No. 17-1477

IN THE

Supreme Court of the United States

UNITED STATES, EX REL. NANCY CHASE,
Petitioner,

v.

CHAPTERS HEALTH SYSTEM, INC. ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a relator's complaint asserting claims under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, that generally alleges the submission of false claims to the government for repayment but that otherwise lacks indicia of reliability in the form of the underlying factual bases for the relator's assertions satisfies the requirement of Rule 9(b) of the Federal Rules of Civil Procedure that fraud be pleaded with particularity.

RULE 29.6 STATEMENT

Chapters Health, Inc., is a not for profit corporation registered under the laws of Florida. The organization has no members or parent corporation. It is not publicly held and issues no stock; therefore, no other organization owns 10 percent or more of its stock.

Chapters Health System, Inc., is a not for profit corporation registered under the laws of Florida. The organization has no members or parent corporation. It is not publicly held and issues no stock; therefore, no other organization owns 10 percent or more of its stock.

DaVita Healthcare Partners Inc. (NYSE: DVA), also known as DaVita Inc., is the parent corporation of HealthCare Partners, LLC and owner of JSA Healthcare Corporation.

LifePath Hospice, Inc., is a not for profit corporation registered under the laws of Florida. The organization's sole member is Chapters Health System, Inc. It is not publicly held and issues no stock; therefore, no other organization owns 10 percent or more of its stock.

Good Shepherd Hospice, Inc., is a not for profit corporation registered under the laws of Florida. The organization's sole member is Chapters Health System, Inc. It is not publicly held and issues no stock; therefore, no other organization owns 10 percent or more of its stock.

HealthCare Partners, LLC, operates JSA Healthcare Corporation and is a wholly owned subsidiary of DaVita HealthCare Partners.

Sunrise Senior Living Services, Inc., is owned by parent corporation Sunrise Senior Living, LLC, and no publicly held company owns 10% or more of its stock.

Superior Residences, Inc., is an active Florida corporation. It is a corporation with 50 or fewer shareholders. No other parent companies, subsidiaries or affiliates of Superior Residences, Inc. issue shares to the public, and no other publicly held corporation owns ten percent or more of Superior Residences, Inc.'s stock.

Mobile Physician Services, P.A. is an active Florida professional corporation. The organization does not have a parent corporation. It is not publicly held and issues no stock; therefore, no other organization owns 10 percent or more of its stock.

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BRIEF IN OPPOSITION

Respondents, Chapters Health System, Inc., Chapters Health, Inc., LifePath Hospice, Inc., Good Shepherd Hospice, Inc., JSA HealthCare Corporation, Sunrise Senior Living Services, Inc., Superior Residences, Inc., Mobile Physician Services, P.A., Richard M. Wacksman, M.D., Sayed Hussain, M.D., Robert Schonwetter, M.D., and Diana Yates respectfully submit this brief in opposition to the petition for writ of certiorari filed by Petitioner, Nancy Chase.

OPINIONS BELOW

The opinion from the Eleventh Circuit Court of Appeals is reported at 723 F. App'x 783. Pet. App. 1a. The district court's opinion is unreported but is available electronically at 2016 WL 5239863. Pet. App. 18a.

JURISDICTION

The Eleventh Circuit Court of Appeals entered judgment on January 24, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and Federal Rules of Civil Procedure 8(a) and 9(b), are reproduced in the petition. Pet. 2-3.

STATEMENT

Petitioner asks the Court to revive her fifth attempt to plead various claims under the False Claims Act. Applying a standard consistent with the one applied by every court of appeals to consider the issue, a unanimous panel of the Eleventh Circuit held that to

plead a False Claims Act violation under Rule 9(b) of the Federal Rules of Civil Procedure, a relator must plead "indicia of reliability" that a false claim had been submitted to the government for repayment; the panel affirmed dismissal of Petitioner's complaint in the light of her failure to do so. Pet. App. 10a. In an effort to manufacture a split between the circuits, Petitioner asserts that her complaint was dismissed for failure to "allege or show 'representative samples' of the alleged false claims, specifying the time, place, and content of the claims and the identity of those submitting them to the government." Pet. 15. But what the Eleventh Circuit actually found was that Petitioner had failed to "include the underlying factual bases for her assertions" that false claims had been submitted at all. Pet. App. 10a. Indeed, the Eleventh Circuit has disavowed any categorical rule about what type of allegations could satisfy Rule 9(b)'s requirement to plead fraud with particularity.

