No. 19-225

In The Supreme Court of the United States

UNITED STATES EX REL. STEPHANIE STRUBBE, CARMEN TRADER, AND RICHARD CHRISTIE,

Petitioners,

v.

CRAWFORD COUNTY MEMORIAL HOSPITAL AND BILL BRUCE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. For substantive violations of the False Claims Act to survive a motion to dismiss under Rule 9(b), must Relators plead either "representative examples of the false claims" or "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted"?

2. For retaliation claims under the False Claims Act, must Relators show they engaged in protective activity that at least has some connection to the Act?

CORPORATE DISCLOSURE STATEMENT

Respondent Crawford County Memorial Hospital is not a subsidiary of any other corporation and no publicly held corporation owns 10% or more of its stock.

RELATED CASES

United States of America ex rel. Stephanie Strubbe, Carmen Trader and Richard Christie v. Crawford County Memorial Hospital and Bill Bruce, No. C15-4034-LTS, United States District Court for the Northern District of Iowa. Judgment entered December 6, 2017.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 915 F.3d 1158 (8th Cir. 2019). The order denying the petition for rehearing and rehearing *en banc* (Pet. App. 93a) is unreported.

JURISDICTION

The court of appeals entered its judgment on February 11, 2019, and denied Relators' petition for rehearing *en banc* and petition for rehearing by the panel on March 20, 2019. The petition for a writ of certiorari was filed on June 17, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves a False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), complaint filed by Relators Stephanie Strubbe, Carmen Trader, and Richard Christie against Crawford County Memorial Hospital ("CCMH"), a publicly owned hospital in Iowa, and Bill Bruce ("Bruce"), CCMH's Chief Executive Officer. Relators asserted three types of FCA claims against the Respondents: "substantive" FCA claims in Counts I and

II, an FCA "conspiracy" claim in Count III,[1] and FCA "retaliation" claims in Counts IV, V, and VI.

I. Relators' Amended Complaint

Relators did not identify any specific false claim or bill in the Amended Complaint. Instead, Relators' alleged "that CCMH submitted false claims through a *wide-ranging fraudulent scheme*." (Pet. App. 7a) (emphasis added). As summarized by the Eighth Circuit, Relators alleged in support of Count I that Respondents submitted false claims for Medicare reimbursement by submitting "(1) claims for breathing treatments administered by paramedics; (2) claims for laboratory services done by paramedics and EMTs; (3) claims with false credentials of service providers; (4) claims for EMT and paramedic services at Eventide, L.L.C. and Denison Care Center; and (5) cost reports with improper reimbursements and payments to vendors for non-CCMH expenses." (Pet. App. 3a). In support of Count II, Relators alleged that Respondents made false statements or reports in support of their claims for Medicare reimbursement, including "(1) records documenting breathing treatments at 30 minutes; (2) records listing paramedics as 'specialized ancillary staff' for breathing treatments; (3) reimbursement requests and invoices for improper payments for non-CCMH expenses; (4) documents with false credentials

[1] Relators do not present any argument in this Petition about their conspiracy claim, which the district court dismissed. (Pet. App. 79a-80a).

for emergency medical staff; and (5) cost reports with false costs." (Pet. App. 3a).

Relators' retaliation claims were based on the Relators' individual circumstances. Strubbe—an EMT hired by CCMH in March 2014—claimed in Count IV that within months "she began reviewing hospital financial documents in July 2014" and expressed a belief "soon after" to CCMH's Board that the "finances were not adding up." (Pet. App. 4a). After injuring herself and undergoing surgery in November 2014, CCMH put Strubbe on "light duty," and later in July 2015 moved her to "part-time status" because her "light-duty assignments were a financial hardship for the hospital." (Pet. App. 4a). In March 2016, after a second shoulder surgery and because Strubbe had not worked for CCMH in any capacity for more than six months, CCMH removed her from part-time status pursuant to CCMH's part-time policy (that required part-time employees, *inter alia*, "to have worked in the past six months"). (Pet. App. 4a, 30a-31a).

