NO. ___

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
MICHAEL RAY PERRY,

Petitioner,

v.

HOOKER CREEK ASPHALT & PAVING, LLC, OREGON MAINLINE PAVING, LLC, J.C. COMPTON CONTRACTOR, INC., HAP TAYLOR & SONS, INC., KNIFE RIVER CORPORATION – NORTHWEST, AND CENTRAL OREGON REDI-MIX, LLC,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a *qui tam* action brought under the False Claims Act, 31 U.S.C. §3729 *et seq.*, must the relator be an insider with personal knowledge of the contractor's claim submissions to meet gateway Rule 9(b) particularity pleading requirements?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, and *Qui Tam* Plaintiff-Appellant below, is Michael Ray Perry ("Perry" or "relator").

Respondents, and Defendants-Appellees below, are:

Hooker Creek Asphalt & Paving, LLC,

Oregon Mainline Paving, LLC,

J.C. Compton Contractor, Inc.,

Hap Taylor & Sons, Inc.,

Knife River Corporation – Northwest, and

Central Oregon Redi-Mix, LLC.

Wildish Standard Paving Co. and Hamilton Construction Co. were defendants in the district court and were appellees in Perry's earlier appeal to the Ninth Circuit. Neither is an appellee in the most recent Ninth Circuit proceedings or a respondent in this Court.

RELATED CASES

United States of America ex rel. Perry v. Hooker Creek Asphalt Co. No. 6:08-cv-06307-HO, U.S. District Court for the District of Oregon. Judgment entered March 16, 2012.

United States of America ex rel. Perry v. Hooker Creek Asphalt Co., No. 12-35278, U.S. Court of Appeals for the Ninth Circuit. Judgment entered March 27, 2014.

United States of America ex rel. Perry v. Hooker Creek Asphalt Co. No. 6:08-cv-06307-MC, U.S. District Court for the District of Oregon. Judgment entered May 26, 2017.

United States of America ex rel. Perry v. Hooker Creek Asphalt Co., No. 17-35524, U.S. Court of Appeals for the Ninth Circuit. Judgment entered April 8, 2019, and a timely petition for panel rehearing and rehearing *en banc* was denied on May 20, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Michael Ray Perry respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's unreported opinion is available at 765 Fed. Appx. 318 and is reproduced at App. 1a-3a. The district court's unreported opinion dismissing the third amended complaint is available at 2017 U.S. Dist. LEXIS 81175 and is reproduced at App. 4a-14a. The Ninth Circuit's unreported opinion in Perry's earlier appeal is available at 565 Fed. Appx. 669 and is reproduced at App. 15a-21a. The district court's unreported opinion dismissing the second amended complaint is available at 2012 U.S. Dist. LEXIS 35898 and is reproduced at App. 26a-36a.

JURISDICTION

Judgment of the court of appeals was entered on April 8, 2019. A timely petition for rehearing and for rehearing *en banc* was denied on May 20, 2019, reproduced at App. 37a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE AND RULE INVOLVED

False Claims Act

31 U.S.C. § 3729(a)(1)

> [A]ny person who -
>
> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; [or]
>
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; . . .
>
> is liable to the United States Government for a civil penalty . . . plus 3 times the amount of damages which the Government sustains because of the act of that person.

Rule 9(b) of the Federal Rules of Civil Procedure

> 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.

INTRODUCTION

The False Claims Act, 31 U.S.C. §§3729 *et seq*., "was enacted during the Civil War with the purpose of forfending widespread fraud by government contractors who were submitting inflated invoices and shipping faulty goods to the government." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265-66 (9th Cir. 1996). The Act was amended in 1986 to undo overly restrictive judicial interpretations, and to make it "the Government's primary litigative tool for combating fraud" "in modern times." S. Rep. No. 99-345, at 2 (1986), 1986 U.S.C.C.A.N. 5266.

Qui tam provisions authorize private persons – "relators" – to stand in the shoes of the government and enforce the statute's proscriptions. If a relator brings a *qui tam* action, the complaint is initially filed under seal and served upon the government, together with "substantially all material evidence and information the [relator] possesses." 31 U.S.C. §3730(b)(2). The government receives the majority of any resulting settlement or judgment, but the relator is entitled to a share of the proceeds for prosecuting the action. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769-770 (2000); §3730(d)(1)-(2). Lower courts have recognized that the *qui tam* provision is "a powerful tool that augments the government's limited enforcement resources by creating a strong financial incentive for private citizens to guard against efforts to defraud the public fisc." *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 546 (D.C. Cir. 2002).

In light of the importance of the False Claims Act – and the need for uniformity in its enforcement – this Court has reviewed and resolved several conflicts among the lower courts regarding its application, often in a unanimous voice. It has as yet, however, declined to grant a writ of certiorari in the one area under the Act where review is most needed: application of Rule 9(b) pleading standards. In particular, lower courts have splintered over the question whether the relator must have personal knowledge of – and, at the initial pleading stage, make particular allegations concerning – the specific claim submissions at issue in the case.

As demonstrated by the steady and continuing flow of petitions for writs of certiorari on the issue, brought by *qui tam* plaintiffs and defendants, the conflicting rulings between and within the lower circuits will not resolve without guidance from this Court. In response to this Court's requests for its views, the Solicitor General of the United States has twice acknowledged the circuit courts have reached "inconsistent conclusions about the precise manner in which a *qui tam* relator may satisfy the requirements of Rule 9(b)." Brief for the United States as *Amicus Curiae* at 10, *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, No. 12-1249 (U.S. Feb. 2014) (hereinafter "U.S. *Nathan* Br."); *see* Brief for the United States as *Amicus Curiae* at 9, *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury*, No. 09-654 (U.S. May 2010) (hereinafter "U.S. *Duxbury* Br."). The United States recommended denial of the petitions in those two cases because neither was a suitable vehicle for review. It agreed, however, that the

issue was of national significance, and that the Court's review likely would be "warranted in an appropriate case" if the conflict persists. U.S. *Nathan* Br., at 10; U.S. *Duxbury* Br., at 9.

