NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, EX REL. STEPHANIE STRUBBE; CARMEN TRADER; RICHARD CHRISTIE,

Petitioners,

v.

CRAWFORD COUNTY MEMORIAL HOSPITAL; BILL BRUCE,

Respondents.

On Petition for Writ of Certiorari To The Eighth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Paramedics and EMTs at a county hospital were ordered by management to perform unnecessary services and then enter incorrect time into the hospital billing software, which they were told was for "billing and cost reporting" purposes. Must these employees, Relators in a suit brought under the False Claims Act, have seen and therefore pled the exact content of billings sent to Medicare - contents which were kept secret by management - in order to be able to survive a motion to dismiss made under Fed. R. Civ. P. 9(b)

2. When three hospital employees became concerned about billing and financial irregularities at the hospital, they undertook their own investigation about those irregularities. The employees also complained internally about the facts that ultimately led to their lawsuit brought under the False Claims Act. Do the actions of employees related to their investigation and internal complaints constitute protected activity under the Act, or must employees specifically threaten a False Claims Act lawsuit in order to be protected?

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OPINION BELOW

The petitioners, Stephanie Strubbe, Carmen Trader, and Richard Christie, respectfully pray that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in Case No. 18-1022 entered on February 11, 2019, and made final with the denial of rehearing and rehearing en banc on *United States ex rel. Strubbe v. Crawford Cty. Mem'l Hosp.*, 915 F.3d 1158 (8th Cir. 2019).

JURISDICTION

The panel of the Eighth Circuit Court of Appeals entered its judgment on February 11, 2019. The petitioner's petition for rehearing and rehearing en banc was denied on March 20, 2019. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 9(b) states:

> (b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

31 U.S.C. § 3729(a) states:

> (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), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages. If the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to

such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

31 U.S.C. § 3730(h) states:

Relief from retaliatory actions.

(1) In general. Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter [31 USCS §§ 3721 et seq.].

(2) Relief. Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor,

> or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.
>
> (3) Limitation on bringing civil action. A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

STATEMENT OF THE CASE

Relators, two paramedics and one EMT at Crawford Count Memorial Hospital ("CCMH") filed a False Claims Act ("FCA") case against CCMH and its CEO, Bill Bruce ("Bruce") for repeated and various violations of the FCA under 31 U.S.C. § 3729(a) and retaliation claims under 31 U.S.C. § 3730(h) after CCMH and Bruce fired two of the Relators and demoted the third. Relators alleged that after Bruce became CEO, Bruce implemented policy changes that led to fraudulent claims being submitted to Medicare, both for medical treatments provided to patients by Relators, and on CCMH's cost reports for which CCMH was reimbursed 101% of reported expenditures by Medicare. Relators were not privy (absent illegally hacking CCMH's billing system) to the bills that were sent to Medicare for the

services provided nor to the underlying financial records for expenditures submitted on cost reports to Medicare that formed the basis for their FCA complaint.

Relators provided the services in question and Relators pled that they were personally required to enter false time into the system that was used for billing Medicare. They also pled how the false time entry would result in improperly unbundling services by misclassifying the paramedics and EMTs as "separately billable ancillary services" so as to obtain more money from Medicare than CCMH was entitled. Relators pled that they personally witnessed, and reported, unlicensed service providers providing medical services to patients who were improperly identified in the billing software used by CCMH, and that they were told by their supervisor that changes in procedures were for "billing and cost reporting purposes."

Relators did not have access to CCMH's underlying financial information because Bruce had eliminated public and employee access to financial information at CCMH, so Relators had no way of comparing purported expenditures with Medicare cost reports. But, Relators were told, and pled, that their HR director, Kurt Wilkins believed Bruce was misusing the hospital credit card, and then Wilkins was fired and Bruce became acting HR manager. Relators pled that they uncovered a MoneyGram cash withdrawal on a hospital credit card that was purportedly for a hospital expense, but clearly was not for the stated expense, and that

upon inquiry, CCMH presented a clearly altered receipt.

