No. 21-462

In the Supreme Court of the United States

JOLIE JOHNSON, ET AL., PETITIONERS

v.

BETHANY HOSPICE AND PALLIATIVE CARE LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether petitioners' complaint in their qui tam action under the False Claims Act, 31 U.S.C. 3729 *et seq.*, pleaded the defendant's submission to the government of false claims for payment with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b).

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

A. Legal Background

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, imposes civil liability for a variety of deceptive practices involving government funds and property. *Inter alia*, the Act imposes liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1)(A). The "claim[s]" subject to the FCA include "any request or demand * * * for money

or property" that is "presented to an officer, employee, or agent of the United States." 31 U.S.C. 3729(b)(2).

The Attorney General may bring a civil action if he finds that a person has violated the FCA. 31 U.S.C. 3730(a). Alternatively, the Act permits private parties (known as relators) to bring suit "in the name of the Government" against persons who have violated the Act, 31 U.S.C. 3730(b)(1), through a mechanism commonly known as a "qui tam" action. When a qui tam suit is filed, the government may "elect to intervene and proceed with the action" during an initial 60-day period (which may be extended "for good cause shown") while the relator's complaint remains under seal. 31 U.S.C. 3730(b)(2) and (3). If the government intervenes during the seal period, "the action shall be conducted by the Government." 31 U.S.C. 3730(b)(4)(A). If the government declines to intervene, the relator may proceed with the litigation, 31 U.S.C. 3730(b)(4)(B), though the district court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3). If a qui tam action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

2. This qui tam action alleges that respondent, a provider of hospice services, unlawfully paid kickbacks to doctors in exchange for referring patients to respondent's facilities. Respondent then allegedly violated the FCA by submitting claims for reimbursement by federal healthcare programs for patients who had been unlawfully referred to it in violation of the federal anti-kickback statute.

a. Medicare provides federally funded health insurance to eligible elderly and disabled persons. See 42

U.S.C. 1395 *et seq.*[1] In general, when a healthcare provider performs a Medicare-covered service for an eligible patient, the provider submits a claim for payment to a federal contractor, which reimburses the provider for the service in accordance with the Medicare Act and applicable regulations. See 42 U.S.C. 1395h.

In the context of hospice care, Medicare pays for services that are "reasonable and necessary for the palliation or management of [a patient's] terminal illness." 42 U.S.C. 1395y(a)(1)(C). Medicare contractors reimburse hospice providers at fixed per-diem, per-patient rates for established categories of care. See 42 C.F.R. 418.302. Hospice providers may bill the government using Form 1500, which requires the provider to certify that every claim "complies with all applicable * * * laws, regulations, and program instructions for payment[,] including but not limited to the Federal anti-kickback statute." Centers for Medicare & Medicaid Services (CMS), Health Insurance Claim Form 2, https://go.usa.gov/xuFsq.[2]

b. The Anti-Kickback Statute (AKS) prohibits any person from, *inter alia*, "knowingly and willfully offer[ing] or pay[ing] any remuneration (including any kickback, bribe, or rebate), directly or indirectly,

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[1] Some of respondent's claims for reimbursement in this case concerned patients covered by Medicaid, rather than Medicare. But the lower courts found "no meaningful distinction between" the two programs for purposes of this case, Pet. App. 18a n.3, so the courts referred only to Medicare "[f]or simplicity," *id.* at 4a n.4. This brief does the same.

[2] Some healthcare providers submit claims only electronically, rather than on Form 1500. Providers wishing to submit claims electronically must certify that they will submit only claims that "are accurate, complete, and truthful." CMS, Electronic Data Interchange (EDI) Enrollment Form 2, https://go.usa.gov/xJq7v.

overtly or covertly, in cash or in kind[,] to any person to induce" them "to refer an individual * * * for the furnishing of any * * * service for which payment may be made in whole or in part under a Federal health care program." 42 U.S.C. 1320a-7b(b). An AKS violation is a felony. *Ibid.* It may also result in civil monetary penalties of up to $100,000 per violation, an assessment of up to three times the amount of remuneration paid, and exclusion from participation in federal healthcare programs. 42 U.S.C. 1320a-7a(a)(7). Those substantial penalties reflect the seriousness of kickbacks, which "are pernicious because of their potential to subvert medical decision-making." U.S. Dep't of Justice, *Justice Department Recovers over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020* (Jan. 14, 2021), https://go.usa.gov/xuF7d.

