No. 21-___

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
EX REL. TRACY SCHUTTE & MICHAEL YARBERRY,

Petitioners,

v.

SUPERVALU, INC., ET AL.

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act protects government programs from fraud by, *inter alia*, imposing civil liability on anybody who knowingly presents false claims for payment to the government or makes false statements that are material to such claims. 31 U.S.C. § 3729(a). The statute defines "knowingly" to include acting with: (1) actual knowledge; (2) deliberate ignorance; or (3) reckless disregard of the falsity of information. *See id*. § 3729(b)(1)(A). 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

Petitioners Tracy Schutte and Michael Yarberry are relators for the following governments under their various False Claims Acts: the United States of America and the States of California, Illinois, Utah, and Washington.

In addition to SuperValu Inc., the following entities are respondents here:

SuperValu Holdings, Inc.

FF Acquisitions, LLC

Foodarama, LLC

Shoppers Food Warehouse Corp.

SuperValu Pharmacies, Inc.

Albertson's, LLC

Jewel Osco Southwest LLC

New Albertson's, Inc.

American Drug Stores, LLC

Acme Markets, Inc.

Shaw's Supermarket, Inc.

Star Market Company, Inc.

Jewel Food Stores, Inc.

AB Acquisition LLC

RELATED PROCEEDINGS

United States ex rel. Schutte v. SuperValu Inc., No. 11-3290 (C.D. Ill.)

United States ex rel. Schutte v. SuperValu Inc., No. 20-2241 (7th Cir.)

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The Seventh Circuit's precedential opinion (Pet. App. 1a-58a) is published at 9 F.4th 455. The district court's opinion (Pet. App. 59a-87a) is not in the *Federal Supplement* but is available at 2020 WL 3577996.

JURISDICTION

The Seventh Circuit entered its decision on August 12, 2021, Pet. App. 1a, and denied petitioners' timely petition for rehearing on December 3, 2021, Pet. App. 88a-89a. On February 24, 2022, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including April 1, 2022. No. 21A439. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the appendix at Pet. App. 92a-93a.

INTRODUCTION

The False Claims Act (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).

Circuit courts disagree, four to four, over how the FCA's scienter requirement works in cases in which the defendant's claims are false because the defendant violated an ambiguous legal requirement. Four circuits apply ordinary scienter rules and hold that a defendant acts "knowingly" if the defendant subjectively knew or believed—or had reason to know or believe—that its conduct was unlawful. Potential ambiguity is one factor in this inquiry, but scienter ultimately turns on whether the defendant nevertheless understood or should have understood that its conduct was unlawful notwithstanding any ambiguity.

In conflict with those decisions, four circuits apply a special rule inspired by this Court's decision in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), under which scienter cannot be shown as a matter of law if the defendant's conduct was consistent with a reasonable interpretation of an ambiguous legal requirement, unless authoritative guidance warned the defendant away from that interpretation. Among these courts, there appears to be a further split regarding whether a defendant asserting this defense must have subjectively believed its reasonable interpretation at the time of the alleged misconduct (as *Safeco* put it, "followed" the interpretation, *id.* at 70 n.20)—or whether the defendant can escape liability merely by identifying a reasonable interpretation of the law *post hoc*.

Here, the Seventh Circuit embraced the most extreme version of this rule. In addition to holding that ambiguity defeats a finding of scienter absent authoritative guidance, the Seventh Circuit held that the defendant's subjective intent is "irrelevant" to the scienter inquiry. Pet. App. 26a. Thus, under the Seventh

Circuit's rule, even if a defendant *believes* it is presenting false claims, *wants* to present false claims, and *in fact* presents false claims, the defendant cannot be found to have "knowingly" presented false claims if the defendant's lawyers can later convince a court in litigation that the defendant's conduct fell within a reasonable interpretation of the law.

We cannot overstate the practical consequences of this rule. It is unavoidable that many statutes, regulations, and government contracts will contain ambiguities that the government has not expressly addressed. Private parties seeking public funds under such programs are supposed to act with care and make reasonable inquiries to ensure that they are entitled to payment before presenting claims for taxpayer dollars. The Seventh Circuit's rule encourages the exact opposite behavior by providing contractors a license to defraud myriad government programs as long as they can find any way to rationalize their behavior.

The Seventh Circuit's error is serious enough that the United States filed an amicus brief in support of petitioners' request for rehearing en banc. The government argued that the Seventh Circuit'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. C.A. Reh'g Br. 5. The government also highlighted the importance of the question, explaining that this case involves a "frequent fact pattern," and that the Seventh Circuit's rule "will create an unwarranted 'safe harbor' even for defendants who intended fraud." *Id*. at 5, 12.

This Court should grant certiorari and reverse.

STATEMENT OF THE CASE

I. Legal Background

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. The government has recovered over $70 billion since Congress strengthened the FCA in 1986, including over $5.6 billion in 2021. *See* Press Release, U.S. Dep't of Just., Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021 (Feb. 1, 2022), tinyurl.com/3wbusphm.

Most of these recoveries involve healthcare fraud—but the FCA also protects "a multitude of other government operations and functions." Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion, *supra*. Thus, the FCA "helps to support our military and first responders by ensuring that government contractors provide equipment that is safe, effective and cost efficient." *Ibid*. It safeguards "American businesses and workers by promoting compliance with customs laws, trade agreements, visa requirements and small business protections." *Ibid*. And it protects "other critical government programs ranging from the provision of disaster relief funds to nutrition benefits for needy families." *Ibid*.

To establish liability, the FCA requires both falsity and scienter—the latter of which is at issue in this case. *See* 31 U.S.C. § 3729(a)(1)(A)-(G). Anyone who "*knowingly* presents, or causes to be presented, a false or fraudulent claim for payment or approval," or who

"*knowingly* makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" has violated the FCA. *Id.* § 3729(a)(1)(A), (B) (emphasis added). The FCA explicitly defines the terms "knowing" and "knowingly," providing three possible ways to establish scienter: the person (1) had "actual knowledge of the information"; (2) acted "in deliberate ignorance of the truth or falsity of the information"; or (3) acted "in reckless disregard of the truth or falsity of the information." *Id.* § 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 is a *qui tam* FCA action brought by petitioners, as relators on behalf of the United States and various state governments, against respondents, which are corporations associated with the grocery and pharmacy chain SuperValu. Petitioners allege that SuperValu intentionally misreported the usual and customary prices it charged for prescription drugs (sometimes called "U&C prices")—which caused government healthcare programs like Medicare Part D and Medicaid to pay more for the drugs than they lawfully should have.

From 2006 to 2016, SuperValu utilized a price-matching program to lure customers to buy drugs at SuperValu's in-store pharmacies. Pet. App. 6a. SuperValu made this program available to the general public, matching competitors' prices for any customer who wanted a lower price. *Id*. at 6a-7a. SuperValu matched prices 3,813 times in 2006, increasing to a high of 1.25 million times in 2011—for a total of 6.3 million price matches in the ten-year period at issue. *See* Pet'r C.A. Br. 10. For 44 of SuperValu's top 50 drugs, the company was matching prices for a majority of sales. *Id*. at

11. For some drugs, more than 80% of sales were discounted—often steeply. For example, for the drug Simvastatin, a widely prescribed medication that mitigates the risk of heart disease, SuperValu sold five times as many prescriptions at the discounted price of $4 as it did at the much higher U&C prices reported to the government, which ranged from $33.69 to $150.69. *Ibid*.

Under SuperValu's contracts with Pharmacy Benefit Managers (PBMs)[1] as well as under Medicaid regulations, SuperValu was not allowed to charge the government more than the "usual and customary" (U&C) price it charged to customers paying cash.[2] SuperValu's discount program created a legal problem because it offered discounts with such high frequency that the discount prices became the U&C prices for cash customers. But SuperValu did not report those discounted prices as the U&C price; instead, it continued reporting—and charging the government—higher prices.

SuperValu knew that its reporting was problematic. Many of SuperValu's contracts with PBMs explicitly provided that U&C prices must incorporate discounts like price-matching. *See* Pet'r C.A. Br. 12-13 (collecting citations). For Medicaid purposes, state laws often defined the U&C price as the price offered to the general public—and SuperValu knew that its

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[1] PBMs are intermediaries that negotiate drug prices on Medicare's behalf. Under agreements with plan sponsors, PBMs effectively administer Medicare Part D's prescription drug program. *See* Pet. App. 3a-4a.

[2] In this context, "cash" means the customer paid out of her own pocket, as opposed to using insurance.

price-matching program was available to any member of the public who requested a match. *Id*. at 14. SuperValu also was aware of notices—including a memorandum by the Centers for Medicare and Medicaid Services (CMS) stating that "where a pharmacy offers a lower price to its customers throughout a benefit year" that discount price is the pharmacy's U&C price, as well as a notice from a PBM to SuperValu stating that discount prices (including price-matching) must be reported as U&C prices—and inquiries from PBMs about the same issue. *Id*. at 14-16 (citation omitted).

SuperValu responded by taking a more covert approach to discounts. Whereas in 2006, the company had openly advertised the price-matching program in all its stores, it ceased doing so after receiving a subpoena from the U.S. Department of Health and Human Services' Office of Inspector General in 2012 about the practice—but SuperValu continued to offer the discount prices to all customers, while still charging the government more. *See* Pet'r C.A. Br. 8-9.

Indeed, a SuperValu executive acknowledged internally that once "price matching" stops being the "exception," and starts being "more 'rule' or routine," that would "begin to affect the integrity of our U&C price." Pet. App. 67a. The executive recognized that reporting the "true U&C price is a claim submission requirement for all Medicaid and private commercial Managed Care and PBM agreements," which meant that the "financial implication of this is very broad." *Ibid*. The executive therefore noted that SuperValu had taken a "'stealthy' approach" to price-matching, offering it to customers but hiding that practice from PBMs and the government. *Ibid*; Pet'r C.A. Br. 10, 30-31.

The government paid dearly. In many cases, SuperValu charged the government prices that were "*eight to fifteen times higher* than the prices it was actually charging a majority of the relevant customers." Pet. App. 31a (Hamilton, J., dissenting).

In *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 645 (7th Cir. 2016), the Seventh Circuit held that prices under discount programs similar to SuperValu's must be reported as U&C prices. The court further held that a pharmacy that fails to properly report U&C prices can be held liable under the FCA. *Id.* at 635.

2. Petitioners sued respondents in the Central District of Illinois in 2011. Pet. App. 9a, 59a. After the Seventh Circuit decided *Garbe*, the district court granted partial summary judgment to petitioners on the element of falsity, holding that respondents' "lower matched prices, offered to the general public and widely and consistently available, are the usual and customary prices for their drugs," such "that Medicare Part D and Medicaid were entitled to those actual usual and customary prices." *United States v. SuperValu, Inc.*, 2019 WL 3558483, at *8 (C.D. Ill. Aug. 5, 2019).

Approximately one year after finding that respondents' claims were false as a matter of law, the district court turned around and granted summary judgment to respondents on the element of scienter. The court held that the reasoning of *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), which concerned the conduct of non-government contractors under the Fair Credit Reporting Act (FCRA), "applies to the FCA and its scienter requirement." Pet. App. 74a. Under this standard, as the district court understood

it, "[i]f there was more than one reasonable interpretation of 'usual and customary price' and [respondents'] interpretation was consistent therewith, a defendant should not be treated as a 'knowing or reckless violator.'" *Id*. at 75a (citation omitted). The district court held that prior to the decision in *Garbe*, there was no "binding authority warning the [respondents] away from their position" regarding U&C prices, and so petitioners could not "meet the FCA's scienter requirement." *Id*. at 85a-86a. In the district court's view, "[i]f an objectively reasonable interpretation of the law supported its conduct, . . . [respondents] could not actually know they were violating a legal obligation," no matter their belief that they were doing just that. *Id.* at 76a.

3. Petitioners appealed, and a divided panel of the Seventh Circuit affirmed. The court imported what it described as *Safeco*'s interpretation of the FCRA to the FCA, holding that a court cannot find scienter as a matter of law if the defendant's conduct falls within an "objectively reasonable" interpretation of the law, and "no authoritative guidance cautioned defendants against it." Pet. App. 12a.

Of particular concern, the Seventh Circuit rejected the argument "that for an erroneous interpretation to be objectively reasonable, the defendant must have held that view at the time that it submitted its false claim." Pet. App. 26a. The majority recognized the concern, raised by the dissent, that under the majority's rule, "defendants can avoid liability by concocting 'post-hoc arguments' to justify their conduct under an objectively reasonable reading of the applicable regulation—even if they acted in bad faith." *Ibid*. The ma-

jority found this concern "irrelevant." *Ibid*. In the majority's view, "it is not enough that a defendant suspect or believe that its claim was false"—and "a defendant's subjective intent does not matter for [the] scienter analysis" because "the inquiry is an objective one." *Id*. at 26a-27a. Applying this test, the Seventh Circuit held that "SuperValu has offered an objectively reasonable interpretation of U&C price." *Id*. at 27a.

The Seventh Circuit also found that there was no "authoritative guidance that should have warned defendants away from their erroneous interpretation." Pet. App. 27a. The court held that such guidance "must come from a source with authority to interpret the relevant text," and "must have a high level of specificity to control an issue." *Id*. at 27a-29a. Thus, the court held that the guidance "must come from a governmental source—either circuit court precedent or guidance from the relevant agency." *Id*. at 28a.

Applying this rule, the court ignored altogether "the PBM contract definitions of U&C price" because PBMs are private entities. Pet. App. 28a. The court also held that a manual by CMS "was not sufficiently specific to warn SuperValu that its program likely would fall within the definition of U&C price," because the manual discussed discount programs, but not specifically "price-match programs like that employed by SuperValu." *Id*. at 29a-30a. Based on these holdings, the Seventh Circuit held that "[t]he district court correctly granted summary judgment to SuperValu on the question of scienter." *Id*. at 31a.

Judge Hamilton dissented. He explained that the application of *Safeco*'s understanding of the FCRA's scienter provision does not make sense in FCA cases and contradicts the statute's text and history. Pet.

App. 48a-49a, 52a-53a (Hamilton, J., dissenting). Judge Hamilton pointed to the FCA's three-pronged definition of "knowledge," explaining that the majority's grafting-on of *Safeco*'s rule "effectively nullifies two-thirds of the statutory definition of 'knowing'" by reducing the requirement to recklessness alone. *Id.* at 49a. The dissent drew on the common law history of fraud, noting how "state of mind is critical" in the "common law of fraud, one of the paradigmatic intentional torts." *Id.* at 54a (emphasis omitted). Furthermore, Judge Hamilton warned that preventing judges from considering subjective intent—particularly given the vast permutations of fraudulent conduct for which clever lawyers "can concoct a *post hoc* legal rationale that can pass a laugh test"—could open the door to widespread fraudulent conduct. *Id.* at 32a.

4. Petitioners sought rehearing en banc. The United States filed an amicus brief in support of the rehearing petition. The government did not mince words, arguing that the Seventh Circuit's "unprecedented interpretation of the False Claims Act will significantly impair the government's ability to combat fraud." U.S. C.A. Reh'g Br. 5. The government explained that the Seventh Circuit's rule conflicts with "circuit decisions holding that ambiguity in a requirement or applicable government guidance does not alone preclude a finding of knowledge" and "that warnings from non-governmental sources can put a defendant on notice of a likely violation." *Id*. at 12. Highlighting the question's practical importance, the United States detailed this "frequent fact pattern" and explained how the decision "encourages defendants to engage in ostrich-like behavior and places the burden on the government to anticipate every possible fraud."

Id. at 5, 12. Indeed, the Seventh Circuit's rule "makes it practically impossible to prove knowledge in contexts . . . where private entities administer the program on the government's behalf." *Id*. at 12-13. Additionally, the government praised this case as a vehicle to consider the issue as it "presents a stark example of the kind of evidence the majority's ruling will keep from a jury." *Id*. at 13.

The Seventh Circuit denied rehearing. Pet. App. 88a-89a.

5. This petition followed.

REASONS FOR GRANTING THE WRIT

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

Certiorari should be granted to resolve a circuit split over the meaning of the FCA's scienter requirement in cases involving claims of legal falsity. Considering published opinions, the circuits are divided four to four.

1. Four circuits apply ordinary scienter principles in determining whether a defendant "knowingly" violated the FCA despite a reasonable-but-wrong interpretation of an ambiguous legal requirement. These circuits consider defendants' subjective understanding, often looking to defendants' reactions after warnings of potentially illegal conduct to determine whether they acted "knowingly." They also consider a range of evidence—from government documents to advice of counsel to internal company warnings—as indicia of defendants' knowledge at the time of the challenged conduct. Although some of these circuits

acknowledge that *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), is relevant authority, they do not apply the broad reading of *Safeco* advanced by the Seventh Circuit.

The Eleventh Circuit exemplifies this holistic approach, holding that "[a]lthough ambiguity may be relevant to the scienter analysis, it does not foreclose a finding of scienter." *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148, 1155 (11th Cir. 2017). Instead, the appropriate 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." *Ibid.* (emphasis added). In making this inquiry, the Eleventh Circuit explicitly rejects defendants' ability to seek refuge in a "'reasonable' interpretation of an ambiguous regulation manufactured *post hoc*." *Ibid.*

The defendants in *Phalp* relied on *Safeco* to support their scienter argument. *See* Appellees' Answer Br. at 56, *Phalp*, *supra*, 2016 WL 3098444 ("*Safeco* is instructive on the issue of FCA scienter in a case, like this, where Defendants adopted reasonable interpretations of the Medicare regulations at issue in the absence of contrary authorities"); *id.* at 57 (arguing that *Safeco*'s "definition of 'willfully' and the FCA's definition of 'knowingly' are synonymous," such that the Eleventh Circuit should follow "the Supreme Court's knowledge analysis in *Safeco*"). However, the Eleventh Circuit rejected those arguments, evidently guided by the amicus brief filed by the United States—which specifically urged the court not to apply *Safeco*, and instead advanced the same rule the government advanced in this case.

Phalp relied on *United States ex rel. Walker v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349 (11th Cir. 2005). There, the defendant followed a reasonable-but-wrong interpretation of a Medicare regulation, billing 15% more than the correct interpretation allowed. *Id.* at 1353-54. Reversing summary judgment, the Eleventh Circuit cited a range of evidence "during the relevant time period," including the "Medicare Carrier's Manual, Medicare bulletins, seminar programs, and expert testimony regarding proper billing." *Id.* at 1356, 1358. Most relevant here, the Eleventh Circuit determined that guidance bulletins written by private intermediaries of the Medicare program and internal company communications about the requirements were "[e]ach . . . relevant to the meaning of the Medicare regulation at issue and [defendant's] understanding of that meaning." *Id.* at 1358. *Walker* exemplifies the Eleventh Circuit's holistic approach to the scienter inquiry.

The Ninth Circuit adopts the same approach. In *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 461 (9th Cir. 1999), the defendant failed to properly report information, causing the government to pay more under a contract than it should have—which is of course exactly what happened in this case. Although the defendant argued that its reasonable interpretation of the reporting requirement precluded liability, the Ninth Circuit determined this was not dispositive. *Id.* at 463-64. Instead, the court inquired into the defendant's subjective belief at the time, holding that evidence of the defendant's intent to leave a subcontractor off government forms—including its directive to "'forget about it'" when the issue was brought to the defendant's attention by an employee—was

enough to "preclud[e] summary judgment on the issue of scienter." *Id.* at 465.

In *United States v. Mackby*, 261 F.3d 821 (9th Cir. 2001), the court expressly rejected 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. *Id*. at 827 (quotation marks omitted). The court reasoned that such a high level of certainty might be appropriate in criminal cases, but that in a civil FCA case, the government was not required to "negative any reasonable interpretation that would make the defendant's statement factually correct." *Ibid*. (quotation marks omitted). Citing this Court's decision in *Heckler*, which held that "'[p]rotection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law,'" the Ninth Circuit held that the defendant had "a duty to familiarize [himself] with the legal requirements for payment," and was properly held liable for his failure to conduct a reasonable inquiry before seeking payment. *Id*. at 828 (quoting *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63-64 (1984)).