According to the Solicitor General, the overall body of appellate precedent creates "substantial uncertainty" on whether, to meet Rule 9(b) requirements, a relator must plead specific requests for payment with particularity. U.S. *Duxbury* Br., at 16.

> That uncertainty hinders the ability of *qui tam* relators to perform the role that Congress intended them to play in the detection and remediation of fraud against the United States. *Qui tam* complaints under the FCA are often filed by the defendants' employees and former employees. Such relators may know that their employers are receiving funds from the United States, and they may be privy to detailed information indicating that the employers' actual practices differ markedly from their representations to the federal government. Under the reading of Rule 9(b) that petitioner advocates, however, those relators would be disabled from filing suit under the FCA unless they were also familiar with the minutiae of their employers' billing practices.
>
> Subjecting *qui tam* relators to that requirement is especially unwarranted

> because it attaches elevated significance to the relator's awareness of facts that in most instances are already known to the government. The government rarely if ever needs a relator's assistance to identify claims for payment that have been submitted to the United States. Rather, relators who make valuable contributions to the government's enforcement efforts typically do so by bringing to light information, outside the four corners of the claims for payment, that shows those claims to be false. Requiring *qui tam* complaints to identify specific false claims would not meaningfully assist the government's enforcement efforts. To the contrary, the likely effect of such a requirement would be to discourage the filing of *qui tam* suits by relators who would otherwise have both the means and the incentive to expose acts of fraud against the United States. [*Id*., at 16-17.]

Perry's 10-year pleading battle in the lower courts – involving multiple rulings under Rule 9(b) and two appeals to the Ninth Circuit – shows that the conflict persists among and within the circuits. His case perfectly frames the issue, presenting the best vehicle yet for the Court to finally address and resolve the question. Perry was a longtime employee in quality assurance for Oregon Department of Transportation (ODOT), where he witnessed systemic misconduct on

quality control by highway contractors building federally-funded roads and bridges in Oregon. He documented persistent failure to conduct appropriate tests, knowing omission of inadequate results, doctoring of test results, failure to rework sections of materials known to be failing, use of substandard and failing materials to complete projects, contract change orders obtained on false information or to cover up failing materials, and deliberate failure to use properly calibrated equipment. App. 56a-57a, ¶43. Such misconduct involving federal funds fits squarely within the ambit of the False Claims Act, not only because the contractors created "false records" material to the claim for payment, but also because customary contractor invoices were "half-truths" which "render the defendant's representations misleading with respect to the goods or services provided." *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1999-2000 (2016).

Despite personal knowledge, documentation and detailed allegations regarding the contractors' false and misleading conduct, the district court below dismissed Perry's complaint at the pleading stage because Perry was not an "insider" with personal knowledge of defendants' claim submissions. The court held "'insider' knowledge of the actual claims is critical to any False Claims Act claim" and it found: "Perry is not an 'insider' within the meaning of the Act." App. 9a-10a. See also ER 13a ("It is clear that Perry is unable to properly plead a False Claims Act claim due to his status as an 'outsider' with no access to the claims at issue").

The Ninth Circuit affirmed, agreeing with the district court's dismissal without discussion, concluding that Perry therefore failed to meet Rule 9(b) standards. App. 3a. It reached this disposition despite the opinion of a panelist in the prior appeal that Perry "provides several specific examples of incidents that, standing alone, are sufficiently detailed to satisfy the requirements of Rules 8(a) and 9(b)." *Id*., 24a. Although the prior panel had granted Perry's petition for rehearing – immediately after this Court denied the petition in *Nathan* – and it had granted leave for Perry to "narrow" his claims, on remand the district court dismissed Perry's amended complaint anyway, citing the dissenting panelist in Perry's earlier appeal.

The conflicting and confusing decisions by the lower courts in Perry's case demonstrate the need for a definitive ruling from this Court on whether Rule 9(b) bars a relator from bringing a *qui tam* action when he or she lacks personal knowledge of defendants' claim submissions. Perry's petition is focused on this single question, one that has spawned an enormous body of conflicting lower court rulings. In Perry's case, the lower court found Perry's status as an "outsider" without direct knowledge of the contractors' invoices dispositive of his claims. But an employee with access to billing information would not learn of the violations in this case because they happened out in the field. Unlike the petitions in *Duxbury*, *Nathan* and several other cases where this Court's review of the circuit fracture was sought, Perry's petition for a writ of certiorari presents the best vehicle yet for much needed guidance from this Court.

STATEMENT

1. For nearly 25 years, Perry was employed by ODOT in Region 4 (Bend). Starting in 1999, Perry was Assistant Quality Assurance Coordinator, responsible for significant aspects of monitoring compliance with specifications and contract requirements. ODOT is required by 23 C.F.R. §637.207 to institute and maintain a quality assurance program, which conducts sampling and testing of construction material for acceptance and verification. App. 46a-47a, ¶¶18 & 19. ODOT has limited resources in relation to the contract work. Its monitoring is sporadic and does not detect all non-compliance. Nor does ODOT always take effective remedial steps when non-compliance is found. Notwithstanding ODOT's efforts, private contractors are responsible for their own quality control, including frequent duties for testing and documentation. Limitations in the state's quality assurance enforcement do not relieve contractors of their quality control obligations. *Id*., 51a-53a, ¶¶29-33.