Section 6402(f) of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, provides that "a claim" for payment from the government "that includes items or services resulting from a violation of [the AKS] constitutes a false or fraudulent claim for purposes of [the False Claims Act]." 124 Stat. 759 (42 U.S.C. 1320a-7b(g)). That provision makes it especially clear that, "if a medical service provider pays kickbacks to a doctor to induce referrals and then submits claims to Medicare for services it provided to patients who were referred by that doctor, the claims are false [under the FCA] because the medical care was not provided in compliance with the Anti-Kickback Statute." *United States ex rel. Greenfield* v. *Medco Health Solutions, Inc.*, 880 F.3d 89, 98 (3d Cir. 2018) (brackets and citation omitted). That rule applies "regardless of whether the doctor would have referred the patients absent the kickbacks." *Ibid.* (citation omitted).

B. The Present Controversy

1. Respondent is a hospice provider operating in Georgia. Pet. App. 3a. Between December 2014 and July 2015, petitioners were employed at respondent's sister company, which the parties call "Bethany Coastal." *Ibid.*[3] Respondent and Bethany Coastal are organized and licensed as separate companies, but they share the same ownership and management, and they allegedly share "personnel, resources, and management software." *Ibid.* Petitioners allege that, although they were employed at Bethany Coastal, they were "effectively . . . corporate insiders of" respondent. *Ibid.*

Petitioners allege that, through their employment at Bethany Coastal, they learned that respondent was violating the FCA by seeking Medicare reimbursement for hospice services provided to patients whose referring doctors had accepted kickbacks in violation of the AKS. Pet. App. 3a-4a. Specifically, petitioners allege that respondent hired local doctors as medical directors at its facilities, or sold ownership interests in respondent to the doctors, and then paid the doctors for each patient referred by disguising the payments as dividends, bonuses, or salary. See *id.* at 4a; see also *id.* at 55a-60a (operative complaint). Petitioners further allege that some of the referring doctors were permitted to purchase ownership interests in respondent at below-market rates and then later to sell those interests at higher rates, see *id.* at 5a, 60a-61a, and that respondent offered the doctors vacations as compensation for referrals, see *id.* 5a n.5, 66a.

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[3] Petitioner Debbie Helmly died during this litigation, and her estate was substituted as a party. Pet. App. 18a n.2.

Petitioners allege that the doctors who received kickbacks referred the overwhelming majority of their hospice patients to respondent. Pet. App. 5a; see *id.* at 76a (operative complaint). Petitioners further allege that they learned through their access to respondent's records and conversations with other employees that respondent sought reimbursement from Medicare for nearly all of its patients. *Id.* at 6a-7a; see *id.* at 78a-81a.

2. Petitioners filed their initial qui tam complaint in November 2016. Pet. App. 18a. The United States investigated petitioners' allegations and declined to intervene. *Id.* at 18a-19a. Petitioners' operative complaint (the third amended complaint) alleged, as relevant here, that respondent had presented false claims for payment to the government, in violation of 31 U.S.C. 3729(a)(1)(A), by submitting claims for Medicare reimbursement for patients whose care had been tainted by kickbacks. Pet. App. 85a-87a; see *id.* at 47a-85a.[4]

The district court dismissed petitioners' complaint on two alternative grounds. Pet. App. 17a-44a. First, the court held that petitioners' allegations of AKS violations did not satisfy Federal Rule of Civil Procedure 9(b), which requires a party alleging fraud to "state with particularity the circumstances constituting fraud." See Pet. App. 29a-34a. The court found that, while petitioners had provided "some facts to support * * * an illegal kickback scheme," they had "fail[ed] to allege with particularity 'precisely what * * * incentives'" were provided to the doctors for patient referrals,

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[4] Petitioners' operative complaint also alleged that Bethany Coastal had terminated petitioners' employment for objecting to kickbacks. Pet. App. 87a. The parties settled that claim, *id.* at 7a n.6, and petitioners dismissed Bethany Coastal as a defendant, *id.* at 19a & n.4.

"'when [those incentives] were provided,' and how they were provided to the doctors." *Id.* at 31a-32a (citation and ellipsis omitted).

