No. 21-462

IN THE

Supreme Court of the United States

JOLIE JOHNSON & ESTATE OF DEBBIE HELMLY,

Petitioners,

v.

BETHANY HOSPICE AND PALLIATIVE CARE LLC,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

REPLY BRIEF

Respondent does not dispute that the question presented—the only issue the Eleventh Circuit decided—arises in hundreds of significant False Claims Act (FCA) cases every year, and is potentially case-dispositive whenever it arises. This is exactly the sort of important question this Court should review as soon as possible. Against that backdrop, respondent's objections to the split, vehicle, and merits are unpersuasive.

I. There Is A Clear Circuit Conflict

Respondent argues that the circuits are converging, and that the Eleventh Circuit's rule falls on the "lenient" side of the split. We can refute both arguments by showing the ongoing conflict between the Eleventh Circuit's rigid rule and the flexible rule adopted by most circuits.

1. Respondent contends that some courts on the rigid side of the split (the Sixth, Eighth, and Eleventh Circuits) have abandoned the requirement that relators must provide representative examples of false claims, and now allow relators to satisfy Federal Rule of Civil Procedure 9(b) by pleading particulars of a fraudulent scheme together with "reliable indicia" that claims were presented to the Government. BIO 23, 27. This addresses a straw man: the split asserted is not "representative examples" vs. "reliable indicia." Instead, the split is over what a relator must plead *if she lacks* representative examples, *i.e.*, what counts as "reliable indicia." The rigid rule requires specifics of false claims or claim-specific knowledge; the flexible

rule allows relators to plead other facts that make the presentment of claims plausible.[*]

As a clear illustration, petitioners called our shot by highlighting the "especially acute" conflict between the decision below and four specific decisions from the Third, Fifth, Seventh, and Ninth Circuits, "all of which involved alleged fraudulent schemes that tainted large numbers of unidentified claims for payment." Pet. 24. Tellingly, respondent does not even cite, let alone discuss, *any* of those four cases—but their contrast with the decision below is stark.

Here, petitioners pleaded that Government data—showing what respondent actually billed—establishes that respondent billed the Government millions of dollars for patients referred by the Bethany Hospice doctors. Pet. 10 (providing complaint citations). Petitioners also personally observed—and multiple knowledgeable employees confirmed—that respondent only took patients on Government health insurance. *Id*. at 10-12. And respondent's billing system automatically bills the Government for each patient enrolled. *Id*. at 9. In summary, petitioners reliably pleaded, based on authoritative data and personal knowledge, that respondent certainly presented many false claims. They only lacked details of the claims themselves.

That was fatal in the Eleventh Circuit, which holds that "a relator alleging the submission of a false claim" must "allege specific details about false claims

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[*] *A fortiori*, there is a split between the more flexible circuits and the First and Fourth Circuits, which the parties agree apply restrictive rules, and do not even permit relators to allege false claims based on "reliable indicia." Pet. 24-25, 27; BIO 22, 24-25.

to establish the indicia of reliability necessary under Rule 9(b)." Pet. App. 15a (quotation marks omitted). It was not enough that petitioners had "senior insider knowledge" about respondent's billing practices, because petitioners did not provide "specific details" of claims, nor allege that they "observed" or "personally participate[d] in the submission of false claims." *Id*. at 13a-14a (quotation marks omitted). Petitioners' knowledge of respondent's business model (to only admit Government-insured patients), and their data showing that claims were presented, were likewise insufficient. According to the Eleventh Circuit, these facts lent "no credence to [petitioners'] allegation that [respondent] submitted a false claim," because the presentment of claims can never be "inferred from the circumstances" or from "mathematical probability." *Id*. at 14a-15a (quotation marks omitted). Without "specific details about the submission of an actual false claim," the complaint failed as a matter of law. *Id*. at 15a. The key propositions are quoted from published Eleventh Circuit decisions.

The four contrary precedents we highlighted applied different rules to reach opposing results. Those relators did not allege details of claims, nor personally observe or participate in the presentment of claims. But the circuit courts applied a flexible approach under which the presentment of false claims can be inferred based on probability, logic, and circumstantial evidence. *See United States ex rel. Prose v. Molina Healthcare of Ill., Inc.*, 17 F.4th 732, 741 (7th Cir. 2021); *United States ex rel. Bookwalter v. UPMC*, 946 F.3d 162, 176 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2720 (2020); *United States ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667, 679 (9th Cir. 2018); *United States*

ex rel. Colquitt v. Abbott Lab'ys, 858 F.3d 365, 372 (5th Cir. 2017); *see also United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 192 (5th Cir. 2009) (Rule 9(b) satisfied when "the logical conclusion of the particular allegations in [the relator's] complaint" was "[t]hat fraudulent bills were presented to the Government").

