No. 16-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
ROBERT R. PURCELL, PETITIONER

v.

MWI CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

At the time of the events at issue in this case, the False Claims Act (FCA) imposed liability on those who "knowingly" engaged in specified deceptive practices involving government funds or property. See, *e.g.*, 31 U.S.C. 3729(a)(1)-(2) (2006). The FCA defined the term "knowingly" to include a defendant who "(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) (2006). Respondent MWI Corporation submitted claims for federal payments, while representing that it paid only "regular commissions" to its agents. The commissions that MWI paid to one agent were far in excess of industry standards, but consistent with the commissions that MWI had previously paid to the particular individual involved. The question presented is as follows:

Whether MWI "knowingly" engaged in deceptive practices that violated the FCA when it represented that it paid only "regular commissions" to its agents.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 3a-21a) is reported at 807 F.3d 281. Decisions of the district court (Pet. App. 22a-49a) are reported at 15 F. Supp. 3d 18 and 50 F. Supp. 3d 33.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2015. A petition for rehearing was denied on June 21, 2016 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 19, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA or Act) imposes civil liability for a variety of deceptive practices involving government funds and property. At the time of the events at issue in this case, the Act rendered liable

any person who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1) (2006); and any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," 31 U.S.C. 3729(a)(2) (2006). The FCA defined the term "knowingly" to include a defendant who "(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) (2006).[1] The FCA authorizes enforcement actions to be brought either by the United States or by a private party, commonly known as a "relator."

2. The Export-Import Bank of the United States (Ex-Im) is "an agency of the United States that finances and facilitates transactions between U.S. exporters and international buyers." Pet. App. 23a. Beginning in 1992, Ex-Im agreed to loan the Government of Nigeria $74.3 million to facilitate its purchase from respondent MWI Corporation (MWI) of irrigation pumps and related equipment. *Id.* at 5a-6a. Before approving the loan, Ex-Im required MWI to cer-

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[1] The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1621, modified and renumbered the subsections of 31 U.S.C. 3729(a) and (b). Because the allegedly fraudulent conduct at issue in this case occurred before those amendments were enacted, this brief cites the prior version of the Act. The amended versions of the relevant FCA provisions, however, do not differ substantively from their predecessors in any way relevant to this case. See Pet. App. 11a n.1.

tify that it had paid sales agents only "regular commissions or fees" in connection with the sales. *Id.* at 6a (brackets and emphasis omitted). Ex-Im required a similar certification each time it disbursed funds. "Altogether, MWI certified in fifty-eight documents that it had paid only 'regular commissions' in connection with the water pump sales." *Ibid.*

In 1998, Robert Purcell, a former employee of MWI, filed suit under the FCA. Purcell alleged that, despite its certifications, MWI had paid $28 million in commissions to its Nigerian sales agent, Alhaji Indimi. Pet. App. 6a. Purcell alleged that MWI's failure to disclose to Ex-Im those commissions, which were far in excess of industry standards, had rendered MWI's certifications false. *Ibid.* The United States intervened in the action and filed additional claims based on the unreported commissions. *Id.* at 6a-7a.

After a nine-day trial, the jury determined that MWI had knowingly presented to the government 58 false or fraudulent requests for payment, and it awarded the government $7.5 million in damages. Pet. App. 9a. In a post-trial ruling, however, the district court concluded that Nigeria's ultimate repayment of the entire $74.3 million loan, plus interest and fees, was a "compensatory" payment that had offset any damages to the government. *Ibid.* The court accordingly imposed $0 in damages, but it ordered MWI to pay $580,000 in penalties—$10,000 per violation. *Ibid.* The government appealed the court's calculation of damages; MWI cross-appealed the imposition of liability. *Id.* at 10a.

3. The court of appeals reversed. Pet. App. 3a-21a. The court observed that, because the FCA imposes liability only for "knowing" violations, the Act does

not reach claims for payment that are "based on reasonable but erroneous interpretations of a defendant's legal obligations." *Id.* at 14a. The court accordingly identified the relevant questions in this case as "whether the term 'regular commissions' is ambiguous and whether MWI's interpretation is objectively reasonable," both of which the court described as "legal questions." *Ibid.*

First, based on a dictionary definition, the court of appeals determined that "the meaning of the term 'regular commissions' is ambiguous" because "the term could imply at least three different standards: industry-wide, intra-firm, or individual-agent." Pet. App. 15a; see *id.* at 15a-16a. MWI had argued during litigation that the commissions it had paid to Indimi were "regular" under the individual-agent standard because those payments were "consistent with what had historically been paid to an individual agent." *Id.* at 7a. The court agreed that MWI "could reasonably have concluded that Indimi's commissions were regular because they were consistent with what MWI had been paying him for over twelve years." *Id.* at 16a.

