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

SECOND SUPPLEMENTAL BRIEF OF PETITIONERS

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SECOND SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners submit this supplemental brief to address the Solicitor General's brief in *United States ex rel. Owsley v. Fazzi Associates, Inc.*, No. 21-936. Asked to weigh in a second time as to whether the Court should grant review to decide whether Rule 9(b) requires a relator to plead specific false claims, the Solicitor General doubled down, contending once again that review is not warranted. But repetition does not make her right. Relators, defendants, and *amici* all agree that there is an entrenched circuit split on this issue and that this Court's review is needed. As she did in *Johnson v. Bethany Hospice & Palliative Care LLC*, No. 21-462, the Solicitor General argues that the circuit split on this issue has subsided. That is wrong for all the reasons set forth in Molina's earlier supplemental brief. Now the Solicitor General also argues that this issue is unworthy of review because different factual allegations in different complaints will necessarily produce different results. Different results based on the application of the same rule to different facts are how law is supposed to work. Different results based on the application of different rules to the same facts are not. This Court should grant certiorari.

ARGUMENT

I. This Court Should Grant Review to Resolve the Widely Acknowledged Split Over Rule 9(b)

As an initial matter, the Solicitor General does not argue that *Owsley* is not a good vehicle to resolve

the Rule 9(b) question. It is, and so are *Bethany Hospice* and this case, which also presents a second important question regarding the scope of FCA liability under an implied false certification theory. Instead, the Solicitor General contends, as she did in *Bethany Hospice*, that the courts of appeals have "largely converged on the Rule 9(b) pleading standard in FCA cases." SG Br. 14, *Owsley*, No. 21-936 (U.S. Sept. 9, 2022) ("*Owsley* SG Br."). Bluntly put, no, they haven't. Indeed, despite contending that there is no circuit split, the Solicitor General is forced to admit that different circuits have *not* articulated "the same standard for applying Rule 9(b) in FCA cases" and have diverged over how to apply Rule 9(b) to the circumstances present in *Bethany Hospice, Owsley,* and this case, where the relator pleads the defendant's alleged underlying fraudulent scheme with particularity, but does not plead any false claims for payment with particularity. *Owsley* SG Br. 21. None of the Solicitor General's arguments against review should carry the day.

First, the Solicitor General tries to downplay the range of interpretations of Rule 9(b) by emphasizing that even under a single rule, there might be a range in *results*. *Owsley* SG Br. 21-22. But different results should be based on the contents of a complaint, not the court in which that complaint is brought. This Court's review is not and should not be limited to the rare circumstances where the Court can announce a simple "bright-line rule" that will "eliminate all disuniformity." *Owsley* SG Br. 21-22. Relators, defendants, and *amici* alike are not seeking uniform results, just a uniform rule. Not even the Solicitor General can contend that there currently is such a

uniform rule about how Rule 9(b) applies in FCA cases.

Second, the Solicitor General misdescribes the Sixth Circuit's position and the larger split. In describing the Sixth Circuit's decision, the Solicitor General bends over backwards to contend that when "best read," or "[t]aken as a whole," the Sixth Circuit did not actually mean what it said when it held that Rule 9(b) "'imposed a clear and unequivocal requirement that a relator allege specific false claims.'" *Owsley* SG Br. 9-10 (quoting *U.S. ex rel. Owsley v. Fazzi Assocs., Inc.*, 15 F.4th 192, 196 (6th Cir. 2021)). More specifically, the Solicitor General contends that the Sixth Circuit doesn't necessarily require examples of actual false claims; instead, a relator can satisfy Rule 9(b) by pleading facts, based on personal knowledge of billing practices, "supporting a strong inference that *particular identified claims* were submitted." *Owsley* SG Br. 6-7, 10 (quoting *Owsley*, 15 F.4th at 196 (emphasis added by 6th Cir.)).

True enough, but the Solicitor General erroneously concludes from this that the Sixth Circuit—and supposedly every circuit—accepts allegations that support "a strong inference" that *some* "false claims" must have been submitted—leaving out the Sixth Circuit's "particular identified" qualifier. *See, e.g., Owsley* SG Br. 15-16. But the Sixth Circuit emphasized those words for good reason, and the Solicitor General's elision of them is critical to her effort to downplay the circuit split. As the Solicitor General concedes, appellate courts have disagreed repeatedly over whether and when the submission of

false claims can be inferred. *Owsley* SG Br. 20. Those disagreements cannot simply be chalked up to "fact-intensive" variations among cases or "subjective assessments" rather than what those disagreements actually represent—namely, "a choice among competing legal standards." *Owsley* SG Br. 19, 20.

It is true that the Sixth Circuit has acknowledged that the requirement that a relator allege actual false claims with particularity can be *met* in various ways—be it by including a sample false claim itself, or pleading details about a particular identified false claim that was submitted. *See, e.g., U.S. ex rel. Prather v. Brookdale Senior Living Communities, Inc.,* 838 F.3d 750, 771 (6th Cir. 2016). If, for example, a relator doesn't have the claim itself, but worked in billing and can plead that she saw a fellow employee submit a claim for a specific patient on or about a specific date for specific healthcare services, that may provide the required particularity regarding an actual false claim.

