No. 21-1145

IN THE

Supreme Court of the United States

MOLINA HEALTHCARE OF ILLINOIS, INC. AND MOLINA HEALTHCARE, INC.,

Petitioners,

v.

THOMAS PROSE,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Rule 9(b) requires plaintiffs in False Claims Act cases to plead details of the alleged false claim.

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INTEREST OF *AMICUS CURIAE**

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. In several significant cases, WLF has appeared as an *amicus curiae* to argue for the proper construction of the False Claims Act. *See, e.g.*, *Univ. Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016); *United States ex rel. Harman v. Trinity Indus.*, 872 F.3d 645 (5th Cir. 2017).

Congress enacted the FCA long ago to check the wrongdoing of war profiteers. Today, unfortunately, the courts often must check the wrongdoing of FCA profiteers. *See, e.g.*, *United States ex rel. Holmes v. Northrop Grumman Corp.*, 642 F. App'x 373 (5th Cir. 2016); *United States v. Quest Diagnostics, Inc.*, 734 F.3d 154 (2d Cir. 2013). WLF believes that applying Rule 9(b)'s heightened pleading standard to FCA claims is one of the best ways to ensure that the Act is used only for its intended purpose—as a curb on those who knowingly defraud the United States by submitting false claims for payment.

SUMMARY OF ARGUMENT

"The False Claims Act is not * * * a vehicle for punishing garden-variety breaches of contract or

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* No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, contributed money for preparing or submitting this brief. After timely notice, all counsel of record consented in writing to WLF's filing this brief.

regulatory violations." *Escobar*, 579 U.S. at 194. Its origin reflects this. It was passed in reaction to contractors who, during the Civil War, caused the United States to be "billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *Id.* at 182. Thus, the statute imposes "treble damages plus civil penalties" of up to $23,607 per false claim. *Id.*; *see Civil Monetary Penalties Inflation Adjustment for 2021*, 86 Fed. Reg. 70,740, 70,741 (Dec. 13, 2021). The strictness of this punishment combined with a *qui tam* "bounty" provision confirms that the FCA is meant only to punish conduct equivalent to robbing or defrauding the government.

Accusing someone of defrauding the government is a serious charge. Federal Rule of Civil Procedure 9(b) establishes "an elevated pleading standard" for all allegations of fraud. *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009). As Chief Judge Sykes noted below in dissent, that standard requires *qui tam* plaintiffs to "describ[e] the 'who, what, when, where, and how' of the fraud." Pet. App. 28-29.

Respondent's *qui tam* complaint supplies none of that. It describes no false claim submitted to the government, no express falsehood in the enrollment forms, and no specific misleading statement by Petitioners or their agents. On mere "information and belief," Respondent speculates that Petitioners agreed to provide certain Medicaid-reimbursed services in skilled nursing facilities when they "did not intend to do so." *Id.* at 98. That is not enough.

This lack of particularity should have doomed Respondent's complaint—and would have in at least the First, Sixth, Eighth, or Eleventh Circuits. Those circuits all require relators to allege particularized details about specific false claims submitted to the government—names, dates, places, amounts, and the like. Pet. App. 14-16. But, as Petitioners ably detail, the Seventh Circuit joins the Third, Fifth, Ninth, Tenth, and D.C. Circuits by holding, in an acknowledged circuit split, that FCA plaintiffs need not identify any specific fraudulent claim for payment at the pleading stage. *Id.* at 16-18. This wide disagreement among the circuits, which was outcome-determinative here, cries out for this Court's review.

I. Allowed to stand, the entrenched circuit split over Rule 9(b) will make it impossible to filter out vague, generalized, or speculative FCA fraud allegations. Both the FCA and Rule 9(b) require precise allegations about specific false or fraudulent claims. Speculative allegations about the defendant's generalized misconduct, without connecting that misconduct to a specific false claim, cannot suffice.

Faithful application of Rule 9(b) thus ensures that the government and the defendant have ample information to investigate FCA allegations, and that district courts can decide whether those who file *qui tam* actions are statutorily barred from suing.

