No. _____

In the Supreme Court of the United States

INTERMOUNTAIN HEALTH CARE, INC. AND IHC HEALTH SERVICES, INC. d/b/a INTERMOUNTAIN MEDICAL CENTER,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. GERALD POLUKOFF, MD, ST. MARK'S HOSPITAL, SHERMAN SORENSEN, MD, SORENSEN CARDIOVASCULAR GROUP, AND UNITED STATES OF AMERICA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Matthew L. Knowles
Shamis Beckley
A.J. Kritikos
MCDERMOTT WILL & EMERY LLP
28 State Street
Boston, MA 02109
(617) 535-3885

M. Miller Baker
Counsel of Record
Sarah P. Hogarth
Eric Hageman
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com

Attorneys for Petitioners
(Additional counsel listed on inside cover)

Daniel S. Reinberg
Asher D. Funk
POLSINELLI PC
151 North Riverside Plaza
Suite 300
Chicago, IL 60606
(312) 873-3636

Attorneys for Petitioners

QUESTIONS PRESENTED

The False Claims Act ("FCA") imposes punitive civil liability for submitting false claims to the government. Under the FCA's *qui tam* provisions, self-appointed private relators prosecute actions for the United States and share in any recovery. Relators file more than 600 such cases annually. The government may intervene, but if it declines—as happens 80% of the time—the relator prosecutes the law.

A self-appointed relator has prosecuted this FCA case for more than six years. The district court dismissed the complaint under Federal Rule of Civil Procedure 9(b), which requires a party pleading a fraud claim to "state with particularity the circumstances constituting fraud." The Tenth Circuit below reversed. It "excuse[d]" the relator's pleading deficiencies because the relator argued that only the petitioners had possession of the details that Rule 9(b) requires. And although petitioners asserted an Appointments Clause challenge to the FCA's *qui tam* provisions below, circuit precedent foreclosed that challenge.

The questions presented are:

1. Whether a court may create an exception to Federal Rule of Civil Procedure 9(b)'s particularity requirement when the plaintiff claims that only the defendant possesses the information needed to satisfy that requirement.

2. Whether the False Claims Act's *qui tam* provisions violate the Appointments Clause of Article II of the Constitution.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), the following list identifies all of the parties appearing here and before the Tenth Circuit.

The petitioners here, and included among the defendants-appellees below, are Intermountain Health Care, Inc. and IHC Health Services, Inc. d/b/a Intermountain Medical Center.[1]

Respondent and relator Gerald Polukoff, MD was plaintiff-appellant below.

Respondent United States of America intervened in the Tenth Circuit pursuant to 28 U.S.C. § 2403(a) to defend the constitutionality of the False Claims Act. The United States has not intervened in this case under the False Claims Act. *See* 31 U.S.C. §§ 3730(b)(2), (c)(3).

Respondents St. Mark's Hospital, Dr. Sherman Sorensen, and Sorensen Cardiovascular Group were among the defendants-appellees below.

---

[1] The Tenth Circuit's caption below—reflecting errors in the complaint—misidentifies (1) Intermountain Health Care, Inc. as "Intermountain Healthcare, Inc." and (2) IHC Health Services, Inc. d/b/a Intermountain Medical Center as "Intermountain Medical Center."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that Intermountain Health Care, Inc. is the parent of IHC Health Services, Inc. d/b/a Intermountain Medical Center.

As not-for-profit organizations, Intermountain Health Care, Inc. and IHC Health Services, Inc. do not have stock, and thus no publicly held corporation owns 10% or more of either organization's stock.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioners Intermountain Health Care, Inc. and IHC Health Services, Inc. d/b/a Intermountain Medical Center (together, "Intermountain") respectfully petition for a writ of certiorari to review the decision of the Tenth Circuit below.

OPINIONS BELOW

The decision below is published at 895 F.3d 730 and is reprinted at Pet. App. 1a. The order of the court of appeals denying rehearing is reprinted at Pet. App. 62a. The district court's unpublished opinion dismissing the complaint is reprinted at Pet. App. 32a.

JURISDICTIONAL STATEMENT

The Tenth Circuit entered its decision on July 9, 2018. Petitioners filed a petition for rehearing en banc on August 23, 2018, which was denied on October 29, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, provides:

> [The President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior of-

ficers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

* * *

The False Claims Act, 31 U.S.C., provides in pertinent part:

§ 3729 False Claims

(a) Liability for certain acts.—

(1) [A]ny person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; [or] knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990[2] . . . , plus 3 times the amount of damages which the Government sustains because of the act of that person.

§ 3730. Civil Action for False Claims

(b) Action by Private Persons.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Govern-

---

[2] The Federal Civil Penalties Inflation Adjustment Act of 1990 has adjusted the civil penalties to not less than $11,181 and not more than $22,363. 28 C.F.R. § 85.5.

> ment. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
>
> * * *

Federal Rule of Civil Procedure 9(b) provides:

> In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

STATEMENT

A. Statutory Background

The False Claims Act ("FCA") imposes civil 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 government may bring an action against a defendant, *id.* § 3730(a), or a private individual (a relator) can bring an action against the defendant "in the name of the Government," *id.* § 3730(b)(1). If a relator brings suit, known as a *qui tam* action, she must serve on the government a copy of the complaint and material evidence, and the government has 60 days to decide whether to intervene. *Id.* § 3730(b)(2).

Before the government decides whether to intervene, it may investigate the case by serving Civil Investigative Demands requiring the production of documents, depositions, and sworn responses to interrogatories. *Id.* § 3733. The government may then

file its own complaint-in-intervention "to clarify or add detail to the claims." *Id.* § 3731(c).

If the government declines to intervene, the relator has "the right to conduct the action." *Id.* § 3730(b)(4). The government may intervene later only with leave of the court, upon a showing of good cause to intervene late. *Id.* § 3730(c)(3).

A liable defendant must pay treble damages and a penalty of between $11,181 (minimum) and $22,363 (maximum) per claim. *Id.* § 3729(a)(1); 28 C.F.R. § 85.5. A relator receives 15–25% of the recovery if the government intervenes, 31 U.S.C. § 3730(d)(1), and 25–30% if the government declines to intervene, *id.* § 3730(d)(2), plus attorneys' fees and costs.