These courts thus reject the Eleventh Circuit's key legal propositions, *i.e.*, that relators must plead "specific details about false claims," and that the presentment of claims "cannot be inferred from the circumstances" or based on "mathematical probability." Pet. App. 14a-15a (quotation marks omitted). They are not alone. *See United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 85 (2d Cir. 2017) (holding that claims could be inferred based on probability of billing the Government); *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 158 (3d Cir. 2014) (Rule 9(b) satisfied when relator had no knowledge of how the defendant actually billed the Government, but fraud was the more logical of two possibilities). Petitioners' complaint would have survived in these circuits.

Respondent cites *Chorches* to argue that the split is not "sharp." BIO 26. Subsequent decisions show otherwise. Three of our four strongest cases embodying the flexible rule (*Prose*, *Bookwalter*, and *Silingo*) were decided after *Chorches*. On the rigid side, the Eleventh Circuit's recent decision in *Carrel v. AIDS Healthcare Foundation, Inc.*, 898 F.3d 1267 (11th Cir. 2018), held that "even if a relator asserts direct knowledge of a defendant's billing and patient records, she still must allege specific details about false claims to establish the indicia of reliability necessary under Rule 9(b)." *Id.* at 1276 (cleaned up). And in *United States ex rel. Owsley*

v. Fazzi Associates, the Sixth Circuit held that the complaint described "in detail, a fraudulent scheme," but still failed because it did not "identify any specific claims." 16 F.4th 192, 194, 196 (6th Cir. 2021), *petition for cert. pending*, No. 21-936 (docketed Dec. 23, 2021). The court further held that even though the relator had "personal knowledge of billing practices employed in the fraudulent scheme," that was insufficient absent "particular identified claims." *Id*. at 196-97 (quotation marks omitted). These recent decisions show ongoing divergence.

Finally, the Court need not credit our word regarding the split. A recent article about this case quotes two defense lawyers, who explain that "[t]his has percolated pretty well, and we still have a fairly sharp split," and "[t]he stakes are enormous because [a Supreme Court ruling] would, in fact, give clarity that would be certainly helpful to every practitioner." Jennifer Doherty, *Attys Hope for Clarity with Justices' Interest in Fraud Claims*, Law360 (Oct. 15, 2021), https://www.law360.com/articles/1426789/attys-hope-for-clarity-with-justices-interest-in-fraud-claims. The same article quotes a lawyer who represents relators (not petitioners), who agrees that there is a "widening gulf between the circuits" on the question presented. *Ibid*. The clear signal from knowledgeable, objective practitioners on both sides of the bar is that the circuits are divided, and this Court's review is necessary.

2. The foregoing also refutes respondent's assertion that the Eleventh Circuit's rule is "lenient." Notably, the Eleventh Circuit and objective commentators disagree with that characterization. *See United States ex rel. Clausen v. Lab'y Corp. of Am.*, 290 F.3d 1301, 1313-14 (11th Cir. 2002) (rejecting relator's request for

"leniency"); Pet. 15 (citing commentators observing that the Eleventh Circuit applies the most rigid rule).

To argue otherwise, respondent block-quotes *United States ex rel. Mastej v. Health Management Associates*, 591 F. App'x 693 (11th Cir. 2014). BIO 19-21. But *Mastej* is the exception that proves petitioners' argument. That case should have survived easily—but it squeaked past the Eleventh Circuit in an unpublished decision, where it has subsequently been all-but overruled: *Mastej* has never even been cited in a precedential Eleventh Circuit decision.

Petitioners attempted to resurrect *Mastej* below. But respondent argued that the Eleventh Circuit had "properly construed this line of authority narrowly, looked upon it skeptically, and ultimately confirmed that *Clausen*," which adopted the most rigid formulation of the rule, "controls the analysis in the event of any conflict in the legal standard" because *Mastej* is "an unpublished decision." Resp. C.A. Br. 46-47. The Eleventh Circuit agreed, relegating *Mastej* to a barebones footnote. Pet. App. 15a n.7. Accordingly, this unpublished decision is properly regarded as a blip. The Eleventh Circuit's decision in *Carrel*, 898 F.3d at 1276, as well as the decision below, more accurately communicate how rigid the circuit's rule is.

