No. 21-936

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA & STATE OF INDIANA, EX REL. CATHY OWSLEY,

Petitioner,

v.

FAZZI ASSOCIATES, INC., CARE CONNECTION OF CINCINNATI, LLC, GEM CITY HOME CARE, ASCENSION HOME CARE, AND ENVISION HEALTHCARE HOLDINGS, INC.

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

On January 18, 2022, after the petition in this case was filed, this Court called for the views of the Solicitor General in No. 21-462, *Johnson v. Bethany Hospice & Palliative Care LLC*, which presents the same question as this case. Petitioner respectfully suggests that the Court consider the petitions together and grant certiorari in whichever case the Court deems to be the superior vehicle. None of the arguments in the brief in opposition (which completely ignores the Court's CVSG order) support a different course of action.

I. Respondents Do Not Dispute That The Question Presented Is Important And Frequently Recurring

The petition explained that particularity challenges under Federal Rule of Civil Procedure 9(b) are "one of the most frequently litigated defenses at the pleading stage of an FCA action," arising in a tremendous number of cases every year. Pet. 26. Based on Westlaw searches, Rule 9(b) issues have been raised in well over 1,000 cases to date. *See id*. at 26-27. The legal press and commentators also frequently note the issue's importance. *See id*. at 10-11.

Respondents dispute none of this—and so, as the Court considers the petition, it can start from the conceded premise that this case presents an important question of federal law.

II. There Is An Undeniable Circuit Split

The petition laid out a seven-to-five split between courts that hold that when the plaintiff pleads a fraudulent scheme with particularity, it is plausible to infer

that false claims were presented to the government—and courts that hold that even when the plaintiff pleads a fraudulent scheme with particularity, the complaint fails if the plaintiff does not *also* plead the presentment of specific false claims with particularity. *See* Pet. 10-25.

The decision below places the Sixth Circuit in the latter camp. The court of appeals explained that "our circuit has imposed a clear and unequivocal requirement that a relator allege specific false claims when pleading a violation of" the FCA. Pet. App. 6a (quotation marks omitted). "Thus, under Rule 9(b), the identification of at least one false claim with specificity is an indispensable element of a complaint that alleges a False Claims Act violation." *Ibid*. (quotation marks and brackets omitted). It is not enough "to describe a private scheme in detail but then to allege simply that claims requesting illegal payments must have been submitted." *Ibid*. (quotation marks omitted). Instead, "the touchstone is whether the complaint provides the defendant with notice of a specific representative claim that the plaintiff thinks was fraudulent." *Id*. at 9a. Without "facts that identify any specific fraudulent claims," the complaint always fails. *Id*. at 7a.

Respondents attempt (BIO 13-14) to soften the Sixth Circuit's rule by pointing to its earlier decision in *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750, 772 (6th Cir. 2016), which recognized an "exception to the heightened pleading standard" for relators "who not only plead facts supporting a strong inference that claims were submitted, but do so while identifying the particular claims based on their own personal knowledge of billing-related practices." But that case only proves

the circuit split because the *Prather* rule is manifestly not the same as the rule adopted by the seven-circuit majority. In *Prather* itself, the Sixth Circuit located its rule on "the more stringent side of the circuit split." *Id.* at 773.

In contrast with *Prather*, the majority of courts hold that pleading a fraudulent scheme with particularity can, on its own, support a plausible logical inference that claims were presented; none of them also require a plaintiff to identify particular claims based on her own personal knowledge of billing-related practices. *See, e.g.*, *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009) (allowing claim to proceed by employee who provided no example false claim, and had no personal billing-related knowledge, because presentment of claims was a plausible inference from scheme); *United States ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667, 679 (9th Cir. 2018) (similar); *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 192 (5th Cir. 2009) (similar); *see also United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 83-84 (2d Cir. 2017) (finding such allegations sufficient when the plaintiff also alleged that the billing information was within the defendant's exclusive possession and control).

Prather is also the exception that proves the Sixth Circuit's generally rigid rule because the court of appeals has only ever applied that exception once, and district courts routinely find it does not apply. *See, e.g.*, *United States ex rel. Sharma v. Miraca Life Scis., Inc.*, 472 F. Supp. 3d 429, 443-44 (N.D. Ohio 2020); *United States ex rel. Petkovic v. Founds. Health Sols., Inc.*, 2019 WL 251556, at *3 (N.D. Ohio Jan. 17, 2019).

Respondents also argue (BIO 8-9) that the circuits are converging. They base this on a brief filed by the Solicitor General in 2014, and the Second Circuit's 2017 decision in *Chorches*. Both of those sources, however, acknowledged a circuit split; the only qualification they added is that courts on the rigid side of the split had sometimes recognized exceptions to their rule.