Oliver and *Mackby* were decided before *Safeco*, but the Ninth Circuit continues to follow those holdings. Thus, in *United States v. Chen*, the Ninth Circuit determined that Medicare "pamphlets and newsletters that collectively explained the requirements" for a regulation were indicia that the defendant's interpretation "was neither correct nor in good faith." 402 F. App'x 185, 187-88 (9th Cir. 2010) (citing *Oliver*, 195 F.3d at 464). The Ninth Circuit explained that "Medicare providers have a duty to familiarize themselves with billing requirements," and that providers that fail

to do so and get the law wrong "act[] in reckless disregard or deliberate ignorance." *Id.* at 187 (citing *Heckler*, 467 U.S. at 64); *see also United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1150 (9th Cir. 2004) (holding that evidence of defendant's preparation of a document "without investigating the truth of [a] claim" within the document "is sufficient to raise a triable issue of material fact as to whether [defendants] . . . acted knowingly or with reckless disregard for or deliberate ignorance of the truth or falsity of the representations"). District courts in the Ninth Circuit apply the same rule. *See, e.g.*, *United States ex rel. Kuzma v. N. Ariz. Healthcare Corp.*, 2021 WL 75827, at *7 (D. Ariz. Jan. 8, 2021) (citing *Oliver* and discussing evidence of defendant's good faith); *United States v. Vandewater Int'l Inc.*, 2020 WL 4372115, at *9-10 (C.D. Cal. June 23, 2020) (similar).

The Sixth Circuit in *United States ex rel. Prather v. Brookdale Senior Living Communities*, 892 F.3d 822, 838 (6th Cir. 2018), likewise focused on the defendant's subjective understanding at the time of the alleged misconduct, holding that "defendants deliberately ignored multiple employees' concerns about their compliance with relevant regulations," indicating "that they acted with 'reckless disregard.'" "Once the defendants had been informed by the employees explicitly hired to review these claims that there may be compliance issues, they had an obligation to inquire into whether they were actually in compliance with all appropriate regulations." *Ibid.*; *cf. United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 531 (6th Cir. 2012) (holding evidence of good faith, including seeking legal counsel on an ambiguous issue and

having counsel seek "clarification on the rules from CMS officials," proved "defendants were not in reckless disregard of the truth or falsity of their claims").

The Tenth Circuit similarly asks what the defendant knew or intended at the time and treats the reasonableness of a defendant's interpretation as relevant but not dispositive. In *United States v. Boeing Co.*, 825 F.3d 1138, 1145 (10th Cir. 2016), the district court granted summary judgment to the defendants on multiple grounds, including the defendants' reasonable interpretation of the relevant legal requirement (certified designs for aircraft parts). The Tenth Circuit affirmed without adopting the district court's reasoning. Instead, the court looked to the record for evidence that the defendant subjectively "knew the [aircraft] parts didn't comply with FAA regulations—or, alternatively, was deliberately ignorant of, or acted with reckless disregard to, FAA violations—yet submitted a claim to the government for payment anyway." *Id.* at 1149. The court was "struck" "by what is not in the record," *i.e.*, the lack of evidence of subjective understanding or intent. *Ibid.* (quotation marks omitted). It also found the relevant requirements ambiguous, but ambiguity was only one fact in a holistic scienter inquiry. *See id.* at 1149-50; *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 950 (10th Cir. 2008) (finding no scienter because defendants did not "intentionally ignore[], "appreciate[] the significance of, yet disavow[]," or "purposefully refuse[] to verify" ambiguous legal requirements for Department of Defense grants).

2. In contrast with the circuits that apply ordinary scienter principles, four circuits adopt a narrower 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. While the Eighth and D.C. Circuits are somewhat vague as to whether a defendant must have *actually believed* its interpretation at the time of the challenged conduct, divided panels of the Fourth and Seventh Circuits have adopted the extreme position that all evidence of a defendant's subjective belief is irrelevant.

The Eighth Circuit holds that "a reasonable interpretation of a statute cannot support a claim under the FCA if there is no authoritative contrary interpretation of that statute." *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 (8th Cir. 2010); *see also Olson v. Fairview Health Servs. of Minn.*, 831 F.3d 1063, 1072 (8th Cir. 2016) ("A reasonable interpretation of ambiguous statutory language does not give rise to a FCA claim."); *United States ex rel. Ketroser v. Mayo Found.*, 729 F.3d 825, 832 (8th Cir. 2013) (holding defendant's "reasonable interpretation of any ambiguity inherent in the regulations belies the scienter necessary to establish a claim of fraud under the FCA").

In *United States ex rel. Donegan v. Anesthesia Associates of Kansas City, PC*, 833 F.3d 874, 878-80 (8th Cir. 2016), the Eighth Circuit affirmed summary judgment for the defendant because a Medicare requirement was ambiguous, the requirement had not "been defined by a controlling source," and the defendant's interpretation was "objectively reasonable." Refusing to expand the inquiry beyond authoritative guidance, the Eighth Circuit rejected the argument—embraced by the Sixth Circuit in *Prather* and the Ninth Circuit

in *Chen*—that, in the face of the ambiguous requirement, the defendant had a duty to "ask CMS or its local contractors whether its interpretation . . . was proper" to avoid "reckless disregard." *Id.* at 880.

Eighth Circuit precedent also suggests, however, that a defendant must have contemporaneously believed its "reasonable interpretation" at the time of the challenged conduct for that interpretation to provide any protection. *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").

In *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015), the D.C. Circuit held as a matter of law that a defendant could not be liable under the FCA because (1) its interpretation of an ambiguous term was "reasonable" and (2) there was no "authoritative guidance" from the court of appeals or relevant agency warning the defendant away from that interpretation. *Id.* at 289 (citing *United States ex rel. K&R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983 (D.C. Cir. 2008)).

The D.C. Circuit is also ambiguous as to whether defendants must have contemporaneously held their reasonable interpretation at the time of the challenged conduct. *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.*, --- F. Supp. 3d ----, 2021 WL 3363446, at *9 (D.D.C. Aug. 3, 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.").

A sharply divided panel of the Fourth Circuit recently held that because a defendant's reading of the relevant statute "was at the very least objectively reasonable and because it was not warned away from that reading by authoritative guidance, it did not act 'knowingly' under the False Claims Act." *United States ex rel. Sheldon v. Allergan Sales, LLC*, 24 F.4th 340, 343-44 (4th Cir. 2022). The question in *Sheldon* was whether, when a drug manufacturer provided discounts to different participants in a supply chain (*e.g.*, a discount to distributors, and then a discount to retail pharmacies), it was required to aggregate those discounts when calculating its best price (which would require the manufacturer to pay a larger rebate to Medicaid States), or whether the manufacturer was instead permitted to use only the largest discount it offered to a single customer (resulting in a lower rebate). *See id.* at 346. Consulting the statutory and regulatory text and history, the Fourth Circuit held that the manufacturer's interpretation was at least reasonable, and therefore precluded liability. *See id.* at 351.

The Fourth Circuit's decision provoked a fiery dissent arguing that the panel majority had committed a

"judicial overhaul of the False Claims Act" by applying *Safeco* to the FCA, deepened a split with the Eleventh Circuit, and applied the *Safeco* framework incorrectly. *See* 24 F.4th at 357, 361-64 (Wynn, J., dissenting). The dissenting opinion in *Sheldon* mirrored, in substance and in tone, Judge Hamilton's dissenting opinion in this case—and illustrates that the question presented has provoked sharp divisions among circuit court judges that only this Court can ultimately resolve.

3. Finally, in this case and in *Sheldon*, the panel majorities argued that their decisions were consistent with the decisions of other circuits, Pet. App. 16a ("Every other circuit court to discuss the relevance of *Safeco*'s scienter standard to the FCA has arrived at this conclusion"); *Sheldon*, 24 F.4th at 344 (arguing that "sister circuits . . . have followed the framework that the Supreme Court has set forth in *Safeco*")—while the dissenting opinions asserted a circuit conflict, Pet. App. 47a (Hamilton, J., dissenting) (explaining that the Eleventh Circuit in *Phalp* "squarely rejected the majority's position here"); *Sheldon*, 24 F.4th at 363-64 (Wynn, J., dissenting) (arguing that "the Eleventh Circuit received extensive briefing on the recklessness standard recognized in *Safeco* and declined to import it into the False Claims Act," and that the out-of-circuit decisions the majority cited "are either unpublished or easily distinguishable").

Here, it is important to recognize that the panel majorities framed the question in a misguided way, arguing that there is no split because no circuit court has explicitly rejected the application of *Safeco* to the FCA. This framing is wrong because the circuit split inquiry does not turn on whether courts have cited particular

precedents; it turns on whether different circuits' precedential decisions resolve the same legal question using materially different rules such that a given case will come out differently based on where it is brought.

Properly understood, the split is clear because this case would have been decided differently in other circuits. Under the ordinary scienter rule, evidence of respondents' subjective understanding would have precluded summary judgment, notwithstanding any ambiguity about the meaning of "usual and customary" prices. That evidence showed SuperValu had repeatedly been admonished to report discount prices as U&C prices, it had observed other discount sellers (including Walmart) instructed to do the same, and its own executives understood that when discount pricing became the rule rather than the exception, it would affect the integrity of the U&C prices SuperValu reported. These concerns about the "integrity" of the scheme would trigger an obligation to inquire under *Prather* and *Chen* to avoid acting in "reckless disregard." SuperValu's internal email describing its approach as "stealthy"—similar to the defendant in *Oliver* telling an employee to "forget about" a noncompliance concern—would also have been a key fact permitting a jury to hold that SuperValu knew that its claims were false at the time.

II. The Question Presented Is Frequently Recurring And Important

Certiorari should be granted because the question presented is frequently recurring. As the government explained in its amicus brief supporting rehearing en banc, "[t]his case concerns a frequent fact pattern: a company submitted false claims in violation of a legal

requirement under a government program, but in litigation identifies an incorrect-but-still-reasonable alternative interpretation of the rule that would have allowed its conduct." U.S. C.A. Reh'g Br. 5. Even limited only to prescription drug pricing cases, this fact pattern arises often.[3] It also arises in the vast array of other government programs the FCA protects from fraud—everything from military contracting to education financing to reimbursements for hospitals.[4] Indeed, regulatory ambiguity defenses are litigated in myriad FCA cases every year.[5]

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[3] *See, e.g.*, *United States v. Allergan, Inc.*, 746 F. App'x 101, 103, 106 (3d Cir. 2018) (affirming motion to dismiss because defendants held a reasonable-but-wrong interpretation of their drugs' "Average Manufacturer Price"); *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 645 (7th Cir. 2016) (holding Kmart's generic-drug discount prices were its "usual and customary" prices, not the much-higher prices charged to Medicare Part D); *BCBSM, Inc. v. Walgreen Co.*, 512 F. Supp. 3d 837, 847 n.3 (N.D. Ill. 2021) (describing Walgreen's settlement of FCA claims for submitting "usual and customary" prices higher than those for its cash-discount program); *United States v. Safeway Inc.*, 466 F. Supp. 3d 912, 941 (C.D. Ill. 2020) (granting summary judgment for a reasonable-but-wrong interpretation of "usual and customary prices"), *appeal pending*, No. 20-3425 (7th Cir. docketed Dec. 15, 2020).

[4] *See, e.g.*, *Oasis Int'l Waters, Inc. v. United States*, 134 Fed. Cl. 405 (2016); *Miller*, 840 F.3d 494; *Olson*, 831 F.3d 1063.

[5] *See, e.g.*, *United States ex rel. Martino-Fleming v. S. Bay Mental Health Ctrs.*, 540 F. Supp. 3d 103 (D. Mass. 2021) (discussing whether regulations for clinical supervision, recordkeeping, and counselor credentialing were ambiguous, based on defendant's "reasonable interpretations" defense); *United States ex rel. Ormsby v. Sutter Health*, 444 F. Supp. 3d 1010, 1071-72 (N.D. Cal. 2020) (finding that defendants' claimed "reasonable interpretation" of an actuarial-equivalence regulation was precluded by authoritative guidance).

The problem here is not that the government is lax about regulating or resolving ambiguities. Instead, the problem is that a certain amount of ambiguity is inevitable in complex government programs—and so it is unrealistic to expect the government to anticipate and regulate in response to every potential ambiguity, particularly when, as here, a defendant in bad faith conceals its unlawful conduct. Pet'r C.A. Br. 10, 30-31. Instead, the government relies—and indeed must rely—on contractors to act in good faith by attempting to resolve ambiguities relating to payment and reporting requirements instead of exploiting every ambiguity to extract the maximum amount of taxpayer funds.

Certiorari should also be granted because the question presented is important in the qualitative sense. With implications for almost every government agency,[6] the Seventh Circuit's "radical re-interpretation" of the FCA threatens to so drastically expand the regulatory ambiguity defense that it will "significantly impair the government's ability to combat fraud." U.S. C.A. Reh'g Br. 5. It will gut the government's ability to recover for false claims if a bad-faith actor can comb regulations *post hoc* for any arguable ambiguity and

[6] *See, e.g.*, *Ketroser*, 729 F.3d 825 (Department of Health and Human Services); *United States v. Quicken Loans Inc.*, 239 F. Supp. 3d 1014 (E.D. Mich. 2017) (Department of Housing and Urban Development); *United States v. Savannah River Nuclear Sols., LLC*, 2016 WL 7104823 (D.S.C. Dec. 6, 2016) (Department of Energy); *U.S. Dep't of Transp. ex rel. Arnold v. CMC Eng'g, Inc.*, 947 F. Supp. 2d 537 (W.D. Pa. 2013) (Department of Transportation), *aff'd*, 567 F. App'x 166 (3d Cir. 2014); *United States v. Kellogg Brown & Root Servs., Inc.*, 800 F. Supp. 2d 143 (D.D.C. 2011) (Department of Defense).

defeat scienter on the basis that someone else, somewhere else could have held a different interpretation.

The question presented also has important implications for the role of administrative agencies. The Seventh Circuit's understanding of "authoritative guidance" is limited to "circuit court precedent or guidance from the relevant agency" that speaks to the defendant's interpretation with "a high level of specificity." Pet. App. 27a-28a. "Rather than requiring due diligence, the decision encourages defendants to engage in ostrich-like behavior and places the burden on the government to anticipate every possible fraud." U.S. C.A. Reh'g Br. 12. In essence, the government must now play the role of a company's attorney rather than allowing the jury to consider a "defendant's failure to heed the warnings of attorneys or employees and the guidance of industry experts." *Id*. at 9. "The decision also makes it practically impossible to prove knowledge in contexts such as Medicare Part D, where private entities administer the program on the government's behalf," *id.* at 12-13, and "the relevant requirements" therefore "arise from contracts between private entities rather than regulations," *id.* at 10.

As an illustration of the type of problems the Seventh Circuit's decision will cause, consider the government's efforts to recover billions of dollars in fraudulent claims connected to rapidly created aid programs under the American Rescue Plan Act of 2021 and CARES Act. The broad, swift distribution of funds in emergency pandemic-response measures makes some amount of ambiguity inescapable. It is inevitable that many bad-faith actors will attempt to exploit those ambiguities for their own gain, at the expense of taxpayers and the American public. *See* Memorandum

from Majority Staff to Members, Select Subcommittee on the Coronavirus Crisis (Mar. 25, 2021), https://tinyurl.com/45tdbnt5 (estimating $79 billion in potential fraud from the Economic Injury Disaster Loan program and $4.6 billion from the Paycheck Protection Program); Press Release, U.S. Dep't of Just., Justice Department Takes Action Against COVID-19 Fraud (Mar. 26, 2021), https://tinyurl.com/2fft8t93 ("[W]histleblower complaints have been on the rise as unscrupulous actors take advantage of vulnerabilities created by the COVID-19 pandemic and the new government programs disbursing federal relief[.]"). The government is relying on the FCA to recover those fraud losses. *See* U.S. Dep't of Just., Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Federal Bar Association Qui Tam Conference (Feb. 17, 2021), https://tinyurl.com/zdbj3j9. Yet, in the absence of specific authoritative guidance, the Seventh Circuit's interpretation will enable a vast number of fraudsters—who were acting in bad faith—to escape this liability through crafty attorney arguments presented after the fact.

III. This Case Presents An Ideal Vehicle For Deciding The Question Presented

This case is an exemplary vehicle for deciding the relevance of subjective intent to FCA scienter in the face of an ambiguous legal requirement. The question presented is the sole issue in the case, as the scienter determination was the only ground on which respondents sought and received summary judgment. No other elements are contested at this time; indeed, petitioners themselves received summary judgment on the element of falsity.

It is also beneficial that this case was decided on a full record after summary judgment, because the case includes real-world examples of evidence of bad faith, government-issued guidance, and instructions from the PBMs administering government healthcare programs. The record thus illustrates, in detail, the sorts of evidence that the Seventh Circuit deemed "irrelevant," which the Court can consider for itself as it decides which legal rule makes sense.

IV. The Decision Below Is Incorrect

Under the Seventh Circuit's rule, even a defendant that believes it is presenting, wants to present, and actually does present a false claim is not liable under the FCA if its lawyers can later concoct a reasonable interpretation of the law that covers its conduct. Thus, rather than encourage contractors to turn square corners when dealing with the government, the Seventh Circuit's rule encourages the opposite behavior: taking as much public money as possible and relying on skilled lawyering to whitewash the misconduct after the fact. This approach contravenes the FCA's text and this Court's precedents.

1. First, the Seventh Circuit's opinion flouts the FCA's text. The statutory definition of "knowingly" lays out three independent ways to meet it: "(i) ha[ving] actual knowledge of the information; (ii) act[ing] in deliberate ignorance of the truth or falsity of the information; or (iii) act[ing] in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A). These three paths have distinct meanings. A core distinction is that "actual knowledge" and "deliberate ignorance" are centrally concerned with one's subjective knowledge whereas

"reckless disregard" also adds an objective standard. *Compare Knowledge*, *Black's Law Dictionary* (11th ed. 2019) ("An awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact."); *and Deliberate*, *ibid.* ("Intentional; premeditated; fully considered."), *with Reckless Disregard*, *ibid.* ("[I]ntentional commission of a harmful act or failure to do a required act when the actor knows or has reason to know[.]").

The Seventh Circuit recognized that "the three scienter terms used to define 'knowingly' are distinct and bear different meanings." Pet. App. 21a. Yet, the Seventh Circuit took the FCA's three provisions and "reduce[d them] to one objective recklessness inquiry in which *only* the objective clarity of the rule and governmental guidance matter . . . ." U.S. C.A. Reh'g Br. 1. This not only contradicts the plain meaning of all three terms, but also violates the canon against surplusage. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

Moreover, "'it is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses.' And the term 'fraudulent' is a paradigmatic example of a statutory term that incorporates the common-law meaning of fraud." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 187 (2016) (citation and brackets omitted). In *Escobar*, the Court examined the very provision at

issue here and concluded that, besides no longer requiring specific intent, "Congress retained all other elements of common-law fraud that are consistent with the statutory text." *Id.* at 187 n.2.

Congress thus retained an emphasis on subjective belief, which plays a central role in assessing scienter for common law fraud. Under the Second Restatement of Torts:

> A misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.

Restatement (Second) of Torts § 526. The comments to the Restatement repeatedly emphasize the relevance of subjective belief. *See id.* cmt. c ("[K]nowledge of falsity is not essential; it is enough that he believes the representation to be false."); *id.* cmt. d ("[I]t is a matter to be taken into account in determining the credibility of the defendant if he testifies that he believed his representation to be true."); *id.* cmt. e ("[F]raud is proved if it is shown that a false representation has been made without belief in its truth[.]").[7] The Restatement definition is fully consistent with the FCA's definition

[7] These authorities dispose of the Seventh Circuit's argument that a defendant "cannot know that its claim is false if the requirements for that claim are unknown." Pet. App. 21a (emphasis omitted). The law of fraud has never required certainty beyond all doubt as a prerequisite to "knowledge." A lack of confidence or an awareness of a high risk of falsity have always been enough.

of "knowingly," signaling Congress's intention to retain this common law understanding.

