No. 22-___

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
EX REL. THOMAS PROCTOR,

Petitioner,

v.

SAFEWAY, INC.

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Tejinder Singh
Counsel of Record
SPARACINO PLLC
1920 L Street, NW
Suite 835
Washington, DC 20036
(202) 629-3530
tejinder@sparacinopllc.com

John Timothy Keller
Dale J. Aschemann
ASCHEMANN KELLER LLC
300 North Monroe St.
Marion, IL 62959-2326
(618) 998-9988

Additional Counsel Listed on Inside Cover

Rand J. Riklin
GOODE CASSEB JONES
RIKLIN CHOATE & WATSON
2122 North Main Avenue
P.O. Box 120480
San Antonio, TX 78212
(210) 733-6030

Gary M. Grossenbacher
ATTORNEY AT LAW
402 Vale Street
Rollingwood, TX 78746
(512) 699-5436

Glenn Grossenbacher
LAW OFFICE OF GLENN
GROSSENBACHER
24165 IwH-10 W.
Ste 217-766
San Antonio, TX 78257
(210) 271-3888

C. Jarrett Anderson
ANDERSON LLC
1409 Wathen Avenue
Austin, TX 78703-2527
(512) 619-4549

Paul B. Martins
Julie Webster Popham
James A. Tate
HELMER, MARTINS, TATE
& GARRETT CO., LPA
1745 Madison Road
Cincinnati, OH 45206
(513) 421-2400

Jason M. Idell
IDELL PLLC
6800 Westgate Blvd.
Ste 132 #301
Austin, TX 78745
(512) 689-3081

QUESTION PRESENTED

This case presents the same question as No. 21-1326, *United States ex rel. Schutte v. SuperValu Inc*. It also arises from the same court of appeals. The Court may wish to consider the two petitions together. The question presented is:

Whether and when a defendant's contemporaneous subjective understanding or beliefs about the lawfulness of its conduct are relevant to whether it "knowingly" violated the False Claims Act.

PARTIES TO THE PROCEEDING

Petitioner Thomas Proctor brought this action as a *qui tam* relator for the United States of America, as well as the States of California, Colorado, Delaware, Hawaii, Illinois, Maryland, Montana, New Jersey, New Mexico, Nevada, Virginia, and the District of Columbia.

RELATED PROCEEDINGS

United States ex rel. Thomas Proctor v. Safeway Inc., No. 20-3425 (7th Cir. Apr. 5, 2022)

United States ex rel. Thomas Proctor v. Safeway Inc., No. 11-cv-3406 (C.D. Ill. June 15, 2020)

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The Seventh Circuit's precedential opinion (Pet. App. 1a-41a) is published at 30 F.4th 649. The district court's opinion (Pet. App. 42a-105a) is published in the *Federal Supplement* at 466 F. Supp. 3d 912.

JURISDICTION

The Seventh Circuit entered its decision on April 5, 2022, Pet. App. 1a. On June 30, 2022, Justice Barrett extended the time to file a petition for a writ of certiorari to and including August 3, 2022. No. 21A861. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the appendix at 108a-09a.

INTRODUCTION

This is a case under the False Claims Act (FCA), 31 U.S.C. §§ 3729-33, where petitioner is a *qui tam* plaintiff alleging that respondent Safeway overcharged the government for prescription drugs by knowingly misreporting the usual and customary (U&C) prices for those drugs. The Seventh Circuit affirmed summary judgment for Safeway, holding that Safeway did not act "knowingly" as the FCA defines that term because an objectively reasonable (although wrong) interpretation of U&C prices would have allowed Safeway to make the reports it did, and no authoritative guidance foreclosed that interpretation. In the process, the Seventh Circuit held that evidence of Safeway's subjective understanding or beliefs about U&C prices—which showed that Safeway executives

believed that their reporting was incorrect—was "irrelevant" to whether Safeway acted knowingly. Pet. App. 14a. Instead, Safeway could prevail by convincing a court after the fact that its conduct fell within a reasonable interpretation of U&C, even if it did not believe that interpretation to be correct at the time it submitted claims for payment. This petition asks the Court to decide whether that interpretation of the FCA's scienter requirement is correct, and argues that it is not.

This is not the only case raising this question. The Court also has before it the petition in No. 21-1326, *United States ex rel. Schutte v. SuperValu, Inc.*, which overlaps substantially with this case. The two cases raise the same question presented; they arise from the same circuit (indeed the majority and dissenting opinions were authored by the same judges in each case); they involve similar underlying fraud (failure to properly report discounted drug prices as "usual and customary" prices); and the plaintiffs and defendants in both cases are represented by the same lawyers. The principal difference between the cases, as noted by the dissent below, is that this case has "even stronger evidence of fraud and an even less plausible *post hoc* rationale" than *Schutte*. Pet. App. 25a (Hamilton, J., dissenting).