While Petitioner generally asserts a number of claims arising from allegedly improper certifications and referrals of ineligible patients for hospice care, the Eleventh Circuit found that Petitioner's complaint lacked "examples of specific patients who were ineligible for hospice care, details about why they were ineligible, [which individuals] made particular false certifications, when the falsifications occurred, or when fraudulent bills were submitted to Medicare." Pet. App. 10a. That is, Petitioner's complaint failed to allege "the 'indicia of reliability' required by [the Eleventh Circuit]'s precedent because it did not include the underlying factual bases for her assertions." *Id.* Overall, the Eleventh Circuit found that Petitioner had failed to "include specific examples of the conduct she describes or allege the submission of any specific fraudulent claim." *Id.* No court of appeals has held

that a complaint under the False Claims Act can satisfy Rule 9(b) without pleading facts from which a reliable inference can be drawn that false claims were submitted to the government. Accordingly, to the extent there is any conflict in the way the courts of appeals assess complaints under the False Claims Act, this case does not implicate it, and this Court's review is therefore not warranted.

The False Claims Act "authorize[s] both the Attorney General and private *qui tam* relators to recover from persons who make false or fraudulent claims for payment to the United States." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 (2010) (citation omitted). Any 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" is liable under the False Claims Act. 31 U.S.C. § 3729(a)(1)(A)-(B).

To adequately plead a claim under the False Claims Act, a complaint must satisfy Rule 9(b)'s heightened pleading requirement for claims alleging fraud. The complaint must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); Pet. 13.

In this case, the Eleventh Circuit affirmed the district court's ruling that Petitioner did not satisfy that pleading requirement despite five attempts to do so. Pet. App. 5a, 11a. It explained that "[t]he key inquiry is whether the complaint includes 'some indicia of reliability' to support the allegation that an actual false claim was submitted." Pet. App. 9a. "One way to satisfy this requirement is by alleging the details of false claims by providing specific billing

information—such as dates, times, and amounts of actual false claims or copies of bills." *Id.* "In other circumstances, this Court has deemed indicia of reliability sufficient where the relator alleged direct knowledge of the defendants' submission of false claims based on her own experiences and on information she learned in the course of her employment." *Id.* In this case, Petitioner's complaint failed to satisfy the Eleventh Circuit's "key inquiry" in either way.

The Eleventh Circuit has stressed that it "evaluate[s] whether the allegations of a complaint contain sufficient indicia of reliability to satisfy Rule 9(b) on a case-by-case basis." *United States ex rel. Atkins v. McInteer,* 470 F.3d 1350, 1358 (11th Cir. 2006). It has also stated that "there is no per se rule that an FCA complaint must provide exact billing data or attach a representative claim." *United States ex rel. Mastej v. Health Mgmt. Associates, Inc.*, 591 F. App'x 693, 704 (11th Cir. 2014).

The panel's straightforward application of Rule 9(b) to the particular facts of this case does not warrant this Court's review. The Eleventh Circuit's decision is consistent with the application of Rule 9(b) in False Claims Act cases in other circuits. Indeed, the courts of appeals have coalesced around a nuanced, case-by-case approach that allows relators to satisfy Rule 9(b) by including "some indicia of reliability" to support the allegation that an actual false claim was submitted to the government, without imposing a "rigid view" or "bright line" rule requiring citation of actual claims presented to the government. This approach is faithful to the aims of both the False Claims Act and Rule 9(b).

For these reasons, the Court should deny the petition.

1. Petitioner, the relator, is a licensed social worker, but does not allege any clinical background or medical expertise, nor does she allege any familiarity with bills submitted to insurance by any Respondent. She was employed by LifePath Hospice, Inc. from 1992 to 2012. Pet. App. 19a. There are twelve Respondents. Respondent Chapters Health System, Inc. is a non-profit organization. *Id.* Two of its subsidiaries, LifePath and Good Shepherd Hospice, Inc., are non-profit organizations that provide hospice care to the terminally ill. Pet. App. 19a. Another subsidiary, Chapters Health Inc., is a related non-profit organization. Pet. App. 19a-20a. The four individual respondents are or were employees of LifePath. Pet. App. 3a. The Hospice respondents and the four individual respondents are referred to, collectively, as "Chapters Defendants." Pet. App. 20a. JSA Healthcare Corporation, Sunrise Senior Living Services, Inc., and Superior Residences, Inc., are for-profit health care and assisted living providers. *Id.* Mobile Physician Services, P.A., is a for-profit provider of at-home health care. Pet. App. 3a. These providers referred patients to Chapters for hospice services. *Id.* Collectively, these respondents are called the "Referral Defendants." *Id.*

