No. 21-462

IN THE

Supreme Court of the United States

JOLIE JOHNSON & ESTATE OF DEBBIE HELMLY,

Petitioners,

v.

BETHANY HOSPICE AND PALLIATIVE CARE OF GEORGIA, LLC,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

Mike Bothwell
BOTHWELL LAW GROUP
304 Macy Drive
Roswell, GA 30076

Tejinder Singh
Counsel of Record
SPARACINO PLLC
1920 L Street, NW
Suite 835
Washington, DC 20036
(202) 629-3530
tejinder@sparacinopllc.com

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully respond to the brief of the United States, filed May 24, 2022. Petitioners also direct the Court's attention to the supplemental brief filed May 31 by the petitioner (an FCA defendant) in No. 21-1145, *Molina Healthcare of Illinois, Inc. v. Prose*, which points out errors in the government's position—and also demonstrates that plaintiffs and defendants agree that this Court should grant certiorari to decide the question presented, and that this case is a suitable vehicle.

I. The Circuits Have Not Converged on a Uniform Rule, and the Eleventh Circuit's Rule Is Unduly Restrictive

The government states that "[i]f 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." U.S. Br. 9. The government argues that no review is necessary because, instead of applying that problematic rule, "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." *Id*. at 9-10.

The obvious problem with that argument is that in the Eleventh Circuit, these two purported alternative means of satisfying Rule 9(b)—details of false claims *or* reliable indicia that claims were presented—are one and the same. Thus, the Eleventh Circuit's published opinions unambiguously hold that relators "must 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) (quoting *United States ex rel. Sanchez v. Lymphatx, Inc.*, 596 F.3d 1300, 1302 (11th Cir. 2010)).

That rule is the sole reason the Eleventh Circuit affirmed the dismissal of petitioners' complaint. Petitioners offered numerous indicia of reliability supporting their allegation that false claims were presented, including their own personal observations at work, insights gleaned from other employees, the fact that respondent bills essentially all of its claims to the government, and actual claims data showing that respondent had in fact billed Medicare for the care of patients referred by the doctors who allegedly received kickbacks. *See* Pet. App. 3a-7a.

The Eleventh Circuit rejected all of these as insufficient because petitioners did not also provide specific details of alleged false claims. *See* Pet. App. 15a (quoting the passage from *Carrel* above to reject petitioners' argument that false claims could be inferred because respondents billed essentially all of their business to the government); *id*. at 12a (holding that petitioners "failed to allege any specifics about actual claims submitted to the government"); *id*. at 13a-14a (holding that petitioners' knowledge and access "are not sufficient indicia of reliability" because "even with 'direct knowledge of the defendants' billing and patient records,' [petitioners] have 'failed to provide any specific details regarding either the dates on or the frequency with which the defendants submitted false claims, the amounts of those claims, or the patients whose treatment served as the basis for the claims'") (quoting *Sanchez*, 596 F.3d at 1302). The Eleventh Circuit thus concluded that because petitioners "have failed to

allege any specific details about the submission of an actual false claim," their complaint "fails to contain some indicia of reliability to meet Rule 9(b)'s particularity requirement." *Id*. at 15a.

In arguing that the Eleventh Circuit's rule is more flexible than it actually is, the government conflates two things: "representative examples" of false claims, and "specific details" of false claims. *See* U.S. Br. 13 (first full paragraph). These are not the same. A representative example is an entire claim (*e.g.*, an invoice or claim for payment that was submitted to the government, appended to the complaint). Specific details are some, but maybe not all, of the features of claims (*e.g.*, the patient's name, the date on which the claim was submitted). The reason the Eleventh Circuit's rule is unduly restrictive is not because it always requires complete representative examples (it doesn't); it is because the Eleventh Circuit always requires specific details. As the government acknowledges, such a rule is wrong. U.S. Br. 9, 11-12. It is wrong because there are other ways to reliably show that claims were presented, and there is no reason to impose such a rigid, arbitrary restriction at the pleading stage.

As the petition and reply explained, this rule stands in contrast with other courts that apply a flexible standard allowing district courts to infer the presentment of false claims at the pleading stage based on a much broader range of criteria, including probability, logic, and circumstances. *See* Pet. 18-24; Reply 1-5. That is a circuit split, and the Eleventh Circuit is on the wrong side of it.

The government acknowledges that "courts of appeals have expressed different degrees of willingness to infer the submission of false claims 'based on

probability, logic, and circumstantial evidence.'" U.S. Br. 17 (quoting Reply 3). But it tries to minimize the disagreement, saying that "the courts' statements generally appear to reflect different judges' subjective assessments of the reliability of the particular allegations at issue, as opposed to a choice among competing legal standards." *Id*. at 17-18. This is pure *ipse dixit*, devoid not only of citations to judicial opinions that substantiate the government's characterization, but of any explanation beyond that one sentence.