In the operative complaint, App. 38a-123a, Perry makes particular allegations of the "who, what, where, when and how" of the contractors' material falsities and fraudulent conduct. Perry satisfies the "who" requirement by identifying the entity named as a defendant to each claim. Although not required of relators under Rule 9(b), Perry also pleads the names of involved individual employees within the defendants' organizations and several contracting officers, when known to him.

Perry satisfies the "what" requirement by identifying particular circumstances of alleged non-compliant construction materials, precise test results which defendants' falsified, and specific efforts to cover up its conduct and avoid contract adjustments on 21 federally-funded highway construction projects. Perry names the exact specifications that were not met, and he identifies the precise verification tests which the defendants' falsified. For example, on US 26, Laughlin Road Project (App. 75a-77a), Hooker Creek paid a substantial bribe to Bruce Dunn, an ODOT inspector working on the project manager's staff, in the form of a free home driveway consisting of high quality materials. Hooker Creek was supposed to use those materials on the project, but instead it used substandard materials from a commercial source that were not tested for specification compliance. On US 97, China Hat Project (App. 81a-86a), Hooker Creek knowingly used a malfunctioning gauge to falsely report passing results; it used fake numbers to report compaction; and it made false statements of compliance with respect to specific verifications. Perry identifies and describes specific failed tests and other false statements of compliance.

On OR 38, Silver Creek Bridge Project (App. 106a-107a), Knife River knew materials provided had failures in earthwork and concrete, but it purposefully failed to notify ODOT when the project began, to avoid density test verification. On Grandview Project (App. 98a-99a), Knife River submitted invoices for $1.17 million, even though it failed to achieve compaction. Quoting specifications, Perry details a scheme to use

rollers that were too small, and he explains how the use of smaller rollers achieved compaction with less weight, compacting too easily. On US 97 Riley Bridge Project (App. 99a-100a), Knife River failed to conduct more than one concrete verification test, and the one test showed failures. On Or 16: Glacier-Highland Project (App. 100a-102a), Knife River submitted invoices for over $10 million, knowing about failing materials, and claiming a performance bonus. Through its technician, defendant fraudulently used a moisture gauge, mis-calibrated to allow a bigger bonus, even though an original test showed failure.

On Redmond Reroute Project (App.87a-94a), Oregon Mainline created false and misleading reports that it had conducted the required quality control and that materials provided had met specification; it falsely stated the Nuclear Moisture Density Gauge was not accurate in use on lightweight aggregate; and it produced approximately 70 quality control tests that falsely reported passing materials. On Biggs-Wasco & Grass Valley project (App. 94a-95a), J.C. Compton performed only 24 quality control tests, despite knowing 53 such tests were required; and it knowingly violated HMAC Production specifications, using a false record of passing results when three of four verifications failed. On Cotton Wood project (App. 96a-98a, Compton knowingly placed damaged mix on the project. After aggregate samples failed, it cherry-picked samples it knew would pass product compliance tests, and submitted false quality control documents. This contractor claimed and received a bonus, knowing that it had provided a substandard product.

Perry satisfies the "where" and "when" requirements on each of the 21 projects. He lists the contract names (which identify locations), the dates when each contract was awarded (and thus work began), the time frames when they were constructed with non-compliant materials, and the dates when defendants submitted supporting documentation.

Perry satisfies the "how" by setting forth specific facts and explanations for why the misconduct on each project resulted in requests for payment when the defendant knew material specifications were not met. Perry also identifies each scheme by each defendant to falsify verification test results, cherry-pick testing locations, pave over failed materials to avoid tests and lie about the calibration and use of equipment.

Against two contractor groups (J.C. Compton/Oregon Mainline and Knife River), Perry pleads additional facts showing a consistent course of fraudulent conduct outside ODOT Region 4 where Perry worked. App. 114a-117a, ¶¶156-161. These allegations included information on (a) frequency and consistency in substandard materials and fraudulent conduct witnessed by relator within Region 4; (b) statewide consistency in ODOT oversight failures, not restricted to Region 4; (c) statewide consistency in the processes for claiming funds for non-compliant work on road contracts; (d) statewide consistency in premature failure of roads and bridges, premature wear, excessive safety concerns and high repair and replacement costs; and (e) corporate cultures at these contractors that are likely to produce the same sorts of violations in other regions. *Id*., ¶161(a)-(e).

Perry did not work in billing departments, but he nevertheless pleads significant detail on defendants' claims for payment. In ¶49 (App. 59a-61a), Perry lists each contract or project, the award date, the total amounts claimed, and the date when work was completed and documentation submitted. In ¶50 (App. 61a-62a), he alleges generally the fact of defendants' claims submissions, including "claims, representations, certifications and reports regarding the quality and quantity of the work performed and materials provided." In ¶51 (App. 62a), Perry alleges that each bill or request for payment to ODOT constituted "a 'claim,' under former §3729(b)" which was amended in 1986 to include invoices to grantees, in part to overturn the restrictive ruling in *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981). *See* S. Rep. No. 99-345, at 22, 1986 U.S.C.C.A.N., 5266, 5287.[1]

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[1]*Azzarelli* involved a federal highway contractor who argued it could not be liable for submitting false claims to the state. The Seventh Circuit held no "claims" were made upon the federal government. Congress amended the Act to change that very holding. Legislative history makes clear a false claim could be submitted to and paid by the state, so long as there is partial federal funding. *Id*., at 5286-87. Based on this history, courts uniformly hold false claims may be made for federal funds from parties other than the federal government. *See United States ex rel. Yesudian v. Howard University*, 153 F.3d 731 (D.C. Cir. 1998); *United States ex rel. Hunt v. Merck-Medco Managed Care*, 336 F. Supp. 2d 430, 443 (E.D. Pa 2004); *United States v. Photogrammetric Data Servs.*, 103 F. Supp. 2d 875 880 (E.D. Va 2000); *United States v. American Elevator Co.,* 1989 U.S. Dist. LEXIS 1391 (E.D. Pa 1989); *United States v. Macomb Contracting Corp*., 1988 U.S. Dist. LEXIS 17608 at *113. (M.D. Tenn. 1988).

