NO. 22-111

In the
Supreme Court of the United States

UNITED STATES OF AMERICA EX. REL.
THOMAS PROCTOR,

Petitioner,

v.

SAFEWAY, INC.,

Respondent.

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 of the courts of appeals to resolve the question have uniformly concluded.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, respondent states as follows:

The parent company of respondent Safeway Inc. is Albertsons Companies, Inc. ("ACI"). ACI and Apollo Global Management, Inc. own 10% or more of respondent's stock.

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

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 legal obligation "allow[s] for more than one reasonable interpretation," the defendant acted consistent with "one such interpretation," and no authoritative guidance warned it away from that interpretation. *Id.* at 70 & n.20. In the years since, every court of appeals to address the issue has agreed *Safeco*'s holding applies to the False Claims Act ("FCA") where the basis for a claim's purported falsity turns on the interpretation of a legal obligation as opposed to a factual understanding. 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.*, whether a claimant complied with an ambiguous legal obligation for which there had been no authoritative interpretation—the only context in which *Safeco*'s holding is relevant.

With its recent decision in *United States ex rel. Schutte v. SuperValu, Inc.*, 9 F.4th 455 (7th Cir. 2021), the Seventh Circuit joined its sister circuits in this conclusion. *Schutte* held that *Safeco* squarely applied to an FCA claim premised on a legal ambiguity. *Schutte* is currently the subject of a petition for certiorari to this Court, No. 21-1326.

In the decision below, the Seventh Circuit applied its *Schutte* decision and rejected an FCA claim under the *Safeco* standard. Petitioner acknowledges the substantial "overlap between these two cases," Pet.3, and explains "[t]his case presents the same question" as that presented by *Schutte*. Pet.i. That is true only

in the sense that this case applies *Safeco* to the FCA because circuit precedent (*Schutte*) says to do so. The decision below does not contain a reasoned decision on the question presented by this petition for certiorari, and supplies no independent reason for this Court to review a question answered uniformly by the courts of appeals—and certainly no reason to grant this case instead of, or in addition to *Schutte*, should the Court grant the *Schutte* petition.

The petition for a writ of certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

The facts of this case and the facts of the *Schutte* petition overlap for a simple reason: the petitioners in both cases challenge the "usual and customary" ("U&C") prices reported by grocery store pharmacies that are now owned by the same parent company, and the same relators' counsel brought both actions. Pet.2-3.

Respondent Safeway, like Supervalu (the respondent in *Schutte*), is a nationwide grocery chain that operates pharmacies inside many of its stores. Dist.Ct.Dkt. ("R.") 73 ¶3. And, similar to Supervalu, for several years Safeway offered two general types of customer service policies to help uninsured and underinsured customers afford prescription drugs: (1) automatic discounts, modeled after discount prices Walmart introduced, whereby Safeway lowered its own retail prices for particular drugs for the general public, and (2) programs that made lower prices available to individual customers

who took certain affirmative actions to qualify for those programs.

In the first category (Walmart-style, automatic discounts), Safeway introduced a $4 Generics Program in March 2008. R.195 at 3 (Undisputed Material Facts 15, 16, 18). Modeled after discounts Walmart had established, Safeway created a list of generic drugs priced at $4 for a 30-day supply, which it sent to participating pharmacies. *Id.* Customers did not need to take any action, like a sign-up process or affirmative request, to receive the $4 price. R.195-4 ¶4. Because all customers at participating pharmacies (uninsured and insured) automatically received the discounted prices, Safeway considered these prices to be those pharmacies' retail cash prices offered to the "general public." R.176-1 at 289-90. Accordingly, petitioner concedes that for the entirety of the $4 Generics Program, Safeway reported the $4 discounted price as participating pharmacies' U&C price for listed drugs. Pet. 5*; R.195 at 3 (UMF 18).

In the second category of prices, some Safeway pharmacies offered customer service policies (price-matching and membership-club discounts) that applied on an individualized basis depending on the decisions of particular customers. One is described at length in *Schutte*: price-matching. Like Supervalu, Safeway permitted some pharmacists to deviate from Safeway's own retail price available to all customers for a particular prescription in order to match a local competitor's price under specified circumstances. R.195-4 ¶3. By definition, price-matches were individualized exceptions made at the customer's request to Safeway's own retail drug prices. R.176-1

at 271-72. Safeway 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.195-4 ¶¶3-4. As in *Schutte*, price-matches were infrequent, amounting to just 1.4% of Safeway's prescriptions during the relevant period and only 17.6% of total cash sales. R.176-21 at 7.

In certain other divisions, Safeway also introduced a membership-club program (the only practice not explicitly at issue in *Schutte*). The membership club provided certain discounts on drugs to club members, and only club members. R.195 at 3 (UMF 25); R.195-4 ¶4. To become a member of Safeway's clubs, customers had to take affirmative steps, which provided valuable information to Safeway: (1) submit an enrollment form agreeing to terms and conditions; (2) provide contact information (including address, email, birthdate, dependents, and phone number); (3) receive email notifications about pharmacy events (subject to the customer opting out); and (4) pay without using insurance. R.195-4 ¶4; R.176-22.[1] Customers who did not affirmatively enroll in the program—whether because they did not want to agree to its terms, provide personal and contact information, or disclaim use of insurance—were not offered the program's discounts, and instead received the price set by their insurer or the retail price Safeway charged the general public. R.195-4 ¶8; R.195 ¶28.

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[1] Petitioner asserts that Safeway already had all this information, and the court of appeals repeated that allegation in its opinion, but nothing supports it.