II. Allowing the lower courts to continue abdicating their responsibility to apply Rule 9(b) as a check on FCA relators who allege no specific false claim with particularity would give a green light to abusive litigation. Meritless FCA suits—increasingly

common due to the enticing windfalls that relators can obtain—will proliferate even more, and many will advance beyond the pleading stage.

Defendants targeted by these dubious lawsuits will face hydraulic pressure to settle, yielding *in terrorem* settlements that are a deadweight loss to the economy. What's more, the FCA's generous venue provision makes it especially easy for relators to file in favorable forums with lax Rule 9(b) pleading standards, creating perverse incentives for forum-shopping.

III. A circuit split on the proper interpretation and application of one of the Federal Rules of Civil Procedure is uniquely worthy of this Court's review. After all, the entire purpose behind the Federal Rules was to supply a uniform and orderly way of adjudicating disputes in the federal courts. But that crucial goal of uniformity is a dead letter if the meaning of Rule 9(b) in FCA cases hinges on where the suit is filed. Only this Court can provide a single, nationwide standard for Rule 9(b) in all FCA cases.

* * *

The Court should grant review, reverse the decision below, and clarify that Rule 9(b) applies with full force to all FCA claims.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NEEDED TO ENSURE THAT RULE 9(B) FILTERS OUT VAGUE, GENERALIZED, OR SPECULATIVE FCA FRAUD ALLEGATIONS.

"The False Claims Act is not an all-purpose antifraud statute." *Escobar*, 579 U.S. 194. It does not attach liability for breach of contract or for violating government regulations. Rather, it attaches liability only for "knowingly ask[ing]," or causing others to ask, "the Government to pay amounts it does not owe." *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002) ("The submission of a claim is * * * the *sine qua non* of a False Claims Act violation.").

Congress intended the FCA to "strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 295 (2010). Both the FCA's first-to-file bar, 31 U.S.C. § 3730(b)(5), and its public-disclosure bar, 31 U.S.C. § 3730(e)(4)(A), encourage relators to come forward with useful, original facts about fraud while preventing follow-on suits.

Rule 9(b) works in harmony with those provisions. By requiring FCA plaintiffs to "state with particularity the circumstances constituting fraud," Rule 9(b) also helps district courts decide whether the first-to-file or public-disclosure bars apply. *See* Fed. R. Civ. P. 9(b); *Escobar*, 579 U.S. at 195 n.6. Because the crux of any FCA violation is the submission of a false claim, a relator may satisfy Rule 9(b)

only by alleging the particularized details of a false claim submission.

Among the "circumstances" a plaintiff must plead with particularity are "the time, place, and contents of the false representations or omissions, as well as the identity of the person making the misrepresentation of failing to make a complete disclosure and what the defendant obtained thereby." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1297 (3d ed. 2008). This heightened pleading requirement furthers many venerable goals: "providing notice to a defendant of its alleged misconduct"; "preventing frivolous suits"; "protecting defendants from harm to their goodwill and reputation"; and "eliminating fraud actions in which all the facts are learned after discovery." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456 (4th Cir. 2013).

Beyond serving as a filter in its own right, Rule 9(b) also helps the government make timely decisions in FCA cases. By demanding particularized details about *qui tam* claims, Rule 9(b) enables the United States to scrutinize FCA requirements and decide whether to intervene in the suit. Relators who lack enough information to allege the details of any particular false claim are unlikely to have inside information that would assist the government if it chooses to intervene. *See United States ex rel. Hirt v. Walgreen Co.*, 846 F.3d 879, 882 (6th Cir. 2017) ("If Hirt lacked the information to do even this, he was not the right plaintiff to bring this *qui tam* claim.").

A relator who survives a motion to dismiss in a lax pleading jurisdiction may prevent other possi-

ble relators with "genuinely valuable information" from filing their own lawsuits and giving the government vital information it needs to uncover fraud. *Graham Cnty.*, 559 U.S. at 294. Without particularized details of a false claim, neither defendants nor district courts can know whether a relator's claim derives from public disclosures or whether the relator qualifies as an original source. So requiring relators to plead fraud with particularity "not only respects Civil Rule 9(b), but * * * also helps in determining whether the public-disclosure bar applies." *Hirt*, 846 F.3d at 881.