Christie and Trader—hired by CCMH as paramedics in 2007 and 2010, respectively—alleged in Counts V[2] and VI that they also began investigating CCMH's finances in 2014. (Pet. App. 4a). By "January 2015, Christie reported to [his] supervisor that [another employee] was not 'properly licensed' as a paramedic." (Pet. App. 4a). Christie and Trader reported the

[2] "Petitioner Christie does not request review of the dismissal of his retaliation claim." (Pet. 19). As a result, the information regarding Christie's retaliation claim in Count V is provided for background only.

alleged license violation to the Iowa Department of Public Health. (Pet. App. 4a). "Four months later, CCMH transitioned Christie from night shifts to day shifts," and terminated him later that month for workplace violations. (Pet. App. 4a). Trader, on the other hand, remains employed at CCMH, but alleged she was "demoted" from days to nights in February 2015; reported to the state for allowing an authorized nurse to treat a patient with her in July 2015; and required to provide proof of her nephew's obituary before receiving leave to attend his funeral. (Pet. App. 88a-89a).

II. Declination, Partial Dismissal, And Summary Judgment

After an investigation of Relators' allegations, the Department of Justice declined to intervene, and the Respondents moved to dismiss Relators' Amended Complaint. The district court dismissed Relators' "substantive" FCA claims (Counts I and II) and their FCA conspiracy claim (Count III) because the complaint lacked the plausibility and particularity required by Fed. R. Civ. P. 8(a) and 9(b). The district court's ruling at the motion-to-dismiss stage was based on the alleged facts—or lack thereof—in Relators' complaint. These allegations included over thirty based "upon information and belief" (*see* DCD 12), and led the district court to observe that the allegations were "based

largely on conjecture, speculation and, it seems, gossip."[3] (Pet. App. 78a).

The district court also dismissed the Relators' FCA "retaliation" claims (Counts IV, V, and VI) against Bruce because such claims, as a matter of law, cannot be asserted against Bruce as an individual. The district court dismissed Christie's and Trader's retaliation claims (Counts V and VI, respectively) against CCMH because they had failed to allege they had engaged in protected activity and, alternatively, they had failed to allege any retaliation was solely motivated by the alleged protected activity.

After a period of discovery, CCMH moved for summary judgment on the sole remaining count—Strubbe's retaliation claim (Count IV). The district court granted summary judgment, concluding that Strubbe failed to meet her *prima facie* case because she failed to show that she had engaged in protected activity. Alternatively, the district court concluded that Strubbe failed to demonstrate that CCMH's reason for removing her from casual, part-time status was pretextual. (Pet. App. 50a-53a).

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[3] Indeed, Relators concede that they "were not privy . . . 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." (Pet. App. 5).

III. Relators' Appeal

Relators appealed the district court's rulings on Respondents' motion to dismiss and motion for summary judgment. Reviewing *de novo*, the Eighth Circuit affirmed.

Regarding Relators' substantive FCA claims, the Eighth Circuit recognized the appropriate standard that "[a] relator can meet the Rule 9(b) requirements by pleading (1) 'representative examples of the false claims,' or (2) 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.'" (Pet. App. 6a-7a (quoting *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 918 (8th Cir. 2014))). Because Relators failed to plead representative examples of false claims, the Eighth Circuit addressed whether Relators had pleaded the requisite "particular details of a scheme." The Eighth Circuit recognized Relators came "close to meeting this standard," but the majority determined the allegations "lack[ed] the sufficient indicia of reliability leading to a strong inference that claims were actually submitted." (Pet. App. 10a). The Eighth Circuit compared analogous cases from the Fifth and Sixth Circuits regarding claims that were dismissed on the pleadings when no details were provided about the provider's billing practices (Pet. App. 10a (citing *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190-91 (5th Cir. 2009))), and when the relators personally did not know of the billing system or the submission of false claims (Pet. App. 11a (citing *United States ex rel.*

Prather v. Brookdale Senior Living Cmtys., 838 F.3d 750, 769-70 (6th Cir. 2016))). Similar to these cases, and other judgment calls made by other circuits, the Eighth Circuit determined "the facts pleaded do not 'lead to a strong inference that claims were actually submitted.'" (Pet. App. 11a (citing *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 472 (6th Cir. 2011); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005))). Relators' allegations—including "many key facts upon information and belief"—were insufficient because they came "without a statement of facts on which the belief was founded." (Pet. App. 12a).

