No. 22-374

In the Supreme Court of the United States

TROY OLHAUSEN,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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February 7, 2023

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Respondents' ("Arriva's") brief in opposition lacks force in view of the Court's decision to grant certiorari on essentially the same issue presented in *Schutte v. SuperValu Inc.*, No. 21-1326, and *Proctor v. Safeway, Inc.*, No. 22-111. Those cases present the question "[w]hether 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." *Schutte* Pet. i; *Proctor* Pet. i. The Court's answer to that question will also resolve the differently worded but substantively identical question presented here.

Perhaps because the Court granted review in *Schutte* and *Proctor* a week before Arriva filed its brief, Arriva added a threshold question whether Olhausen waived this issue below. But the waiver objection fails. It relies on a forced and acontextual reading of Olhausen's arguments. Fairly read, he consistently maintained that his allegations concerning Arriva's subjective contemporaneous belief that the applicable Medicare regulations prohibited its conduct precluded dismissal of his False Claims Act ("FCA") claims on scienter grounds. In any event, it is uncontested that Olhausen raised the precise issue for which he seeks review on rehearing in the appeals court, and the Eleventh Circuit squarely passed upon the issue. The case therefore falls comfortably within the heartland of cases "traditional[ly]" deemed appropriate for acceptance of review. *U.S. v. Williams*, 504 U.S. 36, 41 (1992); *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

I. The Court's Grant of Certiorari in *Schutte* and *Proctor* Undermines Arriva's Arguments That Review Is Unwarranted

The Court's grant of certiorari in *Schutte* and *Proctor* undermines Arriva's arguments that "review in this case is unwarranted"—either on grounds that there is no circuit split (Br. in Opp. ("BIO") 17-26), or that the decision below is correct (BIO 26-35). Arriva's insistence on these points largely recycles arguments the Court already found unpersuasive for certiorari purposes in *Schutte* and *Proctor* fully a week before Respondents filed their brief in this case. Those arguments, presumably made for protective purposes, should not detain the Court from granting review in this case too.

Arriva cannot erase the reality that at least four circuits consider a defendant's subjective state of mind in assessing FCA scienter, while three others employ a purely objective standard. *See* Pet.15-21, 21-25. These conflicting positions cannot be reconciled by differentiating knowledge of facts from awareness of legal requirements. *See, e.g.*, BIO 18. As the petitioners in *Schutte* explained, that distinction between issues of fact and law lacks support in the text of the FCA or general principles of statutory interpretation. *See* Pet'rs Reply in *Schutte* 10-11.

Given that this Court already rejected for certiorari purposes in both *Schutte* and *Proctor* the same arguments Arriva makes here, Olhausen will not belabor those points and, respectfully, adopts generally Schutte's and Proctor's replies to the parade of arguments Arriva presses in Parts II and III of its

brief (BIO 17-35). For the same reasons the Court accepted review in *Schutte* and *Proctor*, it should do so here.

II. Arriva Is Mistaken That Olhausen Waived the Issue Presented

Olhausen at no point waived the scienter issue presented here by conceding below that a defendant's subjective understanding of regulations is irrelevant to FCA scienter, or that Arriva could defeat his claims merely by offering a *post-hoc* reasonable interpretation of applicable regulations.

Arriva is incorrect that this case involves a petitioner seeking review of an issue on which it took the "opposite" or a "directly contrary" position below. BIO 7, 15, 16. The way Olhausen articulated his opposition to Arriva's defense of the scienter prong does not intersect the petition nearly as orthogonally as Arriva contends. Fairly viewed, he has consistently maintained throughout this litigation that Arriva's contemporaneous, subjective understanding of the law is relevant to the scienter inquiry. Specifically, Olhausen always argued that a defendant who acted pursuant to such a subjective belief in its own wrongdoing could not avoid scienter by articulating afterwards a different, reasonable interpretation of the regulation. Moreover, Arriva concedes that Olhausen presented the exact same issue he raises before this Court in his petition for rehearing before the Eleventh Circuit. *See* BIO 12, 15-16.

Under these circumstances, and this Court's precedent, there has been no waiver of the issue.

