand, has adopted a bright-line rule requiring dismissal for any violation of the FCA's seal provision. *See United States ex rel. Summers v. LHC Grp., Inc.*, 623 F.3d 287, 296 (6th Cir.

result, only this Court's review can provide a single, national, and uniform rule for remedying FCA seal violations.

But review is also warranted because the holding below is contrary to the plain language and structure of the FCA itself. Congress's unambiguous requirement that a *qui tam* relator's complaint and evidentiary disclosure "shall" remain under seal underscores the mandatory nature of the seal as a precondition for filing and maintaining the suit. And the fact that Congress enacted the *qui tam* seal requirement in the very same subsection of the statute in which it created the private right of action reinforces the understanding that a relator's full compliance with the seal requirement is an absolute prerequisite for maintaining suit.

A. The Holding Below Is Inconsistent with the Plain Language and Statutory Structure of the FCA

The FCA's *qui tam* provision requires that a relator's complaint, including a written evidentiary disclosure, "*shall* be filed in camera" and "*shall* remain under seal for at least 60 days." 31 U.S.C. § 3730(b)(2) (emphasis added). Congress's choice of words is unmistakable and dispositive. Through its

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2010). Meanwhile, the Second and Fourth Circuits have held that dismissal is required only when a relator's seal violation incurably frustrates the statutory purposes of the seal provision. *See United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 999 (2d Cir. 1995); *Smith v. Clark/Smoot/Russell*, 796 F.3d 424 (4th Cir. 2015).

repeated and unambiguous use of the word "shall," Congress enacted § 3730(b)(2)'s seal provision as a "mandatory, not precatory" requirement. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015); *see United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen [a] stronger word [than 'shall'] to express its intent that forfeiture be mandatory."). The Fifth Circuit therefore is not free to rewrite the statutory language enacted by Congress.

By contrast, a specific provision is optional or conditional where the statute states that the parties "may" take such action. Indeed, the juxtaposition of "shall" and "may" in § 3730(b) only reinforces the ordinary meaning of "shall." *See, e.g.,* § 3730(b)(1) ("A person *may* bring a civil action for a violation …"); § 3730(b)(2) ("The Government *may* elect to intervene …"); § 3730(b)(3) ("The Government *may*, for good cause shown, move the court for extensions of time during which the complaint remains under seal …") (emphases added). As this Court has recognized, "when the same [statutory provision] uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one being permissive, the other mandatory." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *see United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-60 (1895) (explaining that when Congress uses the "special contradistinction" of "shall" and "may," no "liberty can be taken with the plain words of the statute," which indicate[] command in the one and permission in the other").

Further, it is "a fundamental canon of statutory construction … that the words of a statute

must be read … with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the "overall statutory scheme" reinforces what the plain text makes clear: a relator's compliance with the seal requirement is a mandatory prerequisite to suit. Indeed, Congress inserted both the grant of a private right of action *and* the seal requirement into § 3730(b), entitled "Actions by private persons."

As this Court has held, when Congress enacts a procedural requirement at the same time it creates a private right of action, it is a "mandatory, not optional condition precedent" to the private right of action. *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 26 (1989) (holding that because the Resource Conservation and Recovery Act's 60-day notice was "expressly incorporated by reference" into the statute's rights of action, "it acts as a specific limitation on a citizen's right to bring suit").

Accordingly, mandatory dismissal is the only remedy for *qui tam* seal violations that is faithful to the statute's plain language and overall structure. Here, as in other areas of the law, "the most severe in the spectrum of sanctions provided by statute or rule must be available … not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such detriment." *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

B. The Panel Improperly Ignored the Extent of Respondents' Violations of the FCA's Seal Provision

In affirming the district court's decision not to dismiss respondents as *qui tam* relators for violating the FCA seal provision, the panel below concluded that "there is no indication that the Rigsbys themselves communicated the existence of the suit in the relevant interviews" and that any resulting leaks were "in the context of allegations about State Farm misleading policyholders, not the federal government." Pet. App. 23a. The appeals court is wrong on both counts.