The district court also held that petitioners had failed to plead with particularity the submission to the government of false claims for payment. Pet. App. 34a-43a. The court found that petitioners had not alleged "specific details of false claims or example claims that were allegedly submitted," and had not otherwise provided "clear 'indicia of reliability' [that] support the actual submission of a false claim." *Id.* at 37a (citations omitted); see *id.* at 39a-41a. Petitioners argued that they had reliably shown the submission of false claims by pleading "Medicare claims data" purportedly showing that, between 2016 and 2018, the relevant doctors had "referred 100% of their [Medicare-eligible] patients to" respondent, which billed Medicare for those patients' care. *Id.* at 42a (citation omitted); see *id.* at 76a-78a (operative complaint). The district court rejected that contention, finding that the claims data were insufficiently reliable and that those data would not establish the submission of false claims in any event. See *id.* at 42a-43a.[5]

3. The court of appeals affirmed. Pet. App. 1a-16a. The court agreed with the district court that petitioners had "failed to plead with particularity the submission of an actual false claim" to the government. *Id.* at 9a. Be-

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[5] Petitioners' operative complaint also pleaded claims under the Georgia False Medicaid Claims Act. Pet. App. 85a-87a. The district court dismissed those claims for the same reasons that it found petitioners' federal FCA claims deficient. *Id.* at 25a n.7. The court also dismissed petitioners' claim alleging false statements to the federal government, in violation of 31 U.S.C. 3729(a)(1)(B), on the ground that petitioners had failed to develop that claim. Pet. App. 36a n.11.

cause that conclusion was a sufficient basis to affirm the judgment dismissing the complaint, the court of appeals declined to consider the district court's separate holding that petitioners had not adequately pleaded AKS violations. See *ibid.*

The court of appeals explained that, to satisfy the Rule 9(b) particularity standard, an FCA relator "must allege actual 'submission of a false claim,'" and "must do so with 'some indicia of reliability.'" Pet. App. 11a (quoting *Carrel* v. *AIDS Healthcare Found., Inc.*, 898 F.3d 1267, 1275 (11th Cir. 2018), and *United States ex rel. Clausen* v. *Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002), cert. denied, 537 U.S. 1105 (2003)). The court further stated that a relator may not ask the court to "infer[]" the submission of a false claim, *ibid.* (quoting *Carrel*, 898 F.3d at 1275), but must instead "allege the 'who,' 'what,' 'where,' 'when,' and 'how' of fraudulent submissions to the government," *ibid.* (quoting *Corsello* v. *Lincare, Inc.*, 428 F.3d 1008, 1014 (11th Cir. 2005) (per curiam), cert. denied, 549 U.S. 810 (2006)).

In arguing that "their complaint contain[ed] sufficient indicia of reliability to support their claim that [respondent] submitted false claims to the government," Pet. App. 11a, petitioners relied on their allegations that they "had access to and knowledge of [respondent's] billing practices," *id.* at 11a-12a, as well as on "data about [respondent's] Medicare claims submissions," *id.* at 12a. But the court of appeals found those allegations insufficiently particularized. The court observed that, "[d]espite [petitioners'] alleg[ed] intimate familiarity with and access to [respondent's] billing practices," petitioners had not "identif[ied] even a single, concrete example of a false claim submitted to the

government." *Id.* at 12a-13a. The court of appeals recognized that the Eleventh Circuit "do[es] not always require a sample fraudulent claim." *Id.* at 13a. The court concluded, however, that petitioners had not alleged the sort of "personal knowledge or level of participation [in the fraud] that can give rise to some indicia of reliability" regarding the submission of false claims, *ibid.*, explaining that petitioners had not "claim[ed] to have observed the submission of an actual false claim" or "personally participate[d] in the submission of false claims," *id.* at 14a.

The court of appeals also rejected, as insufficiently reliable indicia of the submission of false claims, petitioners' allegations regarding respondent's business model and 2016-2018 Medicare claims data. Pet. App. 14a-15a. The court applied its precedents holding that "a false claim cannot be 'inferred from the circumstances,'" *id.* at 15a (quoting *Corsello*, 428 F.3d at 1013), and that FCA relators "cannot 'rely on mathematical probability to conclude that a defendant surely must have submitted a false claim at some point,'" *id.* at 14a (quoting *Carrel*, 898 F.3d at 1277) (brackets omitted).