This case thus helps illustrate the need to address the Seventh Circuit's deeply flawed scienter standard and restore uniformity to FCA law. In addition to the observations made by the dissent, the arguments herein are supported by the amicus briefs filed in *Schutte* by Senator Charles Grassley and the Taxpayers Against Fraud Education Fund (TAFEF)—which make arguments about the importance of the case and

the merits that are equally applicable here. The United States government also filed a brief in *Schutte* (at the petition-for-rehearing stage below), arguing that the Seventh Circuit's rule—which the court applied here—is fundamentally flawed and threatens to upend FCA enforcement.

Given the overlap between these two cases, petitioner suggests that the Court consider this petition together with the petition in *Schutte*, which has been distributed for the conference to be held September 28, 2022. When the Court does so, it should either grant certiorari in one or both cases (holding the other petition as necessary), or call for the views of the Solicitor General in one or both cases.

STATEMENT OF THE CASE

I. Legal Background

The FCA imposes liability if a defendant "knowingly" presents false claims or makes false statements to the government. 31 U.S.C. § 3729(a). The statute is triggered when, for example, a defendant knowingly bills the government for goods or services it did not provide, or bills the government while knowingly omitting its noncompliance with a material legal requirement. *See, e.g.*, *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 181-82 (2016). "Knowingly" means to act with: (1) actual knowledge; (2) deliberate ignorance; or (3) reckless disregard of the falsity of information. 31 U.S.C. § 3729(b)(1)(A). The definition "require[s] no proof of specific intent to defraud." *Id*. § 3729(b)(1)(B).

Congress added the FCA's constructive-knowledge scienter provisions to the statute in 1986 as

part of an effort to solve the so-called "ostrich" problem, *i.e.*, defendants "who ignore 'red flags' that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim." H.R. Rep. No. 99-660, at 21 (1986). Instead, Congress wanted claimants seeking public funds to make reasonable inquiries before doing so—or else face liability.

The requirement to make reasonable inquiries before seeking public funds is consistent with this Court's holdings. There is a longstanding principle that "[m]en must turn square corners when they deal with the Government." *Rock Island Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920) (opinion of Holmes, J.). "This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984). Those claiming government funds are "held to the most demanding standards" and subject to "the general rule that those who deal with the Government are expected to know the law." *Ibid.* This entails a "duty to familiarize [oneself] with the legal requirements for cost reimbursement," including "obtain[ing] an interpretation of the applicable regulations" when confronted with "a doubtful question not clearly covered by existing policy statements." *Id.* at 64.

II. Factual Background and Procedural History

1. This case is about how the government pays for prescription drugs. As relevant here, federal law provides that the government will not pay more than the

U&C prices charged to the general public, and requires pharmacies to report their U&C prices. *See* Pet. App. 3a-4a. In 2006, retail chain Walmart shook up the pharmacy industry by offering a 30-day supply of many popular generic drugs for only $4. *Id*. at 5a. Walmart correctly reported the $4 cash price as its U&C price—and so received less in reimbursement from the government than it otherwise would have. *See ibid.*

Safeway wanted to compete with Walmart by offering discounts on drugs, but didn't want to sacrifice revenue from the government by reporting those discount cash prices as U&C prices. Accordingly, Safeway implemented two schemes to effectively offer discounts to every cash customer without saying that it was doing so. The first was price-matching: from 2006 until July 2015, any customer who asked a Safeway pharmacist to charge the same price as a competitor (*e.g.*, Walmart) would receive that price. Pet. App. 5a-6a. The second was a discount club: from March 2008 until July 2015, Safeway customers could enroll in a membership program that would entitle them to a monthly supply of certain generic drugs for $4 (or two months for $8, or three months for $12). The burden to entry was minimal. There was no fee; just a form to fill out with basic information that Safeway already had, including the customer's address, birthdate, dependents, and phone number. Customers also had to pay for prescriptions without using insurance. *Id*. at 6a-7a.[*]

[*] At certain locations from March 2008 to July 2010, Safeway provided discounted generic drugs to all customers without any membership requirement. Pet. App. 6a. It is undisputed that

"[B]etween 2011 and 2015, discounted sales accounted for a majority of Safeway's total cash sales," *i.e.*, sales made without insurance. Pet. App. 8a. Indeed, "for the top 20 generic drugs sold annually, Safeway sold the vast majority of those drugs at discounted rates. For example, in 2009, 65% of Safeway's cash sales for top 20 generics were at discounted rates. By 2014, 88% of cash sales for top 20 generics were at discounted rates." *Id.* at 8a-9a.

Nevertheless, Safeway did not report its discounted prices as its U&C prices. This allowed Safeway to offer discounts to price-sensitive consumers without sacrificing lucrative reimbursements from the government. Indeed, petitioner's "expert estimated that Safeway received $127 million more in reimbursements from government health programs than it would have if it reported its price-match and discount-club prices as its U&C prices." Pet. App. 8a.