2. a. When Perry's action was filed initially, it was assigned to District Court Judge Michael Hogan. At that time, the federal courts stood at a crossroads in Rule 9(b) jurisprudence. In particular, courts were divided over whether relators must be "insiders" with personal knowledge of false billings for federal funds. Judge Hogan sided with the restrictive view, which would limit the pool of would-be relators to those with knowledge of the actual claims for payment submitted to the government.

In his second amended complaint, Perry alleged a specific scheme and pattern of systemic conduct by defendants across Oregon, pleading 25 paragraphs of "representative examples." Judge Hogan dismissed this complaint without leave to amend, holding Rule 9(b) required relators to allege "the 'who, what, when, where, and how' to support each element of the alleged False Claims Act violations with regard to each false claim supposedly made by each defendant." App. 33a. The court below rejected Perry's attempt to satisfy Rule 9(b) in a case of systemic fraud through "representative examples," holding that is appropriate only in cases of "cookie-cutter" fraud. App. 31a. In so doing, the court found Perry's allegations "lacked the necessary detail" because Perry (1) did not have access to defendants' billing records so could not identify specific bills or invoices; (2) could not tie alleged misconduct to individuals within the companies; and (3) purportedly identified only the general area and time periods for the contract work rather than the "when and where" of fraud. App. 34a-35a.

2. b. Perry appealed Judge Hogan's decision to the Ninth Circuit. On October 24, 2013, a divided panel initially affirmed judgment. App. 22a-25a. Together, the two short opinions exemplify the divide among circuits and between jurists over Rule 9(b) in False Claims Act cases. Without addressing any facts or circumstances alleged, Judge Callahan – writing for the majority – stated Perry "fails to allege with particularity the 'who, what, when and how' of any alleged incident of fraud." App. 23a.

Judge Fletcher wrote separately. He agreed with Judge Hogan that representative examples were appropriate only in cases of "cookie-cutter" fraud, but he found Perry had provided "several specific examples of incidents that, standing alone, are sufficiently detailed to satisfy the requirements of Rules 8(a) and 9(b)." In his opinion, these "specific instances would state plausible claims under the False Claims Act if brought individually" rather than as representative examples of systemic fraud. App. ER 24a.

Following the initial panel decision, Perry petitioned for rehearing. He argued the majority had overlooked particular allegations of representative examples, and he requested that he be permitted to go forward on them as individual claims. He cited and discussed Rule 9(b) rulings from other circuits with which the majority disposition conflicted.

> *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 30 (1st Cir. 2009) (relator need not state details of each false claim in his complaint), *cert denied* 561 U.S. 1005

(2010). In *Duxbury*, it was sufficient to identify, "as to each of the eight medical providers (the who), the illegal kickbacks (the what), the rough time periods and locations (the where and when), and the filing of the false claims themselves." *Id*.

United States ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 556-557 (8th Cir. 2006) (relators need not allege each and every fact for each false claim); *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818 (8th Cir. 2009) (same). In these cases, the Eighth Circuit permitted use of representative examples to plead systemic False Claims Act violations over multiple years or multiple customers.

United States ex rel. Snapp, Inc. v. Ford Motor Co., 532 F.3d 496 (6th Cir. 2008) (fraud which is "complex and far-reaching" may be pled through "characteristic examples" that are "illustrative" of the class of all claims); *United States ex rel. Bledsoe v. Community Health Systems*, 501 F.3d 493 (6th Cir. 2007) (same). The "who" of Rule 9(b) is satisfied by identifying the corporation; names of individual employees are not required. *See Bledsoe*, 501 F.3d at 506 ("[A]bsent from the . . . requirements is the identity of the employee").

United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009) ("time, place, contents, and identity" standard is not a "straitjacket for Rule 9(b)," which requires

> "context specific and flexible" application "to achieve the remedial purpose of the ... Act." False Claim Act). In *Grubbs*, the Fifth Circuit held a relator need not allege the details of any actually submitted false claim if particular details of a scheme are paired with reliable indicia that lead to a strong inference that claims were actually submitted.
>
> *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009) (relator need not be an insider at the defendant's billing department or specify the details of an actual claim to satisfy Rule 9(b)). In *Lusby*, the Seventh Circuit held it is not "essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit" and "a pleading [need not] exclude all possibility of honesty in order to give the particulars of fraud. 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." Id. at 854-855.

While Perry's petition was pending, the petition for a writ of certiorari was filed in *Nathan*, where this Court had invited the Solicitor General to express the United States' views. The *amicus* brief in *Nathan* cited many of the same authorities discussed in Perry's petition, including *Grubbs*, *Lusby*, and *Duxbury*. Perry pointed out where the government argued rigid Rule 9(b) standards would "hinder the ability of *qui tam* relators to perform the role that Congress intended them to play in the detection and remediation of fraud

against the United States." U.S. Nathan Br., at 15. In the government's view, a relator such as Perry need not know the "minutiae" of defendants' billings; for to attach "dispositive significance" to the relator's awareness of such details – often already known to the government – would discourage persons with the "means and incentives" to expose the fraud. *Id*., at 16.

On March 27, 2014, with two panelists voting in favor of rehearing, the Ninth Circuit granted Perry's petition, withdrew the disposition and reversed the judgment. App. 15a-18a. Writing for the majority, Judge Fletcher found Perry had described a "wide variety of alleged violations" rather than a "consistent course of fraudulent conduct," and thus could not use representative examples to satisfy Rule 9(b). But the panel majority held that Perry's complaint contains specific examples that, if brought as individual claims, could potentially provide sufficient particularity to satisfy Rule 9(b). The panel granted Perry's petition and voted to "remand to allow him an opportunity to amend to narrow his complaint." App. 18a.