"False Claims Act plaintiffs must . . . plead their claims with . . . particularity under Federal Rule[] of Civil Procedure . . . 9(b) . . . ." *Universal Health Servs., Inc.* v. *United States*, 136 S. Ct. 1989, 2004 n.6 (2016). To allege the circumstances of a fraud with particularity, the plaintiff must plead the "the who, what, when, where, and how" of the fraud. *Ebeid ex rel. United States* v. *Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (internal quotation marks omitted). "Rule 9(b) has long played [a] screening function, standing as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner than later." *United States ex rel. Grubbs* v. *Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009). That screening function is critical in FCA cases because "the current version of the FCA imposes damages that are essentially punitive in nature." *Vt. Agency of Nat. Res.* v.

United States ex rel. Stevens, 529 U.S. 765, 784 (2000).

B. Proceedings Below

1. In 2012, Dr. Gerald Polukoff ("the Relator") filed this *qui tam* lawsuit. C.A. A28–57. The Relator alleged that septal closures Dr. Sherman Sorensen performed and associated hospital services that Intermountain and St. Mark's Hospital provided were medically unnecessary, and that reimbursement claims to the government for these services were therefore "false" under the FCA. C.A. A506.

Dr. Sorensen is a clinical cardiologist. C.A. A533. Septal closures correct heart defects known as PFOs and ASDs, which are openings in the chambers of the heart. *See* C.A. A522–23; A527–28. Dr. Sorensen performed septal closures at two hospitals where he had privileges, Intermountain and St. Mark's. C.A. A506–07.

After the government declined to intervene and left prosecution of the case to the Relator, the district court granted the defendants' motions to dismiss the Amended Complaint. Pet. App. 33a. As to Intermountain, the district court held the Relator failed to satisfy Rule 9(b)'s requirement to plead fraud with particularity. Pet. App. 48a. The Relator was required to plead "the who, what, when, where and how of a fraudulent scheme perpetrated by each of the defendants," but the district court concluded that, as to Intermountain, the complaint failed "to specify what the objections [to the procedures] were,

to whom the objections were directed, and when they were made." Pet. App. 45a, 48a.[3]

2. The Relator appealed and was supported by the government as amicus curiae. After Intermountain raised separation-of-powers arguments as alternative grounds to defend the district court's judgment, the government intervened under 28 U.S.C. § 2403 to defend the FCA's constitutionality.

The Tenth Circuit reversed the district court's dismissal of the Relator's claims against Intermountain under Rule 9(b). Pet. App. 30a.[4] The court acknowledged that Rule 9(b) requires relators pleading FCA violations to allege "the who, what, when, where and how of the alleged claims." Pet. App. 29a–30a (quoting *United States ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163, 1167 (10th Cir. 2010)). But rather than requiring the Relator to meet that heightened pleading standard, the Tenth Circuit "excuse[d] deficiencies that result from the [Relator's] inability to obtain information within the defendant's exclusive control." Pet. App. 30a. For example, it was of no moment that the Relator did not plead the "who" of the fraud because "Intermountain, no doubt, knows which employees handle federal billing . . . and, in particular, who reviewed reimbursement claims for Dr. Sorensen." Pet. App. 30a (footnote omitted).

---

[3] The district court also dismissed the Relator's claims against all defendants on Federal Rule of Civil Procedure 12(b)(6) grounds not at issue here. Pet. App. 50a–58a.

[4] The Tenth Circuit also reversed the district court's Rule 12(b)(6) dismissal as to all defendants. Pet. App. 19a–29a.

Finally, the Tenth Circuit declined to consider Intermountain's constitutional challenge to the FCA because Intermountain did not assert the challenge in the district court. Pet. App. 18a n.7.

The Tenth Circuit remanded for further proceedings, Pet. App. 31a, denied rehearing, Pet. App. 63a, and denied a stay of the mandate.

REASONS FOR GRANTING THE PETITION

I. This Court Should Decide Whether Rule 9(b) Must Be Enforced According to Its Terms.

The Court should grant certiorari to answer a question that has deeply divided the courts of appeal: whether a plaintiff pleading fraud is excused from Federal Rule of Civil Procedure 9(b)'s particularity requirement so long as the plaintiff asserts that only the defendant has the information needed to satisfy Rule 9(b).

Rule 9(b) requires a plaintiff alleging fraud to "state with particularity the circumstances constituting fraud." In this case, every court to examine this question has held that the Relator's allegations fail that standard.

First, the district court held that the Relator did not plead fraud with particularity and dismissed his claims against Intermountain. Pet. App. 30a. Next, on appeal, the Tenth Circuit did not conclude that the Relator's allegations satisfy the particularity requirement. Instead, the Tenth Circuit simply "excuse[d] deficiencies" in the Relator's complaint because the defendants exclusively possess important information. Pet. App. 30a–31a.

Had the Relator filed his complaint in the Eighth or Eleventh Circuits, the dismissal would have been affirmed. Unlike the D.C., Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits, the Eighth and Eleventh Circuits apply the plain text of Rule 9(b)—no exceptions. The other eight circuits ignore Rule 9(b)'s particularity requirement when the plaintiff asserts that the defendant has exclusive possession of the specific information the rule requires the plaintiff to plead. The circuits have been divided for years, and the divide is widely acknowledged.

This issue is exceedingly important given the increase in FCA suits in recent years. In 2018, on average, more than twelve FCA *qui tam* actions were filed per week, alleging tens of billions of dollars in damages. Due to the time- and cost-intensive discovery that most FCA actions require, defendants typically move to dismiss. But currently, a relator can use the FCA's generous venue provision to file in a circuit that ignores Rule 9(b)'s text, prolonging the time and cost for defendants to dispose of meritless suits and increasing the chances that the relator will exact a settlement from a cautious defendant.