Judge Beam dissented from the majority regarding this part of the Eighth Circuit's decision. Judge Beam found that "the relators' pleadings in Counts I and II of their complaint more than adequately give notice, with particularity, of the fraud they are alleging." (Pet. App. 24a). Judge Beam did not rely on or identify any alleged circuit split or differing Rule 9(b) standards among the circuits for evaluating particularity; rather, he applied the same standards as the majority and arrived at a different conclusion based on his evaluation of the totality of the allegations in the Amended Complaint. (Pet. App. 24a-28a).

Regarding Relators' FCA retaliation claims (Counts IV, V, and VI), the Eighth Circuit unanimously held that Bruce, as an individual and not Relators' employer, could not be held liable as a matter of law (and Relators' petition does not seek review of this issue). (Pet. App. 16a). The court also unanimously held that "[e]ven assuming Christie and Trader engaged in

protected activity, their retaliation claims fail to state a plausible claim because they did not adequately plead that CCMH knew they were engaging in protected activity." (Pet. App. 17a). The court recognized that "to provide actual or constructive knowledge, employees must connect the alleged misconduct to fraudulent or illegal activity or the FCA." (Pet. App. 17a-18a). At no point did they allege that Christie or Trader "told CCMH or the State that CCMH's behavior [that Christie and Trader allegedly investigated] was fraudulent or potentially subjected it to FCA liability." (Pet. App. 18a).

The court held the same with regard to Strubbe's retaliation claim (Count IV), even after discovery presented in the summary-judgment record: "She did not connect her concerns about CCMH's finances to fraud, the FCA, or any unlawful activity." (Pet. App. 20a). The court also concluded that "Strubbe cannot prove that her termination [*i.e.*, removal from part-time status in March 2016] was solely motivated by protected activity" (Pet. App. 21a), because the temporal connection between the unsealing of the complaint and her termination (four months) was "too attenuated to establish a prima facie case" (Pet. App. 22a), and because "CCMH has provided a legitimate, nondiscriminatory reason" for her termination by following its policies regarding the requirements for part-time work (Pet. App. 22a).

REASONS FOR DENYING THE WRIT

Relators do not contend that this case involves a conflict between the Eighth Circuit's decision and a decision of this Court. They instead mischaracterize the Eighth Circuit's decision as requiring a relator in an FCA case allege the "exact contents of billings sent to Medicare" (Pet. i). But this was not the standard applied, much less announced, by the Eighth Circuit.

Relators also attempt to manufacture a split among the circuits about the standard for pleading an FCA claim with particularity under Rule 9(b). But the Eighth Circuit's reasoning did not reflect a split in the law, which another circuit has aptly described as "not . . . to be in conflict with that of our sister circuits." *United States ex rel. Chorches for Bankr. Estate of Fabula*, 865 F.3d 71, 92 (2d Cir. 2017). The disagreement between the majority opinion and the dissent regarding the Rule 9(b) analysis is not a disagreement over the legal standard. Instead, it is a disagreement over the application of the standard to the facts pleaded in Relators' Amended Complaint—the kind of case-specific inquiry unsuitable for Supreme Court review.