DISCUSSION

Petitioners urge this Court to grant review "to resolve a longstanding circuit split about how Rule 9(b) works in FCA cases." Pet. 15. Petitioners also suggest (*ibid.*) that the Eleventh Circuit has inflexibly required every FCA relator to plead, in addition to the details of a fraudulent scheme, "specific details of false claims" submitted to the government. If the courts of appeals were applying a per se rule that every relator must plead the details of specific false claims, this Court's intervention might be warranted. In recent years, however, the courts have largely converged on an approach

that allows relators *either* to identify specific false claims *or* to plead other sufficiently reliable indicia supporting a strong inference that false claims were submitted to the government.

The Eleventh Circuit applied that standard in this case. And the divergent outcomes in the courts of appeals that petitioners view as evidence of disarray simply reflect courts' application of a fact-intensive standard to a range of different types of allegations. It is unlikely that further review by this Court would produce greater uniformity or materially clarify the Rule 9(b) pleading standard for FCA complaints.

Even if the question presented warranted further review, this case would be an unsuitable vehicle. The question whether petitioners pleaded with particularity the submission of false claims for payment to the government is closely intertwined with the separate question whether petitioners adequately pleaded AKS violations. The district court resolved that separate question against petitioners. Although the court of appeals did not reach the issue, the district court's finding would complicate this Court's consideration of the question on which petitioners seek review. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals Held That An FCA Relator Must Plead Facts With Some Indicia Of Reliability Showing The Defendant's Submission Of False Claims

The petition for a writ of certiorari asserts that the Eleventh Circuit has adopted "the most rigid approach" to Rule 9(b) in FCA cases, Pet. 16, and that the decision below is representative of that approach, Pet. 18. Petitioners state that, under Eleventh Circuit precedent, it is not enough for an FCA relator to plead facts describing a fraudulent scheme "in detail." Pet. 16 (quoting

United States ex rel. Clausen v. *Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002), cert. denied, 537 U.S. 1105 (2003)). Rather, the relator "must identify 'actual, and not merely possible or likely, claims' for payment." *Ibid.* (quoting *Clausen*, 290 F.3d at 1313). The court has also stated that the submission of a false claim cannot be "inferred from the circumstances," *ibid.* (quoting *Corsello* v. *Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005) (per curiam), cert. denied, 549 U.S. 810 (2006)), and that relators cannot "rely on mathematical probability to conclude that the [defendant] surely must have submitted a false claim at some point," Pet. 17 (quoting *Carrel* v. *AIDS Healthcare Found., Inc.*, 898 F.3d 1267, 1277 (11th Cir. 2018)) (brackets in original). The certiorari petition distills from those decisions a firm rule that "the existence of false claims can never be inferred from circumstances, established by probability, or even shown through aggregate data; the claims themselves [must] be pleaded in detail." Pet. 18 (citing Pet. App. 11a).

In an invited amicus curiae brief in *United States ex rel. Nathan* v. *Takeda Pharmaceuticals North America, Inc.*, 572 U.S. 1033 (2014) (No. 12-1349), the United States (at 10) opposed "a per se rule that a relator must plead the details of particular false claims—that is, the dates and contents of bills or other demands for payment—to overcome a motion to dismiss." The government explained that such a "per se rule is unsupported by Rule 9(b) and undermines the FCA's effectiveness as a tool to combat fraud against the United States." *Ibid.* Instead, the government argued, "a relator's complaint satisfies Rule 9(b) if it 'alleges 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 11-12 (quoting *United States ex rel. Grubbs* v. *Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)) (brackets omitted).

The court of appeals in this case did not adopt a per se rule like the one the United States opposed in *Nathan*. To be sure, the court invoked its precedent stating that the submission of false claims to the government "cannot be inferred from the circumstances" or established by "mathematical probability." Pet. App. 11a, 14a (quoting *Carrel*, 898 F.3d at 1275, 1277). But the court also stated that an FCA complaint could satisfy Rule 9(b) if it "allege[d] actual 'submission of a false claim' * * * with 'some indicia of reliability.'" *Id.* at 11a (quoting *Carrel*, 898 F.3d at 1275, and *Clausen*, 290 F.3d at 1311). The court then identified various ways that a relator might satisfy that requirement, such as by alleging "personal knowledge [of] or participation in the fraudulent conduct." *Id.* at 13a (quoting *United States ex rel. Matheny* v. *Medco Health Solutions, Inc.*, 671 F.3d 1217, 1230 (11th Cir. 2012)). And the court specifically stated that the Eleventh Circuit "do[es] not always require a sample fraudulent claim." *Ibid.*

