NO. 21-1326

In the
Supreme Court of the United States

UNITED STATES OF AMERICA EX. REL.
TRACY SCHUTTE AND MICHAEL YARBERRY,

Petitioners,

v.

SUPERVALU INC., et al.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the objective knowledge standard this Court articulated in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), applies in the context of the False Claims Act's scienter requirement where a claim's purported falsity turns on an ambiguous legal obligation, as all seven courts of appeals to resolve the question have uniformly concluded.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, respondents state as follows:

Albertsons Companies, Inc. ("ACI") is the parent company of the following respondents:

- AB Acquisition LLC
- Acme Markets, Inc.
- Albertson's LLC
- American Drug Stores LLC
- Jewel Food Stores, Inc.
- Jewel Osco Southwest LLC
- New Albertsons L.P. (formerly New Albertson's, Inc.)
- Shaw's Supermarket, Inc.
- Star Markets Company, Inc.

ACI is a publicly traded company on the New York Stock Exchange trading under the ticker ACI. As of the date hereof, the following have beneficial ownership of at least 10% of ACI's stock: Cerberus Capital Management, L.P.; Klaff Realty, L.P.; Funds Affiliated with Lubert-Adler; and Schottenstein Stores Corp.

United Natural Foods, Inc. ("UNFI") is the parent company of respondent Supervalu Inc. UNFI is a publicly traded company on the New York Stock Exchange trading under the ticker UNFI. As of the date hereof, BlackRock, Inc., a publicly traded company on the New York Stock Exchange trading under the ticker BLK, owns 10% or more of UNFI's stock.

Respondent Supervalu Inc. is the direct parent company of respondents SuperValu Pharmacies, Inc., and FF Acquisitions, LLC.

Respondent Supervalu Inc. is also the ultimate parent company of respondents Foodarama LLC, Shoppers Food Warehouse Corp., and SuperValu Holdings, Inc. Respondent Foodarama LLC's immediate parent company is respondent Shoppers Food Warehouse Corp. The parent company of respondent Shoppers Food Warehouse Corp. is SFW Holding Corp., and the parent company of SFW Holding Corp. is respondent Supervalu Inc.

Respondent SuperValu Holdings, Inc., was merged into UNFI Distribution Company, LLC, on July 31, 2021. The parent company of UNFI Distribution Company, LLC, is UNFI Wholesale, Inc., whose parent company is respondent Supervalu Inc.

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INTRODUCTION

This Court held in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), that a defendant cannot be deemed "a knowing or reckless violator" of a legal obligation if the obligation "allow[s] for more than one reasonable interpretation" and the defendant acted consistent with "one such interpretation." *Id.* at 70 & n.20. In the years since, seven courts of appeals have addressed whether that holding applies to the False Claims Act where the basis for a claim's purported falsity *turns on the interpretation of a legal obligation* as opposed to a factual understanding. All seven circuits have given the same answer: "Yes." Indeed, no court has ever rejected application of *Safeco*'s reasoning to the FCA where (as here) falsity turns not on a question of *fact*, but on a question of *law*, *i.e.*, where falsity turns on whether a claimant complied with an ambiguous legal obligation for which there had been no authoritative interpretation—which is the only context in which *Safeco*'s holding is relevant.

Faced with overwhelming appellate consensus, petitioners dissemble. They claim circuits are divided over whether to interpret the FCA's scienter provision in line with *Safeco*'s objective standard. But all the cases petitioners point to that looked to subjective intent in the scienter analysis are cases in which *falsity turned on a question of fact*—which means all of them are cases in which *Safeco* has no application in the first place. The fact that circuits have (correctly) declined to apply *Safeco*'s objective scienter standard outside *Safeco*'s limited ambit is not evidence of conflict; it is evidence that—unlike petitioners—the courts of appeals understand the law.

In any event, even petitioners ultimately admit that no circuit has ever held that *Safeco*'s standard is inapplicable to the FCA in cases where falsity turns on an ambiguous legal obligation. There is no circuit split.

Nor is there any other reason for this Court to intervene. The FCA imposes "essentially punitive" liability in the form of treble damages and per-claim civil penalties. *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). To impose punitive liability on one who acted consistent with a reasonable but erroneous interpretation of a "less-than-pellucid" obligation, and who was not "warned … away" from such conduct by authoritative guidance, would "defy history and current thinking," *Safeco*, 551 U.S. at 70 n.20, and raise serious constitutional "concerns about fair notice and open-ended liability," *Universal Health Servs. Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 192 (2016). That explains why all courts to confront the issue have rejected petitioners' sweeping view of FCA liability.

It also gives the lie to petitioners' caricature of "the practical consequences of th[e] rule" all circuits to date have adopted. Pet.3. Petitioners protest that "the Seventh Circuit's interpretation" (the interpretation of every circuit to address the issue) "will enable a vast number of fraudsters." Pet.27. As the court of appeals explained, "[t]hat fundamentally misapprehends *Safeco*." Pet.App.21a. Under *Safeco*, defendants find no refuge in objectively *un*reasonable interpretations, or even reasonable interpretations contradicted in real time by authoritative guidance. *Safeco* "does not shield bad faith defendants that turn

a blind eye to guidance indicating that their practices are likely wrong. Nor does *Safeco*'s standard excuse a company if its executive decisionmakers attempted to remain ignorant of the company's claims processes and internal policies." Pet.App.22a. All it does is ensure that defendants will not be saddled with treble damages and per-claim penalties merely for adopting a wrong *but* "*not objectively unreasonable*" view of an unsettled legal obligation, *Safeco*, 551 U.S. at 69, 71 (emphasis added)—in this case, unclear and complex Medicare and Medicaid provisions, which lower courts have described as among the "most completely impenetrable texts within human experience." *Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 541 (7th Cir. 2012) (quoting *Rehab. Ass'n of Va. v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994)).

Contrary to petitioners' assertions, nothing in the FCA's text suggests a different result. The FCA restricts liability to defendants proven to have submitted a materially false claim with "actual knowledge," "deliberate ignorance," or "reckless disregard of the … falsity of the information." 31 U.S.C. §3729(b)(1)(A). The decision below is clear that actual knowledge (and reckless or deliberate disregard) of *facts* would satisfy §3729(b)(1)(A) when those facts would render the claim false under then-existing law. Pet.App.22a. But when it comes to interpretations of ambiguous legal obligations—*i.e.*, in cases within *Safeco*'s ambit—the inquiry is objective. That is not because *Safeco* lowered the bar for compliance; it is because, as *Safeco* recognizes, it is impossible to have "actual knowledge" (as opposed to suspicion or belief) of the correct interpretation of an

ambiguous legal obligation *before* the obligation has been authoritatively interpreted. Pet.App.27a.