A. No Waiver Occurred Before the District Court

In the district court, Olhausen articulated imprecise positions on the standard governing scienter under the FCA. On the one hand, he acknowledged that some case law holds that if a defendant's interpretation of the applicable regulation is reasonable, a relator must show the existence of an authoritative contrary interpretation to prove scienter. Pet.11; R.69 at 9-10 (citing *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 286-90 (D.C. Cir. 2015)). This is the aspect of Olhausen's response to the motion to dismiss that Arriva latches onto. BIO 13-15.

What Arriva ignores is that Olhausen *also* argued that "[f]urther, a defendant cannot avoid liability by relying on a 'reasonable' interpretation 'manufactured *post hoc*, despite having actual knowledge of a different authoritative interpretation.'" R.69 at 10 (quoting *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148, 1155 (11th Cir. 2017)). To that "further" point, Olhausen argued that the complaint "alleged [defendants] had direct knowledge that their interpretations were incorrect." *Id.* With respect to the issue of assignments of benefits, Olhausen argued that Arriva was aware of the requirement that it have assignments from Medicare enrollees and that its "post hoc interpretations … do not illustrate Arriva's understanding at the time of its fraud." *Id.* at 13 (citing *Phalp*).

These arguments about the dominance of Arriva's contemporaneous subjective belief about what the law required over after-the-fact interpretations of the law is nearly identical to the issue presented in this petition: whether "well-pled allegations that Respondents knew they were violating various Medicare laws" could permit a finding of scienter despite an after-the-fact "argument that the laws could be reasonably interpreted [another] way." Pet.4. *See also* Pet.28 (criticizing the "panel's view [that] allegations that Respondents were aware of their potential noncompliance with applicable law … are meaningless when stacked against their ability to articulate a post-hoc, reasonable interpretation of Medicare law").

The proceedings in the district court never presented an opportunity for further exploration of the tension between these strands of the law, nor any reason to specifically trace its source to the non-alignment between *Phalp* and *Safeco Insurance Company v. Burr*, 551 U.S. 47 (2007). The district court did not hold a hearing, and it decided the motion to dismiss on an entirely different element of the FCA cause of action, presentment.

The fact that Olhausen cited *Purcell* in his response to the motion to dismiss does not effect a waiver of the issue presented in this petition. "Waiver is the 'intentional relinquishment or abandonment of a known right.'" *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (cleaned up; citations omitted). Olhausen clearly did not intend his embrace of *Purcell* as an abandonment of the argument he raises in this petition, for he articulated it in his next breath in

response to the motion: that "a defendant cannot avoid liability by relying on a 'reasonable' interpretation 'manufactured *post hoc*, despite having actual knowledge of a different authoritative interpretation.'" R.69 at 10 (quoting *Phalp*, 857 F.3d at 1155). Precision in the articulation of an issue in the district court is not essential to preserve it for review. *See City of St. Louis v. Prapotnik*, 485 U.S. 112, 130 (1988) (plurality opinion).

B. Nor Was the Issue Waived on Appeal

Because the district court decided the motion to dismiss solely on the presentment prong, the parties gave comparatively short shrift on appeal to the other FCA elements, including scienter. Arriva even urged the Eleventh Circuit not to decide the appeal on any ground other than presentment. Resp't C.A. Br.41. Olhausen therefore only responded to Arriva's scienter argument "as a protective matter." Pet'r C.A. Br.2.

Olhausen focused initially upon showing that the complaint contained adequate allegations regarding scienter. *See* Pet'r C.A. Br.18, 25, 34-38 (citing *Phalp*). Moreover, Olhausen argued that the fraud-in-the-inducement theory "requires that the defendant have knowledge of the applicable rules at the time it entered into a contractual relationship with the government and *also to have intended at the time not to honor them*." *Id.* at 36 (emphasis added). This statement makes plain that Olhausen was not embracing an objective standard.