The court of appeals' opinion is thus best read to hold that an FCA relator must *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. That standard is not significantly different from the one that the United States endorsed in *Nathan*, see pp. 11-12, *supra*, and that has been applied across several courts of appeals in recent years, see Part B, *infra*. That understanding of the decision below also accords with other Eleventh Circuit decisions in which the court has found that relators' allegations based on personal knowledge were suffi-

ciently particularized to satisfy Rule 9(b), even though their complaints did not identify specific false claims. See *United States ex rel. Walker* v. *R&F Props. of Lake County, Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005), cert. denied, 549 U.S. 1027 (2006); *United States ex rel. Mastej* v. *Health Mgmt. Assocs., Inc.*, 591 Fed. Appx. 693, 707-709 (11th Cir. 2014), cert. denied, 575 U.S. 1037 (2015); *Hill* v. *Morehouse Med. Assocs., Inc.*, No. 02-14429, 2003 WL 22019936, at *5 (11th Cir. Aug. 15, 2003) (per curiam).

Indeed, although the petition for a writ of certiorari suggests (at 15) that the court of appeals categorically requires FCA relators to "plead specific details of false claims" to survive a motion to dismiss under Rule 9(b), petitioners' reply brief disclaims that view of Eleventh Circuit precedent, describing it as a "straw man." Pet. Reply Br. 1. The reply brief instead alleges a current circuit conflict "over what a relator must plead *if she lacks* representative examples" of false claims submitted to the government. *Ibid.* Petitioners thus appear to recognize that no circuit currently adheres to the categorical rule that the government opposed in *Nathan*.

Read as a whole and against the backdrop of relevant Eleventh Circuit precedent, the decision below does not reflect an outlier standard for applying Rule 9(b) to FCA complaints. And the court of appeals' fact-bound conclusion that petitioners' particular allegations here were insufficient to satisfy Rule 9(b) does not warrant this Court's review.

B. The Courts Of Appeals Have Largely Converged On The Rule 9(b) Pleading Standard In FCA Cases

Petitioners contend (Pet. 15) that the question presented is the subject of a "longstanding circuit split" that "has been repeatedly acknowledged." After sur-

veying multiple decisions applying Rule 9(b) in FCA cases, however, courts of appeals have observed that "the reports of a circuit split are * * * 'greatly exaggerated.'" *United States ex rel. Chorches for Bankr. Estate of Fabula* v. *American Med. Response, Inc.*, 865 F.3d 71, 89 (2d Cir. 2017); see *United States ex rel. Prather* v. *Brookdale Senior Living Communities, Inc.*, 838 F.3d 750, 772 (6th Cir. 2016) ("This split is not nearly as deep as it first appears."). "As the various Circuits have confronted different factual variations, differences in broad pronouncements in early cases have been refined in ways that suggest a case-by-case approach that is more consistent than might at first appear." *Chorches*, 865 F.3d at 89.

1. The United States' 2014 amicus brief in *Nathan*, *supra* (No. 12-1349) explained (at 10-14) that, while some courts of appeals had erroneously articulated a per se rule requiring all FCA relators to plead the details of specific false claims, those courts "ha[d] not consistently adhered to th[at] rigid understanding of Rule 9(b)," so that the "extent of the disagreement among the lower courts" was "uncertain" and might "be capable of resolution without this Court's intervention." Since then, the specific disagreement that was the focus of the United States' brief in *Nathan* has been largely resolved. The parties here ultimately agree that no court of appeals now applies a per se rule requiring every FCA complaint to identify representative examples of specific false claims. See Br. in Opp. 34; Pet. Reply Br. 1; p. 13, *supra*; accord *Prather*, 838 F.3d at 772 ("Every circuit" that previously required relators to plead specific false claims "has retreated from such a requirement in cases in which other detailed factual allegations support a strong inference that claims were submitted.").