Certiorari is particularly warranted because these eight circuits flout the plain text of Rule 9(b). To borrow from Justice Frankfurter: read the Rule, read the Rule, read the Rule! Henry J. Friendly, Benchmarks 202 (1967); *In re England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004) (Roberts, J.); *Sierra Club* v. *EPA*, 536 F.3d 673, 681 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). Eight circuits have bypassed the Rule's text. Rule 9(b)'s text resolves this

issue by providing that a plaintiff alleging fraud must plead the fraud's circumstances with particularity. Whatever the policy merits of such an exception, policy arguments are best addressed to the authorities with responsibility for the Rule's content, Congress and the Standing Committee on Rules of Practice and Procedure.

The exception that eight circuits created contravenes the structures and purposes of Rule 9(b) and the FCA. The rule already contains an express exception allowing plaintiffs to plead the scienter element of fraud generally, so there is no basis for reading an atextual exception into the Rule. Rule 9(b) aims to cut short suits based on deficient allegations. But eight circuits undermine that purpose by allowing plaintiffs to plead fraud generally and then proceed to discovery to try to substantiate their claims (or more pragmatically, to force a settlement). In FCA actions in particular, it is imperative that courts apply Rule 9(b) faithfully because, unlike almost any other suit, a relator has not been personally harmed. The FCA's *qui tam* provisions are meant to incentivize insiders to expose fraud they have observed, but a relator who cannot particularly describe a fraud is no such insider.

The Court should resolve this split of authority by applying Rule 9(b) as written.

A. The Tenth Circuit's Rule 9(b) Holding Deepens an Entrenched Circuit Split.

According to the Tenth Circuit, a plaintiff need not allege the who, what, when, where, or how of the alleged fraud, as long as he claims that some of that

information is possessed exclusively by the defendant. Pet. App. 30a–31a. While eight circuits allow a plaintiff generally alleging fraud to proceed to discovery if the defendant exclusively possesses information, two others require a plaintiff to plead the circumstances of fraud with particularity. This split is acknowledged, longstanding, and outcome-dispositive. This case is an ideal vehicle to resolve this deep split because the Tenth Circuit acknowledged the deficiencies in the allegations but "excuse[d]" them due to the "plaintiff's inability to obtain information in the defendant's exclusive control." Pet. App. 30a.

1. The Eighth and Eleventh Circuits properly hold plaintiffs to Rule 9(b)'s particularity requirement as written. The Eighth Circuit has acknowledged the split of authority, noting that other courts "relax[]" the requirement "where the information relevant to the fraud is 'peculiarly within the perpetrator's knowledge.' " *United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 559 (8th Cir. 2006) (quoting *United States ex rel. Karvelas* v. *Melrose–Wakefield Hosp.*, 360 F.3d 220, 229 (1st Cir. 2004)). The Eighth Circuit then rejected the relator's "request to relax Rule 9(b)'s pleading requirements by allowing him to plead his complaint generally at the outset and to 'fill in the blanks' following discovery." *Id.* The structure of the FCA reinforced its conclusion, as a relator must be an "original source" of the information forming the basis of the complaint, but the relator would not be an original source if key information were possessed exclusively by the defendant. *Id.*

Likewise, in *United States ex rel. Clausen* v. *Laboratory Corp. of America, Inc.*, the Eleventh Circuit rejected the atextual exception to Rule 9(b). 290 F.3d 1301, 1314 n.25 (11th Cir. 2002). The court noted that allowing discovery despite Rule 9(b) "enables [a relator] to learn the complaint's bare essentials through discovery and may needlessly harm a defendants' goodwill." *Id.* at 1313 n.24. Further, it may allow "baseless allegations" to be "used to extract settlements." *Id.* This concern is amplified with claims under the FCA, "which provides a windfall for the first person to file and permits recovery on behalf of the real victim, the Government." *Id.*

2. In conflict with the Eighth and Eleventh Circuits, eight circuits do not require a plaintiff to allege the circumstances of fraud with particularity. While these circuits formulate the exception somewhat differently, all permit plaintiffs to plead fraud generally if defendants exclusively possess the information required by Rule 9(b).

The Tenth Circuit decision below held that the court will "excuse deficiencies that result from the plaintiff's inability to obtain information within the defendant's exclusive control." Pet. App. 30a. The deficiencies acknowledged by the court were that the "who" and "when" were missing from the Relator's complaint. Pet. App. 30a–31a. The court noted that "Intermountain, no doubt, knows which employees handle federal billing for procedures reimbursable under Medicare, and in particular, who reviewed reimbursement claims for Dr. Sorensen during his decade there." *Id.* In an inversion of Rule 9(b)'s pleading requirements, the court assumed Inter-

mountain could identify the who and when of the partially alleged fraud.

The D.C. Circuit employs the same exception. *See United States ex rel. Williams* v. *Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1258 (D.C. Cir. 2004); *United States ex rel. Bender* v. *N. Am. Telecomms. Inc.*, 499 F. App'x 44, 45 (D.C. Cir. 2013). The D.C. Circuit explained that "frequently former employees of the parties they sue[] often have difficulty getting access to their former employers' documents." *Id.* Thus, the D.C. Circuit "provides an avenue for plaintiffs unable to meet the particularity standard because defendants control the relevant documents—plaintiffs in such straits may allege lack of access in the complaint." *Id.*

The Second Circuit also excuses plaintiffs from complying with the particularity requirement. *See United States ex rel. Chorches for Bankr. Estate of Fabula* v. *Am. Med. Response, Inc.*, 865 F.3d 71, 86 (2d Cir. 2017). In addition to the possession requirement, the Second Circuit requires that there be a "strong inference" that false claims were submitted to the government. *Id.* The Second Circuit explained that it was rejecting the plain text because "[u]nder that approach, by simply insulating its accounting department from personnel with operational knowledge, a corporate fraudster could ensure that few employee relators could successfully plead both the falsity of recorded information and the presentment of a claim containing those falsehoods." *Id.*