The Restatement is not the only source emphasizing that subjective intent matters. The relevance of subjective belief is a bedrock principle throughout the common law of fraud. *See* U.S. C.A. Reh'g Br. 11; George Spencer Bower, *The Law of Actionable Misrepresentation* §§ 99-100, at 107-08 (2d ed. 1927) ("[W]here this 'honest belief in its truth' is not to be found, the misrepresentation is fraudulent . . . ." *Id.* at 105); *Derry v. Peek* [1889] 14 AC (HL) 337, 374 ("[F]raud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.").

To the extent the FCA departs from the common law, it is only to loosen the requirements for proving scienter. Prior to 1986, the statute had no definition of "knowingly." Some lower courts had defined knowingly as requiring actual knowledge or even specific intent, but Congress thought that was too demanding a standard for the FCA's civil remedy. *See* S. Rep. No. 99-345, at 7 (1986). Congress thus broadened the standard to not require specific intent, 31 U.S.C. § 3729(b)(1)(B), and to encompass constructive knowledge, *id.* § 3729(b)(1)(A)(ii)-(iii)—but neither of these limited the relevance of subjective belief. *Cf.* S. Rep. No. 96-615, at 5 (1980) (interpreting the text to cover someone "who seeks payment from the government without regard to his eligibility and with indifference for the requirements . . . [or] with neither personal knowledge of its accuracy nor reasonable inves-

tigative efforts"). The Seventh Circuit's decision cannot be squared with the statute's enactment history or its plain meaning.

2. The Seventh Circuit's decision conflicts with this Court's precedents. In *Escobar*, the Court rejected the argument that a defendant cannot know that a requirement is a condition of payment unless the government expressly calls it so. 579 U.S. at 191. Under *Escobar*'s scienter analysis, "[i]f the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has 'actual knowledge.'" *Ibid.* Likewise, *Escobar* recognized the potential for a finding of "deliberate ignorance" or "reckless disregard" of a requirement's materiality "even if the Government did not spell this out." *Ibid.* In contrast, the Seventh Circuit allows a bad faith actor to escape liability in the absence of circuit court precedent or highly specific agency guidance.

The Seventh Circuit's rule also inverts the Court's long-standing approach to parties claiming taxpayer money. The Court generally requires such parties to "'turn square corners'" when "seek[ing] to spend the Government's money"—imposing on any such party "a duty to familiarize itself with the legal requirements for cost reimbursement." *Heckler*, 467 U.S. at 63, 64 (quoting *Rock Island Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920)). Contractors and other providers are expected to determine—before they claim public funds—whether their claims are eligible or not. They are not allowed simply to take whatever they can unless the government specifically forbids it. "There is

simply no requirement that the Government anticipate every problem that may arise in the administration of a complex program such as Medicare." *Id.* at 64. Yet, that is functionally what the Seventh Circuit demands. "Rather than requiring due diligence, the decision encourages defendants to engage in ostrich-like behavior and places the burden on the government to anticipate every possible fraud." U.S. C.A. Reh'g Br. 12.

Instead of following the reasoning of *Escobar* and *Heckler*, the Seventh Circuit looked to the Court's decision in *Safeco*. However, *Safeco* interpreted a different word ("willfully" not "knowingly"), under a different statute (FCRA not FCA), and appealed to a different common law tradition ("reckless disregard of a person's physical safety," not fraud). *Safeco*, 551 U.S. at 52, 69. Moreover, *Safeco* itself emphasized that "willfully" is a "word of many meanings whose construction is often dependent on the context in which it appears." *Id.* at 57 (citation omitted). In the FCA context, "claimants often expressly or impliedly certify their compliance with legal requirements, and typically have a continuing relationship with the government and ongoing opportunities (and obligations) to make reasonable inquiries." U.S. C.A. Reh'g Br. 10-11. The FCA's "text, history, and precedent thus look entirely unlike FCRA," creating "ample reason to construe the False Claims Act differently." *Id.* at 11.

The Seventh Circuit's opinion rests heavily on its interpretation of footnote 20 in *Safeco*, which indicated that in the FCRA context, the defendant's subjective belief was not relevant. Any suggestion that this Court intended to revolutionize the law of fraud in a footnote of an opinion about the Fair Credit Reporting Act is

manifestly incorrect. Indeed, in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 579 U.S. 93, 106 (2016), this Court refused to extend *Safeco*'s footnote 20 to the distinct context of enhanced damages under the Patent Act. The Court understood that bad faith had always been a basis for awarding such damages, and nothing in *Safeco* disturbed that status quo. *Id.* at 106 n.*. So too here: The text and purpose of the FCA make it clear that bad faith has always been relevant to scienter. *See* S. Rep. No. 99-345, at 7, 21; *see also* U.S. C.A. Reh'g Br. 7.

The Court in *Halo* was equally skeptical of a rule holding that "someone who plunders a patent—infringing it without any reason to suppose his conduct is arguably defensible—can nevertheless escape any comeuppance under § 284 solely on the strength of his attorney's ingenuity." *Halo*, 579 U.S. at 105. Instead, the Court recognized that "culpability is generally measured against the knowledge of the actor at the time of the challenged conduct." *Ibid.* Moreover, the Court rejected the notion that *Safeco* allows defendants to escape liability by identifying a reasonable alternative interpretation of the law *post hoc*. *Id.* at 106 ("Nothing in *Safeco* suggests that we should look to facts that the defendant neither knew nor had reason to know at the time he acted."). Here too, the Court should apply the same reasoning to hold that defendants who accurately believed they were breaking the law cannot prevail merely by later identifying a favorable interpretation of the laws they broke.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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April 1, 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-2241

UNITED STATES OF AMERICA EX REL.
TRACY SCHUTTE, *et al*.,
Relators-Appellants,
v.
SUPERVALU INC., ET AL.,
Defendant-Appellee-Cross-Appellant.

Appeal from the United States District Court for
the Central District of Illinois.
No. 11-cv-3290 — **Richard Mills**, *Judge*.

Argued January 19, 2021 – Decided August 12, 2021

Before ROVNER, HAMILTON, and ST. EVE,
Circuit Judges.

ST. EVE, *Circuit Judge*. This Court is no stranger to False Claims Act *qui tam* actions. The present appeal, however, contains a novel question for this Circuit: does the Supreme Court's interpretation of the Fair Credit Reporting Act's scienter provision in *Safeco Insurance Company of America v. Burr*, 551

U.S. 47 (2007), apply with equal force to the False Claims Act's scienter provision? We join the four circuits that have answered that question in the affirmative and hold that it does.

This issue comes to us in a lawsuit against Defendants (collectively, "SuperValu"), which claims that SuperValu knowingly filed false reports of its pharmacies' "usual and customary" ("U&C") drug prices when it sought reimbursements under Medicare and Medicaid. SuperValu listed its retail cash prices as its U&C drug prices rather than the lower, price-matched amounts that it charged qualifying customers under its discount program. Medicaid regulations define "usual and customary price" as the price charged to the general public. Based on our decision in *U.S. ex rel. Garbe v. Kmart Corporation*, 824 F.3d 632 (7th Cir. 2016), the district court held that SuperValu's discounted prices fell within the definition of U&C price and that SuperValu should have reported them. Relators Tracy Schutte and Michael Yarberry (the "Relators") thus established falsity, the first prong of their False Claims Act ("FCA" or "the Act") claims. On the scienter prong, however, the court applied the *Safeco* standard to the FCA and held that SuperValu did not meet it.

We agree that the scienter standard articulated in *Safeco* applies to the FCA. Here, as with the Fair Credit Reporting Act ("FCRA"), there is no statutory indication that Congress meant its usage of "knowingly," or the scienter definitions it encompasses, to bear a different meaning than its common law definition. We further hold that while the FCA's scienter provision is defined via three distinct definitions, a failure to establish the *Safeco* standard as a threshold

matter precludes liability under any of these definitions. Applying this standard to the case at hand, SuperValu did not act with the requisite knowledge under the FCA. The judgment of the district court is affirmed.

I. Background

Underlying this case is a complex regulatory scheme, the details of which inform whether SuperValu has run afoul of the FCA's prohibition on submitting false claims to the government. Before canvassing the case facts, it is necessary to provide a brief overview of both the regulatory schemes under Medicare Part D and Medicaid and our FCA precedent involving those statutes.

A. Medicare Part D and Medicaid

Medicare and Medicaid are government healthcare programs administered by the Department of Health and Human Services through the Centers for Medicare and Medicaid Services ("CMS"). Medicare Part D is a prescription drug benefit providing insurance coverage to beneficiaries. The government employs a multi-tier system to provide Medicare prescription subsidies. At the outset, CMS awards contracts to private plan sponsors to facilitate the benefits program and pays them directly, based in part on the number of enrolled beneficiaries. 42 U.S.C. § 1395w-115; 42 C.F.R. §§ 423.265, 423.315, 423.329(a), (c). Plan sponsors, in turn, enter agreements with pharmacies or with middlemen, known as Pharmacy Benefit Managers ("PBMs"), which deal directly with the pharmacies. The PBMs' contractual agreements with pharmacies specify the methods of calculating prescription drug rates for reimbursement claims, and the

PBMs process claims and oversee reimbursements. *See* 42 U.S.C. § 1395w-111(i).

Medicare Part D limits prescription drug reimbursement rates to the lower of either the "actual charge" or "106 percent of the average sales price," subject to specific limitations. 42 C.F.R. § 414.904(a). While federal regulations do not define "actual charge," they do define "actual cost." 42 C.F.R. § 423.100. The actual cost for a prescription from a "network pharmacy" means the "negotiated price" set by the PBM contract with that pharmacy. *Id.* If an out-of-network pharmacy prescribed the drug, the actual cost is the U&C price. *Id.* Medicare regulations define U&C price as the price charged to "a customer who does not have any form of prescription drug coverage." *Id.* PBM contracts must comply with the Medicare Part D statute and regulations.

Medicaid operates in similar fashion but leverages the cooperative efforts of the states. 42 U.S.C. § 1396 *et seq*. The federal government and participating states jointly finance Medicaid, and the states implement the program through "state plans." To be eligible for federal funding, a state's plan must comply with the Medicaid statute and federal regulations and obtain approval from CMS. 42 U.S.C. §§ 1396-1, 1396a, 1396b. A state's plan must describe the state agency's "payment methodology for prescription drugs," and the drug reimbursement methodology must comport with federal requirements for Medicaid expenditures. 42 C.F.R. § 447.518(a)–(b). Relevant here, federal regulations limit the pharmacy reimbursement for certain prescription drugs to the lower of either "[Actual acquisition cost] plus a professional dispensing fee" or providers' "usual and customary charges to the

general public."[1] 42 C.F.R. § 447.512(b). Because both Medicare and Medicaid programs involve third-party submission of claims to the government, these reimbursement processes give rise to FCA litigation.

B. *United States ex rel. Garbe v. Kmart Corporation*

We confronted one such FCA *qui tam* suit in *United States ex rel. Garbe v. Kmart Corporation*. In *Garbe*, we elaborated on the falsity prong of FCA claims in the context of U&C prices reported by pharmacies. The *Garbe* relator alleged that Kmart submitted false claims for prescription reimbursements under Medicare and Medicaid by failing to report its discount-program prices as its U&C prices. *Garbe*, 824 F.3d at 636. Instead, Kmart had reported the higher prices it charged to third-party insurers and non-program cash customers. *Id.* The district court disposed of the relator's FCA claim on a motion for partial summary judgment. On interlocutory appeal, we added the question whether the district court correctly held that Kmart's discount-program prices were U&C prices—the prices "charged to the general public." *Id.* at 637. We affirmed that determination.

Our decision referenced a variety of sources—dictionary definitions, regulatory definitions, Medicare policy, caselaw, and a CMS manual—to determine the boundaries of "usual and customary price charged to

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[1] While the state plans for the four states implicated in this appeal contain definitions of U&C price that have slight variances from the wording in § 447.512(b), the Relators have stipulated that these definitions are substantively equivalent to the federal definition. We consequently analyze the federal definition of U&C price for purposes of this appeal.

the general public." We noted that unless state regulations provided a different meaning, the U&C price "is defined as the 'cash price offered to the general public.'" *Id.* at 643. Upon consideration of these sources and the case facts, we determined that Kmart's program fell within the scope of "U&C price." Kmart's generic-drug discount program offered set prices and was open to the public—any customer could opt in by paying a $10 fee and providing personal information. *Id.* at 643. The discount prices were "the lowest prices for which its drugs were widely and consistently available"—over 89% of Kmart's cash customers received the discount prices. *Id.* at 635, 645; *U.S. ex rel. Garbe v. Kmart Corp.*, 73 F. Supp. 3d 1002, 1018 n.10 (S.D. Ill. 2014). We also found it significant that Kmart had offered these prices for several benefit years rather than as "a one-time 'lower cash' price." *Garbe*, 824 F.3d at 644. On those facts, we held that a pharmacy's discount-program prices could be its U&C prices when the program was offered to the public, even though the discount prices were not the retail prices charged to all customers. *Id.* at 645. We remanded *Garbe* without discussing the FCA's scienter prong. Although the scienter prong is at issue in this appeal, *Garbe* played a key role in the suit against SuperValu.

C. Factual Background

SuperValu, through several subsidiaries, operated or controlled roughly 2,500 grocery stores with over 800 in-store pharmacies between 2006 and 2016. In 2006, SuperValu's national headquarters implemented the discount program underlying this appeal, which ran until December 2016. The price-match initiative was an attempt to compete with pharmacies

such as Wal-Mart, which had launched a discount program that same year offering hundreds of generic drugs at $4 per 30-day prescription. SuperValu sought to remain competitive without adopting WalMart's program. According to SuperValu's Vice President of Prescription Services, implementing a $4 generics program would cost SuperValu $40–$50 million in losses if $4 was the U&C cost passed on to PBMs. Instead, SuperValu employed what it internally characterized as a "'stealthy' approach." Corporate officers framed SuperValu's price-match program as an "'exception' for customer service reasons" that would not be reported as the U&C price.

Under SuperValu's price-match program, its regional stores could match lower prices on prescription drugs offered by other, local pharmacies within a specific proximity to the regional store. But the discount was not automatic. Customers had to request a price match. Once SuperValu pharmacists verified the competitor's price, SuperValu automatically applied the discount for that customer on future refills.[2] Any customer could request a price match, including those with insurance or government healthcare plans. When applying a price-match cost for insured customers, the pharmacists overrode the price in the pharmacy's automatic system and manually entered the price-matched cost. SuperValu instructed pharmacies to process these price-match sales as cash transactions

[2] SuperValu did not implement its automatic price override until 2008. All SuperValu's pharmacies had ceased the price-match program by December 2016, a few months after this Court decided *Garbe* in May 2016.

rather than third-party payor claims that would go directly to insurers.

SuperValu did not report these price-matches when it submitted reimbursement claims to third-party insurers, including Medicare Part D and Medicaid. Rather, SuperValu listed its retail price—the price for uninsured cash customers—as its U&C price. Many of SuperValu's PBM contracts contained U&C price clauses, but the contractual definitions of that term varied. Some contracts addressed reporting prices from discount programs, either including discount programs as a blanket rule or excepting specific types of discounts. Others did not mention discounts at all. None of the contracts expressly included price-matching, although one PBM, Medco, stated in its 2007–2008 manual that it included a "competitor's matched price" in its definition of U&C price.

Between 2006 and 2016, sales under SuperValu's price-matching policy accounted for 26.6% of SuperValu's cash drug sales and 1.69% of its total prescription drug sales—roughly 6.3 million sales. In 2012, the majority of the cash sales for 44 of SuperValu's top 50 prescription drugs were made at a price-match cost rather than SuperValu's retail price.[3] SuperValu continued its price-match program until December 2016 and did not report its discount prices as its U&C prices to any PBM or state agency during that time.

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[3] The dissent cites this statistic without confining it to fiscal year 2012. We note that the Relators have identified no evidence regarding the frequency of price-match sales versus retail cash sales for SuperValu's top 50 drugs during any of the other years between 2006-2016 when its price-match program was active.

D. Procedural Background

In 2011, the Relators filed this suit against SuperValu under the FCA on behalf of the federal government and several states.[4] They alleged that SuperValu knowingly caused false payment claims to be submitted to government healthcare programs between 2006 and 2016 by incorrectly reporting their U&C drug prices. The Relators' theory of the case was that SuperValu price-matched to avoid losing customers to competitors with lower drug prices like Wal-Mart and made up the difference by charging government healthcare programs its higher, retail price. In effect, the Relators argued, SuperValu caused the government to subsidize its market competitiveness. The government did not intervene in this case.

The district court, relying on *Garbe*, granted summary judgment to the Relators on the falsity prong.[5] It acknowledged that SuperValu's price-match program required customers to initiate a discount and found that discount sales comprised a lower portion of SuperValu's sales—roughly 2% of total transactions and 26.9% of cash sales—compared to Kmart's discounts in *Garbe*, which amounted to 89% of its cash sales. Even so, the court held that the fact that SuperValu made its price-match policy *available* to the general public throughout a benefit year was determinative.

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[4] In the district court, the parties stipulated to a dismissal of all Medicaid claims on behalf of the states except those on behalf of California, Illinois, Utah, and Washington.

[5] SuperValu does not contest the district court's falsity holding in this appeal.

In a separate order, the district court sided with SuperValu on the scienter prong. The court first applied *Safeco*'s standard to the FCA's scienter prong and held that a failure to establish the objective scienter standard precluded liability under the FCA. Under the *Safeco* standard, the court held that SuperValu's understanding of U&C price, while incorrect, was objectively reasonable at the time. The district court first observed that there were multiple district court decisions endorsing SuperValu's view of U&C price or recognizing that the term was open to interpretation. It also took note of the unique circumstance in which *Garbe* addressed the definition of U&C price. Because the Seventh Circuit added that question to the issues certified for interlocutory appeal, the district court suggested that we must have found the matter "sufficiently debatable to be addressed."

Based on the available caselaw, the court held that it was unclear that SuperValu's program fell within the U&C definition. Further, the court held that prior to our 2016 decision in *Garbe*, there was no authoritative guidance to warn SuperValu away from its interpretation of U&C price. In view of these conclusions, the district court entered summary judgment for SuperValu on all FCA claims, which the Relators now challenge.

II. Discussion

On appeal, the parties ask us to determine whether *Safeco* applies to the FCA's scienter standard and, if so, to what extent. Our answers to those questions will dictate the outcome of the final issue in this appeal—whether the district court properly granted summary judgment for SuperValu on the scienter

prong of the FCA claim. We review the district court's determinations on these legal issues de novo and affirm the grant of summary judgment to SuperValu. *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1048, 1051 (7th Cir. 2020).

A. The False Claims Act

The FCA imposes civil liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). FCA civil claims thus re-quire proof of two primary elements: (1) falsity and (2) scienter. The Supreme Court has also interpreted § 3729(a)(1)(A) to require that knowingly false claims be material to the government's payment decision for liability to attach. *Univ. Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016).

Although "Congress did not define what makes a claim 'false' or 'fraudulent,'" the Supreme Court has applied the common law meaning of fraud to these terms as they are used in the FCA. *Id.* at 1999. Under that definition, a claim may be false or fraudulent through either express misrepresentations or "misrepresentations by omission." *Id.*

Unlike the falsity prong, the FCA's scienter requirement is statutorily defined. A party who submits a false claim to the government is on the hook for FCA liability only if it acted knowingly. § 3729(a)(1)(A). The FCA defines knowingly to "mean that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." § 3729(b)(1)(A). It "require[s] no proof of

specific intent to defraud." § 3729(b)(1)(B). The FCA levies significant consequences against parties found liable under the Act and balances the severity of its penalties by carefully circumscribing liability, in part through its scienter requirement. *See Escobar*, 136 S. Ct. at 1995–96 (observing that FCA civil "liability is essentially punitive in nature" (internal quotation omitted)).

B. *Safeco Insurance Company of America v. Burr*

While the FCA lists the range of scienter levels encompassed by "knowingly," it does not further define those terms. SuperValu urges us to look to the Supreme Court's decision in *Safeco* for guidance. *Safeco* involved an interpretation of the FCRA's common law scienter requirement, under which plaintiffs must show that defendants acted "willfully." 15 U.S.C. § 1681n(a). As defined by the Court, the FCRA's use of that term includes both "knowing" and "reckless disregard." *Safeco*, 551 U.S. at 52, 59.

