NO. 22-374

In the
Supreme Court of the United States

UNITED STATES OF AMERICA EX. REL.
TROY OLHAUSEN,

Petitioners,

v.

ARRIVA MEDICAL, LLC, ALERE, INC., AND ABBOTT LABORATORIES, INC.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether petitioner has waived the issue he raises in his petition by taking the opposite position in both courts below.

If not waived, 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 complaint's allegations of falsity turn on ambiguous legal obligations, as the 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:

Respondent Abbott Laboratories, Inc. (Abbott) is a wholly owned subsidiary of Abbott Laboratories, which is a publicly traded company on the New York Stock Exchange trading under the ticker ABT. As of the date hereof, no parent or publicly held company owns 10% or more of Abbott Laboratories' stock.

The parent company of respondent Arriva Medical, LLC (Arriva) is respondent Alere, Inc. (Alere). The parent company of respondent Alere is Abbott Laboratories. No other publicly held company owns 10% or more of Arriva's or Alere's stock.

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INTRODUCTION

Petitioner seeks review of whether the objective reasonableness standard established by this Court's decision in *Safeco* applies to False Claims Act cases in the context of pleading allegations in a complaint consistent with Federal Rule of Civil Procedure 9(b). Because he waived review of that question in both courts below, however, it is not properly presented in this case. Thus, whatever the disposition in *United States ex rel. Schutte v. Supervalu*, No. 21-1326 (cert. granted Jan. 13, 2023), this petition should be denied.

In any event, the decision below applying *Safeco* is correct and does not conflict with the law of any other circuit; indeed, petitioner can identify no court of appeals that has adopted the position he now takes. And even if he could, the judgment dismissing this case is supported on alternative grounds, including the critical fact that he makes no argument that respondents *actually violated the law* that is the predicate for the purportedly false claims. Further review of this case is unwarranted under all circumstances.

COUNTERSTATEMENT OF THE CASE

A. Petitioner's Relevant Allegations

Until it closed in 2017, Arriva was a supplier of mail-order diabetes testing supplies. Based in Florida, Arriva shipped medical supplies (such as glucose meters, blood glucose testing strips, and lancing devices) to individuals' homes. Patients or healthcare providers could order the medical supplies either by mailing a request to Arriva's Florida location or calling into several call centers that Arriva owned.

None of the call centers shipped any products to patients; they simply received patients' intake calls, medical records requests, and customer service questions. Pet.App.65-66. And although the call centers were located off-site from Arriva's Florida headquarters (in Arizona, Tennessee, and the Philippines) they were all part of a single business network under common control. Pet.App.64.

In 2013 (and again in 2016), the Centers for Medicare and Medicaid Services (CMS) awarded Arriva a contract to supply its medical products to Medicare Part B beneficiaries. Pet.App.64. Medicare Part B is a federal program that subsidizes health coverage for seniors and people with qualifying disabilities. 42 U.S.C. §§1395 *et seq*. The program covers the cost of, among other things, "durable medical equipment," prosthetics, orthotics, and other supplies ("DMEPOS" for short). 42 U.S.C. §1395k; 42 C.F.R. §414.200; 75 Fed. Reg. 52629-01, 52629 (Aug. 27, 2010).

CMS awards DMEPOS contracts based on a competitive bidding process, and has issued extensive regulations governing that process and the terms of the contracts. 42 U.S.C. §§1395w-3(a)(1), (2); 42 C.F.R. §414.400. Petitioner alleges that Arriva violated a number of those Medicare rules in the course of furnishing its medical products to Part B beneficiaries. He asserts that these supposed *regulatory violations* rendered false some unidentified and unspecified number of Arriva's alleged Medicare claims.

Accreditation Requirements. Petitioner's primary theory of liability is that Arriva insufficiently

disclosed and accredited its locations in Arizona, Tennessee, and the Philippines. Pet.6. He alleges that Arriva's non-Florida locations were "subcontractors" or separate suppliers, and therefore should have been disclosed within 10 days of Arriva entering into the contract with CMS. 42 C.F.R. §414.422(f)(1)(i). But as his complaint elsewhere concedes, the Philippines location was "incorporated as an indirect subsidiary of Alere" (Arriva's parent), and Arriva "acquired"—*i.e.*, owned—the Arizona and Tennessee locations. Pet.App.64, 118. These locations were not operated by unaffiliated "subcontractors"; they were "[c]ommonly-owned or controlled suppliers" entitled to "submit a single bid to furnish a product category" under Medicare rules. 42 C.F.R. §414.412(d)(3); *see also* 75 Fed. Reg. at 52635 (endorsing ancillary locations under the same corporate umbrella without suggesting they must be in the same physical location as the supplier's main office).

Petitioner points to a separate regulation suggesting a supplier should enroll and disclose separate physical locations it uses to "furnish" supplies "in order to bill Medicare." 42 C.F.R. §424.57(c)(24). But Arriva's call centers did not "furnish" supplies. They shipped no physical goods at all. They only *received* patient calls. No CMS guidance ever warned that such facilities needed separate accreditation. Nor did any of those locations bill Medicare; petitioner alleges all claims were routed through Arriva's headquarters, ensuring only Arriva's accredited Florida location submitted any claims to Medicare. 42 C.F.R. §424.57(c)(24); Pet.App.116-17; SAC ¶¶ 62, 211-12.

Notably, the government has been aware of these locations since at least 2013, when another relator—who worked in the Tennessee location—filed a complaint flagging Arriva's use of non-Florida locations. R.61-1, *Goodman* Initial Compl. ¶¶ 70, 86 (discussing Arriva's Tennessee location); ¶73 (alleging Defendants maintained a call center in the Philippines that performed "new patient intake, reorder, and customer service"). Yet the government *never* withheld payment on this basis. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 195 n.6 (2016). On the contrary, petitioner admits the government decided to *renew* Arriva's contract in 2016 *despite* these allegations, Pet.App.131, confirming they were not material, *Escobar*, 579 U.S. at 196.

Assignment of Benefits. Next, petitioner alleged that Arriva was "required" to obtain "Assignment of Benefits" forms from its customers, as well as their signatures on claims submitted to Medicare, as conditions of reimbursement from the Medicare program. Pet.App.75. But the regulations he cites in fact exempt Arriva from those requirements.