After their counsel, Dickie Scruggs, e-mailed a copy of the FCA complaint's sealed evidentiary disclosure[3] to ABC News for use as background, respondents agreed to be interviewed on camera for "Blowing in the Wind," a *20/20* investigative report that aired on August 25, 2006. Along with Scruggs, respondents "spoke publicly for the very first time" by levelling on-air allegations against State Farm virtually identical to those contained in the sealed FCA complaint and evidentiary disclosure. Among other things, viewers learned that "Dickie Scruggs, the lawyer who took on the big tobacco companies, is now taking on State Farm. And the Rigsby sisters' allegations are a big part of his lawsuit." *See ABC*

[3] The sealed evidentiary disclosure Scruggs provided to news outlets expressly stated that it was made pursuant to 31 U.S.C. § 3730 and alleged that State Farm was "engaging in wholesale fraud both on policy holders *and on the federal government*" in "[t]his False Claims Act case" (emphasis added).

News 20/20: Blowing in the Wind (ABC television broadcast, Aug. 25, 2006) *available at* https://vimeo.com/40482028.

Scruggs also e-mailed a copy of the sealed evidentiary disclosure to the Associated Press (AP). Respondents later invited an AP correspondent to their home to conduct an on-the-record interview. On August 26, 2006, the AP published an article entitled "Sisters Blew Whistle on Katrina Claims," which contained quotations from both Cori and Kerri Rigsby (but none from Scruggs) alleging misconduct on the part of State Farm identical to that alleged in the sealed evidentiary disclosure. The article stated that "the first of Scruggs' cases against State Farm is scheduled to be tried early next year" and that "the Rigsbys' cooperation has been invaluable in building [that] case." Michael Kunzelman, *Sisters Blew Whistle on Katrina Claims*, The Associated Press (Aug. 26, 2006).

On September 16, 2006, respondents met with Congressman Gene Taylor. Only five days later, in remarks published in the *Congressional Record*, Congressman Taylor recalled his meeting with respondents and announced—on the floor of the House of Representatives—that State Farm had not only misled policy holders, but had "stole[n] from the taxpayers" because "[f]lood insurance is paid through you, the taxpayers." 152 CONG. REC. H6903-02 (Sept. 21, 2006) (statement of Rep. Taylor). Accusing State Farm of "commit[ing] fraud against the United States Government," Congressman Taylor explained that State Farm's conduct in attributing wind damage to flood waters "broke the law, because under the False Claims Act, when you ask your

Nation to pay a bill that it should not pay, you are liable for triple damages and a $10,000-per-incident fine." *Ibid.*[4]

Even if respondents had no personal involvement in violating the seal—and they clearly did—the actions of respondents' attorney are imputed to them. *See, e.g., Pioneer Inv. Services Co. v. Brunswick Associates Ltd.*, 507 U.S. 380, 397 (1993) ("Petitioner voluntarily chose this attorney as his representative in the action and he cannot now avoid the consequences of the acts … of this freely selected agent.") (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962)); *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005) ("[A]ttorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client."). As this Court has consistently recognized, "any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer agent." *Pioneer Inv. Services*, 507 U.S. at 397 (citing *Link*, 370 U.S. at 633-34).

Contrary to the Fifth Circuit's opinion below, respondents' seal violations patently were not limited to "the context of allegations about State Farm misleading policyholders, not the federal government." Pet. App. 23a. As Congressman Taylor's comments make clear, respondents revealed

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[4] Each of these seal violations occurred before January 18, 2007, the date the panel held that the original seal was "effectively mooted" by a public filing in *E.A. Renfroe & Co. v. Cori Rigsby Moran et al.*, No. 2:06-cv-10752 (N.D. Ala. Jan. 18, 2007).

that they were alleging fraud "against the United States Government." These uncontroverted facts underscore the egregious nature of the seal violations committed in this case, which cry out for this Court's plenary review.