A defendant that *knows* it is violating the law, or puts its head in the sand rather than confront the settled implications of its conduct, or engages in conduct that is objectively unreasonable even in the face of an uncertain legal obligation, or acts contrary to an authoritative interpretation of an otherwise unsettled legal obligation, faces liability under the FCA. Nothing about *Safeco* or the decision below changes that. *Safeco* does not give a free pass to cheats and fraudsters, nor make ignorance of the law a defense. It merely protects those that "cannot *know* that [their] claim is false" because "the requirements for that claim are unknown." Pet.App.21a.

This case is also just about the last context in which it would make sense to lower the bar to punitive FCA liability. Petitioners' claims relate to the so-called "usual and customary" (U&C) prescription-drug prices pharmacies report to Medicaid administrators and pharmacy benefit managers (PBMs) in seeking reimbursement. U&C generally refers to "the cash price charged to the general public" for a particular drug. Pet.App.69a. That may seem easy enough to determine in the abstract, but it is far from simple. Only "cash" prices counted toward U&C during the relevant period, so the vast majority of prices a pharmacy charged—those submitted to insurers—were excluded, notwithstanding the "U&C" moniker. Federal regulations were also silent about what it means to charge a price "to the general public." No regulation governed how ad hoc prices paid by individual customers fit into this framework—and

what little guidance existed at the time was inconsistent. Adding a(nother) layer of complexity, U&C prices could vary widely depending on the PBM contract(s) or Medicaid regulation(s) involved. Determining U&C was anything but straightforward.

Petitioners nonetheless filed suit under the FCA seeking treble damages on the theory that respondent Supervalu *knowingly* defrauded the government by submitting claims for reimbursement based on a U&C calculation that did not account for individual "price-matches"—one-off transactions by local retailers in which customers paying cash for a prescription identified a lower price at another local pharmacy, requested that a local Supervalu pharmacy match that price, and had that request individually honored. During the timeframe over which Supervalu's price-matching occurred, no court of appeals or federal agency guidance had addressed whether such one-off transactions must be counted in U&C. So although the Seventh Circuit in separate litigation ultimately decided—*after* Supervalu's price-matching program had ended—that such transactions ought to be included, the court here held that petitioners could not establish scienter because Supervalu's approach to U&C was not unreasonable, and no contrary authoritative guidance existed, at the relevant time.

That decision fully accords with the FCA's text, this Court's precedents, the decisions of every circuit to consider how to apply the FCA's scienter requirement where falsity turns on competing reasonable interpretations of a legal obligation, and basic due process. Petitioners' unalloyed policy arguments and brazen attempts to conjure division

among the circuits when none exists do not justify this Court's intervention. The petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Respondent Supervalu is a nationwide grocery chain that operates pharmacies inside many of its stores. Each Supervalu pharmacy has a retail price available to all customers who pay cash (*i.e.*, without insurance) for a prescription. Dist.Ct.Dkt. ("R.") 174-1. Supervalu also had a customer-service policy permitting its pharmacies, at a customer's request, to match prices offered by a local competitor on an individual basis, if they verified the competitor's lower price. R.164 ¶¶2, 26-27; R.166-3; R.174-6; R.174-8; R.174-13; R.176-17 ¶12. This longstanding policy, aimed toward helping under-insured customers access prescription drugs, originated in the 1980s, decades before Congress enacted Medicare Part D in 2003.

Price-matches were, by definition, an exception to Supervalu's retail price for its drugs. Supervalu did not set the price in such transactions; the price was the one the customer requested, based on a local competitor's price, which a local pharmacy honored for a specific transaction. R.174-6; R.174-13. And price-matching never approached a majority of Supervalu's overall drug sales, or even cash sales, during any year in the relevant period. Far from it: It is undisputed that, from 2006 to 2016, just 1.69% of Supervalu's total drug sales, and only 26.6% of total cash sales, involved price-matches.[1] R.188-3 at 8.

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[1] Petitioners cite Supervalu's 6.3 million price-matched sales (over a decade), Pet.6, without mentioning the denominator: *370*

Supervalu's willingness to honor price-match requests differed from across-the-board discount programs. For example, in 2006, Walmart began offering 30-day supplies of popular generics for $4. Because all Walmart customers received these lower prices automatically, Walmart reported the $4 prices as U&C. R.176-20 at 90. Some Supervalu stores similarly offered fixed discounted prices on generics, and when they did, Supervalu reported those fixed discounts as U&C for those stores. R.176-1 at 51.

Customer-requested price-matching was different. Because Supervalu did not set *any* particular price when matching, and instead deviated from its retail price only when *individual customers* specifically initiated the transaction to obtain verified prices of local competitors, Supervalu treated price-matching as an individualized exception to its retail prices, not its "usual" charge to the "general public." *See* Pet.8 (quoting documents showing Supervalu executives believed price-matching would not affect U&C if it was an "exception" and not "rule or routine").

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million total sales. *See* R.188-3 at 7. They also cite the frequency of price-matches for Supervalu's "top 50 drugs," and for a single drug, Lovastatin. Pet.6-7. But these cherry-picked examples ultimately do zero work in petitioners' argument. According to petitioners, Supervalu affected its U&C prices merely by offering any price-matching, even if *no one* ever received such prices.

B. Legal and Procedural Background

1. Contemporaneous Guidance on U&C Pricing

During the time Supervalu price-matched,[2] no court of appeals or binding agency guidance addressed whether or how price-matched transactions affected pharmacies' U&C prices. That said, the field was not empty. Multiple courts issued rulings strongly suggesting that limited discounts do not affect U&C under similar circumstances, *see* Supervalu.C.A.Br. 48-50 (citing cases), and regulators made numerous contemporaneous statements to the same effect, *see id.* at 51 (describing guidance).

As a result, major stakeholders interpreted "usual and customary" to exclude individual price-matching. For instance, the Academy of Managed Care Pharmacy, a leading nonprofit organization of pharmacists, published materials defining U&C as the "*undiscounted* price that individuals without drug coverage would pay at a retail pharmacy." Supervalu.C.A.Br. 13. So did the PBMs responsible for implementing Medicare and Medicaid, who had every incentive to keep Supervalu's reported U&C prices low. One of the largest PBMs (Express Scripts) defined U&C in its contract with Supervalu to "exclude[]" price-matching. *Id.* at 14-15. Another (CVS Caremark) responded to an inquiry by Supervalu by affirming that excluding "[p]rice matches *will not be in conflict*" with the U&C price that CVS expected Supervalu to report. R.176-29 ¶¶6-

[2] Most Supervalu chains stopped price-matching in 2013; all had stopped by December 2016. R.164 ¶¶3-4.

7 (emphasis added); R.174-25. The record is replete with similar statements from PBMs affirming that they did *not* expect pharmacies to include price-matches in reported U&C prices.