Generally, Medicare beneficiaries may either seek payment from Medicare directly, or assign their claim to suppliers or providers, who seek payment on the beneficiary's behalf. 42 C.F.R. §§424.34, 424.55(a). The regulations clearly state that "when payment is for services furnished by a *participating* physician or *supplier*, the beneficiary … *is not required* to assign the claim to the supplier in order for an assignment to be effective." *Id.* §424.55(c) (emphasis added).

Because Arriva had a contract with Medicare, it was a "participating supplier," and therefore was not required to obtain assignment of benefit forms. *Id.* §400.202; *see also* 69 Fed. Reg. 66236-01, 66360 (Nov. 15, 2004) (to "reduce the paperwork burden on beneficiaries and suppliers," payment must be made on an "assignment-related basis" "*regardless* of whether or not the beneficiary actually assigns the claim to the supplier" (emphasis added)).[1]

The Department's regulations also generally require a beneficiary to sign the claim, regardless of whether the beneficiary submits the claim or assigns it to the supplier. 42 C.F.R. §§424.32(a)(3), 424.36(a). But for obvious practical reasons, CMS exempted mail-order suppliers like Arriva from that requirement, too. *Id.* §424.36(c) (Suppliers "may sign the claim on the beneficiary's behalf" if the "supplier files a claim for services that involved no personal contact between the … supplier and the beneficiary.").

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[1] Petitioner concedes that "the DMEPOS competitive bidding program absolved 'participating suppliers' from providing assignments of benefits for DMEPOS items under the program." Pet.9. He nonetheless asserts that "items that are not subject to the competitive bidding program continued to require the assignment of benefits." *Id.* But the regulation applies to the *supplier*, it does not differentiate by product. It is enough that Arriva—a participating supplier—provided the service.

B. Procedural History

1. The Parties Agree *Safeco* Applies to FCA Claims, and the District Court Dismisses Petitioner's Complaint for Failure to Allege Actual Submission of Any False Claim.

Petitioner filed his complaint in 2019, alleging Arriva knowingly defrauded the federal government based on these and additional scattershot allegations of noncompliance with regulatory requirements. After the government declined to intervene, R.19, respondents moved to dismiss based on numerous legal defects: petitioner did not adequately plead any element of an FCA claim—including falsity, materiality, or scienter; petitioner failed to identify a single false claim submitted to the government; and three of petitioner's counts were independently precluded by each of the FCA's first-to-file, government-action, and public disclosure bars, as a different relator had previously raised the same claims in another case. R.33; R.61.

In general, the FCA imposes liability for material false statements made "knowingly," in presenting false claims (or causing false claims to be presented) for payment by the government. 31 U.S.C. §3729(a)(1). The FCA defines "knowingly" to include "reckless disregard of the truth or falsity of the information." *Id.* §3729(b)(1)(A)(iii). In *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), this Court held in the context of the Fair Credit Reporting Act (FCRA) that a defendant cannot be "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." *Id.* at 70 & n.20 (emphasis added).

As explained below, and as petitioner concedes, Pet.20, every circuit to consider the question directly has agreed that *Safeco*'s holding applies to FCA claims where falsity is premised on alleged violations of *legal obligations that allow for more than one reasonable interpretation*. *Safeco*'s holding is narrow. In cases involving factual disputes about falsity under clear legal obligations or where a defendant's actions are not consistent with a *reasonable* but later-rejected interpretation of a statute, *Safeco*'s reasoning does not apply, and a defendant's subjective intent is relevant to the FCA's scienter inquiry. *See infra* pp. 17-19.

Although petitioner now contends that *Safeco* does *not* apply to FCA claims at all, he consistently took the opposite position in proceedings below. In the district court, his opposition to respondents' motion to dismiss argued within *Safeco*'s framework, contending that an FCA relator need not "present a contrary 'authoritative interpretation' that would warn Defendants that their chosen interpretation was unreasonable" *unless* "Defendants' interpretation of the statutes and regulations was reasonable in the first place." R.69 at 9. In other words, petitioner agreed with the *Safeco* framework, and simply argued that he need not "provide guidance documents illustrating his points" because the rules "are not ambiguous." *Id.* at 11. Petitioner affirmatively cited and relied on *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015)—the leading D.C.

Circuit opinion applying *Safeco* to the FCA. R.69 at 10-11 (citing *Purcell*, 807 F.3d at 286-90).

The district court dismissed petitioner's amended complaint.[2] The court held that petitioner failed to "adequately allege that a fraudulent claim was in fact submitted to the Government." Pet.App.26. As the court explained, Rule 9(b) requires a party alleging fraud to "state with particularity the circumstances constituting fraud or mistake." *Id.* at 25 (quoting Fed. R. Civ. P. 9(b)). To satisfy that standard, a relator must allege "the actual submission of a false claim." *Id.* at 26. After all, the "False Claims Act does not create liability merely for a health care provider's disregard of Government regulations or improper internal policies" unless the provider ultimately "asks the Government to pay amounts it does not owe." *Id.* (quoting *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002)).

Petitioner's complaint failed to meet that standard. Petitioner "concede[d] that he did not include 'exact billing data or attach a representative

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[2] In addition to the claims at issue here, the district court also found that the FCA's first-to-file rule barred three of petitioner's other pleaded claims: that Arriva allegedly supplied products to customers whose prescriptions had lapsed, shipped devices to patients that were medically unnecessary, and made unsolicited calls to patients. Pet.App.14-25. Because those claims were based on the same alleged facts underlying a previously filed action in which (unlike here) the government had intervened, the FCA required they be dismissed with prejudice. 31 U.S.C. §3730(b)(5); *United States ex rel. Goodman v. Arriva Med. LLC*, Case No. 13-CV-00760 (M.D. Tenn. Mar. 12, 2014). On appeal, petitioner did not challenge that part of the district court's decision, so those claims are no longer live.

sample claim' that was submitted for reimbursement." Pet.App.26-27. And his allegations were a "far cry" from the requisite "necessary indicia of reliability" to support his allegation that actual false claims were submitted. *Id.* at 27-28. The court therefore dismissed petitioner's remaining claims.[3]

Petitioner moved for reconsideration and leave to amend his complaint for a fourth time. R.75 at 6. The district court denied that motion, explaining that it would not provide "a fifth bite of the apple," as petitioner already "had every opportunity to fix the deficiencies the Defendants identified…." Pet.App.37.