As should surprise no one who has ever been asked to provide their email address while checking out at a counter, many customers declined to enroll. In fact, the transactions processed under Safeway's membership programs never approached a majority of its cash transactions. *See* R.178-2 at 7. According to petitioner's own expert, membership-club transactions amounted to only 2% of total prescriptions Safeway filled during the relevant period, and at most 26.9% of total cash sales. *Id.*[2] Because Safeway did not charge the membership-club prices to the general public—just to club members—Safeway did not report them to third-party payers as its U&C prices. R.176 ¶29.

B. Contemporaneous Guidance on U&C Pricing

"Usual and customary" pricing is a *contractual* term, agreed to between pharmacies and other private entities, such as Pharmacy Benefit Managers ("PBMs"). R.176-5 at 3, 7-8, 21; R.195-12 at 4. It is defined through private contracts that vary in what is

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[2] Petitioner asserts that "discounted sales accounted for a majority" of cash sales for certain years (but not for the overall ten-year period), Pet.6, but that is only because he *combined* "Club Card Sales" with "Override Cash Sales"—the latter of which included, but was not limited to, price-matches. He did the same in citing the frequency of "discounted" "top 20 generic drugs." *Id.* There is no basis for combining these different types of discounts for U&C reporting, nor assuming that they resulted in the same price. Safeway C.A.Br.11 & n.3, 52 & n.9. In any case, petitioner's cherry-picked examples do no work; he contends that merely by offering membership clubs and price-matching, Safeway affected its U&C prices, even if *no one* was ever charged those prices. *E.g.*, R.195 at 4-5.

included and excluded for purposes of determining a given pharmacy's U&C price at a given location on a given day. The term, however, admittedly excludes most commercial transactions, because most commercial transactions involve payments by insurers (whether private or government), and every definition excludes transactions that are paid for with insurance. R.195 at 3, 16. In other words, despite the terminology, a U&C price is certainly not the price usually (or customarily) charged in ordinary parlance.

During the time that Safeway's programs were in effect, no court of appeals or binding agency guidance had addressed whether or how membership-club or price-matched transactions affected pharmacies' U&C prices. But multiple courts issued rulings strongly suggesting that limited discounts do not affect U&C under similar circumstances, *see* Safeway.C.A.Br.48-52 (citing cases), and regulators made numerous contemporaneous statements to the same effect, *see id.* at 53-54 (describing guidance).

As a result, major stakeholders interpreted the phrase "usual and customary price charged to the general public" to exclude discount programs. 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." Safeway.C.A.Br.15. So did the PBMs responsible for implementing Medicare and Medicaid, who had every incentive to keep Safeway's reported U&C prices low. One of the largest PBMs (Express Scripts) defined U&C in its contract with Safeway to "include any '$4

generic' or similar programs offered on a corporate-wide, routine basis"—like the Walmart-style automatic discount program Safeway reported as U&C—and expressly "*exclude[d]* a 'Pharmacy's competitor's matched price discount [*i.e.*, price-matching], [and] cash discount networks.'" *Id.* at 16. In other words, like Safeway, Express Scripts distinguished between Walmart-style $4 programs, which affect U&C pricing, and those requiring affirmative action by customers, which do not. And it was not just Express Scripts: the record is replete with similar statements from PBMs affirming that they did *not* expect pharmacies to include membership-club prices or price-matches in reported U&C prices. *Id.* at 18-19, 54-55.

Indeed, the first court of appeals to address how certain discount programs impact U&C pricing issued its decision in 2016—*after* Safeway had already ended price-matching and its membership-club program. *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 643 (7th Cir. 2016). And that decision confirmed that no binding, on-point authority existed during the relevant period. Instead, the most the *Garbe* court could consult to interpret the requirement were: dictionary definitions of "general public"; regulations that do not mention discounts of any kind; the "policy" that federal funds be expended economically; case law interpreting a different defined term ("maximum allowable cost"); and language buried in a CMS Manual footnote (that was removed in 2013) explaining that Walmart's $4 generics are its U&C prices. *See id.* at 643-45. Based on what it viewed as the best reading of those sources, the court held Kmart's club prices should have been reported as its

U&C prices. It did not address scienter, let alone say 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").

C. The District Court's Summary Judgment Decision

The district court granted summary judgment to Safeway under the objective knowledge standard articulated in *Safeco*.[3] The court found Safeway's approach was objectively reasonable, citing multiple district courts that adopted similar interpretations and "the lack of any controlling authority at the time." C.A.SA.51-52, 60. The court then asked whether there "was 'guidance from the courts of appeals' or relevant agency 'that might have warned Safeway away from the view it took.'" C.A.SA.50. The court recognized "there was some authority in support of both parties on the issue of how membership discount and price-matching programs affect usual and customary prices," but "no guidance from the courts of appeals or binding authority from the applicable agency." C.A.SA.64. Thus, "Safeway could not recklessly or knowingly violate the law between 2006 and 2015 when the law … was not clear." C.A.SA.63. The

[3] The district court's decision does not concern the "falsity" of Safeway's claims. Because petitioner could not prove scienter, the court dismissed the case without deciding the best or "correct" reading of U&C here.

district court therefore granted Safeway's motion for summary judgment. C.A.SA.64-65.

Petitioner then filed a motion for reconsideration and to supplement the record. Petitioner belatedly sought to inject documents into the record, and raised new—and therefore waived—arguments he now repeats here. For the first time, petitioner argued that informal "notices" from PBMs and Medicaid agencies were "authoritative guidance" under *Safeco*. But because petitioner never made this argument in opposing summary judgment, he forfeited it below.[4] The district court denied petitioner's motions, R.211, and petitioner appealed.

D. The Court of Appeals' Decision

The court of appeals affirmed summary judgment in Safeway's favor on *Safeco* grounds.

