No. 19-228

In the Supreme Court of the United States

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

v.

HOOKER CREEK ASPHALT & PAVING, LLC, *et al.*

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that petitioner's third amended complaint fails to plead any claim under the False Claims Act, 31 U.S.C. § 3729 *et seq*. (2006), with the particularity required by Federal Rule of Civil Procedure 9(b).

CORPORATE DISCLOSURE STATEMENT

Hooker Creek Asphalt & Paving, LLC has no parent corporation, and no publicly-held company owns 10% or more of its stock.

Knife River Corporation – Northwest is a wholly-owned subsidiary of MDU Resources Group, Inc. MDU Resources Group, Inc. is a publicly-held company.

Central Oregon Redi-Mix, LLC is 78% owned by Knife River Corporation – Northwest, which is a wholly-owned subsidiary of MDU Resources Group, Inc., a publicly-held company.

Hap Taylor & Sons, Inc. is a name under which Knife River Corporation – Northwest does business.

Oregon Mainline Paving, LLC is 80% owned by Baker Rock Crushing Co. Baker Rock Crushing Co. has no parent corporation, and no publicly-held company owns 10% or more of its stock.

J.C. Compton Contractor, Inc. has no parent corporation, and no publicly-held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted at 765 F. App'x 318. The order of the district court (Pet. App. 4a-14a) is not published in the *Federal Supplement* but is available at 2017 WL 2311666.

A prior relevant order of the court of appeals (Pet. App. 15a-25a) is not published in the *Federal Reporter* but is reprinted at 565 F. App'x 669. A prior relevant order of the district court (Pet. App. 26a-36a) is not published in the *Federal Supplement* but is available at 2012 WL 913229.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2019. A petition for rehearing was denied on May 20, 2019 (Pet. App. 37a). The petition for a writ of certiorari was filed on August 19, 2019. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner brought this suit under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*. (2006), alleging that respondents submitted false claims for payment for work on state road construction projects. After more than eight years of litigation and three amendments to the complaint, the district court concluded that petitioner failed to adequately plead a claim under the FCA and dismissed the complaint with prejudice. Pet. App. 4a-14a. On *de novo* review, the court of appeals affirmed in an unpublished, non-precedential opinion. *Id.* at 1a-3a.

1. The False Claims Act imposes liability on any person who "knowingly presents, or causes to be presented" "a false or fraudulent claim for payment or approval" to the federal government. 31 U.S.C. § 3729(a)(1) (2006).[1] An FCA action can be brought by the federal government or by a private person (known as a *qui tam* relator). *Id.* § 3730(a), (b)(1).

Like any litigant in federal court, a *qui tam* relator bringing an FCA suit must allege in the complaint "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 697 (2009) (same). Further, because an FCA claim by definition involves fraud, a *qui tam* relator must satisfy the heightened pleading standard contained in Federal Rule of Civil Procedure 9(b). *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2004 n.6 (2016); *Ebeid ex rel. United*

[1] Because petitioner originally filed this lawsuit in 2008, the 2006 version of the FCA applies to his case.

States v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010). Rule 9(b) requires a plaintiff alleging fraud to "state with particularity the circumstances constituting fraud," Fed. R. Civ. P. 9(b), meaning the "who, what, when, where, and how" of the alleged fraud, *e.g.*, *United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834, 839 (7th Cir. 2018) (internal quotation marks omitted).

2. Petitioner is a former employee of the Oregon Department of Transportation (ODOT). Pet. App. 44a. In his most recent role at ODOT, he was an assistant quality assurance coordinator. *Id.* at 56a. ODOT terminated his employment in January 2008. *Id.*[2]

Respondents are road construction companies that each separately contracted with ODOT to perform work on different state road projects. Pet. App. 59a. Some of those projects were partially funded by the federal government. *Id.*

All the ODOT construction contracts at issue incorporate and are governed by the Oregon Standard Specifications for Construction. Pet. App. 54a; *see* ODOT, *Oregon Standard Specifications for Construction* (2002) (version applicable here). That manual sets out performance specifications and testing standards. Pet. App. 54a. It allows ODOT to issue change orders or to accept work and reduce payment when a contractor's work is in substantial compliance with contractual requirements. *Id.* at 10a-11a; *see* C.A. S.E.R. 29, 33. Accordingly, a mere deviation from

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[2] Petitioner sued ODOT, claiming he was fired in retaliation for reporting quality assurance concerns; that lawsuit was dismissed. C.A. S.E.R. 6, 24.

original ODOT contract specifications or quality assurance standards does not necessarily indicate a contract breach, much less fraud. Pet. App. 11a.