The gist of Relator's pleadings are artfully summed up by Judge Beam in his dissent from the panel opinion,

> The complaint contained 198 paragraphs, including 55 paragraphs in the "Specific and Detailed Allegations" section, and spelled out the impropriety of EMTs and paramedics being asked to perform work differently, and to perform work–(i.e., breathing treatments on inpatients)–that EMTs and paramedics were not the most qualified and certainly not the most conveniently situated to perform. The complaint alleges the relators were told the reason for this abrupt change in procedure and policy was for "billing" purposes. Comp. ¶¶ 26-28. The complaint detailed the exponential increase in separately billed "breathing" treatments even while the number of hospital patients declined. ¶¶ 33-35. The complaint detailed how relators were required to make false entries into the computer system that was used for Medicare billing–averring that the treatments lasted at least thirty minutes regardless of how long the treatment lasted. ¶¶ 30, 98. Requiring the relators to plead an exact day in which any one of them performed a breathing treatment in less than 30 minutes, see ante at 9, is more than is necessary…

Further, the relators did provide a concrete example of a terminal patient who clearly did not need a breathing treatment but was required to get one. ¶ 37. Relators pleaded with particularity that "Patient A, known to Relator Trader, was ordered to receive breathing treatments despite having been in a traumatic, clearly terminal, accident." Id. Two of the relators questioned the hospital's nurses about giving breathing treatments to other patients who clearly did "not need the treatments, but they were told to give the treatments anyway." ¶ 38. The complaint goes on to explain that breathing treatments given by paramedics, as opposed to nurses, are billed differently and generate more revenue for the hospital. ¶¶ 39-53. There are links to governmental and industry documents explaining this process. The complaint details specific accounts of staff who were held out to be, and required to perform, acts of paramedics and phlebotomists despite their lack of certification. ¶¶ 59-63.

Although relators were not in a position to see the bills generated after such computer entries, the pleadings gave adequate notice of the natural inference that the breathing treatments were fraudulently and inflatedly billed the way they were entered. Further, evidence of fraud–Bruce's purported misuse of a hospital credit card–is documented with particularity in the complaint including: the day of payment to "Money Gram," the amount of payment, and the outcome of an

> open records request which resulted in the production of an altered receipt. ¶ 70.

(Appendix p. 26a-27a, Beam, J. dissenting)(internal citations omitted).

Defendants argued Relators did not see the Medicare bills so they could not adequately plead fraud without pleading the contents of the bills. Both the district court and the majority bought the Defendants' arguments and dismissed Relators' complaint.

The majority found that Relators needed to have personal knowledge of the contents of the bills submitted to Medicare in order to bring an FCA complaint. Judge Beam dissented as to the dismissal of the substantive FCA claims, arguing it should not be the law that wrongdoers can eliminate future civil liability for false claims by eliminating access to financial information. The Eighth Circuit's opinion further divides a growing circuit split on the questions presented.

The Eighth Circuit also held that the district court did not err in dismissing two of the Relators' retaliation claims, or in granting summary judgment on the third, finding that the "protected activity" could not have begun until after the hospital learned of the filing of the False Claims Act case because the Relators had not used the words "fraud" or "False Claims Act" in their complaints to management. And so because the two of the Relators had not pled that the hospital had knowledge of the pending False Claims Act complaint on relevant dates of adverse

employment actions, and the third (Strubbe) was bound only to the date of the unsealing of the FCA complaint, Relators' retaliation complaints were dismissed. (Appendix p. 15a-16a). This further divided the Eighth Circuit from its sister circuits on retaliation claims under the False Claims Act.