Nowhere in Olhausen's initial brief did he cite *Safeco*. Arriva's brief asserted that *Safeco* and *Purcell* supply the governing standard. Resp't C.A. Br.45-46. Olhausen's reply brief devoted but one paragraph to this issue. It said:

> Given that Defendants were "aware of" this requirement in the [Medicare Claims Processing] Manual …, their protestations about reliance on an assertedly reasonable interpretation of the regulations cannot support dismissal. This Court has held that a defendant cannot "avoid liability by relying on a 'reasonable' interpretation of an ambiguous regulation manufactured *post hoc*, despite having actual knowledge of a different authoritative interpretation." *Phalp*, 857 F.3d at 1155. That is consistent with the Supreme Court's teachings. *See Safeco*[, 551 U.S. at 70] (objective reasonableness of defendant's interpretation of an ambiguous regulation is a defense to willfulness only absent "authoritative guidance" from applicable agency or appeals court).

Pet'r C.A. Reply Br.18-19. This statement shows that Olhausen again argued that Arriva's contemporaneous subjective awareness of an authoritative interpretation of an applicable regulation trumps a contrary yet reasonable interpretation conjured after the fact for scienter purposes.

Arriva seizes on the brief's curt line that followed: that the *Phalp* subjective standard is "consistent with" *Safeco*. BIO 10, 15, 16. Arriva claims this shows Olhausen argued that "*Safeco* is *the* governing standard" (BIO 10 (emphasis added)), "*Safeco* supplies *the* scienter standard for FCA claims" (BIO 15 (emphasis added)), and that "*Safeco* applies to FCA claims" (BIO 9 (capitalization altered)). Those are vast and hopeful overstatements. Olhausen never said any of those things.

He merely said that *Phalp*'s point about subjective understanding is "consistent" with *Safeco* where that understanding was based on authoritative guidance. Context is important. The point was being made in the course of an argument that Arriva was aware of a requirement in an authoritative source. *See* Pet'r C.A. Reply Br.16 (describing requirement in Medicare Claims Processing Manual that Arriva "had to obtain written authorization from [a] beneficiary to submit a claim on their behalf"). Olhausen was simply pointing out that, at least as applied to his view of the circumstances of this case, the rule in *Phalp* overlaps with the exception this Court demarcated in the scienter rule from *Safeco*—*i.e.*, that an objectively reasonable interpretation does not relieve a defendant from actionable scienter *if the defendant knew of "authoritative guidance" to the contrary*, 551 U.S. at 70. His argument never ventured beyond that, into the territory of whether, absent knowledge of any authoritative guidance, a defendant's subjective belief that it was violating the law could give rise to actionable FCA scienter. And he certainly never conceded otherwise. Therefore, Arriva's assertion that

Olhausen had adopted *Safeco* lock-stock-and-barrel relies on a misreading of the briefing. He did not take "the opposite position" to his petition (BIO 16) by pointing to the sphere where the two cases overlap. Instead, he consistently demonstrated that he was also relying on allegations of Arriva's subjective understanding of regulations to satisfy the scienter element.

It was only when the Eleventh Circuit relied on *Safeco*—holding that it doesn't matter *at all* what a defendant actually believed the law required when it submitted claims for reimbursement, but instead only whether it presently articulated an objectively reasonable interpretation of the regulation—that the issue of whether any subjective knowledge is relevant to FCA scienter was joined. *See, e.g.*, Pet.App.5 (reasoning that "[e]ven if Arriva's interpretation is wrong (and it was required to obtain signatures), Olhausen cannot show that Arriva had the requisite scienter because it is an objectively reasonable interpretation of the rules to conclude that the signatures were not required").

Olhausen sought rehearing, decrying as inconsistent with *Phalp* this exclusive focus on present-day interpretation, to the exclusion of the defendant's contemporaneous "actual state of mind." Pet.App.155 (capitalization altered). He emphasized that "[t]he record … contains nothing about [Arriva's] actual state of mind at the time of its conduct beyond the complaint's allegations, which the Court must accept as true[.]" Pet.App.158 (quotation marks omitted).

As Arriva concedes, on rehearing Olhausen squarely raised the issue presented in this petition. *See* BIO 12, 15-16. He argued that the panel's "embrace of a *purely objective standard* for scienter under the False Claims Act directly conflicts with the precedential holding in … *Phalp*[.]" Pet.App.154 (emphasis altered). If the panel felt *Safeco* compelled this standard, he noted, that standard is inconsistent with *Phalp*, which had "refuse[d] to import the *Safeco* standard" into the FCA context. Pet.App.154. The rehearing petition went on to assert:

> The governing scienter standard from *Phalp* which this Court should have applied does not allow resolution of plausible [FCA] claims on scienter grounds at the motion to dismiss stage. That is because "a court *must* determine 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*."