ODOT performs its own quality verification testing on road construction projects. *See* C.A. S.E.R. 32. Petitioner acknowledges this in his complaint. Pet. App. 50a. The fact that ODOT does its own quality testing means that it generally is aware of failures to meet project specifications. *Id.* at 12a; *see, e.g.*, *id.* at 108a. And whether specific work passes ODOT's quality verification testing depends on an average of a series of test results – so a failure to pass one test does not mean that the work fails quality verification testing. *See, e.g.*, C.A. S.E.R. 155.

3. In 2008, petitioner filed this lawsuit, alleging that respondents each violated the FCA by submitting claims for payment to ODOT on contracts for which they failed to meet various specifications and quality assurance standards. Pet. App. 26a. The United States declined to intervene in the case. *Id.* at 27a. Respondents moved to dismiss the complaint for failure to state a claim; petitioner amended the complaint; and respondents filed another motion to dismiss. *Id.*; *see* Fed. R. Civ. P. 12(b)(6).

The district court granted the motion to dismiss. Order 1-20, *United States ex rel. Perry v. Hooker Creek Asphalt & Paving, LLC*, No. 08-cv-06307 (D. Or. Dec. 13, 2011), ECF No. 122 (2011 Order). The court explained that the complaint had a number of fatal deficiencies, including that "the allegations regarding the fraudulent conduct [were] woefully lacking in detail." *Id.* at 13. Petitioner "generally allege[d] that [respondents] submitted bills for highway construction work and materials in violation of specifications for quality assurance," but he did not provide the neces-

sary details to support this claim, including "who committed the alleged misconduct," "what invoices contained false statements," or "even the specific false statements themselves." *Id.* Nor did the complaint indicate "when the allegedly deficient work was done (or not done)," "when false records or statements were made," or "where the specific defective construction took place." *Id.*

The court also explained that, under the 2006 version of the FCA, petitioner was required to show that respondents presented a false claim for payment to the federal government (not just a state grantee), and for his false-statement claims, that respondents made the statements to the federal government for the purpose of inducing the federal government to pay the claims. 2011 Order 15-17; *see* 31 U.S.C. § 3729(a)(1), (2) (2006); *see also Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 665 (2008).[3] The court determined that petitioner had not pleaded sufficient facts to show either presentment to the federal government or the necessary mental state with respect to the federal government. 2011 Order 15-17.

Because the complaint "utterly fail[ed] to state with particularity the circumstances constituting fraud," respondents were left "in the dark" about what conduct allegedly was fraudulent. 2011 Order 14. That was significant, the court explained, because a mere deviation from contract specifications does not show fraud. *Id.* at 3, 14. And because petitioner's allegations of fraud were so "vaguely stated," the court concluded that petitioner had not adequately pleaded the elements of scienter or materiality, either. *Id.* at

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[3] The 2009 version of the FCA changed those requirements. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-2, 123 Stat. 1617.

19; *see Escobar*, 136 S. Ct. at 2002 (FCA includes materiality and scienter requirements).

The court granted petitioner leave to amend his complaint, but warned him that he needed to plead each allegedly false claim with particularity, and also plead facts to show materiality and scienter. 2011 Order 19-20.

4. Petitioner filed a second amended complaint. Pet. App. 27a. Respondents again moved to dismiss the complaint. *Id.*

The district court granted the motion to dismiss. Pet. App. 26a-36a. The court concluded that petitioner had not cured any of the deficiencies in the prior complaint, including the failure to plead fraud with particularity. *Id.* at 33a. The court explained that petitioner "trie[d] to equate general allegations of substandard work to an FCA claim," yet he "still [did] not connect any person to the alleged fraudulent conduct," "state when and where the conduct occurred," or provide any facts "concerning the alleged false vouchers and cost schedules . . . presented to the federal government," including "when and by whom they were submitted," "what was contained in the claims for payment," "whether the claims were paid with or without adjustment," and "whether the federal government viewed payment as contingent on the absence of the alleged deficient testing or materials." *Id.* at 33a-35a. The court also noted that petitioner failed to plead sufficient facts to satisfy the requirements about presentment to the federal government. *Id.* at 34a-35a.