The court of appeals next addressed "the factual question * * * whether there was sufficient evidence that MWI was warned away from its interpretation" by the government. Pet. App. 16a. Reviewing the record, the court found "[in]sufficient record evidence that" MWI had been "warned * * * away from the view it took." *Id.* at 17a (citation omitted). The government pointed to testimony at trial from a former employee of MWI that an Ex-Im officer "had told MWI that even though there were no definitive guidelines for commissions, they should be somewhere near five percent." *Id.* at 18a. Characterizing that instruc-

tion as "informal guidance," however, the court of appeals determined that it was "not enough to warn a regulated defendant away from an otherwise reasonable interpretation it adopted." *Ibid.*

The court of appeals reached the same conclusion with respect to testimony by MWI's employee "that he and his fellow employees knew they were applying the wrong definition of 'regular commissions' and had concerns about not disclosing Indimi's commissions in the certifications to [Ex-Im]." Pet. App. 18a. The court acknowledged that the testimony "might imply * * * that MWI did not hew to its reasonable interpretation in good faith." *Ibid.* But the court relied on a footnote in S*afeco Insurance Co. of America* v. *Burr*, 551 U.S. 47 (2007), for the proposition that "subjective intent—including bad faith—is irrelevant when a defendant seeks to defeat a finding of knowledge based on its reasonable interpretation of a regulatory term." Pet. App. 18a-19a (citing *Safeco*, 551 U.S. at 70 n.20).

Finally, the court of appeals rejected the government's argument "that because the sheer amount of these commissions—both in absolute dollar amount and percentage terms—was so much greater than those paid elsewhere, MWI must have known that they were irregular." Pet. App. 19a. In the court's view, evidence in support of that argument "might confirm that MWI's interpretation of 'regular commissions' is incompatible with [Ex-Im's] basic purposes and the government's interpretation [is] the better one." *Id.* at 20a. Nevertheless, the court held, "[t]hat MWI's interpretation may not be the best interpretation does not demonstrate that MWI's interpretation was necessarily unreasonable." *Ibid.* The court con-

cluded that, "[a]bsent evidence that the negative consequences of an interpretation render it unreasonable," the adverse consequences of adopting a particular reading "can play no role in evaluating whether an FCA defendant acted knowingly" in violating the requirement. *Ibid.*

4. The United States filed a petition for rehearing and rehearing en banc, which the court of appeals denied. Pet. App. 1a-2a; C.A. Doc. 1,620,637 (June 21, 2016).

ARGUMENT

Although the court of appeals' decision is erroneous, this case does not warrant the Court's review.

1. The FCA imposes liability on those who "knowingly" use falsehoods to seek governmental funds. 31 U.S.C. 3729(a)(1) (2006). In 1986, Congress defined the terms "knowing" and "knowingly" to "mean that a person, with respect to information—(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) (2006). That amendment was part of an effort by Congress "to make the False Claims Act a more effective weapon against Government fraud." S. Rep. No. 345, 99th Cong., 2d Sess. 4 (1986) (Senate Report). According to the Senate Report, that change and others were intended to address "ostrich-like" conduct on the part of government contractors. *Id.* at 7. The Senate Report explained that, although the FCA is not intended to "punish honest mistakes or incorrect claims submitted through mere negligence," the Act's scienter requirement should make clear "that those doing business with the Government have an obligation to make

a limited inquiry to ensure the claims they submit are accurate." *Ibid.*

Claimants that request payment from the government are often subject to statutory, regulatory, or contractual requirements. In such a case, the claimant has "knowingly" submitted a false claim if the claimant requests payment despite "actual knowledge" that the requirement was not met; if the claimant "acts in deliberate ignorance" of whether the requirement was met; or if the claimant "acts in reckless disregard" of whether the requirement was met. 31 U.S.C. 3729(b) (2006). Thus, by its terms, the FCA's definition of "knowing" and "knowingly" focuses, not merely on the objective reasonableness of the defendant's actions, but also on the defendant's mental state—including the defendant's knowledge and beliefs at the time of action.