Judge Callahan wrote separately in dissent. Believing relators must have "access to information on billing" in order to meet Rule 9(b) requirements, she would have held Perry's amendment to be futile. App. 18a-21a. As the district court had, Judge Callahan focused exclusively on Perry's lack of access to claim submissions, without addressing specific facts alleged regarding the contractors' misconduct in the field.

2. c. Upon remand, the case was reassigned to Judge Michael McShane, and Perry filed his third

amended complaint against Respondents. Despite Perry's detailed individual claims, the district court dismissed again, quoting at length to the previous opinions of Judge Hogan in the district court and the dissenting opinion of Judge Callahan on the prior appeal. App. 26a-36a. The court below did not address the granting of Perry's rehearing petition, the brief of the United States in *Nathan* or the conflict among the circuits created by the courts' rulings.

Dismissing Perry's complaint under Rule 9(b), the district court imposed a non-textual requirement that relators be "insiders" with personal knowledge of claim submissions. It held "'insider' knowledge of the actual claims is critical to any False Claims Act claim" and he found: "Perry is not an 'insider' within the meaning of the Act." App. 9a-10a. *See also id*., at 13a ("It is clear that Perry is unable to properly plead a False Claims Act claim due to his status as an 'outsider' with no access to the claims at issue"); 14a, n.2 ("Perry's lack of direct knowledge regarding the claims is fatal"). The court below referred generally to the False Claims Act, but did not cite any statutory provision employing the term "insider."

Dismissing Perry's complaint, the court below accepted the proposition that lies at the heart of the judicial schism: the belief that allegations of claim submissions made on information and belief present a problem for one "bringing a claim under the False Claims Act." App. 7a. Judge McShane attributed this to the Ninth Circuit decision in *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993 (9th Cir. 2010), but he did not address contrary rulings in *United States ex rel.*

Lee v. Beecham Clinical Labs., 245 F.3d 1048 (9th Cir. 2001) and *United States ex rel. Tamanaha v. Furukawa Am.*, Inc., 445 Fed. App'x 992, 994 (9th cir. 2011). The district court also did not yet have the benefit of the Ninth Circuit's unpublished decision in *United States ex rel. Vatan v. QTC Med. Servs., Inc.*, 721 F. App'x 662, 663-64 (9th Cir. 2018) ("The district court's requirement to the contrary would vitiate the False Claims Act, by excluding many whistle-blowers who – as here – allege insider knowledge of wrongdoing that few others would be positioned to reveal and solely lack access to the corporate documents outlining the precise nature of the company's obligations").

2. d. Perry appealed again, asking the Ninth Circuit to consider a published opinion on the key question that had so conflicted rulings between the circuits and within the Ninth: the district court's dismissal of Perry's detailed *qui tam* because – in its view – "Perry is not an insider within the meaning of the Act." The Second, Third, Fifth, Seventh, Tenth and D.C. Circuits – as well as some of the vacillating opinions within the Ninth Circuit – had rejected the idea that relators must have personal knowledge of defendants' billings invoices and plead facts of particular claim submissions. Despite substantial briefing and argument – and the draw of Judge Fletcher from the first appeal – the panel affirmed under Rule 9(b) without a discussion of any of Perry's allegations, in an unpublished disposition. App. 3a. Perry's petition for panel rehearing and for rehearing *en banc* was denied, App. 37a, and this petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve an issue that continues to fracture the lower courts: proper application of Rule 9(b) standards in False Claims Act cases. In this case, after 10 years of motion briefing and appeals, the lower court held that relator could not satisfy gateway pleading standards because Perry did not work as an insider at the contractors' billing departments. This non-textual requirement that relator's be "insiders" able to plead particular facts of defendants' claim submissions lies at the core of recurring petitions for writs of certiorari in this Court. It has not only divided the circuit courts of appeals, it has sewn much unpredictability in the district courts and confusion among *qui tam* litigants.

The question of proper pleading standards is raised in practically every False Claims Act case, and often is outcome dispositive. Fulfillment of the lofty purposes of the Act turns on the balance of the issue's resolution. The government relies on relators to bring forward information regarding fraudulent schemes on federally-funded grants and programs. A restrictive application of Rule 9(b) standards in this case resulted in dismissal of Perry's claims – despite revised particularized pleading of the defendants' misconduct in quality control – because he was not familiar with the "minutiae" of the contractors' invoices. This rule – employed to various degrees in conflicting ways between the circuits – only discourages relators like Perry from coming forward, let alone undertaking the substantial effort required to litigate *qui tam* actions and recover damages to the United States.

I. The Decisions of the Lower Courts in Perry's Case Highlight the Fractured Application of Rule 9(b) in the False Claims Act Arena

During the decade that Perry has litigated the application of Rule 9(b) to his *qui tam* claims, there has been a steady flow of petitions for writs of certiorari, by relators and defendants, seeking review of the issue. In *Duxbury*, No. 09-694, the defendant – Ortho Biotech Products – sought review of the question whether, to satisfy Rule 9(b), relators must plead particular facts associated with the claims alleged to be false or fraudulent. In that case, the relator did not have access to the documentation of medical provider claims, but in the complaint had supplied approximate dates and amounts of claims by eight medical providers. Citing the Fifth Circuit in *Grubbs*, the First Circuit found these allegations to be sufficient under a "more flexible standard." *Duxbury,* 579 F.3d at 30.