The district court noted that the amended complaint "challenge[d] virtually every claim/bill/request for payment by [respondents] for every project over a ten year plus period." Pet. App. 32a. Yet, the court

explained, the complaint did not provide the detail necessary to "apprise [respondents] of the particular conduct constituting fraud to permit a defense." *Id.* at 31a.

Not only did the court find that the allegations lacked particularity, but it found them not plausible: "It is simply not plausible that all [respondents] submitted falsified billings for all projects for all work for the Oregon Department of Transportation over a ten year period." Pet. App. 34a-35a. And the court determined that the complaint failed to adequately allege materiality or scienter as well. *Id.* at 35a. The court denied petitioner leave to amend the complaint, characterizing this case as nothing more than a "fishing expedition." *Id.* at 30a n.2, 36a.

5. The court of appeals initially affirmed. Pet. App. 22a-25a. The court explained that the complaint "fail[ed] to allege with sufficient particularity the 'who, what, when, where, and how' of any alleged incident of fraud." *Id.* at 23a (citing cases and Fed. R. Civ. P. 9(b)). The court also agreed with the district court that "any further amendments would [be] futile." *Id.* at 24a. Judge William Fletcher concurred in the result, agreeing that petitioner "d[id] not succeed in alleging with particularity the details of an overall scheme of fraudulent claims." *Id.* at 25a.

On petition for rehearing, the court withdrew the original opinion and issued a new opinion. Pet. App. 15a-21a. The court again concluded that the complaint failed to allege "the 'who, what, when, where, and how' of a consistent course of fraudulent conduct." *Id.* at 16a (citing cases and Fed. R. Civ. P. 9(b)). But the court decided to give petitioner one more chance to amend his complaint. *Id.* at 17a. The court noted that petitioner was "'not required to allege all facts

supporting each and every instance' of fraudulent billing"; instead, he could 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." *Id.* at 17a (quoting *Ebeid*, 616 F.3d at 998-99). Judge Callahan concurred in part and dissented in part, taking the view that the complaint was deficient and that any further amendment would be futile. *Id.* at 18a-21a.

6. Petitioner filed a third amended complaint – the complaint at issue here. Pet. App. 38a-123a. By then, about eight years had elapsed since the start of this lawsuit. Respondents again moved to dismiss the complaint. *Id.* at 4a.

A new district court judge dismissed the complaint with prejudice. Pet. App. 4a-14a. The court noted that petitioner was required to state claims that are plausible on their face under Rule 8(a) and to plead those claims with particularity under Rule 9(b). *Id.* at 5a. In the district court's view, petitioner satisfied neither requirement.

The district court explained that petitioner's "fourth bite at the apple" fared no better than his previous attempts. Pet. App. 8a. The third amended complaint "d[id] not fix the fatal flaws found in each earlier complaint," *id.* at 7a, including that "[t]here [we]re no facts concerning the alleged false vouchers and cost schedules caused to be presented to the federal government or when and by whom they were submitted," "what information was presented to the federal government," "what role the information provided [played] in the federal government's decision," "whether the claims were paid with or without adjustment," and "whether the federal government viewed payment as contingent on the absence of deficient testing or materials," *id.* at 8a (quoting prior district

court opinion). The court also concluded that petitioner's claim that respondents "submitted falsified billings for all projects for all work for the Oregon Department of Transportation over a ten year period" was "simply not plausible." *Id.* (quoting prior district court opinion).

Petitioner had argued that, because "the contracts and bills are in the exclusive possession of the government and/or defendants," the heightened pleading standard should be "relaxed" and he should be allowed to "pursue his theories via discovery." Pet. App. 9a. The district court disagreed, explaining that "the False Claims Act requires an actual false claim" and petitioner had not alleged one here, because the contracts at issue allowed ODOT to accept nonconformance with contract specifications and quality assurance measures and to pay the contractor less. *Id.* at 10a-11a. The court noted that a failure to meet specifications or standards does not establish even a contract breach, let alone the knowing, material falsity required under the FCA. *Id.*; *see United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 899 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 783 (2019).

The court found an "obvious alternative explanation" to fraud: "any payments to [respondents] were simply adjusted downward for any failures to comply with specifications." Pet. App. 12a. As the court explained, petitioner "simply assumes the worst, alleging a seemingly vast conspiracy, over nearly a decade, between private contractors and ODOT Project Mangers over nearly all state highway construction projects." *Id.* at 11a.