In some cases, a governmental requirement may be reasonably susceptible to two or more possible interpretations. In such a case, the claimant may offer evidence that it relied in good faith on a particular reasonable interpretation of the requirement when it submitted its claims. Such contemporaneous evidence would tend to disprove any allegation that the claimant "knowingly" requested payment to which it was not entitled, since it would suggest that the claimant lacked "actual knowledge" of the falsity of the request, and that the claimant did not "act[] in deliberate ignorance" or "in reckless disregard" of the falsity of the request. 31 U.S.C. 3729(b) (2006).

2. In *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016), this Court disapproved, as unduly demanding, the Federal Circuit's standard for awarding enhanced damages in patent-infringement

suits. The Court stated that one flaw in the Federal Circuit's approach was that it "ma[de] dispositive the ability of the infringer to muster a reasonable (even though unsuccessful) defense at the infringement trial. The existence of such a defense insulates the infringer from enhanced damages, even if he did not act on the basis of the defense or was even aware of it." *Id.* at 1933. The Court explained that, under that approach, a person who infringes a patent "without any reason to suppose his conduct is arguably defensible" can avoid liability for enhanced damages "solely on the strength of his attorney's ingenuity." *Ibid.* The Court found that approach to be inconsistent with common-law tort principles, under which "culpability is generally measured against the knowledge of the actor at the time of the challenged conduct." *Ibid.*; see W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 34, at 212 (5th ed. 1984) (recklessness standard "look[s] to the actor's real or supposed state of mind").

Halo Electronics reinforces the conclusion that a claimant who has sought government funds in violation of applicable legal requirements cannot avoid FCA liability simply by showing, at the time of trial, that the applicable payment condition was subject to a reasonable (but mistaken) interpretation under which his claim would have been valid. A claimant may have "actual knowledge" (31 U.S.C. 3729(b)(1) (2006)) of a claim's inconsistency with applicable requirements at the time it is submitted, even if he (or his attorney) subsequently articulates a reasonable alternative view of those requirements. A claimant who consciously shields himself from knowledge of applicable requirements, or who submits claims without making any

inquiry into the legal prerequisites to payment, likewise acts with "deliberate ignorance" (31 U.S.C. 3729(b)(2) (2006)) or "reckless disregard" (31 U.S.C. 3729(b)(3) (2006)) of the governing rules.

Here, the jury was instructed that, to find MWI liable for violating the FCA, it was required to determine that MWI had "knowingly" submitted false or fraudulent claims. See Pet. App. 43a-44a. After trial, the jury found that element satisfied with respect to 58 requests for payment in which MWI had represented that it had paid only "regular commissions or fees." *Id.* at 6a (brackets and emphasis omitted). MWI asserted during this litigation that the term "regular commissions" could reasonably be understood to mean that the commissions were "consistent with what had historically been paid to an individual agent," rather than "consistent with industry-wide benchmarks." *Id.* at 7a. But the jury heard testimony from a former MWI employee "that he and his fellow employees knew they were applying the wrong definition of 'regular commissions.'" *Id.* at 18a; see *id.* at 46a ("[W]e knew that we were violating . . . the rules. We just hoped that we would never get caught.") (citation omitted). Under those circumstances, "[t]here was ample evidence to support a finding that MWI acted with, at a minimum, reckless disregard." *Id.* at 44a.

3. The court of appeals referred repeatedly to a particular interpretation of the term "regular commissions"—*i.e.*, the view that the term meant commissions consistent with those historically paid to a particular agent—as "MWI's understanding" and "MWI's interpretation" of that term. See Pet. App. 5a, 7a, 12a, 15a, 16a, 20a. It is unclear, however,

whether the court of appeals understood that view of the term "regular commissions" to be one that MWI had adopted when it submitted the relevant claims for payment, or whether the court was simply identifying that interpretation as the one that MWI had advocated during the FCA litigation.

Some language in the court of appeals' opinion suggests that the court understood or assumed that MWI had this interpretation in mind when it submitted the claims for payment on which this suit is premised. Thus, the court's statement that "MWI's understanding of the term ['regular commissions'] proved to be erroneous once the government announced the term's meaning in this litigation," Pet. App. 16a (internal quotation marks omitted), suggests that the court viewed "MWI's understanding of the term" as predating the litigation itself. The court also stated that, by declining to define the term "regular commissions" more precisely, Ex-Im had "afforded exporters such as MWI the right to rely on its reasonable interpretation of that flexible standard until [Ex-Im] (or a court, Congress, or an appropriate agency) indicates otherwise." *Id.* at 17a. The reference to MWI's "right to rely on its reasonable interpretation" suggests a belief that MWI had that interpretation in mind when it submitted the claims at issue. The court of appeals also cited this Court's decision in S*afeco Insurance Co. of America* v. *Burr*, 551 U.S. 47, 70 n.19 (2007), for the proposition that "informal guidance like the kind described here * * * is not enough to warn a regulated defendant away from an otherwise reasonable interpretation *it adopted*." Pet. App. 18a (emphasis added). The italicized language suggests an understanding that MWI had "adopted" its current inter-