The Seventh Circuit's divided opinion jettisons these core policy aims. In the Seventh Circuit's view, although he has identified no false claim, Respondent may proceed on the strength of allegations that do no more than "plausibly support[] the inference that [Petitioners] included false information" in their paperwork with the government. Pet. App. 12. As Chief Judge Sykes explained in dissent, the panel majority "accept[ed] [Respondent's] invitation to deviate from Rule 9(b)" by excusing him from having to "describ[e] the 'who, what, when, where, and how' of the fraud." *Id.* at 28-29.

Combining this lax application of Rule9(b) with the Seventh Circuit's mistaken view that *Escobar*'s implied-certification liability does not require a misleading statement about goods or services allows almost any relator—no matter how generalized or insubstantial the allegations—to survive dismissal and obtain burdensome discovery. Permitting that approach to FCA pleading to stand—and the recognized circuit split embracing it to persist—is a recipe for disaster.

II. BY IMPROPERLY LOWERING THE BAR FOR FCA PLEADINGS, THE DECISION BELOW INVITES MERITLESS *QUI TAM* SUITS.

By relaxing Rule 9(b)'s requirement that FCA relators allege the details of specific false claims, the Seventh Circuit's latest salvo in an entrenched circuit split not only departs from the text and purpose of Rule 9(b), but also allows meritless cases to advance to costly and burdensome discovery. Unless this Court intervenes, speculative *qui tam* complaints will continue to proliferate. That is no small matter.

Q*ui tam* actions have become "the fastest-growing area of federal litigation." Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under The Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 844 (2012). Recent years have seen an explosion in FCA complaints, many of which have lacked merit and should have been dismissed for failure to state a claim. From 1990 to 1999, relators filed an average of 274 *qui tam* complaints each year. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1986 — Sept. 30, 2021* <http://bit.ly/34vxS2K>. From 2000 to 2009, that number had climbed to 373. *Id*. And from 2010 to 2019, the average number of *qui tam* suits had nearly doubled to 665—more than a dozen new cases per week. *Id.*

The healthcare industry has proven to be an especially popular target for relators. Healthcare-related cases now comprise about 70% of all new *qui tam* cases, with 459 new suits filed in 2020. *Id.* And healthcare companies paid 90% of all FCA settlements in 2021. *See* Tara Bannow, *Healthcare com-*

panies paid 90% of False Claims Act settlements in 2021, Modern Healthcare (Feb. 1, 2022) <https://bit.ly/35mHJbW>. These cases are rarely of any value or interest to the government. Indeed, the government intervenes in only one out of four FCA actions. Eric Topor, *Intervention in False Claims Act Lawsuits*, Bloomberg Law (Apr. 24, 2017) <http://bit.ly/2milJ8d>. The vast majority of the remaining 75% of FCA complaints are meritless. In 2020, for example, all healthcare *qui tam* actions in which the government declined to intervene yielded only 12% of the total healthcare *qui tam* recovery. *See Fraud Statistics*, *supra.*

Nor is that all. As this Court knows well, "extensive discovery and disruption in a lawsuit could allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 149 (2008). Prospective relators (and their counsel) have every incentive to pursue government contractors until they agree to settle, no matter how vague, speculative, or unfounded the complaint's allegations may be. Faced with the risk of financial ruin, many defendants have little choice but to settle even frivolous FCA claims once they survive a motion to dismiss.