2. Hospice provides medical and emotional support for patients in the last stages of terminal illness and focuses on pain management and quality of life. Pet. App. 57a; 42 U.S.C. § 1395xx(dd)(1); 42 C.F.R. § 418.3. Medicare beneficiaries who are terminally ill are entitled to elect hospice care rather than curative treatment for their terminal illness. 42 C.F.R. §§ 418.20, 418.24. In order to receive hospice care, a patient must obtain a certification from a hospice physician and the patient's attending physician, if the patient has one, that the patient is eligible for hospice services. 42 C.F.R. § 418.22. That certification must be "based

on the physician or medical director's clinical judgment regarding the normal course of the individual's illness" and must include a predictive statement that the patient is expected to live six months or less if the patient's terminal illness runs its normal course. *Id.*

3. Petitioner accuses the Chapters Defendants of all manner of wrongdoing over a span of sixteen years, including (i) admitting ineligible patients to hospice care, (ii) deceiving patients into electing hospice without informed consent, (iii) falsifying Medicare/Medicaid election documents and medical records, (iv) providing patients higher levels of hospice care than medically necessary, (v) changing patients' plans of care to conserve costs, and (vi) requesting payment for services not provided or provided for hospice-ineligible patients. Pet. App. 47a-48a, 59a-60a. Petitioner accuses the Referral Defendants of improperly referring patients to the Chapters Defendants in exchange for kickbacks. Pet. App. 48a, 61a. Petitioner also alleges that the Respondents conspired to defraud the government by submitting Medicare claims for hospice care they did not provide or for hospice care they provided to patients who were ineligible for that care.[1] Pet. App. 49a, 95a.

4. Since 2010, there have been five renditions of the complaint. This petition follows the Middle District of Florida's dismissal of Petitioner's Fourth Amended Complaint and the Eleventh Circuit's affirmance of that dismissal. Petitioner's operative complaint asserts five counts, the first three of which are brought

[1] Petitioner also included employment discrimination claims against LifePath under state law. Pet. App. 90a-92a. The Eleventh Circuit affirmed the dismissal of those state law claims and they are not at issue in this Court.

against all Respondents and the last two of which are asserted only against LifePath. *See* Pet. App. 46a-100a.

5. The district court dismissed Petitioner's complaint, concluding that Petitioner "failed to meet the heightened pleading requirement for claims alleging fraud and that this conclusion alone warrants dismissal of [Petitioner's] counts alleging False Claim Act violations" and that Petitioner "failed to adequately state a cause of action for her remaining counts of conspiracy and retaliation." Pet. App. 19a.

6. On appeal, the Eleventh Circuit affirmed. Judge Beverly Martin explained for the unanimous panel of the court that Petitioner's complaint "lacked the 'indicia of reliability' required by this Court's precedent because it did not include the underlying factual bases for her assertions." Pet. App. 10a.

7. The Eleventh Circuit opinion observed that Petitioner's factual allegations were insufficient to meet Rule 9(b) in several respects. The court noted that "[a]lthough [Petitioner] details a scheme, her complaint does not include specific examples of the conduct she describes or allege the submission of any specific fraudulent claim." Pet. App. 11a. "Neither does [Petitioner] allege the basis of her knowledge of the defendants' fraudulent billing practices—a process she was far removed from as a social worker." *Id.* In this regard, "the complaint does not give examples of specific patients who were ineligible for care, details about why they were ineligible, who at Chapters made particular falsifications, when the falsifications occurred, or when the fraudulent bills were submitted to Medicare." Pet. App. 10a.

8. The Eleventh Circuit also rejected Petitioner's allegations of "a False Claims Act violation predicated on illegal kickbacks under a false certification theory." Pet. App. 11a. It concluded that Petitioner's "allegations fall far short of satisfying Rule 9(b). For example, she fails to identify a single individual from Sunrise, JSA, or Superior who made a referral to Chapters in exchange for a benefit, a single patient that was improperly referred, who at Chapters provided the bribes, or when those exchanges took place."[2] Pet. App. 11a-12a.

9. Finally, the Eleventh Circuit affirmed the district's court's dismissal of Petitioner's conspiracy allegations. It ruled that "the complaint fails to identify the people from any of the Referral Defendants involved in the agreement or any specific facts that show an agreement to violate the False Claims Act," thus falling "far short of stating a conspiracy claim." Pet. App. 13a.

REASONS FOR DENYING THE PETITION

The fundamental premise of Petitioner's argument is that the Eleventh Circuit held that "a relator must allege sufficient facts to show the time, place, and substance of the specific false claims submitted to the government." Pet. 13. She says the Eleventh Circuit has taken a "rigid view" of Rule 9(b)'s particularity requirement, "holding that a plaintiff must allege or show 'representative samples' of the alleged false claims, specifying the time, place, and content of the

[2] The Eleventh Circuit similarly reasoned that Petitioner's allegations that Chapters and Mobile Physicians Services improperly referred ineligible patients to each other were insufficient. Pet. App. 12a.

claims and the identity of those submitting them to the government." Pet. 15. This is demonstrably not so.