Safeway had ample warning during this time period that it was required to report discount prices as U&C prices. For example, starting in 2006, multiple Pharmacy Benefit Managers (PBMs)—which are intermediaries that negotiate drug pricing on the government's behalf and administer the reimbursement process—issued bulletins expressly stating that pharmacies were required to include discount prices, including price-matching and other discounts, in its U&C prices. *See* Pet. App. 10a-11a, 51a-53a, 60a, 69a-71a; Pet'r C.A. Br. 59-60 (collecting citations). Multiple

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Safeway understood it had to report these discounted prices as U&C prices and did so before developing its stealthy discount club. *See ibid.*

States participating in the Medicaid program similarly issued notices in 2007 and 2008 that pharmacies were required to include discounts in their U&C prices. Pet. App. 11a; Pet'r C.A. Br. 61-63. And in October 2006, the Centers for Medicare and Medicaid Services (CMS) issued a memorandum, which was then incorporated into CMS's Medicare Prescription Drug Benefit Manual, which similarly explained that "where a pharmacy offers a lower price to its customers throughout a benefit year," that price should be reported as the U&C price, and not treated as a one-time cash discount (which need not be reported as a U&C price). Pet. App. 9a-10a. The memorandum used Walmart's program as an illustration, explaining that because Walmart's discounted prices were "not a one-time special price," and because "the beneficiary can access this discount at any point in the benefit year," it was the U&C price for purposes of calculating reimbursements. *Id.* at 10a.

Discovery in this case further revealed that Safeway received these communications and knew that it was at risk of violating its U&C price reporting obligations. The specific evidence is laid out in detail in the dissenting opinion, which shows that upon receipt of the various communications described in the previous paragraph, Safeway executives forwarded them to colleagues with cover messages acknowledging that Safeway was required to report its discount prices as U&C. *See* Pet. App. 32a-36a. (Hamilton, J., dissenting). In some cases, the executives resolved to violate the law. For example, after a pharmacy manager informed executives that Nebraska's Medicaid program was requiring price-matched discount prices to be reported as U&C prices, an executive asked: "Does anyone

think we have an issue here? My question is how the state of Nebraska will know that we offered to match any price out there." *Id*. at 33a. In a follow-up communication, other executives pointed out that advertising their price-matching program would "Alert the Medicaid programs to start looking" into what Safeway was doing, and therefore stressed the "need to keep a low profile." Pet. App. 33a-34a.

Indeed, Safeway's programs were shot through with deception. With respect to price-matching, Safeway adopted an "official company policy" of denying that it would match Walmart prices "if an unidentified customer calls in. This is to avoid trouble with the media or competitors." But "[i]f a regular customer known to you asks if we will match . . . the answer is YES." Pet. App. 31a. Not only that, Safeway would fill such discounted prescriptions as cash sales (even if the customer had insurance), foregoing insurance reimbursement to keep its program secret; and its internal guidance emphasized that "[w]e cannot put any of this in writing to stores because our official policy is we do not match." *Ibid.*

The discount club program was similarly deceptive. Indeed, even the Seventh Circuit majority (which ruled in Safeway's favor), 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 a Wal-Mart-style generics program without reporting those prices as U&C. The only thing separating club members from 'the general public' was the fact that they took an affirmative step to enroll." Pet. App. 17a. But as the majority effectively admitted, even that "af-

firmative step" was essentially nothing; all the customer had to do was "fill out an enrollment form," which itself "provided no meaningful information to Safeway." *Id*. at 7a.

2. Based on this conduct, petitioner sued Safeway under the FCA, alleging that Safeway had defrauded the government by overcharging it for drugs. The district court granted summary judgment to Safeway, holding that its interpretation of U&C prices—devised by its lawyers after the fact—was objectively reasonable, and that Safeway therefore could not have acted "knowingly" under this Court's decision in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007)—which held that "willful" violations of the Fair Credit Reporting Act (FCRA) can include reckless violations, but that a party does not act recklessly if it merely followed a reasonable interpretation of the FCRA, and no authoritative guidance warned the party away from that interpretation. *See* Pet. App. 88a-105a.

3. Petitioner appealed. Before the appeal was argued, the Seventh Circuit decided *Schutte*, holding in essence that the district court was correct to apply the *Safeco* analysis in the FCA context. The court of appeals in *Schutte* held that the pharmacy chain SuperValu, which had a price-matching program similar to Safeway's, did not "knowingly" fail to report its discount prices as U&C prices under *Safeco*, and therefore affirmed summary judgment in favor of SuperValu. *See United States ex rel. Schutte v. SuperValu, Inc.*, 9 F.4th 455, 472 (7th Cir. 2021).