State regulators expressed comparable views. When certain states changed their U&C definitions, Supervalu sought clarification on whether they included price-matching—and states uniformly confirmed they did not. *E.g.*, R.174-112; R.174-113. Petitioners apparently disagree with these representations, but there is no dispute that PBMs and states made them, confirming—at the very least—that there was uncertainty over whether individual price-matches affected U&C prices.

2. The Seventh Circuit's *Garbe* Decision

Against this backdrop, the Seventh Circuit in 2016 became the first court of appeals to provide guidance about how discount programs—albeit not price-matching specifically—affect U&C pricing. *See United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632 (7th Cir. 2016). At issue in *Garbe* was Kmart's membership-club program, under which Kmart offered specific drugs at pre-set prices to all members. Unlike here, Kmart's membership-club program was pervasive, and so were the discounts it generated: At least *89%* of Kmart's cash sales were at the pre-set membership-club prices. *United States ex rel. Garbe v. Kmart Corp.*, 73 F.Supp.3d 1002, 1018 n.10 (S.D. Ill. 2014). Given the ubiquity of membership-club transactions, the Seventh Circuit held that these pre-set prices were Kmart's U&C prices because they were

"the lowest prices for which its drugs were widely and consistently available." *Garbe*, 824 F.3d at 645.

The *Garbe* court did not say that its conclusion was the *only* reasonable interpretation of the law; indeed, its decision to address the issue under 28 U.S.C. §1292(b) suggested otherwise. *See* 28 U.S.C. §1292(b) (permitting interlocutory review of controlling legal questions "as to which there is substantial ground for difference of opinion"); *Garbe*, 824 F.3d at 637. Nor did it address the effect of customer-initiated price-matching (like Supervalu's) on U&C. Nevertheless, all of Supervalu's chains stopped price-matching either before *Garbe* or immediately following it. R.164 ¶¶3-4.

3. The District Court's Summary Judgment Decisions Here

Following *Garbe*, petitioners moved for partial summary judgment against Supervalu. Petitioners argued that the variable competitor prices Supervalu honored (at certain times, in certain stores, for certain customers, only upon customer request, and only if verified) were Supervalu's U&C prices as a matter of law—no matter how infrequently Supervalu actually charged those prices. R.164 at 1-2, 11; R.161 at 4. Petitioners thus claimed that the U&C prices Supervalu reported to PBMs, which did not account for price-matching, were "false" because the law required the lowest price Supervalu agreed to provide to any member of the public. R.164 at 2.

The district court agreed—at least with respect to falsity—concluding that *Garbe* divined a universal meaning of U&C that included price-matched transactions. The court therefore granted partial

summary judgment for petitioners on the FCA's falsity prong. R.301 at 2; *see* 31 U.S.C. §3729(a)(1).

But *Garbe* came too late to have warned Supervalu away from its conduct. R.164 ¶¶3-4. So Supervalu moved for summary judgment on scienter, arguing that Supervalu could not have "knowingly" violated an ambiguous requirement—which had not yet been the subject of authoritative guidance—under the objective knowledge standard this Court articulated in *Safeco*. This time, the district court entered judgment for Supervalu.

On the threshold issue of *Safeco*'s applicability, the court observed that "the Seventh Circuit has not addressed whether *Safeco*'s standard … applies to the FCA," but "every court of appeals to consider the issue has held that it does." Pet.App.73a. Applying *Safeco*, the court first found Supervalu's approach to be objectively reasonable, citing multiple district courts that adopted similar interpretations and "the lack of any controlling authority at the time." Pet.App.78a. The court next found "no authoritative guidance from any court of appeals or CMS at the time the Defendants submitted the relevant claims that could have warned them away from their objectively reasonable interpretation." Pet.App.79a. That meant Supervalu could not have acted with the requisite scienter, and so the district court granted Supervalu's motion and dismissed the case.

4. The Decision Below

The Seventh Circuit affirmed. Based on a careful review of the FCA's text and this Court's precedents, the court of appeals held that *Safeco*'s interpretation of the Fair Credit Reporting Act's "similar" scienter

provision "appl[ies] with equal force to the False Claims Act's scienter provision," Pet.App.2a, 15a, where the purported falsity turns on an ambiguous legal obligation. In doing so, the court joined "[e]very other circuit court to" have considered that question. Pet.App.16a.[3]

The FCA's text dictated this result. The statute defines "knowingly" to "encompass[] three common law standards—actual knowledge, deliberate indifference, and reckless disregard." Pet.App.14a; *see* 31 U.S.C. §3729(b)(1). Under this Court's case law, "a common law term in a statute comes with a common law meaning, absent anything pointing another way." Pet.App.14a (quoting *Safeco*, 551 U.S. at 58). And there is "no statutory indicia that Congress intended the familiar, common law terms used in §3729 to differ from their common law meaning." *Id.* Just the opposite; Congress *did* incorporate common-law definitions into the FCA (with one exception not relevant here), and "Congress retained all other elements of common-law fraud that are consistent with the statutory text because there are no textual indicia to the contrary." *Id.* (quoting *Escobar*, 579 U.S. at 187 n.2). "There is no reason why the scienter standard established in *Safeco* (for violations

[3] At the time, that was at least four other circuits (the Third, Eighth, Ninth, and D.C. Circuits). The Fourth and Eleventh Circuits later expressly joined them, *United States ex rel. Olhausen v. Arriva Med. LLC*, 2022 WL 1203023, at *2 (11th Cir. Apr. 22, 2022); *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340, 344 (4th Cir. 2022), although the Fourth Circuit recently voted to vacate the panel opinion in *Sheldon* and rehear the case en banc, 2022 WL 1467710 (4th Cir. May 10, 2022); *see* pp.25-26, *infra*.

committed knowingly or with reckless disregard) should not apply to the same common law terms used in the FCA." Pet.App.15a.

The court made clear, though, that *Safeco*'s standard is "a baseline requirement" for proving scienter. Pet.App.20a. FCA defendants can defeat liability on scienter via *Safeco* only where "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation" at the time of the defendants' conduct, and no authoritative guidance warns otherwise. 551 U.S. at 70 n.20.

The court also rejected petitioners' refrain that "subjective intent matters" to knowledge under *Safeco*. Pet.31. When *Safeco* applies—*i.e.*, when the relevant legal obligations are ambiguous and nothing warned the defendant away from its reasonable interpretation—what is in dispute is not *factual* knowledge; it is "knowledge" of what unclear *legal obligations* actually require. It therefore makes no difference in that limited context whether a defendant "might suspect, believe, or intend to file a false claim." Pet.App.21a. Because a defendant "cannot *know* that its claim is false if the requirements for that claim are unknown," "[w]hen relators cannot establish the standard articulated in *Safeco*, there is no liability under the FCA." Pet.App.21a-22a. Were the rule otherwise, private parties operating under a morass of convoluted regulatory requirements would risk treble-damages *punishment* (plus civil penalties) merely for adopting a reasonable interpretation of an uncertain legal obligation later deemed erroneous.