In fact, the Eleventh Circuit does *not* apply a "rigid view" or "bright line" rule requiring citation of actual claims presented to the government. In this case, the court expressly stated that "the key inquiry is whether the complaint includes 'some indicia of reliability' to support the allegation that an actual false claim was submitted." Pet. App. 9a. It explained that there is more than one way to satisfy this standard. *Id.*

Yet, despite its being the "key inquiry" in the Eleventh Circuit, Petitioner makes no mention of the "some indicia of reliability" standard anywhere in the Petition. Rather, she selectively quotes the Eleventh Circuit's analysis to posit a "rigid view" that does not exist. In fact, the Eleventh Circuit has expressed willingness to draw *reasonable* inferences when relators provide well-pleaded details that provide some indicia of reliability to the allegation of claim presentment. *See United States ex rel. Walker v. R&F Properties of Lake Cnty., Inc.,* 433 F.3d 1349, 1353 (11th Cir. 2005); *Mastej*, 591 F. App'x at 704; *Hill v. Morehouse Med. Assocs.,* No. 02-14429, 2003 WL 22019936, at *4 (11th Cir. Aug. 15, 2003).[3]

At bottom, no "rigid view" or *per se* rule exists or was applied by the Eleventh Circuit. Therefore, Petitioner's foundational premise is simply wrong. The Eleventh Circuit's straightforward application of its nuanced, case-by-case False Claims Act jurisprudence to the

[3] Although Petitioner relied heavily on these three cases in her briefing in the Court of Appeals, none is even mentioned in the petition.

particular facts of this case does not warrant this Court's review.

I. CONTRARY TO PETITIONER'S ASSERTIONS, NO GENUINE CONFLICT EXISTS AMONG THE CIRCUITS

Every court of appeals to consider the question has held that while a relator need not identify the contents of a particular claim for payment in order to satisfy Rule 9(b) in a False Claims Act case, a relator must plead facts that support a reliable inference that false claims were, in fact, submitted to the government. Though formulations of the rule differ slightly, most circuits have held that a relator can satisfy Rule 9(b) by "alleging particular details of a scheme to submit false claims, paired with reliable indicia that lead to a strong inference that claims were actually submitted." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010) (adopting *Grubbs* standard); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010) (same); *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013) (same); *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156-57 (3d Cir. 2014) (same); *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 918-19 (8th Cir. 2014) (same); *United States ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112, 126 (D.C. Cir. 2015) (same); *United States ex rel. Chorches for Bankr. Estate of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 93 (2d Cir. 2017) (same); *cf. United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29-30 (1st Cir. 2009) (holding that relator may satisfy Rule 9(b) by "providing factual or statistical evidence to strengthen the inference of

fraud beyond possibility" without necessarily providing details as to each false claim); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854–55 (7th Cir. 2009) (permitting an inference of claim submission where such a submission was a contractual and regulatory requirement under the facts pleaded); *Mastej*, 591 F. App'x at 704 (inferring the submission of claims where relator's personal knowledge of billing practices provided "indicia of reliability" that claims were submitted); *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750, 773 (6th Cir. 2016) (inferring the submission of claims where facts alleged by relator led to a "strong inference" of submission).

Petitioner's attempt to manufacture a circuit split is therefore misplaced. No circuit currently applies a *per se* rule mandating False Claims Act relators to plead a representative claim in all circumstances. If there ever was a split between the circuits over such a *per se* rule, it has been resolved without this Court's intervention, as anticipated by the United States in a brief opposing certiorari in a prior case presenting the issue. *See* Br. For United States as Amicus Curiae, *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.,* No. 12-1349, 2014 WL 709660, at *10 (U.S. Feb. 25, 2014) (observing that circuits having previously endorsed a *per se* rule had subsequently embraced a "more nuanced approach" and arguing that any "disagreement among the circuits therefore may be capable of resolution without this Court's intervention"). Indeed, the Second Circuit recently observed with respect to this issue that "the reports of a circuit split are, like those prematurely reporting Mark Twain's death, 'greatly exaggerated.'" *Chorches*, 865 F.3d at 89. Thus, it is unsurprising this Court has denied at

least sixteen certiorari petitions regarding Rule 9(b)'s application in False Claim Act cases since 2000.[4]

Notwithstanding the above, Petitioner asserts that the Fourth, Sixth, Eighth, and Eleventh Circuits maintain a "rigid view of the Rule 9(b) particularity requirement." Pet. 15. Petitioner is mistaken. As shown above, the Eleventh Circuit does not apply such a "rigid view." In making its argument otherwise, Petitioner omits any mention whatever of the Eleventh Circuit's "some indicia of reliability" standard, which that court calls the "key inquiry." Pet. App. 9a.