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[4] Petitioner and the dissent nonetheless continue to reference PBM and state Medicaid notices without acknowledging those arguments have been forfeited, *see also* C.A.Dkt. 65 at 9, claiming they required pharmacies "to include discounts in their U&C prices." Pet.6-7. That is not what the communications said, C.A.Dkt. 65 at 10, and the PBMs they are referring to (Caremark and Medco) in fact confirmed they never considered club programs like Safeway's—which "require[] members to join or register for the program in order to obtain the special pricing"—to affect U&C prices. Safeway.C.A.Br.17-18. Similarly, petitioner references scattershot, informal newsletters from a handful of state Medicaid agencies, but each one clearly addressed Walmart-type $4 discount programs, not *customer-initiated* price matching or membership programs. *Id.* at 73-74. In any event, even taking petitioner's mischaracterizations as true, at worst those communications would only confirm there was uncertainty at the time about the impact of membership clubs and price-matching on U&C.

1. While petitioner's appeal was pending, the Seventh Circuit issued its decision in *Schutte*, resolving the central issues in petitioner's appeal. In *Schutte*, the court "determined that *Safeco* applies to the FCA's 'reckless disregard' language, and that a defendant's subjective intent is irrelevant for purposes of *that* inquiry." Pet.App.14a (emphasis added). That decision "joined every other circuit to address the issue." Pet.App.13a. As the court made clear, its holding is narrow: *Safeco* applies only when a defendant "cannot *know* that its claim is false [because] the requirements for that claim are unknown." Pet.App.15a (quoting *Schutte*, 9 F.4th at 468).

The *Schutte* court then applied *Safeco*'s standard to Supervalu's price-matching program, which, like Safeway's, permitted pharmacists to match local competitors' prices upon an individual customer's request. The court found that during the relevant time, excluding price-matches from the determination of U&C was "not inconsistent with the text of the U&C price definition," and not objectively unreasonable. 9 F.4th at 469. After all, although "[u]sual and customary" might mean the price that is "'charged' most frequently for a drug," "it could also indicate the *retail rather than discount price*." *Id.* (emphasis added). And "general public" was likewise ambiguous: it could mean "[1] discount prices qualify only if applied *to all consumers* or, alternatively, [2] if they constitute the price most frequently charged to consumers. [3] But it just as easily might encompass any discount program *offered* to the public, regardless of whether all consumers take advantage of it," as *Garbe* concluded years after the conduct in question.

Id. (emphasis added). The "U&C price definition is open to multiple interpretations," and Supervalu's was a reasonable one at the time. *Id.*

The *Schutte* court then went on to explain that even "a permissible interpretation is no defense if there existed authoritative guidance that should have warned defendants away from their erroneous interpretation." *Id.* at 471. In order to do so, authoritative guidance "must come from a source with authority to interpret the relevant text" and "be sufficiently specific to the defendant's incorrect interpretation." *Id.* Anything less would lack the authority to put a defendant on notice that it was violating an actual law in existence. But the relators pointed to nothing that satisfied that standard: only purportedly conflicting interpretations of a handful of PBMs, a few state Medicaid notices (not even binding for those states' Medicaid programs, let alone for the separate Medicare program), and a footnote in a CMS Manual addressing Walmart's automatic discounts, which differed significantly from Supervalu's price-matching, which "depended upon the pricing of local competitors" and "could vacillate." *Id.* at 472.

2. In the decision below, the Seventh Circuit applied *Schutte* to this case's similar facts and reached the same result. The court of appeals held that "[f]or the same reasons that SuperValu's interpretation of U&C—as excluding price-matching—was objectively reasonable in *Schutte*, Safeway's interpretation also passes muster here." Pet.App.17a. The "analysis [was] similar" for Safeway's discount clubs. *Id.* It "was not objectively unreasonable at the time" to conclude "that the lower prices [Safeway] offered to

discount-club participants were not 'charged to the general public' because customers were not automatically enrolled" in the program. Pet.App.17a-18a. As in *Schutte*, "an interpretation of U&C that excludes discounted prices available only to program participants 'is not inconsistent with the text of the U&C price definition.'" Pet.App.18a (quoting *Schutte*, 9 F.4th at 469). And "[i]n the absence of authoritative guidance warning that U&C must include these discounts, Safeway's interpretation was not objectively unreasonable at the time." *Id.*

Next, following the rule laid out in *Schutte*, the court examined whether authoritative guidance warned Safeway its conduct was unreasonable. Predominantly, the Seventh Circuit evaluated whether (1) "the source of the purported guidance" had the "authority to interpret the relevant text," (*i.e.*, "the courts of appeals or appropriate guidance from the relevant agency") and (2) whether "the guidance [was] specific enough to" render the defendant's interpretation unreasonable, or otherwise warn it away. Pet.App.18a-19a. Anything less would not "put a defendant on notice that its conduct is unlawful." Pet.App.19a.

The court concluded no authoritative guidance warned Safeway away from its interpretation. On that score, the court's analysis focused on "the only relevant guidance relator has identified: the CMS Manual." Pet.App.20a.[5] But in the court's view, under

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[5] The court of appeals correctly recognized that varied interpretations of the meaning of federal U&C requirements by PBMs—private parties—could not suffice as a source of authoritative guidance, as "they did not come from the agency."

the "totality of the circumstances," the footnote from the Manual was not a sufficiently authoritative statement of the law on this issue to have warned Safeway away from its otherwise reasonable position. Pet.App.23a.[6] That was so for four reasons:

First, the language petitioner relied on appeared only in "a single footnote in a fifty-seven page chapter of the voluminous Medicare Prescription Drug Benefit Manual." Pet.App.22a.

