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

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

Petitioners submit this supplemental brief to address the Solicitor General's brief in *Johnson v. Bethany Hospice & Palliative Care LLC*, No. 21-462. As the Solicitor General reliably does in cases involving the False Claims Act, she urges this Court to deny review in *Bethany Hospice* despite an acknowledged circuit split over whether Rule 9(b) requires plaintiffs to plead details of false claims. Carefully avoiding any mention of the Seventh and Sixth Circuit decisions at issue in this petition and *U.S. ex rel. Owsley v. Fazzi Assocs., Inc.*, No. 21-936, the Solicitor General urges the Court not to review the Eleventh Circuit's decision in *Bethany Hospice* because, she says, the "circuit disagreement" "has now subsided." SG Br. 17. She is the only one who thinks that. Relators, defendants, *amici*, and even the circuits themselves all agree that there exists a deep-seated circuit split over the issue. Pet.i.; *Bethany Hospice* Pet.i; *Owsley* Pet.i. This Court's intervention is necessary to resolve that split, and any of the three pending petitions give it the opportunity to do so.

Both before and after 2014—when the Solicitor General first asked this Court not to take up the Rule 9(b) split in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, 572 U.S. 1033 (2014) (No. 12-1349) (mem.)[1]—the circuits themselves

[1] Notably, in *Nathan*, although the Solicitor General's brief urged the Court to deny certiorari, it acknowledged that the issue was "a significant" one; that review might be appropriate in the future; and that, in particular, "this Court's intervention may be warranted" if, as is the case here and in *Owsley*, some "courts of

have acknowledged that "the various Circuits disagree as to what a plaintiff . . . must show at the pleading stage to satisfy the 'particularity' requirement of Rule 9(b) in the context of a claim under the FCA." *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155 (3d Cir. 2014); *U.S. ex rel. Eberhard v. Physicians Choice Lab'y Servs., LLC*, 642 F. App'x 547, 550-51 (6th Cir. 2016); *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010).

Despite the Solicitor General's claim that most differences in outcomes can be ascribed to factual differences between complaints, this split is outcome-determinative in many cases. The Eleventh and Sixth Circuits would have dismissed the complaint in this case for failure to plead details of false claims, while the Seventh Circuit would have allowed the claims in *Bethany Hospice* and *Owsley* to advance into discovery based on a mere inference that false claims were submitted. *Bethany Hospice* Reply 3-4. This issue is too important for its resolution to vary geographically—the relaxed application of Rule 9(b) generates an influx of meritless FCA suits that burdens defendants and the courts alike. This Court should grant review now.

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appeals continue to adhere to the rigid view" requiring such details and "application of that approach appears to be outcome-determinative." *Nathan* SG Br. 16. Now, however, despite the significance of the issue and the durability and depth of the split, the Solicitor General suggests that the moment for review has passed.

ARGUMENT

I. The Widely Acknowledged Circuit Split Over Rule 9(b) Warrants Review

Everyone but the Solicitor General agrees that the circuits are hopelessly divided over whether Rule 9(b) requires a relator to plead details of false claims. All but one of the circuits have weighed in, with half—the Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits—not requiring plaintiffs to plead any details about actual claims submitted and the other half—the First, Second, Fourth, Sixth, Eighth, and Eleventh Circuits—requiring such details. Relators, defendants, and *amici* all agree this is an "entrenched" split. U.S. Chamber of Commerce Br. 4-5; *Bethany Hospice* Pet.28. So do "commentators." *Bethany Hospice* Pet.15. And most tellingly, so do the circuits themselves. *Foglia*, 754 F.3d at 155; *Eberhard*, 642 F. App'x at 550-51; *Ebeid*, 616 F.3d at 998-99. The Solicitor General stands alone in arguing that all circuits "have largely converged" on a single test for applying Rule 9(b): "whether an FCA relator's complaint . . . contains some 'indicia of reliability' to support a strong inference that the defendant submitted false claims for payment to the government." SG Br. 15.

When it comes to discussing the rules of the specific circuits, however, even the Solicitor General is forced to agree with petitioners in *Bethany Hospice*, *Owsley*, and this case that the First, Fourth, and Sixth Circuits require (with specific, rare exceptions) "details regarding specific false claims for payment." SG Br. 16-17. None of these circuits allows relators to automatically forgo pleading details of false claims by

pleading other "indicia of reliability." *See U.S. ex rel. Grant v. United Airlines, Inc.*, 912 F.3d 190, 197 (4th Cir. 2018) (cleaned up) (requiring details of false claims unless relator "allege[s] a pattern of conduct that would *necessarily* have led to submission of false claims to the government"); *U.S. ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 38-39 (1st Cir. 2017) (requiring relator to allege the "essential particulars of at least some actual false claims" unless defendant caused a third party to submit claims).