Petitioner leaves it to this Court to determine why the Fourth, Sixth, and Eighth Circuits purportedly conflict with the others. Petitioner offers three citations to cases and no analysis of those cases. Pet. 15 (citing *Nathan*, 707 F.3d at 455-56; *United States*

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[4] *See United States ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 138 S. Ct. 2582 (2018); *Victaulic Co. v. United States, ex rel. Customs Fraud Investigations, LLC*, 138 S. Ct. 107 (2017); *AT&T, Inc. v. United States ex rel. Heath*, 136 S. Ct. 2505 (2016); *United States ex rel. Walterspiel v. Bayer AG*, 137 S. Ct. 162 (2016); *United States ex rel. Gage v. Davis S.R. Aviation, L.L.C.*, 136 S. Ct. 984 (2016); *United States ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 135 S. Ct. 2379 (2015); *United States ex rel. Grenadyor v. Ukrainian Vill. Pharm., Inc.*, 136 S. Ct. 49 (2015); *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 134 S. Ct. 1759 (2014); *United States ex rel. Ebeid v. Lungwitz*, 562 U.S. 1102 (2010); *United States ex rel. Hopper v. Solvay Pharm., Inc.*, 561 U.S. 1006 (2010); *Ortho Biotech Products, L.P. v. United States ex rel. Duxbury*, 561 U.S. 1005 (2010); *United States ex rel. Fowler v. Caremark RX, L.L.C.*, 552 U.S. 1183 (2008); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 549 U.S. 881 (2006); *United States ex rel. Corsello v. Lincare, Inc.*, 549 U.S. 810 (2006); *Sanderson v. HCA-The Health Care Co.*, 549 U.S. 889 (2006); *United States ex rel. Goldstein v. Fabricare Draperies, Inc.*, 542 U.S. 904 (2004); *United States ex rel. Harris v. George Washington Primary Care Assocs.*, 530 U.S. 1230 (2000).

ex rel. Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 510 (6th Cir. 2007); and *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006)).

The Fourth Circuit does not have a "rigid view" as asserted by Petitioner. To the contrary, it requires "relators to allege that defendants either caused specific false claims to be submitted or committed actions that '*necessarily* . . . led to the submission of false claims.'" *United States ex rel. Szymoniak v. Am. Home Mort. Servicing, Inc.*, 679 F. App'x 299, 301 (4th Cir. 2017) (quoting *Nathan*, 707 F.3d at 457) (emphasis supplied). In fact, the *Nathan* court noted its case-specific approach, explaining that "Rule 9(b) requires that 'some indicia of reliability' must be provided in the complaint to support the allegation that an actual false claim was presented to the government," and simply found that such "indicia of reliability" were absent in that case. *Nathan*, 707 F.3d at 457 (quoting *United States ex rel. Clausen v. Lab. Corp. of Am.,* 290 F.3d 1301, 1311 (11th Cir. 2002)).

The Sixth Circuit has likewise acknowledged that a relator may state a claim without pleading specific examples of fraudulent claims submitted to the government, by "pleading specific facts based on her personal billing-related knowledge that support a strong inference that specific false claims were submitted for payment." *Prather*, 838 F.3d at 773. Moreover, the Sixth Circuit has expressly recognized that other circumstances exist where a relator could satisfy Rule 9(b) without identifying a specific claim. *See Chesbrough v. VPA, P.C.*, 655 F.3d 461, 471-72 (6th Cir. 2011) (noting it did "not foreclose the possibility that this court may apply a 'relaxed' version of Rule 9(b) in certain situations," a strong inference

that claims were submitted may arise when a relator has "personal knowledge" that the defendant submitted the claims, and there also "may be other situations in which a relator alleges facts from which it is highly likely that a claim was submitted").

The Eighth Circuit has also rejected the "rigid view" that Petitioner attributes to it. In *Thayer*, the Eighth Circuit wrote that "[w]e agree that '[s]tating 'with particularity the circumstances constituting fraud' does not necessarily and always mean stating the contents of a bill.'" 765 F.3d at 918 (citation omitted). Indeed, the *Thayer* court concluded that

> a relator can satisfy Rule 9(b) without pleading representative examples of false claims if the relator can otherwise plead the particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted. To satisfy the particular details requirement of our holding, however, the relator must provide sufficient details to enable the defendant to respond specifically and quickly to the potentially damaging allegations.