7. On *de novo* review, the court of appeals affirmed in a three-page, unpublished, non-precedential opinion. Pet. App. 1a-3a. The court first rejected pe-

titioner's argument that the district court was required to find his complaint sufficient under the law-of-the-case doctrine, explaining that its prior decision concluded only that "it was not clear that [petitioner's] complaint could not have been saved by any amendment." *Id.* at 2a-3a (internal quotation marks omitted).

The court of appeals then "agree[d] with the district court that [petitioner's] third amended complaint did not allege with particularity the 'who, what, when, where, and how' of a consistent course of fraudulent conduct." Pet. App. 3a (citing *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570; *Ebeid*, 616 F.3d at 998; and *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054-55 (9th Cir. 2011)). The court stated that although petitioner had "narrowed his complaint to focus on stand-alone projects rather than representative examples, the third amended complaint still fails to satisfy Rule 9(b)." *Id.* That was the extent of the court of appeals' analysis.

8. Petitioner filed a petition for rehearing en banc, which was denied, with no judge requesting a vote on the petition. Pet. App. 37a.

ARGUMENT

Petitioner contends (Pet. 22) that this Court should grant review to decide whether a *qui tam* relator in a False Claims Act case must identify specific claims for payment in order to plead fraud with particularity under Federal Rule of Civil Procedure 9(b). The court of appeals' decision is correct, and that unpublished, non-precedential decision does not address the question petitioner attempts to present in this case. There is no circuit split on that question, and this case would be a poor vehicle for addressing any

disagreement in the circuits in any event. Further review therefore is unwarranted. This Court has denied review on the question petitioner seeks to present in several cases, and there is no reason for a different result here (especially because this case does not actually present that question).[4]

I. THE DECISION BELOW IS CORRECT

Petitioner originally filed this case over ten years ago. Two different district court judges and five different judges on the court of appeals each concluded that petitioner's allegations fail to plead fraud with particularity, as is required under the False Claims Act, 31 U.S.C. § 3729 *et seq*. Most recently, the court of appeals reached that conclusion in a short, unpublished, non-precedential decision. Pet. App. 1a-3a. That decision plainly is correct.

A. It is well-settled that a *qui tam* relator must plead his claim of fraud with particularity to satisfy the pleading standard in Federal Rule of Civil Procedure 9(b). Pet. App. 3a (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010); and *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054-55 (9th Cir. 2011)). Petitioner does not dispute that.

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[4] *See, e.g.*, *United States ex rel. Chase v. Chapters Health Sys., Inc.*, 139 S. Ct. 69 (2018) (No. 17-1477); *Med. Device Bus. Servs., Inc. v. United States ex rel. Nargol*, 138 S. Ct. 1551 (2018) (No. 17-1108); *Victaulic Co. v. United States ex rel. Customs Fraud Investigations, LLC*, 138 S. Ct. 107 (2017) (No. 16-1398); *AT&T, Inc. v. United States ex rel. Heath*, 136 S. Ct. 2505 (2016) (No. 15-563); *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 136 S. Ct. 49 (2015) (No. 14-1326).

The court of appeals, like the other courts before it, reviewed petitioner's kitchen-sink complaint and concluded that it failed to meet the Rule 9(b) standard. Pet. App. 3a. Although the court of appeals did not set out its reasons in detail, its conclusion is unsurprising. The gravamen of petitioner's complaint is that respondents performed work or used materials that did not strictly conform to contract specifications or quality assurance standards in 21 road construction projects over a ten-year period and that ODOT paid respondents for those projects. Pet. App. 66a-109a.

But those "general allegations of substandard work" do not amount to a false claim. Pet. App. 33a. The relevant contracts allow ODOT to accept variances and pay contractors less, which means there is no breach of contract and certainly no fraud. *Id.* at 11a-12a. That feature of the contract is an "obvious alternative explanation" to fraud. *Id.* at 12a (internal quotation marks omitted). Petitioner essentially admits this at several points in the complaint, when he acknowledges that ODOT knew of many of the alleged deficiencies but paid the contractors anyway. *Id.* at 12a-13a. In fact, most of the tests about which petitioner complains were performed by ODOT itself. *Id.* at 70a, 72a, 103a. So ODOT no doubt was aware of the test results and took them into account when paying respondents.

