NO. 19-225

IN THE
SUPREME COURT OF THE UNITED STATES

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

Petitioners,

v.

CRAWFORD COUNTY MEMORIAL HOSPITAL; AND BILL BRUCE,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

I. Instead of addressing the merits of the circuit split, respondents instead pretend there is no split in the face of court opinions and legal scholars who comment on that very split.

Respondents make various related claims in their briefing that Petitioners are essentially being disingenuous in setting forth a purported fake circuit split on the issues presented, including claims that:

- Petitioners "manufactured" a split in the circuits, (Resp. Br. p. 9);
- Petitioners' "argument that a circuit split exists over the applicable Rule 9(b) standard is incorrect and misleading" (Resp. Br. p. 11);
- Petitioners' "assertion of a 'split' is based on a misreading of the circuit decisions" (Resp. Br. p. 11-12);
- "Most of the cases cited by Relators use the same language as the Eighth Circuit" (Resp. Br. p. 12;
- The differences in the circuits are "semantic differences" only (Resp. Br. p. 14);
- There "is no conflict, explicit or otherwise" between the circuits (Resp. Br. p. 15)

- Petitioners contention that there is split is "overblown" (Resp. Br. p. 16); and
- Judge Beam did not "rely on" or "identify" any purported circuit split or differing Rule 9(b) in his dissenting opinion (Resp. Br. p. 18).

Petitioners disagree with all of these assertions by Respondents. A "circuit split" was not manufactured by the Petitioners, but has been explicitly recognized by the Circuit courts. *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.,* 838 F.3d 750, 773 (6th Cir. 2016) ("Like us, the Fourth Circuit agrees with the more stringent side of the circuit split…"); *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 37–38 (1st Cir. 2017) ("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.); *Foglia v. Renal Ventures Mgmt., LLC,* 754 F.3d 153, 155 (3d Cir. 2014) ("the various Circuits disagree as to what a plaintiff, such as Foglia, must show at the pleading stage to satisfy the 'particularity' requirement of Rule 9(b) in the context of a claim under the FCA.")

A circuit split has been recognized by legal scholars and commentators. *See, e.g.,* Constantine Cannon Blog, 5/25/19, available at: https://constantinecannon.com/2019/05/24/intermountain-settles-dispute/, last accessed 10/31/19. ("The circuit split at issue concerns the correct

interpretation of Federal Rule of Civil Procedure 9(b)'s requirement that litigants alleging fraud do so with "particularity." … The correct interpretation of 9(b) has long divided the federal courts of appeal. The issue arises in various contexts, creating a muddied body of case law. The Eighth Circuit's recent decision in *United States ex rel. Strubbe v. Crawford County Memorial Hospital*, 915 F.3d 1158 (2019) highlights the ongoing dispute.") *See also*, Sheehan, Christian, *Eighth Circuit Breathes New Life into 9(b)*, 3/13/19, available at: https://www.arnoldporter.com/en/perspectives/blogs/fca-qui-notes/posts/2019/03/8th -cir-breathes-new-life-into-rule-9b, last accessed 10/31/19. ("As we have blogged about previously, circuits remain split on whether Rule 9(b) requires that a relator identify specific invoices submitted to the government, or whether the relator need only provide sufficiently reliable information to suggest that false claims were submitted. Although the Eighth Circuit still falls in the latter camp, *Strubbe* moves it a bit closer to the line, and is likely to increase calls for the Supreme Court finally to resolve the Rule 9(b) split.")

And Judge Beam did rely upon other circuits in forming his dissenting opinion in this case, despite Respondents' contentions to the contrary. Judge Beam specifically cited and relied upon First Circuit cases in his dissent, including *Bos. & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 866 (1st Cir. 1993), overruled on other grounds by *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 66-67 (1st Cir. 2004) and *United States ex rel. Nargol v. DePuy*

Orthopaedics, Inc., 865 F.3d 29, 37-41 (1st Cir. 2017). App. 24a-28a.

And so, the Respondents' contention that Petitioners have manufactured a circuit split and mis-cited the dissenting opinion in this case is wrong and should be disregarded. Similarly, Respondents' assertion that this case is merely a nuanced factual dispute is an argument that entirely misses the mark. Petitioners' argument is not that the facts as presented automatically result in False Claims Act liability. Petitioners instead argue that there is a circuit split that should be resolved regarding the quantum and type of facts that must exist, and be pled, to survive Rule 9(b) scrutiny. The Eighth Circuit requirement begs the question whether a Relator really must have access to the specific financial documentation underlying the allegation in order to survive a challenge to the pleadings. The Eighth Circuit said the Petitioners needed "access to the billing department" so they could plead "billing practices," as well as "most importantly" being able to plead "whether a claim was actually submitted for that particular patient." App. 9a-10a. It is this type of categorical requirement, not any fact specific inquiry, that feeds the already-present circuit split on the question of adequate pleadings in False Claims Act cases that this Court should address on certiorari.

II. Respondents' argument that there is not a circuit split on the question of what conduct constitutes protected activity ignores major distinctions between the standards the courts apply to alleged protected activity.

The practical effect of the Eighth Circuit's ruling is that conduct intended by employees to inhibit or stop conduct they believe constitutes fraud is not protected from retaliation unless the conduct meets extremely restrictive requirements. Under the Eighth Circuit's analysis, the path for protecting FCA relators from retaliation is so narrow as to make it less likely that people will feel it is safe to speak out. The circuit held that internal complaints regarding treatments Relators knew to be both unnecessary and for the sole purpose of bilking Medicare are not protected from retaliation unless Relators:

> [P]lead[s] that [Respondent] knew they were engaging in protected activity. They must show [Respondent] knew they were "either taking action in furtherance of a private qui tam action…[,] assisting in an FCA action brought by the government," or taking some other action to stop an FCA violation.