Accepting that premise for a moment, it shows nothing approaching uniformity among the circuits. Instead, it shows there remain two camps (a rigid one and a flexible one) and that among the more rigid circuits, there is further dis-uniformity. For example, the First Circuit has held that details of false claims are always required when the plaintiff alleges that the defendant itself presented false claims, but not when the plaintiff alleges that the defendant caused a third party to present false claims. *See United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 38-39 (1st Cir. 2017). No other court embraces that distinction. The Fourth Circuit requires either details of false claims, or facts that make it a certainty (and not merely a probability) that claims were presented. *See United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 197 (4th Cir. 2018). No other court adopts that requirement. Far from demonstrating convergence, these authorities show that the circuits have adopted a patchwork of inconsistent rules.

Respondents' premise is also wrong because any convergence that may have been underway when the Second Circuit predicted it in 2017 has reversed itself. Three cases embodying the flexible rule (*United States ex rel. Prose v. Molina Healthcare of Illinois, Inc.*, 17 F.4th 732 (7th Cir. 2021), *petition for cert. pending*,

No. 21-1145 (filed Feb. 14, 2022); *United States ex rel. Bookwalter v. UPMC*, 946 F.3d 162 (3d Cir. 2019); and *Silingo*) were decided after 2017. On the rigid side, the Eleventh Circuit's decisions 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 the court in this case reiterated that the Sixth Circuit has clearly and unequivocally adopted a rigid standard. Pet. App. 6a.

FCA defendants other than respondents agree there is a circuit split warranting this Court's review. In *Molina Healthcare of Illinois, Inc. v. Prose*, No. 21-1145, defendants petitioned for this Court's review on the same Rule 9(b) question. That petition is supported by *amicus* briefs from the Washington Legal Foundation, the U.S. Chamber of Commerce, and America's Health Insurance Plans, all of whom agree that a split warranting this Court's review exists.[*]

Commentators likewise agree that the circuits are not converging. A 2021 article 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

[*] *Molina* is an inferior vehicle to consider this issue for a variety of reasons, including that the question is not squarely presented, and is clouded by other questions that may obviate the need to reach it. But the fact that both relators and defendants are calling for this Court's review on this question is itself a strong signal of the existence of a split and the issue's importance.

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) (last brackets in original), 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 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.

Against these points, respondents cite cases from the more rigid circuits where relators sometimes won, or cases from the more flexible circuits where defendants sometimes won, as evidence that the circuits' positions are closer together than petitioner suggests. BIO 10-12. But petitioner's argument is not that plaintiffs *never* win in the rigid circuits and *always* win in the flexible ones; it is that these circuits apply different rules to reach divergent legal outcomes, such that this case would have been decided differently in other circuits. Respondents' examples don't prove or even suggest otherwise.

Moreover, the examples respondents cherry-pick are unpersuasive. For example, respondents argue (BIO 10-11) that the Eleventh Circuit applied a more flexible approach in *United States ex rel. Mastej v. Health Management Associates, Inc.*, 591 F. App'x 693 (11th Cir. 2014). But *Mastej* was an unpublished decision that has *never* been cited favorably in a published one. The Eleventh Circuit's published decisions uniformly adopt the rigid rule.

Ultimately, respondents' efforts to deny the split are unpersuasive compared to the many sources acknowledging the split and urging this Court to resolve it.

III. Respondents' Asserted Vehicle Problems Aren't Vehicle Problems

Respondents do not dispute that the question presented is the only issue on which the Sixth Circuit ruled in their favor. Indeed, the court of appeals could not have been clearer: it acknowledged at the outset that petitioner "alleged in considerable detail that she observed, firsthand, documents showing that her employer had used fraudulent data . . . to submit inflated claims for payment to the federal and Indiana state governments," Pet. App. 2a, and later reiterated that petitioner's "allegations describe, in detail, a fraudulent scheme," *id*. at 6a. Petitioner's claim failed for one "reason alone," which was that she did not provide "details that would allow the defendants to identify any specific claims" that were fraudulent. *Id*. at 2a. Or, as the court put it later, "the touchstone" of the Rule 9(b) inquiry in the Sixth Circuit "is whether the complaint provides the defendant with notice of a specific representative claim that the plaintiff thinks was fraudulent." *Id*. at 9a. The question presented is essentially whether Rule 9(b) requires such details about claims when, as here, the plaintiff pleads the details of a fraudulent scheme. Thus, the question is cleanly and squarely presented, and this case is a good vehicle to resolve it.

To argue otherwise, respondents contend that petitioner's claim would fail under any standard. BIO 26-31. But the petition detailed petitioner's allegations,

Pet. 4-7, and identified similar cases from other circuits that have survived dismissal, *id*. at 20 (citing the Second Circuit's decision in *Chorches*, the Seventh Circuit's decision in *Prose*, and the Ninth Circuit's decision in *Silingo*).

