NO. _____

In the
Supreme Court of the United States

MOLINA HEALTHCARE OF ILLINOIS, INC.
and MOLINA HEALTHCARE, INC.,
Petitioners,

v.

THOMAS PROSE,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the same question as *Johnson v. Bethany Hospice & Palliative Care LLC*, No. 21-462, and *United States ex rel. Owsley v. Fazzi Assocs., Inc.*, No. 21-936, regarding Federal Rule of Civil Procedure 9(b)'s application to False Claims Act cases. Circuit courts are divided over whether FCA plaintiffs must plead the element of a false claim with particularity, or whether the existence of a false claim can simply be inferred, as the Seventh Circuit held.

This petition also raises a second conflict. *Universal Health Services, Inc. v. United States ex rel. Escobar* held that a claim can be "false or fraudulent" if (1) the claim makes representations about the goods or services provided; and (2) the defendant's failure to disclose material statutory, regulatory, or contractual noncompliance makes those representations misleading half-truths. 579 U.S. 176, 187, 190 (2016). Circuit courts disagree over whether a claim that makes no representations about the goods or services at issue can be deemed "false or fraudulent" via an "implied" certification of compliance with underlying conditions, with the Seventh Circuit concluding that it can.

The questions presented are:

1. Whether Rule 9(b) requires plaintiffs in False Claims Act cases to plead details of the alleged false claims.

2. Whether a request for payment that makes no specific representations about the goods or services provided can be actionable under an implied false certification theory.

CORPORATE DISCLOSURE STATEMENT

Petitioner Molina Healthcare of Illinois, Inc.'s parent company is petitioner Molina Healthcare, Inc., which has no parent company.

No publicly held company owns 10% or more of the stock of Molina Healthcare of Illinois, Inc. or Molina Healthcare, Inc.

RELATED PROCEEDINGS

United States ex rel. Prose v. Molina Healthcare of Ill., Inc., 17 F.4th 732 (7th Cir. 2021)

United States ex rel. Prose v. Molina Healthcare of Ill., Inc., 2021 WL 5296454 (7th Cir. Nov. 15, 2021)

United States ex rel. Prose v. Molina Healthcare of Ill., Inc., 10 F.4th 765 (7th Cir. 2021)

United States ex rel. Prose v. Molina Healthcare of Ill., Inc., 2020 WL 3050342 (N.D. Ill. June 8, 2020)

United States ex rel. Prose v. Molina Healthcare of Ill., Inc., 2019 WL 3555336 (N.D. Ill. July 31, 2019)

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False Claims Act defendants, plaintiffs, and the lower courts alike need to know how Rule 9(b) applies in FCA cases. In addition to this petition, two other pending petitions present the same question, including one in which the Court has called for the views of the Solicitor General. *See* Cert. Pet., *Johnson v. Bethany Hospice & Palliative Care LLC*, No. 21-462 (U.S. Sept. 23, 2021) (*Bethany Hospice* Pet.); Cert. Pet., *United States ex rel. Owsley v. Fazzi Assocs., Inc.*, No. 21-936 (U.S. Dec. 21, 2021) (*Owsley* Pet.). All three petitions urge the Court to clarify an important issue over which circuit courts are deeply divided: Whether Rule 9(b) requires an FCA plaintiff to plead the statute's false claim element with particularity. Under this mature and widely acknowledged split, the viability of a frequently invoked federal cause of action depends largely on the circuit in which it is brought.

The Seventh Circuit's divided decision in this case joins those circuits that have improperly loosened Rule 9(b)'s requirements. The petitioners in *Bethany Hospice* and *Owsley*—who are represented by counsel for respondent here—tout this decision as one of the "strongest cases embodying" the relaxed approach to Rule 9(b), Reply 4, *Bethany Hospice*, No. 21-462 (U.S. Dec. 28, 2021) (*Bethany Hospice* Reply), and marking an "especially acute" conflict with the Eleventh and Sixth Circuits, *Bethany Hospice* Pet. 24; *Owsley* Pet. 20. Here, as Chief Judge Sykes observed in dissent, the panel majority "accept[ed] [respondent's] invitation to deviate from Rule 9(b)" by not requiring the relator to "describ[e] the 'who, what, when, where, and how' of the fraud." App.28-29. The panel majority

thus gave respondent a free pass to circumvent Rule 9(b), holding that he pleaded a valid FCA claim despite never identifying any specific false claim (or misleading statement) by petitioners Molina Healthcare of Illinois, Inc., and Molina Healthcare, Inc. (collectively, Molina).