App. 17a.

The circuit found Relators' claim on this allegation to be wanting because it "[does] not allege that [Relators] told [Respondent] or the State that [Respondent's] behavior was fraudulent of potentially subjected it to FCA liability." App. 18a.

Regarding the final retaliation allegation, the circuit observed that one of the Relator's complaints to Respondent's board of directors and the county sheriff about financial wrongdoing along with her own investigations into Respondent's finances do not constitute protected activity. Slip op. 20a. The circuit concluded that such conduct did not meet the definition of protected activity because Relator had not made indication that her actions "[were] made in furtherance of an FCA action or were an effort to stop an FCA violation. She did not connect her concerns about [Respondent's] finances to fraud, the FCA, or any unlawful activity." App 20a.

Respondents argue there is no circuit split distinguishing cases cited by Relators in support of its assertion of a split on whether they sufficiently pled their retaliation claims. The Eighth Circuit was clear in its ruling that the pleading must state that the employer knew the employee was engaging in protected activity. The circuit interpreted that requirement to mean that the Respondent knew Relator was acting in furtherance of a qui tam action, assisting in an FCA action brought by the government, or some other action to stop an FCA violation.

The Eighth Circuit's interpretation of what is required to be pled to survive a motion to dismiss is more stringent than the pleading requirements embraced by other circuits. In support of its argument, Respondents argue that a comment by the DC Circuit that its holding regarding what constitutes protected activity was in accord with the views of other circuits does not support the

argument of a lack of circuit split. To the contrary, the holding in *United States ex. rel. Yesudian v. Howard Univ., et al.,* 153 F.3d 731, 740 (DC Cir. 1998) supports the reality of a circuit split for two reasons.

The first is that the DC Circuit's recognition that its conclusion regarding what constitutes protected activity is in accord with the views of other circuits does not prove that the holding was in accord with the views of all the circuits, most of the circuits, or even the Eighth Circuit. The DC Circuit does not cite the Eighth Circuit as one of the circuits who's views were in accord with that holding. *Id.*

The second is that the holding in *Yesudian* was not in accordance with the views of the Eighth Circuit--notably in this case. In *Yesudian* court held, "it is sufficient that a plaintiff be investigating matters that "reasonably could lead" to a viable False Claims Act case." *Id.* Such a conclusion directly conflicts with the holding in this case, namely that Respondent had to know that Relator was engaging in activity protected by the FCA. Applying the holding in *Yesudian* to the facts in this case would have led to a different outcome—a ruling denying motions to dismiss and summary judgment.

Respondents attempt to distinguish the Tenth Circuit opinion in *United States ex. rel. Reed v. KeyPoint Government Solutions,* 923 F.3d 729 (10th Cir. 2019) arguing that the court held "that a relator's actions must still convey a connection to the [FCA]." Brief in Opposition p. 20. *Reed* stands for that proposition only in the most generic form

but instead recognizes how the 2009 amendments to the FCA broadened the definition of what activities are protected from retaliation under the FCA. The court recognized that as amended, the FCA protects "[e]mployees who take "lawful" actions "in furtherance of *other efforts to stop 1 or more violations*" of the False Claims Act." *Reed*, 923 F.3d at 765.

The court also recognized that the universe of conduct protected by the FCA had expanded substantially in 2009 and then again in 2010.

In this expanded universe, whistleblowers who lawfully try to stop one or more violations of the Act are protected, without regard to whether their conduct advances a private or government lawsuit under the Act.

Congress did amend the whistleblower protections again in 2010. As a consequence, the now-effective protections expressly apply to an employee's "lawful" acts "in furtherance of" *either* "an action" under the Act "or other efforts to stop 1 or more violations of" the Act. *Id.* Relators here were at the very least engaged in lawful acts or efforts intended to stop violations of the FCA. As such, the standard applied to the facts and which resulted in the holding in this case demonstrate a split in the circuits related to the pleading (and proof) requirements sufficient to survive motions to dismiss and for summary judgment.

Respondents' final effort to discourage a finding of a circuit split, is based in part on the argument that Relators' cases cited in support of the circuit split argument do not cite a split among the

circuits. See, Respondents' Brief in Opposition at 19, 20, and 21. Respondent does not address the fact that under the *Chorches* analysis Relators would have survived a motion urging dismissal on the pleadings. In *Chorches,* the Relator alleged a violation of the act based on retaliation for the simple act of refusing to amend a patient care report so that it could be submitted to Medicare. *United States ex. rel. Chorches for Bankruptcy Estate of Fabula,* 865, F.3d 71, 76-79 (Second Cir. 2017). The allegations at the basis of the *Chorches* case, allegations which the Second Circuit found:

> Based on the plain language of the FCA's anti-retaliation provision, we hold that Fabula'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.
>
> As alleged, Fabula's "refus[al] to falsify the [Patient Care Report] as demanded by" his AMR supervisor, [Second Amended Complaint] ¶ 135, was plainly in furtherance of an effort to stop an FCA violation."

Id. 96. Given that the conduct alleged by Relators in this case is similar in context and purpose to the conduct in *Chorches*, the only explanation that the Relators in this case lose their right to pursue their claims of retaliation while the relator in *Chorches* survives is that the circuits are applying different standards.

The Eighth Circuit is on the wrong side of this split, misapplying the plain language and wording of the statute and requiring a pleading and proof standard greater than required by the text of the FCA. For this reason, certiorari should be granted.

CONCLUSION

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

RESPECTFULLY SUBMITTED,

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