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, 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

## REPLY BRIEF FOR PETITIONER


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## INTRODUCTION

Sooner or later, this Court will have to provide much-needed guidance on application of Rule 9(b) in the context of the False Claims Act; and, specifically, whether the *qui tam* plaintiff (relator) must be an insider with personal knowledge of the contractor's claim submissions to meet gateway particularity pleading requirements. Over the past decade – while a steady and continuing flow of petitions for writs of certiorari have come under the Court's consideration – lower courts have splintered over Rule 9(b) requirements. Entrenched in each circuit's particular doctrinal history, there are now divergent alignments over so-called "strict" and "lenient" approaches, and even further disharmonies within several circuits. Without this Court's intervention, lower courts have been unable to adopt a consistent approach to relators who plead facts of fraud with particularity, but plead facts of claims submissions on "information and belief."

Contrary to the unsupported arguments of respondents, Perry's petition is the best vehicle yet for the Court to finally address and resolve this important question of national significance. Perry possesses much personal knowledge and ample documentation of respondents' falsified records and fraudulent conduct. In his *qui tam* complaint – reprinted in the appendix – Perry pleads those facts with particularity, providing notice to respondents of the precise conduct subject to challenge, and ensuring the action is neither a "strike suit" nor a fishing expedition. Yet, Perry's complaint was dismissed, because he was not an "insider" and did not have access to the contractors' billing records.

The tortured procedural history of Perry's case perfectly frames the persistent troubling question. As the lower courts fractured, then splintered over Rule 9(b) standards, Perry's *qui tam* action was dismissed, that dismissal was affirmed (with one circuit judge concurring separately in the result), then on rehearing the judgment was reversed (in a 2-1 decision) and Perry was granted leave to "narrow" his claims, and then Perry's "narrowed" complaint was dismissed again, with the district court judge citing the dissenting panelist from the prior appeal. After 10 years of pleading, briefing and appeals, Perry's complaint – chock full of particularity with respect non-compliant construction materials, falsified verification tests and fraudulent quality control measures – was dismissed based on Perry's lack of personal access to billing records.

Until this Court grants review of the question, intolerable uncertainties will continue to undermine enforcement of the Act. Relators like Perry – and attorneys who counsel them – will be left to wonder whether to take up the *qui tam* litigation in the absence of access to invoices. By granting the petition, unencumbered by the conflicting doctrinal developments of the lower courts, this Court could clarify once and for all that relators are not "disabled from filing suit under the [Act]" because they were "[un]familiar with the minutiae of [the contractors'] billing practices. Brief for the United States as *Amicus Curiae* at 17, *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury*, No. 09-654 (U.S. May 2010) (hereinafter "U.S. *Duxbury* Br.").

## REPLY ARGUMENT

### I. Perry's *qui tam* action was dismissed based on lack of insider knowledge over contractor invoices, not – as respondents assert – based on "generalized allegations of substandard work."

Respondents argue (at 12) that Perry makes only "generalized allegations of substandard work." As stated in the petition(at 9-12), Perry pleads particular circumstances of fraud on 21 federally-funded Oregon highway and bridge construction projects – the "who, what, where, when and how" of substandard construction, false records and fraudulent quality control. This includes using substandard concrete from a third party on one project, while bribing the contracting official with a high-quality paved home driveway; employing malfunctioning gauges to achieve false test results on compaction and water density; paving over highway portions before verifications could be performed; achieving compaction artificially by using rollers smaller than those permitted by specifications; and other false, misleading or cherry-picked reports of quality control. Perry includes much evidentiary information, naming specific verification tests and involved individuals, when known. App. 69a-110a.

In their brief in opposition, respondents neither dispute Perry's statement of the case, nor address actual allegations reproduced in the appendix. Under Rule 15, respondents were obligated to point out any

perceived misstatements of the case made by Perry. They have therefore waived any objections thereto.

Respondents also do not dispute that Perry lost his case solely because he was not an "insider" to the contractors' billing records. Respondents (at 11) argue that two district court judges and five circuit judges "each concluded that petitioner's allegations fail to plead fraud with particularity," but this is an overly simplistic statement of results, not reasoning. No judge addressed Perry's particular allegations. In the first appeal, Judge Fletcher referred generally to them, and found them sufficient under Rule 9(b); but he held Perry could not use representative examples to satisfy Rule 9(b) for claims of systemic fraud.