The consequences of that lax approach are costly. The FCA's "bounty" system, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000), already creates a powerful incentive for plaintiffs (and plaintiffs' lawyers) to file *qui tam* suits. Rule 9(b)'s gatekeeping function serves as a critical check against abuse, but only if faithfully applied. That three petitions (by both relators and defendants) present the same question regarding Rule 9(b) underscores the need for this Court to resolve the split now.

In addition, this petition presents a second cert-worthy issue over which circuits have also split: Whether under *Universal Health Servs., Inc. v. United States ex rel. Escobar*, a claim can be deemed "false or fraudulent," 31 U.S.C. § 3729(a), based on a pure implied certification theory—*i.e.*, even if the claim "merely request[s] payment" and makes no "specific representations" about the goods or services provided and therefore contains no "half-truths." 579 U.S. 176, 190 (2016). The Seventh Circuit's conclusion that a request for payment is by itself sufficient reads the false claim element out of the FCA, deepens an existing split in the lower courts, and runs afoul of this Court's admonition that the FCA is not "an all-purpose antifraud statute," let alone "a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Id.* at 194 (cleaned up). Treating a claim

as implicitly certifying compliance with an underlying condition it does not mention expands the FCA beyond its proper bounds to encompass virtually any statutory, regulatory, or contractual violation.

The Court should grant this petition because it provides an excellent vehicle to resolve two important issues over which the circuits are irremediably split. At a minimum, the Court should grant at least one of the petitions presenting the Rule 9(b) issue. If the Court believes that *Bethany Hospice* or *Owsley* is a preferable vehicle on the Rule 9(b) issue and opts not to grant this petition on the implied certification issue, the Court should hold this petition pending its decision on the Rule 9(b) issue.

OPINIONS BELOW

The Seventh Circuit's initial opinion (App.40-79) is reported at 10 F.4th 765. The order amending that opinion and denying Molina's petition for rehearing (App.109-11) is unpublished but available at 2021 WL 5296454. The amended published opinion (App.1-39) is reported at 17 F.4th 732.

The opinions of the U.S. District Court for the Northern District of Illinois (App.80-99, 100-08) are unpublished but available at 2020 WL 3050342 and 2019 WL 3555336.

JURISDICTION

The Seventh Circuit denied rehearing and issued its amended opinion on November 15, 2021. This Court has jurisdiction under 28 U.S.C. § 1254.

RULE AND STATUTORY PROVISION INVOLVED

Federal Rule of Civil Procedure 9(b) and 31 U.S.C. § 3729 are reproduced at App.112-17.

STATEMENT

A. Legal background

1. The FCA imposes liability for knowingly presenting to the government "a false or fraudulent claim for payment." 31 U.S.C. § 3729(a). While the government can bring FCA claims directly, private individuals, acting as "relators," can also prosecute *qui tam* actions on the government's behalf. 31 U.S.C. § 3730. Relators can obtain treble damages, per-claim penalties, and attorney's fees and expenses, *id.* §§ 3729(a), 3730(d)(1)–(2), and are entitled to a share of any recovery, *id.* § 3730(d). That liability is, as this Court has observed, "punitive." *Stevens*, 529 U.S. at 784.