Petitioner also alleges that respondents manipulated test results. Pet. App. 66a, 88a. But even if those allegations are taken as true, they do not plead a false claim, because petitioner does not plead materiality, or even connect any test to a claim for payment made to the federal government. *Id.* at 8a; 2011 Order 15-17. Because petitioner alleges only deficiencies, and no actual fraud, he has not pleaded any instance

of a false claim, much less the "who, what, where, and when" required under Rule 9(b). Pet. App. 13a.

Petitioner has had four chances to plead his claims over ten years. The court of appeals was right to affirm the district court's dismissal of the (most recent) complaint with prejudice.

B. Petitioner contends (Pet. 21) that the court of appeals held that he "could not satisfy gateway pleading standards because [he] did not work as an insider in the contractors' billing departments." The court of appeals did no such thing. Its analysis of the Rule 9(b) issue was one paragraph long. Pet. App. 3a. That analysis does not mention "insiders" or "billing departments." *Id.* The court of appeals did not adopt any new legal rule specifying that certain evidence, such as evidence of particular bills, was invariably required to satisfy Rule 9(b). Instead, it cited settled Ninth Circuit and Supreme Court precedents about pleading standards – *Iqbal*, *Twombly*, *Ebeid*, and *Cafasso* – and then stated its conclusion that petitioner's third amended complaint does not meet those standards. *Id.*

Because the court of appeals' decision does not set out any new rule of law, let alone one about insiders, petitioner attempts to rely on (Pet. 19) language in the district court's most recent decision. But that language also does not state the hard-and-fast rule that petitioner claims. The district court used the flexible legal standard from *Ebeid*. Pet. App. 9a. The district court did not reject petitioner's claims because he was not an insider and "was not familiar with the 'minutiae' of the contractors' invoices," Pet. 21; it rejected the complaint because petitioner failed to connect any alleged non-compliant conduct to an actual false claim, Pet. App. 11a. Because ODOT could accept sub-

stantial performance and pay contractors less, and because one test result does not mean that the specified work fails quality verification testing, petitioner could not show a contract breach, much less fraud. *Id.*

Even if the district court's opinion could be interpreted in the manner petitioner claims, that would not provide a basis for this Court's review. This Court reviews the decision of the court of appeals, not the decision of the district court. The court of appeals reviewed the adequacy of the complaint *de novo*. *See United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001). The court of appeals did not repeat any of the district court's language about insiders, and so that language is not any part of the decision under review.

As the court of appeals (Pet. App. 17a) and district court (*id.* at 31a) both previously recognized, the Ninth Circuit has not adopted the rule that an "insider" must make allegations about a specific false claim to plead fraud with particularity. The relator need not "identify representative examples of false claims to support every allegation." *Ebeid*, 616 F.3d at 998. Rather, the relator may 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." *Id.* at 998-99 (internal quotation marks omitted).[5]

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[5] Petitioner claims (Pet. 29) that the law in the Ninth Circuit is "conflicting and contradictory." He is mistaken. The Ninth Circuit set out the governing standard in *Ebeid*, and it reaffirmed that standard as recently as last month. *See Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1209 (9th Cir. 2019); *see also, e.g.*, *United States ex rel. Solis v. Millennium Pharm., Inc.*, 885 F.3d 623, 628-29 (9th Cir. 2018). Even if petitioner were correct, an intra-circuit disagreement would not be a basis for this Court's review. *See* Sup. Ct. R. 10.

The court of appeals' decision reflects the (correct) application of settled law to the particular facts of this case. It does not warrant this Court's review.

II. NO CONFLICT EXISTS AMONG THE CIRCUITS

Petitioner contends (Pet. 22-30) that the courts of appeals have divided on whether a *qui tam* relator must identify specific claims for payment in order to plead fraud under the FCA with particularity. Petitioner is mistaken. Although the courts of appeals have articulated their pleading standards somewhat differently, they all amount to the same flexible approach.

A. Contrary to petitioner's suggestion (Pet. 21), no circuit applies a *per se* rule requiring a *qui tam* relator to be an "insider" who can plead the "minutiae" of invoices. Rather, in every circuit a relator can satisfy Rule 9(b) by pleading facts that support a plausible inference that false claims were, in fact, submitted to the federal government.