In this case, the Seventh Circuit relied on *Schutte* to affirm the grant of summary judgment to Safeway. The court explained the legal rule adopted in *Schutte*: "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"—and failure to satisfy the "standard for reckless disregard precludes liability under the FCA's actual knowledge and deliberate indifference provisions, which concern higher degrees of culpability." Pet. App. 2a. Moreover, "a defendant's subjective intent is irrelevant for purposes of that inquiry." *Id*. at 14a. The court explained that under its rule, "[t]his appeal thus presents the following questions: (1) whether Safeway's interpretation of U&C during the relevant period was objectively reasonable, and (2) whether authoritative guidance warned it away from that interpretation." *Id*. at 16a.

The court 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 court next determined that the analysis for discount clubs was "similar" because, under *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.'" *Id*. at 18a (quoting *Schutte*, 9 F.4th at 469). Because customers had to enroll in the club to receive the discounts, the court held that Safeway reasonably did not report the club prices as U&C prices—even as it acknowledged that the enrollment process was a mere "fig leaf to disguise a Wal-Mart-style generics program." *Id*. at 17a.

The court then considered whether any "authoritative guidance" warned Safeway away from its interpretation. It concluded first that the communications

from the PBMs were "irrelevant in this context because they did not come from the agency." Pet. App. 18a. Instead, the only source that could even potentially qualify as authoritative guidance, in the Seventh Circuit's view, was CMS's benefits manual. The court determined that the manual was not sufficiently specific to put Safeway on notice that its discount-club price was its U&C price because the illustration in the manual discussed Walmart's program, which did not use the price-matching mechanism. With respect to the discount club, the Seventh Circuit believed that the manual "may have been specific enough to put Safeway on notice that it should have reported its membership-club prices as its U&C prices," but determined that the manual was not sufficiently "authoritative" because the relevant statements appeared in a footnote, and that a later version of the manual removed that footnote. Pet. App. 21a-23a.

Judge Hamilton dissented, urging the court to "reverse summary judgment for defendant Safeway and overrule" *Schutte*. Pet. App. 25a (Hamilton, J., dissenting). The dissent argued that the facts of this case are "more egregious" than *Schutte*, so that "[i]f the False Claims Act cannot reach Safeway's conduct here, the Act will neither deter nor remedy many frauds that loot the federal treasury." *Id.* at 26a. The dissent thus explained that the majority had "misinterpret[ed] the standard of fraudulent intent set forth in the False Claims Act," creating "a deep and basic anomaly in the law" because, in fraud cases, "[a] defendant's state of mind is critical," but the majority's rule requires it to "turn its back on the evidence of Safeway's fraudulent intent at the time it was submitting false claims to the

government to keep its drug reimbursements inflated by tens of millions of dollars." *Id*. at 28a.

To illustrate its point, the dissent canvassed the evidence that Safeway deliberately concealed its discount programs to avoid tipping off the government, and that Safeway's executives believed that they should have been reporting discount prices as U&C prices, but chose not to do so in pursuit of profits. Pet. App. 29a-39a (Hamilton, J., dissenting). The dissent also showed the massive financial impact of Safeway's fraud. As one particularly revealing example, the dissent showed that Safeway was selling 30-day supplies of the cholesterol drug lovastatin for $4 a whopping 84% of the time—but simultaneously falsely reporting inflated U&C prices between $27.14 and $65.99 to the government. *Id*. at 39a. In other words, the government was paying six to sixteen times as much as customers walking in off the street for the same drug. "The cumulative effects of the deception were in the tens of millions of dollars per year." *Ibid*.

4. The petition in *Schutte* was filed on April 1, 2022, and distributed on July 6, 2022 for the conference of September 28, 2022.

This petition followed.

REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari in *Schutte* addresses the core certiorari criteria, including the circuit split, the importance of the question, and merits arguments. Rather than repeat all those points, this petition focuses on what has changed since the petition in *Schutte* was filed. Subsequent developments only further demonstrate the need for this Court's review.

I. The Circuits Remain Split Over How To Interpret The False Claims Act's Scienter Requirement

1. As the petition in *Schutte* explained, most courts interpreting the FCA's scienter requirement focus on defendants' subjective understanding and beliefs at the time false claims were presented to determine whether the defendant presented those false claims "knowingly." Rather than allow defendants to manufacture explanations for their conduct *post hoc*, these courts consider whether defendants took affirmative steps to comply with the law—and especially whether defendants heeded warnings that their conduct might violate the law. The range of relevant warnings also includes everything from government documents to advice of counsel to industry understanding, as opposed to what the Seventh Circuit calls "authoritative guidance" (a term that appears nowhere in the statute).