Relators attempt to manufacture another split regarding the standards for determining protected activity under an FCA retaliation claim. Yet there is no split regarding that standard either, as even the latest cases, by their silence, demonstrate, *e.g.*, *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 766-67 (10th Cir. 2019) (recently recognizing "[the Tenth Circuit] has yet to begin the work of defining the

boundaries of what constitutes protected efforts" under the FCA, and identifying no circuit split over the issue). Even if there was a split, this case would be a poor vehicle to address it given the Eighth Circuit's alternative holding that Christie and Trader failed to sufficiently plead that CCMH knew of their alleged protected activity and that Strubbe could not rebut CCMH's legitimate non-discriminatory reason for removing Strubbe from part-time status.

This Court should deny the petition because the issues presented by the petition do not involve conflicting decisions, but instead factual inquiries or non-dispositive questions inappropriate for review.

I. The Circuits Are Not Split Regarding The Rule 9(b) Standards, And The Disagreement Between The Majority And The Dissent Here Involves A Case-By-Case Inquiry Unsuitable For Supreme Court Review

Relators' petition is predicated on the argument that they must have "pled the exact content of billings sent to Medicare" to survive Rule 9(b) under the Eighth Circuit's decision. (Pet. i). But the Eighth Circuit did not announce a standard that requires Relators to plead the "exact content of billings" (Pet. i) or even "the contents of the bills" (Pet. 13) and there is no circuit split regarding the applicable standard, in any event. Instead, the Eighth Circuit applied the standard set forth in its precedent: "A relator can meet the Rule 9(b) requirements by pleading (1) 'representative

examples of the false claims,' *or (2) 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.'*" (Pet. App. 6a-7a (quoting *Thayer*, 765 F.3d at 918 (emphasis added))). This standard—specifically the second prong—does not require the "contents of the bills" to be pleaded. Thus, the central premise of Relators' petition is false.

In any event, any argument that a circuit split exists over the applicable Rule 9(b) standard is incorrect and misleading. Dozens of petitioners, like Relators here, have sought certiorari based on a purported circuit split over the Rule 9(b) standard, and each of their petitions have been denied. *E.g.*, *United States ex rel. Chase v. Chapters Health System, Inc. et al.*, 139 S. Ct. 69 (2018) (denying certiorari on the question of "[w]hether a relator filing a *qui tam* suit under the [FCA] may satisfy [Rule 9(b)] without identifying a specific false or fraudulent claim submitted to the government in her complaint, but instead may do so by alleging the details of a false or fraudulent scheme and facts sufficient to create a basis for an inference that false or fraudulent claims were submitted to the government").[4] The assertion of a "split" is based on a

[4] In fact, at least eighteen additional petitions for certiorari regarding Rule 9(b)'s application in FCA cases have been denied since 2000. *Ibanez v. Bristol-Myers Squibb Co.*, 138 S. Ct. 2582 (2018); *Med. Device Bus. Servs., Inc. v. United States ex rel. Nargol*, 138 S. Ct. 1551 (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);

misreading of the circuit decisions. As the Second Circuit has explained after examining the circuit authority nationwide and the same Eighth Circuit authority relied upon here, "we do not view our interpretation of Rule 9(b) to be in conflict with that of our sister circuits." *Chorches*, 865 F.3d at 92.

The standard applied by the Eighth Circuit was consistent with the standards of the circuits nationwide. A review of even the cases cited *by Relators* purportedly as evidence of a split is illustrative. (Pet. 13-15). Most of the cases cited by Relators use the same language as the Eighth Circuit did here to describe the applicable standard. *See United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 39 (1st Cir. 2017) (recognizing that it is sufficient to plead the "details of the scheme with 'reliable indicia that lead to a strong inference that claims were actually submitted.'" (quoting *Grubbs*, 565 F.3d at 190)); *Chorches*, 865

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. Associates, Inc.*, 135 S. Ct. 2379 (2015); *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, 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 Associates*, 530 U.S. 1230 (2000).