The First, Third, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits hold that a *qui tam* relator need not plead a specific instance of a false claim, but may 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." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009); *see United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 39 (1st Cir. 2017) (adopting *Grubbs*), *cert. denied*, 138 S. Ct. 1551 (2018); *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156-67 (3d Cir. 2014) (same); *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 917 (8th Cir. 2014) (same); *Ebeid*, 616 F.3d at 998-99 (same); *United States ex rel.*

Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1172 (10th Cir. 2010) (same); *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 126 (D.C. Cir. 2015) (same).

The Second, Fourth, Seventh, and Eleventh Circuits use slightly different wording, but their legal standards amount to essentially the same thing. In the Second Circuit, a relator does not need to "provide details of actual bills or invoices submitted to the government, so long as the relator makes plausible allegations . . . that lead to a strong inference that specific claims were indeed submitted." *United States ex rel. Chorches for Bankr. Estate of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 93 (2d Cir. 2017). The Second Circuit surveyed the decisions of the other courts of appeals and concluded that its "interpretation of Rule 9(b)" is "clearly consistent" with the Fifth Circuit's approach and is not "in conflict with [the approaches] of our Sister Circuits." *Id.* at 89, 92.

The Fourth Circuit similarly explains that a *qui tam* relator need not allege "with particularity that specific false claims actually were presented to the government," but can instead "allege a pattern of conduct that would *necessarily* have led[] to submission of false claims." *United States ex rel. Grant v. United Airlines, Inc.*, 912 F.3d 190, 197 (4th Cir. 2018) (internal quotation marks omitted). The Fourth Circuit understands that rule to be consistent with the rules in other circuits. *See United States ex rel. Nathan v. Takeda Pharm. N. Am. Inc.*, 707 F.3d 451, 457 & n.6 (4th Cir. 2013) (citing decisions from the Fifth, Tenth, and Eleventh Circuits).

The Sixth Circuit also does not require that a *qui tam* relator always plead a specific claim for payment. Instead, "a relator may . . . 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." *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750, 773 (6th Cir. 2016). This standard, the court observed, is "broadly consistent with the approach adopted by the Fourth Circuit," and also with the "many cases" that use the *Grubbs* standard. *Id.* at 772 n.10, 773. The Sixth Circuit explained that the claimed circuit split on this issue is illusory, because the circuits' standards amount to the same thing in practice. *Id.* at 772-73.

The rule in the Seventh Circuit is no different. In that circuit, a relator "does not need to present . . . a specific document or bill that the defendants submitted to the Government." *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 777 (7th Cir. 2016) (citing *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853-54 (7th Cir. 2009)). Instead, it is enough for the relator to "allege[] facts [that] necessarily [lead] one to the conclusion that the defendant had presented [false] claims to the Government." *Id.* at 778.

Finally, the Eleventh Circuit requires "some indicia of reliability . . . to support the allegation of *an actual false claim* for payment being made to the Government." *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002). A relator can satisfy this requirement by pleading a particular claim for payment. *E.g.*, *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1358 (11th Cir. 2006). But that is not the only way; a relator could instead allege other facts that plausibly support the inference that the defendant submitted a false claim. *See United States ex rel. Walker v. R&F Props. of Lake*

Cty., Inc., 433 F.3d 1349, 1360 (11th Cir. 2005) (holding that the relator's allegations were "sufficient to explain why [the relator] believed [the defendant] submitted false or fraudulent claims" even though the relator did not plead specific examples of false claims).

These decisions illustrate that application of the Rule 9(b) heightened pleading standard is "context specific and flexible." *Grubbs*, 565 F.3d at 190. Rule 9(b) does not "dictate adherence to a preordained checklist of 'must have' allegations." *Heath*, 791 F.3d at 125. The circuits all use some variation of this flexible approach; there is no circuit split warranting this Court's review.

B. None of the decisions petitioner cites supports his claim of a circuit split.

Petitioner claims (Pet. 26-27) that the Fourth, Sixth, Eighth, and Eleventh Circuits adhere to a "rigid view" of Rule 9(b) that requires pleading a particular claim for payment. None of the decisions petitioner cites actually states such a rule.

For example, petitioner cites (Pet. 24) *Nathan* from the Fourth Circuit – even though *Nathan* states that a *qui tam* relator need not allege a particular claim for payment if his other allegations "necessarily [lead] to the plausible inference that false claims were presented." 707 F.3d at 457. Petitioner also cites (Pet. 26) *United States ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 874 F.3d 905 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2582 (2018). But *Ibanez* expressly recognizes that pleading a specific claim is not always required. *Id.* at 915 (citing *Prather*, 838 F.3d at 768).