2. The Parties Continue to Agree *Safeco* Applies to FCA Claims, and the Court of Appeals Affirms Based on Petitioner's Failure to Allege Scienter Sufficiently.

On appeal to the Eleventh Circuit, petitioner's opening brief argued that he had adequately pled the submission of false claims under Rule 9(b), and separately spent pages arguing the complaint had adequately alleged scienter based on allegations that "Arriva had knowledge of the pertinent legal

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[3] Petitioner had also alleged that Arriva conspired with its parent companies, Alere (which acquired Arriva in 2011) and Abbott (which acquired Alere in 2017), to commit the FCA violations alleged in his complaint. Because petitioner had "fail[ed] to adequately allege underlying FCA violations," the court dismissed this claim too. Pet.App.30. But those allegations also failed for two independent reasons: (1) petitioner's complaint lacked specific allegations of any agreement, and (2) under the intra-corporate conspiracy doctrine, a claim for conspiracy cannot be asserted among wholly-owned corporate legal entities, *see Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984).

requirements" and "applicable rules at the time." CA11 Appellant Br.34, 36.

Arriva responded to petitioner's Rule 9(b) arguments, and further responded that under *Safeco*, petitioner also could not show scienter because the alleged knowledge "(a) turns on an interpretation of a regulatory requirement, (b) Arriva's conduct was consistent with a reasonable interpretation of that requirement, and (c) no authoritative guidance or interpretation of that requirement existed to warn Arriva way from its purportedly erroneous conduct." CA11 Appellee Br.44; *id.* at 45-48.

In reply, petitioner did not dispute *Safeco*'s application to the FCA. Just the opposite: petitioner continued to treat *Safeco* as the governing standard, arguing only that Arriva's interpretation was "objectively unreasonable" and contrary to "authoritative guidance." CA11 Reply.18. Indeed, petitioner affirmatively argued that *Safeco* was *consistent* with how the Eleventh Circuit interprets the FCA's scienter standard. *Id.* (arguing *Phalp* "is consistent with the Supreme Court's teachings" in *Safeco*).

The court of appeals affirmed. It held that petitioner's complaint failed to allege scienter. Pet.App.4 n.1 (noting "the parties have fully briefed the scienter issue"). Starting with the FCA's text and its prior decision in *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148 (11th Cir. 2017), the court explained a defendant must act with "actual knowledge," "deliberate ignorance," or "reckless disregard" in order to "knowingly" submit a false claim. Pet.App.4 (quoting *Phalp*, 857 F.3d at 1155).

That "rigorous" scienter element, the court explained, does not reach "claims made based on reasonable but erroneous interpretations of a defendant's legal obligations." *Id.* (quoting *Purcell*, 807 F.3d at 287-88). *Safeco* made that clear: Where "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.* (quoting *Safeco*, 551 U.S. at 70 n.20).

Applying that standard, the court held petitioner had failed to allege the requisite scienter. First, it was at least "objectively reasonable" for Arriva not to have included beneficiaries' signatures on assignment of benefit forms for its mail-order products. Pet.App.5. After all, CMS's rules expressly provide that beneficiaries are "not required to assign" their claims to a "participating supplier" like Arriva at all, and such suppliers "may sign the claim on the beneficiary's behalf" for "services that involved no personal contact between the … supplier and the beneficiary." 42 C.F.R. §§424.55(c); 424.36(c). Thus, even if a court were to later interpret those regulations as somehow requiring Arriva to obtain beneficiaries' signatures, "Olhausen cannot show that Arriva had the requisite scienter because it was an objectively reasonable interpretation of the rules to conclude that the signatures were not required." Pet.App.5. Moreover, the court noted, "a reasonable interpretation of a statute cannot support a claim under the FCA if there is *no authoritative contrary interpretation* of th[e] statute." Pet.App.5-6 (quoting *United States ex rel.*

Hixson v. Health Mgmt. Sys., Inc., 613 F.3d 1186, 1190 (8th Cir. 2010) (emphasis added)).

The same was true for petitioner's call-center allegations. The relevant regulation only requires enrollment of separate locations that "*furnish* Medicare-covered DMEPOS." Pet.App.6 (quoting 42 C.F.R. §424.57(b)(1)). And the court noted that "the term 'furnish' is not defined." *Id.* On its face, therefore, it reasonably did not apply to locations that *received* customer orders (and complaints), rather than shipped product, meaning Arriva could not have *known* its position was wrong. *Id.* In the absence of any well-pled allegations of an FCA violation, petitioner failed to allege a conspiracy, too. *Id.*

3. Petitioner's Rehearing Petition Argues for the First Time that *Safeco* Does Not Apply to FCA Claims.

Petitioner sought rehearing, arguing for the first time (and directly contrary to his prior submissions), that the Eleventh Circuit's earlier *Phalp* decision "expressly rejected" the application of *Safeco* to the FCA, and that the panel's decision in this case "creates a new escape hatch from FCA liability." Pet.App.154, 155-62. The court denied rehearing without comment. Pet.App.40-41.[4]

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[4] Despite appealing the district court's decision, petitioner also subsequently filed a "new" action, parroting allegations from the rejected proposed fourth amended complaint in this action. No. 1:21-cv-23916 (S.D. Fla.); *see* CA11 Dkt. Nos. 27-29. That action currently remains pending, even as petitioner asks this Court to review the same matter.

REASONS FOR DENYING THE WRIT

The petition should be denied for the basic, fundamental reason that petitioner waived review of the question presented. Thus, whatever the disposition of *Schutte v. Supervalu*, No. 21-1326 (cert. granted Jan. 13, 2023), no further review is appropriate here.

Regardless, the decision below is correct and does not conflict with any decision of this Court or another court of appeals. And in all events, this case would be a poor vehicle for this Court's resolution of the question that would be presented (if not waived) both based on the deficiencies in petitioner's allegations under Rule 9(b) as well as his failure to articulate a coherent theory of "falsity" in the first instance. Certiorari should be denied.

I. Petitioner Has Repeatedly Waived the Question Presented.

Petitioner has waived the ability to challenge *Safeco*'s applicability to the FCA, which warrants denial of certiorari regardless of the final disposition in *Schutte v. Supervalu* (or any other case pending before this Court).