F.3d at 89 (adopting an approach that is "clearly consistent with the approach taken by the Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits," which "allow[s] 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.'" (quoting *Grubbs*, 565 F.3d at 190)); *Prather*, 838 F.3d at 773 (adopting a standard that "is not inconsistent with the many cases on the more permissive side," and "that (1) requires the pleading of representative false claims in the majority of cases, while (2) recognizing that a relator may nonetheless survive a motion to dismiss by pleading specific facts based on her personal billing-related knowledge that support a strong inference that specific false claims were submitted for payment");[5] *United States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010) ("In our view, use of representative examples is simply one means of meeting the pleading obligation. We join the Fifth Circuit in concluding, in accord with general pleading requirements under Rule 9(b), that it is sufficient to allege 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" (quoting *Grubbs*, 565 F.3d at 190)); *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 126 (D.C. Cir.

[5] Although not mentioned by Relators, the Sixth Circuit recently re-emphasized that a "strong inference of a false claim" is required. *United States ex rel. Crockett v. Complete Fitness Rehab., Inc.*, 721 F. App'x 451, 459 (6th Cir. 2018).

2015) (framing "[t]he central question" as "whether the complaint alleges 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted' " (quoting *Grubbs*, 565 F.3d at 190; and citing *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156-57 (3d Cir. 2014); *Ebeid*, 616 F.3d at 998-999; *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172-73 (10th Cir. 2010); *United States ex rel. Lusby v. Rolls-Royce Corporation*, 570 F.3d 849, 854 (7th Cir. 2009); *United States ex rel. Duxbury v. Ortho Biotech Prods., LP*, 579 F.3d 13, 29 (1st Cir. 2009))).

The other cases Relators cite provide some semantic differences, but the standard remains essentially the same. *See Lemmon*, 614 F.3d at 1172 (explaining that "claims under the FCA need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme"); *Lusby*, 570 F.3d at 854-55 ("We don't think it essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit. True, it is essential to show a false statement. But much knowledge is inferential . . . and the inference that [relator] proposes is a plausible one. . . . It is enough to show, in detail, the nature of the charge, so that vague and unsubstantiated accusations of fraud do not lead to costly discovery and public obloquy."). More recently the Seventh Circuit has explained that "a party may make allegations on information and belief in the fraud context when '(1) the

facts constituting the fraud are not accessible to the plaintiff and (2) the plaintiff provides the grounds for his suspicions.'" *United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834, 841 (7th Cir. 2018) (citations omitted). "Even under this standard, however, the relator must still describe the predicate acts with some specificity to inject 'precision and some measure of substantiation' into his allegations of fraud." *Id.* These standards are consistent with the Eighth Circuit standard because all require the description of a fraudulent scheme with sufficient particularity to infer the submission of false claims.

Relators' additional argument that the First Circuit's decision in *Duxbury* "explicitly conflicts" with the Eighth Circuit's decision here is also not supportable. (Pet. 13-14). As is the case with the long list of cases referenced above, there is no conflict, explicit or otherwise. The First Circuit, as subsequently explained in *Nargol*, requires a relator to plead the "details of the scheme with 'reliable indicia that lead to a strong inference that claims were actually submitted.'" *Nargol*, 865 F.3d at 39 (quoting *Grubbs*, 565 F.3d at 190); *see Duxbury*, 579 F.3d at 32 ("Duxbury has alleged facts that false claims were in fact filed by the medical providers he identified, which further supports a strong inference that such claims were also filed nationwide. We thus have allegations of 'factual . . . evidence to strengthen the inference of fraud beyond possibility.'" (quoting *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 733 (1st Cir. 2007))). The First Circuit standard borrows the same language from the Fifth Circuit

in *Grubbs*, and is necessarily consistent with the *Grubbs* standard applied by the Eighth Circuit here. (Pet. App. 6a-7a).