Petitioner cites (Pet. 26) *United States ex rel. Chase v. HPC Healthcare, Inc.*, 723 F. App'x 783 (11th Cir.) (unpublished), *cert. denied*, 139. S. Ct. 69 (2018). But *Chase* states that pleading a particular example

is only "[o]ne way" a relator can satisfy Rule 9(b). *Id.* at 789. The Eleventh Circuit uses a "nuanced, case-by-case approach," where "there are no bright-line rules." *United States ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 591 F. App'x 693, 704 (11th Cir. 2014) (unpublished). Petitioner also cites (Pet. 23) *United States ex rel. Joshi v. St. Luke's Hospital*, 441 F.3d 552 (8th Cir. 2006). But since that decision, the Eighth Circuit has expressly adopted the approach set out in *Grubbs*. *Thayer*, 765 F.3d at 917.

C. Petitioner also relies (Pet. 23-25) on statements in the *amicus* briefs the federal government filed at this Court's invitation in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, 572 U.S. 1033 (2014) (No. 12-1349), and *Ortho Biotech Products, L.P. v. United States ex rel. Duxbury*, 561 U.S. 1005 (2010) (No. 09-654). In neither brief did the United States acknowledge a clear circuit split.

In its brief in *Nathan*, the United States explained that the Fourth Circuit does not apply a *per se* rule, and that although some decisions in the Sixth, Eighth, Tenth, and Eleventh Circuits could be read to imply a *per se* rule, those circuits did not "consistently adhere[] to this rigid understanding of Rule 9(b)." U.S. *Amicus* Br. at 12-14, 17-19, *Nathan*, 572 U.S. 1033, 2014 WL 709660.

In its brief in *Duxbury*, the United States noted "uncertainty" about "whether a qui tam complaint that contains detailed allegations giving rise to a reasonable inference that false claims were submitted to the government, but that does not identify specific requests for payment, can be sufficiently particularized to withstand a motion to dismiss." U.S. *Amicus* Br. at 15-16, *Duxbury*, 561 U.S. 1005, 2010 WL 2007742. It acknowledged that some circuits' approaches were not clear. *Id.* at 16. But that was nine years ago.

Time has confirmed that there is no real disagreement in the circuits. Each circuit that petitioner claims has taken a hard-line approach has issued a decision confirming its adherence to a flexible approach. By 2014, when the government filed its brief in *Nathan*, the Tenth Circuit already had adopted the standard in *Grubbs*. *See Lemmon*, 614 F.3d at 1172. Since then, the Sixth, Eighth, and Eleventh Circuits have each clarified that they do not always require a *qui tam* relator to plead a particular false claim. *See Ibanez*, 874 F.3d at 924; *Thayer*, 765 F.3d at 917; *Chase*, 723 F. App'x at 789. Each of those circuits also has allowed an FCA case to proceed to discovery even though the complaint did not plead a specific instance of a false claim. *See Prather*, 838 F.3d at 769; *Thayer*, 765 F.3d at 919; *United States ex rel. Polukoff v. St. Mark's Hosp.*, 895 F.3d 730, 745 (10th Cir.), *cert. dismissed*, 139 S. Ct. 2690 (2018); *Mastej*, 591 F. App'x at 709.

Thus, as the Sixth Circuit observed, "[e]very circuit . . . has retreated from [a *per se*] requirement in cases in which other detailed factual allegations support a strong inference that [false] claims were submitted." *Prather*, 838 F.3d at 772-73. Or as the Second Circuit put it, "[R]eports of a circuit split are, like those prematurely reporting Mark Twain's death, 'greatly exaggerated.'" *Chorches*, 865 F.3d at 89.

III. THIS CASE IS AN EXCEEDINGLY POOR VEHICLE FOR FURTHER REVIEW

This case is a poor vehicle for further review for two reasons. First, petitioner has not met the particularity standard as articulated by any circuit. Second, even if this Court were to find that petitioner pleaded his claims with particularity, the claims would fail at the pleading stage for a number of other, independent reasons.