As pointed out in the government's invited brief, the First Circuit's ruling conflicted with decisions in other courts of appeals stating that "particular *qui tam* complaints should be dismissed under Rule 9(b) because relators had failed to identify specific false claims for payment submitted to the government." U.S. *Duxbury Br.*, at 15-16 (citing *Bledsoe*, 501 F.3d at 504 (6th Cir. 2007) ("We hold that pleading an actual false claim with particularity is an indispensable element of a complaint that alleges a FCA violation in compliance with Rule 9(b)."); *United States ex rel. Sikkenga v. Regence BlueCross BlueShield*, 472 F.3d 702, 727-728 (10th Cir. 2006) (affirming dismissal of cause of action

that failed "to identify any specific [false] claim"); *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1358-1360 (11th Cir. 2006) (same); *Joshi*, 441 F.3d 552, 560 (8th Cir.) (requiring the relator to plead "some representative examples" of false claims), *cert. denied*, 549 U.S. 881 (2006)).

The United States also pointed out that the Eleventh Circuit had not consistently adhered to a single vision of Rule 9(b) in this context, contrasting decisions in that circuit that reached conflicting conclusions. U.S. *Duxbury* Br., at 16 & n.5 (citing *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1326 (11th Cir. 2009) (holding that a relator must plead a specific false claim to avoid dismissal of his complaint), *cert denied* 561 U.S. 1006 (2010); *United States ex rel. Walker v. R&F Props. of Lake County, Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005) (permitting a relator to allege detailed information about a fraudulent scheme supporting an inference that the defendant submitted false claims), *cert. denied*, 549 U.S. 1027 (2006), and *United States ex rel. Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) (stating that a *qui tam* complaint must contain "some indicia of reliability . . . to support the allegation of an actual false claim for payment") (emphasis omitted), *cert. denied*, 537 U.S. 1105 (2003).

As quoted *supra* at 5-6, the Solicitor General agreed that requiring relators to have direct knowledge of claim submissions – typically already known to the government – would discourage relators from coming forward and undermine the government's efforts to

expose fraud. But jurisdictional issues in that *Duxbury* meant it was not an appropriate vehicle for review.

In *Nathan*, No. 12-1349, the relator sought review of the Fourth Circuit's opinion that relators must "allege with particularity that specific false claims actually were presented to the government for payment." He claimed the decision deepened an entrenched circuit conflict, with the Sixth, Eighth and Eleventh Circuits joining it in the more stringent approach. In its invited brief, the government acknowledged that "lower courts have reached conflicting results about the application of Rule 9(b) in the [False Claims Act] context." U.S. *Nathan* Br., at 11. Noting recent decisions that were internally inconsistent even within certain circuits, however, the government suggested there was "some uncertainty about the extent of the disagreement." *Id*., at 13-14.

The United States advised against granting the petition, because it was not an appropriate vehicle. *Id*., at 11. "Particularly because the issue continues to percolate in the lower courts, this Court's consideration of the question presented should await a case in which it would be outcome-determinative." *Id*.

> The proper application of Rule 9(b) in the FCA context is thus a significant issue. If one or more courts of appeals continue to adhere to the rigid view that petitioner attributes to the court below (*but see* pp. 13-14, *supra*), this Court's intervention may be warranted in a case where application of that approach appears to

> be outcome-determinative. This case, however, is not a suitable vehicle in which to take up the question.

In *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 41 (1st Cir. 2017), *cert denied* 138 S.Ct. 1551 (2018), the relator alleged that over a five year period, several thousand Medicare and Medicaid recipients received certain medical implants, with more than half falling "outside the specifications approved by the FDA," and "the latency of the defect was such that doctors would have had no reason not to submit claims for reimbursement for noncompliant devices." In this context, the First Circuit held "where the complaint essentially alleges facts showing that it is statistically certain that [defendant] caused third parties to submit many false claims to the government, we see little reason for Rule 9(b) to require Relators to plead false claims with more particularity than they have done here in order to fit within *Duxbury*'s 'more flexible' approach to evaluating the sufficiency of fraud pleadings in connection with indirect false claims for government payment." *Id*.

Defendant petitioned for a writ of certiorari. Case No. 17-1108. Petitioner pointed out that "the need for review has only intensified in the four years since the United States submitted its brief in *Nathan*," citing *United States ex rel. Chorches v. Am. Med. Response, Inc*., 865 F.3d 71, 92 n.21 (2d Cir. 2017) (noting that its standard is "distinguishable from that of *Grubbs*). As stated by Respondent, however, the very question presented in *Nargol* – whether relator can satisfy Rule 9(b) without alleging details about any specific false

claim – was one the First Circuit did not address. As such, the case was not an appropriate vehicle for this Court's review.

In *United States ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 874 F.3d 905, 914-16 (6th Cir. 2017), *cert denied* 138 S.Ct. 2582 (U.S., May 29, 2018), the Sixth Circuit persisted in its views that, outside "limited circumstances," relators alleging "complex and far reaching" schemes must plead details not only of the scheme, but must "identify a representative false claim that was actually submitted to the government." 874 F.3d at 915 (quoting *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 470 (6th Cir. 2011)). That narrow exception for "relaxing" pleading standards applies only where an "insider" relator has "specific personal knowledge" of a defendant's billing practices. *See United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 838 F.3d 750, 769 (6th Cir. 2016). Thus, even where the Sixth Circuit might be willing to relax Rule 9(b) requirements in a False Claims Act case, it would not do so for relators such as Perry who were outsiders to the claim submissions. In *Ibanez*, relator petitioned for a writ of certiorari (No. 17-1399), arguing that the Sixth Circuit's entrenched views continued the Circuit schism, and conflicted with *Tellabs v. Makor Issuer Rights*, 551 U.S. 308, 324 (2007) (applying Rule 9(b) to the Private Securities Litigation Reform Act).