REASONS FOR GRANTING THE WRIT

I. PARAMEDICS AND EMTS AT A COUNTY HOSPITAL THAT WERE ORDERED BY MANAGEMENT TO PERFORM UNNECESSARY SERVICES AND THEN ENTER INCORRECT TIME INTO THE HOSPITAL BILLING SOFTWARE, WHICH THEY WERE TOLD WAS FOR "BILLING AND COST REPORTING" PURPOSES SHOULD NOT BE REQUIRED TO PLEAD THE EXACT CONTENT OF BILLINGS SENT TO MEDICARE THAT WERE KEPT HIDDEN BY MANAGEMENT AND SHOULD HAVE BEEN ABLE TO SURVIVE A MOTION TO DISMISS MADE UNDER FEDERAL RULE OF CIVIL PROCEDURE 9(B) BY PLEADING THE CIRCUMSTANCES SURROUNDING THE BILLINGS

Several circuits have identified a growing circuit split on the question of what specific knowledge a relator must have to be able to properly plead an FCA case when the relator does not have access to the physical bills sent to the government. The Eighth Circuit now falls on the

most restrictive, and Relators contend, wrong, side of those splits.

In September 2016, the Sixth Circuit in *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.,* 838 F.3d 750, n. 10 (6th Cir. 2016) noted the growing circuit split between the "more permissive" circuits like the First, Third, Seventh, Ninth and D.C. Circuits, and the more restrictive circuits, explicitly the Eighth and the Tenth Circuits in FCA pleading cases. By July 26, 2017, the First Circuit in *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 37–38 (1st Cir. 2017) commented on the further developing split, stating:

The circuits have varied, though, in their statements of exactly what Rule 9(b) requires in a qui tam action. Of most relevance here, a consensus has yet to develop on whether, when, and to what extent a relator must state the particulars of specific examples of the type of false claims alleged. See *Foglia v. Renal Ventures Mgmt., LLC,* 754 F.3d 153, 155–56 (3d Cir. 2014) (surveying circuits).

On July 27, 2017, the Second Circuit questioned the depth of the split in *United States ex rel. Chorches for Bankr. Estate of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 89–91 (2d Cir. 2017), noting:

> We recently acknowledged—without taking any position of our own—a seeming "circuit split regarding whether, to satisfy Rule 9(b), an FCA relator alleging a fraudulent scheme must provide the details of specific

examples of actual false claims presented to the government." *United States ex rel. Polansky v. Pfizer, Inc.*, 822 F.3d 613, 619 (2d Cir. 2016). On further consideration, we conclude that our holding today is consistent with the law as generally stated by a majority of our sister circuits, and that the reports of a circuit split are, like those prematurely reporting Mark Twain's death, "greatly exaggerated." 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.

Our holding today is clearly consistent with the approach taken by the Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits, which have overtly adopted a "more lenient" pleading standard. Those courts have allowed a complaint that does not allege the details of an actually submitted false claim to pass Rule 9(b) muster 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." [internal case citations omitted].

In arguable conflict, at least at first glance, are decisions from circuits that have

> professed to apply a "stricter" standard for pleading the submission of false claims…. However, the decisions from those Circuits are in fact more nuanced (as are those from the Circuits adopting a more "lenient" standard) and leave open unresolved possibilities such that any "split" between them and decisions from the more lenient circuits is not, we think, a sharp one.

Chorches for Bankr. Estate of Fabula, 865 F.3d at 89–91.

But any question from *Chorches* that there was a "true" circuit split has been answered here as the majority's opinion directly conflicts with the holdings from several circuits that do not require contents of the bills submitted to the government, including *Nargol*, 865 F.3d at 37–38; *United States ex rel. Chorches for Bankr. Estate of Fabula*, 865 F.3d at 81–82 (2d Cir. 2017), *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156-57 (3d Cir. 2014); *United States ex rel. Grubbs*, 565 F.3d at 190 (5th Cir. 2009); *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750, n. 10 (6th Cir. 2016); *United States ex rel. Lusby*, 570 F.3d 849, 854 (7th Cir. 2009); *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010); *U.S. ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010); and *United States ex rel. Heath*, 791 F.3d 112, 126 (D.C. Cir. 2015).