The Third Circuit excuses plaintiffs from Rule 9(b) "when factual information is peculiarly within

the defendant's knowledge or control." *Craftmatic Sec. Litig.* v. *Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989). In *Craftmatic*, the Third Circuit cautioned courts to be "sensitive" to applying Rule 9(b) "prior to discovery" because that " 'may permit sophisticated defrauders to successfully conceal the details of their fraud.' " *Id.* (quoting *Christidis* v. *First Pa. Mortg. Tr.*, 717 F.2d 96, 99 (3d Cir. 1983)). Further, the Third Circuit warned that "focusing exclusively on the particularity requirement [of Rule 9(b)] is 'too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.' " *Id.* (quoting *Christidis*, 717 F.2d at 100). While the Third Circuit has not yet applied the Rule 9(b) exception to FCA cases, it has noted that the exception applies in "cases of corporate fraud." *Id.*

Likewise, the Fifth Circuit has repeatedly held "that the pleading requirements of Rule 9(b) may be to some extent relaxed where . . . the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge." *United States ex rel. Willard* v. *Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 385 (5th Cir. 2003); *see also United States ex rel. Doe* v. *Dow Chem. Co.*, 343 F.3d 325, 330 (5th Cir. 2003) ("It is possible that the pleading requirements of Rule 9(b) may be relaxed in certain circumstances—when, for instance, the facts relating to the fraud are peculiarly within the perpetrator's knowledge." (internal quotation marks omitted)).

The Sixth Circuit has adopted the Fifth Circuit's position. *See United States ex rel. Bledsoe* v. *Cmty. Health Sys., Inc.*, 501 F.3d 493, 512 (6th Cir. 2007)

(citing *United States ex rel. Williams* v. *Bell Helicopter Textron Inc.*, 417 F.3d 450, 454 (5th Cir. 2005)).

The Seventh Circuit similarly excuses relators from Rule 9(b)'s particularity requirement. *See United States ex rel. Presser* v. *Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 778 (7th Cir. 2016). In *Presser*, the relator generally alleged that claims were billed to Medicare. *Id.* The relator, a nurse practitioner, worked in "a position that does not appear to include regular access to medical bills," and thus the court could "not see how she would have been able to plead more facts pertaining to the billing process." *Id.* The Seventh Circuit then held that "[t]he particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail [her] claim." *Id.* (quoting *Corley* v. *Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1051 (7th Cir. 1998)).

The Ninth Circuit, meanwhile, has vacillated between excusing relators from the particularity requirement and refusing to do so. For example, in *United States ex rel. Lee* v. *SmithKline Beecham, Inc.*, the circuit held that "Rule 9(b) may be relaxed to permit discovery in a limited class of corporate fraud cases where the evidence of fraud is within a defendant's exclusive possession." 245 F.3d 1048, 1052 (9th Cir. 2001). Nearly a decade later, the Ninth Circuit appeared to reverse course, rejecting a relator's argument for a relaxed pleading standard because the defendant exclusively possessed patient billing information. *Ebeid ex rel. United States* v. *Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010) ("To jettison the particularity requirement simply because it

would facilitate a claim by an outsider is hardly grounds for overriding the general rule, especially because the FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government."). The *Ebeid* court conceded, though, that "in the securities fraud context we have held that 'Rule 9(b) may be relaxed to permit discovery.' " *Id.* (quoting *Lee*, 245 F.3d at 1052).

Yet nearly a decade after *Ebeid*, a Ninth Circuit panel excused a relator from the particularity requirement because "the relevant information [was] within the defendant's exclusive possession and control." *United States ex rel. Vatan* v. *QTC Med. Servs., Inc.*, 721 F. App'x 662, 663–64 (9th Cir. 2018) ("The district court's requirement to the contrary would vitiate the False Claims Act, by excluding many whistle-blowers who—as here—allege insider knowledge of wrongdoing that few others would be positioned to reveal and solely lack access to the corporate documents outlining the precise nature of the company's obligations." (citing *Presser*, 836 F.3d at 778)). No other court has decided this question based on the type of fraud a plaintiff is pleading.

This Court should hear this case to decide whether Rule 9(b)'s text means what it says, as the Eighth and Eleventh Circuits hold, or instead should be ignored to facilitate fraud suits, as the D.C., Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits hold.

B. The Question Presented Is Important and Frequently Recurring.

The question presented is important because exempting plaintiffs from the particularity requirement saves deficient claims. Because "the current version of the FCA imposes [treble] damages that are essentially punitive in nature," *Vt. Agency*, 529 U.S. at 784, *qui tam* suits can cripple defendants—and thus, this judicial exception to Rule 9(b) can force them to settle weak claims that would otherwise be dismissed at the pleadings stage. Indeed, the gatekeeping role of Rule 9(b) is important because the costs of defending *qui tam* actions are multiples higher than recoveries. *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 540, 625 (2000) (describing study of 38 non-intervened *qui tam* suits that cost more than $53 million dollars to defend but yielded only about $3.7 million in recoveries). Further, considering that around three quarters of *qui tam* actions are meritless, *id.* at 623, and that relators have brought more than 600 *qui tam* actions every year since 2011, Civil Division, U.S. Dep't of Justice, *Fraud Statistics Overview: October 1, 1986–September 30, 2018*, https://perma.cc/35CZ-X9VL ("*Fraud Statistics*"), defendants likely spend several hundred million dollars every year defending meritless suits.

Heavily regulated industries such as healthcare are forced to bear the brunt of overzealous litigation. *See* U.S. Dep't of Justice, *Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018* (Dec. 21, 2018), https://perma.cc/

LB3Z-93CA ("*Justice Department Recovers*"), (noting 89% of fraud settlements and judgments stem from healthcare industry). Hospital systems, which have an average operating margin of only 2.5%, can be pushed to brink of closure from a *qui tam* suit, regardless of the suit's merits. Navigant, *Stiffening Headwinds Challenge Health Systems to Grow Smarter*, at 2 (Sept. 2018), https://perma.cc/EC88-PR9Y. Due to the risk of catastrophic liability and high discovery costs, FCA cases that advance beyond dismissal on the pleadings often result in settlements. The motion to dismiss is often the defendant's last line of defense against substantial litigation or settlement costs.