Instead, the courts of appeals have largely converged on a more flexible standard, asking whether an FCA relator's complaint—in addition to providing detailed allegations describing the defendant's fraudulent scheme—contains some "indicia of reliability" to support a strong inference that the defendant submitted false claims for payment to the government. As described above, the Eleventh Circuit has endorsed that standard, both in the decision below, Pet. App. 11a, 13a, and in some other cases, *e.g.*, *Clausen*, 290 F.3d at 1311 (stating that "some indicia of reliability must be given in the complaint to support the allegation of *an actual false claim* for payment being made to the Government"). Five other courts of appeals have articulated essentially the same standard, under which an FCA complaint satisfies Rule 9(b) if it "alleg[es] particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Grubbs*, 565 F.3d at 190 (5th Cir.); see *United States ex rel. Strubbe* v. *Crawford County Mem'l Hosp.*, 915 F.3d 1158, 1163 (8th Cir.), cert. denied, 140 S. Ct. 553 (2019); *United States ex rel. Customs Fraud Investigations, LLC.* v. *Victaulic Co.*, 839 F.3d 242, 258 (3d Cir. 2016), cert. denied, 138 S. Ct. 107 (2017); *United States ex rel. Heath* v. *AT&T, Inc.*, 791 F.3d 112, 126 (D.C. Cir. 2015), cert. denied, 579 U.S. 927 (2016); *Ebeid* v. *Lungwitz*, 616 F.3d 993, 998-999 (9th Cir.), cert. denied, 562 U.S. 1102 (2010).

The Seventh and Tenth Circuits have not used the term "reliable indicia," but their articulations of the Rule 9(b) standard do not appear to be meaningfully different. See *United States ex rel. Mamalakis* v. *Anesthetix Mgmt. LLC*, 20 F.4th 295, 301 (7th Cir. 2021) (relator can plead the submission of false claims "by includ-

ing particularized factual allegations that give rise to a plausible inference of fraud"); *United States ex rel. Polukoff* v. *St. Mark's Hosp.*, 895 F.3d 730, 745 (10th Cir. 2018) (relator "need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme") (citation omitted). The Second Circuit's standard is similar with one caveat: it holds that relators can satisfy Rule 9(b) with "plausible allegations * * * that lead to a strong inference that specific claims were indeed submitted," as opposed to "details of actual bills or invoices submitted to the government"—"so long as" the relator alleges "that information about the details of the claims submitted are peculiarly within the opposing party's knowledge." *Chorches*, 865 F.3d at 93.

Although the First, Fourth, and Sixth Circuits have placed greater emphasis than other courts of appeals on FCA relators pleading details regarding specific false claims for payment, each of those courts has recognized that such details are not invariably required. The First Circuit generally expects relators to "allege the essential particulars of at least some [specific] false claims," but recognizes that, "where the defendant allegedly 'induced *third parties* to file false claims with the government[,] a relator could satisfy Rule 9(b) * * * without necessarily providing details as to each false claim'" by alleging "the details of the scheme" combined with "'reliable indicia that lead to a strong inference that claims were actually submitted.'" *United States ex rel. Nargol* v. *DePuy Orthopaedics, Inc.*, 865 F.3d 29, 39 (2017) (citation and ellipsis omitted), cert. denied, 138 S. Ct. 1551 (2018). The Fourth Circuit generally requires relators to describe specific false claims, but it has also permit-

ted relators to "allege a pattern of conduct that would '*necessarily* have led to the submission of false claims' to the government for payment." *United States ex rel. Grant* v. *United Airlines Inc.*, 912 F.3d 190, 197 (2018) (brackets and citation omitted). The Sixth Circuit has stated that specific allegations concerning the defendant's claims for payment are usually required, but it has also recognized an exception where the relator pleads "specific facts based on her personal billing-related knowledge that support a strong inference that specific false claims were submitted for payment." *Prather*, 838 F.3d at 773.

In sum, the circuit disagreement identified in the United States' *Nathan* brief has now subsided, and the courts of appeals permit at least some FCA relators to plead the defendant's submission of false claims for payment even without identifying representative examples or specific details of the defendant's claims.

