App. No. 21A____

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL. THOMAS PROCTOR,
Petitioner,

v.

SAFEWAY, INC.
Respondent.

APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF CERTIORARI FROM JULY 5, 2022 TO AUGUST 3, 2022

To the Honorable Justice Barrett, as Circuit Justice for the Seventh Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30, petitioner Thomas Proctor respectfully requests that the time to file a petition for a writ of certiorari in this case be extended to and including August 3, 2022. The United States Court of Appeals for the Seventh Circuit issued its opinion in this case on April 5, 2022 (App., *infra*). Absent an extension, the petition for a writ of certiorari would be due on July 5, 2022 (the 90-day deadline falls on July 4, a holiday). Petitioner is filing this application more than ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254 to review this case.

BACKGROUND

This case presents a similar question to *United States ex rel. Schutte v. SuperValu, Inc.*, No. 21-1326, which has to do with the nature of the False Claims Act's (FCA) scienter requirement. The FCA provides that a defendant can be held

liable if it acts "knowingly." 31 U.S.C. § 3729(a)(1). The statute further provides that "knowingly" means that a person acts with "actual knowledge," "in deliberate ignorance," or with "reckless disregard" of information. *Id*. § 3729(b)(1)(A).

The Seventh Circuit interprets this requirement narrowly, holding that "a defendant does not act with reckless disregard as long as its interpretation of the relevant statute or regulation was objectively reasonable and no authoritative guidance warned the defendant away from that interpretation." App. at 2. The court further holds that if the plaintiff cannot show reckless disregard, that also "precludes liability under the FCA's actual knowledge and deliberate indifference provisions, which concern higher degrees of culpability." *Ibid*.

In this case, respondent Safeway operates a pharmacy business. In connection with that business, Safeway is required to report to the government the "usual and customary" (U&C) price it charges for drugs, *i.e.*, the cash price it charges to the general public. App. at 3. The U&C price operates as a cap on the amount the government will pay for those drugs.

Petitioner Thomas Proctor alleges that Safeway offered the public discounted prices through price-matching and discount-club programs, but reported its non-discounted prices as the U&C prices—even when, as "for the top 20 generic drugs sold annually, Safeway sold the vast majority of those drugs at discounted rates." App. at 8. This caused the Safeway to receive "$127 million more in reimbursements from government health programs than it would have if it had reported its price-match and discount-club prices as its U&C prices." *Ibid.*

The district court granted summary judgment to Safeway on the element of scienter, and the Seventh Circuit affirmed. Relying on its recent decision in *Schutte*, the court of appeals held that it was objectively reasonable to interpret the relevant legal requirements to exclude prices offered pursuant to price-matching and discount-club programs like Safeway's from the definition of U&C prices. The court acknowledged that "it is easy to criticize Safeway's interpretation of U&C as applied to its discount clubs" because "Safeway effectively used its enrollment forms as a fig leaf to disguise" an across-the-board discount program "without reporting those prices as U&C" because "[t]he only thing separating club members from 'the general public' was the fact that they took an affirmative step to enroll." App. at 16. The court reasoned, however, that "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," and therefore held that the interpretation was not "objectively unreasonable at the time." *Id*. at 17 (quotation marks omitted).

The court also held that no "authoritative guidance" warned Safeway that it was required to report its discounted prices as U&C prices. The court reasoned that even though multiple contracts between Safeway and pharmaceutical pricing intermediaries (who negotiated prices on the government's behalf) defined U&C prices to include discount prices, those sources were "irrelevant in this context because they did not come from the agency." App. at 17.

The court further held that a portion of the manual issued by the Centers for Medicare and Medicaid Services—which provided that pharmacies should report

discount-club prices as U&C prices—did not qualify as authoritative guidance for two reasons. First, with respect to the price-matching programs, the court of appeals held that the manual was not sufficiently specific. App. at 19. With respect to the discount-club programs, the Seventh Circuit did not doubt the manual's specificity, but held that the relevant language was not sufficiently prominent, and was not authoritative because it had been revised over time. *Id*. at 19, 21-22.