2. As one would expect given the draconian nature of the FCA's remedies and its unusual provision for private enforcement, the conduct it prohibits and penalizes is narrow and specific. In particular, the Court has repeatedly emphasized that the FCA is not "a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Escobar*, 579 U.S. at 194. Private parties and the government have all manner of judicial and administrative remedies to address contractual and regulatory issues; the FCA, in contrast, addresses fraud. And even with respect to fraud, the FCA is not "an all-purpose antifraud statute," but rather one concerned with a specific type of fraud—namely, "false or fraudulent

claim[s] for payment." But federal courts are fundamentally divided on how to apply the FCA's limitation to *claims* that are *false*.

a. One key practical check on relator-driven FCA litigation arises from Federal Rule of Civil Procedure 9(b), which requires plaintiffs alleging any fraud-based claim to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). The rule is intended to "deter[] the filing of suits solely for discovery purposes" and "guard[] against the institution of a fraud-based action in order to discover whether unknown wrongs actually have occurred." 5A Wright & Miller, Federal Practice and Procedure § 1296 (4th ed.).

The circuits are deeply divided on whether Rule 9(b)'s particularity requirement applies to the FCA's false claim element. Six circuits—the First, Second, Fourth, Sixth, Eighth, and Eleventh—require particularity for the false claim element. *United States ex rel. Owsley v. Fazzi Assocs., Inc.*, 16 F.4th 192, 196 (6th Cir. 2021); *United States ex rel. Benaissa v. Trinity Health*, 963 F.3d 733, 739 (8th Cir. 2020); *United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 86 (2d Cir. 2017); *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 456 (4th Cir. 2013); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 232-33 (1st Cir. 2004); and *United States ex rel. Clausen v. Lab'y Corp. of Am., Inc.*, 290 F.3d 1301, 1311-12 (11th Cir. 2002). Six others—the Third, Fifth, Seventh, Ninth, Tenth, and D.C.—relax Rule 9(b) by allowing the submission of a false claim to be inferred. *United States ex rel. Colquitt v. Abbott Labs.*, 858 F.3d 365,

372 (5th Cir. 2017); *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 777 (7th Cir. 2016); *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 126-27 (D.C. Cir. 2015); *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155-56 (3d Cir. 2014); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010); and *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010).

This Court is currently considering two petitions for certiorari presenting the same Rule 9(b) question based on the same split. *Bethany Hospice* Pet.; *Owsley* Pet. Both were filed by counsel for respondent here. The Court called for a response in both cases and for the Solicitor General's views in *Bethany Hospice*. Order, No. 21-462 (U.S. Jan. 18, 2022).

b. A second critical limit in the FCA is the Act's falsity element—its requirement that a defendant's "claim for payment" be "false or fraudulent." 31 U.S.C. § 3729(a). Claims for payment can be "false or fraudulent" under the "well-settled meaning" of those terms if they "contain[] express falsehoods." *Escobar*, 579 U.S. at 187-88. In *Escobar*, the Court held that claims can also be "false or fraudulent" if they make "misrepresentations by omission[s]." *Id.* Relying on the common law of fraud, *Escobar* held that omissions can render a claim false or fraudulent "at least where two conditions are satisfied: first, the claim does not merely request payment, but also *makes specific representations* about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or

contractual requirements makes *those representations* misleading half-truths." *Id.* at 190 (emphasis added).

Escobar, however, left open "whether *all* claims for payment implicitly represent that the billing party is legally entitled to payment." *Id.* at 188 (emphasis added). On this theory, a claim can be deemed "false or fraudulent" even when it is truthful within its four corners and "merely request[s] payment" *without* making any "specific representations" that could be "misleading half-truths," *id.* at 188-90, if the party submitting the claim has not complied with all underlying regulatory and contractual conditions. Federal courts have split over whether to recognize this theory. The Third, Fifth, Ninth, and Eleventh Circuits are on one side, and the Fourth, D.C., and now Seventh Circuits are on the other. *Compare Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1099 (11th Cir. 2020); *United States ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1018 (9th Cir. 2018), *as amended* (Nov. 26, 2018); *United States ex rel. Smith v. Wallace*, 723 F. App'x 254, 256 (5th Cir. 2018) (per curiam); *United States ex rel. Whatley v. Eastwick Coll.*, 657 F. App'x 89, 94 (3d Cir. 2016); *with United States ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174, 178 n.3 (4th Cir. 2017); *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010).