Second, the chapter where the footnote appears addressed a different issue (how a Part D enrollee's out-of-pocket costs should be calculated, not the "requirements for pharmacies seeking reimbursement under Medicare and Medicaid") for a different intended audience (insurers, not pharmacies). *Id.*

Third, "the footnote went in and out of the Manual during the relevant period," appearing in 2006 and

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Pet.App.18a. PBM contracts may define "U&C" to include (or exclude) particular types of discounts, but "doing so does not convert a 'garden-variety breach of contract' into a false claim." Pet.App.19a (quoting *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 194 (2016) (alterations omitted)). And the Medicaid notices petitioner pointed to (that were waived) were "irrelevant because Relator is not bringing claims under those states' parallel FCA statutes." Pet.App.18a n.11.

[6] The court of appeals raised but did not resolve a further doubt about whether the Manual's footnote is even specifically relevant to this case in the first place. The footnote in the Manual did not specifically address membership-club programs; it instead addressed Walmart-style automatic discounts. Nonetheless, the court considered club discounts to more closely resemble fixed discounts than price-matching, noting that it was "a closer question" whether the footnote "may have been" sufficiently specific. Pet.App.20a-21a.

removed in 2013, two years before Safeway ended its relevant programs. Pet.App.22a-23a. The court asked, rhetorically (and sensibly): "How can agency guidance be 'authoritative' under *Safeco* when that guidance no longer exists? And if CMS removed the footnote without explanation in 2013, was the footnote really 'authoritative' during the preceding years or merely illustrative?" Pet.App.23a.

Fourth, the manual was "nonbinding." Pet.App.25a. The court left "for another day whether agency guidance must *always* be binding to satisfy *Safeco*'s scienter standard"; *Safeco*'s "dicta suggest the Court might impose such a requirement," Seventh Circuit "case law lends support for such a distinction," and so too do other circuits. Pet.App.21a, 25a. And that rule makes good sense: agencies have a wide variety of ways to make statements about regulated entities' legal obligations, but only "binding interpretive guidance" has the force and effect of law such that it can settle any unclear legal obligation. *Safeco*, 551 U.S. at 70; *Purcell*, 807 F.3d at 287, 289-90.

Based on these facts, and "heed[ing] the Supreme Court's call for 'rigorous' enforcement of the FCA's scienter requirement," Pet.App.24a (quoting *Escobar*, 579 U.S. at 192), the court declined to find "that treble damages liability should hinge on a single footnote in a lengthy manual that CMS can, and did, revise at any time. Such an outcome would raise serious due process concerns because defendants may not receive adequate notice of the agency's shifting interpretation." Pet.App.23a. The court therefore affirmed the district court.

As he did in *Schutte*, Judge Hamilton dissented. The panel majority, however, declined Judge Hamilton's invitation to revisit *Schutte*, noting 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." Pet.App.13a n.9.

This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

The decision below is correct and does not conflict with the decision of any other court of appeals. Further review is unwarranted.

I. There Is No Circuit Split.

A. The courts of appeals are not divided. The Third, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits have all held that *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 asserted legal falsity. *United States ex rel. Olhausen v. Arriva Med. LLC*, 2022 WL 1203023, at *2 (11th Cir. Apr. 22, 2022) (per curiam), *petition for cert. filed Oct. 21, 2022* (No. 22-374); *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). Despite petitioner's

mistaken characterizations, no circuit has held that *Safeco* is inapplicable to the False Claims Act—not the Sixth, Ninth, or Tenth Circuits, and not the Fourth Circuit, which vacated its decision in *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340 (4th Cir. 2022), but declined to reach a contrary decision, 49 F.4th 873 (4th Cir. 2022) (en banc). As Supervalu explained in *Schutte*, where the alleged false claim rests on a question of legal falsity, "there simply is no circuit split over the meaning of the FCA's scienter requirement." Supervalu BIO.16. That remains true. Although this Court may wish to take up the issue should an outlier emerge among the circuits, there is no occasion to do so here.

Petitioner tries but fails to manufacture a circuit split. He contends, wrongly, that three courts of appeals—the Seventh, Eighth, and D.C. Circuits—hold that a defendant's subjective intent is *never* relevant to scienter. Pet.16-17. Petitioner further contends that the law in those circuits conflicts with the law in five other circuits—the Fourth, Sixth, Ninth, Tenth, and Eleventh—which, according to petitioner, will consider subjective intent in the FCA scienter analysis. Pet.13-16. Petitioner is wrong. Many of petitioner's cases predate *Safeco* and have been overtaken by subsequent authority that petitioner fails to mention. In short, there is no division of authority for this Court to resolve.

Instead, what petitioner frames as a conflict is rather a reflection of the limits of *Safeco*'s standard. As the Seventh Circuit explained in *Schutte*, its holding reflects only the FCA's "baseline requirement" for liability, or its "scienter floor." *Schutte*, 9 F.4th at

465, 467. Indeed, that fact is inherent in the court's reasoning. The court held that subjective intent is irrelevant to addressing the question *Safeco* asks: whether the legal authority supposedly prohibiting the defendant's conduct was sufficiently clear at the relevant time that it is even possible to say law existed that a defendant could meaningfully know or recklessly disregard. Supervalu BIO.16-17. "[T]hat inquiry" is purely legal and objective, and failure to meet it precludes liability. Pet.App.14a. But when a relator can clear that minimal baseline, evidence of subjective intent "remains relevant." Supervalu BIO.17. Indeed, that is why, as petitioner concedes, "the cases the respondent in *Schutte* cited" *do not* "hold that the defendant's subjective understanding and beliefs are irrelevant to the scienter inquiry" even while "they cite *Safeco*." Pet.18.