The court accordingly held that under its test for FCA scienter, Safeway could not have acted "knowingly," and affirmed the district court's decision granting summary judgment to Safeway. App. at 24.

Judge Hamilton dissented, describing the Seventh Circuit's rule as "a deep and basic anomaly in the law." App. at 28 (Hamilton, J., dissenting). The dissent argued that the evidence would allow a reasonable jury to conclude that Safeway's discount "programs were designed to deceive the government by concealing the fact that the discounted prices were actually being offered to the general public, making those discounted prices the 'usual and customary' prices." *Id*. at 35. To that end, the dissent cited internal communications at Safeway showing that Safeway understood that the purpose of the programs was to offer discounted prices to as many cash customers as possible, but not to report the discounted prices to the government. *See ibid*. Accordingly, "discount sales accounted for much more than a *majority* of Safeway's cash prescription sales," but "Safeway continued to tell the government that its non-discounted prices were its 'usual and customary' prices." *Id*. at 37. The dissent thus believed that "[t]he contemporaneous evidence of Safeway's choices to hide what it

was doing, and of its reasons for those choices, easily permits the inference that Safeway knew at the time that it was carrying out a fraud and needed to conceal it." *Id*. at 39. The dissent concluded that a legal rule that requires courts to ignore such evidence was insupportable.

In parallel with this case, the relators in the *Schutte* case have filed a petition for a writ of certiorari, which is due to be considered at the start of next Term. *See* No. 21-1326.

This application followed.

REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a petition for a writ of certiorari should be extended to August 3, 2022, for several reasons.

First, the press of other matters will make preparation of the petition difficult absent an extension. In addition to this petition, counsel for petitioner has been managing numerous recent and upcoming deadlines. The upcoming deadlines include a reply in support of the petition for a writ of certiorari in *Schutte*, No. 21-1326, to be filed by July 6, 2022; and an amicus brief in *Fuld v. Palestine Liberation Organization* (CA2, No. 22-76), due June 28, 2022. Recent deadlines include a reply brief in *O'Donnell & Sons, Inc. v. N.Y. State Department of Taxation and Finance*, No. 21-1245; a supplemental brief responding to the United States' invitation brief in *Johnson v. Bethany Hospice and Palliative Care LLC*, No. 21-462; oral argument in *United States ex rel. Silbersher v. Valeant Pharmaceuticals International* (CA9 Nos. 20-16176, 20-16256); and briefs in multiple complex cases, including *UPPI, LLC v.*

Cardinal Health, Inc. (CA9 No. 21-35905); *Zobay v. MTN Group Limited* (E.D.N.Y. No. 21-cv-3503-CBA); and *Wildman v. Deutsche Bank Aktiengesellschaft* (E.D.N.Y. No. 21-cv-4400-KAM-RML. Additional time is necessary to prepare a thorough and comprehensive petition for this Court's review.

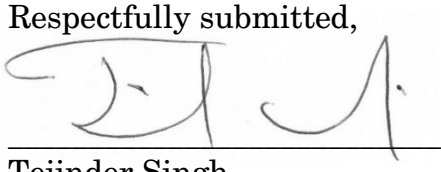
Second, no prejudice will result from the requested extension. Whether the extension is granted or not, the petition will be considered next Term—and, if granted, the case will be argued and decided next Term. In the interim, the status quo *ante* remains intact. Counsel for respondent has advised that respondent does not oppose the requested extension.

Third, the petition is likely to be granted. This case raises an important issue of federal law that has divided federal courts and provoked a sharp reaction from the government, which filed an amicus brief in support of rehearing en banc in *Schutte*.

CONCLUSION

For the foregoing reasons, the time to file a petition for a writ of certiorari should be extended to and including August 3, 2022.

Respectfully submitted,



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