Pet.App.161 (quoting *Phalp*).

Olhausen's truncated attempt in his reply brief to identify common ground between *Safeco* and *Phalp* applicable to this case did not waive his ability to seek review of the broader question—which the opinion subsequently placed front and center—of whether Arriva's contemporaneous subjective understanding of applicable regulations is relevant to FCA scienter. The fact that Olhausen did not articulate that position without qualification in his reply brief was not a

waiver; "[a]t worst, that reflects a forfeiture of … a possible argument against [affirmance on scienter grounds], not an affirmative waiver of the argument, or an intentional relinquishment of any interest in the issue." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2175 (2020) (Gorsuch, J., dissenting), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Olhausen always maintained the relevance of an FCA defendant's contemporaneous state of mind. This Court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Pass. Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). Olhausen's argument in this petition "is not a new claim … , but [at worst] a new argument to support what has been his consistent claim." *Id.*

Further, to the extent any inconsistency in Olhausen's conceptualization of the scienter rule could fairly be construed as a forfeiture of the argument in his petition—something Arriva has not even asserted—this Court has "discretion to forgive any forfeiture." *Shinn v. Ramirez*, 142 S. Ct. 1718, 1730 n.1 (2022). And it should. If any forfeiture occurred, it was short-lived. When the appeals court adopted an unqualifiedly objective position on scienter, Olhausen promptly filed a petition for rehearing expressly challenging that reading of the law.

Arriva cites no case in which this Court has found a waiver (or forfeiture) under these circumstances. *See* BIO 16 (citing *Buck v. Davis*, 580

U.S. 100, 127 (2017) (finding waiver where the respondent's argument was not raised at all in the district court, appeals court, or certiorari briefing); *Steagald v. U.S.*, 451 U.S. 204, 208 (1981) (concluding respondent "lost its right to challenge" a factual issue because it never did so in the district court, appeals court, or certiorari briefing); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121-22 (1994) (dismissing writ as improvidently granted because "[t]he law of res judicata … prevents th[e] question [presented] from being litigated here")). None of these cases remotely fits the procedural history here.

Not only did Olhausen present the issue in the court of appeals, but that court also passed upon the issue. The case therefore falls comfortably within the Court's "traditional rule" of accepting review of a case decided by the court of appeals, even in cases (unlike here) where the issue was not even presented below. *See Williams*, 504 U.S. at 41; *Lebron*, 513 U.S. at 379. There has been no waiver.

And, of course, the Court has now granted review in two other cases that present the *identical* issue as this case. There is no good reason to deprive Olhausen of the opportunity to benefit from the Court's forthcoming clarification of the law of scienter. And as an FCA relator, it is not only his individual interests at stake, *see* BIO 17, but also potentially the interests of the United States in the fraud claims he has asserted.

III. Arriva's Challenge Regarding Other Elements of the Claims Should Not Deter Granting Review

The Eleventh Circuit eschewed deciding whether the allegations of presentment of a false claim were sufficiently particular. Yet Arriva faults Olhausen for not challenging here the *district court's* ruling on that issue and touts it as a basis to deny review. BIO 35-36. That is weak gruel. This Court is unlikely to reach a separate, fact-specific issue the court of appeals left unresolved. It is best left for remand.

Arriva is mistaken that Olhausen had not identified Medicare regulations that prohibited its conduct. *Compare* BIO 36, *with* Pet.6, 9. Olhausen disputes Arriva's reading of the regulations. *Compare* BIO 3-5, *with* Pet'r C.A. Br.28-32, 50-51 *and* Pet'r C.A. Reply Br.15-17, 23-25. Neither court below interpreted the regulations. The Eleventh Circuit merely deemed them susceptible to ambiguity. Pet.App.5-6. Whether Arriva's *post hoc* interpretations are objectively reasonable will not be dispositive if this Court concludes that contemporaneous subjective intent is relevant to FCA scienter.

CONCLUSION

The petition of writ of certiorari should be granted.

Respectfully submitted,

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