In fact, judicial opinions show that the disagreement among the courts of appeals stems not from a quibble over the sufficiency of particular allegations, but instead fundamentally different understandings about what facts must be stated "with particularity" in an FCA case. Courts like the Eleventh Circuit believe that in an FCA case, the "circumstances constituting fraud" are the false claims themselves—and so those courts require plaintiffs to allege details of claims. *See, e.g.*, *United States ex rel. Clausen v. Lab'y Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002) ("The submission of a claim is . . . the *sine qua non* of a False Claims Act violation.").

Courts on the more flexible side of the split, by contrast, adopt a broader understanding of the "circumstances constituting fraud." Thus, in cases involving fraudulent schemes, these courts hold that "[s]tating 'with particularity the circumstances constituting fraud' does not necessarily and always mean stating the contents of a bill" because "[i]t is the scheme in which particular circumstances constituting fraud may be found that make it highly likely the fraud was consummated through the presentment of false bills." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d

180, 190 (5th Cir. 2009). The Second Circuit has likewise criticized the logic adopted by the Eleventh Circuit, concluding that "[a]n interpretation of Rule 9(b) that requires *qui tam* plaintiffs to plead billing details regarding the submission of specific false claims, even when knowledge of such details is peculiarly within the defendant's purview, would discourage the filing of meritorious *qui tam* suits that can expose fraud against the government." *United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 86 (2d Cir. 2017). As the petition explained (at 33), the risk is heightened when, as here, the defendant fires a suspicious employee before the employee can gather information about specific claims. A legal rule that encourages such preemptive action against would-be whistleblowers is flatly at odds with the FCA's intent.

Based on these fundamentally different understandings of what Rule 9(b) requires, courts on the more flexible side of the split have readily inferred the presentment of false claims based on logic and common sense—even when the plaintiff concededly provided no specific information about claims for payment. *See, e.g.*, *United States ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667, 679 (9th Cir. 2018) (inferring, based on logic, the submission of false claims by defendant insurance companies that contracted with a vendor to procure tainted data that would inflate their claims—even though the relator, who worked for the data vendor and not the insurance companies, had no firsthand knowledge that the data was actually been submitted, and no details of claims); *United States ex rel. Colquitt v. Abbott Labs.*, 858 F.3d 365, 372 (5th Cir. 2017) (inferring presentment of claims to Medicare because the complaint alleged that it was

"common" for the defendant's products to be used on persons over 65). Courts on the rigid side prohibit such inferences. That is an undeniable circuit conflict.

More broadly, the petition identified multiple conflicting idiosyncratic rules, including: the Eleventh Circuit's requirement of specific details of false claims, Pet. App. 15a, the First Circuit's requirement that every relator must always provide specific details of false claims *unless* the allegation is that the defendant induced a third party to file false claims, in which case the relator can rely on "factual or statistical evidence to strengthen the inference of fraud," *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 39 (1st Cir. 2017) (quotation marks omitted); the Second Circuit's rule that allows pleading false claims on information and belief but only when the plaintiff alleges that the relevant information is peculiarly within the defendant's control, *Chorches*, 865 F.3d at 86; the Fourth Circuit's rule requiring specific details of claims, unless it is a certainty (and not merely a probability) that claims were presented, *United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 197 (4th Cir. 2018); and the Sixth Circuit's rule that treats personal billing-related knowledge of particular identified claims (but not any other type of knowledge) as sufficient indicia that claims were presented, *United States ex rel. Owsley v. Fazzi Assocs., Inc.*, 16 F.4th 192, 197 (6th Cir. 2021), *petition for cert. pending*, No. 21-936 (Docketed Dec. 23, 2021).

The government acknowledges this lack of uniformity, accepting that "the First, Fourth, and Sixth Circuits have placed greater emphasis than other courts of appeals on FCA relators pleading details regarding specific false claims." U.S. Br. 16. The

government argues that this is not a big deal because "each of those courts has recognized that such details are not invariably required." *Ibid*. But, as just shown—and as the government does not deny—the conditions under which each of these courts vary from their generally rigid requirements differ from court to court. Far from exhibiting uniformity, these precedents show a multi-way circuit conflict. Without guidance from this Court, the lower courts have been unable to reach consensus—and there is no indication that this will change any time soon.

This Court can resolve this longstanding circuit conflict simply by holding that ordinary pleading principles—and not any arcane, special rules—apply to FCA cases. Thus, the rule petitioners want the Court to announce is straightforward: When an FCA complaint alleges a fraudulent scheme with particularity, and plausibly alleges that false or fraudulent claims were presented pursuant to that scheme, that is enough to satisfy Rule 9(b). Such a rule is simple, uniform, and will simultaneously eliminate artificial limitations on allegations that claims were presented (*e.g.*, requiring specific details of claims, personal billing-related knowledge, or certainty) as well as artificial triggers for the proper standard (*e.g.*, that third parties presented the claims, or that the information is peculiarly within the defendant's control).