In interpreting the FCRA's scienter prong, the Court first observed "the general rule that a common law term in a statute comes with a common law meaning, absent anything pointing another way." *Id*. at 58. Finding none, it employed what amounts to a two-step inquiry for determining reckless disregard. *Id.* at 69. A defendant who acted under an incorrect interpretation of the relevant statute or regulation did not act with reckless disregard if (1) the interpretation was objectively reasonable and (2) no authoritative guidance cautioned defendants against it. *Id.* at 70. Critically, the Court emphasized that a defendant's subjective intent is irrelevant for purposes of liability. *Id.* at 68, 70 n.20. The Court also explained that failure to

meet this standard would preclude a finding of knowing violations as well. *Id.* at 70 n.20.

The Court then applied that standard and held that while Safeco may have violated the FCRA, it did not do so with reckless disregard. The FCRA requires that any person who takes an "adverse action" against a consumer based on information in a consumer report notify that consumer. 15 U.S.C. § 1681m(a). An "adverse action" is statutorily defined as including "an increase" in the amount charged for "insurance, existing or applied for." § 1681a(k)(1)(B)(i). The *Safeco* plaintiffs argued that Safeco violated the FCRA when it offered new insurance applicants higher rates without notifying them that their credit scores triggered the less favorable policy offers. *Safeco*, 551 U.S. at 55. Safeco thought initial rate offers to new customers fell outside FCRA notice obligations because it interpreted "increase" to mean rate hikes on existing policies. *Id.* at 69–70.

While Safeco's interpretation was erroneous, the Court held that it was objectively reasonable. Why? Because Safeco's "reading ha[d] a foundation" in "the less-than-pellucid statutory text." *Id.* Further, there was no court of appeals decision or authoritative guidance from the Federal Trade Commission—the agency charged with enforcing the FCRA—that "might have warned it away from the view it took." *Id*. at 70. Under the Court's two-step inquiry, these facts precluded a finding of reckless disregard. Since this decision, four circuit courts have applied the *Safeco* standard to the FCA's scienter prong. SuperValu asks us to do the same today.

C. *Safeco* applies to the FCA

To determine what the FCA's scienter provision requires, we "start, as always, with the statutory text." *Escobar*, 136 S. Ct. at 1999. The FCA defines "knowingly" as encompassing three common law standards—actual knowledge, deliberate indifference, and reckless disregard—but is silent as to what those standards mean in the context of this statute.[6] Supreme Court precedent teaches that "a common law term in a statute comes with a common law meaning, absent anything pointing another way." *Safeco*, 551 U.S. at 58. That principle informs our decision today. Here, the Relators have identified no statutory indicia that Congress intended the familiar, common law terms used in § 3729 to differ from their common law meaning. Indeed, the Supreme Court has confirmed that the FCA does employ the common law meaning for other common law terms—"false" and "fraudulent"—and has limited the common law definition only to the extent that the statute expressly contradicted it. "Congress retained all other elements of common-law fraud that are consistent with the statutory text because there are no textual indicia to the contrary." *Escobar*, 136 S. Ct. at 1999 & n.2. Given that the common law meaning applies to the FCA's scienter standard, all that remains is to identify that meaning. We need

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[6] The FCA imposes civil liability. We thus reference the civil, not criminal, definitions of these scienter standards throughout our discussion. *Safeco*, 551 U.S. at 60 (acknowledging distinctions between criminal and civil uses of the same scienter terms and indicating that criminal law usage has no bearing on the definitions of these terms when used in civil laws).

look no further than the Supreme Court's decision in *Safeco*.

Safeco defined a similar common law term—"willfully," as used in the FCRA— which the Court interpreted as encompassing the same common law scienter terms used in the FCA ("knowingly" or "reckless disregard"). Referencing the common law meaning, the Court then announced a standard inquiry for reckless disregard. While reiterating that "knowingly" and "reckless disregard" remain distinct terms, the Supreme Court held that the objective scienter standard it articulated precluded liability under either term. *Safeco*, 551 U.S. at 60, 70 n.20. There is no reason why the scienter standard established in *Safeco* (for violations committed knowingly or with reckless disregard) should not apply to the same common law terms used in the FCA.

The dissent suggests that *Safeco* has no bearing simply because it interpreted a different scienter requirement in a different statute. We respectfully disagree. *Safeco* articulated an objective scienter standard for establishing willful violations, which it framed in terms of the scienter floor for that standard—reckless disregard. Likewise, reckless disregard is the baseline scienter definition encompassed by the FCA's scienter requirement, "knowingly." *United States v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013) (observing that reckless disregard "is the most capacious of the three" terms used to define the FCA's scienter requirement). And *Safeco* explicitly held that the test for reckless disregard would likewise cover violations committed "knowingly." *Safeco*, 551 U.S. at 70 n.20. In view of those parallels, we see no barrier to importing the

Safeco standard to the FCA. *See Purcell*, 807 F.3d at 284, 290.

Every other circuit court to discuss the relevance of *Safeco*'s scienter standard to the FCA has arrived at this conclusion. *United States ex rel. Streck v. Allergan*, 746 F. App'x 101, 106 (3d Cir. 2018); *United States ex rel. McGrath v. Microsemi Corp.*, 690 F. App'x 551, 552 (9th Cir. 2017); *United States ex rel. Donegan v. Anesthesia Assocs. of Kan. City, PC*, 833 F.3d 874, 879–80 (8th Cir. 2016); *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 284 (D.C. Cir. 2015). The dissent claims that the Eleventh Circuit declined to apply *Safeco* to the FCA in *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148 (11th Cir. 2017). But *Phalp* did not reject *Safeco*—it did not even cite *Safeco*. To support its conclusion, the dissent points to *Phalp*'s assertion that "scienter is not determined by the ambiguity of a regulation, and can exist even if a defendant's interpretation is reasonable." *Id.* at 1155. That is not inconsistent with *Safeco*. Under *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. Regardless of differing views as to whether *Phalp* is consistent with the *Safeco* standard, the Eleventh Circuit did not reject *Safeco*'s applicability to the FCA. Even though the parties briefed the court on *Safeco*, that briefing does not convert the Eleventh Circuit's silence into a decision that *Safeco* does not apply to the FCA. As it stands, no circuit has held *Safeco* inapplicable to the FCA.

The dissent would part ways with the circuits that have applied the *Safeco* standard to the FCA and look

instead to the Restatement (Second) of Torts § 526, which makes subjective intent relevant to the scienter inquiry. Section 526 defines "conditions under which misrepresentation is fraudulent." It does not define "knowingly" (or any of the common law scienter terms listed in § 3729(b)(1)(A)). And it is a different provision than the Restatement provision that the Court referenced in *Safeco*, 551 U.S. at 69 (relying upon § 500, defining "reckless disregard"). We thus disagree that § 526 is relevant to the FCA's scienter provision. Take out "knowingly," and perhaps it makes sense to read general, common law fraudulent scienter into the Act. But here, Congress *has* willed a specific scienter requirement—knowingly, not "'knowing' of falsity," as the dissent suggests.

Unlike § 526, § 500 defines a term that the FCA's definition of knowingly expressly includes ("reckless disregard"). The dissent insists that because § 500—which defines "reckless disregard of safety"—applies to cases involving physical harm, it is inapplicable to "reckless disregard" as used in the FCA. But the Supreme Court applied this definition outside the physical-harm context in *Safeco*. Ultimately, the crucial point is that the Court has articulated a standard for acts committed "knowingly" or with "reckless disregard" that excludes subjective intent. In the absence of textual indicia in the FCA supporting that subjective intent matters here, we apply Supreme Court precedent to interpret the same common law terms addressed in *Safeco*.

While the dissent claims that its countervailing view is textually mandated, nothing in the language of the FCA suggests that a defendant's subjective intent is relevant. In contrast to § 526, terms such as

"believes" or "have [ ] confidence" are conspicuously absent from the FCA, and the only reference to intent is an express disclaimer that "specific intent to defraud" is irrelevant. § 3729(b)(1)(B). We decline to graft aspects of common law fraudulent scienter into the FCA when Congress chose not to include such requirements.

The dissent instead looks to legislative history and out-of-circuit caselaw to support its reading of the FCA. We find neither source persuasive. Legislative history cannot support reading in a subjective-intent requirement that goes beyond the text of the Act's scienter provision. *See Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 599 (2011) ("Congress's authoritative statement is the statutory text, not the legislative history." (internal citation and quotation omitted)). And the circuit cases upon which the dissent relies all predate *Safeco*, as well as subsequent caselaw in each of those circuits applying *Safeco* to the FCA. Neither Restatement § 526 nor legislative history pose a barrier to applying *Safeco*.

The Relators challenge Safeco's viability on a separate basis that likewise fails. They contend that subsequent Supreme Court precedent limited *Safeco*, leaning on a 2016 patent case for this premise—*Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016). *Halo Electronics* interpreted § 284 of the Patent Act, which provides that courts may award treble damages in infringement cases. Section 284 does not specify a scienter standard, and prior to *Halo Electronics*, the Federal Circuit required plaintiffs to show that an infringer's conduct was "both objectively baseless and brought in subjective bad faith." *Id.* at 1932–

33. *Halo Electronics* clarified that § 284 liability does not depend on objective recklessness.

The problem with importing an objective recklessness inquiry into the patent context was that "such a defense insulates the infringer from enhanced damages, even if he did not act on the basis of the defense or was even aware of it." *Id.* at 1933. In rejecting that standard, the Court emphasized that the Patent Act targets "consciously wrongful" bad action and held that "[i]n the context of such deliberate wrongdoing, however, it is not clear why an independent showing of objective recklessness . . . should be a prerequisite to enhanced damages." *Id.* at 1932.

The defendants, citing *Safeco*, argued that bad faith is irrelevant when there is no showing of objective recklessness. *Id.* at 1933 n.*. While acknowledging the *Safeco* standard, the Court declined to apply it. It observed that "willfully is a word of many meanings whose construction is often dependent on the context in which it appears." *Id.* (internal quotation omitted). The Patent Act presented a different context than the FCRA: "[O]ur precedents make clear that 'bad-faith infringement' *is* an independent basis for enhancing patent damages." *Id.*

The Supreme Court thus did not walk back *Safeco* or adopt a new standard for objective recklessness. *Halo Electronics* simply did not apply objective recklessness in the context of a statute focused on defendants' subjective bad faith. The reasons informing that decision do not apply here. Unlike the Patent Act, the FCA expressly includes a scienter standard and limits liability to knowingly false claims. By its own terms, *Safeco* holds that a failure to establish its objective

scienter standard precludes a finding that a defendant acted knowingly. We thus hold that *Safeco*'s scienter standard applies to the FCA.

D. Failure to meet the *Safeco* standard precludes liability

Beyond the threshold question of *Safeco*'s applicability to the FCA, the parties also dispute how broadly *Safeco* reaches. We agree with SuperValu that the *Safeco* standard reaches all three of the scienter terms that define "knowingly." The dissent takes the Relators' position that even if it is relevant to the FCA, *Safeco* defines only "reckless disregard." Under this view, failure to show that a defendant meets the *Safeco* standard does not preclude liability under the actual knowledge or deliberate ignorance components of the FCA's scienter definition. The dissent contends that holding otherwise would collapse distinct scienter terms and violate the rule against surplusage. We are unconvinced.

The Supreme Court has already undermined this line of reasoning. In *Safeco*, the Court rejected the defendants' argument that it was conflating scienter terms and reaffirmed that the terms it used to define "willfully" were distinct. *Safeco*, 551 U.S. at 60. ("[A]ction falling within the knowing subcategory does not simultaneously fall within the reckless alternative."). It nevertheless held that the standard it articulated in the context of "reckless disregard" also functioned as a baseline requirement for establishing the more demanding scienter category of "knowledge." *Id.* at 70 n.20 ("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." (emphasis added)). That holding nullifies the dissent's contention.

Even aside from *Safeco*'s dismissal, the dissent's argument rests upon a false equivalence. No one disputes that the three scienter terms used to define "knowingly" are distinct and bear different meanings. Both actual knowledge and deliberate ignorance indicate higher degrees of culpability and, if implicated in a case, might render reckless disregard inapplicable. *See Purcell*, 807 F.3d at 288 (observing that reckless disregard is the loosest standard of knowledge under the FCA's scienter requirement). That does not prevent these terms, however, from sharing a common requirement.

Indeed, we do not see how it would be possible for defendants to actually know that they submitted a false claim if relators cannot establish the *Safeco* scienter standard. A defendant might suspect, believe, or intend to file a false claim, but it cannot *know* that its claim is false if the requirements for that claim are unknown. The dissent's primary concern that the *Safeco* standard eliminates culpability for deliberately indifferent defendants is likewise misplaced. The dissent postulates that under the *Safeco* standard, defendants could escape liability by making a "barely plausible" post-hoc argument about a statute's meaning, "even though the defendant ignored repeated and correct warnings." That fundamentally misapprehends *Safeco*. Under *Safeco*, a defendant will be successful only if (a) it has an *objectively* reasonable reading of the statute or regulation and (b) there was no

authoritative guidance warning against its erroneous view. That test does not shield bad faith defendants that turn a blind eye to guidance indicating that their practices are likely wrong. Nor does *Safeco*'s standard excuse a company if its executive decisionmakers attempted to remain ignorant of the company's claims processes and internal policies. *Safeco* covers all three of the scienter standards listed in § 3729. When relators cannot establish the standard articulated in *Safeco*, there is no liability under the FCA.

E. SuperValu's interpretation of "usual and customary price" was objectively reasonable under *Safeco*

Although the *Safeco* Court did not express its standard for reckless disregard in terms of elements, the Court's objectively reasonable inquiry involved two distinct questions—whether the defendant has a permissible interpretation of the relevant provision and whether authoritative guidance nevertheless warned it away from that reading.[7]

1. Permissible Interpretation

The objectively reasonable inquiry hinges on the text of the statute or regulation that the defendant

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[7] Some courts have divided the *Safeco* inquiry into three steps, adding as a preliminary question whether the relevant text is ambiguous. *Donegan*, 833 F.3d at 878; *Purcell*, 807 F.3d at 288. We elect to condense the inquiry into the two issues expressly discussed in *Safeco*—permissible interpretation and authoritative guidance. The *Safeco* Court did not require a separate determination of ambiguity, and we think that the issue of textual ambiguity is subsumed within the permissible-interpretation inquiry. A defendant's erroneous interpretation cannot be reasonable if the meaning of the text is unambiguous.

allegedly violated and as such is a question of law. *Safeco*, 551 U.S. at 69; *see also Van Straaten v. Shell Oil Prods. Co. LLC*, 678 F.3d 486, 489–90 (7th Cir. 2012). If the plain language of the statute precludes the erroneous interpretation, the defendant cannot clear this hurdle. To decide whether SuperValu had a permissible interpretation of U&C price, we must first determine the source of that term and relevant definition.

Medicaid regulations define U&C price without much elaboration as the price that a pharmacy "charges to the general public."[8] 42 C.F.R. § 447.512(b); *see also Garbe*, 824 F.3d at 643–44. Federal regulations do not elaborate beyond that cursory definition or guide pharmacies on identifying the "general public" when they charge customers various prices for the same prescription.[9] "Usual and

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[8] The Relators argue that for Medicare, pharmacies that have contracted with a plan sponsor or PBM report the "negotiated price" determined by the contract. On appeal, the Relators consequently look to the various formulations of U&C price in SuperValu's PBM contracts. In the district court, however, they took the opposite position: "Relators dispute that the contracts between PBMs and pharmacies 'govern the terms' by which Defendants are required to submit claims to the PBMs and in turn, whether and how much the PBMs should pay Defendants for dispensing drugs to their beneficiaries." Relators' Resp. to Defs.' Mot. for Partial Summ. J. at 9 [1911]. As a result, they have waived any argument on appeal that the contractual definitions of U&C price are distinct from the Medicaid regulatory definition. We thus ex amine only § 447.512(b)'s definition of U&C price and treat the PBM contract definitions of U&C price as consistent with it.

[9] The Relators also identified four states' regulations defining U&C price, as Medicaid is implemented through the states.

customary" might mean the price that is "charged" most frequently for a drug, but it could also indicate the retail rather than discount price. *See* GAO, Report to Congress on Trends in Usual and Customary Prices for Drugs Frequently Used by Medicare and Non-Medicare Enrollees at 1 (Oct. 6, 2004) ("The usual and customary price is the undiscounted price individuals without drug coverage would pay."). "General public" may mean that discount prices qualify only if applied to all consumers or, alternatively, if they constitute the price most frequently charged to consumers. But it just as easily might encompass any discount program *offered* to the public, regardless of whether all consumers take advantage of it. *Garbe*, 824 F.3d at 643. As is, the U&C price definition is open to multiple interpretations.

Here, SuperValu interpreted its set, retail price for a prescription drug as the "price it charges to the general public." Unlike its retail price, the discount prices under SuperValu's price-match program depended upon the prices charged by local competitors and initially applied only upon customer request. In short, while its program was available to any customer requesting a valid price match, SuperValu would not necessarily charge all or most of its customers lower, price-matched costs. SuperValu thus did not view its competitor price-matching as the price that it "charged

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The regulations that were concurrent with SuperValu's price-match program used substantially the same definition of U&C price as 42 C.F.R. § 447.512(b). The Relators also claim that they are "consistent with the controlling federal definition and the U&C framework analyzed in *Garbe*." We consequently treat our analysis of the federal definition of U&C price as extending to these states and the FCA claims related to Medicaid.

to the general public." That interpretation is not inconsistent with the text of the U&C price definition. *See Garbe*, 824 F.3d at 644 (citing § 447.512(b)).

The Relators spend little time discussing the compatibility of SuperValu's interpretation of U&C price with the regulatory text. Instead, they contend that *Garbe* forecloses any argument on objective reasonableness. *Garbe* characterized the federal regulations at issue here as having a "clear" purpose—ensuring that the government receives the benefit of the "prevailing retail market price" that pharmacies provide to consumers. *Garbe*, 824 F.3d at 644. From this, the Relators claim that we have already held that the meaning of U&C price is unambiguous. The flaws in this argument are two-fold.

As an initial matter, it overextends our holding in *Garbe*. *Garbe* held that the correct interpretation of U&C price included certain discount program prices—it did not hold that this was the *only* objectively reasonable interpretation of the term. In fact, *Garbe* did not discuss *Safeco* at all. We had no reason to do so because we explicitly did not address the FCA's scienter prong. The decision that we did reach in *Garbe*—interpreting "U&C price"—does not influence the objectively reasonable inquiry here, either. *Safeco*'s scienter standard has bite only if a defendant's interpretation may be objectively reasonable even if it is erroneous. That SuperValu's interpretation of U&C price is incorrect under *Garbe* does not de facto render its interpretation unreasonable.

The Relators also err by calibrating objective reasonableness against the clarity of a statute or regulation's policy objective. Their *Garbe* argument rests on

the assumption that any regulation with a clear *purpose* cannot be ambiguous. But *Safeco* tethered the objectively reasonable inquiry to the legal text, not its underlying policy. *Safeco*, 551 U.S. at 69–70 (holding that Safeco's erroneous interpretation was reasonable because it had a foundation in the "less-than-pellucid" statutory text). The Relators' failure to engage with the regulatory text is fatal to their objections. They have not shown that SuperValu's erroneous interpretation of U&C price was unreasonable.

Apart from the Relators' arguments based on *Garbe*, the dissent suggests a more fundamental concern with SuperValu's interpretation of U&C price. It argues that for an erroneous interpretation to be objectively reasonable, the defendant must have held that view at the time that it submitted its false claim.[10] Otherwise, the dissent insists, defendants can avoid liability by concocting "post-hoc arguments" to justify their conduct under an objectively reasonable reading of the applicable regulation—even if they acted in bad faith. The dissent essentially argues that SuperValu believed it was violating the requirement to report its U&C price and arrived at its "interpretation" of U&C price after the fact.

