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

REPLY BRIEF FOR PETITIONERS

Kelly Perigoe
Albert Giang
KING & SPALDING LLP
633 West Fifth Street
Suite 1600
Los Angeles, CA 90071
(213) 443-4355

Jeffrey S. Bucholtz
Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500

Anne M. Voigts
Counsel of Record
Quyen L. Ta
Matthew V.H. Noller
KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, CA 94111
(415) 318-1200
avoigts@kslaw.com

Counsel for Petitioners

May 16, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONERS

According to Prose's counsel, this case is one of the "strongest" examples of an "'especially acute' conflict" over whether Rule 9(b) requires FCA plaintiffs to "plead specific details of false claims." *Bethany Hospice* Pet.i, 24, Reply 2, 4; *Owsley* Pet.i, 20.[1] In counsel's own words, this "split warrant[s] this Court's review," and the fact that Molina's petition is one of three raising "the same Rule 9(b) question" is "a strong signal of the existence of a split and the issue's importance." *Owsley* Reply 4-5 & n.*.

Prose would prefer the Court grant certiorari in *Bethany Hospice* or *Owsley*, where his counsel filed the petitions. But he offers no good reason why the Court should not grant *this* petition. Prose's quibbling over the Rule 9(b) question's phrasing does not change the bottom line: twelve circuits have split over "[w]hether Rule 9(b) requires plaintiffs in [FCA] cases to plead details of the alleged false claims." Pet.i. Prose admits he did not do so. BIO15. So in the six circuits that require details of false claims, Prose's complaint would be dismissed. In the Seventh Circuit, which, like five other circuits, does not require such details, it survived. That split calls for certiorari.

The same is true of the second question presented—"[w]hether a request for payment that makes no specific representations about the goods or services provided can be actionable under an implied false certification theory." Pet.i. Prose does not dispute that the circuits are split: Four have held that such a

[1] On May 16, 2022, the Court called for the views of the Solicitor General in *Owsley,* as it had previously done in *Bethany Hospice*.

request is not actionable, and three that it is. That split will not resolve itself. And if the Court agrees with Molina that implied-certification claims require "specific representations about the goods or services provided," the decision below must be reversed on that ground too.

This case is the best vehicle because it presents both of these important and related questions over which courts have split and does so cleanly. Prose's purported vehicle problems are manufactured: Molina argued below that all of Prose's theories, including fraudulent inducement, failed because he did not plead the details of a false claim, and the issues presented are legal, not factual. Because deciding what claims qualify as "false or fraudulent" may inform the Court's consideration of what Rule 9(b) requires a plaintiff to plead, the Court should grant review in this case to consider both questions together. At a minimum, the Court should grant certiorari in *Bethany Hospice* or *Owsley* on the Rule 9(b) question and hold this petition.

ARGUMENT

I. Both questions presented raise deep circuit splits worthy of this Court's review.

1. Prose does not dispute either that the circuits are deeply divided over whether Rule 9(b) requires pleading details of false claims or that this question is important, recurring, and certworthy—as his counsel correctly explained in *Bethany Hospice* and *Owsley*. Pet.13-18, 22-24. Rather than concede that the Court should grant certiorari here, however, Prose asserts that by not including the "predicate" that "the plaintiff

has pleaded a fraudulent scheme with particularity" in the first question presented, Molina raises a different question than *Bethany Hospice* and *Owsley*. BIO11-12.

The opposite is true. By not asking the Court to decide whether Prose adequately pleaded the alleged underlying "scheme," Molina focused this petition on the exact question presented in *Bethany Hospice* and *Owsley*: even assuming Prose pleaded a fraudulent scheme with particularity, did Rule 9(b) require him to plead details of false claims? Prose contends it is "unclear" whether the petition also asks the Court to decide whether he pleaded a fraudulent scheme with particularity, but Prose himself admits that unposed question is "outside the scope of the question presented." BIO12.

The circuits that require FCA plaintiffs to plead details of false claims do so in every case, independent of the separate requirement to allege a fraudulent scheme. *E.g.*, *U.S. ex rel. Owsley v. Fazzi Assocs., Inc.*, 16 F.4th 192, 196-97 (6th Cir. 2021); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005) (per curiam). Other circuits, in contrast, never require FCA plaintiffs to plead details of false claims. *E.g.*, *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155-56 (3d Cir. 2014); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010). That is the split that *Bethany Hospice*, *Owsley*, and this case all squarely present. Prose concedes that split is certworthy. BIO14, 16. And its resolution is outcome-determinative because, as Prose also concedes, he "did not allege details of claims." Pet.26 (cleaned up); *see* BIO15.