The panel majority explicitly conflicts with the First Circuit in *United States ex rel. Duxbury v.*

Ortho Biotech Prods., L.P., 579 F.3d 13, 29 (1st Cir. 2009) holding that a relator could satisfy Rule 9(b) by providing statistical evidence to strengthen the inference of fraud without providing the details as to each false claim. Relators here provided statistical evidence demonstrating massive increases in breathing treatments with a corresponding decrease in total number of patients, a fact ignored by the panel majority. And it also conflicts with *Nargol* where the First Circuit considered whether the alleged scheme makes "little sense" without claims being submitted to the government. *Nargol*, 865 F.3d at 40. The panel majority here made no such analysis – even though the schemes make no sense absent the claims made to Medicare.

The panel majority here also explicitly conflicts with the Second Circuit in *Chorches for Bankr. Estate of Fabula*, 865 F.3d at 81–82, where it noted that allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge, especially where the relator has sufficient data to justify interposing an allegation on the subject. The Second Circuit found it compelling that the relator was explicitly informed by supervisors that the conduct in question was done for Medicare reimbursement purposes, as well as allegations that these supervisors expressly asked for certain conduct for Medicare reimbursement purposes. Id. at 84–86. Here, the panel majority ignored that Relators were explicitly informed by their supervisors that the changes were being made for billing and cost reporting purposes and that they were instructed

to perform certain tasks for this express Medicare purpose.

The panel majority here explicitly conflicts with the Seventh Circuit in *Lusby*, 570 F.3d at 854, where it held that a relator need not produce, or have ever seen, the actual claims for payment that were fraudulent. The Seventh Circuit held that pleading fraud is not the same as proving fraud, indeed, the complaint may turn up to be wrong and there may be a defense available to the defendant. *Id*. The panel majority here held instead that Relators needed to essentially have proven fraud to survive the 9(b) motion to dismiss, and needed to have seen the claims for payment in order to proceed.

In this case the Eighth Circuit has broadened the split amongst the circuits because it has retreated from its own holding in *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 917-18 (8th Cir. 2014) by finding that because "most importantly" the petition here did not plead personal knowledge regarding "whether a claim was actually submitted" for any particular patient, it should be dismissed. (Appendix p. 8a-9a). The majority relied on the fact that Relators were paramedics and EMTs providing the care to the patients, not billing them directly, and they "did not have access to the billing department" at CCMH. (Appendix p. 10a-11a). The majority held that being told that the changes to the breathing treatments were done for billing and cost reimbursement purposes showed only that "the possibility that CCMH submitted claims," but could not "lead to a strong

inference that claims were actually submitted" absent Relators personally viewing the bills that were sent to Medicare. (Appendix p. 9a-10a). The majority further found that there was a failure to connect individual false records or statements made to the government, despite the elaborate pleading of how critical access hospital and breathing treatment billing to Medicare works. (Appendix p. 9a-10a).

Judge Beam strongly dissented from the other two judges on the Eighth Circuit panel, stating,

> [T]he majority opinion and the district court essentially require that the relators here witness the Medicare forms being submitted in order to get past the pleading stage in this case. If that were the case, only someone with access to the hospital's internal accounting records could successfully bring a qui tam action in this situation. Indeed, as relators point out, the accounting records became unaccessible to employees and the public once Bill Bruce because CEO (and incidentally, the HR manager) of the hospital. Bruce and the hospital can thus effectively eliminate any civil liability for false claims by eliminating access to financial information.

(Appendix p. 25a, Beam, J. dissenting).

Judge Beam went on to flag the misguided long-term outcome of the panel's opinion:

> In short, the district court, and a majority of this court, essentially hold that short of the relators committing criminal activity by illegally accessing the hospital's billing records, they cannot successfully plead a false claims act case of Medicare billing fraud. This should not be the state of the law, especially as here []when the opposing party is the only practical source for discovering the specific facts supporting a pleader's conclusion.[]

(Appendix, p. 25a, Beam, J. dissenting)(internal citations omitted).