In the district court, Arriva's motion to dismiss argued that each of petitioner's claims failed because he could not meet the FCA's objective knowledge requirement under *Safeco*. R.61 at 13-19. In response, petitioner argued only that he *could* satisfy the *Safeco* standard—not that that standard did not apply. Petitioner specifically *agreed* that "[a] statement made based on a reasonable interpretation of a statute cannot support a claim under the FCA if there is no authoritative contrary interpretation of

that statute." R.69 at 9 (quoting *United States v. Planned Parenthood of Heartland, Inc.*, 2016 WL 7474797, at *6 (S.D. Iowa June 21, 2016), itself quoting *Hixson*, 613 F.3d at 1190). Indeed, petitioner affirmatively cited the leading D.C. Circuit opinion applying *Safeco* to the FCA (*Purcell*) throughout his motion to dismiss opposition. R.69 at 10-11. And he admitted "*[t]his standard applies* only if Defendants' interpretation of the statutes and regulations was reasonable in the first place." *Id.* at 9 (emphasis added).

Petitioner argued within the *Safeco* framework that "Defendants' stated interpretations of the applicable rules and regulations were at all times unreasonable," and this, he argued, absolved him of the need to show contrary guidance (a telling concession in its own right). R.69 at 10-11, 13. In so arguing, petitioner derided Arriva's positions as "post hoc," but he admitted that is relevant only if a defendant had "actual knowledge of a different *authoritative interpretation*." *Id.* at 10 (emphasis added); *see also supra* pp.7-8.

Nowhere did petitioner argue in district court, as he does now, that *Safeco* is confined to the FCRA, Pet.32, undermines the "government's anti-fraud efforts," Pet.35, or conflicts with *Phalp* or any other Eleventh Circuit FCA cases (or any other law). Pet.21. Nor did he urge the "organic" (*i.e.*, invented) scienter standard he now suggests in his petition. Pet.31. To the contrary, petitioner recognized not only that *Safeco*'s objective standard controls here, but that Eleventh Circuit law fully accorded with Eighth and D.C. Circuit law applying *Safeco* to the FCA. R.69 at

9-10 (relying on *Phalp*, *Purcell*, and *Hixson* as establishing the same, controlling scienter standard, despite now arguing those decisions conflict, Pet.17-18, 21-22). At most, petitioner accepted the *Safeco* standard, and tried (and failed) to rebut satisfaction of that standard on its own terms.

Petitioner took the same tack in the court of appeals, indeed affirmatively arguing that *Safeco* supplies the scienter standard for FCA claims—the opposite of what his petition now argues. Arriva briefed the *Safeco* standard extensively. CA11 Appellee Br.18, 44-48. Petitioner again treated *Safeco* as controlling, and again made arguments directly contrary to those he now makes in his petition. Although petitioner now contends that the Eleventh Circuit "implicitly rejected the applicability of *Safeco*'s scienter standard" in FCA cases, Pet.21, he argued below that *Phalp* "is consistent with the Supreme Court's teachings" in *Safeco* that "objective reasonableness of [a] defendant's interpretation of an ambiguous regulation is a defense to willfulness only absent 'authoritative guidance' from [the] applicable agency or appeals court." CA11 Reply.18-19. That is the precise point the Seventh Circuit made about *Phalp*: "[u]nder *Safeco*, an objectively reasonable interpretation of a statute or regulation does not shield a defendant from liability if authoritative guidance warned the defendant away from that interpretation." *United States ex rel. Schutte v. Supervalu Inc.*, 9 F.4th 455, 465 (7th Cir. 2021).

Only after petitioner lost on the merits on appeal did he argue for the first time that the *Safeco* standard does not apply to FCA claims in the Eleventh Circuit

and that, instead of being consistent with *Safeco*, the *Phalp* decision had supposedly rejected application of *Safeco* to the FCA. Until then, petitioner had taken the opposite position. *Compare* Pet.App.154 (arguing that *Phalp* "directly conflicts" with applying *Safeco* to the FCA), *with* CA11 Reply.18 (arguing *Phalp* "is consistent with the Supreme Court's teachings" in *Safeco*). To be clear, this was not an instance of a petitioner claiming to have been constrained by lower-court precedent, while reserving the right to challenge that precedent in this Court. As explained, among other things petitioner affirmatively relied on out-of-circuit cases that he now contends are both wrong and contrary to precedent of the circuit from which this petition arises. Petitioner's position now—that Eleventh Circuit precedent in *Phalp* supports his argument that *Safeco* should not be applied to the FCA—was available to him at the panel stage, but he argued the opposite.

Petitioner has thus waived the legal issue he now asks the Court to revisit. For that reason alone, the petition should be denied. *Buck v. Davis*, 580 U.S. 100, 127 (2017) (declining to reach question that had been waived in lower courts); *Steagald v. United States*, 451 U.S. 204, 209 (1981) (holding the government waives issues "before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation."); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (per curiam) (dismissing writ as improvidently granted where res judicata prevented the Court from deciding question).

Indeed, the most petitioner can claim is that he disagrees with *how* the Eleventh Circuit applied *Safeco* to the specific facts in this case; he cannot credibly argue he has preserved the broader challenges to the court's scienter framework that make up his petition. But even if a question might be "of great practical importance *to these litigants*" in this case, that "is ordinarily not sufficient reason for our granting certiorari," and certainly no basis for permitting a litigant to challenge a legal standard he repeatedly acknowledged controlled in the proceedings below. *Ticor Title Ins.*, 511 U.S. at 122 (emphasis added).

II. There Is No Circuit Split.

A. There Is No Division Among the Courts of Appeals on Whether and How *Safeco* Applies to FCA Claims.

Were the Court to consider taking this case up as a vehicle to consider the question presented, there simply is no division among the circuits for this Court to resolve. Petitioner all but concedes the lack of circuit split on the question presented, admitting: "no appellate court has *expressly* rejected the applicability of *Safeco* to the FCA." Pet.20. No appellate court has implicitly rejected *Safeco*'s applicability either. Petitioner contends otherwise to try to manufacture a split to no avail.