Even if the Relators can raise an issue of fact on this point, it is irrelevant. The FCA establishes liability only for *knowingly* false claims—it is not enough

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[10] The dissent does not—and cannot—rely on *Safeco* for this assertion. *Safeco* made no mention of a temporal requirement when it articulated the objectively reasonable inquiry. The Relators cited *Halo Electronics* when they raised this same argument on appeal. But as explained previously, we reject the applicability of that case to the FCA.

that a defendant suspect or believe that its claim was false. *See Purcell*, 807 F.3d at 288 (holding that defendants did not violate the FCA because they "could reasonably have concluded" that their conduct complied with the law, even though they believed—and testified that they "knew"—it did not). Indeed, *Safeco* emphasized that a defendant's subjective intent does not matter for its scienter analysis—the inquiry is an objective one. This standard reflects the limits of FCA liability. *See Escobar*, 136 S. Ct. at 2003 ("The False Claims Act is not an all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations." (cleaned up)). We apply the standard as we find it and hold that SuperValu has offered an objectively reasonable interpretation of U&C price.

2. Authoritative Guidance

This moves SuperValu but halfway across the scienter line. *Safeco* makes clear that a permissible interpretation is no defense if there existed authoritative guidance that should have warned defendants away from their erroneous interpretation.[11] "Authoritative guidance," as the moniker implies, must come from a source with authority to interpret the relevant text. *Safeco* also suggests that the guidance must be sufficiently specific to the defendant's incorrect interpretation.

The Supreme Court did not flesh out the boundaries of authoritative guidance, but at minimum, *Safeco*

[11] The authoritative-guidance inquiry is a question of law in this case, as it entails only the interpretation of regulatory guidance.

supports that it must come from a governmental source—either circuit court precedent or guidance from the relevant agency.[12] *Safeco*, 551 U.S. at 70. We are not alone in this view. Other circuit courts likewise have limited authoritative guidance to these two sources. *See Purcell*, 807 F.3d at 289 (considering only circuit court caselaw and guidance from the controlling agency); *Streck*, 746 F. App'x at 106, 108 (same). Our reading of *Safeco* automatically excludes one of the three sources of guidance proposed by the Relators—the PBM contract definitions of U&C price. The Relators also identify federal and state regulations defining U&C price, but we have considered the relevant regulatory definition above and determined that it does not preclude SuperValu's interpretation. As a result, those definitions cannot constitute warnings that SuperValu's interpretation was erroneous.

The remaining source of guidance identified by the Relators is the CMS Medicare Prescription Drug Benefit Manual ("CMS manual" or "manual"). The Relators contend that the manual constitutes authoritative guidance which should have warned SuperValu that its discount prices amounted to U&C prices. SuperValu responds that it did not, for two reasons. First, SuperValu suggests that the manual is not "authoritative" guidance as defined by *Safeco*. It reads *Safeco* to require that authoritative agency guidance

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[12] The parties agree that *Garbe* is no help to the Relators on this front, despite its status as circuit court precedent that would otherwise constitute authoritative guidance. Recall that we decided that case in May 2016, the same year that SuperValu shelved its discount program. The Supreme Court did not deny the *Garbe* certiorari petition until 2017.

not only originate from the agency charged with implementing the relevant statute but that it be binding on the agency, such as notice-and-comment rulemaking or agency adjudication. The circuits that have addressed *Safeco*'s applicability to the FCA appear split on this question. But we need not— and do not—decide this matter today because we agree with SuperValu's second argument: the CMS manual was not sufficiently specific to warn SuperValu that its program likely would fall within the definition of U&C price.

Safeco suggests that authoritative guidance must have a high level of specificity to control an issue. In *Safeco*, the agency guidance at issue was an FTC letter to *Safeco* explaining that an adverse action "occurs when 'the applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report had been more favorable.'" *Safeco*, 551 U.S. at 70 n.19 (internal citation omitted). That guidance certainly related to the question on appeal—whether an "increase" in insurance rates based on a consumer report could "be understood without reference to prior dealing (allowing a first-time applicant to sue)." *Id.* at 64–65. Nevertheless, the Supreme Court rejected the FTC letter in part because the Court thought that it "did not canvass the issue."[13] *Id.* at 70 n.19.

Upon review of the CMS manual, we conclude that it is similarly flawed. Footnote one of the manual is most salient and reads in relevant part as follows:

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[13] The Court's other reason for considering the letter unauthoritative was that the FTC had expressly stated that it was not binding on the agency. *Safeco*, 551 U.S. at 70 n.19.

> We note that in cases where a pharmacy offers a lower price to its customers throughout a benefit year, this would not constitute a "lower cash price" situation that is the subject of this guidance. For example, Wal-Mart recently introduced a program offering a reduced price for certain generics to its customers. The low Wal-Mart price on these specific generic drugs is considered Wal-Mart's "usual and customary" price, and is not considered a one-time "lower cash" price. Part D sponsors consider this lower amount to be "usual and customary" and will reimburse Wal-Mart on the basis of this price.

CENTERS FOR MEDICARE & MEDICAID SERVICES, *Chapter 14—Coordination of Benefits*, *in* MEDICARE PRESCRIPTION DRUG BENEFIT MANUAL 19 n.1 (2006), https://perma.cc/MW6AH4P6.

The footnote clarifies that a pharmacy's consistent, lower-price offers are included within U&C prices. But it says nothing about price-match programs like that employed by SuperValu. Further, the majority of the footnote discusses a specific example—Wal-Mart's $4 generics program—which differed in significant respects from SuperValu's price-match guarantee. Wal-Mart's program employed a set lower price ($4 for 30-day generic prescriptions) automatically applied to any customer. By contrast, SuperValu's discount prices could vacillate. Its discounts depended upon the pricing of local competitors, which could vary between SuperValu's regional stores. SuperValu's discounts also were customer-initiated in the first instance. The manual did not put SuperValu on notice that this type of discount program fell within

the definition of U&C price—at least, not with the specificity required to be authoritative guidance. We hold that no authoritative guidance warned SuperValu away from its permissible interpretation of U&C price. The district court correctly granted summary judgment to SuperValu on the question of scienter.

III. Conclusion

Our resolution of this case is controlled by *Safeco*. Today, we hold that *Safeco*'s standard both applies to the FCA's scienter requirement and precludes liability under it, regardless of whether relators premise their case on reckless disregard or the other scienter terms. Because SuperValu had an objectively reasonable understanding of the regulatory definition of U&C price and no authoritative guidance placed it on notice of its error, the Relators have not shown that SuperValu acted knowingly. The district court's judgment is

AFFIRMED.

* * *

HAMILTON, *Circuit Judge*, dissenting. We should reverse summary judgment for defendant SuperValu. The relators have come forward with evidence that SuperValu knowingly misled the government's agents about its "usual and customary" prices for a significant number and volume of prescription drug sales. For forty-four of the fifty top-selling drugs, SuperValu was charging the government prices *eight to fifteen times higher* than the prices it was actually charging a majority of the relevant customers. Binding circuit precedent holds that those price claims were false. SuperValu's defense is that it did not "know" its "usual and

customary" price claims were false. When the False Claims Act is properly understood, however, genuine factual disputes over SuperValu's conduct and state of mind should preclude summary judgment.

This appeal presents a broad and important issue for the False Claims Act. The issue is whether the Act can reach businesses that submit false claims for government payment but claim there is some legal ambiguity that kept them from "knowing" for certain that their claims were false. Under the text and history of the Act, the answer should be yes.

The majority answers no. It thus creates a safe harbor for deliberate or reckless fraudsters whose lawyers can concoct a *post hoc* legal rationale that can pass a laugh test. The majority's new safe harbor even makes subjective bad faith "irrelevant" *in fraud cases*. Ante at 25. That undermines the 1986 amendments to the False Claims Act and turns the Act upside-down, losing touch with the statutory text and its history and links to the common law of fraud. I respectfully dissent.

Part I of this opinion explains the relators' claims and supporting evidence. Part II explains the better understanding of the False Claims Act's "knowledge" standard based on the statutory text, the common law of fraud, and statutory history. Part III explains the majority's two fundamental errors in reading the statute. First, rather than focusing on the statutory text, history, and purpose of the False Claims Act itself, the majority reads far too much into *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), where the Supreme Court interpreted a different term under a different statute. Second, the majority turns into surplusage two-thirds

of the False Claims Act's definition of "knowing" added in 1986.

I. *The Relators' Claims*

A. *The Relators' Evidence*

The majority explains helpfully the important role of "usual and customary" drug prices in Medicare and Medicaid. Congress has not allowed the government to do what private insurance companies do: use bargaining power to negotiate for lower drug prices. Instead, the government tries to take advantage of private competition in so-called "cash" sales of prescription drugs. See *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 644 (7th Cir. 2016). Those are sales to customers whose drug purchases are not covered by insurance. Under the statutes and regulations, SuperValu's "usual and customary" drug prices for those cash sales were caps on what the government would pay SuperValu for drugs provided to Medicare and Medicaid patients.

Starting in 2006, Walmart began offering cash sales of generic drug prescriptions for four dollars for a one-month supply and ten dollars for a three-month supply. SuperValu responded to Walmart's move with an aggressive, widely-advertised price-matching program. The result, giving relators the benefit of reasonable inferences from the evidence, was dramatic reductions in the prices SuperValu charged most "cash" customers for many drugs for over a decade.

The applicable regulation describes the price cap as "Providers' usual and customary charges to the general public." 42 C.F.R. § 447.512(b)(2). Regulations also include this definition: "Usual and customary

(U&C) price means the price that an out-of-network pharmacy or a physician's office charges a customer who does not have any form of prescription drug coverage for a covered Part D drug." 42 C.F.R. § 423.100.

In this appeal, SuperValu does not dispute that under now-binding circuit precedent, a discounted price can be the "usual and customary" price. See *Garbe*, 824 F.3d at 644–45. SuperValu also does not dispute that it pushed its price match as a matter of company policy and that it usually charged the four-dollar price for many drugs.

Relators offered evidence that SuperValu told the federal government for years that its "usual and customary" prices were much higher than those that it actually charged most cash customers for many drugs. The question here is whether plaintiffs have come forward with evidence to support a finding that SuperValu made these many false claims "knowingly."

There is room for reasonable disagreement about *exactly* how to interpret "usual and customary" prices when a seller matches a competitor's prices to keep a customer. That room for argument, says the majority, entitles SuperValu to summary judgment. As applied to these facts, though, it should be easy to find that SuperValu's claims were false and that SuperValu knew they were false.

At one end of a spectrum, imagine a local mom-and-pop pharmacy that occasionally grants a few customers' informal requests for lower prices after some comparison shopping. At the other end, imagine a nationwide chain with a nationwide program advertising that the seller will match any competitor's lower prices. Then imagine that the seller tells its

pharmacists and cashiers to offer the discounted prices to all customers paying cash for drugs (i.e., without insurance or government coverage). And then imagine that the seller makes a majority of its cash drug sales at the discounted rates, not at the *much* higher prices that it officially tells the government are "usual and customary." Relators' evidence here fits this end of the spectrum—SuperValu's price matches were available to any members of the general public, who were encouraged to ask for them.

Then consider relators' evidence about the results of this nationwide, decade-long program. Focus on SuperValu's sales of the fifty highest-volume drugs, where most of the relevant money is. For forty-four of those top fifty drugs, SuperValu was making a *majority* of its cash sales for less than its claimed "usual and customary" prices. For thirty of those drugs, SuperValu was making *more than eighty percent* of its cash sales for less than its claimed "usual and customary" prices.

Then consider that SuperValu was claiming that its "usual and customary" prices for those drugs were as much as *eight to fifteen times* the discounted prices it was actually charging *most of the time*. See Dew Rebuttal Report at 7–8. Given those facts, a reasonable jury could easily find both that SuperValu's claims for reimbursement based on its "usual and customary" prices were false under any reasonable interpretation of the term and that SuperValu knew its claims were false.

B. *Ambiguity and Knowing Fraud*

Smart lawyers and judges can debate exactly how to define "usual and customary" under the infinite

variety of situations we might hypothesize. But with respect, I do not see room for reasonable disagreement about whether claimed prices eight to fifteen times the actual cash prices that SuperValu charged most of the time were in any sense "usual and customary." Without even reaching the direct evidence of knowledge, discussed below, a reasonable jury could infer that SuperValu's decade-long practice of claiming higher reimbursement levels by disregarding the much higher prices it actually charged a majority of the time was a "knowing" fraud on the government. See 31 U.S.C. § 3729(a)(1). The disconnect between its representations (the higher prices were usual and customary) and reality (much lower prices were charged most of the time) is great enough that a jury could infer knowledge, as the term is defined in the False Claims Act, on that basis alone.

Then we come to the more direct evidence that SuperValu knew that what it was doing was fraudulent. The huge gaps between actual sale prices and claimed "usual and customary" prices did not escape notice by executives. Documents show that they paid close attention to the results of the price-matching program. That's no surprise. The program responded to a major disruption in retail drug markets, with a big financial impact on cash sales. The executives also knew it had huge implications for the even higher volume of Medicare and Medicaid sales of those drugs. The executives estimated that the correct application of "usual and customary" prices could cost SuperValu tens of millions of dollars per year.

Executives recognized that widespread price-matching could undermine what they euphemistically called the "integrity" of SuperValu's "usual and

customary" price claims for government reimbursement as price-matching became more than an "'exception' for customer services reasons." And in the face of that concern, they chose what one called in an email the "stealthy" approach (scare-quotes in the SuperValu original) to ensure that word about this "exception" did not reach too many customers. The problem, of course, is that SuperValu's price-matching was not only widespread but also advertised in all its stores. It knew that these practices were undermining the "integrity" of its certifications to the government, yet went forward anyway.

The False Claims Act requires proof that a defendant knowingly submitted false claims. It defines "knowing" of falsity to include acting "in deliberate ignorance of the truth or falsity" of the information submitted to the government. 31 U.S.C. § 3729(b)(1). A jury could reasonably find that SuperValu's widespread adoption of price-matching on a scale far beyond an "exception" was at least a deliberate choice to remain ignorant about whether its ongoing claims based on supposedly "usual and customary" prices were false. A jury could also reasonably infer actual knowledge from the obvious and known effects of the gap between most actual sale prices under the nationwide price-matching and the claimed "usual and customary" prices. See *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (obvious risk of harm justifies inference of knowledge), cited in *Safeco Insurance*, 551 U.S. at 68.

SuperValu of course has arguments and evidence pointing toward its honesty and innocence. But we are reviewing a grant of summary judgment. The account set forth above is a reasonable view of the evidence in the light most favorable to the non-moving relators. A

reasonable jury could find that SuperValu either actually knew or deliberately chose to keep itself in ignorance that it was submitting false, hugely inflated claims for reimbursement.

SuperValu does not dispute that it was selling forty-four of the top fifty drugs most of the time for much less than it claimed to the government were its "usual and customary" prices. Nor does it dispute that it was selling thirty of those drugs more than eighty percent of the time for much less than its claimed "usual and customary" prices. Instead, SuperValu points out that relators' case is not limited to those high-volume drugs ("cherry-picked examples," says SuperValu). Perhaps, but even if the relators tried to reach too far with other drugs, that would not mean their claims based on the "cherry-picked" drugs lack merit. The evidence of SuperValu's actions and state of mind regarding those "cherry-picked" drugs can also shed light on others. After all, the price-match program covered lots of drugs over the decade it was in place.

Relators' case here is factually complex because of time, geography, and the number of drugs involved. Their claims span a decade, during which SuperValu's price-matching practices changed in arguably important ways. Their claims also span drug sales across a host of local and regional retail markets with different competitors and matched prices. And their claims cover hundreds of different drugs. That complexity should not distract us from the sound theory at the core of relators' case. Where the price-matching program produced a majority of actual sales at prices below the claimed "usual and customary" prices, the

claimed prices could no longer be honestly deemed "usual and customary."

II. *Knowledge Under the False Claims Act*

SuperValu and the majority do not dispute this evidence or even the inferences that relators seek to draw from it. Instead, SuperValu and the majority say the evidence of SuperValu's actual knowledge and intentions is "irrelevant." Ante at 25. If that's correct, this case creates a safe harbor for fraudsters who claim taxpayer funds in bad faith, but whose barely-straight-faced lawyers offer an innocent explanation for their conduct. The majority even says it is irrelevant whether SuperValu actually believed and/or relied upon the *post hoc* justifications offered in litigation. "[I]t is not enough that a defendant suspect or believe that its claim was false." *Id.*, citing *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 288 (D.C. Cir. 2015); ante at 20 ("A defendant might suspect, believe, or intend to file a false claim, but it cannot *know* that its claim is false if the requirements for that claim are unknown.").

From 40,000 feet, that interpretation of the False Claims Act, or any cause of action for fraud, is extraordinary. It is a standard of knowledge we do not accept in any other areas of law, including criminal law. How many chief financial officers could say they did not "know"—not *really*—that the earnings reports were inflated, even if they suspected or believed they were? How many drug couriers could assert they did not really "know" that they were carrying drugs? Federal lawsuits and prosecutions are not seminars in such radical epistemological doubt. Federal courts routinely give "ostrich" instructions in response to such

defenses, even in criminal cases: "You may find that the defendant acted knowingly if you find beyond a reasonable doubt that he believed it was highly probable that [state fact as to which knowledge is in question, e.g., 'drugs were in the suitcase,' 'the financial statement was false,'] and that he took deliberate action to avoid learning that fact." Seventh Circuit Pattern Criminal Jury Instructions 4.10 (2020). We would never accept a defense theory based on such Cartesian doubt, and certainly not as a matter of law, in any other case requiring proof of knowledge of the key facts.

A. *Statutory Text and the Common Law*

Looking at the analysis more closely, the majority's interpretation conflicts with the statutory text of the False Claims Act, its common-law foundations, and its history and purposes. Let's start with the text of the Act. The key language imposes liability on a person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1).

The scienter standard is "knowingly," and the Act then defines the term:

> (b) Definitions. For purposes of this section–
>
> (1) the terms "knowing" and "knowingly"–
>
> (A) mean that a person, with respect to information–
>
> (i) has actual knowledge of the information;

> (ii) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (iii) acts in reckless disregard of the truth or falsity of the information; and
>
> (B) require no proof of specific intent to defraud. . . .

31 U.S.C. § 3729(b).

The three prongs of the statutory definition closely track the most authoritative summary of the common law's treatment of fraudulent scienter, used by the Supreme Court to interpret the False Claims Act. The Restatement (Second) of Torts § 526 (1977) also offers three prongs:

> A misrepresentation is fraudulent if the maker
>
> (a) knows or believes that the matter is not as he represents it to be,
>
> (b) does not have the confidence in the accuracy of his representation that he states or implies, or
>
> (c) knows that he does not have the basis for his representation that he states or implies.

The majority itself emphasizes that the Supreme Court has interpreted the False Claims Act consistently with the common law of fraud. Ante at 14, quoting *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1999 & n.2. That's certainly correct. *Escobar* relied on the Restatement

(Second) of Torts, as did *Safeco* in interpreting the Fair Credit Reporting Act. 551 U.S. at 69.[1]

As Restatement § 526 shows, the common law definition of fraud makes subjective bad faith central to fraudulent scienter. Yet the majority concludes that bad faith is irrelevant . . . in a fraud case! I would follow the Restatement, as echoed in the text of the False

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[1] The majority thinks § 526 is irrelevant in interpreting the False Claims Act's scienter standard, and that § 500 is a better guide because that's what *Safeco* cited for "reckless disregard." Ante at 16, citing *Safeco*, 551 U.S. at 69. That reasoning is circular. Section 500 addresses reckless disregard for the *safety* of another person. In other words, the majority is relying on the common law of reckless driving, not the common law of fraud. *Safeco* seems to have cited § 500 for lack of anything more pertinent to violations of the technical notice requirements of the Fair Credit Reporting Act. But § 526 appears in the Restatement Division on Misrepresentation, the Chapter on Misrepresentation and Nondisclosure Causing Pecuniary Loss, the Topic on Fraudulent Misrepresentation (Deceit), and Title A, Fraudulent Character of Misrepresentation. Section 526 is titled "Conditions Under Which Misrepresentation is Fraudulent (Scienter).," Each of its three prongs is phrased in terms of what the maker of the misrepresentation "*knows*." Thus, for the common-law understanding of the False Claims Act's definition of "knowing," § 526 is right on target. (In *Escobar*, the Supreme Court relied on § 529, from the same topic on fraudulent misrepresentations. 136 S. Ct. at 1999.) And I confess to being baffled by the majority's assertion: "We decline to graft aspects of common law fraudulent scienter into the FCA when Congress chose not to include such requirements." Ante at 17. With respect, given the majority's stated adherence to common-law understandings, what the maker of the false claims believes or suspects fits squarely into both the second and third prongs of 31 U.S.C. § 3729(b) and Restatement (Second) of Torts § 526. The common law of reckless driving (§ 500) does not provide the relevant scienter standard for a fraud case or a fraud statute.