A. Petitioner contends that some circuits have adopted more flexible standards than others about pleading fraud with particularity under the FCA. But petitioner loses under even the most flexible standard. Petitioner, citing *Ebeid*, concedes that the Ninth Circuit is on the "more flexible" side of the supposed split. Pet. 27. The *Ebeid* standard rejects a "categorical approach that would, as a matter of course, require a relator to identify representative examples of false claims to support every allegation" and instead states 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.'" *Ebeid*, 616 F.3d at 998-99 (quoting *Grubbs*, 565 F.3d at 190).

Both the district court and the court of appeals used the *Ebeid* standard and concluded that petitioner's complaint fails under that standard. Pet. App. 3a, 13a. So even if this Court granted review and adopted the most permissive standard used by any circuit, it would not help petitioner, because petitioner already has lost under that standard. No court has adopted a standard under which petitioner would prevail, and this Court should not be the first.

B. Even if petitioner could overcome the Rule 9(b) hurdle, his claims would fail under Rule 8(a) because he does not sufficiently allege scienter or materiality and because his claims are not plausible. Although the court of appeals did not address these arguments, the district court noted that they "appear to be strong." Pet. App. 14a n.2. Any one of them would be fatal to petitioner's claims.

1. Petitioner does not sufficiently plead scienter, a required element of his FCA claims. Petitioner was required to allege facts showing that respondents "knew that [their] statements were false, or that

[they] [were] deliberately indifferent to or acted with reckless disregard of the truth of the statements." *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 996 (9th Cir. 2011); *see* 31 U.S.C. § 3729(b) (2006). As this Court has explained, the FCA's scienter requirement is "rigorous." *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2002 (2016). At best, petitioner alleged only examples of apparent non-conformity with contract requirements, not that respondents knowingly defrauded the federal government. "[I]nnocent mistakes" and "mere negligent misrepresentations . . . will not suffice to create [FCA] liability." *Corinthian Colls.*, 655 F.3d at 996 (internal quotation marks omitted).

As the district court previously noted (Pet. App. 35a), petitioner's allegations about scienter are wholly conclusory. He alleges that respondents "had actual knowledge they were submitting bills for materials and work that did not meet material specifications, and/or acted with deliberate ignorance and reckless disregard as to whether material specifications had been met." Pet. App. 63a. His view thus seems to be that if any materials or work failed any test, respondents had the requisite scienter if they presented any claims for those materials or that work. But that allegation leaves out a crucial step – the connection between an individual failure to follow contract specifications and a false claim.

Knowledge of discrepancies in test results is not the same as knowledge of a fraudulent claim, particularly where the work was accepted and reduced payment was made under the contract. Pet. App. 10a-11a. The district court repeatedly warned petitioner that he needed to adequately allege scienter. *Id.* at

33a; 2011 Order 17, 19. Petitioner still has not done so.

2. Petitioner also does not sufficiently plead materiality, *i.e.*, that the allegedly false statement made a difference in the government's payment decision. *Escobar*, 136 S. Ct. at 2002. "[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Id.* at 2003. That is just what petitioner alleges happened here. Most of the deficient results petitioner alleges were of quality verification tests that ODOT itself performed, *e.g.*, Pet. App. 103a – so ODOT necessarily knew of the alleged deficiencies yet decided to pay anyway. And for tests performed by others, petitioner recognizes that ODOT knew of those allegedly deficient results as well. *E.g.*, *id.* at 109a (complaint's allegation that the "deficiency had been revealed to ODOT"). So not only does the complaint fail to include allegations of materiality, but it actually disproves that element.

Further, although petitioner claims that various projects received failing test results, he ignores the fact that ODOT's quality verification testing depends on the average result of multiple tests. *E.g.*, C.A. S.E.R. 155. Significantly, petitioner never once alleges that a project received a failing grade overall. And even if he did, that would only be evidence of a contract breach – not fraud.

3. At their core, petitioner's claims simply are not plausible. The only way petitioner could get from failure to meet certain specifications to false claims would be to "assume[] the worst" – "a seemingly vast conspiracy, over nearly a decade, between private contractors and ODOT Project Managers over nearly all state highway construction projects." Pet. App. 11a. As the

district court concluded, such a scheme is not plausible. *Id.* at 12a. That is especially true because the complaint itself acknowledges an "obvious alternative explanation" – that ODOT can and did accept substantial compliance and adjusted payment amounts to account for any deficiencies. *Id.* at 10a-12a. Not surprisingly, two different district court judges concluded that petitioner's claims are not plausible. *Id.* at 12a, 34a-35a. For all of these reasons, the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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