Circuit courts on this side of the split include:

- The Eleventh Circuit. *See United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148, 1155 (11th Cir. 2017) (holding that the relevant inquiry is "whether the defendant actually knew or should have known that its conduct violated a regulation in light of any ambiguity at the time of the alleged violation"); *United States ex rel. Walker v. R&F Props. of Lake Cnty., Inc.*, 433 F.3d 1349, 1358 (11th Cir. 2005) (finding liability when a range of sources—that would not qualify as "authoritative" in the Seventh Circuit—put the defendant on notice that its interpretation of the law, although reasonable, was incorrect).

- The Ninth Circuit. *United States ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1174, 1176 (9th Cir. 2016) (holding that defendant acted with scienter when it failed to "take affirmative steps" to ensure the accuracy and completeness of data submitted to the government, displaying a "lack of diligence and an absence of good faith"); *United States v. Mackby*, 261 F.3d 821, 827 (9th Cir. 2001) (rejecting the argument that "to sustain an FCA action, a claim must be found to be false under any plausible interpretation" of the relevant legal requirements, or that the government must "negative any reasonable interpretation that would make the defendant's statement factually correct") (quotation marks omitted); *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463-65 (9th Cir. 1999) (rejecting argument that defendant could prevail by showing that its interpretation of legal requirement was reasonable, and holding instead that evidence of defendant's subjective understanding was sufficient to defeat summary judgment on scienter).
- The Sixth Circuit. *United States ex rel. Prather v. Brookdale Senior Living Cmtys.*, 892 F.3d 822, 838 (6th Cir. 2018) (holding that defendants acted with scienter when they "deliberately ignored multiple employees' concerns about their compliance with relevant regulations").
- The Tenth Circuit. *United States v. Boeing Co.*, 825 F.3d 1138, 1149 (10th Cir. 2016) (ruling for defendant on scienter grounds when there was no evidence that defendant subjectively understood that it was violating the law).

The Fourth Circuit's precedents are similar—and that court is poised to consider the question presented *en banc*. Previously, in *United States v. Mallory*, the Fourth Circuit rejected the argument that "ambiguous statutory language" precluded "knowingly violat[ing] the False Claims Act." 988 F.3d 730, 737 (4th Cir. 2021), *cert. denied sub nom. Dent v. United States*, 142 S. Ct. 485 (2021). The court cited "repeated" warnings "including by legal practitioners" as "[a]mple evidence" that defendants "knowingly violated" the FCA. *Ibid.; cf. Drakeford v. Tuomey*, 792 F.3d 364, 380-81 (4th Cir. 2015) (holding one attorney's repeated warnings and "shopp[ing] for legal opinions approving" defendant's actions as evidence of "knowingly" violating the FCA).

Subsequent to those decisions, the Fourth Circuit issued an opinion agreeing with the Seventh Circuit's rule. *See United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340, 343-44 (4th Cir. 2022). That result was short-lived. The plaintiff, supported by the United States, sought rehearing *en banc*—including on the ground that the decision in *Sheldon* conflicted with the aforementioned decisions in *Mallory* and *Drakeford*—and the Fourth Circuit granted the petition and vacated its decision. *See United States ex rel. Sheldon v. Allergan Sales, LLC*, 2022 WL 1467710 (4th Cir. May 10, 2022). Of course, one does not count chickens before they hatch, but vacatur in favor of rehearing *en banc* typically precedes a result in the opposite direction from the panel opinion. Accordingly, it is now likely that the Fourth Circuit will reject the rule adopted in *Schutte* and applied in this case, deepening the existing circuit conflict.

After the vacatur in *Sheldon*, the Fourth Circuit issued another published opinion regarding FCA scienter, holding that a plaintiff's claim failed when the plaintiff "relie[d] almost exclusively on the supposed clarity of" the legal requirement to prove scienter, but the legal requirement was "not as clear as [the plaintiff] claims." *United States ex rel. Gugenheim v. Meridian Senior Living, LLC*, 36 F.4th 173, 179 (4th Cir. 2022). The court found it significant that the plaintiff had not provided "any evidence that Defendants attempted to avoid discovering how the regulation applied . . . or plowed ahead with a dubious interpretation despite serious doubts about its accuracy." *See id.* at 181-82. This decision recognizes, in conflict with the Seventh Circuit's rule, that a defendant's subjective understanding is relevant to the scienter inquiry.

2. Three circuits adopt a rule inspired by this Court's decision in *Safeco*, holding that a defendant can use a reasonable-but-wrong interpretation to disprove FCA scienter unless authoritative guidance warned the defendant away from that interpretation. These include the Seventh, Eighth, and D.C. Circuits. *See, e.g.*, *United States ex rel. Donegan v. Anesthesia Assocs. of Kansas City, PC*, 833 F.3d 874, 878-80 (8th Cir. 2016); *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 289 (D.C. Cir. 2015).