A relator also petitioned the Court for a writ of certiorari in *United States ex rel. Chase v. HPC Healthcare, Inc.*, No. 17-1477, seeking review of the Eleventh Circuit's rigid view of the Rule 9(b) expressed at 723 F. App'x 783, 790 (11th Cir. 2018), *cert denied*

139 S.Ct. 69 (U.S., Oct. 1, 2018). That rigid view – followed by the Fourth, Sixth and Eighth Circuits as well, requires relators to allege or show "representative samples" specifying time, place, and content of the claims and the identity of those submitting them to the government. Although the Ninth Circuit had been thought to be an adherent to "more flexible" Rule 9(b) standards, this very same view was adopted by the district court judges who dismissed Perry's complaint, as well as the dissenting panelist in Perry's first appeal to the Ninth Circuit. Although the persistent circuit divide was presented by the petition in *Chase*, as pointed out in respondent's requested Brief in Opposition, the "rigid view" of Rule 9(b) in the False Claims Act case was not outcome-determinative, as the complaint would have failed in any circuit. *See* Brief in Opposition, at 16 (quoting U.S. *Nathan* Br.).

Although there might have been some hope at the time of *Nathan* that the conflict might go away on its own, retreat by some circuits with respect to its "rigid" views towards a more "nuanced case-by-case" approach does not mean the lower courts can, or will, resolve it without this Court's intervention. Even under a case-by-case method, lower courts and litigants require uniformity in the rule of law on standards to apply in those individualized determinations. No circuit court which held one view or the other has expressly overruled its prior decisions under Rule 9(b), and expressions of hope for self-resolution have been posited only by judges of one circuit regarding the views of others. *See Prather*, 838 F.3d at 772-773; *Chorches*, 865 F.3d at 89. This unexplained shifting of

decisions within certain circuit courts does little to quell the need for guidance on this important gateway issue in False Claims Act cases.

Perry's treatment under shifting and conflicting opinions within the circuit illustrates the point. As stated in the most recent petition on topic:

> The Ninth Circuit, meanwhile, has vacillated between excusing relators from the particularity requirement and refusing to do so. For example, in *United States ex rel. Lee v. SmithKline Beecham, Inc.*, the circuit held that "Rule 9(b) may be relaxed to permit discovery in a limited class of corporate fraud cases where the evidence of fraud is within a defendant's exclusive possession." 245 F.3d 1048, 1052 (9th Cir. 2001). Nearly a decade later, the Ninth Circuit appeared to reverse course, rejecting a relator's argument for a relaxed pleading standard because the defendant exclusively possessed patient billing information. [*Ebeid*, 616 F.3d at 999] ("To jettison the particularity requirement simply because it would facilitate a claim by an outsider is hardly grounds for overriding the general rule, especially because the FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government."). The *Ebeid* court conceded, though, that "in the securities fraud context we have held that

> 'Rule 9(b) may be relaxed to permit discovery.' " Id. (quoting *Lee*, 245 F.3d at 1052).
>
> Yet nearly a decade after *Ebeid*, a Ninth Circuit panel excused a relator from the particularity requirement because "the relevant information [was] within the defendant's exclusive possession and control." [*Vatan*, 721 F. App'x at 663-64] ("The district court's requirement to the contrary would vitiate the False Claims Act, by excluding many whistle-blowers who – as here – allege insider knowledge of wrongdoing that few others would be positioned to reveal and solely lack access to the corporate documents outlining the precise nature of the company's obligations." [Petition for a Writ of Certiorari, *United States ex rel. Polukoff v. St. Mark's Hosp*. No. 18-911, at 14-15.]

The Petition in *Polukoff* was withdrawn after the case settled, but the description of the vacillation within the Ninth Circuit presciently captured the essence of Perry's petition. Perry cited *Lee*, *Vatan* and *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161 (9th Cir. 2016) to no avail. Perry still lost his claims – asserted on behalf of the United States – based upon lack of personal knowledge over particulars that had little or no significance. Courts should not administer justice on an important statute through such conflicting and contradictory standards.

II. This Case is the Best Vehicle Yet to Resolve Persistent Conflicts and Intolerable Uncertainties in the False Claims Act Arena

Perry is a model relator. At significant personal and professional peril, he called out detailed information regarding material falsities and fraud by highway and bridge contractors working on federally-funded projects, and he backed up his claims with volumes of documentation. When ODOT management ignored his warnings, he turned to state and federal officials. In 2005, he met with the late state legislator Ben Westlund; in 2006, with the Fraud Division of the Oregon Secretary of State; in 2007, with the Federal Bureau of Investigation; and on dates thereafter with the Department of Justice. App. 44a, ¶7.

Although he did not have access to the actual contractor invoices, such documents were not needed for him to raise allegations of False Claims Act violations. He could determine, based on available data, the general range of dates on which the claims were made, the total amounts claimed and paid, the specific projects for which the invoices were submitted, and the general process for their submission. But what he alone knew – or was willing to act on – was the conduct giving rise to the violations, occurring in the field, not in billing departments. A clerk with access to the invoices would not know what Perry knew. The lower courts' determinations that Perry cannot be a relator under the Act because he did not have access to the billing records means that no one could bring an

action against these highway construction contractors for the misconduct Perry alleges occurred here.

A central purpose of the regulatory scheme for highway construction is to ensure that public money expended on vital infrastructure is spent only on projects which meet the federal safety and durability mandate embodied in the Transportation Act. 23 U.S.C. §109 (requiring adoption of construction standards adequate to enable highway projects to accommodate anticipated traffic on each project for a 20-year period). Perry alleges the contractors' failure to supply conforming materials, refusal to truthfully report Quality Control, and fraudulent conduct on highway contracts, has led to the United States paying for a system of federally-funded roads and bridges in Oregon that suffers from premature wear, excessive safety concerns and high repair and replacement costs. As demonstrated in Perry's Request for Judicial Notice – granted by the Ninth Circuit panel App. 1a – forensic investigations performed after Perry's complaint was filed confirm that premature failures and observable "rutting" in Oregon's highways and bridges are linked to substandard construction of the sort he witnessed.