Applying *Safeco*, the court found that "usual and customary" and "general public" were both "open to multiple interpretations," and that Supervalu's approach was reasonable. Pet.App.23a-24a. The court next looked to whether "there existed authoritative guidance that should have warned defendants away" from the challenged conduct, and found none. Pet.App.27a. Finally, the court considered and rejected the argument that, for conduct consistent with "an erroneous interpretation to be objectively reasonable, the defendant must have held that view at the time that it submitted its false claim." Pet.App.26a. Instead, consistent with uniform appellate precedent, the Seventh Circuit held that because the *Safeco* "inquiry is [ ] objective," it does not turn on the timing of a defendant's *subjective* legal interpretation. Pet.App.27a; *see Shimon v. Equifax Info. Servs. LLC*, 994 F.3d 88, 94 (2d Cir. 2021); *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287-91 (D.C. Cir. 2015); *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 250 (3d Cir. 2012).

Judge Hamilton dissented. Like petitioners, he felt the majority had "create[d] a safe harbor for deliberate or reckless fraudsters." Pet.App.32a. But as the majority explained, that charge "fundamentally misapprehends *Safeco*." Pet.App.21a. Neither *Safeco* nor the majority "shield[s] bad faith defendants." Pet.App.22a. Defendants cannot avail themselves of the *Safeco* scienter defense *either* if they engaged in objectively unreasonable conduct *or* if they acted despite contrary authoritative guidance. *Id.* Nor does *Safeco* preclude evidence of subjective intent when the legal prohibition was clear. But when (as here) a defendant's conduct was consistent with an objectively

reasonable view of its legal obligations at the time, it is simply not *reckless* (which is the lowest scienter standard under the FCA)—and since the obligation is ambiguous, there was nothing else for the defendant to "know" at the time. Pet.App.21a.

Petitioners sought rehearing en banc, raising many of the arguments they repeat here. The Seventh Circuit denied rehearing without a single judge requesting a vote on the petition. Pet.App.88a-89a.[4]

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Split.

A. Seven courts of appeals—the Third, Fourth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits—have considered whether *Safeco*'s holding, under which a defendant cannot be deemed "a knowing or reckless violator" of a legal obligation if the obligation "allow[s] for more than one reasonable interpretation" and the defendant acted consistent with "one such [reasonable] interpretation," 551 U.S. at 70 & n.20, applies "to the False Claims Act's scienter provision" in cases of legal falsity. Pet.App.1a-2a. All seven hold that it does. Pet.App.2a; *see, e.g.*, *United States ex rel. Olhausen v. Arriva Med. LLC*, 2022 WL 1203023, at *2 (11th Cir. Apr. 22, 2022) (per curiam); *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340,

[4] On April 5, 2022, another panel of the Seventh Circuit reaffirmed the decision below, "declin[ed]" Judge Hamilton's "call to revisit [the] decision in *Schutte*," and reiterated that "[n]o court of appeals majority opinion—before or after *Schutte*—has agreed with the dissent's position that *Safeco* does not apply to the FCA." *United States ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649, 658 n.10 (7th Cir. 2022). The court then applied *Safeco* to facts that overlap with this case. *Id.* at 662-63.

344 (4th Cir. 2022), *vacated by order granting rh'g en banc*, 2022 WL 1467710 (4th Cir. May 10, 2022); *United States ex rel. Streck v. Allergan, Inc.*, 746 F.App'x 101, 106 (3d Cir. 2018); *United States ex rel. McGrath v. Microsemi Corp.*, 690 F.App'x 551, 552 (9th Cir. 2017), *cert. denied*, 138 S.Ct. 407 (2017); *United States ex rel. Donegan v. Anesthesia Assocs. of K.C.*, 833 F.3d 874, 879-80 (8th Cir. 2016); *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 290-91 (D.C. Cir. 2015), *cert. denied*, 137 S.Ct. 625 (2017). On the other side of the ledger, no circuit has declined to apply *Safeco*'s objective standard to the FCA where falsity turned on an unclear legal obligation. There simply is no "circuit split over the meaning of the FCA's scienter requirement in cases involving claims of legal falsity." Pet.13.

Petitioners nonetheless contend that four courts of appeals—the Fourth, Seventh, Eighth, and D.C. Circuits—hold that a defendant's subjective intent is *never* relevant to scienter. Pet.18-23. They further contend that the law in those circuits conflicts with the law of four other circuits—the Sixth, Ninth, Tenth, and Eleventh—which, according to petitioners, will consider subjective intent in the FCA scienter analysis. Pet.13-18. Petitioners' accounting is deeply flawed. Even taking petitioners' cases on their own terms—though many of them pre-date *Safeco* and have been overtaken by subsequent authority that petitioners fail to mention, and despite the fact that petitioners simply ignore a number of on-point circuit decisions—there is no division of authority.

What petitioners frame as conflict is simply a reflection of the limits of *Safeco*'s standard, which

petitioners either fail to grasp or fail to acknowledge. "*Safeco* simply does not reach factually false claims, where the law is clear." *Sheldon*, 24 F.4th at 350. It "is narrowly cabined" to cases in which the applicable *legal* rules are susceptible of multiple interpretations. *Id.* Evidence of subjective intent therefore remains relevant in the typical FCA case, where the rules are clear and a defendant is accused of "actual knowledge" or "deliberate ignorance" of *facts* that would render a claim false under established law. *Id.* But where the relevant law is not clear and no authoritative guidance had addressed the conduct at the time, *Safeco*'s objective standard is what governs. 551 U.S. at 70; *see, e.g.*, *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 727 (7th Cir. 2008) (explaining that "[i]t would be reckless *today*" to adopt defendant's position, but "it was not reckless … in 2003" under *Safeco*). Indeed, even the pre-*Safeco* decisions petitioners invoke are remarkably consistent with that principle, reflecting how faithfully *Safeco* interpreted the common law meanings of the FCA's scienter standard.

B. It should therefore come as no surprise that petitioners badly mischaracterize the case law, or that they have identified zero cases in *Safeco*'s ambit—*i.e.*, where defendants engaged in objectively reasonable, but erroneous, conduct under an unclear legal obligation—that nonetheless looked to subjective intent.

Petitioners claim the Eleventh Circuit "rejected" *Safeco*'s application to the FCA in *United States ex rel. Phalp v. Lincare Holdings*, 857 F.3d 1148 (11th Cir. 2017). Pet.14. The Eleventh Circuit begs to differ. That court recently expressly confirmed that it follows

Safeco's reasoning in FCA cases, just like the decision below (and every circuit to confront the issue head-on). In *Olhausen*, the Eleventh Circuit affirmed dismissal of FCA claims under *Safeco*, concluding that the relator could not "show that [the defendant] had the requisite scienter because" the defendant's position was "an objectively reasonable interpretation of the rules." 2022 WL 1203023, at *2. *Olhausen* (1) relied on *Phalp* in summarizing the standard, *see id.*; (2) made clear that the FCA's "'rigorous'" scienter requirement "ensures that FCA liability 'does not reach … claims made based on reasonable but erroneous interpretations of a defendant's legal obligations,'" *id.* (quoting *Escobar*, then *Purcell*); and (3) underscored that "the analysis of whether an interpretation of ambiguous law is reasonable is an objective one," *id.* (citing *Safeco*). That is on all fours with the decision below.