Among these three courts, the Seventh Circuit has clearly adopted the extreme position that all evidence of a defendant's subjective belief is irrelevant. Pet. App. 14a. Under this rule, a defendant can believe that it is violating the law yet nevertheless prevail if its lawyers can concoct a *post hoc* rationalization for the defendant's conduct that is not refuted by authorita-

tive guidance. In the Eighth and D.C. Circuits, by contrast, it is unclear whether a *post hoc* rationalization suffices—or whether the defendant must instead have *actually believed* its interpretation at the time of the challenged conduct. *See United States ex rel. Miller v. Weston Educ., Inc.*, 840 F.3d 494, 502-03 (8th Cir. 2016) (reversing summary judgment because evidence of defendant's understanding "both before and after" the challenged conduct showed a "dispute of material fact whether, when signing the [agreement, defendant] intended to manipulate its records"); *compare United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1272 (D.C. Cir. 2010) (holding that defendant's "alleged[ly] false statements [that] were the *result of its belief*" precluded judgment as a matter of law since it could have led to "reasonable jury inferences [about what defendant] *knew*") (emphasis added), *and United States ex rel. Morsell v. NortonLifeLock, Inc.*, 560 F. Supp. 3d 32, 46 (D.D.C. 2021) (holding that under *Purcell*, "a reasonable interpretation must have been held contemporaneously to defeat a finding of knowledge"), *with Purcell*, 807 F.3d at 290 ("[S]ubjective intent—including bad faith—is irrelevant when a defendant seeks to defeat a finding of knowledge based on its reasonable interpretation of a regulatory term.").

3. Respondent will likely attempt to muddy the split by pointing to unpublished decisions that apply *Safeco* in FCA cases. But as the petitioners' papers in *Schutte* explain, these cases do not disprove the split for two reasons. *See Schutte* Pet. 22-23; *Schutte* Reply 2, 4-5. First, unpublished decisions are not law—and to the extent they conflict with the published decisions cited *supra*, they are irrelevant. Second, the split is not about whether *Safeco* is relevant precedent; it is about

whether *Safeco* compels courts in FCA cases to hold that the defendant's subjective understanding and beliefs are irrelevant to the scienter inquiry—and the cases the respondent in *Schutte* cited hold no such thing. On the contrary, they typically hold otherwise, even as they cite *Safeco*.

For example, in *Olhausen v. Arriva Medical, LLC*, 2022 WL 1203023 (11th Cir. Apr. 22, 2022), the court held that liability "does not reach an innocent, good-faith mistake about the meaning of an applicable rule or regulation, nor does it reach claims made based on reasonable but erroneous interpretations of a defendant's legal obligations." *See id.* at *2 (quotation marks omitted). The defendant accordingly must have subjectively believed its interpretation at the time (either because it held that interpretation in "good faith," or because the claims were "based on" that interpretation). Similarly, in *United States ex rel. McGrath v. Microsemi Corp.*, 690 F. App'x 551, 552 (9th Cir. 2017), the court found no scienter because the defendant held its interpretation, in "good faith," "at th[e] time" it presented claims. Accordingly, even considering the unpublished decisions respondent is likely to cite, a stark conflict remains between courts that regard a defendant's subjective beliefs as central to the scienter inquiry and those that regard it as irrelevant.

II. The Question Presented Is Frequently Recurring And Important

The papers in *Schutte* and below show that the question presented is frequently recurring and important. Thus, the *Schutte* petition explained how the question will arise frequently with respect to myriad legal regimes (including recently created programs for

pandemic assistance). *Schutte* Pet. 23-27. The United States' brief in support of the *Schutte* petitioners' request for rehearing *en banc* similarly argued that the Seventh Circuit's "unprecedented interpretation of the False Claims Act will significantly impair the government's ability to combat fraud" because these cases involve "a frequent fact pattern." U.S. *Schutte* C.A. Reh'g Br. 5. Senator Grassley, the principal architect of the modern FCA, filed a brief arguing that the Second Circuit's interpretation "threatens to undermine [the FCA's] critical role in policing those who do business with the government." Grassley *Schutte* Amicus Br. 1. TAFEF, a prominent public-interest organization representing whistleblowers and their attorneys, argues that the Seventh Circuit's rule "could significantly undermine the application of the FCA in a range of circumstances that it is intended to address." TAFEF *Schutte* Amicus Br. 7. And in the lower court, the Chamber of Commerce, PhRMA, and other prominent amici likewise weighed in. The tremendous resources being poured into this debate from both sides show how important this question is to a critically important federal statute.

A similar cast of characters—including TAFEF, the Chamber of Commerce, the National Association of Chain Drug Stores, and the Washington Legal Foundation—appeared in this case. The dissenting opinion below likewise explained that this case is important both on its own terms and in terms of what it means for the FCA. Thus, the dissent explained that for our nation's drug pricing system to work "'usual and customary' prices must be reported honestly," but "[g]iven the high stakes, drug sellers have faced great temptations to cheat," and have in fact cheated "on a

grand scale and for many years." Pet. App. 27a (Hamilton, J., dissenting). The "financial stakes" of this issue alone are "enormous," and warrant this Court's attention. *Ibid*.