2. Prose also concedes that the circuits have split over the second question presented: "Whether a request for payment that makes no specific representations about the goods or services provided can be actionable under an implied false certification theory." Pet.i. Prose argues that the split is "superficial and likely to resolve itself," BIO18, but provides no support for that prediction. Like the first question, this issue raises an entrenched split that calls out for this Court's intervention.

The Fourth and D.C. Circuits hold that a mere request for payment is "false" whenever it omits a material breach of contract, without requiring specific representations about the goods or services provided. *See* Pet.20-21 (citing *United States v. Dynamic Visions Inc.*, 971 F.3d 330, 337 (D.C. Cir. 2020); *U.S. ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174, 178 n.3 (4th Cir. 2017)). In contrast, the Third, Fifth, Ninth, and Eleventh Circuits hold that specific representations are required. *See id.* (citing *U.S. ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1018 (9th Cir. 2018); *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1109 (11th Cir. 2020); *U.S. ex rel. Smith v. Wallace*, 723 F. App'x 254, 255-56 (5th Cir. 2018) (per curiam); *United States v. Eastwick Coll.*, 657 F. App'x 89, 94 (3d Cir. 2016)). Faced with that split, Prose (1) fails to address the Fourth and D.C. Circuit decisions, (2) downplays the Ninth and Eleventh Circuit decisions, and (3) dismisses the Fifth and Third Circuits' decisions siding with the Ninth and Eleventh because they are unpublished.

Whether or not Prose cares to acknowledge them, the Fourth and D.C. Circuits stake out one position

(indeed, Prose's position). Neither they nor the circuits that have taken the opposite position have offered any indication that they are likely to change their positions or that this well-developed split will dissipate. Far from "show[ing] that any split is shallow and ephemeral," let alone "signal[ing] that further percolation may well change the Ninth Circuit's view," BIO19, *Rose* followed the Ninth Circuit's rule requiring "specific representations" because the panel was "bound" by two previous published decisions. 909 F.3d at 1018 (cleaned up); *see U.S. ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 332 (9th Cir. 2017) (requiring "specific representations"); *U.S. ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 902 (9th Cir. 2017) (same). Sure enough, the Ninth Circuit continues to rely on *Rose* to dismiss implied-certification claims that do not identify "specific representations." *McElligott v. McKesson Corp.*, 2022 WL 728903, at *1 (9th Cir. Mar. 10, 2022) (cleaned up).

To try to downplay the divide, Prose asserts "the Eleventh Circuit would [not] have ruled against" him, BIO20, but he admits that its decision in *Ruckh* required "specific representations regarding the services provided," 963 F.3d at 1109. And although Prose contends that the claims in *Ruckh* are the same as his, the portion of *Ruckh* on which he relies addressed affirmative statements about services that were not provided. BIO20 (citing 963 F.3d at 1105). Prose does not allege that Molina made any such statements here.

As for the Fifth and Third Circuits' decisions, Prose is wrong that they "do not turn on this issue." BIO18-19. The Fifth Circuit rejected the plaintiff's

implied-certification theory because he did not "provide evidence … that the claims included 'specific representations.'" *Wallace*, 723 F. App'x at 256. The Third Circuit held that "implied false certification liability attaches when a claimant 'makes specific representations about the goods or services provided,'" then found the plaintiff did not satisfy that "established FCA liability framework." *Eastwick Coll.*, 657 F. App'x at 94. Although those decisions are unpublished, district courts in those circuits have followed them and required "specific representations." *E.g.*, *U.S. ex rel. Jamison v. Career Opportunities, Inc.*, 2020 WL 520590, at *6 (N.D. Tex. Jan. 31, 2020); *U.S. ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd.*, 2017 WL 1133956, at *5-6 (E.D. Pa. Mar. 27, 2017).

This Court should grant review in this case because it raises not one but two certworthy questions over which circuits are divided, and the Court would benefit from considering them together. But if this Court were to consider the Rule 9(b) issue in another case, not even Prose disputes that a hold would be warranted here.

II. This case presents an excellent vehicle to consider both questions.

This case presents an excellent vehicle to provide much-needed clarity regarding these two questions, both of which have major ramifications for courts and litigants—one because it determines the pleading standard that applies to all FCA claims and the other because it defines the contours of a theory of liability that, unless properly cabined, could transform the FCA from a statute about false claims into a broad contract- and regulatory-enforcement tool. In trying to

gin up purported vehicle problems to stave off review, Prose misrepresents his claims, Molina's arguments, and the decision below. There is every reason to grant review here and no reason not to.