pretation of the term "regular commissions" when it submitted the relevant claims. If the court's opinion is construed to reflect that understanding of the pertinent events, it does not raise the concern that a deliberate wrongdoer could escape FCA liability "solely on the strength of his attorney's ingenuity" in fashioning a reasonable (but incorrect) post hoc interpretation of the governing payment criteria. See *Halo Elecs.*, 136 S. Ct. at 1933.[2]

Elsewhere in its opinion, however, the court of appeals cited *Safeco*, 551 U.S. at 70 n.20, for the proposition "that subjective intent—including bad faith—is irrelevant when a defendant seeks to defeat a finding of knowledge based on its reasonable interpretation of a regulatory term." Pet. App. 18a-19a. That sentence could be read to mean that, so long as the defendant at trial identifies a reasonable interpretation of the pertinent payment condition under which its claim would have been valid, the fact that the defendant was unaware of that possible interpretation when it submitted its claims is irrelevant to the FCA's scienter element. If the court's opinion is read in that manner, it could create the same sort of loophole that the Court in *Halo Electronics* warned against.

This aspect of the court of appeals' opinion, however, may also be construed more narrowly. The court may simply have meant that, if an FCA defendant has identified a particular interpretation of a payment

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[2] Even assuming, however, that the court of appeals based its decision on that factual premise, the court's decision would nonetheless be erroneous. As noted above, the government presented evidence from which a reasonable jury could find that MWI did not in fact hold that interpretation when it submitted its certifications to Ex-Im. See p. 9, *supra*.

condition at the time he submits a claim for payment, and if that interpretation is found in litigation to be objectively reasonable, a finding that the defendant "knowingly" submitted a false claim cannot be premised on evidence that the defendant lacked a subjective belief that the interpretation was correct. Even that narrower holding would improperly limit the FCA's coverage, since a claimant may have "actual knowledge" (31 U.S.C. 3729(b)(1) (2006)) that his claim is false despite the fact that it rests on an objectively reasonable interpretation of the applicable payment condition. A claimant under those circumstances may also act with "deliberate ignorance" (31 U.S.C. 3729(b)(2) (2006)) or "reckless disregard" (31 U.S.C. 3729(b)(3) (2006)) by refusing to make the limited disclosures or inquiries necessary to determine which interpretation is correct. See Pet. App. 83a ("[T]he defendants should have assumed the featherweight onus of disclosing any questionable commissions and not, in lieu thereof, drawn an imaginary line in the sand inside which to claim immunity."). But the practical consequences of this narrower error would be less severe than the consequences of holding that an objectively reasonable post hoc rationale precludes FCA liability. And even if the court of appeals had unambiguously issued the more expansive holding, the Court's subsequent decision in *Halo Electronics* would deprive that holding of continuing precedential effect. See, *e.g.*, *Perry* v. *Merit Sys. Prot. Bd.*, 829 F.3d 760, 764 (D.C. Cir.) ("[A] circuit precedent eviscerated by subsequent Supreme Court cases is no longer binding on a court of appeals.") (citation omitted), petition for cert. pending, No. 16-399 (filed Sept. 27, 2016).

4. Although the decision below is incorrect, it does not warrant this Court's review. In prior cases, the D.C. Circuit has correctly applied the FCA's scienter requirement to analogous circumstances. In *United States* v. *Science Applications International Corp.*, 626 F.3d 1257 (D.C. Cir. 2010), for instance, the court acknowledged that the defendant's representations to the government could "reasonably" be construed as truthful, *id.* at 1271, but nevertheless concluded that a jury would need to evaluate, based on evidence of the defendant's contemporaneous understanding, whether the defendant's "alleged false statements *were the result of its belief* that the entities with which it had relationships were entities wholly excluded from [the relevant] regulation," *id.* at 1272 (emphasis added; citation omitted); see *ibid.* (defendant would have to overcome evidence "that *[it] knew* that it had relationships with entities that were subject to the regulations") (emphasis added; citation and ellipsis omitted); see also *United States ex rel. K&R Ltd. P'ship* v. *Massachusetts Hous. Fin. Agency*, 530 F.3d 980, 983 (D.C. Cir. 2008) (absence of "unreasonableness" in defendant's asserted interpretation "does not preclude a finding of knowledge").