II. This Case Is a Suitable Vehicle to Resolve the Question Presented

As the petition explained, the Eleventh Circuit affirmed dismissal of petitioners' complaint on a single ground: that it failed to allege the presentment of false claims. The government does not defend that decision

on the merits. It says that the Eleventh Circuit applied the "indicia of reliability" test (U.S. Br. 12)—but as shown above, the Eleventh Circuit's version of that test is unduly narrow. Importantly, the government does not deny that the indicia of reliability petitioners provided—including their firsthand knowledge and observations, their conversations with other employees, details of respondent's business model, and Medicare claims data—alone and together adequately plead that respondent presented claims to the government for the care of patients referred by the doctors who allegedly received kickbacks from respondent in exchange for referrals.

Instead, the government argues that because the district court—though not the Eleventh Circuit—held that petitioners had not alleged the underlying kickback scheme with particularity, this case is not a suitable vehicle to determine the standard applicable to allegations that false claims were presented. *See* U.S. Br. 19-20.

It is unclear why the government thinks the district court's alternative holding matters. The government argues that the issues are somehow intertwined, such that it will be hard to determine whether petitioners' complaint adequately pleads that false claims were presented without also considering whether the complaint pleads that kickbacks were offered. U.S. Br. 19. But the Eleventh Circuit had no trouble considering the questions separately, and the government offers no reason why this Court cannot do the same. Thus, the Court can assume for the sake of argument that the complaint pleads that respondent offered kickbacks to the Bethany Hospice doctors, and limit its inquiry to whether the complaint also adequately

pleads that respondent presented claims to the government for the care of patients referred by those doctors.

Or, if there is any concern, the Court can skip that inquiry, too. To resolve the question presented—which is about the correct legal standard—the Court need not decide whether petitioners' complaint adequately pleads an FCA violation; it can instead announce the correct standard for Rule 9(b) in FCA cases and remand for the court of appeals to apply it in the first instance, as the Court frequently has done in both the FCA and other contexts. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 196 (2016) (when lower court applied an incorrect interpretation of the FCA, vacating "and remand[ing] the case for reconsideration of whether [plaintiffs] have sufficiently pleaded a False Claims Act violation"); *see also* Reply Br. 7 (citing additional cases); *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) ("[W]hen we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing.") (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)); *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1804 (2019) ("Because the Court of Appeals did not apply the proper standard, we vacate the judgment below and remand the case for further proceedings consistent with this opinion."); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 426 (2014) (remanding for court of appeals to "apply the [correct] pleading standard").

On the other hand, if the Court believes it necessary to decide whether the complaint pleads the underlying kickback scheme with particularity, the

Court should easily conclude that it does. As the petition explains, the complaint sets forth the "who, what, where, when, and how" of the fraudulent scheme—including naming the participants, identifying the hospice locations to which patients were referred and the timeframe for the referrals, describing the kinds of compensation offered including specific allegations that the compensation was intended to induce referrals, and walking through the process by which respondent's marketers solicited referrals, respondent's administrators input those referrals into the system, and the system generated bills to the government. Pet. 5-8, 31. The complaint further details how the scheme actually caused referrals to flow in—enabling respondent to grow its patient census and bill the government for those patients' care. *Id*. at 8-12. Indeed, the government itself does not dispute that the district court's alternative rationale is wrong. It is therefore not a potential bar to the Court reaching the question presented, and not a vehicle problem.

Independently, it bears noting that this purported "vehicle" issue will arise in every case raising the question presented—and so it is not a reason to prefer any other case over this one. Every case raising the question presented will involve an underlying fraudulent scheme and the ensuing presentment of claims. In every case, the defendant will argue that neither the underlying scheme nor the claims themselves were pleaded with particularity. Where, as here, the appellate court does not agree with the defendant about the underlying scheme (either because it resolves that issue in the plaintiff's favor or because it does not reach the issue), a defendant opposing certiorari will always advance its attack on the scheme as an alternative

ground for affirmance, and always argue that it complicates consideration of the question presented. But in a case like this one, the Court can sidestep that issue, leaving it for the lower court to address on remand. Because the issue is equally present in every other case, and easily avoided in a case like this one where the appellate court did not rule on this ground, it is not a reason to deny certiorari. In other words, it is not a vehicle problem.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

Mike Bothwell
BOTHWELL LAW GROUP
304 Macy Drive
Roswell, GA 30076

Tejinder Singh
Counsel of Record
SPARACINO PLLC
1920 L Street, NW
Suite 835
Washington, DC 20036
(202) 629-3530
tejinder@sparacinopllc.com

June 7, 2022