Claims Act itself. A reasonable jury could infer that SuperValu "knew" or "believed" that its higher prices were not its usual and customary prices, or, at the very least, did "not have the confidence in the accuracy" of its representations to the United States government that its certifications stated or implied. But see ante at 20 ("A defendant might suspect, believe, or intend to file a false claim, but it cannot *know* that its claim is false if the requirements for that claim are unknown.").

B. *Origins of the Statutory Definition*

The majority fails to appreciate the importance of the False Claims Act's textual definitions of "knowingly" and their common-law roots. The majority instead focuses on the Supreme Court's interpretation of a different term in a different statute. That's a mistake. The False Claims Act's three-part definition of knowingly, with the disclaimer that specific intent to defraud is not required, did not come from nowhere. It was a clear instruction from Congress to courts to relax their restrictive interpretations of "knowing" under the Act.

Before 1986, the False Claims Act used the terms "knowing" and "knowingly" without elaboration. When Congress added the definitions in 1986, it acted in response to court decisions that were making it difficult to bring claims against dishonest claimants absent clear evidence of actual knowledge of the falsity of the claim. We should not ignore this history. The statutory text and history show Congress's clear intent to allow False Claims Act lawsuits to proceed against businesses that fail to do basic due diligence in

response to warning signs that their government payments are ill-gotten.[2]

The amended three-pronged definition of "knowledge" in the False Claims Act was added in 1986 as part of a broader revision to the Act. As sponsor Senator Grassley explained, the government needed "lots of help" from Congress to identify fraudsters and bring them to justice. 132 Cong. Rec. S11243 (Aug. 11, 1986). Expanding the statute's definition of "knowledge" to reach broader degrees of culpability was an important tool to reach that goal. *Id.*

The problem, as explained in the Senate Committee report, was that courts had applied too narrow a definition of "knowledge," often requiring actual literal knowledge of a claim's falsity or even specific intent to defraud to find liability under the Act. S. Rep. 99-345 at 7, citing *United States v. Aerodex*, 469 F.2d 1003 (5th Cir. 1972) (collecting cases). Given the "remedial" goals of the False Claims Act, the Committee sought to prevent courts from allowing unscrupulous claimants, acting in bad faith, to evade liability through

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[2] The majority asserts it is an error to rely on statutory history to go "beyond the text" of the statute. Ante at 17. If the statutory text were clear as applied to this case, I might agree, but the majority obviously does not believe the statutory text of § 3729 is clear. Otherwise the majority would not need to rely on *Safeco*, addressing a different statute and different scienter standard. Since the text is not self-explanatory, it makes good sense to use reliable evidence to figure out what problem Congress was trying to solve. See also *Safeco* itself, where the Supreme Court said it was deciding as it did because there was "no indication that Congress had something different in mind." 551 U.S. at 69. The Court's comment invites reliance on statutory history to answer these questions where the text is not entirely clear.

legal technicalities about the definition of "knowledge." See S. Rep. 99-345 at 7, 21.

The result of these earlier court decisions had been predictable: unscrupulous claimants could structure claim-processing procedures so that false claims could be filed without the relevant decisionmakers truly "knowing" of the fraud. *Id.* at 7. Even if hints of possible wrongdoing surfaced, decision-makers could insulate themselves from liability by ignoring problems that even a cursory investigation would have uncovered. *Id.*

In explaining the statutory text, the House Judiciary Committee noted the problems from the lack of a definition of "knowledge" and reported:

> By adopting this [three-pronged] definition of knowledge, the committee intends not only to cover those individuals who file a claim with actual knowledge that the information is false, but also to confer liability upon those individuals who deliberately ignore or act in reckless disregard of the falsity of the information contained in the claim. *It is intended that persons 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 should be held liable under the Act.* This definition, therefore, enables the Government not only to effectively prosecute those persons who have actual knowledge, but also those who play "ostrich."

H. Rep. 99-660 at 21 (emphasis added).

The Senate Committee also focused on proverbial "ostriches" who stick their heads in the sand instead of verifying that they are not cheating taxpayers. S. Rep. 99-345 at 7, 15, 21. These ostriches need not have "conscious culpability" of wrongdoing: people who submit claims that they have "reason to know" are potentially false run the risk of violating the Act if they "fail[] to inquire" as to the falsity of the claims. 132 Cong. Rec. S11243–44 (Aug. 11, 1986; statement of Senator Grassley).

The Committee reports explained that the added definition was aimed at claimants who acted in bad faith by failing to investigate potential problems: "those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate." S. Rep. 99-345 at 7. Congress chose statutory language that could have been custom-tailored for SuperValu's approach in this case. SuperValu knew that the "integrity" of its "usual and customary" prices would be suspect if price-matching were not the "exception" but the rule, yet it kept submitting those claims through a nationwide price-matching campaign anyway, netting tens of millions of dollars of public funds annually.

This is the same standard that the Eleventh Circuit adopted in *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148 (11th Cir. 2017), another case involving arguable regulatory ambiguity. After considering the statutory text and legislative history, the court concluded that "scienter is not determined by the ambiguity of a regulation, and can exist even if a defendant's interpretation is reasonable." *Id*. at 1155, citing the Senate Committee Report indicating Congressional intent to require claimants to engage in

"limited inquiry." *Phalp* also squarely rejected the majority's position here: "The district court's conclusion that a finding of scienter can be precluded by a defendant's identification of a reasonable interpretation of an ambiguous regulation that would have permitted its conduct is erroneous." *Id*. (*Phalp*'s treatment of this issue refutes the majority's attempt to explain it away. See ante at 15.) The *Phalp* court's interpretations of the Act's scienter definition should be obviously correct.

In fact, before the *Safeco* progeny cited by the majority, our colleagues in other circuits followed the amended text of the False Claims Act and common sense: a claimant could be liable under the Act notwithstanding a purported regulatory ambiguity if the defendant deliberately ignored the falsity of the claim or otherwise acted in bad faith. *United States v. Science Applications International Corp.*, 626 F.3d 1257, 1272–73 (D.C. Cir. 2010) (affirming verdict for United States; jury could infer that defendant knew its claims were false notwithstanding "regulatory divide" in how to interpret a regulation); *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999) (reversing summary judgment: "In short, [defendant's] petition arguing that the sky will fall upon government contractors if they are precluded from relying on a 'reasonable interpretation' is not only unsupported by case law, it is also ungrounded in reality."); see also *Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1053 (8th Cir. 2002) (citing *Parsons* for the proposition that "any possible

ambiguity of the regulations is water under the bridge" where contractor's misinterpretation is "knowing").[3]

In this case, the relators' evidence shows that SuperValu knew it was claiming high "usual and customary" prices that it was charging less than half the time, often less than one fifth of the time. SuperValu knew that its practices raised questions about the "integrity" of its "usual and customary" prices but nonetheless ignored those concerns. The False Claims Act's statutory definition of "knowing" reaches those who know their claims are false or who act in deliberate ignorance of whether their claims were true or false. We should reverse summary judgment for SuperValu.

III. *The Majority's Safeco Tangent*

Rather than focusing on the language of the False Claims Act itself, and its origins in the common law of fraud and responses to crabbed judicial interpretations, the majority opinion takes a very different approach. It borrows the Supreme Court's treatment of a different term, "willfully," under a different statute,

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[3] We took a similar approach in *United States ex rel. Sheet Metal Workers Int'l Ass'n, Local Union 20 v. Horning Investments, LLC*, 828 F. 3d 587 (7th Cir. 2016). The defendant argued that it relied on advice of professional experts in determining that its claims were not false. We rejected that argument on grounds inconsistent with the majority approach here. Rather than treat a professional's ability to find ambiguity as a defense in itself, we applied a much more demanding five-part test that required proof of timely, good-faith, and full disclosure to competent experts. *Id.* at 594–95. We ultimately affirmed summary judgment for the defendants, but on a different ground, that the relator simply did not have evidence that defendants were on notice that their claims were false. *Id.* at 595.

the Fair Credit Reporting Act, in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007). The majority adopts *Safeco*'s treatment of reckless disregard for law as a branch of "willful" misconduct. The majority then goes even further and concludes that relators must meet that standard for reckless disregard for any False Claims Act case, even if they rely on the actual-knowledge or deliberate-ignorance prongs of the Act's definition of knowing.

The majority makes two fundamental mistakes. First, the reliance on *Safeco* to understand "reckless disregard" is neither necessary nor fitting for the False Claims Act. The Act draws on a different branch of the common law (of fraud, not reckless driving), and the history of the statutory amendments shows that Congress thought it was enacting a standard quite different from the majority's. Second, by saying relators must satisfy the *Safeco* reckless-disregard standard in any case, the majority effectively nullifies two-thirds of the statutory definition of "knowing." To explain:

The question in *Safeco* was whether an insurer's decision about an initial premium rate for an insured could qualify as an "adverse action" based on a credit report that could require notice to the consumer in question. The Supreme Court ultimately held that it could but also held that Safeco had not "willfully" violated that Act because the statute and regulation were not clear as applied to initial premium decisions, so that Safeco had not acted willfully.

The Fair Credit Reporting Act does not define "willfully," which the Court described as a "word of many meanings whose construction is often dependent on the context in which it appears." 551 U.S. at 57,

quoting *Bryan v. United States*, 524 U.S. 184, 191 (1998). Without more specific guidance for interpreting the term in that act, the *Safeco* Court had little choice but to construct a working definition from multiple sources. The Court focused on civil law, noting that in several civil contexts, willful violations of statutes could be shown by recklessness, which was consistent with common-law use of the term. *Id.* Then, because there was "*no indication that Congress had something different in mind*," and because the term "recklessness" is not "self-defining," the Court announced an application of that scienter standard to the Fair Credit Reporting Act. *Id.* at 57–58, 68–69.

The Court then drew on common-law definitions of "recklessness" that apply to actions putting others in physical danger. The Court described recklessness as action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known," *id*. at 68, quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994), and conduct involving "unreasonable risk of physical harm . . . substantially greater than that which is necessary to make his conduct negligent. *Id*. at 69, quoting Restatement (Second) of Torts § 500 (also regarding putting another person in physical danger). The Court summarized its view for the Fair Credit Reporting Act:

> *There being no indication that Congress had something different in mind*, we have no reason to deviate from the common law understanding in applying the statute. Thus, a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company

> ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

551 U.S. at 69 (emphasis added; citation omitted). Along the way, the Court added footnote 20, saying that evidence of subjective bad faith would not be relevant to the definition of willfulness in 15 U.S.C. § 1681n(a) where a company followed an objectively reasonable interpretation of the Fair Credit Reporting Act.

The majority here and four other circuits have borrowed this reasoning from *Safeco* and grafted it onto the False Claims Act. Two of those circuits did so in non-precedential decisions. The two precedential decisions are *United States ex rel. Purcell v. MWI Corp.,* 807 F.3d 281 (D.C. Cir. 2015), and *United States ex rel. Donegan v. Anesthesia Associates of Kansas City*, 833 F.3d 874 (8th Cir. 2016). The Eleventh Circuit reached a different conclusion in *Phalp*, 857 F.3d 1148, discussed above. (The *Phalp* opinion did not discuss *Safeco* or *Purcell*, but both cases were briefed extensively, including by the United States in an amicus brief arguing that *Safeco* provided no meaningful guidance for False Claims Act cases. There is no doubt that the Eleventh Circuit rejected *Purcell*'s borrowing of *Safeco*. It did not cite Safeco because, for reasons explained here, Safeco simply is not needed to interpret the scienter requirement of the False Claims Act.)

In the absence of better guidance for the False Claims Act and common law, reliance on *Safeco* might be understandable, if a bit of a stretch. The majority here errs, however, by overlooking *Safeco*'s directive: first check to see if "Congress had something different

in mind." 551 U.S. at 57, 69. With the False Claims Act, we *do* have meaningful guidance from the statutory text, the common law, and legislative history, as discussed above.

If the majority limited its reliance on *Safeco* to the reckless-disregard prong of the False Claims Act's definition of knowing, its mistake would be more understandable. It's the majority opinion's next move that is more extraordinary and much more damaging. The majority concludes that a relator under the False Claims Act must satisfy the *Safeco* definition of reckless disregard—show that no reasonable understanding of law could justify the defendant's action, or show that the defendant disregarded "authoritative guidance"—*in every case*, even those relying on the actual-knowledge and deliberate-ignorance prongs of the definition of "knowingly." As a result, the majority holds in effect that those two-thirds of the statutory definition add zero meaning to the statute.

The majority's major premise is that "reckless disregard" is the broadest of the three prongs. Its minor premise is that any case of "actual knowledge" or "deliberate ignorance" would *always* fall within "reckless disregard," *as that term was defined in Safeco*. That too-simple heuristic may be useful in some easy cases, but its application here is inconsistent with how courts should read statutes.

The key logical error lies in the minor premise, that any case of actual knowledge or deliberate ignorance would necessarily also be covered by *Safeco*-reckless disregard. There is no basis for that assumption, which leads away from the common law of fraud, where subjective bad faith is central.

Consider a hypothetical close to this case. A government contractor submits claims believing, subjectively, that the claims are probably false. The agency has not yet provided what *Safeco* would call "authoritative guidance," but the contractor reads the controlling regulation (correctly) to preclude its claim. Still, it decides to stay quiet, hoping it will not get caught, or at least not too quickly. In that situation, judges and jurors can say that claims were fraudulent and the contractor knew it, even if a creative lawyer can later make a non-frivolous legal argument for its innocence. Likewise, the contractor acted with fraudulent intent because it "believed" the claims were false and submitted claims in which it did not have the "confidence" it claimed. See 31 U.S.C. § 3729(b); Restatement (Second) of Torts § 526.

This bad-faith "catch us if you can" approach to public funds is exactly what Congress thought it was outlawing when it decided in 1986 that it needed to define "knowledge" more specifically for the False Claims Act, including to reach deliberate ignorance of falsity. Recall also that under the majority's approach, there is no need for a defendant to show that it actually "followed" any "objectively reasonable" interpretation of the law that would supposedly save the claims from being false. See ante at 25.

The majority's logic thus takes the False Claims Act in a direction 180 degrees away from common-law fraud. It makes subjective bad faith, including deliberate ignorance, "irrelevant." *Id*. That's contrary to both the actual-knowledge and deliberate-ignorance prongs of the Act's textual definition. It loses sight of the fact that the Act applies to "fraudulent" conduct. And it's also contrary to the common-law scienter standard in

the Restatement (Second) of Torts, which is satisfied if the defendant "knows *or believes* that the matter is not as he represents it to be," or if he "does not have the confidence in the accuracy of his representation that he states or implies. . . ." § 526 (emphasis added).

The majority rests heavily on *Safeco*'s footnote 20 to supports its new safe harbor where subjective state of mind is irrelevant. See ante at 19. With respect, the majority reads far too much into that footnote, which by its own terms is limited to "determining whether a company acted knowingly or recklessly for purposes of § 1681n(a)." By the majority's reading, that footnote in an opinion on credit reporting requirements, which borrowed from the common law of reckless driving, upended the common law of *fraud*, one of the paradigmatic intentional torts, where state of mind is critical. The *Safeco* Court gave no sign that its footnote intended to reach beyond § 1681n(a) or that it was creating a new element for fraud claims—the absence of any plausible reading that would render the false statement true. The majority's too-broad reading leads it to depart from the text of the False Claims Act and loses sight of Congress's clear intent.

In fact, the Supreme Court itself has warned against reading *Safeco*'s footnote 20 so broadly. It did so in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923, 1933 n.* (2016). The Court declined to extend the *Safeco* definition of "willfully" to treble-damage awards for patent infringement under 35 U.S.C. § 284. Subjectively bad-faith infringement, focused on the defendant's state of mind when it acted, had long been an independent basis for enhanced patent damages. 136 S. Ct. at 1933 & n.*. As the majority points out here, ante at 17–18, in *Halo Electronics*,

differences in the two statutes produced different scienter standards. Exactly the same reasoning should apply here. The differences between the texts and histories of the Fair Credit Reporting Act and False Claims Act should lead us to decline to extend the *Safeco* standard and its footnote 20 to the False Claims Act.

Returning to False Claims Act cases, consider, for example, *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 837–38 (6th Cir. 2018), where the Sixth Circuit reversed dismissal of a relator's complaint. The complaint alleged that the relator and other nurses had "concerns about the defendants' compliance with Medicare regulations, but were told to ignore any problems." When relator raised issues about regulatory compliance, executives told her on multiple occasions that " '[w]e can just argue in our favor if we get audited' as a solution to any compliance issues." The Sixth Circuit reasoned that the allegations about notice of compliance problems imposed an obligation on the defendants to inquire whether they were actually in compliance with regulations. The Sixth Circuit concluded the allegations supported "knowledge" under both the deliberate-ignorance and reckless-disregard prongs of the definition. *Id.* at 838. Yet under the majority's approach here, that case would have been dismissed so long as an attorney could later offer a barely-plausible theory of innocence, even though the defendant ignored repeated and correct warnings that it was violating the regulations. Worse yet, the majority here would have dismissed the case even if the supervisors had admitted that they *knew* their submissions were non-compliant.

The majority's bottom line—that only objectively reckless disregard matters, and subjective bad faith does not—also violates one of the most common tools of statutory interpretation. It renders the actual-knowledge and deliberate-ignorance prongs of the statutory definition utterly superfluous. See *City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."), quoting *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality); *National Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 632 (2018), quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 710 (7th Cir. 2015); Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 174 (2012) ("The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition.").

The canon against surplusage is not absolute, of course. Sometimes drafters of legal documents may "intentionally err on the side of redundancy to 'capture the universe.' " *Sterling Nat'l Bank v. Block*, 984 F.3d 1210, 1218 (7th Cir. 2021), quoting Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 934 (2013); accord, e.g., *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019); *White v. United Airlines, Inc.*, 987 F.3d 616, 622 (7th Cir. 2021).

The False Claims Act definition of "knowingly" is about as strong a case for the canon against surplusage as one is likely to find. The three prongs mirror

three distinct common-law prongs for fraudulent scienter. Congress adopted them to give courts clearer guidance because Congress was disappointed with courts' interpretations of the undefined "knowing." Congressional leaders on the subject, such as Senator Grassley and Representative Berman, were concerned that courts would continue to misinterpret the statute. They explained exactly how the definition of "knowing" should be applied, as did the respective committees. The three prongs may overlap in many cases, but the adoption of the three distinct prongs in the same paragraph of the statutory text was unmistakably an effort to be both thorough and broad. Congress said as clearly as it could that the False Claims Act should reach just this kind of case.

I close with two final observations about the majority's misguided holding. First, even under the *Safeco* standard, a reasonable jury could find that SuperValu's more extreme conduct here was not reasonable. There is simply no reasonable definition of "usual and customary" that means "something we do less than half the time and that we instruct our employees not to do." Defining "usual and customary" to mean the opposite of what those two words actually mean is simply not reasonable.