Respondents do not try to distinguish *Chorches*—a case in which the plaintiff was an insider (an emergency medical technician who went out on ambulance runs for the defendant ambulance company) but lacked access to billing information. They point out that *Prose* was an outsider to the defendant, as opposed to an insider like petitioner—but nothing in the Seventh Circuit's decision turned on the relator's outsider status. Instead, the Seventh Circuit found the relator's allegations adequate because he provided "precise allegations about the beneficiaries, the time period, the mechanism for the fraud, and the financial consequences." *Prose*, 17 F.4th at 741. Respondents attempt to distinguish *Silingo* by arguing that *Silingo* was a case in which entire categories of claims were allegedly tainted by fraud. That isn't an accurate description; in *Silingo*, the allegation was that coders (similar to respondent Fazzi Associates) were consistently upcoding patients' diagnoses to increase the amount paid to the defendants. *See* 904 F.3d at 674-75. This case also involves a situation in which classes of claims were false. For example, petitioner alleges that beginning in March 2015, respondents instructed nurses to always say that patients could not walk unassisted, even if that was not true. Pet. App. 50a, 53a-54a. At the same time, nurses were instructed to indicate that all homebound patients were unable to take their own medications, even when that was not true. *Id*. at 53a. Petitioner also plausibly alleges this

misconduct was part of a common policy, implemented nationwide. *Id*. at 59a-60a. These are the sorts of facts that have been found sufficient in cases like *Silingo*.

Even if respondents were correct that they would win under a different legal rule, that would be no reason to deny review and allow the circuit conflict to fester. Put simply, that argument is not a "vehicle problem" in the sense that it presents any obstacle to this Court reaching and deciding the question presented, and so it is not a reason to deny review.

Finally, if the Court has any hesitation on this score, there is an alternative vehicle, the pending petition in *Johnson*, that the Court could choose instead, holding this one pending the outcome.

IV. Respondents' Merits Arguments Are Wrong, And In Any Event Not A Reason To Deny Review

Respondents also make a merits argument, contending that Rule 9(b) should not be relaxed for FCA cases. BIO 20. In support, they argue that in various non-FCA contexts, Rule 9(b) has been interpreted by circuit courts to require various details about allegedly fraudulent statements. *See id.* at 21-22. Because petitioner argues that not all of those details are essential in this case, respondents contend that "petitioner's argument amounts to seeking a non-textual exemption to this heightened pleading standard for non-intervened FCA suits." *Id*. at 22.

Respondents mischaracterize petitioner's argument, which doesn't seek an exception to Rule 9(b), but instead asks what is necessary to comply with the rule. The rule's text says that "a party must state with particularity the circumstances constituting fraud." Fed.

R. Civ. P. 9(b). This naturally raises two questions: What are the "circumstances constituting fraud"? And how much "particularity" is enough? The text of the rule doesn't answer those questions, and so it will inevitably fall to courts to fill in those blanks by relying on extra-textual guideposts. That is true whether courts adhere to a rigid approach that requires representative examples of false claims (a requirement that isn't spelled out in the text of the rule) or a more flexible approach that allows such claims to be inferred from other facts.

Petitioner and the courts on the more flexible side of the split agree that the "circumstances constituting fraud" will always vary, and that these circumstances do not invariably include specific false claims. More specifically, when a plaintiff alleges a fraudulent scheme with particularity (laying out the "who, what, where, when, and how" of that scheme with enough detail to put the defendant on notice of the alleged misconduct), and the presentment of claims is a logical inference from the defendant's conduct, the plaintiff has carried her burden to plead fraud with particularity even if she does not also identify specific claims for payment. Petitioner believes this is correct because such a rule provides defendants with adequate notice of the claims against them and ensures that allegations are not baseless. It also recognizes that defendants will always have in their possession the relevant claims information, such that there is no additional benefit in requiring plaintiffs to furnish that information in a pleading. And it ensures that Rule 9(b) does not become an artificially high hurdle that prevents plaintiffs with genuinely important information

about frauds on the United States from coming forward. *See* Pet. 28-30 (making merits arguments).

It is unclear what respondents' answer to all of that is. They never explain, for example, why pleading the details of specific claims (as opposed to the details of underlying fraudulent schemes) is compelled by the text of the rule, or its underlying purpose. Instead, they say that Rule 9(b) requires "the plaintiff to allege the 'who, what, when, where, why, and how' of the alleged fraud." BIO 22. Putting aside that courts generally omit the "why" from that articulation—it sheds little light on why the "circumstances constituting fraud" means the claims, as opposed to the scheme to present them.

Ultimately, it is unclear what respondents think Rule 9(b) requires in an FCA case. Does it require a plaintiff to identify every alleged false claim? Does it require a representative example claim? Is the Sixth Circuit right that a plaintiff with personal knowledge of specific false claims can state a claim, but a plaintiff who lacks that specific billing-related knowledge can't? Does Rule 9(b) categorically prohibit a plaintiff who knows of fraud in one location, but doesn't have details about fraud in other locations, from alleging fraud in those locations? Does it mean that if a defendant organizes its operations such that the people who know of its fraudulent coding are unlikely to ever get their hands on specific bills, it can escape FCA liability? Based on the brief in opposition, we really cannot say. But whatever the answers, those are issues to be resolved at the merits stage; they are not a reason to deny review.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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