1. Prose contends that this case is a poor vehicle for the Rule 9(b) question, feigning confusion over whether Molina asks the Court to decide whether he pleaded a "scheme" with particularity. BIO12-14. Because Molina does not seek review of that question, no "lack of clarity" obstructs this Court's review. BIO12. Whether "Rule 9(b) requires plaintiffs in False Claims Act cases to plead details of the alleged false claims," Pet. i, is a legal question that applies to *all* of Prose's claims, including fraudulent inducement.

Contrary to Prose's suggestion, BIO13, Molina consistently contended that Prose had not pleaded sufficiently specific claims under *any* of his theories, including fraudulent inducement. Below, Molina argued that Rule 9(b) required "establishing a relationship between the specific allegations of deceit [and] any claim for payment" for all of Prose's theories, C.A.Br.21-22 (cleaned up), and that Prose had not "plead[ed] with plausibility and particularity that Molina submitted a false claim or certification for payment to support *any theory of liability*"—including fraudulent inducement, C.A.Br.16-18 (emphasis added); *see also* N.D.Ill.Br.10-11 (ECF 55) (arguing Prose "failed to allege *any* false claims with the particularity required by Rule 9(b)" (emphasis added)).

Nor can fraudulent inducement be carved out from the Rule 9(b) split. Pet.17-18, 24 n.2.[2] Even in fraudulent-inducement cases, the FCA requires the submission of a "false or fraudulent claim." 31 U.S.C. § 3729(a)(1); *U.S. ex rel. Cimino v. Int'l Bus. Machs. Corp.*, 3 F.4th 412, 424-25 (D.C. Cir. 2021) (Rao, J., concurring). Indeed, the *Bethany Hospice* petition quotes the Seventh Circuit majority's discussion of Prose's fraudulent-inducement theory as evidence of the split Prose now contends does *not* extend to that theory. *See Bethany Hospice* Pet.19.

Prose's argument that Molina presents a "factbound dispute[]" because the Seventh Circuit majority "stated the law correctly" is fiction. BIO14-15 (citing App.8, 27). While the majority agreed that Rule 9(b) applied to FCA claims, the judges—like the circuits—split over what Rule 9(b) requires *as a matter of law*. App.12-13, 28-29. Prose contends that the details of the alleged false claims are "immaterial facts," BIO15, but the fact that he prefers the side of the split under which his claims survive is no reason to deny review.

Because the fraud the FCA prohibits is the submission of "a false or fraudulent claim," 31 U.S.C. § 3729(a)(1), the "'circumstances constituting fraud'"

---

[2] No circuit that requires pleading details of claims has held that that rule does not apply where the plaintiff relies on a fraudulent-inducement theory. *In re Baycol Products Litigation*, 732 F.3d 869, 876-77 (8th Cir. 2013), did *not* hold that plaintiffs don't have to allege details of claims. BIO13. Instead, it blessed the plaintiff's fraudulent-inducement theory *because* she "connected her allegations regarding the alleged fraud" to specific claims and payments. 732 F.3d at 877.

under Rule 9(b) will always include "*an actual false claim* for payment being made," *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002). So the "fraud" Rule 9(b) requires an FCA plaintiff to plead with particularity *always* includes the submission of "an actual claim for payment." *Id.* at 1311-12 & n.21 (cleaned up). And to plead the submission of a false claim with particularity, a plaintiff must always plead specific details—"the 'who,' 'what,' 'where,' 'when,' and 'how'"—of that claim. *Corsello*, 428 F.3d at 1013-14.

Prose does not contend that the majority below held he pleaded details of false claims, and he plainly didn't. BIO14-15. The majority nonetheless allowed his claims to proceed, consistent with the Seventh Circuit's preexisting rule that FCA plaintiffs need not "include allegations about[] a specific document or bill that the defendants submitted." *U.S. ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 777 (7th Cir. 2016); *see* Prose C.A.Br.42 (citing *Presser* for the rule). That legal rule, which does not turn on any disputed facts and over which the circuits have split, is what Molina challenges.