Second, the majority's approach actually leaves the False Claims Act definition of knowledge *narrower* than when the 1986 amendment was passed. Consider, for example, *United States v. Mead*, 426 F.2d 118, 122–23 (9th Cir. 1970), which Representative Fish singled out as applying a too-narrow definition of knowledge. 132 Cong. Rec. H6480 (Sept. 9, 1986); see also *Aerodex*, 469 F.2d at 1007, cited negatively in S. Rep. 99-345 (collecting *Mead* as an example of then-

operative knowledge standard). In *Mead*, the court explained that where regulatory language is uncertain and even the district court misinterpreted the regulations, scienter is still a question of fact. If the government had shown that Mead knew his regulatory interpretation was wrong or had fraudulent intent, he would still be liable under the Act. See also *United States v. Ueber*, 299 F.2d 310, 314 (6th Cir. 1962), cited negatively in S. Rep. 99-345 (where contract distinguished between "direct" and "indirect" labor costs, falsity of claims for "direct" labor costs and defendant's knowledge of their falsity are questions of fact for trial; remanding for further fact-finding). Whatever "reckless disregard" means, we should not use it to *narrow* the definition of knowledge that Congress thought it was expanding.

To sum up, relators have come forward with substantial evidence of knowing fraud, as SuperValu claimed reimbursement at supposedly "usual and customary" prices for drugs that were as much as eight to fifteen times higher than the prices it was actually charging the general public a majority of the time. The evidence supports a reasonable inference of actual knowledge or at least deliberate ignorance or reckless disregard for whether its reimbursement claims were false. We should reverse summary judgment and remand for trial on relators' claims. With respect, I believe that both Congress and the Supreme Court will be surprised by this decision and the others extending *Safeco* to the False Claims Act. If the False Claims Act is to remain effective in discouraging and remedying fraudulent raids on taxpayer dollars, Congress or the Supreme Court or both will need to respond to this line of cases.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 11-3290

UNITED STATES OF AMERICA, and THE STATES OF CALIFORNIA, DELAWARE, ILLINOIS, INDIANA, MASSACHUSETTS, MINNESOTA, MONTANA, NEVADA, NEW JERSEY, NORTH CAROLINA, RHODE ISLAND, VIRGINIA, *ex rel.* TRACY SCHUTTE and MICHAEL YARBERRY,

Plaintiffs and Relators,

v.

SUPERVALU, INC., SUPERVALU HOLDINGS, INC., FF ACQUISITIONS, LLC, FOODARAMA, LLC, SHOPPERS FOOD WAREHOUSE CORP., SUPERVALU PHARMACIES, INC., ALBERTSON'S LLC, JEWEL OSCO SOUTHWEST LLC, NEW ALBERTSON'S INC., AMERICAN DRUG STORES, LLC, ACME MARKETS, INC., SHAW'S SUPERMARKET, INC., STAR MARKET COMPANY. INC., JEWEL FOOD STORES, INC., and AB ACQUISITION LLC,

Defendants.

OPINION

RICHARD MILLS, U.S. District Judge:

This is a False Claims Act ("FCA") case.

The Relators allege that the Defendant pharmacies submitted false or fraudulent claims to obtain federal funds from Government Healthcare Programs (GHP) to which they were not entitled.

The Relators claim this occurred through the electronic submission of inflated usual and customary charges to GHPs because Defendants failed to report their cash price matches as their usual and customary price.

I. INTRODUCTION

Federal and State GHPs include Medicare, Medicaid, TRICARE and the Federal Employees Health Benefits Program. The federal government provides beneficiaries of GHPs with prescription drug-benefits through relationships with private subcontractors known as pharmacy benefit managers. GHPs would offer pharmaceutical benefits, reimbursing those providers who dispense covered drugs to program beneficiaries. At issue here is the "usual and customary price" that must be reported under the FCA if the Defendants matched Wal-Mart's or other competitors' discount drug prices—specifically the meaning of "usual and customary price" and whether in submitting claims to GHPs for reimbursement Defendants were obligated to report any individualized price matches as their usual and customary price.

Plaintiffs United States of America and the States, through the Relators, filed this action alleging violations of the FCA, 31 U.S.C. § 3729 *et seq.*, and

analogous false claims acts and health care fraud remedial statutes of the Plaintiff States. The Relators seek recovery on the basis of the state statutes and the FCA.[1]

The Relators allege the Defendants have submitted false claims to the Medicaid programs of a number of states through the use of false records and documents, and by failing to disclose material information in presenting their claims. Regarding these states, the Relators do not seek to recover under a false claims act or similarly named health care fraud remedial statute. They allege that because Medicaid is a program jointly funded by the United States and each state, each false claim submitted by the Defendants in those states is a false claim against the United States for the federal share of the claimed amount in violation of the FCA.[2]

As part of a Stipulation, the Medicaid claims relating to the ten Plaintiff States other than California and Illinois have been dismissed. The Medicaid claims related to the ten non-Plaintiff States except for Utah and Washington have been dismissed. The Medicaid claims as to the United States, regarding the Federal Financial Participation paid in connection with these 20 states, have been dismissed.

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[1] The Relators' amended complaint sought recovery based on the false claims and/or health care fraud remedial statutes for California, Delaware, Illinois, Indiana, Massachusetts, Minnesota, Montana, Nevada, New Jersey, North Carolina, Rhode Island and Virginia.

[2] These non-Plaintiff states include Idaho, Iowa, Maine, Maryland, Missouri, New Hampshire, Oregon, Pennsylvania, Utah, Vermont, Washington and Wyoming.

Accordingly, the Relators' claims on behalf of the United States and the States of California, Illinois, Utah and Washington related to Medicaid remain pending. The Relators' claims on behalf of the United States related to Medicare Part D, TRICARE and the Federal Employees Health Benefit Plan also remain at issue.

This Court previously considered the Relators' motion for partial summary judgment based on the Seventh Circuit's decision in *United States ex rel. Garbe v. Kmart*, 824 F.3d 632 (7th Cir. 2016). At issue in that Order granting the Relators' motion for partial summary judgment was the Defendants' Price Match Program and whether those discounted prices constituted the usual and customary prices.

In an Opinion and Order entered on August 5, 2019 which considered the effect of *Garbe*, the Court determined that the Defendants' "discount cash prices" offered through a Price Match Program available to all cash customers "are the usual and customary prices" and that Medicare Part D and the California, Illinois, Utah and Washington Medicaid programs were entitled to those usual and customary prices. *See* Doc. No. 301, at 20. The Court noted that the knowledge element of the FCA was not at issue in the motion for partial summary judgment based on *Garbe*. *See id*. at 21.

Pending are the (1) Defendants' motion for partial summary judgment as to all Medicaid claims based on Defendants' assertion that Relators cannot prove each of the FCA elements, including knowledge and materiality; (2) Relators' second motion for partial summary judgment as to inflated Medicare Part D claims submitted to Medco Health Solutions, Inc., based on

the Defendants' alleged failure to report their discounted cash prices offered to the general public as their usual and customary prices; and (3) Defendants' motion for partial summary judgment as to the Medicare Part D, TRICARE and FEP claims based on Defendants' assertion that Relators' cannot prove each of the elements under the FCA, including knowledge and materiality.

Also pending is the Defendants' motion for case management procedures regarding related motions for summary judgment under *Safeco Insurance Co. of Am. v. Burr*, 551 U.S. 47 (2007). The motion states that Defendants have filed the aforementioned summary judgment motions in this case that raise identical legal issues to a motion filed by Defendant Safeway, Inc. in *U.S. ex rel. Proctor v. Safeway, Inc.*, case No. 3:11-cv-03406. The Defendants claim that, in the interest of judicial efficiency, the Court should consider both motions together or, alternatively, decide the *Proctor* motion first. That is because the Court's ruling in *Proctor*, which concerns membership-only and price-matching programs, will largely determine its ruling here, which concerns price-matching only. The Court decided the motion in *Proctor* on June 12, 2020, holding that because there was no authoritative guidance warning Safeway away from what before *Garbe* was an objectively reasonable position, the Relator could not satisfy *Safeco*'s objective scienter standard and thus could not meet the FCA's "knowing" element as a matter of law.

II. BACKGROUND

The Defendants' "banners" (i.e. Cub Pharmacy, Osco Drug, etc.) offered a price-match guarantee. SuperValu and Albertsons operated more than 1,000

pharmacies located inside grocery stores in 24 states during the time at issue between 2006 and 2016.

The Price Match Program began for the Defendants in 2006. The Defendants claim advertising of the Price Match Program occurred at certain times between 2006 and 2012 but Defendants have had a price match policy in place since the 1980s. A Price Match Program "override" occurred when pharmacy personnel replaced Defendants' then-current, reported cash "retail" price with a lower competitor price. Albertsons discontinued the Price Match Program in October 2013. SuperValu discontinued the Price Match Program in December 2016.

The Defendants' advertisements publicized their practice of matching competitor prices on prescription drugs and generally included disclaimers. Defendants' price match advertisements were disseminated to the public through various means, such as in-store and pharmacy signage, fliers, circulars, in-store audio announcements, mailers, newspapers of general circulation, on the back of store receipts and Defendants' web pages. The Price Match Program advertisements described the Defendants' price match policy.

The Relators allege the Defendants' Price Match Program was a "stealthy" discount program that was a response to Walmart's discount prescription drug program. It was available to anyone who would request that Defendants match a competitor's price. The Defendants say certain other requirements had to be met before a customer could receive a competitor's lower price, including the fact that the lower price had to be available at a local pharmacy and be verified by pharmacy staff. No fee was required of customers to participate in the Price Match Program.

The Defendants' price overrides grew from 8.75% of cash sales of all drugs (including drugs that were not available from the competitors at a lower cash price) in 2007 to 39.36% of cash sales of all drugs in 2011. The Defendants claim these percentages are taken out of context with respect to how many total cash transactions occurred. Moreover, price-match transactions were at most 26.6% of total cash sales throughout the relevant time period. The Relators state that price-match overrides occurred as frequently as 18,000 times per week. When all of the prescriptions filled by the Defendants between 2006 and 2016 are taken into account, at most, 2% were priced-matched prescriptions.

The Defendants did not submit lower matched price cash sales transactions to third-party payors, including GHPs. The Defendants would not allow lower matched prices to be submitted to third party insurance even if a customer specifically asked Defendants to process a price match transaction through the customer's insurance. The Defendants claim doing so would have violated their contracts with these payors. The customer's preference does not control. The contract does.

The Relators allege the Defendants refused to sacrifice profits from third parties by "officially" lowering their prices. Instead, they made an end-run around established law to deprive the Government of discount prices.

In October 2006, soon after Walmart announced its discount generics program, the Defendants estimated that adopting a similar discount generics program would result in tens of millions of dollars of lost profits, 90% of which "would go to PBMs, Managed

Care and other payors due to co-pay and U&C contract language." The Defendants viewed this as a business decision so they would not lose money.

On October 27, 2006, Medco Health Solutions, Inc.'s Senior Director, Bill Strein, sent Defendants' top managers an email entitled "Usual and Customary (U&C) pricing provision reminder" which stated in part:

> [W]e wanted your organization to be reminded of the Usual and Customary pricing provision in all Medco pharmacy network agreements.
>
> Pharmacy is required, by contract, to:
>
> "Submit Pharmacy's Usual and Customary ("U&C") price, which represents the lowest net price a cash patient would have paid on the day that the prescription was dispensed inclusive of all applicable discounts."
>
> These discounts include, but are not limited to, senior citizen discounts, loss leaders, frequent shopper, or special customer discounts, competitor's matched price, or other discounts offered customers. For Medco members or patients, it is expected that their prescription claim will be submitted through Tele-PAID/POS by pharmacy submitting appropriate pharmacy U&C pricing.

The email was circulated to SuperValu Executive Ron Richmond (Director of Managed Health Care Contracting), Maxine Johnson (Director of Managed Care Operations), Dan Salemi (Vice President of Pharmacy Services) and Chris Dimos (President of Pharmacies).

The Defendants claim the email is immaterial because their relationship with Medco was governed exclusively by contracts and Defendants did not violate any contractual terms with respect to submitted claims processed by Medco during the relevant time period.

On December 27, 2007, Ron Richmond sent an email to SuperValu Executives Pamela Caselius (Marketing Director), Maxine Johnson and Dan Salemi, writing in part:

> As for price matching on the various competitors generic programs, I believe that we have always taken a "stealthy" approach. We consider this to be something that we do as an "exception" for customer service reasons. Once we deviate to a process that is more "rule" or routine, we begin to affect the integrity of our U&C price – a slippery slope, as true U&C price is a claim submission requirement for all Medicaid and private commercial Managed Care and PBM agreements. The financial implication of this is very broad, Please communicate with Max and Dan for a broader discussion on Generic Price matching and/or promotional activities.

The Defendants promoted price matching in part to "combat" discount generic drug programs offered by Walmart and other competitors. The Defendants' Price Matching Program was designed to retain existing customers and attract new customers.

In October 2008, Defendants' ARx pharmacy application was enhanced with an ongoing price match override feature. The "Ongoing Price Override" 1) processed subsequent fills of the same prescription at the

overridden price automatically; 2) maintained a record of the competitor pharmacy whose price had been matched; and 3) automatically logged notes to the prescription on which the override had been performed. Regarding automatic refills, patients were not required to ask for a price match and refills were done automatically.

SuperValu Prescription Pricing Policy (September 2009) stated that "[t]he company will not lose a prescription because of price," and required SuperValu employees responding to price quotes to "Mention service, convenience and price match guarantee." The Defendants say this did not change their longstanding approach to price matching. Customers were still required to take an affirmative action, quote a local competitor and price, and have the pharmacy staff verify the competitor's price before providing the customer with a price match. The Relators dispute that customers had to initiate the price match transaction.

SuperValu's August 2012 Prescription Pricing Policy added the words "[i]f a customer requests that we match the price . . ." to SuperValu's "Prescription Price Match Program" and removed the requirement from the September 2009 Prescription Pricing Policy to "Mention . . . price match guarantee."

Individual pharmacies could not change the usual and customary price reported to third parties, including GHPs. The usual and customary price reported to third parties, including GHPs, "was set by Defendants' corporate pricing department." The Defendants state the usual and customary prices were controlled by applicable third-party contracts or state law. The Defendants generally did not acknowledge or consider discount Price Match Program cash prices when

setting the usual and customary prices they reported to third parties.

The Relators dispute the Defendants' assertion that they "sought clarification" from payers regarding the proper reporting of usual and customary price. The Defendants only did this when the Price Match Program "exception" was directly challenged. At best, the Relators claim the Defendants remained deliberately ignorant of their obligations and did not want to let third-party payers find out about the scope of their Price Match Program.

The "PBM Industry Definition of U&C Price" is "generally understood to be the cash price charged to the general public." The Defendants allege the primary Pharmacy Benefit Managers that processed more than 92% of Defendants' total prescription records and more than 94% of their total amount paid for those prescription records did not consider Defendants' individualized price matching to have altered the usual and customary prices they submitted. Pharmacy reimbursement is governed by statutory and regulatory requirements. Contracts between Defendants and Pharmacy Benefit Managers must be construed consistent with those statutes and regulations.

The Defendants allege the Pharmacy Benefit Managers and the state Medicaid programs were well aware of these types of discount programs. The Department of Justice and relevant States investigated the allegations in Relators' amended complaint for more than three years before declining to intervene. Moreover, the Pharmacy Benefit Managers and the State Medicaid programs at issue extensively audited Defendants' prescription claims. The Relators dispute that Pharmacy Benefit Managers and State Medicaid

programs were "well aware" of Defendants' Price Match Program. They allege that Defendants did not provide Pharmacy Benefit Managers and State Medicaid programs with candid and complete disclosure of the scope and operation of their Price Match Program.

A number of summary judgment motions are pending. Among the issues in each is whether the Relators can meet the FCA's "knowing" element.

III. DISCUSSION

Summary judgment standard

Summary judgment is appropriate if the motion is properly supported and "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). The Court views the evidence and construes all reasonable inferences in favor of the non-movant. *See Driveline Systems, LLC v. Arctic Cat, Inc.*, 936 F.3d 576, 579 (7th Cir. 2019). To create a genuine factual dispute, however, any such inference must be based on something more than "speculation or conjecture." *See Harper v. C.R. England, Inc.*, 687 F.3d 297, 306 (7th Cir. 2012) (citation omitted). "The court does not assess the credibility of witnesses, choose between competing reasonable inferences, or balance the relative weight of conflicting evidence." *Driveline Systems*, 36 F.3d at 579 (internal quotation marks omitted). Ultimately, there must be enough evidence in favor of the non-movant to permit a jury to return a verdict in its favor. *See Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008).

FCA and applicable law

The Defendants allege the summary judgment motions in this case raise the same dispositive legal question as the summary judgment motion based on *Safeco* in *Proctor*—that being whether the Relators can establish that Defendants' position on the meaning of usual and customary prices was objectively reasonable based on the standard announced by the United States Supreme Court in *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007). The Defendants assert the Court's recent decision applying *Garbe* regarding usual and customary prices cannot meet the *Safeco* standard as to any pre-*Garbe* conduct.

(1)

To create a factual dispute on an FCA claim, a relator must establish a knowing falsehood. *See United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 840 (7th Cir. 2011). The FCA provides for liability if a person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," *see* 31 U.S.C. § 3729(a)(1)(A), or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). A person acts "knowingly" for purposes of the FCA if he: "has actual knowledge of that information;" "acts in deliberate ignorance of the truth or falsity of the information;" or "acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A). No proof of specific intent to defraud is required. 31 U.S.C. § 3729(b)(1)(B).

In *Safeco*, the Supreme Court examined the scienter requirement of the Fair Credit Reporting Act

("FCRA"). The Court noted that "where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well." *Safeco*, 551 U.S. at 57. The Court further observed that the common law has generally judged "recklessness" according to an objective standard and that Safeco's conduct could not meet the statute's scienter requirement absent an "objectively unreasonable" interpretation of the statute's legal requirements. *See id*. at 58-60. The argument that "evidence of subjective bad faith can support a willfulness finding even when the company's reading of the statute is objectively reasonable" is unsound. *Id*. at 70 n.20. "Congress could not have intended" to make a defendant liable for knowing or reckless violations if the defendant "followed an interpretation that could reasonably have found support in the courts, whatever [its] subjective intent may have been." *Id*. Given that recklessness requires awareness of an objective risk, a defendant cannot act recklessly—let alone knowingly—if the apparent risk it took was "not objectively unreasonable." *Id*. at 69.

Because "'reckless disregard' . . . is the most capacious of the three" mental states, *see United States v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013), it follows that if a relator is unable to prove recklessness, he also would not be able to establish actual knowledge or deliberate indifference.

The Supreme Court in *Safeco* thought it significant that defendant did not have "the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took." *Id*. at 70. No such guidance existed except for a letter "written by an FTC staff

member to an insurance company lawyer." *Id*. at 70 n.19. Because of this lack of guidance, "Safeco's reading was not objectively unreasonable" and fell well short of constituting reckless disregard. *Id*. at 70.

The United States Court of Appeals for the Seventh Circuit has not addressed whether *Safeco*'s standard with respect to the FCRA applies to the FCA and its scienter requirement. However, every court of appeals to consider the issue has held that it does. *See U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 290 (D.C. Cir. 2015) (noting that under the FCA's knowledge element, the inquiry involves the "objective reasonableness" of the defendant's interpretation of an ambiguous term and whether the defendant was warned away from that interpretation); *U.S. ex rel. Streck v. Allergan Inc.*, 746 F. App'x 101, 106 (3d Cir. 2018) (quoting *Purcell* and stating that because of the "knowing" requirement, "the FCA does not reach an innocent, good-faith mistake about the meaning of an applicable rule or regulation. Nor does it reach those claims made based on reasonable but erroneous interpretations of a defendant's legal obligations."); *U.S. ex rel. McGrath v. Microsemi Corp.*, 690 F. App'x 551, 552 (9th Cir. 2017) (finding that scienter under the FCA could not be established because defendant's good faith interpretation of a key term in the applicable regulation was reasonable); *U.S. ex rel. Donegan v. Anesthesia Associates of Kansas City, PC*, 833 F.3d 874, 879-80 (8th Cir. 2016) (concluding FCA scienter could not be established under *Safeco* barring evidence of government guidance warning a regulated defendant away from an otherwise reasonable interpretation of an ambiguous regulation). The court in *U.S. ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645 (5th Cir.

2017) cited *Safeco* with approval and found the trial testimony supported the defendant's assertion that a "reasonable interpretation of any ambiguity inherent in a regulation belies the scienter necessary" to violate the FCA. *Id*. at 657-58 & n.39.