II. Respondent's Vehicle Arguments Are Meritless

Respondent argues that this case is a bad vehicle to resolve the split because: (1) the district court also dismissed the complaint on an alternative ground that the Eleventh Circuit did not reach, BIO 13-15; (2) petitioners were not technically employed by respondent, *id*. at 15-17; and (3) petitioners cannot satisfy any

standard, *id*. at 17. None of these create a vehicle problem—but if the Court thinks otherwise, an alternative vehicle is available (*see Owsley*, No. 21-936), and this Court can pick whichever vehicle it prefers and hold the other case.

1. The district court dismissed petitioners' complaint on two grounds—failure to plead false claims with particularity (the question presented), and failure to plead an Anti-Kickback Statute (AKS) violation with particularity (an alternative argument). Pet. App. 34a, 43a. A vehicle problem would arise if the Eleventh Circuit had affirmed on both grounds—because then this Court would have to decide two questions (one of which is factbound and not certworthy) to reverse. But the Eleventh Circuit did not affirm the AKS holding; it only ruled on the question presented. *See id.* at 16a. The fact that the Eleventh Circuit was able to do so proves that the district court's AKS holding is not logically antecedent to the question presented and does not pose any obstacle to the Court deciding that question, just as the Eleventh Circuit did.

To be sure, the AKS argument remains open to respondent on remand after petitioners prevail in this Court. That, too, is not a vehicle problem. The Court frequently grants certiorari to resolve a circuit conflict arising out of an appellate court's actual decision, and remands for lower courts to consider alternative arguments they did not previously reach. *See Maracich v. Spears*, 570 U.S. 48, 59, 77-78 (2013) (deciding case in factually indistinguishable circumstances); *see also*, *e.g.*, *Brownback v. King*, 141 S. Ct. 740, 747 n.4 (2021); *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 717 (2019). In other FCA cases, the Court has clarified the legal standard and then let lower courts apply the

standard to a relator's complaint in the first instance. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 196 (2016).

The possibility that a case may fail on remand is also not a vehicle problem because it affects *every case* at the pleading stage (and therefore every potential vehicle for Rule 9(b) questions): a defendant might think of a new reason to dismiss on remand, and even cases that survive dismissal may fail at summary judgment or trial. The possibility that a case might not go all the way is no reason to allow a circuit conflict about the pleading standard to fester—especially when that specific issue was the only one decided by the court of appeals and is properly teed up for this Court's review.

Finally, if it matters, the district court's AKS holding is wrong, and petitioners will see it reversed on remand. As the petition shows (at 5-8), the complaint pleads particulars of the AKS scheme (who, what, where, when, and how)—including pleading that the people who offered the kickbacks repeatedly admitted that they were offering compensation to induce referrals, which is a smoking-gun allegation. The additional details the district court wanted are either immaterial (*e.g.*, amounts of kickbacks, Pet. App. 32a, which are immaterial because kickbacks in *any* amount violate the AKS) or plainly improper (*e.g.*, the district court's demand for "evidence" that kickbacks resulted in referrals, *id*. at 34a, which improperly required proof at the pleading stage).

2. Respondent argues that this case is unusual because petitioners were not employed directly by respondent, but instead by an affiliate. There are two problems with this argument.

First, respondent is wrong to suggest that the "typical" relator is the defendant's employee. BIO 15. Tellingly, respondent cites nothing for that proposition. In fact, relators in many cases in the split were not the defendant's employees; instead, they were employees of contractors or related businesses, or even complete outsiders. *See, e.g.*, *Prose*, 17 F.4th at 737 (contractor); *Silingo*, 904 F.3d at 674 (contractor); *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 31 (1st Cir. 2017) (outsider subject matter expert); *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 117 (D.C. Cir. 2015) (same). And that is just a small sample. The FCA allows any "person" to sue, 31 U.S.C. § 3730(b)(1), because Congress wanted "any individual knowing of Government fraud to bring that information forward," S. Rep. No. 99-345, at 2 (1986).