B. As in *Schutte*, it should therefore come as no surprise that petitioner has identified zero cases looking to subjective intent that fell in *Safeco*'s ambit—*i.e.*, cases where defendants engaged in objectively reasonable conduct under an unclear legal obligation later interpreted against them. An examination of petitioner's allegedly "split" cases makes this clear.

Eleventh Circuit. Petitioner insinuates the Eleventh Circuit rejected *Safeco*'s application to the FCA in *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148 (11th Cir. 2017). Pet.13. The Eleventh Circuit begs to differ. That court recently expressly confirmed that it follows *Safeco*'s reasoning in FCA cases, just like the decision in *Schutte* (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*, 579 U.S. at 192, then *Purcell*, 807 F.3d at 287-88); and (3) underscored that "the analysis of whether an interpretation of ambiguous law is reasonable is an objective one," *id.* (citing *Safeco*, 551 U.S. at 69-70). Contrary to petitioner, Pet.18, *Olhausen* did not find, let alone require, that the defendant subjectively believed the reasonable interpretation at the time: its decision denied any discovery into that question. *Id.* That is on all fours with *Schutte*, including as applied in the decision below.[7]

Petitioner's attempt to manufacture a split based on *Phalp* is unavailing on its own terms. As the *Schutte* court noted, *Phalp's* holding that "'scienter … can exist even if a defendant's interpretation is reasonable' … is not inconsistent with *Safeco*." 9 F.4th

[7] Even the relator in *Olhausen* does not agree with petitioner's gloss on that opinion, as he recently filed his own petition asserting that the Eleventh Circuit "align[ed] itself with those circuits that have imported the reasoning from *Safeco* into the FCA context." *Olhausen*, No. 22-374, Pet.3; *see also id.* at 13, 15-16, 28 (arguing *Olhausen*'s reasoning did not depend on defendants' subjective understanding of the law).

at 465 (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 *Schutte* held as well. 9 F.4th at 471. The only other Eleventh Circuit opinion petitioner cites preceded *Safeco*, and concerned the *falsity* of claims, not scienter. Pet.13; *United States ex rel. Walker v. R&F Properties of Lake Cnty., Inc.*, 433 F.3d 1349 (11th Cir. 2005) (rejecting argument that ambiguity alone "necessarily forecloses, as a matter of law, *the falsity* of claims"); *United States ex rel. Armfield v. Gills*, 2011 WL 13151974, at *16–17 (M.D. Fla. Mar. 31, 2011) (interpreting *Walker* as consistent with *Safeco*).

Ninth Circuit. Petitioner's attempt to gin up a split with Ninth Circuit law is equally meritless. Although petitioner asserts that the Ninth Circuit looks to subjective intent even when a defendant's interpretation of an ambiguous legal obligation was objectively reasonable and nothing warned it away, petitioner relies for this point 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.14. But time did not stop in 2001. Since then, the Ninth Circuit (like the Seventh Circuit below and every other circuit to consider the issue) has made plain that 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).[8] That holding is consistent with a long line of published Ninth Circuit cases, which petitioner ignores, 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).

The only other case petitioner cites from the Ninth Circuit, *United States ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161 (9th Cir. 2016), also explicitly applied *Safeco*. Pet.14. Petitioner presumes *Swoben* conflicts with *Schutte* and *Proctor* because the Ninth Circuit *rejected* defendants' *Safeco* defense on its own terms. *Id.* at 1178 (holding "CMS' clear statements … resolved any ambiguity" and therefore defendant's interpretation was not "objectively reasonable"). But that confirms that, unlike petitioner, the Ninth Circuit has no trouble recognizing *Safeco*'s limits.

Sixth Circuit. Petitioner does even less to justify placing the Sixth Circuit on the subjective intent side

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[8] Contrary to petitioner's implication (Pet.17-18), that *McGrath* is unpublished is of no significance. 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) (per curiam). In any event, the Ninth Circuit has also applied *Safeco*'s framework to the FCA in published opinions. *See, e.g.*, *Swoben*, 848 F.3d at 1178 (applying *Safeco*, but ruling against defendants because their interpretation was not "objectively reasonable").

of his supposed divide. He merely quotes *Prather* as holding that defendants acted with scienter when they "deliberately ignored" warnings that they were violating regulations. Pet.14 (quoting *United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 892 F.3d 822, 838 (6th Cir. 2018)). But just like *Swoben*, and unlike here, *Prather* involved clear regulatory obligations—which meant *Safeco* was beside the point. For that reason, *Prather*'s scienter inquiry focused on the defendants' alleged knowledge of *facts* suggesting that their practices violated the (clear) "governing regulations." 892 F.3d at 837. *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. Ctr.*, 24 F.App'x 491, 2001 WL 1609913, at *1 (6th Cir. 2001) (per curiam).

Tenth Circuit. As for the Tenth Circuit, the only case petitioner cites affirmed a scienter judgment *for the defendant* 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. That holding is consistent not only with *Safeco*, but with a wide body of circuit

law that petitioner (again) simply ignores. *See Pack v. Hickey*, 776 F.App'x 549, 557 (10th Cir. 2019) (describing "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).

Fourth Circuit. Petitioner purports to point to "[s]ubsequent developments" from the Fourth Circuit since the *Schutte* petition, but those developments have created no division of authority. In *United States ex rel. Sheldon v. Forest Labs., LLC*, 499 F. Supp. 3d 184 (D. Md. 2020), the district court dismissed an FCA complaint for failing to meet *Safeco*'s standard. *See id.* at 212 (holding relator failed to plausibly allege defendant acted with scienter where defendant's "interpretation is objectively reasonable" and "the guidance was not so clear as to warn [defendant] away from its interpretation"). The Fourth Circuit panel affirmed, "join[ing] each and every circuit that has considered *Safeco*'s applicability to the FCA." 24 F.4th at 348. Following a rehearing petition vacating the panel decision, the *en banc* court evenly divided, and affirmed the district court's judgment without opinion. 49 F.4th 873 (4th Cir. 2022). That creates no circuit split, as petitioner implicitly acknowledges. Pet.15 ("one does not count chickens before they hatch").