Those stakes are also just the tip of the iceberg. "The FCA is the government's primary civil tool to redress false claims for federal funds and property involving a multitude of government operations and functions." Press Release, U.S. Dep't of Just., Justice Department Takes Action Against COVID-19 Fraud (Mar. 26, 2021), https://tinyurl.com/2fft8t93. But the Seventh Circuit's interpretation of the statute removes its teeth. Lawyers are brilliant at finding ambiguity in statutes and regulations, and the government cannot conceivably issue authoritative guidance to close every loophole that highly motivated industry players can invent. Myriad government programs are vulnerable to the same sort of exploitation currently taking place vis-à-vis drug prices—and the inevitable cost to the public cannot be overstated.

This issue is also likely to be dispositive in a significant number of cases. Hundreds of FCA cases are filed every year—and scienter is an essential element in each and every one. *See* U.S. Dep't of Just., Fraud Statistics – Overview, at 2 (2022), https://tinyurl.com/mrnc2ea4 (showing at least 700 FCA cases, and often more than 800, filed in each of the last twelve years by the government and *qui tam* relators). The scope of the scienter inquiry is not only a potentially dispositive issue, but also relevant to the scope of discovery—and therefore to the conduct of every pending FCA case.

III. This Case Is A Suitable Vehicle For Deciding The Question Presented

This case and *Schutte* would be suitable vehicles to address the question presented. In both cases, the question presented was the sole basis on which the Seventh Circuit ruled in the defendant's favor, and so the question is teed up cleanly. And in both cases, the Court has the benefit of a robust summary judgment record, which may be helpful to the Court as it considers whether such evidence is relevant to the scienter inquiry.

IV. The Seventh Circuit's Legal Rule Is Incorrect

The papers in *Schutte* explain why the decision below conflicts with the FCA's text and with this Court's precedents. *See Schutte* Pet. 28-34; Grassley *Schutte* Amicus Br. 3-15; TAFEF *Schutte* Amicus Br. 5-12. There is no need to repeat those arguments here. But it bears noting just how stark the decision in this case is. The majority went so far as to admit that Safeway's discount-club program was a mere "fig leaf to disguise a Wal-Mart-style generics program without reporting those prices as U&C"—and then held that this "fig leaf" was enough to defeat liability as a matter of law. Pet. App. 17a. To arrive at this result, the Seventh Circuit ignored contemporaneous evidence of Safeway's state of mind that "easily permits the inference that Safeway knew at the time that it was carrying out a fraud and needed to conceal it." *Id*. at 40a (Hamilton, J., dissenting). Reading an anti-fraud statute to permit such clear fraud is absurd—and that outcome discredits any rule that compels it.

In defense of the Seventh Circuit's rule, defendants often contend that the FCA's remedies—including treble damages and civil monetary penalties—are strong medicine, and should not be applied where the defendant acts reasonably. From there, defendants argue that a person whose conduct falls within an objectively reasonable interpretation of the law is not the sort of person who deserves punishment under the FCA.

It ought to be clear on its face that this is a naked policy argument with no basis in the statutory text. Congress provided a definition of "knowingly" that plainly incorporates the defendant's subjective understanding and beliefs through its actual-knowledge and deliberate-ignorance prongs. *See* 31 U.S.C. § 3729(b)(1). Reducing the entire inquiry to an objective one is inconsistent with any textualist approach to statutory interpretation—as is introducing an "authoritative guidance" requirement that has no connection to the text Congress enacted.

Even as a policy argument, this is a weak one because there is nothing about the strength of the FCA's remedies that makes a purely objective scienter standard more appropriate than a standard that considers both subjective and objective factors. Indeed, this Court recognized as much when it held that enhanced damages—*i.e.*, up to treble damages, which are regarded as punitive as opposed to compensatory—may properly be imposed in a patent case based on a defendant's subjective intent alone. *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 97, 104 (2016) Reasoning that a purely objective test would fail to reach "many of the most culpable offenders"—*i.e.*, those who engage in "deliberate wrongdoing"—this Court held

that "[t]he subjective willfulness of a patent infringer . . . may warrant enhanced damages, without regard to whether his infringement was objectively reckless." *Id*. at 104-05. For the same reasons, even if the Court accepts that the FCA's treble-damages remedy is robust, it should reject the conclusion that the defendant's subjective beliefs are irrelevant to the scienter inquiry.