2. Petitioners contend (Pet. Reply Br. 1-2) that the circuits continue to disagree over "what counts as 'reliable indicia'" that false claims were submitted, with some courts applying a "rigid rule [that] requires specifics of false claims or claim-specific knowledge" and other courts applying a "flexible rule [that] allows relators to plead other facts that make the presentment of claims plausible." But it is unsurprising that various courts of appeals, in the course of applying the fact-intensive "reliable indicia" standard, have reached divergent results across cases involving a wide range of factual allegations. And although courts of appeals have expressed different degrees of willingness to infer the submission of false claims "based on probability, logic, and circumstantial evidence," *id.* at 3, the courts' statements generally appear to reflect different judges' sub-

jective assessments of the reliability of the particular allegations at issue, as opposed to a choice among competing legal standards.

The question that once divided the circuits—whether qui tam relators are categorically required to identify illustrative false claims in order to plead fraud with the "particularity" that Rule 9(b) requires—presented the courts with a binary choice and was susceptible of definitive resolution through a yes-or-no answer. As events transpired, the courts of appeals have effectively resolved that question in the negative without this Court's intervention. See pp. 15-17, *supra*. By contrast, the question "What allegations will provide sufficient indicia of reliability in cases where illustrative false claims are unavailable?" is not subject to any single answer. The existing disuniformity in the courts of appeals' decisions does not appear to be materially greater than what would be expected from the application of a fact-intensive standard. And under any formulation of the governing standard that this Court might announce, lower courts would still be required to evaluate whether each FCA complaint satisfies Rule 9(b) "on a case-by-case basis." *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1358 (11th Cir. 2006).

C. The Court Of Appeals' Decision Does Not Warrant This Court's Review

1. As a result of the courts of appeals' general convergence toward a fact-driven and flexible Rule 9(b) standard in FCA cases, the question of the appropriate pleading standard does not warrant this Court's review. Even if every court of appeals articulated precisely the same standard for applying Rule 9(b) in FCA cases, the application of such a general standard to each case's individual facts would necessarily produce some varia-

tions and differing glosses. This Court's review therefore could not reasonably be expected to produce a bright-line rule or otherwise eliminate all disuniformity among the courts of appeals.

Moreover, the question presented arises only in the subset of FCA cases where 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. FCA claims litigated by the United States should rarely if ever present that circumstance, because the United States will typically have access to any claims for payment that the defendant submitted.

2. Even if the Rule 9(b) pleading standard warranted further review in an appropriate case, this would not be a suitable vehicle. The other ground on which the district court found petitioners' complaint to be deficient—the failure to plead with particularity the details of respondent's alleged kickback scheme—is closely intertwined with the question whether petitioners adequately pleaded the submission of false claims.

The operative complaint's allegation that referring doctors received illegal kickbacks was petitioners' only basis for asserting that respondent's claims for payment were false. See Pet. App. 7a (observing that petitioners' FCA claims were "based on illegal kickbacks"). Thus, in order for petitioners to plead their FCA claim, they needed to allege with particularity not only that respondent submitted claims for Medicare reimbursement, but also that the specific patients who were the subject of those Medicare claims were referred by doctors who had received kickbacks. That, in turn, required allegations concerning when the doctors named in the scheme received kickbacks and when the relevant

claims for payment were submitted to the government for those patients' care.

The district court found, however, that petitioners had not adequately pleaded those facts. While the complaint identified the doctors at issue and the individual employed by respondent who had allegedly paid them, the court found that the complaint contained "no details" regarding "'precisely what * * * incentives'" were paid to those doctors, "'when they were provided,'" or "how they were provided." Pet. App. 31a-32a (citation omitted). The district court further stated that petitioners had not pleaded any "specific dates that [respondent] paid doctors" or identified "any specific patient" referred after a doctor had accepted kickbacks. *Id.* at 32a.

Because the court of appeals "agree[d] with the district court that [petitioners] failed to plead with particularity the submission of an actual false claim," Pet. App. 9a, the court found it unnecessary to review the district court's finding that petitioners' AKS allegations were inadequate. But that unreviewed finding would complicate this Court's analysis of the closely related question whether petitioners adequately pleaded that respondent's Medicare claims were "false." As petitioners emphasize (Pet. 30-31), their FCA action turns not on the details of the claims for payment that respondent submitted, but on their allegations that those claims were tainted by kickbacks. It therefore would be difficult for this Court to determine whether petitioners pleaded the submission of *false* claims with sufficient particularity without also addressing petitioners' disputed contention that they adequately pleaded a fraudulent kickback scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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