Raising the threshold for dismissal further incentivizes meritless "strike suits[] and protracted discovery, with little chance of reasonable resolution by pretrial process." *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1105 (1991). The government only intervenes in around 20% of the several hundred new *qui tam* cases that relators file every year. U.S. Dep't of Justice, *Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement* (June 7, 2012), https://perma.cc/R44P-V4QK ("Qui Tam *Enforcement*"). Yet in 2018, *intervened* suits accounted for over 94% of *qui tam* recoveries, *Fraud Statistics*, *supra*, further suggesting that many *qui tam* actions are meritless.

The FCA's broad venue provision compounds the problem by allowing relators to file in more permissive circuits. *See* 31 U.S.C. § 3732(a) (relators may

sue "in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred").

The Court should hear this issue in this case because the ability to present it for this Court's review dwindles with each court of appeals decision that excuses relators from complying with Rule 9(b). That is because a district court applying the exception would deny the defendant's motion to dismiss, resulting in a non-appealable interlocutory order (and triggering the very consequences 9(b) is designed to prevent). Thus, seven circuits are already effectively insulated from Supreme Court review of this issue. The Court should not make it eight.

C. The Decision Below Is Wrong.

No court has held that the Relator's allegations satisfy Rule 9(b)'s particularity requirement. Instead, the district court correctly held that his allegations against Intermountain fail to meet that standard, and the Tenth Circuit simply excused him from pleading fraud with particularity. Pet. App. 16a–17a, 30a–31a. Directly contrary to the text of Rule 9(b), the Relator can proceed to discovery on general allegations of fraud. Allowing plaintiffs to plead fraud without particularity violates the text, structure, and purpose of Rule 9(b).

1. Rule 9(b) provides that plaintiffs alleging fraud "must state with particularity the circumstances constituting fraud." Rule 9(b) contains an exception: "Malice, intent, knowledge, and other

conditions of a person's mind may be alleged generally." As the Tenth Circuit acknowledged, the Relator did not allege the circumstances of the fraud with particularity. Pet. App. 30a–31a. That should be the end of this suit.

As discussed above, eight circuits "recognized [an] exception to this rule," *DiVittorio* v. *Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987), excusing particular pleading when a defendant exclusively possesses information. These circuits created this exception simply to facilitate favored fraud claims. For example, in *Presser*, the Seventh Circuit held that a nurse practitioner did not have to plead fraud with particularity because she lacked access to the necessary billing information in her role. 836 F.3d at 778. Similarly, in *Craftmatic*, the Third Circuit downplayed the particularity requirement and emphasized the "flexibility" of the Federal Rules, lest "sophisticated defrauders" escape justice. 890 F.2d at 645. The Tenth Circuit likewise concluded that "Intermountain, no doubt, knows" the information needed to flesh out the Relator's deficient allegations. Pet. App. 30a.

But the courts have no authority to rewrite the Civil Rules. In a similar context, this Court has warned lower courts against "judicial inventiveness," reminding us that courts cannot "amend a rule [of Federal Civil Procedure] outside the process Congress ordered." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997). But lower courts have thrown that caution to the wind. Indeed, even this Court cannot freely create exceptions to the plain requirements of the Civil Rules. "Only by following the

highly reticulated procedures laid out in the Rules Enabling Act can anyone modify the Civil Rules, whether in the direction of relaxing them or tightening them." *United States ex rel. Hirt* v. *Walgreen Co.*, 846 F.3d 879, 881 (6th Cir. 2017) (Sutton, J.).

A court need go no further than the text of Rule 9(b) to decide this issue. *See Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981))). Rule 9(b) even includes an exception that allows plaintiffs to plead the scienter element generally. The existence of that exception confirms that no further exemptions exist. *See Hillman* v. *Maretta*, 569 U.S. 483, 496 (2013) ("[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied . . . ." (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980))).

Nor can courts claim to be furthering the purpose of Rule 9(b). As Judge Sutton observed, "[t]he point of Civil Rule 9(b) is to prevent, not facilitate, casual allegations of fraud." *Hirt*, 846 F.3d at 882. Rewarding plaintiffs that offer deficient allegations undermines Rule 9(b) because the Rule "prevents the filing of a complaint as a pretext for the discovery of unknown wrongs and protects potential defendants . . . from the harm that comes from being charged with the commission of fraudulent acts." *Semegen* v. *Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). "Rule 9(b) has long played that screening function, standing as a gatekeeper to discovery, a

tool to weed out meritless fraud claims sooner than later." *Grubbs*, 565 F.3d at 185.

2. The structure and purpose of the FCA reinforce adherence to Rule 9(b).

As the Eighth Circuit explained in *Joshi*, the FCA's structure resists the court-created exception. 441 F.3d at 559. Far from surplusage, the public disclosure bar was added to the FCA seven decades ago in order to save it. In 1942, Attorney General Biddle asked Congress to repeal the FCA's *qui tam* provisions. S. Rept. No. 77-1708 at 2 (1942). Congress nearly repealed them but stopped short and instead added a requirement that *qui tam* suits could not be predicated on public information. 31 U.S.C. § 232(E) (1946). The public disclosure bar remains today to ensure the relator is the original source of the information. 31 U.S.C. § 3130(e)(4).

The eight circuits' exception to Rule 9(b) undermines the FCA. Just as parasitic pre-1943 relators lacked personal knowledge of fraud (until government information became public), relators lacking personal knowledge may nevertheless proceed with their suits. The public disclosure bar was enacted to ensure relators are the "original source" of the information in a complaint. 31 U.S.C. § 3130(e)(4). But the exception allows relators to learn of fraud from discovery rather than personal knowledge.

The FCA's purpose also counsels against allowing relators who plead inadequate information to survive dismissal. The FCA's *qui tam* provisions were included to "hold out to a confederate a strong temptation to betray his coconspirator, and bring

him to justice." Cong. Globe, 37th Cong., 3d Sess. 955 (1863). Indeed, the FCA "is intended to encourage individuals who are either close observers or involved in the fraudulent activity to come forward, and is not intended to create windfalls for people with secondhand knowledge of the wrongdoing." *Joshi*, 441 F.3d at 561 (quoting *United States ex rel. Kinney* v. *Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003)); *see also Ebeid*, 616 F.3d at 999 (noting the prototypical FCA relator is an insider who possesses important, non-public information). If a relator cannot allege fraud with particularity, the relator is not the type of "coconspirator" or "insider" the *qui tam* provisions enables. If a relator "lacks the information to" allege the who, what, when, where, and how of a fraud, "he was not the right plaintiff to bring this *qui tam* claim." *Hirt*, 846 F.3d at 882. Courts should be especially unsympathetic to bend the rules to save a relator's suit because a relator has "suffered no injury in fact." *Joshi*, 441 F.3d at 559. The only basis a relator has for his *qui tam* action is his "original" knowledge of fraud. If he has no such knowledge, he has no suit.