Thus, certiorari is necessary to resolve the circuit split and make it clear that the FCA should not be read to be impossible to enforce by anyone other than the billing department employee who sends the final bill or cost report.

II. THE HOSPITAL EMPLOYEES' INVESTIGATORY ACTIVITIES AND INTERNAL COMPLAINTS ABOUT THE FACTS THAT ULTIMATELY LED TO THEIR LAWSUIT BROUGHT UNDER THE FALSE CLAIMS ACT SHOULD CONSTITUTE PROTECTED ACTIVITY UNDER THE ACT.

Relying on its own precedent in *Schuhardt v. Wash. Univ.*, 390 F.3d 563 (8th Cir. 2004), the Eighth Circuit determined that Relators here could not demonstrate they engaged in protected activity despite complaining to supervisors,

reporting misconduct to state licensing boards, and making a report to the police, because they did not allege "fraud" to their supervisors at work and did not tell them about the qui tam action. Thus, the Eighth Circuit requires employees to explicitly threaten a qui tam complaint, otherwise the retaliation claim cannot proceed to a fact-finder.

This decision is in direct conflict with the other circuits, including the Sixth Circuit in *United States ex rel. McKenzie v. BellSouth Telcomms.*, 123 F.3d 935, 944 (6th Cir. 1997) (Relator does not have to be investigating her own qui tam case to prevent summary judgment on a retaliation claim); the DC Circuit in *United States ex rel. Yesudian v. Howard University*, 153 F.3d 731, 739-40. (DC Cir. 1998) (Relator need not have developed a winning qui tam action before he is retaliated against, because the FCA doesn't "suggest that the employee must already have discovered a completed case" because Congress intends to protect employees while they are collecting information about possible fraud before they have put all the pieces together); and the Tenth Circuit in *United States ex rel. Reed v. Keypoint Gov't Sols.*, 923 F.3d 729, 765-66 (10th Cir. 2019) (The requirement to adequately plead notice of protected activity necessarily is expanded to include notice that the Relators are not pursuing a False Claims Act Claim, but instead are trying to stop the violations themselves.)

The Eighth Circuit's refusal to protect whistleblowers unless rigid lines are met, i.e., unless the perpetrator knows the whistleblower is contemplating a FCA complaint explicitly, also

puts it in direct conflict with the Second Circuit *in Chorches for Bankr. Estate of Fabula*, 865 F.3d at 97–98, which held that the 2009 FCA amendment broadened the universe of protected conduct by protecting those who actually file a qui tam action, those who plan to file a qui tam case, those who blow the whistle internally or externally without the filing of a case, and those who do nothing other than refuse to participate in the wrongdoing. *Id.* at 97-98. To hold otherwise like the Eighth Circuit has done here draws an arbitrary boundary between relators that makes no rational sense. The Second Circuit recognizes that this type of line-drawing encourages "the adoption of opaque or burdensome reporting mechanisms that would help FCA violators avoid liability." Id. at 98. No such line-drawing should be occurring amongst relators throughout the different circuits.

Petitioners Strubbe and Trader[1] submit that Eighth Circuit is on the wrong side of this split, ignoring the realities of the workplace and allowing employers to protect themselves from meritorious fraud allegations by firing whistleblowers, and as such Supreme Court intervention is warranted. *See, e.g.,* M*ikes v. Strauss,* 889 F. Supp. 746, 753 (S.D.N.Y. 1995) (Noting that to insist upon an express or even an implied threat of a qui tam action imposes a requirement which is wholly unrealistic in an employment context.)

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[1] Petitioner Christie does not request review of the dismissal of his retaliation claim.

It is now easier in the Eighth Circuit than it is in other circuits to commit fraud, hide fraud by eliminating employee access to specific records, and then fire employees without consequence. Therefore, certiorari is required to clarify the correct legal standard to apply to whistleblower actions under the False Claims Act.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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