Petitioner is therefore forced to search for other Fourth Circuit precedent purportedly in conflict with the decision below, but again comes up empty. Pet.15. In *Mallory*, *Safeco* did not apply because the statute was unambiguous and defendants "were repeatedly

'warned away from their interpretation.'" *United States v. Mallory*, 988 F.3d 730, 737 (4th Cir. 2021) (quoting *Purcell*, 807 F.3d at 288). The same was true in *Drakeford v. Tuomey*, 792 F.3d 364 (4th Cir. 2015): falsity turned on an "either/or" proposition, and the defendant's claims were *objectively* false. *Id.* at 383-84 & n.14. And *Gugenheim*'s central holding is *Safeco* itself: that the defendant's reasonable interpretation of ambiguous regulations precluded the relator's ability to prove scienter. *United States ex rel. Gugenheim v. Meridian Senior Living, LLC*, 36 F.4th 173, 181 (4th Cir. 2022). Indeed, *Gugenheim* cited *Purcell* and the panel decision in *Sheldon* as support for its holding—cases petitioner admits are consistent with the Seventh Circuit decisions he challenges—and was joined by Judge Wilkinson, the author of the panel decision in *Sheldon*. *Id.*

In sum, petitioner identifies 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 *Schutte* and applied in 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. Finally, petitioner repeats the arguments advanced in the *Schutte* petition concerning supposed intracircuit inconsistencies in the Eighth and D.C. Circuits on application of *Safeco*. Pet.16-17. For the reasons explained in Supervalu's brief in opposition,

those circuits' precedents are entirely consistent with Seventh Circuit law, and with every other circuit, in holding that *Safeco*'s objective reasonableness inquiry does not turn on the timing of the defendant's subjective understanding of the law. Supervalu BIO.24-25; *see also Shimon v. Equifax Info. Servs. LLC*, 994 F.3d 88, 94 (2d Cir. 2021); *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 250 (3d Cir. 2012).

II. The Decision Below Is Correct.

Petitioner's remaining arguments for certiorari review attack the soundness of *Schutte*'s decision (and only secondarily the decision below). Those arguments are misplaced; both *Schutte* and the decision below are correct.

A. In *Safeco*, this Court held that an entity cannot act in reckless disregard of a statute's meaning unless its interpretation is at least "objectively unreasonable" or contrary to authoritative guidance. 551 U.S. at 69–70. *Safeco* specifically rejected the argument that the defendant's "subjective bad faith" should be taken into account in determining whether the requisite scienter was met. 551 U.S. at 70 n.20. As the *Safeco* Court explained, "[w]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.* The Court's analysis was grounded in the common law meaning of recklessness, not some peculiar feature of the Fair Credit Reporting Act ("FCRA") that would render the analysis distinct from the FCA. *Id.* at 68-70.

In *Schutte*, the Seventh Circuit correctly held that *Safeco*'s reasoning applies with equal force to the False Claims Act. As this Court pointed out in *Safeco*, "recklessness" as used in the FCRA is a common law standard. In general, "a common law term in a statute comes with a common law meaning, absent anything pointing another way." 551 U.S. at 58. There is no evidence Congress intended to treat "recklessness" any differently in the FCA. Following *Safeco*'s logic, the *Schutte* court properly accorded "reckless" its same common law meaning in the FCA as in the FCRA.

Safeco is grounded in constitutional concerns equally applicable to the FCA context. As Judge Rogers has recognized, the *Safeco* rule is necessary to avoid "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; *Escobar*, 579 U.S. at 182, 192 ("[S]trict enforcement of the" FCA's "scienter requirement[]" is necessary to ensure "fair notice" and protect against "open-ended," "essentially punitive" "liability."). For that reason, this Court has long held that "one 'is not to be subjected to a penalty unless the words of the statute plainly impose it.'" *Comm'r v. Acker*, 361 U.S. 87, 91 (1959) (quoting *Keppel v. Tiffin Sav. Bank*, 197 U.S. 356, 362 (1905)). The idea that a relator can impose "essentially punitive" liability on defendants (including per-claim penalties and treble damages) based on language buried in a footnote in an informal agency guidance document—not issued by notice and comment, directed to different entities and different issues, and that only existed for a portion of the relevant period before being removed altogether—is antithetical to due process and agency accountability.

B. Petitioner misunderstands *Safeco* and the Seventh Circuit's law applying it. Contrary to petitioner's contention, the Seventh Circuit does not think "the defendant's subjective beliefs are irrelevant to the *scienter* inquiry." Pet.23; *see also id.* at 22 (arguing Seventh Circuit "[r]educ[es] the *entire* inquiry to an objective one"). Instead, *Schutte* held that "a defendant's subjective intent is irrelevant for purposes *of [the Safeco] inquiry*," Pet.App.14a (emphasis added)—which, as the D.C. Circuit put it, only arises where "falsity turns on a disputed interpretative question" involving an unsettled legal requirement, not on disputed *facts*. *Purcell*, 807 F.3d at 288, *cert. denied*, 137 S.Ct. 625 (2017). The Seventh Circuit was clear that *Safeco* reflects only the FCA's "baseline requirement" for liability: its "scienter floor," not its scienter ceiling. *Schutte*, 9 F.4th at 465. If a relator clears that minimal baseline, the scienter standard works precisely as petitioner wishes: indeed, a defendant's subjective intent becomes not only relevant, but *the* remaining scienter issue in the case.[9] Where the FCA is used in the manner Congress intended, to punish *fraud* on par with "a defendant [who] knowingly bills the government for goods or services it did not provide," Pet.3, relators have no

[9] For the same reason, petitioner is mistaken in claiming *Schutte* is "relevant to the scope of discovery—and therefore to the conduct of every pending FCA case." Pet.20. Once a defendant makes it past a motion to dismiss, a defendant's subjective intent will always satisfy the Federal Rules' broad standard of relevance. If a court has found that a relator has sufficiently alleged a scenario satisfying *Safeco*, then evidence of subjective intent is discoverable. Petitioner points to no case ever holding otherwise.

difficulty clearing *Safeco*'s floor. In such cases, defendants often do not even raise *Safeco* at all, and if they do, courts have no problem rejecting the defense.