Although *Olhausen* came down after they sought certiorari, petitioners' attempt to manufacture a split based on *Phalp* is unavailing on its own terms. As the court below noted, *Phalp's* holding that "'scienter … can exist even if a defendant's interpretation is reasonable' … is not inconsistent with *Safeco*." Pet.App.16a (quoting *Phalp*, 857 F.3d at 1155). Under *Safeco*, a defendant cannot avoid liability by pointing to a "'reasonable' interpretation of an ambiguous regulation" if it has "actual knowledge of a different authoritative interpretation." *Phalp*, 857 F.3d at 1155. That is exactly what the court below held as well. Pet.App.14a-16a, 20a-22a.

Petitioners' attempt to manufacture a split with Ninth Circuit law rests on gross mischaracterizations.

Petitioners assert the Ninth Circuit adopts a "holistic approach to the scienter inquiry" that looks to subjective intent even when a defendant's interpretation of an ambiguous legal obligation was objectively reasonable and nothing warned it away, by relying on two 20-year-old cases that pre-date *Safeco*, *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457 (9th Cir. 1999), and *United States v. Mackby*, 261 F.3d 821 (9th Cir. 2001). Pet.15. But time did not stop in 2001. Since then, the Ninth Circuit has made plain that—just like the decision below (and every circuit to consider the issue)—it applies *Safeco* to FCA cases involving ambiguous legal obligations. In *McGrath*, for instance, the Ninth Circuit held that "the complaint cannot plead facts sufficient to support an inference that [the defendant] knew it had failed to comply with [the relevant legal obligations] at the time of the representation because [the defendant's] good faith interpretation … at that time was reasonable," and cited *Safeco* (and only *Safeco*) in support of that conclusion. 690 F.App'x at 552, *cert. denied*, 138 S.Ct. 407 (2017).

Perhaps petitioners failed to mention *McGrath* because it is unpublished. *See* Pet.13 (purporting to "[c]onsider[] published opinions" only). But whether a decision is published or not "carries no weight in [this Court's] decision to review the case." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987); *see, e.g.*, *Nieves v. Bartlett*, 139 S.Ct. 1715, 1721-22 (2019) (granting certiorari of unpublished decision); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (granting certiorari to resolve conflict between published opinion and "unpublished order" of another circuit). Indeed, the fact that Ninth Circuit panels apply *Safeco* to the FCA in unpublished

dispositions demonstrates that they consider the issue well-settled in their circuit. In any event, the Ninth Circuit has also applied *Safeco*'s framework to the FCA in published opinions. *See, e.g.*, *United States ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1178 (9th Cir. 2016) (applying *Safeco*, but ruling against defendants because their interpretation was not "objectively reasonable").

Petitioners' purported focus on only "published" opinions is also a feint. Petitioners ignore a long line of published Ninth Circuit cases holding that "[t]o take advantage of a disputed legal question … is to be neither deliberately ignorant nor recklessly disregardful." *E.g.*, *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996). Worse, petitioners proceed to rely on unpublished orders that they believe support their cause. The only post-*Safeco* decision petitioners cite for the proposition that "the Ninth Circuit continues to follow" its pre-*Safeco* FCA holdings is, predictably, unpublished. Pet.16 (citing *United States v. Chen*, 402 F.App'x 185 (9th Cir. 2010)).

But not even this gambit works, as *Chen* is consistent with the cases that have come after it. The reason the analysis looked different there is that falsity *did not* "*turn[] on a disputed interpretive question*," which means that *Safeco* would have been irrelevant. *Purcell*, 807 F.3d at 288 (emphasis added). In *Chen*, a doctor "bill[ed] twice each time he performed a single service." Government's Br., No. 09-16477, 2010 WL 5483795, at *2 (9th Cir. Jan. 27, 2010). Although he maintained that "he based his claims on a reasonable interpretation of the CPT

Manual," the court found his "interpretation of the CPT Manual was neither correct nor in good faith." *Chen*, 402 F.App'x at 188. There was thus no need for the court to invoke *Safeco*'s objective scienter standard, since *Safeco* does not permit defendants to take refuge in unreasonable interpretations of clear law.[5] *See* Pet.App.21a-22a. In any event, after *Chen*, the Ninth Circuit has expressly and repeatedly acknowledged that *Safeco* supplies the operative rubric for FCA scienter. *E.g.*, *McGrath*, 690 F.App'x at 552; *Swoben*, 848 F.3d at 1178. Petitioners simply ignore cases that contradict their misleading narrative.

Petitioners take the same approach with the Third Circuit. Petitioners omit Third Circuit cases altogether from their supposed four-to-four split. But that court has unequivocally applied *Safeco* to the FCA in remarkably similar circumstances. *See Streck*, 746 F.App'x at 104-08 (affirming dismissal of FCA claims under *Safeco* where relevant regulation was "susceptible to multiple interpretations," "the available scattershot guidance failed to articulate a coherent position," and the defendant's conduct was not unreasonable).

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[5] The same is true of petitioners' pre-*Safeco* cases. *See United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1144 (9th Cir. 2004) (involving clear prohibition on filing "false claims to FEMA for repairs not related" to an earthquake); *Mackby*, 261 F.3d at 828 (holding that when the legal requirements are unambiguous, it is no defense that defendant "did not know of" them); *Oliver*, 195 F.3d at 463 (holding reasonable legal interpretations do not preclude *falsity*, but "may be relevant to whether [a defendant] *knowingly* submitted a false claim" (emphasis added)).