Petitioner draws a false dichotomy between circuits that "have imported *Safeco*'s objective scienter standard into the FCA," Pet.15, and those petitioner contends have implicitly rejected that standard by "considering the defendant's subjective state of mind." Pet.14-15, 20-21. But there is no inconsistency. *Every*

circuit—including those that have expressly applied *Safeco*'s standard to the FCA—recognize that subjective intent is relevant to scienter in FCA cases where falsity turns on *facts* under an unambiguous or clearly established legal obligation.[5] In such cases, *Safeco* is simply beside the point. Conversely, *no circuit* holds that a defendant can be in knowing or reckless violation of an *ambiguous legal obligation* for which there has been no authoritative guidance if the conduct was objectively reasonable—*i.e.*, falls within the scope of a reasonable interpretation of the unsettled legal obligation, "an interpretation that could reasonably have found support in the courts." *Safeco*, 551 U.S. at 70 n.20. In those circumstances, there can be no finding of scienter, "whatever [the defendant's] subjective intent may have been." *Id.*

What petitioner frames as conflict reflects *Safeco*'s narrow holding, applied to specific facts of individual cases in the limited circumstances where the legal obligation that is the basis for the alleged falsity is ambiguous and has not been authoritatively interpreted. Petitioner acknowledges that very point for *one* (Ninth Circuit) case, without recognizing the implications for every other case. Petitioner concedes that a published Ninth Circuit case that "cited *Safeco* in evaluating defendants' [scienter] argument" "may not play a role in the circuit split given that the court determined the regulations were unambiguous."

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[5] This is how the lower courts apply *Safeco* in FCRA claims, too. *E.g.*, *McIntyre v. RentGrow, Inc.*, 34 F.4th 87, 96 (1st Cir. 2022) (distinguishing between cases in which compliance turns "squarely on a question of statutory interpretation" from those that turn "on the facts").

Pet.24 n.5. But *all* the cases petitioner points to in which courts looked to subjective intent in the scienter analysis are the same: cases in which *falsity turned on a question of fact* or an *unambiguous* legal obligation—which means all of them are cases in which *Safeco* had no application in the first place. There is no circuit split.

B. Petitioner Identifies No Decisions from Any Court Relying on Subjective Intent in FCA Cases in a Manner Inconsistent with *Safeco*.

Petitioner has identified zero cases looking to subjective intent in circumstances where *Safeco*'s reasoning would apply to prohibit it—*i.e.*, none of the cases petitioner relies on for a split are ones where defendants engaged in objectively reasonable conduct under an unclear legal obligation only later interpreted against them. An examination of petitioner's alleged "split" cases makes this clear.

Eleventh Circuit. Starting with the Eleventh Circuit itself, petitioner contends that court "implicitly rejected the applicability of *Safeco*'s scienter standard" to the FCA, particularly in *Phalp*. Pet.21. Petitioner's arguments are belied by the decision below, petitioner's own position below, and by the very decisions he cites.

Although petitioner now argues that *Phalp* rejected *Safeco*'s application to the FCA, and conflicts with the FCA cases that embraced *Safeco*, he took the opposite position in the proceedings below. Pet.21; *see supra* pp.13-16; R.69 at 9-10 (district court brief). Petitioner correctly treated the Eleventh, Eighth, and D.C. Circuits as all consistently applying *Safeco*'s

reasoning to FCA claims. Quoting the same language from *Phalp* he now uses to make the opposite point, Pet.21, Petitioner argued, correctly, *Phalp* was "consistent with the Supreme Court's teachings" in *Safeco*. CA11 Reply.18.

Petitioner was correct then. As the decision below recognized, there is no inconsistency between *Phalp* and the *Safeco* standard, nor any inconsistency between the Eleventh Circuit and any other circuit on this point. The decision here (1) relied on *Phalp* in summarizing the governing standard, Pet.App.4; (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). The Eleventh Circuit's denial of rehearing confirms that was no mistake.

The Seventh Circuit's decision in *Schutte* further refutes petitioner's arguments for a split. *Schutte* found *Phalp*'s holding consistent with its own decision, noting *Phalp*'s conclusion that "'scienter … can exist even if a defendant's interpretation is reasonable' … is not inconsistent with *Safeco*." *Schutte*, 9 F.4th at 465 (quoting *Phalp*, 857 F.3d at 1155). *Safeco* and *Phalp* agree that a defendant cannot avoid liability by pointing to a "'reasonable' interpretation of an ambiguous regulation" if the defendant has "actual knowledge of a different

authoritative interpretation." *Phalp*, 857 F.3d at 1155.

The only other Eleventh Circuit decision petitioner cites to conjure a split involved factual disputes about a defendant's scienter under clear, unambiguous legal obligations. *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1302 (11th Cir. 2021) (rejecting defendant's factual arguments regarding its "honest mistakes or negligen[ce]" where legal obligation was clearly established). As explained above, consideration of subjective intent in these circumstances—*i.e.*, factual disputes about a defendant's scienter under clear, unambiguous legal obligations—is consistent with every other circuit, and consistent with application of *Safeco*'s reasoning when the legal obligation that is the putative basis for falsity is ambiguous.[6]

Ninth Circuit. Petitioner contends the Ninth Circuit has "endorsed a subjective scienter requirement in FCA cases." Pet.23. Petitioner admits he relies on two 20-year-old cases that "were decided before *Safeco*." Pet.24 (discussing *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)). The most petitioner can say is that those cases' "reasoning *seemingly* remains good law in the circuit"

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[6] In any event, to the extent petitioner contends the Eleventh Circuit is internally inconsistent, that is not a basis for this Court's review. *Joseph v. United States*, 574 U.S. 1038, 135 S. Ct. 705, 707 (2014) (Kagan, J., respecting denial of certiorari) ("[W]e usually allow the courts of appeals to clean up intra-circuit divisions on their own, in part because their doing so may eliminate any conflict with other courts of appeals.").

based on two other cases that he buries in a footnote. *Id.* (emphasis added).

But not even that gambit works. The Ninth Circuit considers subjective intent in the same circumstances other circuits do applying the *Safeco* standard to the FCA. In the first post-*Safeco* Ninth Circuit decision petitioner cites, *United States v. Chen*, 402 F.App'x 185 (9th Cir. 2010), Pet.24 n.5, falsity *did not "turn[] on a disputed interpretive question*," which means that the *Safeco* standard 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 the doctor 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 to invoke *Safeco*'s objective scienter standard, since *Safeco* does not permit defendants to take refuge in unreasonable interpretations of clear law.

Petitioner correctly concedes that *United States ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161 (9th Cir. 2016), "may not play a role in the circuit split given that the court determined the regulations were unambiguous," Pet.24 n.5, but fails to appreciate that illustrates why there is no split. *Swoben* is consistent with every other circuit.