Indeed, the Sixth Circuit has specifically *rejected* the "indicia of reliability" rule that the Solicitor General says all circuits apply. *Eberhard*, 642 F. App'x at 550-51. The court refused to "join[]" the circuits that "hold that it is sufficient for a plaintiff 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." *Id.* at 550 (cleaned up). Instead, the Sixth Circuit "joined the Fourth, Eighth, and Eleventh Circuits" in holding that "a relator cannot meet Rule 9(b)'s standard without alleging which specific false claims constitute a violation of the FCA." *Id.* at 550-51 (cleaned up). So in *Owsley*, for instance, the Sixth Circuit held that even though the relator had "personal knowledge of billing practices employed in the fraudulent scheme" and described "in detail, a fraudulent scheme," she could not satisfy Rule 9(b) without alleging "particular identified claims." *U.S. ex rel. Owsley v. Fazzi Assocs., Inc.*, 16 F.4th 192, 194-97 (6th Cir. 2021) (cleaned up). In the Sixth Circuit, that requirement is "clear and unequivocal." *Id.* at 196 (cleaned up). Although the Solicitor General obviously knows about *Owsley* given the Court's call for her views in that case, Order,

Owsley, No. 21-936 (U.S. May 16, 2022), she chose not even to mention *Owsley* in her brief in *Bethany Hospice*.

Nor has the Eleventh Circuit adopted the Solicitor General's relaxed "indicia of reliability" rule as a substitute for requiring details of specific false claims. The Eleventh Circuit requires a relator to "allege specific details about false claims *to establish* the indicia of reliability necessary under Rule 9(b)." *Carrel v. AIDS Healthcare Found., Inc.*, 898 F.3d 1267, 1276 (11th Cir. 2018) (emphasis added) (cleaned up). In other words, "indicia of reliability" must be *demonstrated* by pleading specific details of false claims; such indicia are not a *substitute* for details of specific claims, as they are on the lax side of the circuit split. Thus, while the Eleventh Circuit acknowledged in *Bethany Hospice* that it does not always require a *sample* fraudulent claim, it unequivocally held the "[r]elators were required to plead with particularity the submission of an actual false claim to the government" and affirmed the dismissal of their complaint for "fail[ing] to allege any specific details about the submission of an actual false claim." *Est. of Helmly v. Bethany Hospice & Palliative Care of Coastal Ga., LLC*, 853 F. App'x 496, 497, 501-03 (11th Cir. 2021) (per curiam); *see id.* at 501 (faulting relators for failing to provide "particular facts about a representative false claim" because "a complaint 'must allege actual submission of a false claim,' *and* . . . it must do so with 'some indicia of reliability'" (emphasis added) (citing *Carrel*, 898 F.3d at 1275, and *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002)). Given this holding, *Bethany Hospice* cannot fairly be read as requiring a relator to

"*either* plead details concerning specific false claims for payment presented to the government *or* identify other reliable bases for concluding that such claims were submitted." SG Br. 12. Instead, relators must do *both*.

The Solicitor General's argument comes closest to landing for the Eighth Circuit, which has at least *said* that a relator can satisfy Rule 9(b) "by pleading (1) representative examples of the false claims, or (2) the particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *U.S. ex rel. Benaissa v. Trinity Health*, 963 F.3d 733, 739 (8th Cir. 2020) (cleaned up). But the Solicitor General still misses the mark because the Eighth Circuit applies the "reliable indicia" exception only in the narrow category of cases in which the relator has "firsthand knowledge of [the defendant's] billing practices." *Id.* at 740; *accord U.S. ex rel. Strubbe v. Crawford Cnty. Mem'l Hosp.*, 915 F.3d 1158, 1163-65 (8th Cir. 2019). Even if the Solicitor General were correct about the Eighth Circuit's rule, though, that would merely place the Eighth Circuit on the lax side of the split, in sharp disagreement with the First, Fourth, Sixth, and Eleventh Circuits.

It is not surprising that the Solicitor General strives to find agreement among the circuits where none exists; the government rarely meets an FCA petition it doesn't want denied. It appears that in the twelve FCA cases since October Term 1996 in which the Court has called for the views of the Solicitor General, the Solicitor General has recommended

denial in all but one.[2] Notably, the Court granted certiorari in three of those cases despite the Solicitor General's denial recommendation.[3] To argue for denial here, however, the Solicitor General must ignore the generally applicable rule in each circuit and focus on occasional, narrow exceptions to it. But relators, defendants, *amici*, and the circuits agree that there is a clear split between those circuits that require details of false claims and those that allow the submission of a false claim to be inferred. The narrow exceptions that some circuits on the stricter side of the split recognize do not erase this fundamental divide. If anything, they underscore "that the circuits have adopted a patchwork of inconsistent rules." *Owsley*