> Over the past several years a number of major interstate pavements in Oregon exhibited significant pavement distress that appeared to be associated with moisture damage within months or the first few years following a rehabilitation activity. These premature failures prompted the Oregon Department of Transportation (ODOT) to sponsor a

> study to investigate several projects on interstate highways to determine the conditions and mechanisms that led to the premature failures. ... Improper tack coat or failure, permeable dense-graded layers, stripping, inadequate drainage, and inadequate compaction of dense-graded material were identified as the likely root causes of the observed rutting problems.

Scholz, "Forensic Investigation of Moisture-Related Pavement Failures on Interstate Highways in Oregon," Transportation Research Board, 90th Ann. Mt. (2011).

Perry's third amended complaint fits squarely within the ambit of the Act, as interpreted by this Court's decision in *Escobar*, 136 S. Ct. 1989. Although *Escobar* was issued shortly after Perry filed his complaint, he had the benefit of the briefing and oral argument. There, a relator accused a hospital of submitting state Medicaid claims for counseling services when the counselors lacked required credentials. *Id.* at 1998. While the claim forms themselves did not contain representations regarding staff credentials, the Court explained that "half truths" are actionable. *Id*. at 2000. This is because "[a]nyone informed that a social worker" had provided services "would probably – but wrongly – conclude that the clinic had complied with core" requirements. *Id*. The Court held when "a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they

render the defendant's representations misleading with respect to the goods or services provided." *Id*. at 1999.

The Court's decision in *Escobar* to recognize viability of false implied certification claims follows on a long line of cases involving contract specifications. *See United States v. Science Applications Intern'l Corp. (SAIC),* 626 F.3d 1257, 1269 (D.C. Cir. 2010) (non-compliance with contractual obligations provides basis for violation, whether or not provisions expressly state compliance is a precondition of payment); *United States v. Aerodex*, 469 F.2d 1003 (5th Cir. 1972) (contractor's deliberate mislabeling of bearings under specifications violated the Act); *United States v. National Wholesalers*, 236 F.2d 944 (9th Cir. 1956) (knowing supply of regulators not in compliance with contract specifications provided basis for False Claims Act violations), *cert. denied* 353 U.S. 930 (1957). This includes contractors on federal highway projects who submit bills for substandard work. *See United States DOT ex rel. Arnold v. CMC Eng'g*, 564 F.3d 673, 678 (3rd Cir. 2009) (false billings by highway contractors to Pennsylvania DOT); *United States ex rel. Maxfield v. Wasatch Constructors*, 2005 U.S. Dist. LEXIS 10162 (D. Utah 2005) ("compromised concrete, bridge construction defects and inadequate compaction" used in federal projects).

A review of these and other cases demonstrates that Perry's claims fit squarely within the ambit of the Act. In *United States ex rel. Compton v. Midwest Specialties*, 142 F.3d 296 (6th Cir. 1998), the Sixth Circuit affirmed the grant of summary judgment in

favor of the Government, based on proof that contract provisions required the contractor to conduct quality control brake tests, and defendant had failed to produce evidence such tests were properly conducted. Whether or not the brakes met specifications, under the quality assurance and safety requirements of the contract, the contractors were required to conduct the tests. *Id.*, 142 F.3d at 302. Noting "parties that contract with government are held to the letter of the contract" and "men must turn square corners when they deal with the Government," the court held that defendants' violations of the False Claims Act were undisputed matters of law. *Id*.

In *Varljen v. Cleveland Gear Co.*, 250 F.3d 426 (6th Cir. 2001), the court held "failure to comply with government contract specifications can result in an FCA 'injury' to the government, even if the supplied product is as good as the specified product." Even if the government knew of the fraud and accepted the product as compliant, defendants would still be liable for the violations. *Id*., at 430 (citing *United Sates ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991)). *And see Aerodex*, 469 F.2d at 1009 ("Even where final inspection is the obligation of the government, such obligation does not absolve a contractor on liability for fraud").

Like the allegations by Perry and in *Compton*, the claim in *Cleveland Gear* involved the defendants' knowing failure to comply with quality assurance. 250 F.3d at 431. "The allegation that Cleveland Gear did not comply with this provision amounts to an allegation that, through fraud, it knowingly produced

products that did not meet the contract's quality and corresponding safety requirements." *Id.* The court found undisputed that Cleveland Gear caused to be submitted a "claim" to the government, saying it was immaterial whether the alleged contractual noncompliance resulted in products with the "same basic performance characteristics" as those that would have been produced in compliance with the terms of the contract. *Id*.

Given the important role Perry fulfills – as envisioned by Congress in enacting and amending the False Claims Act – he should be permitted to go forward on his *qui tam* claims. They fit squarely within the scope of the Act. The detailed information gathered by Perry prior to the filing of his action and pleaded in his amended complaint is more than sufficient to meet the twin purposes Rule 9(b) – to put defendants on notice as to the particular misconduct alleged, and to protect defendants against undue "fishing expeditions."

Despite all of this, Perry's claims were dismissed by the lower courts based upon their determination that Perry was not an insider with personal knowledge of defendants' invoices. This failure to identify minutiae of contractor billings – the exact dates invoices were submitted, the identity of the persons who prepared them – is the basis for the judgment below. A review of the Ninth Circuit's decision in this case would reinstate Perry's meritorious claims and provide the best vehicle yet for this Court to resolve a persistent, recurring dispute among the lower courts over a matter of national significance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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