And even if Rule 9(b) might conceivably be a barrier to a meritorious suit lacking certain key details, Congress has provided a procedural remedy: the government—before deciding whether to intervene—can investigate the case using Civil Investigative Demands. *See* 31 U.S.C. § 3733. If necessary and the case warrants it, the government can file a complaint-in-intervention "to clarify or add detail to the claims" missing from the relator's complaint. *See id.* § 3731(c).

Therefore, this exception flouts the text, structure, and purpose of not only Rule 9(b) but also the FCA.

II. This Court Should Decide the Appointments Clause Question that *Vermont Agency* Expressly Reserved.

The Appointments Clause authorizes the President to appoint "Officers of the United States" (principal officers) and authorizes the President, the heads of agencies, and courts to appoint "inferior Officers." U.S. Const. art. II, § 2, cl. 2. It "prescribes the exclusive means of appointing 'Officers.' " *Lucia* v. *SEC*, 138 S. Ct. 2044, 2051 (2018).

In the court of appeals, Intermountain asserted an Appointments Clause challenge to the FCA's *qui tam* provisions but acknowledged that circuit precedent foreclosed the claim. *See* Intermountain C.A. Br. 63–64 (citing *United States ex rel. Stone* v. *Rockwell Int'l Corp.*, 282 F.3d 787, 805 (10th Cir. 2002)).[5] The court of appeals declined to entertain this argument because it was not raised in the district court. Pet. App. 17 n.7.[6]

---

[5] Intermountain also asserted a separation-of-powers challenge under Article II's Executive Vesting Clause, U.S. Const. art. II, § 1, cl. 1, and Take Care Clause, U.S. Const. art. II, § 3, and unlike its Appointments Clause challenge, that claim was not directly foreclosed by circuit precedent. Intermountain does not raise that claim here.

[6] As appellee below, Intermountain was entitled to defend the district court's judgment on "any basis supported by the record." *Richison* v. *Ernst Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (Gorsuch, J.). Moreover, because

As explained below, this Court should decide Intermountain's Appointments Clause challenge to the FCA, which presents an issue this Court expressly reserved in *Vermont Agency*. *See* 529 U.S. at 778 n.8. In *Vermont Agency*, the Court held that FCA relators have Article III standing. 529 U.S. at 778. Without prompting (no party had raised the question), Justice Scalia, writing for the six-justice majority, appended the following express reservation: "In so concluding, we express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3. Petitioners do not challenge the *qui tam* mechanism under either of those provisions, nor is the validity of *qui tam* suits under those provisions a

---

Stone foreclosed Intermountain's Appointments Clause argument, the panel's consideration of it would have been a mere formality. In any event, Intermountain's assertion of the argument preserved it for this Court's review. *See Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) ("Any issue 'pressed or passed upon below' by a federal court . . . is subject to this Court's broad discretion over the questions it chooses to take on certiorari." (quoting *United States* v. *Williams,* 504 U.S. 36, 41 (1992))). And although this Court "[o]rdinarily [does] not decide in the first instance issues not decided below," *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012), had the Tenth Circuit below "decided" the Appointments Clause issue, it merely would have applied *Stone* as binding circuit precedent. Thus, in this case, the Court is not "without the benefit of [a] thorough lower court opinion[ ] to guide [its] analysis of the merits." *Id.*

jurisdictional issue that we must resolve here." *Id.* n.8.

Indeed, the answer to the unresolved question in *Vermont Agency* is that the FCA's *qui tam* provisions violate the Appointments Clause because (1) relators are officers; or, alternatively, (2) the FCA impermissibly vests a core function of officers—civil law enforcement—in nonofficer relators.

A. This Question Is of Immense Importance.

1. The Appointments Clause is "among the significant structural safeguards of the constitutional scheme," *Edmond* v. *United States*, 520 U.S. 651, 659 (1997), and "preserve[s] [the] political accountability" of the President, *id.* at 663. Far from reflecting concern for "mere etiquette or protocol," *Buckley* v. *Valeo*, 424 U.S. 1, 125 (1976), the Clause "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power," *Ryder* v. *United States*, 515 U.S. 177, 182 (1995) (quoting *Freytag* v. *CIR*, 501 U.S. 868, 878 (1991)); *see also Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) ("[E]ach branch [has] the necessary constitutional means, and personal motives, to resist encroachments of the others. A key constitutional means vested in the President—perhaps *the* key means—was the power of appointing, overseeing, and controlling those who execute the laws." (internal quotation marks and citations omitted)). In short, the Appointments Clause allows the President to fulfill his

obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

Given that "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic," *Freytag*, 501 U.S. at 878, this Court regularly reviews Appointments Clause questions notwithstanding the absence of any conflict in the lower courts, *see, e.g.*, *Ortiz* v. *United States*, 138 S. Ct. 2165 (2018); *Free Enter. Fund*, 561 U.S. 477; *Edmond*, 520 U.S. 651; *Ryder*, 515 U.S. 177; *Weiss* v. *United States*, 510 U.S. 163 (1994); *Freytag*, 501 U.S. 868; *Buckley*, 424 U.S. 1.

2. In the context of the contemporary FCA, the importance of the structural question raised by Intermountain cannot be overstated. Private individuals initiate billion-dollar lawsuits in the federal government's name, and in most cases, the government declines to intervene. The result is that relators, not the government, principally prosecute the FCA, a statute that is "essentially punitive in nature," *Vt. Agency*, 529 U.S. at 784, and that regulates trillions of dollars of federally funded activities in myriad sectors of the economy.