Petitioner also ignores additional Ninth Circuit decisions applying *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. *United States ex rel. McGrath v. MicroSemi Corp.*, 690 F.App'x 551, 552 (9th Cir. 2017), *cert. denied*, 138 S.Ct. 407 (2017).[7] That holding is consistent with a long line of published Ninth Circuit cases, which petitioner also 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). Ninth Circuit law does not help petitioner.

Sixth Circuit. The only Sixth Circuit decision petitioner cites involved clear, *unambiguous* regulatory obligations—meaning *Safeco* was beside the point. Pet.23 (quoting *United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 892 F.3d 822 (6th Cir. 2018)). Again, consistent with every other circuit, *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* again 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,

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[7] Perhaps petitioner fails to mention *McGrath* because it is unpublished. Pet.14-15 & n.1 (purporting to "[c]onsider[] published opinions" only). But so is *Chen*, the only post-*Safeco* decision petitioner ultimately relies on in the Ninth 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. The Tenth Circuit case petitioner cites affirmed judgment *for defendants* with reasoning that would apply in any *Safeco* case. Pet.24-25. In *United States ex rel. Smith 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); *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).

C. Petitioner's Remaining Arguments Fail to Demonstrate Division Among the Courts of Appeals.

Petitioner characterizes Fourth Circuit law only as "unclear." Pet.25. But Fourth Circuit law is clear, and only further refutes petitioner's suggestion of a split. The Fourth Circuit consistently applies the

same scienter standard as every other circuit in cases where falsity turns on an ambiguous legal obligation.

Petitioner claims *United States v. Mallory*, 988 F.3d 730 (4th Cir. 2021), "appeared to embrace a subjective FCA scienter standard." Pet.26. But there, *Safeco* did not apply because the statute was unambiguous and defendants "were repeatedly 'warned away from their interpretation.'" *Mallory*, 988 F.3d at 737 (quoting *Purcell*, 807 F.3d at 288).

Petitioner admits "[t]he panel majority [in *Sheldon*] explicitly held that *Safeco*'s reasoning applied to the FCA's scienter analysis." Pet.26 (describing *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340 (4th Cir. 2022), *opinion vacated on reh'g en banc*, 49 F.4th 873 (4th Cir. 2022), *petition for cert. filed* Dec. 27, 2022 (No. 22-593)). Although the en banc court vacated that opinion, it did so without "vindicating the *Sheldon* dissent or endorsing the panel majority's reasoning," Pet.27, and therefore created no split.

What followed was *United States ex rel. Gugenheim v. Meridian Senior Living, LLC*, 36 F.4th 173 (4th Cir. 2022), a decision petitioner appears to concede falls on the *Safeco* side of his supposed divide. Pet.22 (admitting *Gugenheim* "cited the *Sheldon* panel opinion approvingly"). Indeed, *Gugenheim* applied *Safeco*'s reasoning, holding a defendant's reasonable interpretation of ambiguous regulations precluded the relator's ability to prove scienter, cited *Purcell*, and was joined by Judge Wilkinson, the author of the panel decision in *Sheldon*. 36 F.4th at 181. Absent further developments, *Gugenheim* remains governing law in the Fourth Circuit. *See also United States ex rel.*

Complin v. N.C. Baptist Hosp., 818 F.App'x 179, 184 (2020) (per curiam).

Petitioner does concede "[t]he D.C., Seventh, and Eighth Circuits have, like the Eleventh Circuit panel in this case, extended *Safeco*'s standard into the FCA realm." Pet.15.[8] Although he asserts "these circuits differ with respect to" how they apply *Safeco*, he never develops that argument. Pet.16. For good reason: each of those circuits applies *Safeco* the same way, consistent with how every circuit applies *Safeco*, including outside the FCA context. *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). At bottom, petitioner cannot identify any circuit actually disagreeing with those decisions, and there is no reason for this Court to grant review.

III. The Decision Below Is Correct.

Petitioner lodges his disagreement with "all the circuits" that apply *Safeco*'s objective standard to FCA claims premised on legal ambiguities. Pet.28. Those

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[8] Petitioner omits any mention of Third Circuit cases. Like others, that court has applied *Safeco* to the FCA in affirming a motion to dismiss an FCA claim. *See United States ex rel. Streck v. Allergan, Inc.*, 746 F.App'x 101, 104-08 (3d Cir. 2018) (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).

Petitioner also overlooks Eighth Circuit decisions that have likewise affirmed dismissal on the pleadings for failing to meet *Safeco*'s objective standard. *E.g.*, *Olson v. Fairview Health Servs. of Minn.*, 831 F.3d 1063, 1070 (8th Cir. 2016); *United States ex rel. Raynor v. Nat'l Rural Utils. Co-op. Fin., Corp.*, 690 F.3d 951, 956–57 (8th Cir. 2012).

circuits, including the Eleventh Circuit (as reflected in the decision below), are correct, and were the Court to have occasion to consider taking this case up as a vehicle to consider the question presented (notwithstanding the grant in *Schutte v. Supervalu*), there is no reason for this Court to review the question petitioner seeks to raise.

A. The Decision Below Correctly Followed *Safeco*'s Instruction to Apply the Common Law Meanings of the FCA's Scienter Terms.

1. Applying the "general[]" understanding of recklessness "in the sphere of civil liability," the Court in *Safeco* held the defendant had not acted recklessly, much less knowingly, because its conduct was "not objectively unreasonable" and no "authoritative guidance" warned it away. 551 U.S. at 68, 70 & n.19. This was so even though the plaintiff argued there was "direct evidence that [defendant] interpreted the statute exactly how we do" and had been personally warned of its noncompliance by a letter from an FTC staff member—in other words, that the defendant in bad faith, knowingly violated the law. Tr. of Oral Argument at 46:8-13, *Safeco v. Burr*, 551 U.S. 47 (2007) (Nos. 06-84 & 06-100); *see also Safeco*, 551 U.S. at 70 n.19. Because the defendant's interpretation "could reasonably have found support in the courts," and no formal agency guidance or court decision said otherwise, it was neither "knowing" nor "reckless" as a matter of law, "whatever [its] subjective intent may have been." 551 U.S. at 70 n.20.