Petitioners' description of Sixth Circuit case law is hardly any better. Petitioners claim that court "focused" in *Prather* "on the defendant's subjective understanding at the time of the alleged misconduct." Pet.17; *United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 892 F.3d 822 (6th Cir. 2018). But *Prather* has nothing to do with "legal falsity." Pet.13. Just like *Chen*, but unlike here, *Prather* involved clear regulatory obligations—which meant *Safeco* was beside the point and explains why the scienter inquiry there focused on the defendants' alleged knowledge of *facts* suggesting that their practices violated the (clear) "governing regulations." 892 F.3d at 837; *see* Pet.17 (focusing on facts, and never mentioning the legal obligation, in summarizing the decision). *Prather* is not evidence of any circuit split; it merely confirms that *Safeco*'s analysis matters only when the case involves ambiguous legal obligations, not knowledge of *facts*. Consistent with *Safeco*, in the Sixth Circuit, "[d]isputes as to the interpretation of regulations do not implicate False Claims Act liability." *United States ex rel. Swafford v. Borgess Med.*, 24 F.App'x 491, 2001 WL 1609913, at *1 (6th Cir. 2001) (per curiam).[6]

[6] The same goes for *United States ex rel. Williams v. Renal Care Group, Inc.*, 696 F.3d 518 (6th Cir. 2012), which petitioners invoke with a "cf." cite, Pet.17-18. That case did not involve unclear legal obligations. The court there considered the defendants' consultations with lawyers, *see* Pet.17-18, only because the defendants asserted an advice-of-counsel defense. Mem. ISO Defs.' MSJ, No. 3:09-v-738, 2009 WL 7058787, at *13-14 (M.D. Tenn. Aug. 25, 2009). In any event, the court granted judgment for the defendants because the defendants' *conduct*—

As for the Tenth Circuit, both cases petitioners cite affirmed scienter judgments *for defendants* with reasoning that would apply in any *Safeco* case. In *United States v. Boeing Co.*, 825 F.3d 1138 (10th Cir. 2016), the district court ruled for the defendant because the regulation at issue "could … reasonably be interpreted as allowing" the defendant's conduct, *id.* at 1145, and the court of appeals affirmed on the same basis, "reject[ing] the relators' contention that their interpretation is so indisputably correct as to render Boeing's certifications 'knowingly false as a matter of law,'" *id.* at 1151. And in *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931 (10th Cir. 2008), the court held that even if the relator's evidence "somehow did raise a weak inference that a particular defendant" intended to misrepresent the college's eligibility, "this would not be enough to reach a jury" because the ambiguity of "the applicable statutory and regulatory scheme[] preclude a reasonable jury from finding scienter." *Id.* at 951. That holding is consistent not only with *Safeco*, but with a wide body of circuit law that petitioners (again) simply ignore. *See Pack v. Hickey*, 776 F.App'x 549, 557 (10th Cir. 2019) (describing *Burlbaw* as having relied on "cases where legal uncertainty or ambiguity precluded a finding of scienter under the FCA"); *United States ex rel. Troxler v. Warren Clinic, Inc.*, 630 F.App'x 822, 825 & n.5 (10th Cir. 2015); *United States ex rel. Morton v. A Plus Benefits, Inc.*, 139 F.App'x 980, 984 (10th Cir. 2005).

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not their subjective intent—was not reckless under the (clear) governing regulations. 696 F.3d at 531.

In sum, petitioners identify no court of appeals decision in *Safeco*'s ambit that nonetheless turned on subjective intent. That is because no such case exists. Instead, every court of appeals to consider the issue has reached the same conclusion as the decision below: When falsity turns on an ambiguous legal obligation, and no authoritative guidance warned the defendant away from conduct consistent with an objectively reasonable interpretation of that obligation, subjective intent makes no difference. Pet.App.16a.

C. Unable to find any circuit decisions in conflict with the decision below, petitioners insinuate that the Fourth, Eighth, and D.C. Circuits—which petitioners concede apply *Safeco* to the FCA in the same way as the decision below in cases involving ambiguous legal obligations, *see* Pet.18-23—somehow disagree about whether "a defendant must have *actually believed* its interpretation at the time of the challenged conduct." Pet.19. Once again, petitioners' narrative belies reality.

First, "the Eighth and D.C. Circuits" could not be any *less* "vague" in rejecting petitioners' view that objective reasonableness under *Safeco* should be assessed based on a defendant's contemporaneous subjective understanding of the law. Consistent with *Safeco*, the decision below, and every other circuit to confront the issue, the Eighth Circuit requires relators to "show that there is *no* reasonable interpretation" of the law supporting the defendant's position, regardless of what the defendants may have actually believed about the law. *United States ex rel. Hixson v. Health Mgmt. Sys.*, 613 F.3d 1186, 1191 (8th Cir. 2010). D.C. Circuit law is the same, as evidenced by

Purcell, in which the court overturned a relator's jury verdict because the defendants "could reasonably have concluded" the law permitted their conduct, *despite testimony that the defendants "knew they were applying the wrong definition*." 807 F.3d at 288, 290 (emphasis added), *cert. denied*, 137 S.Ct. 625 (2017). Indeed, writing for the court, Judge Rogers made clear that "subjective intent" was legally "irrelevant," *id*. at 290, even where the objectively reasonable position defendant relied on after trial was what petitioners here deride as "post hoc," Pet.2, 25.[7]

Second, far from representing an "extreme" position, Pet.19, the decision below is consistent with how every circuit applies *Safeco*. In addition to the Eighth and D.C. Circuits, the Second and Third Circuits have also expressly "reject[ed] the proposition that a defendant must show that it actually and contemporaneously adopted a particular statutory interpretation to avail itself of the *Safeco* defense." *Shimon*, 994 F.3d at 94; *accord Fuges*, 707 F.3d at 250-51; *Van Straaten v. Shell Oil Prods. Co.*, 678 F.3d 486, 491 (7th Cir. 2012) (*Safeco* "concerns objective reasonableness, not anyone's state of mind"). Indeed, the circuits all agree on this point because *Safeco* is so clear: "Congress could not have intended" to treat as "knowing or reckless" a defendant who "followed an interpretation *that could reasonably have found*

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[7] Petitioners try to show intra-circuit ambiguity by pulling snippets of *United States ex rel. Miller v. Weston Educational, Inc.*, 840 F.3d 494 (8th Cir. 2016), and *United States v. Scientific Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010). Pet.20-21. But the legal obligations at issue in both cases were clear, which (again) is why the *Safeco* floor did not end those cases.

support in the courts, *whatever their subjective intent may have been*." *Safeco*, 551 U.S. at 70 n.20 (emphasis added); Pet.App.26a n.10.

To be sure, the Fourth Circuit recently granted rehearing en banc in *Sheldon* and vacated the panel opinion. *See* n.3, *supra*. But that act creates no circuit split, and the tally of circuit courts disagreeing with the Seventh Circuit's holding that *Safeco* applies to the FCA where falsity turns on an ambiguous legal obligation remains *zero*. Whether the Fourth Circuit may in the future depart from the consensus view—which seems unlikely given its widespread acceptance among appellate jurists, as well as its correctness—is no reason to grant review in *this* case on *these* facts.

II. The Decision Below Is Correct.

There is a good reason why every circuit to consider petitioners' arguments has rejected them. Text, precedent, and first principles all compel the conclusion that defendants that act consistent with an objectively reasonable interpretation of an ambiguous obligation, and have not been warned away from that view by a clear, authoritative source, do not "knowingly" violate the law—let alone deserve to be saddled with treble damages and penalties. That does not mean they face no consequences for an erroneous interpretation—just not *punishment* under a decidedly "punitive" statute. *See Stevens*, 529 U.S. at 784; *Escobar*, 579 U.S. at 182, 192 (FCA's "punitive" regime necessitates "strict enforcement of the Act's materiality and scienter requirements").