Id. at 918-19 (citations and internal quotation marks omitted). In this 2014 published case, the Eighth Circuit addressed its 2006 *Joshi* decision: "*Joshi's* representative-examples requirement need not be satisfied with respect to some portions of the complaint." *Id.* at 917.

Petitioner acknowledges that the First, Third, Fifth, Seventh, Ninth, Tenth and District of Columbia Circuits, the circuits that she identifies as not applying a so-called "rigid view," all have recognized that Rule 9(b)'s

requirements are "context specific and flexible and must remain so to achieve the remedial purpose of the False Claims Act." Pet. 13 (quoting *Grubbs*, 565 F.3d at 190).

So, in 2018, *every circuit* to address the issue now recognizes that a False Claims Act relator may satisfy Rule 9(b) without pleading the contents of a specific bill for reimbursement, provided that certain other conditions are met. All circuits have adopted the view that a False Claims Act complaint can satisfy Rule 9(b) by including some indicia of reliability to support the allegation that an actual false claim was submitted to the government. But, in no circuit can a relator survive dismissal without *at least some* facts providing indicia of reliability that a claim was actually submitted.

In sum, Petitioner's assertion that there is a circuit split is nothing but a willful blindness to current case law. *See* Br. For United States as Amicus Curiae, *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.,* No. 12-1349, 2014 WL 709660, at *10 (U.S. Feb. 25, 2014) ("[E]ven those circuits that initially endorsed the per se rule have issued subsequent decisions that appear to adopt a more nuanced approach."); *Chorches*, 865 F.3d at 89, 90-92 ("As the various Circuits have confronted different factual variations, differences in broad pronouncements in early cases have been refined in ways that suggest a case-by-case approach that is more consistent than might at first appear.")

II. PETITIONER'S CLAIM WOULD FARE NO BETTER IN OTHER CIRCUITS

Given the deficiencies in Relator's complaint identified by the Eleventh Circuit, Relator's complaint would be dismissed under the precedent of any circuit,

notwithstanding any small variation in their respective applications of the Rule 9(b) standard. This alone is sufficient reason to deny review here. As urged by the United States in its brief recommending a denial of certiorari in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.,* if the Court were to address application of Rule 9(b) to False Claims Act litigation, it should do so only "in a case where application of the [rigid view] appears to be outcome-determinative" and not in a case that "could not go forward under the pleading standard most favorable to relators." Br. For United States as Amicus Curiae, *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.,* No. 12-1349, 2014 WL 709660, at *16 (U.S. Feb. 25, 2014). Here the Eleventh Circuit did not apply a "rigid view" and, thus, a "rigid view" was not outcome-determinative. Like *Takeda*, this case "is not a suitable vehicle for resolving the question presented." 2014 WL 709660, at *11.

In explaining the shortcomings of a similar petition by the relator in *Takeda*, the United States offered the following analysis, which is equally apposite here:

> Petitioner contends that the court of appeals found his complaint insufficient only because that court adopted an inflexible rule requiring *qui tam* relators to identify specific false claims. But the court of appeals did not adopt that per se rule. To the contrary, it required only "'some indicia of reliability' . . . to support the allegation that an actual false claim was presented to the government."
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> The court of appeals' rejection of a per se rule is further confirmed by the balance of its

> opinion. If the court had followed the [inflexible approach] it would have rejected petitioner's complaint out of hand, because there is no dispute that petitioner failed to allege the details of any request for payment made to the federal government . . . . Despite the conceded absence of any allegation of a specific false claim, however, the court of appeals carefully examined the complaint to determine whether it provided a plausible basis for inferring that false claims were presented.

Br. For United States as Amicus Curiae, *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.,* No. 12-1349, 2014 WL 709660, at *16-*18 (U.S. Feb. 25, 2014) (citations omitted). Here, too, the court of appeals conducted a careful analysis of Petitioner's allegations, noting their multiple shortcomings, and why they did not supply the necessary "indicia of reliability." Pet. App. 10a. No such analysis would have been necessary if the Eleventh Circuit had been applying the *per se* rule Petitioner ascribes to that court.

The Eleventh Circuit's "nuanced, case-by-case approach," *see Mastej*, 591 F. App'x at 704, using the standard of "some indicia of reliability" as the "key inquiry," is completely consistent with the approach in the other circuits. But even assuming some small variation between the circuits in the application of Rule 9(b), the Petitioner's complaint would not pass muster in any of them.