As shown through the cases above, Relators' argument that "the majority's opinion directly conflicts with the holdings from several circuits that do not require contents of the bills submitted to the government" is overblown. (Pet. 13). Again, the Eighth Circuit here did not require that the "contents of the bills" be pleaded to survive Rule 9(b). Relators erect a straw man. The latest case in this area, issued just over a month ago, shows the application of a consistent standard that does *not* require the "contents of the bills," but instead requires the description of a fraudulent scheme with sufficient particularity to infer the submission of false claims. *See Godecke ex rel. United States v. Kinetic Concepts, Inc.*, No. 18-55246, ___ F.3d ___, 2019 U.S. App. LEXIS 26939, 2019 WL 4230098, at *4 (9th Cir. Sept. 6, 2019) ("To state an FCA claim, a relator is not required to identify actual examples of submitted false claims; instead, it is sufficient to allege particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." (quotations omitted)). This standard is appropriate under the Federal Rules, which "do not require courts to credit a complaint's conclusory statements without reference to factual content" and that specifically require, under Rule 9(b), "particularity when pleading fraud." *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009).

The Eighth Circuit's opinion here followed that standard, which it had previously announced in *Thayer*. (*See* Pet. App. 6a (quoting *Thayer*)). Relators' argument that the majority retreated from *Thayer*—"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"—is misplaced. (Pet. 15 (quoting Pet. App. 8a-9a)). In making this argument, Relators have focused on the majority's comparison of this case to *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552 (8th Cir. 2006)—that is, the Eighth Circuit's initial case on the Rule 9(b) standards when the "complaint alleges a fraudulent scheme without representative examples." (Pet. App. 9a). However, in the very next paragraph, the majority recognizes that *Joshi* was clarified by *Thayer*: "Under *Thayer*, a relator can also satisfy Rule 9(b) by pleading 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.'" (Pet. App. 9a (quoting *Thayer*, 765 F.3d at 918)). Specifically emphasizing the *Thayer* standard in its opinion and analyzing the facts alleged in Relators' Amended Complaint under that standard, as the majority did here, is in no way a "retreat" from *Thayer*.

Here, the Eighth Circuit faithfully applied the *Thayer* standard, which does not meaningfully deviate from the standard of any other circuit. The majority and the dissent in this case simply disagreed with whether the facts alleged in Relators' Amended

Complaint met the applicable standard. The dissent did not rely on any purported circuit split for its differing opinion, and the disagreement between the majority and the dissent is an inherently factual inquiry into the allegations in the pleadings, which is inappropriate for Supreme Court review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Finally, any decision in Relators' favor on this issue would not salvage Relators' Amended Complaint anyway. Respondents alleged at the district court level, and on appeal, that Relators failed to properly plead scienter and materiality. (Brief in Resistance 31-36). The Eighth Circuit did not specifically rule on these arguments, and thus if this Court were to grant certiorari on this issue and rule in Relators' favor, Relators may not survive Rule 9(b) based on deficiencies in pleading scienter and materiality.

III. The Circuits Are Not Split Regarding The Standards For Pleading Protected Activity In Support Of An FCA Retaliation Claim, And Regardless The Issue Is Non-Dispositive

Relators contend that a "direct conflict" exists between the Eighth Circuit's decision here and decisions from the Sixth, Tenth, and D.C. Circuits regarding the standards for pleading "protected activity" in support of an FCA retaliation claim. (Pet. 18). The Eighth Circuit stated the standard in its opinion here:

> An employee's conduct must satisfy two conditions to constitute protected activity. First, it "must have been in furtherance of an FCA action" or an effort to stop one or more FCA violations. Second, the conduct "must be aimed at matters which are calculated, or reasonably could lead, to a viable FCA action," meaning the employee "in good faith believes, and . . . a reasonable employee in the same or similar circumstances might believe, that the employer is possibly committing fraud against the government."

(Pet. App. 17a (quoting *United States ex rel. Schuhardt v. Washington Univ.*, 390 F.3d 563, 567 (8th Cir. 2004))). This was also the standard followed by the district court (Pet. App. 38a), and at no point did the district court or the Eighth Circuit indicate there was a circuit split regarding this standard.