II. THE COURT SHOULD GRANT REVIEW TO CORRECT THE FIFTH CIRCUIT'S UNPRECEDENTED RELAXATION OF THE FCA'S SCIENTER REQUIREMENT

A. The Decision Below Contravenes the Plain Language and Clear Purpose of the FCA

"[T]he motivating purpose of the FCA is to combat and to deter fraud." *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 645 (6th Cir. 2002). In enacting the FCA as an "essentially punitive" statute, *Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 784-85 (2000), Congress deliberately chose not to impose strict liability on those who file (or cause to be filed) false claims for payment with the Government. Rather, the FCA limits liability to only those who act "knowingly." 31 U.S.C. § 3729(a)(1)(A). Under the FCA, a person acts knowingly "with respect to information" when he (1) has "actual knowledge of the information," (2) "acts in deliberate ignorance of the truth or falsity of the information," or (3) "acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1).

As the statute's plain language demonstrates, mere inadvertence, mistake, or negligence—even if sufficient to support a reasonable inference that the

claim was false—is insufficient to support a claim for a "knowing" violation of the FCA. In adopting the FCA's scienter requirements, Congress sought to ensure that "individuals and contractors receiving public funds have some duty to make a *limited* inquiry so as to be *reasonably* certain they are entitled to the money they seek." S. Rep. No. 99-345, at 20, 99th Cong. 2nd Sess. (Aug. 11, 1986) (emphasis added). At the same time, Congress sought to "assure that mere negligence, mistake, and inadvertence are *not* actionable under the False Claims Act." 132 CONG. REC. 20,536 (1986) (statement of Sen. Grassley) (emphasis added); *see United States ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("Innocent mistake is a defense to the criminal charge or civil complaint. So is mere negligence.").

Given the record evidence in this case, State Farm as a matter of law cannot possibly be said to have acted with the requisite scienter. The jury heard *no* evidence that any State Farm employee knew (or should have known) at the time of the claim that the McIntosh house was rendered a "total loss" by wind before any flood damage occurred. To the contrary, it was undisputed at trial that supervisor John Conser, the *only* State Farm employee involved with the submission of the McIntosh flood claim, made a reasonable, good-faith decision—based on the recommendations of two FEMA-certified claims adjusters (including respondent Kerri Rigsby) and his own independent, thorough review of the claim file—that the McIntosh house suffered significant flood damage. This included overwhelming video, photographic, and testimonial evidence showing that the McIntosh

house was overrun with water and revealing extensive structural damage to the house below the five-foot flood line, but very little (if any) above the flood line.

The *very most* that can be said for respondents' evidence regarding State Farm's claim on the McIntosh house is that the reimbursability of that claim is a matter over which reasonable people acting in good faith at the time could disagree. Under such circumstances, the respondents' burden to prove that State Farm "knowingly" filed a false claim fails as a matter of law. *See, e.g., Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1058 (11th Cir. 2015) ("[T]he statute makes plain that liability does not attach to innocent mistakes or simple negligence."); *United States v. SAIC*, 626 F.3d 1257, 1274 (D.C. Cir. 2010) ("Congress clearly had no intention to turn the FCA, a law designed to punish and deter fraud, into a vehicle for either 'punish[ing] honest mistakes or incorrect claims submitted through mere negligence' or imposing 'a burdensome obligation' on government contractors rather than a 'limited duty to inquire.'") (quoting S. Rep. No. 99-345, at 6, 19 (1986)).

Nonetheless, the Fifth Circuit held that State Farm could be found liable for knowingly submitting a false claim even if no State Farm employee had knowledge of underlying facts rendering the claim false, and even if no State Farm employee was aware that a false claim was being submitted. In justifying that holding, the appeals court speculated that the jury "could have" concluded that one of State Farm's flood team managers, Lecky King, had reason to believe that the McIntosh flood claim was false. But

the record is clear that King had no knowledge of—much less any involvement in—the McIntosh flood claim until several days *after* the McIntosh claim was paid. Imposing punitive FCA liability under such circumstances is flatly inconsistent with the statutory scheme established by Congress under § 3729(b).