Finally, Prose's throwaway argument that his "complaint meets any reasonable standard for applying Rule 9(b)," BIO15, just means he disagrees with at least five circuits' interpretation of Rule 9(b) as requiring FCA plaintiffs to plead details of false claims, Pet.13-15. The fact that his complaint would survive in some circuits but not in others is a reason to grant certiorari, not deny it.

2. Prose likewise identifies no genuine vehicle problem with the second question.

Although Prose dismisses the question as "relat[ing] only to the implied false certification theory," BIO16, the expansive approach to that theory adopted by some circuits has serious consequences for courts, the government, and litigants. Because *all* FCA cases involve claims that request payment, the question whether claims that "merely request payment" can be deemed impliedly false despite not "mak[ing] specific representations about the goods or services provided" has the potential to arise in *every* case. Unless this Court grants review, relators will flock to the circuits that make it easy to convert breach-of-contract and regulatory-compliance disputes into *qui tam* actions for treble damages plus penalties.

Prose also wrongly contends that the majority below applied "the rule that petitioners urge." BIO16-18. While the majority quoted *Escobar*'s holding that "specific representations" are *sufficient* for an implied-certification claim, it did not hold that such representations are *necessary*. App.14-15; *see Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 579 U.S. 176, 189-90 (2016). To the contrary, it concluded that *Escobar* "signals that [the Court] continues to find that there are distinct ways in which the [FCA] may be violated" and opted to "follow suit." App.11. That expanded *Escobar* beyond its bourns, answering a question *Escobar* formally left open in a manner inconsistent with *Escobar*'s logic. As the dissent explained, the majority "establishe[d] a new rule" when it approved Prose's implied-certification claim without identifying any specific representations in Molina's enrollment forms. App.32-33, 39 (Sykes, C.J., dissenting); Pet.11-12.

When push comes to shove, even Prose cannot argue the majority identified specific representations in Molina's forms. On Prose's own description, the majority found only that Molina "implicitly" represented that it provided "SNF services." BIO17 (quoting App.18). The majority never identified any specific, *explicit* representations, and Prose has consistently contended that he did not need to plead any; his argument, here and below, is that a claim is false any time it omits "noncomplian[ce] with a contractual requirement." BIO17 (cleaned up) (quoting App.18); *see* Prose C.A.Br.41 & n.4. That erroneous argument, which the Seventh Circuit adopted, conflicts with *Escobar's* logic and four circuits' express holdings. Pet.28.

3. This case is an ideal vehicle to resolve both splits because Rule 9(b) and the FCA's falsity requirement are designed to filter out baseless and non-specific claims like Prose's at the motion-to-dismiss stage. The broad importance of these questions is underscored by the amicus support for certiorari here. Prose seeks a big payday based on nothing more than an alleged breach of contract—without identifying any actual false claim submitted or asserting that such a claim contains a misrepresentation about the goods or services provided. This is typical for Prose, a "[p]rolific" FCA plaintiff, Jeff Overley, *DOJ Sues Prolific FCA Whistleblower for 'Widespread Fraud,'* Law360 (Apr. 6, 2022), https://bit.ly/3vNhMwt, who has himself been accused of masterminding a multi-year, multi-million–dollar scheme to defraud Medicare. Complaint, *United States v. Gen. Med., P.C.*, No. 22-cv-651 (S.D. Ill. Mar. 30, 2022), ECF 1.

As this Court has emphasized, "[t]he False Claims Act is not 'an all-purpose antifraud statute[]' or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Escobar*, 579 U.S. at 194 (quoting *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 672 (2008)). Rule 9(b) and the FCA's falsity requirement, when properly enforced, keep the FCA within its proper bounds and provide an important check on meritless lawsuits. The Rule 9(b) question is just as certworthy here as in the two cases Prose's counsel urges the Court to review. The only difference is that the tables are turned and here it's the defendant urging review. Both sides agree that the Court should grant certiorari in *some* case to resolve this longstanding and important split. It should do so in this case because of the entrenched split over the second, equally important question

CONCLUSION

The Court should grant the petition for certiorari or, at a minimum, hold it pending its disposition of *Bethany Hospice* and *Owsley*.

Respectfully submitted,

Kelly Perigoe
Albert Giang
KING & SPALDING LLP
633 West Fifth Street
Suite 1600
Los Angeles, CA 90071
(213) 443-4355

Jeffrey S. Bucholtz
Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500

Anne M. Voigts
Counsel of Record
Quyen L. Ta
Matthew V.H. Noller
KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, CA 94111
(415) 318-1200
avoigts@kslaw.com

Counsel for Petitioners

May 16, 2022