Second, if insider knowledge matters, petitioners' employer was effectively "another facility office of" respondent, sharing ownership, management, referral sources, funds, and other assets. Pet. App. 81a-83a. This "significant overlap in personnel, resources, and operations . . . effectively made [petitioners] corporate insiders of [respondent]." *Id*. at 81a. Indeed, even the Eleventh Circuit acknowledged that petitioners had "senior insider knowledge" of respondent's practices. *Id*. at 13a.

Respondent emphasizes that petitioners were employed only for seven months. BIO 16. But that is because petitioners were fired in retaliation for whistleblowing (Pet. 5)—which is also why they lack access to specific claims information. If anything, the brevity of petitioners' employment due to retaliation makes the case a better vehicle because it highlights a recurring

factual scenario that threatens to undermine FCA enforcement. In any event, the Court should not be swayed by respondent's ongoing attempts to benefit from unlawful retaliation.

3. Respondent argues that the complaint should be dismissed under any standard. BIO 17. This one-paragraph argument would not create a vehicle problem even if it were correct. As explained in the petition, it is wrong. Pet. 24, 30-34.

4. If the Court finds respondent's vehicle arguments convincing, the best response would not be to deny certiorari, but instead to delay decision until the Court considers the petition in *Owsley* (No. 21-936)—which presents the same question, while dodging respondent's arguments. In *Owsley*, the relator was employed by the defendant, and her complaint failed for one "reason alone": failure to "identify any specific claims." 16 F.4th at 194.

To be clear, petitioners want the Court to grant certiorari here and resolve the question presented sooner rather than later. But if the Court has vehicle concerns, it could consider both petitions together, hear whichever case presents the better vehicle, and hold the other case pending a resolution on the merits.

III. Respondent's Merits Arguments Are Irrelevant And Wrong

Respondent's merits arguments are irrelevant because whoever is right about the merits, approximately half the circuits are wrong. The Court should accordingly grant certiorari either way.

Respondent's arguments are also unpersuasive. Respondent asserts that petitioners' complaint does not plead *both* a fraudulent scheme *and* indicia that

claims were presented. This is wrong for two reasons. First, facts can do double duty. As multiple circuits hold, the existence of a fraudulent scheme is itself evidence that false claims were presented, because such schemes are designed to facilitate the presentment of claims. *See Silingo*, 904 F.3d at 679; *Chorches*, 865 F.3d at 85; *Foglia*, 754 F.3d at 158; *Grubbs*, 565 F.3d at 192. So too here. When a Medicare-dependent business pays kickbacks for referrals, it is plausible to infer that the business bills Medicare for the referred patients. *See* Pet. 32.

Second, the complaint includes additional direct allegations that claims were presented—including information gleaned from conversations, on-the-job observations, and data. *See* Pet. 8-12. Indeed, it is a certainty that respondent submitted claims for patients referred by the Bethany Hospice doctors.

Respondent's other arguments were addressed in the petition. Pet. 31-34. Tellingly, respondent has no answer to petitioners' citations to this Court's precedents about Rule 9(b) and the value of circumstantial evidence. *See id.* at 31-32. Those controlling authorities foreclose the Eleventh Circuit's rigid approach to Rule 9(b).

IV. A CVSG Would Be Appropriate

Alternatively, the Court could call for the views of the Solicitor General. Respondent argues that the Government will recommend denial based on the district court's alternative holding. BIO 34. For the reasons explained in the "vehicle" section, it shouldn't. Indeed, when the Government seeks certiorari, it denies that alternative grounds not reached in the court of appeals create vehicle problems. *See, e.g.*, Cert. Reply,

United States v. Taylor, No. 20-1459, 2021 WL 2385535, at *9 (June 7, 2021); Cert. Reply, *United States v. Stevens*, No. 08-469, 2009 WL 871760, at *8 (Mar. 31, 2009); Cert. Reply, *Comm'r v. Estate of Jelke*, No. 07-1582, 2008 WL 4066478, at *9 (Sept. 3, 2008). In any event, the Government's perspective on the split, merits, and importance of the issue may be valuable.

Respondent argues (at 35) that the Government has no interest in pleading standards applicable to relators—but Rule 9(b) applies to relators and the Government alike. Moreover, even if Rule 9(b) principally affects relators, the Government is the real party in interest in those cases, and whether relators can bring such cases affects the Government's law enforcement efforts. Given that interest, a CVSG would be appropriate here.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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