Moreover, the FCA requires the respondents to establish a causal nexus between the allegedly false claim submitted to the government and the "knowing" or "reckless" intent to defraud. *See* 31 U.S.C. § 3729(a)(1). Even if King were "act[ing] in reckless disregard of the truth" as the panel opinion hypothesizess, Pet. App. 39a, she had *no* causal connection to the submission of the McIntosh flood claim. To the contrary, every FEMA-certified adjuster who reviewed the McIntosh flood file, including relator Kerri Rigsby, testified that the evidence given to Conser justified State Farm's payment of the flood claim. As a result, Conser's independent exercise of his good-faith, professional judgment precludes any causal nexus between King's actions and the submission of the McIntosh flood claim, thus negating the possibility that State Farm acted with the requisite scienter.

Without even a minimal showing that at least one State Farm employee had knowledge of underlying facts that rendered the McIntosh claim false at the time it was submitted, the FCA's requirement that respondents prove that State Farm "knowingly" submitted a false claim cannot possibly be satisfied. Simply put, the FCA does not provide for liability—in the form of treble damages, no less—for accidental, mistaken, or inadvertent acts or

omissions. Yet the use of collective scienter by the relators in this case would, if allowed to stand, effectively impose a negligence standard on all corporate FCA defendants in the Fifth Circuit. Such an approach to establishing scienter runs contrary to the FCA's unmistakable insistence on "knowing" fraud that goes well beyond mere negligence.

B. The Panel Improperly Relied on the Alleged "Collective Knowledge" of a Company's Employees to Establish Scienter Under the FCA

Relying on the legal fiction of State Farm's alleged, collective knowledge of a generalized scheme to falsely attribute wind damage to flood damage, the panel below imposed FCA liability on State Farm in the absence of *any* evidence that a single State Farm employee actually knew that the claim was false when it was submitted to the Government. Despite Congress's clear desire to hold defendants liable for only *knowing* falsity, deliberate ignorance, or reckless disregard, the Fifth Circuit allowed the respondents to establish scienter for a corporate defendant on the lesser basis of the combined knowledge and actions of its employees.

As the petition in makes clear, the Fifth Circuit's expansive theory of scienter has been rejected by every other circuit to have considered the question. *See, e.g., SAIC*, 626 F.3d at 1274 (holding that "collective knowledge" is an "inappropriate basis for proof of scienter" under the FCA); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 918 n.9 (4th Cir. 2003) (declining to adopt the "'collective knowledge' doctrine," which

would impermissibly "allow a plaintiff to prove scienter by piecing together scraps of 'innocent' knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds").

By premising treble-damage liability on the supposed cumulative knowledge of a company's employees, the decision below constitutes a dramatic relaxation of the FCA's scienter requirement. As this Court has noted in another context, "the malicious mental state of one agent cannot generally be combined with the harmful action of another to hold the principal liable for a tort that requires both." *Staub v. Proctor Hosp.*, 562 U.S. 411, 418 (2011) (citing RESTATEMENT (SECOND) AGENCY § 275 (1958)). In sum, "the 'collective knowledge' theory … is both unsupported and unsupportable." 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 2.08[B] at 2-248.1 (3d ed. 2009-2 Supp.).

C. This Case Is Part of a Larger Trend by the Government and Relators to Pursue a "Collective" Approach to Corporate Scienter Under the FCA

The petition raises an important, recurring question of federal law—whether a corporation may be deemed to have "knowingly" presented a false claim under the FCA based on the purported collective knowledge of employees other than the employee who made the decision to present that claim. That question is particularly salient in light of the aggressive stance both the Government and relators have taken in urging a "collective" approach

to corporate scienter under the FCA—even in the face of two adverse rulings on the question by federal appeals courts.

Corporate defendants have long fought efforts by the Government and relators to impute the purported guilty knowledge of management to the innocent actions of employees who submit to the Government what they believe in good faith are true and correct claims. In many such cases, the plaintiff seeks to impute the "scienter" of managers to those employees who actually approve and submit the claims at issue, even where no nexus exists between the managers' purportedly guilty intent and the company's submission of claims. The petition thus offers the Court an excellent opportunity to forestall further abuses by providing much needed clarity on the issue.