The Eleventh Circuit properly held that Petitioner's complaint lacks the required "indicia of reliability" that a fraud was committed against the government because it does not "include the underlying factual bases for [Relator's] assertions." Pet. App.10a. Indeed,

Petitioner is poorly situated to assess Respondents' provision of hospice care to their patients or any resulting bills to the government. Nothing about Petitioner's role as a social worker suggests that she would know anything about the Respondents' billing practices. Further, as a non-medical professional, she has no basis to make a clinical judgment that any patients did not have the appropriate prognosis for hospice care when they were certified as eligible. The paucity of facts in Petitioner's fifth attempt to plead her case is fatal to her case.

The Eleventh Circuit identified precisely these deficiencies in its opinion, which confirms that Petitioner's complaint would fail under any standard. Despite five chances to do so, Petitioner could not "allege the basis of her knowledge of the defendants' fraudulent billing practices—a process she was far removed from as a social worker," Pet. App. 11a, nor could she "give examples of specific patients who were ineligible for care, details about why they were ineligible, who at Chapters made particular falsifications, when the falsifications occurred, or when the fraudulent bills were submitted to Medicare." Pet. App. 10a. The Eleventh Circuit could only conclude that "in light of all these deficiencies" Petitioner "failed to provide the required 'indicia of reliability' to support her allegations of false claims for hospice services." Pet. App. 11a.

The Eleventh Circuit likewise disposed of Petitioner's claims against the Referral Defendants, holding that her scant allegations fell "far short of satisfying Rule 9(b)" as they would in any circuit. Pet. App. 12a. While Petitioner generally alleged that the Referral Defendants were each engaged in separate "kickback schemes" with the Hospice Defendants, she was unable

to "identify a single individual from Sunrise, JSA, or Superior who made a referral to Chapters in exchange for a benefit, a single patient who was improperly referred, who at Chapters provided the bribes, or when those exchanges took place." *Id.* Likewise, with respect to Petitioner's allegation that Defendants Chapters and Mobile Physician Services improperly referred patients to each other, the Eleventh Circuit found Petitioner had "again fail[ed] to allege any specific facts" to support such a claim. *Id.* The Court of Appeals thus affirmed the district court's dismissal of Petitioner's complaint on the unremarkable grounds that "[w]ithout details to support her conclusory allegations of wrongdoing, [Petitioner's] complaint lacks the necessary 'indicia of reliability' under Rule 9(b)." Pet. App. 12a-13a.

The lack of sufficient detail to substantiate Petitioner's allegation of the presentment of a false claim for repayment would not satisfy Rule 9(b) in any circuit. As discussed above, although the precise language each circuit uses may differ slightly, these circuits have held that to satisfy Rule 9(b), a relator must plead facts to support the inference of an actual presentment of a false claim to the government for payment, either by providing representative examples of false claims or by pleading facts that provide any reliable indicia that claims were actually presented. The Eleventh Circuit simply found that Petitioner did neither. There is no reason to believe that Petitioner would have fared better in any other circuit.

In arguing that similar allegations would survive in other circuits, Petitioner focuses on only one opinion from the Seventh Circuit and three district court decisions from within the Third and Tenth Circuits. But a review of the precedent in those jurisdictions

reveals that Petitioner's complaint would fail there as well. None of these circuits permits a relator in a False Claims Act to proceed to discovery without pleading specific examples of the fraudulent conduct alleged, as Petitioner has failed to do. *See, e.g., United States ex rel. Grenadyor v. Ukrainian Vill. Pharm., Inc.*, 772 F.3d 1102, 1107 (7th Cir. 2014) (affirming dismissal on Rule 9(b) grounds where relator failed to identify a single Medicare or Medicaid patient involved in purported scheme); *United States v. Eastwick Coll.*, 657 F. App'x 89, 95 (3d Cir. 2016) (affirming dismissal of claims predicated on false certification of a "satisfactory academic progress policy" where relator failed to plead a single example of the alleged scheme to arbitrarily alter students' grades); *cf. Lemmon*, 614 F.3d at 1172 (requiring relator to "show the specifics of [the] fraudulent scheme" and finding an adequate basis to infer claims were submitted where relator identified specific contractual and regulatory violations and corresponding dates and amounts of corresponding false payment requests).

Moreover, the cases Relator relies upon are plainly inapposite, as the relators in those cases pleaded far more than Relator pleads here. In *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770 (7th Cir. 2016), the Seventh Circuit's decision was highly circumscribed. It concluded that only the specific allegations regarding fraudulent use of billing code 90801 were sufficient because the relator alleged "almost all of [the defendant's] patients were 'on Title 19'" and that "the questionable practices and procedures [regarding that code] were applied to *all* patients at the clinic." *Id.* at 778. Accordingly, it could be inferred as a matter of logical necessity that the fraudulent practices associated with that particular

billing code were applied to patients who were federally insured. Petitioner can provide no similar assurance.