Those *qui tam* defendants who ultimately prevail on the merits still must incur massive litigation costs to clear their names. Against the backdrop of so many meritless claims, the burden and expense of discovery loom much larger in FCA suits than in the typical civil case. *See, e.g.*, *United States ex rel. Barko v. Halliburton Co.*, 954 F.3d 307, 309 (D.C. Cir. 2020) (describing *qui tam* discovery that included 64

document requests and more than 2.4 million pages of potentially responsive documents). "While accurate data would be nearly impossible to compile, the cost of frivolous *qui tam* cases surely runs into the hundreds of millions of dollars annually." Stephen A. Wood, *A Convincing Case for Judicial Stays of Discovery in False Claims Act Qui Tam Litigation*, WLF Legal Backgrounder (May 5, 2017) <https://bit.ly/3p5FDnx>.

Rule 9(b) "is a nullity if [the relator] gets a ticket to the discovery process without identifying a single claim." *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359-60 (11th Cir. 2006). When properly granted, motions to dismiss help "to prevent settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit." *Am. Bank v. City of Menasha*, 627 F.3d 261, 266 (7th Cir. 2010). But if an FCA relator can survive a motion to dismiss despite identifying *no* particular false claim submitted to the government, then the FCA becomes a vehicle for punishing "garden-variety" regulatory offenses and breaches of contract. *Cf. Escobar*, 579 U.S. at 194.

If Rule 9(b) is not a reliable check on opportunistic relators, the number of meritless *qui tam* suits will only continue to rise—especially in circuits that take a relaxed view of the Rule's application in FCA cases. While this entrenched circuit split is reason enough to grant review, how easily FCA plaintiffs can shop for a favorable forum supplies yet another.

The FCA's exceedingly broad venue provision allows suit "in any judicial district in which the defendant, or in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any [violation] occurred." 31 U.S.C. § 3732(a). This expansive venue provision invites relators who lack enough detailed information to identify particularized instances of fraud to bring their FCA suits in circuits that apply Rule 9(b) more leniently. Although such forum-shopping is precisely the kind of "opportunistic and parasitic behavior that the FCA seeks to preclude," *Bailey v. Shell W. E&P, Inc.*, 609 F.3d 710, 721 n.3 (5th Cir. 2010), it is the inevitable consequence of persistent disarray among the circuits.

III. REVIEW IS NEEDED TO VINDICATE THE GOAL OF UNIFORMITY BEHIND THE FEDERAL RULES.

As the petition details, the courts of appeal are hopelessly split on whether Rule 9(b) requires FCA relators to plead with specificity the details of alleged false claims. The First, Sixth, Eighth, and Eleventh Circuits say yes. *See* Pet. at 7. The Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits say no. *Id.* But Rule 9(b) should require the same specificity of a *qui tam* complaint no matter where suit is filed. The decision below only exacerbates this unfairness.

Since their adoption in 1937, the Federal Rules of Civil Procedure have required a party alleging fraud to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). The circuits' entrenched split on the proper application of

one of the Federal Rules of Civil Procedure especially warrants this Court's intervention.

The entire purpose behind the Federal Rules was to supply a uniform and orderly way of adjudicating disputes in the federal courts. *See Sayre v. The Musicland Grp., Inc.*, 850 F.2d 350, 354 (8th Cir. 1988) (stating that "the purpose of the Federal Rules of Civil Procedure" was "to provide uniform guidelines for all federal procedural matters"). Indeed, the wide divergence of legal processes among the States was the primary catalyst for federal procedural rules in the first place.

Before adoption of the Federal Rules, federal law required district courts to apply the procedural rules of the States in which they sat. *See* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 Mercer L. Rev. 757, 780 (1995). Responding to the ensuing huge disparity in federal-court procedure, the Federal Rules were adopted with "the very purpose * * * of providing for a single uniform system of procedure." Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 Cornell L.Q. 443, 451 (1935).

"The justifications for uniformity in the 1930s are still powerful today." Chemerinsky & Friedman, 46 Mercer L. Rev. at 781. The persistent, ongoing circuit split frustrates the uniform application of Rule 9(b) in FCA cases and undermines the core purpose behind the Federal Rules of Civil Procedure. Because only this Court can announce a single, uniform standard for Rule 9(b)'s proper scope and sweep, the petition should be granted. Only then can

Rule 9(b) be consistently applied in a way that achieves its venerable aims.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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