Petitioner argues that because *Safeco* noted that the word "willfully" is "often dependent on the context

in which it appears," it limited its interpretation of "recklessness" to the FCRA. Pet.32-33. The opposite is true. *Safeco* interpreted "willfully" to include recklessness, but having done so, its analysis was grounded in the "general[]" common law meaning of recklessness and not some peculiar feature of the Fair Credit Reporting Act that would render the analysis distinct from the FCA. 551 U.S. at 68. The *Safeco* Court specifically instructed that "recklessness" as used in the FCRA is a common law standard, and "a common law term in a statute comes with a common law meaning, absent anything pointing another way." *Id.* at 58. There is no evidence Congress intended to treat "reckless disregard" any differently in the FCA. The decision below properly accorded "reckless" its same common law meaning in the FCA as in the FCRA.[9]

2. Petitioner does not dispute that *Safeco*'s objective standard applies to the "reckless disregard" prong of the FCA's scienter standard. Instead, he argues "even if 'reckless disregard' contemplates an objective standard," the FCA's even more *exacting* scienter terms (actual knowledge and deliberate ignorance) involve "a *subjective* inquiry." Pet.28-29; *id.* at 32 (conceding the FCA's scienter definition includes "objective" mental states, whereas "actual knowledge" and "deliberate ignorance" are subjective).

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[9] *Jerman v. Carlisle, McNellio, Rini*, 559 U.S. 573 (2010), is not to the contrary. Pet.33. That case involved distinct statutory language putting the burden on defendants to prove their violation "was not intentional and resulted from a bona fide error notwithstanding" certain procedures. 559 U.S. at 578 (quoting 15 U.S.C. §1691k(c)).

But *Safeco* could not have been clearer that its interpretation of "willfulness" encompassed not only reckless violations of a statute, but "knowing" ones as well: "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," 551 U.S. at 70 n.20 (emphasis added); *id.* at 57 (explaining FCRA "cover[s] not only knowing violations … but reckless ones as well"). Indeed, there would have been no need for the Court to address recklessness in the first place if the same subjective evidence would have supported a finding of actual knowledge or deliberate ignorance.

After all, *Safeco* addresses situations where "falsity turns on a disputed interpretative question" unresolved by authoritative guidance. *Purcell*, 807 F.3d at 288. In such cases, a party may *think* it "knows" what the law requires, but without authoritative guidance resolving the issue, the *law* does not "exist[] [yet] in fact or reality" in order to "actual[ly]" be known or deliberately ignored. *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S.Ct. 768, 776 (2020). At most, one may posit "a possible inference from ambiguous circumstances," but that is very different from "actual knowledge" (or deliberate ignorance) of what the law presently requires. *Id.* Whatever a defendant subjectively believed, "willful conduct cannot make definite that which is undefined." *Screws v. United States*, 325 U.S. 91, 105 (1945).

Relators must therefore clear *Safeco*'s objective baseline in order to prove any of the FCA's scienter standards. If a relator cannot prove recklessness in this context, "it follows *a fortiori*" that he cannot establish actual knowledge and deliberate ignorance, since those "scienter requirement[s] plainly demand[] even more culpability than that needed to constitute reckless disregard." *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1058 n.15 (11th Cir. 2015); *see also United States ex rel. Streck v. Allergan, Inc.*, 894 F. Supp. 2d 584, 600 n.11 (E.D. Pa. 2012), *aff'd*, 746 F. App'x 101 (3d Cir. 2018); *see also United States ex rel. Watson v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013) ("'reckless disregard' … is the most capacious of the three" FCA definitions of "knowingly."); *Purcell*, 807 F.3d at 288 (recklessness is "the loosest standard of knowledge").

3. Setting aside the FCA's text (despite purporting to critique an "anti-textual" approach, Pet.28), petitioner next argues that *Safeco* is inconsistent with the fact that "common-law fraud generally centers upon a defendant's subjective belief." Pet.30. But of course it does: the sine qua non of a fraud claim is the existence of facts or clearly established law prohibiting the conduct, or rendering the statement untrue. The provision of the Restatement (Second) of Torts that petitioner relies on makes this clear. Pet.30. It explains that in order for a misrepresentation to be "fraudulently made," the maker must have "knowledge *of the untrue character* of his representation." Restatement (Second) of Torts §526 (emphasis added). *Safeco* addresses a narrow subset of such claims: what standard to apply when the "untrue character" of the representation is not

based on facts or clearly established law, but on ambiguous regulatory requirements, at least one reasonable reading of which *permits* the conduct.

In such cases, acting consistent with a reasonable interpretation of "a byzantine web of administrative regulations" *is not fraud*. Pet.36. Not at common law, and not under any circuit's interpretation of the FCA. To hold otherwise would transform a statute intended to punish knowing fraud into a strict liability regulatory enforcement mechanism. But the FCA "is *not* an all-purpose antifraud statute" and not a substitute for regulatory enforcement. *Escobar*, 579 U.S. at 194 (emphasis added).

Indeed, it is precisely *because* the FCA reaches only knowing frauds on the government that this Court requires "strict enforcement of" its "scienter requirement" to ensure "fair notice" and protect against "open-ended," "essentially punitive" "liability." *Escobar*, 579 U.S. at 182, 192. In our system, due process requires that the government give fair notice before punitive measures like the FCA can be brought to bear. *Comm'r v. Acker*, 361 U.S. 87, 91 (1959) ("[O]ne 'is not to be subjected to a penalty unless the words of the statute plainly impose it.'"). To subject defendants to the threat of punitive liability—and the brand of "fraudster"—for either failing to hold, or disagreeing with, a relator's preferred interpretation of regulations that no court or agency has ever adopted, is inconsistent with due process. *Purcell*, 807 F.3d at 287 (*Safeco*'s standard necessary to avoid "penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule").

B. Petitioner Cannot Distinguish *Safeco* On Any Other Grounds.

Petitioner claims *Halo Electronics Inc. v. Pulse Electronics, Inc.*, 579 U.S. 93 (2016), makes the decision below "problematic." Pet.34. Not so. *Halo* specifically reaffirmed *Safeco*'s holding in the contexts it applies.