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[2] *Gilead Scis., Inc. v. U.S. ex rel. Campie*, No. 17-936 (U.S. Nov. 30, 2018); *U.S. ex rel. Carter v. Halliburton Co.*, No. 17-1060 (U.S. May 22, 2018); *U.S. ex rel. Advocates for Basic Legal Equality, Inc. v. U.S. Bank, N.A.*, No. 16-130 (U.S. Apr. 14, 2017); *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 580 U.S. 39 (2016) (No. 15-513); *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 575 U.S. 650 (2015) (No. 12-1497); *U.S. ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, No. 12-1349 (U.S. Feb. 25, 2014); *U.S. ex rel. Summers v. LHC Grp., Inc.*, No. 10-827 (U.S. May 26, 2011); *Ortho Biotech Prods., L.P. v. U.S. ex rel. Duxbury*, No. 09-654 (U.S. May 19, 2010); *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, No. 08-304 (U.S. May 20, 2009); *U.S. ex rel. Bly-Magee v. Premo*, No. 06-1269 (U.S. Dec. 21, 2007); *Comstock Res., Inc. v. Kennard*, No. 04-165 (U.S. May 26, 2005); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997) (No. 95-1340). *Graham County* was the only one in which the Solicitor General recommended certiorari.

[3] *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 580 U.S. 39 (2016); *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 575 U.S. 650 (2015); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997).

Reply 4. That inconsistency calls out for this Court's resolution.

II. The Court Has Multiple Vehicles Through Which to Resolve the Rule 9(b) Split

This Court has been presented with three different vehicles through which to resolve this important circuit split. The Solicitor General asks this Court not to review *Bethany Hospice* because the district court there decided the motion to dismiss on an alternate ground that the Eleventh Circuit did not reach and that is not presented to this Court. The possibility that the relators could lose for a different reason does not present an impediment to this Court's resolution of the Rule 9(b) question that the Eleventh Circuit decided, but if the Court is at all concerned by the purported vehicle issues the Solicitor General identifies, the Court can resolve the same Rule 9(b) question in *Owsley* or this case.

This case is a particularly good vehicle because it cleanly presents both the Rule 9(b) question and the equally important question of "[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. Both Rule 9(b)'s strictures and the FCA's falsity requirement are important checks against baseless and non-specific claims. And both questions should be considered together because the Court's resolution of the circuit split over the falsity requirement may inform the Court's consideration of what Rule 9(b) requires a plaintiff to plead.

III. Relaxing the Rule 9(b) Standard Burdens the Courts and Litigants Alike

The Solicitor General also resists this Court's intervention because the FCA claims the United States brings "should rarely if ever present" the question presented, "because the United States will typically have access to any claims for payment that the defendant submitted." SG Br. 19. The Solicitor General, in other words, doesn't really care what happens in declined cases.

But the rules that courts apply in declined cases matter a great deal to the rest of the world. The Solicitor General's dismissal of the Rule 9(b) split as primarily affecting declined cases ignores the fact that the vast majority of FCA cases are not brought by the government and that the government *declines* to intervene in approximately 75 percent of all FCA cases. Ralph C. Mayrell, *Digging Into FCA Stats: In-House Litigation Budget Insights*, Law360 (July 13, 2021). It is in these declined cases that courts' enforcement of Rule 9(b)'s limits has critical, real-world consequences for litigants and courts. Under the expansive interpretation of Rule 9(b) applied in the Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits, an increasing percentage of meritless declined cases will advance beyond the pleading stage into expensive and onerous discovery. Those fishing expeditions are not free, and their costs are borne not just by the defendants, but the government, courts, and taxpayers too.

The import of this concern should not be underestimated. As the *amici* in support of Molina's petition explained, *qui 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). Hundreds of FCA complaints are filed each year—nearly 14,600 qui tam suits since 1986. Civ. Div. U.S. DOJ, *Fraud Statistics – Overview: Oct. 1, 2986 – Sept. 30, 2021*, http://bit.ly/34vxS2K ("DOJ Fraud Statistics"). Yet the government intervenes in a small minority of those actions—about 20 percent over the last several years.[4] And *90 percent* of declined cases result in no recovery. Mayrell, *Digging Into FCA Stats*, *supra*. Indeed, declined cases make up only 7.2 percent of total *qui tam* recoveries since 1986 despite making up the overwhelming majority of cases. DOJ Fraud Statistics at 3.

This means more than a dozen new, mostly baseless cases join the dockets of the already over-burdened district courts each week. The costs those cases impose on defendants and the court system are significant regardless of the Solicitor General's view, and the question of what Rule 9(b) requires arises in every one of them. The Court should grant certiorari to resolve that important question.

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[4] Press Release, U.S. DOJ, *Deputy Associate Attorney General Stephen Cox Provides Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement* (Jan. 27, 2020), https://bit.ly/38srprT.

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,

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