But the FCA's critical significance is a phenomenon of only the last three decades. Congress enacted the original version of the FCA during the Civil War after "crooked contractors defrauded the Union Army by selling it sick mules, lame horses, sawdust instead of gunpowder, and rotted ships with fresh paint." *Justice Department Recovers*, *supra*. After some contractors were plagued by a relative handful

(compared to today's cottage industry) of parasitic *qui tam* suits during World War II, Congress defanged the statute in 1943. Charles Doyle, Cong. Research Serv., R40785, *Qui Tam: The False Claims Act and Related Federal Statutes* 6–7 (2009).

Even with a small uptick during World War II, the FCA's *qui tam* provisions largely sat idle. Indeed, from 1877 to 1985, Westlaw identifies only 43 FCA *qui tam* actions in the federal court system—a filing rate of just under one suit every three years.

Then came the 1986 amendments that opened the floodgates. The 1986 amendments ratcheted penalties up from a maximum of $2,000 per claim to a minimum of $5,000 per claim, allowed treble damages, increased the maximum relator's share from 25% to 30%, eliminated the need to prove a specific intent to defraud, allowed fee shifting for successful relators, and created a cause of action for retaliation against relators. *Id.* at 7–8. Not surprisingly, FCA *qui tam* suits reappeared in force. Further amendments in 2009 emboldened relators by increasing the scope of liability, in part by eliminating the need for claims to be submitted directly to a federal employee. *Id.* at 8.

The 1986 and 2009 amendments gave the FCA *qui tam* provisions more bite than any *qui tam* statute in American history. Beckoned by enormous paydays and statutory attorneys' fees, relators have brought more than 600 *qui tam* suits in the federal courts every year since 2011. On average, the government has intervened in only 20% of them. Qui

Tam *Enforcement*, *supra*. Never before has Congress ceded so much executive authority to private parties.

The current FCA is thus different in kind from its Civil War antecedent and *qui tam* and informer statutes enacted by early Congresses. There is no precedent for a *qui tam* statute that can result in a $100 million dollar relator award and privatizes regulation of trillions of dollars in economic activity.

* * *

This Court has repeatedly reviewed Appointments Clause questions because they are important to our constitutional structure. Here, the issue also implicates trillions of dollars of economic activity and over one thousand pending cases in the federal court system.

This Court should answer the Appointments Clause question it reserved in *Vermont Agency*.

B. The Tenth Circuit's Decision in *Stone* Is Wrong.

Contrary to *Stone*—the Tenth Circuit precedent that foreclosed Intermountain's Appointments Clause argument—the FCA violates the Appointments Clause because either relators are officers or, alternatively, if they are not, the FCA vests core Executive functions in nonofficers.

1. To qualify as an officer (either principal or inferior) for Appointments Clause purposes, a person (1) "must occupy a 'continuing' position established by law," *Lucia*, 138 S. Ct. at 2051 (quoting *United States* v. *Germaine*, 99 U.S. 508, 511 (1879)), and (2) "exercis[e] significant authority pursuant to the laws of the United States," *id.* (alteration in original)

(quoting *Buckley*, 424 U.S. at 126). Relator satisfies both prongs.

a. In *Stone*, the Tenth Circuit held that FCA relators are not officers because they hold no office, draw no salary, and otherwise lack "tenure, duration, emolument, and duties" that are "continuing and permanent, not occasional or temporary." *Stone*, 282 F.3d at 805 (quoting *Germaine*, 99 U.S. at 511–12).[7] Thus, *Stone* concluded that relators do not satisfy *Lucia*'s requirement that an officer hold "a continuing position established by law."

Stone, however, contradicts *Morrison* v. *Olson*, where this Court held that a "temporary" independent counsel is nonetheless a continuing position established by law under *Germaine*. 487 U.S. 654, 672 (1988). *Morrison* reasoned that even though the statute in question authorized an independent counsel "to perform only certain, limited duties" confined to particular matters and was "limited in tenure . . . in the sense that an independent counsel is appointed essentially to accomplish a single task," that sufficed "to establish" that an independent counsel "is an 'inferior' officer in the constitutional sense." *Id.* (citing *Germaine*, 99 U.S. at 511).

---

[7] At least three other circuits have employed similar reasoning to reach the same conclusion. *See Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757 (5th Cir. 2001) (en banc); *United States ex rel. Taxpayers Against Fraud* v. *Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 758 n.21 (9th Cir. 1993).

For Appointments Clause purposes, FCA relators are indistinguishable from the independent counsel considered in *Morrison*. Like the independent counsel, relators have prosecutorial duties. *See* 31 U.S.C. § 3730(b)(1) (allowing relators to prosecute FCA "violation[s] . . . in the name of the Government"); Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 207, 222 (1989) (William P. Barr) ("Private relators are empowered to level fraud charges against other private citizens and hail them into court to answer for these alleged public offenses, with the possibility of collecting not only damages but substantial civil penalties."). Like the independent counsel, *see* 28 U.S.C. § 594(b)(1) (providing for no annual salary but instead "compensation at the per diem rate" equal to a specified pay scale), relators receive compensation from the government, albeit through sharing in recovery rather than by salary. *See* 31 U.S.C. § 3730(d) (providing for payment to the relator out of any recovery).[8] Like the independent counsel, who could

[8] Insofar as compensation is required to qualify as an officer, it need not be in the form of a salary. Many federal officers in the eighteenth and nineteenth centuries, were paid by " 'bounties' and 'facilitative payments'—fees for services—than from 'fixed salaries.' " Jennifer L. Mascott, *Who Are Officers of the United States?*, 70 Stan. L. Rev. 443, 534 n.554 (2018) (quoting Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780–1940, at 1–48 (2013)). As a result, "one did not necessarily need to be continuously employed or remunerated to qualify as an officer." *Id.* at 534.

maintain a private law practice while prosecuting the government's claim, *see* 28 U.S.C. § 594(j) (imposing limited restrictions on the practice of law by the independent counsel and any law firm associated with the independent counsel),[9] relators may pursue other professional and business activities while enforcing the FCA. Like the independent counsel, a relator is "limited in tenure" and " 'temporary' in the sense that [the appointment] is essentially to accomplish a single task." *Morrison*, 487 U.S. at 672.[10] Like the independent counsel, a relator "has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed . . . to undertake." *Id.* "These factors relating to the 'ideas of tenure, duration . . . and duties' " of a relator "are sufficient to establish" that a relator, like an independent counsel, has the attributes of "an 'inferior' officer in the constitutional sense." *Id.*

---

[9] For example, independent counsel Kenneth Starr maintained his private law practice for most of his tenure as independent counsel. *See* Michael Winerip, *Ken Starr Would Not be Denied*, N.Y. Times Magazine (Sept. 6, 1998).