Three other judges found the complaint failed under Rule 9(b), not because of generalized allegations of misconduct, but based upon Perry's admitted lack of personal access to contractor invoices. Judge McShane imposed a non-textual requirement that relators must be "insiders" with personal knowledge of claim submissions to state a claim under the Act. He 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").

Judge McShane relied on Judge Callahan's dissenting opinion in Perry's previous appeal. Rather

than review particular allegations of misconduct, Judge Callahan too focused exclusively on allegations of claims submission on "information and belief," finding them admissions by Perry that any amendment would be futile. App. 19a-20a. Both Judge McShane and Judge Callahan, in turn, relied upon similar legal pronouncements by Judge Hogan. *See* 34a-36a.

Compounding the confusion, the panel on Perry's second appeal did not discuss any allegations. Nor did it explain its reasoning. Contrary to respondents suggestion (at 20), silence by the panel of appellate judges neither clarifies the law nor corrects the erroneous ruling below. At oral argument, respondents expressly urged the panel to adopt the bright-line rule that relators must be "insiders." It is hypocritical for them to claim now that Perry is foreclosed from raising that same argument for review before this Court.

## II. As demonstrated by the treatment of Perry's action, lower courts remain splintered on a Rule 9(b) requirement that relators have insider knowledge of claims.

Respondents reformulate the issue presented – stripping it of inquiry into "insider" status or personal knowledge – and argue (at 10, 18), erroneously, "there is no circuit split." Their position is undermined by the parade of petitions that have come under the Court's consideration over the past 10 years. Relators, defendants and the government all agree lower courts reach "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.").

All sides further agree that the overall body of appellate precedent creates "substantial uncertainty" on whether relators must have personal knowledge of claims submissions and plead specific requests for payment with particularity. U.S. *Duxbury* Br. at 16. Resolution of that uncertainty awaits intervention by this Court. None of the prior petitions presented an appropriate vehicle for this Court's examination; that is, until Perry's petition came along.

Respondents gloss over the detailed presentation of conflicting Rule 9(b) rulings and the prior petitions for writs of certiorari on the issue. *See* Petition, at 15-17, 19-20, 22-29. Instead, they argue (at 15) that lower courts have resolved the problem on their own by adopting a "flexible, case-by-case approach." Respondents conflate confusing, conflicting and sometimes (as in the case here) vague unexplained rulings by the circuit courts with appropriate rule-bound context specific decisions. In light of the importance of the False Claims Act, this Court previously has reviewed and resolved several conflicts among the lower courts regarding its application. Those cases too sometimes involved flexible, case-by-case evaluations; but lower court guidance was still required to achieve uniformity in enforcement.

As foretold by Perry, and not addressed or refuted in the opposition, respondents argue that the circuits have achieved substantial harmony, but they

rely merely upon expressions of hope posited by judges of one circuit regarding the views of others. *See United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 838 F.3d 750, 772-773 (6th Cir. 2016); *United States ex rel. Chorches v. Am. Med. Response, Inc*., 865 F.3d 71, 89 (2d Cir. 2017). No circuit court has expressly walked back its prior Rule 9(b) decisions, and several continue to develop peculiar caveats that turn on insider knowledge of claims submissions. *See*, *e.g.*, *Prather,* 838 F.3d at 769 (Sixth Circuit requires specific allegations of claims submissions at the pleading stage, unless the relator is an "insider" with "specific personal knowledge" of a defendant's billing practices); *Chorches,* 865 F.3d at 86 (although the Second Circuit permits "information and belief" allegations, "those who *can* identify examples of actual claims *must* do so at the pleading stage") (original emphasis); and *United States ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 591 F. App'x 693, 704, 707-709 (11th Cir. 2014) (the Eleventh Circuit permits relator to proceed without examples of actual claims only when she has "direct, first-hand knowledge of the defendants' submission of false claims gained through her employment").

Vacillation within the Ninth Circuit parallels the schism across all circuits. In *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001), the circuit held "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." In *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010), however, the circuit rejected the notion that

standards might relax "simply [to] facilitate a claim by an outsider... especially because the [Act] is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government." In two unpublished decisions, the Ninth Circuit seemed to retreat. *United States ex rel. Tamanaha v. Furukawa Am., Inc.*, 445 Fed. App'x 992, 994 (9th Cir. 2011); *United States ex rel. Vatan v. QTC Med. Servs., Inc.*, 721 F. App'x 662, 663-64 (9th Cir. 2018). Perry's case, however, did not benefit from such refinements.