Defendants also have the policy considerations backwards. Although the law should not punish reasonable or innocent behavior, there is nothing reasonable or innocent about persisting with a course of conduct that one believes to be unlawful. Similarly, misconduct does not retroactively become reasonable because clever lawyers can conjure a *post hoc* rationalization for it. *See Halo*, 579 U.S. at 105 (rejecting a rule that immunized parties from enhanced damages based on their ability "to muster a reasonable (even though unsuccessful) defense" when the party "did not act on the basis of the defense," because such a rule would permit bad behavior "solely on the strength of [an] attorney's ingenuity" and deviate from the bedrock legal principle that "culpability is generally measured against the knowledge of the actor at the time of the challenged conduct").

Instead, reasonable behavior when confronted with evidence that one may not be entitled to public funds is to consult the authorities and obtain clarity. *See Heckler*, 467 U.S. at 64 (holding that parties seeking funds from programs like Medicare are required to "obtain[] an interpretation of the applicable regulations" when confronted with "a doubtful question not clearly covered by existing policy statements"). Here, "Safeway received a variety of communications from

CMS, state Medicaid programs, and PBMs about U&C price reporting," which advised Safeway that discount prices must be reported as U&C prices. Pet. App. 9a. The reasonable response would have been to report those prices as U&C—or at least to follow up with authorities to see if the features of Safeway's discount program somehow permitted a different approach. Instead, Safeway took a manifestly unreasonable approach: it concealed its price matching and constructed a "fig leaf" distinction between discount clubs and Wal-Mart's program to justify concealing its prices from the government, *id*. at 17a—knowing all the while that it was being deceptive, and that the recipients of Safeway's information (had they known the truth) would have regarded its reports as false.

The bottom line is that petitioner's rule better serves respondents' policy objective—immunizing reasonable behavior—without excusing unreasonable bad-faith misconduct. Thus, petitioner's rule enables parties that reasonably believed that they were not submitting false claims—or sought in good faith to confirm the lawfulness of their conduct—to assert a defense based on their reasonable interpretation. On the other hand, parties that correctly believed they were submitting false claims or that responded to warnings by engaging in deception and subterfuge cannot take refuge in such a defense. By immunizing even parties that act in manifestly bad faith from liability, the Seventh Circuit's rule sweeps too broadly and subverts the clear intent of Congress.

V. This Court Should Consider Calling For The Views Of The Solicitor General

The federal government's interest in this matter is significant, and the Court may wish to call for the views of the Solicitor General. The United States is the real party in interest in every FCA case, and entitled to receive at least 70% of the proceeds of a successful case. *See* 31 U.S.C. § 3730(d). The government also files hundreds of FCA cases every year, covering a wide range of subject areas. And it has made its position on the question presented clear. Thus, in *Schutte*, the government filed a brief supporting the petition for rehearing *en banc*, arguing that "[t]he panel majority's unprecedented interpretation of the False Claims Act will significantly impair the government's ability to combat fraud," and also conflicts with precedent in "the Supreme Court, and other circuits." U.S. *Schutte* C.A. Reh'g Br. 5. Similarly, the government supported the plaintiff's petition for rehearing *en banc* in *Sheldon*, arguing that the now-vacated decision following *Schutte* "breaks with . . . the FCA's text, context, and history," and "also has enormous practical consequences, preventing the United States from recovering under the FCA wherever defendants can find arguable ambiguities in the myriad taxpayer-funded programs from which they profit." U.S. *Sheldon* C.A. Reh'g Br. 5. Based on these statements, the Court may wish to hear the government's views about whether further review is warranted.

CONCLUSION

This Court should grant certiorari in *Schutte* and/or this case, or in the alternative call for the views of the Solicitor General in one or both cases.

Respectfully submitted,

Tejinder Singh
Counsel of Record
SPARACINO PLLC
1920 L Street, NW
Suite 835
Washington, DC 20036
(202) 629-3530
tejinder@sparacinopllc.com

Rand J. Riklin
GOODE CASSEB JONES RIKLIN CHOATE & WATSON
2122 North Main Avenue
P.O. Box 120480
San Antonio, TX 78212
(210) 733-6030

Gary M. Grossenbacher
ATTORNEY AT LAW
402 Vale Street
Rollingwood, TX 78746
(512) 699-5436

Glenn Grossenbacher
LAW OFFICE OF GLENN GROSSENBACHER
24165 IwH-10 W.
Ste 217-766
San Antonio, TX 78257
(210) 271-3888

John Timothy Keller
Dale J. Aschemann
ASCHEMANN KELLER LLC
300 North Monroe St.
Marion, IL 62959-2326
(618) 998-9988

Paul B. Martins
Julie Webster Popham
James A. Tate
HELMER, MARTINS, TATE & GARRETT CO., LPA
1745 Madison Road
Cincinnati, OH 45206
(513) 421-2400

Jason M. Idell
IDELL PLLC
6800 Westgate Blvd.
Ste 132 #301
Austin, TX 78745
(512) 689-3081

C. Jarrett Anderson
ANDERSON LLC
1409 Wathen Avenue
Austin, TX 78703-2527
(512) 619-4549

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