And there is no split. The Sixth Circuit decision raised by Relators requires that the employer be given "reason to believe that [the relator] was contemplating a *qui tam* action." *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 944 (6th Cir. 1997). The D.C. Circuit decision raised by Relators holds that "it is sufficient that a plaintiff be investigating matters that 'reasonably could lead' to a viable False Claims Act case. . . . To be covered by the False Claims Act, the plaintiff's investigation must concern 'false or fraudulent' claims." *United States ex rel. Yesudian v. Howard Univ., et al.*, 153 F.3d 731, 740 (D.C. Cir. 1998); *see id.* ("This view is in accord with that of other circuits."). Finally, the Tenth Circuit

decision raised by Relators holds "that a relator's actions still must convey a connection to the [FCA]." *Reed*, 923 F.3d at 767. The standards announced in these decisions are all consistent with the standard followed by the Eighth Circuit here. They all require the "protected activity" under the FCA's retaliation provision to have a connection to the FCA, as is compelled by the statute. 31 U.S.C. § 3730(h) (requiring "lawful acts" be done "in furtherance of an action under this section or other efforts to stop one or more violations of this subchapter.").

In addition, the decision in *Reed*—decided two months after the decision in this case—did not create a split or describe any split over the standard to be applied. In fact, *Reed* recognized that "[o]ur circuit has yet to begin the work of defining the boundaries of what constitutes protected efforts to stop a violation of the False Claims Act." *Id.* at 766-67. Despite confronting the issue for the first time, the Tenth Circuit did not identify any circuit split or compare any alleged conflicting decisions from other circuits. Instead, it used a standard that is consistent with the standard employed here—*i.e.*, that the allegations of protected activity demonstrate a connection to the FCA.

Finally, Relators' attempt to argue that *Chorches* is in "direct conflict" with the decision here is likewise wrong. (Pet. 19). In *Chorches*, the Second Circuit addressed whether the Relator adequately pleaded that he engaged in protected activity. 865 F.3d at 95. Despite surveying the circuit positions on Rule 9(b) pleading standards for FCA actions earlier in its opinion, *id.*

at 92, the Second Circuit did not identify any conflict among the circuits regarding the standards for determining whether a relator had sufficiently pleaded that he engaged in protected activity for an FCA retaliation claim, *id.* at 95-97. That, of course, is because there is no conflict. The Second Circuit held that the relator's "refusal to engage in the fraudulent scheme, which under the facts as pled was intended and reasonably could be expected to prevent the submission of a false claim to the government, can constitute protected activity under the statute." *Id.* at 96. The court recognized the relator's refusal "*was plainly in furtherance of an effort to stop an FCA violation*." *Id.* (emphasis added). That certainly would have sufficed under the Eighth Circuit's decision here, which instead concluded that:

> Like Christie and Trader, Strubbe's complaints to the CCMH Board and sheriff about 'financial wrongdoing' and her investigations into CCMH's finances are not protected activity. There is no indication they were made in furtherance of an FCA action or were an effort to stop an FCA violation. *She did not connect her concerns about CCMH's finances to fraud, the FCA or any unlawful activity*. (Pet. App. 20a (emphasis added)).

The Eighth Circuit also concluded—alternatively—that even assuming Relators had engaged in protected activity (however defined) that, "[Christie and Trader] did not sufficiently plead that CCMH knew they were engaging in protected activity" (Pet. App. 18a), and that "CCMH has provided a legitimate,

non-discriminatory reason" for removing Strubbe from part-time status (Pet. App. 22a). Thus, the result in this case would not change based on the alternative grounds for dismissal announced by the district court and the Eighth Circuit, making this case an inappropriate vehicle for review of the contours of "protected activity" under the FCA's retaliation provision.

The circuits are not split about the question of "protected activity," an issue that would not change the outcome in this case given the (unchallenged) other grounds to deny summary judgment to Strubbe that were identified by the Eighth Circuit.

CONCLUSION

For the foregoing reasons, Respondents Crawford County Memorial Hospital and Bill Bruce respectfully request that the Court deny the Petition for Writ of Certiorari.

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Respectfully submitted,

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