Petitioner also claims that "the Seventh Circuit's interpretation of the statute removes [the FCA's] teeth" because "the government cannot conceivably … close every loophole." Pet.20. But again, *Safeco* does not countenance "loopholes"; as decisions petitioner cites make clear, courts have no trouble rejecting unreasonable interpretations, or reasonable interpretations contradicted in real time by authoritative guidance. Nor is it too much to ask agencies to speak clearly before recovering quasi-criminal treble damages and penalties for noncompliance with ambiguous regulations. *Purcell*, 807 F.3d at 291; Supervalu BIO.35. If *Safeco* is "dispositive in a significant number of cases," Pet.20, that would only reflect how aggressive the relator's bar has become in seeking to wield a statute intended to punish *fraud* based on novel, post hoc interpretations of ambiguous regulations.

Next, petitioner is wrong to contend that applying *Safeco* to the FCA will immunize from liability "parties that correctly believed they were submitting false claims." Pet.24; *see also* Schutte Reply.11 (arguing "under respondents' rule, a defendant could *correctly* believe that it is violating the law—and *want* to violate the law—but escape liability" under *Safeco*) (emphasis added). Put simply, it is not possible to "correctly" believe you are violating the law when there *is no* single "correct" legal prohibition to violate, only un-authoritative, ambiguous governmental statements. In hindsight, a court may have a view

about the best reading of that authority that conflicts with the defendant's, but if the defendant's was reasonable at the time and nothing authoritative put it on notice that it was wrong, then to conclude that it recklessly disregarded the law would "defy history and current thinking." *Safeco*, 551 U.S. at 70 n.20.

Petitioner dismisses these considerations as a mere "policy objective" designed to "immuniz[e] reasonable behavior" from harsh consequences, and contends his own preferred rule better serves that "policy." Pet.24; *see also id.* at 22 (similar). That is wrong; *Safeco*'s reasoning was not motivated by policy, but by the common law and considerations of due process and fair notice. The same is true of *Schutte* and the other court-of-appeals decisions applying *Safeco* to the FCA.

Indeed, the facts of this case underscore forcefully *Safeco*'s constitutional undergirding. In this lawsuit, petitioner sought to impose punitive liability based on nothing more than a "single footnote in a lengthy manual that" went in and out of existence with no procedure whatsoever. Pet.App.23a. The court of appeals correctly held that "would raise serious due process concerns because defendants may not receive adequate notice of the agency's shifting interpretation." *See id.*

Finally, petitioner puts great weight on the government's amicus briefs, but the government has taken both sides of this issue. Supervalu BIO.34 (explaining "the government *itself* advocated for *Safeco*'s key holding"). Nor should the judiciary simply defer to the executive branch on this issue. It is this branch's role to protect the constitutional rights

of defendants against an executive branch institutionally conditioned to seek to lower the bar to punitive liability.

C. The court of appeals correctly applied the *Safeco* standard and its *Schutte* decision to this case. Here, as in *Schutte*, petitioner claims Safeway's pharmacies "knowingly" defrauded the government by misreporting their "usual and customary charges to the general public" to Medicaid administrators and pharmacy benefit managers. According to petitioner, rather than report "its 'retail' prices as its U&C prices," Pet.App.15a, Safeway should have adjusted its own U&C prices based on its willingness to match *someone else's* prices (local competitors) upon customer request. Pet.App.4a. Petitioner also alleged that Safeway should have adjusted its U&C prices based on discounts provided to only a *limited subset* of its customers who affirmatively chose to enroll in Safeway member-only clubs. In both cases, petitioners claimed that Supervalu and Safeway "knowingly" committed fraud, even though neither the relevant government agencies nor any court had ever interpreted the terms "usual and customary" and "general public" to include these sorts of discount prices—and many court decisions, government documents, and industry stakeholders had concluded the opposite.

In the face of many court decisions and agency regulations supporting Safeway's interpretation, petitioner relied principally on his mischaracterization of language buried in a CMS Manual footnote. But that footnote could not have warned Safeway away from its reasonable

interpretation of the law: it addressed a different set of issues (how plan sponsors, not pharmacies, should treat automatic discounts, as opposed to membership-club prices) and was not an authoritative statement of the law: it did not go through notice-and-comment or otherwise bind the agency in any way, and CMS could change it at any time (and, in fact, *did* in the middle of the relevant period) without any procedures. *E.g.*, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1809-10 (2019). The court therefore correctly held that "a solitary footnote in a lengthy, nonbinding manual that changed over time" was not sufficiently authoritative to have warned Safeway away from its otherwise reasonable interpretation of the law. Pet.App.25a. That decision was correct, and its reasoning not even seriously challenged here.