The tortured treatment of Perry's claims in the Ninth Circuit thus provides a perfect vehicle for review of judicial splinters across the circuits. Had this Court granted the writ of certiorari in *Duxbury*, *Nathan* or any of the other petitions cited by Perry, he could have avoided his 10-year litigation battle over pleadings. Granting Perry's petition now could resolve the conflict once and for all, for the benefit of countless other *qui tam* litigants and the lower courts. Because this Court is not bound by the lower courts' divergent precedents, it could readily adopt a rule consistent with the twin goals of Rule 9(b) that serves the purposes of the False Claims Act. By finding Perry's allegations sufficient to meet those goals, and adopting the view of the Government expressed in *Duxbury* and *Nathan*, the Court could hold that access to underlying billing information is not necessary for Perry to state claims under the False Claims Act. Guidance is needed from this Court that "outsider" status alone does not bar commencement of a suit, when the relator otherwise adequately states the particular circumstances of fraud on federal funds sufficient to put defendants on notice

and protect against unreasonable fishing expeditions. Only this Court can remedy the confusion among litigants and lower courts, and Perry's petition perfectly frames the issue for the Court to do so.

## III. Contrary to respondents' unsupported contentions, Perry's petition is a perfect vehicle to address the judicial fractures.

1. Perry's allegations are clearly sufficient to meet Rule 9(b) standards articulated by other circuits. Although respondents contend otherwise in argument, they do not dispute the underlying fact that authorities and arguments raised in prior petitions for writs of certiorari figured prominently in Perry's oppositions in the district court and briefs on appeal. Based upon those authorities, Perry's *qui tam* action would not have been dismissed. *See*, *e.g.*, *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 30 (1st Cir. 2009) (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"), *cert denied* 561 U.S. 1005 (2010); *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)). Moreover, 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. *Id.* at 854-855.

2. Defendants argue (at 21-23) that Perry fails to plead *scienter*. The Act defines the necessary mental state as "actual knowledge of the information," "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. §3729(b)(1)(A). Their argument over *scienter* was not adopted by the Ninth Circuit or Judge McShane, and it presents no reason to deny review.

*Scienter* presents no problem for Perry at any rate. As detailed in the complaint, ¶¶31-33, App. 52a-53a, highway construction contractors working on federally-funded projects are responsible for conducting their own quality control, to *know* the quality of materials they provide, to detect and report all non-compliance, and to take effective remedial steps on all occasions when non-compliance is found. Indeed, respondents' quality control efforts lead directly to the certification of compliance with federally-mandated specifications. In this context, Perry's allegations of respondents' *scienter* are clearly sufficient.

3. Similarly, respondents' argument (at 23) on "materiality" lacks merit. No court below agreed that additional allegations were needed to establish materiality, and respondents essentially conceded the issue by arguing that ODOT administrators had responsibility to adjust contract payments based upon compliance with quality control. Moreover, respondents' failure to disclose what they knew from their own quality control makes "the government's payment of claims irrelevant to the question of materiality." *United States ex rel. Prather v. Brookdale*

*Senior Living Cmtys., Inc.*, 892 F.3d 822, 836-37 (6th Cir. 2018).

4. Finally, respondents' argument based on "plausibility" also fails. This argument was not adopted by the lower courts, and it presents no obstacle to the granting of Perry's petition. Indeed, in the time Perry has litigated over pleading standards, an independent expert forensic investigation confirmed that the premature failures and observable "rutting" in Oregon's highways and bridges are linked directly to substandard construction of the sort witnessed and documented by Perry. *See* Scholz, "Forensic Investigation of Moisture-Related Pavement Failures on Interstate Highways in Oregon," Transportation Research Board, 90th Ann. Mt. (2011) ("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"). The Ninth Circuit granted Perry's motion to take judicial notice of the forensic study. App. 1a. Respondents nevertheless ignore the logical impact of the study to proof of Perry's claims. In light of that investigation, it is safe to find Perry's claims to be plausible, and to know that Perry will be able to prove a causal connection between the substandard foundation construction materials and the moisture-related failures of Oregon's highways.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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