Other circuits have similarly made clear that an ambiguous regulation may give rise to liability if the defendant knew, at the time of its representations of compliance, that those representations were inconsistent with the government's understanding of the regulation. See *Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1053 (8th Cir. 2002) (*Allina*) ("If the Association shows the defendants certified compliance with the regulation knowing * * * that their actions did not satisfy the

requirements of the regulation as the [government] interpreted it, any possible ambiguity of the regulations is water under the bridge.")[3]; *United States ex rel. Oliver* v. *Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999) ("A contractor relying on a good faith interpretation of a regulation is not subject to liability, not because his or her interpretation was correct or 'reasonable' but because the good faith nature of his or her action forecloses the possibility that the scienter requirement is met."), cert. denied, 530 U.S. 1228 (2000); *Commercial Contractors, Inc.* v. *United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998) (defendant who submits "a claim based on a plausible but erroneous contract interpretation" may be held liable upon "evidence of knowledge that the claim is false or of intent to deceive").

The D.C. Circuit's characterization of subjective bad faith as "irrelevant" to scienter under the FCA thus is incorrect and inconsistent with other court of appeals decisions, both within the circuit and elsewhere. But no other court of appeals has applied the FCA to the specific interpretive issue (the meaning of "regular commissions") presented here; the scope of the court of appeals' ruling is unclear (see pp. 9-12, *supra*); and neither the D.C. Circuit nor any other court of appeals has addressed the application of *Halo*

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[3] In *United States ex rel. Donegan* v. *Anesthesia Associates of Kansas City, PC*, 833 F.3d 874 (2016), the Eighth Circuit cited the decision in this case in concluding that a relator did not establish that the defendant had knowingly failed to comply with an ambiguous regulation. See *id.* at 879-880. The Eighth Circuit did not repudiate its conclusion in *Allina* that a defendant may be held liable under the FCA if the defendant knew, at the time it requested payment, that it had not satisfied regulatory requirements as the government understood them.

Electronics to the FCA's scienter requirement. Under these circumstances, this Court's plenary review is not warranted.

Petitioner urges (Pet. 5-6) this Court to grant the petition, vacate the judgment below, and remand to the court of appeals to reconsider its decision in light of *Halo Electronics*. Although the decision below can reasonably be read in a way that would render it inconsistent with this Court's analysis in *Halo Electronics* (*i.e.*, as holding that a defendant's objectively reasonable interpretation of a pertinent payment condition defeats FCA liability even if that interpretation post-dates the submission of the claim and was developed for purposes of the litigation), it is not clear that the court of appeals intended to endorse that proposition. See pp. 9-12, *supra*. In any event, this Court's "GVR" authority traditionally has been exercised on the basis of intervening precedent that addresses the same statutory scheme as the petition for a writ of certiorari, see, *e.g.*, *United States ex rel. Nelson* v. *Sanford-Brown, Ltd.*, 136 S. Ct. 2506 (2016), and the Court in *Halo Electronics* construed the Patent Act rather than the FCA. A GVR order is not foreclosed in this situation, but the circumstances must otherwise make such an order appropriate. See *Stutson* v. *United States*, 516 U.S. 193, 195-196 (1996) (per curiam) (finding a GVR order in a criminal case appropriate, in light of intervening precedent regarding filing deadlines in bankruptcy proceedings, where an "exceptional combination of circumstances" was present and "the equities clearly favor a GVR order").

In addition, the government's petition for rehearing and rehearing en banc in this case alerted the court of appeals that this Court was "currently con-

sidering cases that implicate the proper understanding of recklessness as articulated in *Safeco*." Pet. for Reh'g 12 n.2 (citing *Halo Elecs.* and *Stryker Corp.* v. *Zimmer, Inc.*, No. 14-1520 (S. Ct.)). The court of appeals denied the government's rehearing petition in this case eight days after this Court issued its decision in *Halo Electronics*. Pet. App. 1a-2a; C.A. Doc. 1,620,637. Because the court of appeals denied rehearing and rehearing en banc without comment, it is unclear whether the court considered the potential impact of *Halo Electronics* on this case. But that chronology may reduce the likelihood that a GVR order here would serve a useful practical purpose. And because the United States is the injured party in an FCA suit, see *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000), it is well positioned to assess whether further review of a case implicating the statute is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2016