III. The Decision Below Is a Poor Vehicle for the Question Presented.

Petitioner treats this petition as another opportunity to re-argue the question presented in *Schutte*—whether *Safeco*'s objective standard for interpreting "reckless disregard" applies under the FCA when falsity turns on a disputed legal interpretation. But that is the question *Schutte* decided, and that the decision below merely applied. Because neither *Schutte* nor the decision below warrant further review, both petitions should be denied. Should the Court grant review of the Seventh Circuit's decision in *Schutte*, which reasonably applied *Safeco* to the FCA, there is no reason to additionally grant review in this case.

But there is an even more fundamental reason that this petition (and also the *Schutte* petition, for

that matter) presents a poor vehicle for the Court to address the issue framed by petitioner: simply put, *there is no single federal-law definition of "usual and customary" pricing* under which to assess the "defendant's contemporaneous subjective understanding or beliefs" for purposes of determining whether the defendant "'knowingly' violated the False Claims Act." Pet.i. Petitioner would have the Court consider the reasonableness of a defendant's conduct in a context where there is no controlling federal-law obligation—indeed, no single controlling definition at all—against which to judge that conduct. That would be cumbersome at best and create confusion for future application of guiding principles at worst.

The disconnect exists because of the unusual posture in which the scienter issue arose in the district court, following from the (same) district court's partial grant of summary judgment to the relators in *Schutte* on the issue of falsity. At the same time this case was pending in the district court, relators in *Schutte* (represented by the same counsel as petitioner here) convinced the same district court judge hearing this case (over defendants' objections) that federal law establishes a single, uniform federal definition of "usual and customary prices." Supervalu BIO.10-11. Federal law does nothing of the sort, but the district court accepted relators' position (based on an over-reading of language in the Seventh Circuit's decision in *Garbe*, 824 F.3d at 643-45) and entered partial summary judgment for relators in *Schutte* on the falsity element of their claim, holding that this supposedly controlling federal definition of U&C required inclusion of price-match prices. *See id.* In light of that ruling (which the district court had

advised the parties here would affect the proceedings in this case, R.211 at 6), defendants in both cases were forced to then litigate scienter on the premise that U&C has a single, platonic federal meaning, as decided by the district court.

But, in fact, there is no single meaning to "usual and customary" price, much less one commanded by federal law. Unlike the meanings of "best price" or "wholesale acquisition cost," which are universally defined in applicable statutes or regulations, federal law does not define U&C for purposes of pharmacies' price reporting to PBMs: just the opposite.[10]

Federal law *affirmatively prohibits* HHS and CMS from setting such a definition, precisely because that is a matter Congress left to be determined through individual private contractual arrangements. 42 U.S.C. § 1395w-111(i) ("Noninterference": HHS "may not interfere with the negotiations between drug manufacturers and pharmacies and [Plan] sponsors … and may not … institute a price structure for the reimbursement"). In other words, the meaning of "usual and customary" price is the subject of private negotiation between pharmacies and PBMs. The meaning can and does vary from contract to contract, and even from year to year based on the particular

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[10] The federal regulations that address U&C do so in inapposite contexts. 42 C.F.R. § 447.512(b)(2) mentions U&C, but it is a *Medicaid* regulation, that is inapplicable to Medicare Part D, and goes to *aggregate* limits on state Medicaid agency reimbursements. 42 C.F.R. § 423.100 is a backstop provision to address out-of-network pharmacies where there is no applicable contract, and no negotiated price, with a PBM/Plan Sponsor. Neither is directly at issue in this case or in *Schutte*.

PBM contract at issue. Indeed, certain contracts affirmatively made clear that price-matches and club discounts did not affect the U&C price. *See supra* at 5-7; Supervalu BIO.8-9. Others were silent.

To be sure, the variety of contractual definitions of U&C further demonstrates why Safeway's approach was at least objectively reasonable, and underscores why relators should not be able to bootstrap claims for treble damages and penalties under the False Claims Act because of ambiguity in what are private-party contracts—where not even the private counterparties are asserting Safeway was wrong. Were the Court to grant review in this case (or *Schutte*), the issue of whether a defendant's conduct was even inconsistent with the myriad agreements, with their various U&C definitions, will inevitably be raised in briefing at the merits stage—which would also mean the Court might not ever reach the question presented by petitioner. But in all events, the fact that there is not one, singular definition of U&C—much less a federal definition—is further reason to deny this petition.[11]

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[11] The variety of contractual definitions also demonstrates why this is an asymmetrical problem that would only arise from attempting to grant petitioner's requested relief. For petitioner to demonstrate that the objective-reasonableness approach to scienter requires reversal here, he would need to demonstrate as a gating matter that Safeway's approach was inconsistent with the meaning of "usual and customary" price. But he cannot do so given that there is no single meaning in the first place. By contrast, for purposes of whether the disputed conduct was objectively reasonable, the differences in contract language merely reinforce that there was ambiguity and uncertainty over the general concept of what counted for purposes of "usual and customary" pricing. And it is too late in the day for petitioner to proceed on a contract-by-contract basis; not so for defendants.

The lack of a single, controlling U&C definition makes this case (and *Schutte*) an especially poor vehicle to provide guidance on the role of a "defendant's contemporaneous subjective understanding or beliefs about the lawfulness of its conduct," Pet.i, given there is no single yardstick against which to measure the reasonableness of Safeway's disputed conduct in the first place.

CONCLUSION

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

Compare Schutte, 9 F.4th at 469 n.8 (holding relators "waived any argument on appeal that the contractual definitions of U&C price are distinct from the Medicaid regulatory definition" because they argued below that the PBM contracts did not govern the meaning of U&C) *with* Supervalu CA7 Br.23 & n.5. Indeed, after losing this case in the district court, petitioner sought to reverse course and reopen the summary judgment record, arguing the district court should proceed contract-by-contract. The district court denied that request as untimely and forfeited, R.211 at 5-7, and petitioner did not appeal that decision.

Respectfully submitted,

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