As to the *Presser* relator's other allegations, the Seventh Circuit determined that they were insufficient because, like Petitioner here, the relator "provide[d] no medical, technical, or scientific context which would enable a reader of the complaint to understand why [defendant's] alleged actions amount to unnecessary care forbidden by the statute." *Id.* at 779. The Seventh Circuit accordingly affirmed dismissal of claims arising from these other allegations because "the complaint does not provide any reasons *why* these treatments actually were unnecessary" and concluded that "without an ascertainable standard or more context, Ms. Presser's other allegations of fraud do not suffice." *Id.* at 779, 781.

In this case, no analogous single billing code exists that might add some indicia of reliability as there were for the adequately pleaded claims in *Presser*. Nor can any logical inference be drawn that any purportedly improper procedure was applied to a federally insured patient. Petitioner offers no allegations of direct knowledge of actual billing procedures and, as a social services specialist, she was not similarly situated to the billing nurse practitioner in *Presser*.[5] Instead,

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[5] Petitioner also cites *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818 (7th Cir. 2013), and *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009), as Seventh Circuit cases that purportedly support her position. Both cases are factually dissimilar to her claim and, for that reason alone, shed little light on how her allegations would be treated in the Seventh Circuit. Moreover, in each case the relator alleged that the defendant received specific federal disbursements that would only have occurred had the defendant falsely certified compliance with a contractual or regulatory requirement. *See Lusby*, 570 F.3d at 854; *Leveski*, 719 F.3d at 839. Petitioner pleads no similar

Petitioner only offers generalized allegations of improper referrals, without any supporting factual basis or logical connection to a federal healthcare program. Under *Presser*, such allegations fail to pass muster.

Also unlike Petitioner, the relator in *United States ex rel. Landis v. Hospice Care of Kansas, LLC*, No. 06-2455-CM, 2010 WL 5067614 (D. Kan. Dec. 7, 2010), provided specific details, dates, and persons involved, and also identified 27 patients and described factual details underlying the false certifications, claims submission, and the Medicare reimbursements. *Id.* at *2–*3, *6. And in *United States ex rel. Fowler v. Evercare Hospice, Inc.*, Nos. 11-CV-00642, 14-CV-01647, 2015 WL 5568614 (D. Colo. Sept. 21, 2015), there were similar detailed allegations, including specific patients ineligible for hospice care, actual disregard for auditor recommendations, and specific examples of each allegation. *Id.* at *3, *4, *8, *9, *11. Petitioner also cites *Druding v. Care Alternatives, Inc.,* 164 F. Supp. 3d 621 (D.N.J. 2016), as a supposedly similar case. Petitioner's highly sanitized description of the case, however, fails to mention that the relators in *Druding* provided detailed patient records showing that specific hospice patients were ineligible. *Id.* at 630–31, 632.

In reality, Petitioner's dissatisfaction with the opinion below is not rooted in a circuit split between a "rigid view" and a flexible view, but instead with the

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circumstance, and neither case announces a rule of law that conflicts with the rule applied by the Eleventh Circuit in this case. So, the bare fact that some relators present more reliable indicia that an actual claim was submitted than other relators offer does not create a circuit split or a reason to believe that Petitioner would succeed in the Seventh Circuit on her allegations.

hard truth that the courts of appeals have developed a nuanced approach that requires *at least some* indicia of reliability that a claim was actually submitted. In any circuit, that standard requires something more than the unsupported speculation, inference, and say-so Petitioner was able to muster.[6]

Petitioner's approach is out of line with the nuanced approach to Rule 9(b)'s particularity requirement that has developed across the country. In practice, her approach would completely eliminate the requirement that a relator allege the submission of a false claim. If Petitioner were correct, a court could *always* assume that false claims were submitted whenever a fraudulent scheme is alleged because, so goes Petitioner's reasoning (Pet. 22), otherwise there would be no point in engaging in the scheme. That view renders Rule 9(b) meaningless.

In the end, the Eleventh Circuit did not apply a "rigid view" of Rule 9(b)'s particularity requirement in this case and, instead, focused on the "key inquiry" whether "some indicia of reliability" was presented by Petitioner. That inquiry is consistent with the law across circuits. No circuit would have reached a different outcome when confronted with Petitioner's allegations, and accordingly the court of appeals' opinion does not warrant this Court's review.

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[6] In the Eleventh Circuit, for instance, naked inferences are not enough, but *reasonable* inferences based on well-pleaded details that provide some indicia of reliability to the allegation of claim presentment have sufficed. *See Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005); *Walker,* 433 F.3d at 1353; *Mastej* 591 F. App'x at 704; *Hill,* 2003 WL 22019936, at *4.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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