In *SAIC*, 626 F.3d at 1274, the D.C. Circuit squarely held that "collective knowledge" is an "inappropriate basis for proof of scienter" under the FCA. Nonetheless, on remand to the district court from that very holding, the Government continued to press an expansive theory of scienter that "would allow it to prove that SAIC knowingly submitted false claims and made false statements by piecing together 'innocent' knowledge." *United States v. SAIC*, 958 F. Supp. 2d 53, 64-65 (D.D.C. 2013) (rejecting the Government's contention that, to establish scienter, it "would not have to show that the employees ever spoke to each other, were aware of what each other knew, or recklessly disregarded the truth or falsity of their claims or statements").

Similarly, despite the Fourth Circuit's

categorical rejection of a collective theory of scienter in *Harrison*, 352 F.3d at 918 n.9, the Government went on to pursue FCA liability in that circuit against a company providing imaging services reimbursed by Medicare or Medicaid by relying on nothing more than the alleged collective knowledge of the defendant company's agents. *See, e.g., United States v. Fadul*, No. DKC 11-0385, 2013 WL 781614, at *9 (D. Md. Feb. 28, 2013) (denying the Government's summary judgment motion, which "seeks to pool together the collective knowledge of [the company's] employees … to establish that [the company] acted with actual knowledge or reckless disregard").

In other circuits, as well, the Government has persisted in arguing that "a factfinder may consider the collective knowledge of corporate employees in determining whether the corporation had the requisite *mens rea* to violate the [FCA]." Br. of the United States as *Amicus Curiae*, *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, Nos. 101474, 10-1486, 2011 WL 1108700, at *19 (10th Cir. Mar. 11, 2011); *see also United States ex rel. Fox Rx, Inc. v. Omnicare, Inc.*, No. 1:11-cv-962-WSD, 2014 WL 2158412, at * (N.D. Ga. May 23, 2014) (granting summary judgment in defendant's favor because "even if the record supported that the dispensing pharmacists had access to, and knowledge of, patient diagnoses, there is no evidence that any dispensing pharmacist had knowledge that any prescription was off-label").

Nor have relators hesitated to follow the Government's example. *See, e.g., United States ex rel. Conteh v. IKON Office Solutions, Inc.*, 27 F.

Supp. 3d 80, 89 (D.D.C. 2014) ("Not only does the complaint fail to identify a single individual responsible for submitting false claims, it also fails to identify a single false claim or statement that IKON submitted to the federal government, a deficiency that is particularly problematic due to the lack of other evidence to support the plaintiff/ relator's claim."); *United States ex rel. Dyer v. Raytheon Co.*, No. 08-10341-DPW, 2013 WL 5348571, at *26 (D. Mass. 2013) (granting summary judgment in [defendant]'s favor because "the 'collective knowledge' doctrine does not apply to FCA claims" and relator "must show that a single individual, acting on behalf of [defendant] had the requisite knowledge and approved the false claims").

The Government's relentless pursuit of collective scienter in the FCA context is especially troubling given the implications such a rule would have in a criminal context.[5] This Court has recognized that statutory language should generally receive the same interpretation in a criminal prosecution as it does in a civil context. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *United*

[5] The U.S. Criminal Code uses virtually the same language to criminalize the same behavior at issue in *qui tam* civil actions. *Compare* 31 U.S.C. § 3729 ("Any person who knowingly presents . . . a false or fraudulent claim . . . is liable to the United States Government for a civil penalty.") *with* 18 U.S.C. § 287 ("Whoever . . . presents . . . any claim . . . knowing such claim to be false, fictitious or fraudulent, shall be . . . [imprisoned not more than five years and shall be] subject to a fine."); *see also* False Claims Amendment Act of 1986, S. Rep. No. 99-345 at 24-25 (1986) (acknowledging that the facts supporting a relator's civil claim will also support a corresponding criminal charge by the Government).

States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 518 n.10 (1992). Consequently, the Fifth Circuit's "fraudulent scheme" theory of scienter would apply with equal force in criminal proceedings. Imputing such an elastic standard of scienter into a criminal context—where a defendant's liberty is at stake—would inevitably result in punishing innocent mistakes with criminal penalties or even imprisonment.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court grant the petition.

Respectfully submitted,

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