This high bar is important in that it "avoid[s] the potential due process problems posed by 'penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.'" *Purcell*, 807 F.3d at 287. The Defendants contend that, as those courts of appeal have found, the Supreme Court's analysis of the common-law definition of recklessness with respect to the FCRA in *Safeco* applies with equal force regarding the FCA. The Seventh Circuit has endorsed that principle, stating that "mere differences in interpretation growing out of a disputed legal question" involving a contractual term cannot violate the FCA. *Yannacopoulos*, 652 F.3d at 836 (internal quotation marks). Because the FCA requires a knowingly false statement, 31 U.S.C. § 3729(a)(1)(B), a defendant lacks knowledge if "the particular false statements were the result of a difference in interpretation or even negligence." *U.S. ex rel. Marshall v. Woodward, Inc.*, 812 F.3d 556, 561-62 (7th Cir. 2015).

In *Proctor*, this Court noted that every court of appeals to address the issue has found that the Supreme Court's analysis of the common-law definition of recklessness as to the FCRA in *Safeco* applies equally to the FCA and that the Seventh Circuit had approved the principle. This Court agreed with those circuit courts and found that *Safeco*'s standard applies to the FCA and its scienter requirement.

Relying on *Garbe*, this Court previously determined that Defendants' "discount cash prices" offered

through a Price Match Program "are the usual and customary prices." The issue now is whether the Defendants' interpretation of "usual and customary price" was objectively reasonable at the time of their Price Match Program. If there was more than one reasonable interpretation of "usual and customary price" and Defendants' interpretation was consistent therewith, a defendant should not be treated as a "knowing or reckless violator." *See Safeco*, 551 U.S. at 70 n.20. "Congress could not have intended such a result for those who followed an interpretation that could reasonably have found support in the courts." *Id*. Additionally, the Seventh Circuit's decision to address whether the district court correctly identified the "usual and customary" price, *see Garbe*, 824 F.3d at 637, suggested the issue was one "as to which there is substantial ground for difference of opinion" at the time. 28 U.S.C. § 1292(b).

The question becomes whether "there was 'guidance from the courts of appeals' or relevant agency 'that might have warned [the Defendants] away from the view they took.'" *Purcell*, 807 F.3d at 289 (quoting *Safeco*, 551 U.S. at 70). The Price Matching Programs at issue ran between 2006 and 2016. Garbe was decided on May 27, 2016. The mandate issued on July 26, 2016, which was after the Defendants had submitted almost all of their allegedly false claims. Moreover, the United States Supreme Court denied certiorari in Garbe on January 9, 2017, *see* 137 S. Ct. 627, after the Defendants had stopped their Price Match Programs altogether. Accordingly, *Garbe* could not have warned the Defendants away from the view they took. Unless there was some other guidance such as a contract, binding agency rule or court of appeals decision

prohibiting Defendants' interpretation of the "usual and customary" price at the time of their Price Matching Programs, then Defendants conduct would have been objectively reasonable and not knowingly false.

If an objectively reasonable interpretation of the law supported its conduct, however, the Defendants could not actually know they were violating a legal obligation. Otherwise, two actors could engage in the same conduct on the exact same facts and be subject to different liability under the FCA based on how they subjectively interpret the law. Such a result is not permitted under *Safeco*. This "[s]trict enforcement of the FCA's knowledge requirement" serves to prevent a party from becoming liable due to an innocent mistake, thereby "avoiding the potential due process problems posed by penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Purcell*, 807 F.3d at 287. The court in *Purcell* overturned a jury verdict finding FCA violations because the defendants "could reasonably have concluded" their conduct was permitted, even though defendants subjectively believed they were wrong and one witness "knew" they were wrong. *See id*. Subjective intent is "irrelevant" if a defendant has a reasonable interpretation. *See id*. at 290. In order for the conduct to be "knowingly" or "recklessly" illegal, therefore, an authoritative interpretation must exist stating that it is. Here, there does not appear to be any such authoritative interpretation.

(2)

The Defendants first contend their interpretation was objectively reasonable because their Price Match Programs did not impact the usual and customary

price given that the governing contracts and regulations did not equate discounted prices with the usual and customary price. Even if their interpretation is wrong, the Defendants assert it is at least a reasonable one.

The Defendants further note that before, while and after their allegedly fraudulent conduct took place, numerous courts have issued rulings either adopting their position or acknowledging that the phrase "usual and customary" is susceptible to multiple interpretations. They point to district court decisions both from within and outside the Seventh Circuit showing how different courts have interpreted the phrase. *See Forth v. Walgreen Co.*, 2018 WL 1235015, at *5 (N.D. Ill. Mar. 9, 2018) (noting Walgreen's assertion that "because cash-paying customers need to opt in to the [discount program] and pay a yearly membership fee to access [discount] prices, such prices cannot qualify as U&C prices"); *Madison v. Mississippi Medicaid Comm'n*, 86 F.R.D. 178, 188 n.*** (N.D. Miss. 1980) (stating discount prices offered to a portion of customers "would be excluded from the usual and customary calculations unless the patients receiving the favorable prices represent more than 50 percent of the store's prescription volume"); *U.S. ex rel. Garbe v. Kmart Corp.*, 73 F. Supp.3d 1002, 1015 (S.D. Ill. 2014) (stating "with respect to government programs . . . U&C is defined by the relevant contract and/or payer sheet of the PBMs [and] [w]ith respect to state Medicaid programs, U&C is defined by statute or regulation"); *Corcoran v. CVS Health*, 2017 WL 3873709, at *14 (N.D. Ca. Sept. 5, 2017) (finding that specific terms of each PBM contract controlled whether defendants were "required to submit the [discount]

program prices as U&C" and concluding none did), *rev'd*, 779 F. App'x 431, 433 (9th Cir. June 12, 2019) (finding there were genuine issues of material fact concerning the meaning of U&C which required the reversal of summary judgment); *U.S. ex rel. Gathings v. Bruno's, Inc.*, 54 F. Supp.2d 1252, 1257 (M.D. Ala. 1999) ("This court agrees that, in the context of the federal and Alabama regulations, '[usual and customary charge to the] general public' refers to customers paying the prevailing retail price.").

Based on those authorities showing there was more than one reasonable interpretation of "usual and customary price," the Defendants allege they cannot be treated as a "knowing or reckless violator." *See Safeco*, 551 U.S. at 70 n.20. *Id.* Based on the aforementioned district court cases and the lack of any controlling authority at the time, it would be difficult to describe the Defendants' pre-*Garbe* position as objectively unreasonable.

The Defendants allege *Garbe* confirms this was an unsettled legal question at the time. The district court in *Garbe* had held that U&C means "cash price to the general public," and that "members of Kmart's generic discount programs are part of the 'general public.'" *Garbe*, 73 F. Supp.2d at 1014, 1017. The district court certified three questions for interlocutory appeal under 28 U.S.C. § 1292(b) and the Seventh Circuit "added the question whether the district court correctly identified the "usual and customary" price." *Garbe*, 824 F.3d at 637. Based on the standard under § 1292(b) that district judges are directed to employ, the Defendants allege the issue was one "as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

As noted earlier, this Court based its previous Order on *Garbe*, "apply[ing] the law that was so clearly established by the Seventh Circuit," as the Relators alleged in their motion for partial summary judgment. D/E 164, at 2; *see also* 2019 WL 3558483, at *6 ("*Garbe* makes clear that Medicare Part D and Medicaid are entitled to the benefit of the usual and customary price regularly offered by a pharmacy to its cash customers."). By adding "whether the district court correctly identified the 'usual and customary' price" to the issues certified by the district court in *Garbe*, *see Garbe*, 824 F.3d at 637, the Seventh Circuit appeared to determine the issue of generic drug discount programs and usual and customary price was sufficiently debatable to be addressed.

Medicaid claims

The Defendants contend the Relators have not shown any facts demonstrating that Defendants knowingly submitted false claims that were material to the Government's payment decision as to the four Medicaid programs that are still at issue.

The Court finds that, as in the appellate court cases interpreting *Safeco*—including *Purcell*, *Streck*, *Hixson* and others—there was no authoritative guidance from any court of appeals or CMS at the time the Defendants submitted the relevant claims that could have warned them away from their objectively reasonable interpretation. As the Defendants note, *Garbe* was the only decision this Court applied when concluding that "discount cash prices are the usual and customary prices" under the California, Illinois, Utah and Washington Medicaid programs.

The Seventh Circuit decided *Garbe* in May 2016 and the mandate was issued and became effective on July 26, 2016, meaning the parties in *Garbe* were bound by the decision. Fed. R. App. P. 41. In January 2017, the Supreme Court denied certiorari in *Garbe*, after all the alleged false claims had been submitted in this case. No court of appeals had determined that discount cash prices constituted the usual and customary prices before the Seventh Circuit decided *Garbe*. Accordingly, there was no appellate court guidance to warn the Defendants away from their position. The Defendants point out there is still no appellate guidance in most states where they operated. There also was no controlling state authority at the time in the form of the Medicaid laws in effect for California, Illinois, Utah and Washington which addressed individualized price-matching as part of the usual and customary definition. To the extent that any state changed its usual and customary price definition to include price matching, material changes to State Medicaid plans must first receive federal approval pursuant to 42 C.F.R. § 430.12(c)(1)(ii). The effective usual and customary definitions in the relevant states which lacked federal approval could not have included individualized price match programs.

The meaning of the usual and customary provisions of these state regulations is at least ambiguous, which would make it impossible for the Relators to establish that the claims are false. *See Safeco*, 551 U.S. at 70 n. 20 (noting that if "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"). Before *Garbe*, the meaning of "usual and customary" within the pharmacy industry did not encompass individualized price-matching as defined by State Medicaid legal authorities. In certain instances when a statute, regulation or provider manual language was unclear, the Defendants sought clarification regarding whether a particular state's U&C definition applied to their individualized Price Match Program.

Based on the foregoing, the Defendants could not have acted knowingly or deliberately indifferent or in reckless disregard of whether they were required to submit the lower price-match amount as their usual and customary prices. Accordingly, the Court concludes that no material facts show that Defendant could have acted knowingly under the FCA as to the applicable claims submitted to Medicaid.

Alleged false claims submitted to Medco Health Solutions

The Relators moved for partial summary judgment contending that, as a matter of law, the Defendants submission of inflated false claims for payment to Medco Health Solutions, Inc., results in FCA liability.

Medco is a Pharmacy Benefit Manager that processed claims for certain Medicare Part D beneficiaries. The Relators allege the Defendants submitted inflated false claims for payment to Medco by misrepresenting their usual and customary prices charged by the Defendants for prescriptions sold to GHP beneficiaries by failing to report the discounted cash prices offered through their Price Match Program to the general public at their pharmacies nationwide. The

Defendants contend no evidence supports a finding that they knowingly submitted any false claims to Medco.

Based on the October 27, 2006 email to the Defendants' executives, the Relators allege the Defendants knew that Medco required their Medicare Part D claims for payment to be limited to the lower of the negotiated price or the usual and customary price. The Defendants knew that Medco expressly required that their usual and customary price include "all applicable discounts" including a "competitor's matched price."

The Relators also note that in a December 2007 email to his colleagues, SuperValu's Director of Managed Care Contracting, Ron Richmond, wrote that the Price Matching Program used a "stealthy approach." He warned of the "very broad" financial implications if the Price Matching Program became more of a "rule" or routine. The Relators allege the Defendants' approach allowed them to hide discounted prices from Pharmacy Benefit Managers while still offering price incentives to attract and keep pharmacy customers.

In June 2008 Maxine Johnson, Director of Managed Care Operations, advised other SuperValu executives that Medco viewed Walgreens' $4 discount program to be its usual and customary price. However, the Relators contend that Defendants continued to offer and provide their cash price match guarantee to the general public at its pharmacies nationwide, while hiding this information from GHPs such as Medco.

The Relators further assert that, from the outset in 2006, SuperValu executives were aware of the financial implications if they reported their discounted price matches as their usual and customary price to

third party payers. SuperValu calculated potential losses of approximately $70 million annually were it to implement a program such as Walmart's. Additionally Dan Salemi, SuperValu's Vice President of Pharmacy Services, had reservations about offering a generic discount card because that would necessarily involve public dissemination of the discount prices offered in the Price Match Program. Salemi was concerned that public disclosure of the discount prices would result in Medco reducing the Defendants' reimbursements correspondingly.

The record does show that Defendants' executives expressed concerns about the financial hit if their Price Match Programs became widely known and they had to report their individualized price matches as their usual and customary prices. As the Court stated in *Proctor*, regardless of the Defendants' subjective beliefs and/or their internal motivations, it is the contracts or other authoritative guidance that controls. Between 2006 and 2012, the Defendants' contract with Medco did not define usual and customary price. Upon Medco's acquisition by Express Scripts, Inc., the December 2009 contract between Express Scripts and Defendants (and later versions executed by the parties) that excluded price matches from the definition of usual and customary price controlled the submission of Defendants' claims for reimbursement from that time forward. The record does not show that Express Scripts ever objected to Defendants' price-match practices, viewed price matches as affecting usual and customary prices or otherwise objected to the Defendants' usual and customary submissions.

The Defendants relied on the contracts and did not act with actual knowledge, or in deliberate

ignorance or reckless disregard, when submitting their regular cash prices as their usual and customary prices—rather than the lower price-match amounts. Moreover, the Defendants attempted to clarify usual and customary terms when the need arose.

The Court further notes that Bill Strein's 2006 email to Defendants, which references "competitor's matched price" as requiring submission as U&C price under Medco's pharmacy's network agreements, could be interpreted to refer to universal price matching as opposed to individualized price matching. The record does not show that Medco specifically reviewed or challenged Defendants' price-match practices, viewed Defendants' price matches as affecting U&C prices, or otherwise objected to Defendants' U&C submissions.

Based on their reasonable interpretation of the contracts and good faith belief they had complied with the definitions of usual and customary price, the Court concludes that Defendants did not knowingly violate the FCA with respect to the claims submitted to Medco.

Medicare Part D, TRICARE and FEHBP claims

The Defendants also move for partial summary judgment on the basis they did not knowingly submit false claims for payment to the federal healthcare programs Medicare Part D, TRICARE or the Federal Employee Health Benefits Program by reporting their own usual and customary prescription-drug prices instead of local competitors' prices, which Defendants occasionally price-matched.

As the Court has noted, the Defendants' individualized price matching did not affect the usual and customary prices, as defined in their contracts with

Pharmacy Benefit Managers. Any such obligation to include individualized price matching would have been governed by the contracts. The record shows that the Defendants sought guidance from the Pharmacy Benefit Managers if there was a question about whether price matches would affect usual and customary price.

When the claims were submitted to GHPs between 2006 and 2016, the Defendants did not have actual knowledge, were not deliberately indifferent and did not recklessly disregard any contractual provision defining the usual and customary price when they submitted their regular cash prices and not the lower price-match amounts to Medicare Part D, TRICARE and the Federal Employees Health Benefit Programs. The Seventh Circuit had not yet decided *Garbe* so the Parties did not have the benefit of that decision in determining whether individualized price matching constituted the usual and customary price.

Accordingly, no material facts indicate the Defendants could have acted knowingly under the FCA when submitting claims for payment to Medicare Part D, TRICARE and FEHBP. The Defendants are entitled to summary judgment.

IV. CONCLUSION

For the reasons stated herein and, consistent with its decision in *Proctor*, the Court concludes that *Safeco*'s objective scienter standard applies to the FCA. The Defendants' individualized Price Matching Program had been discontinued by the time the Supreme Court denied certiorari in *Garbe*. Accordingly, the Defendants could not look to the reasoning of *Garbe* in determining whether its individualized price

matches had to be reported as its usual and customary price. There was no other guidance in the form of contracts, court of appeals decisions or binding authority from the applicable agency, which means that Relators cannot meet the FCA's scienter requirement. *See Purcell*, 807 F.3d at 287-88. As the Court noted in *Proctor*, there was authority is support of both parties as to how price matching affected usual and customary price. However, there was no binding authority warning the Defendants away from their position.

"[W]ithout knowledge of falsity there cannot be a knowingly false claim" under § 3729 of the FCA. *United States ex rel. Hill v. City of Chicago*, 772 F.3d 455, 456 (7th Cir. 2014). Having determined that the Relators cannot establish the FCA's knowing element as a matter of law, the Court concludes that the Defendants are entitled to summary judgment.

Ergo, the Defendants' Motion for Partial Summary Judgment as to Medicaid claims [d/e 168] is GRANTED.

The Relators' Second Motion for Partial Summary Judgment relating to False Claims submitted by Defendants' to Medco Health Solutions, Inc. [d/e 169] is DENIED.

The Defendants' Motion for Partial Summary Judgment as to Medicare Part D, TRICARE and FEP claims [d/e 175] is GRANTED.

The False Claims Act claims asserted in Count I are Dismissed with Prejudice.

Pursuant to 28 U.S.C. § 1367(c)(3), the Court declines to exercise supplemental jurisdiction over the remaining state law claims.

The state law claims asserted in Counts II through XIII are Dismissed without Prejudice.

The Clerk will terminate the Defendants' Motion for Case Management Procedures regarding related *Safeco* Motions for Summary Judgment [d/e 320].

The Clerk will enter Judgment in favor of the Defendants and terminate this case.

ENTER: July 1, 2020

FOR THE COURT:

/s/ Richard Mills

Richard Mills

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

December 3, 2021

Before
ILANA DIAMOND ROVNER, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*
AMY J. ST. EVE, *Circuit Judge*

No. 20-2241

UNITED STATES OF AMERICA ex rel. TRACY SCHUTTE, *et al.*, *Relators-Appellants*,

v.

SUPERVALU INC., *et al.*, *Defendants-Appellees*.

Appeal from the United States District Court for the Central District of Illinois.
No. 11-cv-3290
Richard Mills, *Judge*.

O R D E R

On consideration of the petition for rehearing and petition for rehearing en banc, no judge[1] in regular

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[1] Judge Candace Jackson-Akiwumi did not participate in the consideration of this matter.

active service has requested a vote on the petition for rehearing en banc and the judges on the original panel have voted to deny rehearing. It is, therefore, **ORDERED** that the petition for rehearing and petition for rehearing *en banc* is **DENIED**.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

Case Number: 11-3290

United States of America, State of California, State of Delaware, State of Illinois, State of Indiana, State of Maryland, State of Massachusetts, State of Minnesota, State of Montana, State of Nevada, State of New Hampshire, State of New Jersey, State of North Carolina, State of Rhode Island, State of Virginia, and State of Wisconsin,
Plaintiffs,

and

Tracy Schutte, Michael Yarberry,
Relators,

v.

Supervalu Inc, Acme Sav-On Pharmacy, Albertsons Osco Pharmacy, Albertsons Sav-On Pharmacy, Biggs Pharmacy, Cub Pharmacy, Farm Fresh Pharmacy, Jewel Pharmacy, Jewel-Osco Pharmacy, Shaws Osco Pharmacy, Shop N Save Pharmacy, Shop N Save Osco Pharmacy, Shoppers Pharmacy, Star Osco Pharmacy, SuperValu Holdings Inc, FF Acquisitions LLC, Foodarama LLC, Shoppers Food Warehouse Corp, SuperValu Pharmacies Inc, Albertson's LLC, Jewel Osco Southwest LLC, New Albertson's Inc, American Drug Stores LLC, Acme Markets Inc,

Shaw's Supermarket Inc., Star Market Company Inc,
Jewel Food Stores Inc, AB Acquisition LLC,
Defendants,

Dr. Cynthia Tudor,
Miscellaneous Party.

JUDGMENT IN A CIVIL CASE

☐ **JURY VERDICT**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **DECISION BY THE COURT**. This action came before the Court, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Relators' and Plaintiffs' False Claims Act claims are DISMISSED and the Court relinquishes jurisdiction over the remaining state law claims pursuant to 28 U.S.C. Section 1367(c)(3).

Dated: July 2, 2020

s/ Shig Yasunaga
Shig Yasunaga
Clerk, U.S. District Court

APPENDIX E

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31 U.S.C. § 3729 provides in relevant part:

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

* * *

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

* * *

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[1] So in original. Probably should read "Public Law 101-410".