First, the decision below is compelled by the text of the FCA and its common-law origins. "The FCA defines 'knowingly' as encompassing three common

law standards—actual knowledge, deliberate indifference, and reckless disregard." Pet.App.14a; *see* 31 U.S.C. §3729(b)(1)(A)(i)-(iii). These familiar "common-law terms" come with their "well-settled meaning[s]," *Sekhar v. United States*, 570 U.S. 729, 732 (2013); *see Escobar*, 579 U.S. at 187 & n.2 (applying this interpretive principle to the FCA), which the Court expounded in *Safeco*.

Safeco dealt with the scienter requirement of the Fair Credit Reporting Act, 15 U.S.C. §1681n(a), which likewise had common-law origins. A consumer reporting agency may be "civilly liable" for actual, statutory, and/or punitive damages under the FCRA if it "'willfully fails'" to comply with the statute. 551 U.S. at 52 (quoting 15 U.S.C. §1681n(a)). The first question in the case was "whether willful failure covers a violation committed in reckless disregard of the [relevant] obligation." *Id.* The Court held that it does, *id.* at 56-60, "reflect[ing] common law usage, which treated actions in 'reckless disregard' of the law as 'willful' violations," *id.* at 57. The last question in the case was whether Safeco (which did violate the statute) "acted recklessly" in doing so. *Id.* at 60; *see id.* at 68-70. The Court held that it did not. "Safeco's reading of the statute, albeit erroneous, was not objectively unreasonable," *id.* at 69, and Safeco had no authoritative "guidance from the courts of appeals or the [relevant federal agency] that might have warned it away from the view it took," *id.* at 71. Safeco therefore did not act in reckless disregard of its statutory obligations, as "the common law understanding" of "reckless disregard" requires a "show[ing] that the [defendant] ran a risk of violating

the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69.

The Court's analysis did not end there. The plaintiffs "argue[d] that evidence of subjective bad faith must be taken into account in determining whether a company acted knowingly or recklessly." *Id.* at 70 n.20. The Court rejected that "argument [a]s unsound." *Id.* "Where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as *a knowing or reckless* violator." *Id.* (emphasis added). The lesson of *Safeco*, then, is that a defendant that acts consistent with an erroneous but "not objectively unreasonable" interpretation of "less-than-pellucid statutory text" does not act either "reckless[ly]" or "knowing[ly]" when no authoritative guidance "warned it away from the view it took" in real time. *Id.* at 70 & n.20.

That lesson applies with full force to the FCA and confirms that the decision below is (and the decisions of every other circuit to consider the issue are) correct. Again, the FCA's scienter provision defines "knowingly" as acting either with "actual knowledge" or recklessly ("in deliberate indifference" or "reckless disregard"). 31 U.S.C. §3729(b)(1)(A)(i)-(iii); *see Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (equating "deliberate indifference to a … risk" with "recklessly disregarding that risk," but noting that "the term recklessness is not self-defining"). The FCA's scienter provision thus tracks the analysis in *Safeco* to a T.

Petitioners' argument to the contrary, Pet.28-32, misapprehends the FCA and the law more generally.

"*Safeco* articulated an objective scienter standard for establishing willful violations, which it framed in terms of the scienter floor for that standard—reckless disregard." Pet.App.15a. Recklessness is the "scienter floor" for the FCA as well. *Id.* ("reckless disregard is the baseline scienter definition encompassed by the FCA's scienter requirement"). As *Purcell* explained in applying *Safeco* to the FCA, recklessness is "the loosest standard of knowledge." 807 F.3d at 288.

Whether "'actual knowledge' and 'deliberate ignorance' are centrally concerned with one's subjective knowledge," Pet.28, therefore makes no difference. If a defendant's conduct is not *at least* reckless, then that defendant cannot be said to have acted "knowingly" within the meaning of the FCA—regardless of what other, "*more* culpab[le]" scienter standards the statute recognizes. *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1058 n.15 (11th Cir. 2015) (emphasis added). That recklessness provides the FCA scienter floor—at least in cases involving less-than-clear legal obligations—does not make the standards above it "surplusage." Pet.29.

Petitioners also elide the key difference between cases in which scienter turns on *factual* falsity and cases in which scienter turns on the interpretation of *legal* obligations. Most cases fall in the former camp. In those mine-run cases, actual knowledge and deliberate indifference will drive the scienter analysis more often than not. But where the relevant law is unclear and no authoritative interpreter has provided on-point guidance—*i.e.*, where a case is within *Safeco*'s ambit—it would defy logic to say that a defendant *actually knew* it was acting unlawfully. After all,

there is no "correct" interpretation to "know" in such cases, only a belief that may appear correct in hindsight (or not), *after* authoritative guidance has issued. A defendant in such cases "might suspect, believe, or intend to file a false claim," but as the Seventh Circuit rightly observed, the defendant "cannot *know* that its claim is false if the requirements for that claim are unknown." Pet.App.21a. *That* is why "subjective intent" is legally irrelevant when, as here, an "interpretation … could reasonably" support the defendant's conduct and no authoritative guidance warned it away. *Safeco*, 551 U.S. at 70 n.20. A defendant can have subjective knowledge of a disputed fact, but the same is not true when it comes to an ambiguous legal obligation that has not been authoritatively interpreted—it has no one "correct" interpretation to know. *See* Pet.App.26a-27a. Indeed, that is *Chevron*'s premise: Agencies may choose among different, reasonable interpretations of ambiguous statutes, and none would be legally wrong. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 & n.11 (1984).

Were the rule otherwise, moreover, parties would risk treble-damages *punishment* (and civil penalties) for adopting a reasonable interpretation of an uncertain legal obligation later determined to be erroneous. Such a result would "defy history and current thinking," *Safeco*, 551 U.S. at 70 n.20, not to mention basic principles of fairness and due process, *see Escobar*, 579 U.S. at 192. *Safeco*'s approach "avoid[s] the potential due process problems posed by 'penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.'" *Purcell*, 807 F.3d at 287. As *Purcell* explained,

a regulator need only speak clearly and definitively to establish the predicate for FCA scienter. *Id.* at 291. *Safeco* thus also reinforces the critical values of transparency and political accountability in regulation.