But there is a fundamental difference between approving different ways of satisfying Rule 9(b)'s requirement to plead the submission of identified claims with particularity, as the Sixth Circuit has done, and holding that there is no such requirement, as the Seventh Circuit did here. The Seventh Circuit, like many other circuits routinely do, allowed Prose's case to go forward based on a mere inference that some claim, somewhere, at some time, must have been submitted because that is the logical upshot of his allegations about the supposed underlying scheme. As Prose's counsel has acknowledged in *Owsley* and *Bethany Hospice*, the Sixth and Eleventh Circuits

would instead have dismissed Prose's claims—and not because they apply the Seventh Circuit's pleading rule differently, but because they apply a *different rule*. *See* Reply 3-4, *Bethany Hospice*, No. 21-462 (U.S. Dec. 28, 2021).

That is the very definition of a circuit split, and the Seventh Circuit is on the wrong side of it.[1] The dispute between the circuits turns on whether "the circumstances constituting fraud" (Fed. R. Civ. P. 9(b)) in an FCA case necessarily include the submission of false claims. They do. The FCA is the False Claims Act, not the Regulatory Compliance Act. *U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 (4th Cir. 2010) ("Congress … has made plain 'its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence.' This is because '[t]he FCA is a fraud prevention statute.'" (citations omitted) (quoting *U.S. ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir. 1998) & *U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3 1013, 1020 (7th Cir. 1999))); *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit."). It is not the

[1] Even decisions that have questioned the depth of the split have acknowledged that the split exists. *See U.S. ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 88-90 (2d Cir. 2017); *see also Prather*, 838 F.3d at 772 ("[W]e recognize that most other circuits have applied either an across-the-board heightened standard or an across-the-board permissive one.").

underlying scheme that "gives rise to liability under the" FCA—"it is the submission of a fraudulent claim." *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005) (per curiam). And because the submission of a false claim is the *sine qua non* of FCA liability, particularity regarding actual false claims is required by Rule 9(b)'s plain language.

The Solicitor General admits that "[r]equiring that fraud allegations give defendants 'notice of the particular misconduct which is alleged to constitute the fraud charged,' so that the defendants can adequately 'defend against the charge,' is not an unduly rigid approach to Rule 9(b)." *Owsley* SG Br. 14 (quoting *Ebeid v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010)). But the Solicitor General fails to acknowledge the fundamental truth that "the particular misconduct which is alleged to constitute the fraud charged" in a False Claims Act case necessarily includes the submission of false claims. The Sixth Circuit and the other circuits on its side of the split correctly understand that basic point. The Seventh Circuit and the other circuits on its side—with their focus on allegations about an underlying scheme—misunderstand or neglect it.

II. The Application of Different Rules Has Real-World Consequences

As in *Bethany Hospice*, the Solicitor General opposes certiorari because the United States has no dog in this fight. As she explains, "FCA claims *litigated by the United States* should rarely if ever present" a circumstance in which "the plaintiff can describe in detail the defendant's fraudulent scheme, but is unable to plead details concerning the false

claims for payment that the defendant submitted to the government" because unlike *qui tam* relators, the "United States will typically have access to any claims for payment that the defendant submitted." *Owsley* SG Br. 22 (emphasis added).

The Solicitor General's point is unclear. The test for whether the Court should grant certiorari is of course not whether doing so is necessary to help the government. And defendants, relators, and the courts *do* care about this circuit split even if the government does not. The vast majority of FCA cases are brought by *qui tam* relators, not the United States. Suzanne Jaffe Bloom, Benjamin Sokoly & Jack Cartwright, *What Cos. Can Learn From The 2021 FCA Recovery Statistics*, Law360 (Feb. 16, 2022), https://www.law360.com/articles/1464188/what-cos-can-learn-from-the-2021-fca-recovery-statistics. And because the government declines to intervene in approximately 75% of those cases, Ralph C. Mayrell, *Digging Into FCA Stats: In-House Litigation Budget Insights*, Law360 (July 13, 2021), https://bit.ly/3UuQXI0, the vast majority of FCA litigation involves declined *qui tam* actions.

The vast majority of those declined *qui tam* actions are meritless—indeed, 90% of them result in no recovery. Ralph C. Mayrell, *In-House Litigation*, *supra*; U.S. DOJ, Fraud Statistics – Overview: Oct. 1, 1986 – Sept. 30, 2021 at 3, https://bit.ly/34vxS2K. Yet this large and growing body of cases exacts enormous costs on defendants and on courts. From 2009 to mid-2020, courts decided nearly 1,900 motions to dismiss and nearly 300 summary judgment motions in FCA cases. Ralph C. Mayrell, *Digging Into FCA Stats:*

Litigation's Return On Investment, Law360 (July 15, 2021), https://bit.ly/3qXAtdG. So, while the Seventh Circuit's and other circuits' relaxed Rule 9(b) standard might not matter to the United States, which can meet a stricter standard, it matters a great deal to the defendants and courts who still must deal with the far larger number of *qui tam* lawsuits by relators who cannot.

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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