[10] Justice Scalia's observation that the independent counsel was hardly temporary in any meaningful sense, *Morrison*, 487 U.S. at 718 (Scalia, J., dissenting) ("This particular independent counsel has already served more than two years, which is at least as long as many Cabinet officials"), applies with equal force in this case. The Relator brought this action in 2012 and thus has occupied this position for more than six years.

Relators also closely resemble United States Commissioners, inferior officers that *Morrison* compared to the independent counsel, 487 U.S. at 673. Like relators, commissioners had civil law-enforcement duties, *see Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 353 n.2 (1931) (describing commissioner powers and duties). Like relators, commissioners served part-time. Charles A. Lindquist, *The United States Commissioner: An Evaluation of the Commissioner's Role in the Judicial Process*, 39 Temple L. Q. 138, 140 (1966) ("Most Commissioners are part-time judicial officials; only . . . 3 percent of the total number[] declare no other occupation."); *see also* Fed. Judicial Ctr., *Court Officers and Staff: Commissioners*, https://perma.cc/9BGD-L9H9 (commissioners were often "lawyers who carried out their judicial responsibilities while pursuing their own practice"). Like relators, commissioners were not salaried, but instead were paid on a per-violation fee basis and similarly "prone to issue complaints . . . at the slightest real, imagined, or contrived violations of federal law." Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 J. Legal History 1, 9 (1970). And just as relators actively prosecuting the FCA today in the federal courts number in the low thousands, United States Commissioners enforcing federal law at times similarly numbered in the low thousands. *See id*. at 9 ("in 1878 approximately 2000 individuals were serving" as commissioners).

In short, under *Morrison*, a relator occupies a "continuing position" for the reasons that the former

independent counsels and United States Commissioners did.

b. Relators satisfy *Lucia*'s second prong, as they exercise significant authority under the laws of the United States, particularly where (as here) the government declines to intervene to prosecute the alleged FCA violation. In *Buckley*, the Court held that "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" is a "function[]" of officers. 424 U.S. at 140. As discussed above, FCA relators exercise such authority over trillions of dollars in federal spending.[11]

* * *

The Tenth Circuit's officer analysis contradicts *Morrison*. Under *Morrison*, relators hold "continuing positions established by law." Moreover, relators exercise significant authority under federal law. Because relators are officers under *Lucia*'s two-prong test, the FCA authorizes officer appointments contrary to the Appointments Clause.

---

[11] For instance, the Relator here alleges false claims in connection with Medicare, Medicare, and TRICARE reimbursement. In 2018, combined federal spending for just these three programs exceeded one trillion dollars. *See* Ctrs. for Medicare & Medicaid Servs., *NHE Fact Sheet* (Dec. 6, 2018), https://perma.cc/Q8UZ-6CKH (Medicare spending was $705.9 billion in 2017; Medicaid spending was $581.9 billion in 2017); Cong. Budget Office, *Options for Reducing the Deficit: 2019 to 2028* (Dec. 13, 2018), https://perma.cc/6W3Z-T6QA (TRICARE spending in 2017 was "about $50 billion").

2. Alternatively, even if relators are not officers, the FCA violates the Appointments Clause by vesting a core officer function in relators.

As Judge Smith observed in dissent in *Riley* v. *St. Luke's Episcopal Hospital*, the conclusion that relators are not officers leads to the question "whether nonofficers may prosecute claims owned by the United States." 252 F.3d 749, 767 (5th Cir. 2001) (en banc) (Smith, J., dissenting). As Judge Smith further observed, *id.* at 768, *Buckley* answered that question: "[T]he administration and enforcement of public law . . . may . . . be exercised only by persons who are 'Officers of the United States.' " *Buckley*, 424 U.S. at 141.

Judge Smith also explained why the holdings of *Riley*, *Taxpayers Against Fraud*, and *Kelly* (and later, *Stone*)—that the FCA does not violate the Appointments Clause because relators are not officers—"proves too much." *Riley*, 252 F.3d at 768. "Under this reasoning, all that Congress or the President must do to circumvent the strictures of the Appointments Clause is to delegate authority to someone who has not officially been appointed to any office." *Id.*

Despite post-dating Judge Smith's dissent, *Stone* offers no rebuttal. Under *Stone* and the *Riley* majority, Congress can freely circumvent the Appointments Clause simply by vesting core executive powers in nonofficers.

This Court, however, has recognized that "constitutional rights would be of little value if they could be . . . indirectly denied." *U.S. Term Limits, Inc.* v.

Thornton, 514 U.S. 779, 829 (1995) (quoting *Harman* v. *Forssenius*, 380 U.S. 528, 540 (1965)). The "structural principles secured by the separation of powers protect the individual as well," *Bond* v. *United States,* 131 S. Ct. 2355, 2365 (2011), and Congress may not do indirectly what the Constitution prohibits directly. Whatever other officer functions Congress might delegate to nonofficers in other contexts, the Appointments Clause is stretched beyond its limits by Congress's delegation of core sovereign function of civil law enforcement to nonofficers.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Matthew L. Knowles
Shamis Beckley
A.J. Kritikos
MCDERMOTT WILL & EMERY LLP
28 State Street
Boston, MA 02109
(617) 535-3885

M. Miller Baker
Counsel of Record
Sarah P. Hogarth
Eric Hageman
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com

Daniel S. Reinberg
Asher D. Funk
POLSINELLI PC
151 North Riverside Plaza
Suite 300
Chicago, IL 60606
(312) 873-3636

Attorneys for Petitioners

January 14, 2019