In applying *Safeco* to the FCA in a case involving ambiguous legal obligations and no contrary authoritative guidance, the decision below broke no new ground. Instead, it simply gave effect to statutory text and this Court's precedents. Petitioners would have this Court do away with all of that, and "look instead to the Restatement (Second) of Torts §526, which makes subjective intent relevant to the scienter inquiry." Pet.App.16a-17a; *see* Pet.30-31. But that Restatement section "does not define 'knowingly' (or any of the common law scienter terms listed in §3729(b)(1)(A))." Pet.App.17a. "And it is a different provision than the Restatement provision that the Court referenced in *Safeco*." *Id.*; *see Safeco*, 551 U.S. at 69 (relying upon §500 ("reckless disregard")). Petitioners' plea to read "general, common law fraudulent scienter into the [FCA]" fails to take account of the "specific scienter requirement" that "Congress has willed" in §3729. Pet.App.17a. In other words, it fails to account for not just what this Court held in *Safeco*, but the text of the FCA as well.

Contra Pet.32-34, the decision below (and every other circuit-court decision to address *Safeco*'s applicability to the FCA) is fully consistent with this Court's cases more broadly. Petitioners suggest a wedge with *Escobar*'s discussion of materiality, Pet.32, but whether a statement is material to the government is a *fact* question, which is categorically

different from the question of whether a defendant can knowingly submit false claims before *the law* provides notice the claims are false. *Safeco* clearly (and correctly) answers that latter question "no." In any event, it would defy *Escobar*—which underscored that "'strict enforcement of the … scienter requirement[]'" is necessary to ensure "fair notice" and protect against "open-ended," "'essentially punitive'" "liability," 579 U.S. at 182, 192 (citations omitted)—to hold otherwise. The decision below is (and the decisions of all other circuits to weigh in are) fully consistent with those aims. Petitioners' position is not.

Petitioners' contention (at Pet.32) that the decision below conflicts with *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51 (1984), a pre-*Safeco* case, is equally unpersuasive. *Heckler* did not involve the FCA at all, and it (unsurprisingly) dealt with "a very different question" than FCA scienter. *Burlbaw*, 548 F.3d at 954-57. *Heckler* held that parties asserting equitable estoppel presumptively have notice of their legal duties. 467 U.S. at 63. Under *Safeco*, too, ignorance of the law is no defense: If a defendant's conduct was not objectively reasonable, the defendant can be liable under the FCA for recklessly disregarding the law. *Safeco* matters only when there is no single legal interpretation *to know*. *Heckler* says nothing about that.

Finally, petitioners rely on *Halo Electronics Inc. v. Pulse Electronics, Inc.*, 136 S.Ct. 1923 (2016), Pet.34, but as the Fourth and Seventh Circuits correctly observed, *Halo* "did not walk back *Safeco* or adopt a new standard for objective recklessness."

Pet.App.19a; *accord Sheldon*, 24 F.4th at 348-49. The *Halo* Court reaffirmed *Safeco*'s objective standard for "knowing or reckless violation[s]" and reiterated *Safeco*'s holding that a "showing of bad faith was not relevant absent a showing of objective recklessness." 136 S.Ct. at 1933 n*. Beyond that, *Halo* is irrelevant. *Halo* addressed a Patent Act provision that historically allowed (but does not require) damages enhancement based on "bad-faith infringement." *Id.* Infringement is a *fact* question, which is why every circuit to address the issue *even after Halo* has ruled that *Safeco* applies to the FCA. There is no daylight between this Court's cases and the decision below.

III. Petitioners' Policy Arguments Do Not Justify Review And Are Misguided Anyway.

Petitioners use colorful rhetoric to make a number of severe predictions. But their concern that the decision below (and the uniform rule among the circuits) will somehow "enable a vast number of fraudsters" to escape liability, Pet.27, "fundamentally misapprehends *Safeco*." Pet.App.21a. Under *Safeco*, defendants find no refuge in objectively *un*reasonable interpretations of the law, or even in reasonable interpretations contradicted by existing authoritative guidance. Lower courts have had no trouble rejecting *Safeco* defenses in such cases, including in many cases petitioners cite in grasping for conflicting precedent that does not exist.[8] That is for a simple reason: *Safeco* does not protect fraudsters.

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[8] *See* pp.18-22 & n.5, *supra*; *United States v. Mallory*, 988 F.3d 730, 737 (4th Cir. 2021) (*Safeco* did not apply because statute was

That explains why, despite increasingly apocalyptic predictions, Pet.23, petitioners fail to point to any real-world abuses in any of the jurisdictions that have applied *Safeco* to the FCA for years now. If the government really has been unable to prosecute meritorious FCA claims in, say, the D.C. Circuit after *Purcell* in 2015, you can bet that petitioners would have led with such evidence. That they instead resort to (wild) hypotheticals—much like the dissent below—is telling. *Safeco* would not excuse drug couriers who "assert they did not really 'know' that they were carrying drugs" or executives deliberately ignoring earnings reports alleged to be false. Pet.App.39a (Hamilton, J., dissenting). Such hyperbole conflates knowledge of *facts* with so-called "knowledge" of what an ambiguous legal obligation may or may not require.

Also telling is the fact that the government *itself* advocated for *Safeco*'s key holding, and also previously recognized that the FCA "protect[s] claimants who … rely in good faith on an objectively reasonable interpretation of a contractual or legal duty." U.S. Amicus Br., *Escobar*, No. 15-7, 2016 WL 836759, at *10 (U.S. Mar. 3, 2016); *see also, e.g.*, U.S. Amicus Br., *Safeco*, Nos. 06-84 & 06-100, 2006 WL 3336481, at *23 (U.S. Nov. 13, 2006) (arguing "[o]nly if the defendant's failure to comply with the law was *objectively reckless* would it become necessary for a court to probe … the defendant's subjective good faith" (emphasis added)).

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unambiguous and defendants "were repeatedly 'warned away from their interpretation'"); *Swoben*, 848 F.3d at 1178 (similar).

Petitioners' fears that the decision below will exempt newly-created federal programs from the FCA's protection, Pet.26-27, are equally misplaced. Once again, petitioners conflate novel *facts* with novel *law*. Just because the government creates a new program does not make the legal provisions surrounding it unclear. Under *Safeco*, the government need not "anticipate" the form of "every possible fraud." Pet.26. But as Judge Rogers explained in *Purcell*, the government generally has power to bring clarity to "its regulatory term[s] to preclude" certain interpretations. 807 F.3d at 291. "Of course, the government may instead determine that its goals are better served by not doing so, … but then the FCA may cease to be an available remedy." *Id*.

It is thus no answer to say that "a certain amount of ambiguity is inevitable in complex government programs." Pet.25. The problem *Safeco* addresses is that the FCA's damages-sharing provision creates a massive incentive for relators to treat a statute intended to punish "knowing" frauds on the government as a trap for the unwary. The decision below prevents the FCA from being used to punish (or coerce settlements from) companies that interact (indirectly) with the government, based on novel, post-hoc interpretations of complex regulations. As Judge Wilkinson put it, "it is not too much" to ask regulators to speak clearly before recovering quasi-criminal treble damages for noncompliance with ambiguous provisions. *Sheldon*, 24 F.4th at 344; *accord Purcell*, 807 F.3d at 291.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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