Halo concerned alleged violations of clearly established law: the defendant in a patent-infringement suit had "all-but instructed its design team to copy" existing patented technology. 579 U.S. at 102. There is no question that copying existing patent technology would violate the patent laws. In such cases, there is no need to ask "whether [the] infringement was objectively reckless," *id.* at 104-05, because the legal prohibition on infringing patents is always clear. Instead, the questions are factual and involve settled legal obligations—did the defendant *in fact* copy patented technology, and with the requisite subjective intent? In that context, *Halo* held that *Safeco* was beside the point; it did not call *Safeco*'s reasoning into question. *See id.* at 106 n.* (reiterating that under *Safeco*'s framework, "bad faith was not relevant absent a showing of objective recklessness" for "knowing or reckless" violations of ambiguous legal obligations).

Regardless, *Halo* involved 35 U.S.C. §284, which provides for enhancement but has no express scienter standard. Willful infringement had historically been required for enhancement and, as *Safeco* acknowledged, "willfully" is a "word of many meanings whose construction is often dependent on the context in which it appears." 551 U.S. at 57. In the historical

context of patent law, "bad-faith infringement" was a sufficient basis for enhancement. *Halo*, 579 U.S. at 100. Those patent-specific concepts do not inform the "general[]" common-law standard the FCA incorporates and *Safeco* interpreted. *See id.* at 106 n.*.

Petitioner's contention that dismissing a complaint at the pleading stage for failing to meet *Safeco*'s standard "conflicts with" the "rules of pleading" is meritless, though telling. Pet.30-31. Courts are not obligated to accept as true petitioner's legal assertions. The courts below accepted all of petitioner's *well-pled* factual allegations as true: even so, they simply did not allege that Arriva acted unreasonably in the face of authoritative guidance.

C. Petitioner's Parade of Horribles Is Unavailing.

Despite 15 years of precedent applying *Safeco* to the FCA,[10] petitioner warns this unpublished decision will "have serious impacts on the federal government's ability effectively to combat fraud," Pet.36, without pointing to any example.

There is none. *Safeco* simply does not "allow someone who knowingly defrauded the government to evade responsibility." Pet.30. If a relator cannot at least satisfy *Safeco*'s minimal requirements, then the defendant *did not* knowingly defraud anyone. That narrow holding opens no floodgates. Courts have no trouble rejecting unreasonable interpretations, or

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[10] *See* Pet.16 (discussing *United States ex rel. K&R Ltd. P'ship v. Massachusetts Hous. Fin. Agency*, 530 F.3d 980 (D.C. Cir. 2008)).

reasonable interpretations contradicted in real time by authoritative guidance.

Petitioner nonetheless warns that the FCA may be unavailable as a tool for imposing liability based on ambiguities that "inhere[] in … a byzantine web of administrative regulations [that] frequently governs any given federal contractor's conduct vis-à-vis the government." Pet.36. That petitioner endorses such a system is telling. The FCA's fee-sharing provision incentivizes opportunistic relators to turn regulatory ambiguities into the threat of (automatic) treble damages and crushing penalties, extracting needless settlements from companies that contract with the government. Pet.35 (acknowledging "*qui tam* FCA cases like these are frequently litigated," with "801 new FCA cases in 2021"). It is that rent sharing—not *Safeco*—that harms the public, as it discourages companies from contracting with the government to serve vital public needs in fields ranging from healthcare to military equipment. *E.g.*, Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 824-27 (2012).

By contrast, as Judges Rogers and Wilkinson observed, "it is not too much" to ask the government to speak clearly when establishing rules it enforces with punitive liability. *Purcell*, 807 F.3d at 291; *Sheldon*, 24 F.4th at 344, *vacated on reh'g en banc*, 49 F.4th 873 (4th Cir. 2022). "[O]ur courts have long and often understood that, 'as between the government and the individual, the benefit of the doubt' about the meaning of an ambiguous law must be 'given to the individual, not to authority; for the state makes the laws.'"

Buffington v. McDonough, 143 S.Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of cert.).

In any event, petitioner's concerns for the administrative state are baseless. *Safeco* does not require the government to "capture and eliminate every conceivable ambiguity," Pet.36; courts can discern when a "rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *United States v. Lanier*, 520 U.S. 259, 271 (1997). And even when the FCA is unavailable, the government still has regulatory and contractual remedies to recover funds for the public fisc where a defendant has erred (even reasonably). *Safeco* merely ensures that defendants do not face treble-damages liability for conduct that was *objectively reasonable* at the time, based solely on whatever a jury might be convinced about a defendant's *subjective* views regarding ambiguous legal obligations.

IV. The Petition Should Also Be Denied Because of Petitioner's Failure to Adequately Plead a False Claim in the First Place.

Even beyond petitioner's repeated waiver of the question presented, *see supra* pp.13-17, petitioner's "unparticularized billing allegations" (Pet.App.29) demonstrate that there is no basis for further review by this Court, again regardless of the disposition in *Schutte v. Supervalu*.

As noted, the district court dismissed the claims for failing—after multiple amendments—to "adequately allege that a fraudulent claim was in fact submitted to the Government," under Rule 9(b).

Pet.App.26; *see supra* pp.8-9. That failure under Rule 9(b) dooms petitioner's claims, regardless of whether *Safeco* applies to the scienter element. Although petitioner does not expressly challenge that holding here, the parties would necessarily be confronted with it on the merits—given this case was decided on the pleadings—were the petition to be granted. The lack of an adequately pled false claim in the first place is an independent basis supporting the judgment, that would moot the question presented.

Additionally, petitioner concedes that scienter "is often wrapped in considerations of another element, falsity." Pet.35. Importantly, petitioner has not identified any legal requirements actually prohibiting Arriva's practices in the first place. *See supra* pp.2-5, 10-12. The very regulations he pointed to in the lower courts as forbidding Arriva's alleged conduct expressly *permitted* it, and his petition does not attempt to show otherwise. In other words, petitioner is asking this Court to lower the standard for "knowingly" violating the FCA in cases where alleged falsity turns on an ambiguous legal obligation, Pet.i, without credibly demonstrating that there is even a question of falsity here. This Court should not consider paring back the FCA's "rigorous" scienter standard in a case that cannot meet it on any standard. *Escobar*, 579 U.S. at 192. The fact that the regulations at issue permit Arriva's conduct—indeed, the fact that this is not a viable FCA case by any measure (falsity, materiality, scienter, or presentment)—is an issue that would inevitably arise in any briefing were the Court to take up this case on the merits, and regardless provides further reason to deny the petition outright, irrespective of any decision in *Schutte v. Supervalu*.

CONCLUSION

The petition for a writ of certiorari should be denied.

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