B. Molina's contract with the government

Molina is a managed care organization that contracted with Illinois in 2013 to offer, deliver, and manage health care services to Medicaid beneficiaries. CA7-App.A33, A41 (FAC ¶¶ 2, 30). Illinois repeatedly extended its contract with Molina, including after learning of the allegations in this suit. CA7-App.A41,

A61 (FAC ¶¶ 31, 116). That contract, which is still in effect, is based on a capitation payment model. Under that model, the government pays Molina not per service, but per patient using a fixed monthly fee that covers "all services" irrespective of how many or how few services a patient actually uses. App.2; CA7-App.A47 (FAC ¶ 52).

As part of its "Care Delivery Requirements," Molina's contract required it to provide the services of a "SNFist," a medical professional who "provide[s] Care Management and care coordination activities" for enrollees residing in nursing facilities (often referred to as "SNFs," for skilled nursing facilities). CA7-App.A85-87. As defined by contract, "Care Management" refers to "[s]ervices that assist Enrollees in gaining access to needed services, including medical, social, educational and other services." CA7-App.A80, A87, A96.

"SNFist services" are not the same as "Skilled Nursing," which refers to the nursing services provided by licensed nurses. CA7-App.A83. Nor does the term refer to all care an enrollee residing at a nursing facility receives or to an enrollee's access to a "Skilled Nursing Facility" itself. Rather, it is limited to care coordination services performed by a SNFist, which are separate from the direct provision of medical care, personal care, or social services to nursing-home residents. CA7-App.A80, A85-87. A failure to provide care coordination services specifically through a SNFist would not mean that any patient lacked access to a skilled nursing facility or to "needed . . . medical, social, educational and other services," or even that a patient could not or did not

receive Care Management from other types of medical professionals. CA7-App.A80, A86-87.

Molina's contract creates five risk pools called "rate cells" that correspond to age, geographic area, and setting-of-care. App.4-5. It fixes capitation payments by cell, with higher rates for rate cells whose enrollees are likely to require more intensive care. App.5. As in any other capitation payment contract, those rates are "fixed . . . regardless of the number or type of services provided to the enrolled member." *United States ex rel. Zemplenyi v. Grp. Health Coop.*, 2011 WL 814261, at *2 (W.D. Wash. Mar. 3, 2011); *see United States ex rel. Gray v. UnitedHealthcare Ins. Co.*, 2018 WL 2933674, at *7 (N.D. Ill. June 12, 2018).

To receive payment, Molina submits a form to the government "enroll[ing] a beneficiary" in the appropriate "rate cell," and the government "pays Molina the corresponding amount." App.25 (Sykes, C.J., dissenting). Molina's submissions do not request payment for specified services or make any specific representation about what goods or services have been or will be provided.

C. Prose's claims

This *qui tam* action was brought by respondent Thomas Prose, the founder of GenMed, a company that once contracted with Molina. App.2-3; CA7-App.A35-37 (FAC ¶¶ 9, 13–18). Prose alleged that after GenMed terminated that contract, Molina sought capitation payments for enrollees in the nursing facility rate cell without disclosing that it no

longer provided SNFist services. App.10-11; App.25 (Sykes, C.J., dissenting).

Despite asserting at least three different theories of fraud—factual falsity, implied false certification, and fraudulent inducement, App.9—Prose:

- Did not describe any specific false claim that Molina allegedly submitted to the government.
- Identified no express falsehoods in the enrollment forms.
- Alleged only "on information and belief" that Molina represented to the government that it would provide SNFist services when it "did not intend to do so."
- Did not allege any specific misleading statement made by an identified Molina representative, let alone specify the "time, place, and content" of such a statement.

The government declined to intervene in Prose's action. App.81. In fact, even after learning of Prose's allegations, the government continued to pay Molina's claims without discount and extended the contract. App.81; CA7-App.A41 (FAC ¶ 31).

D. The decisions below

The district court twice dismissed Prose's complaint under Rule 9(b). It first rejected Prose's attempt "to cast all submitted reports as false claims" because Prose did not "clearly point to any falsified claim in his Complaint," making it "indiscernible *how* and *whether* any fraud occurred." App.105.

The district court dismissed Prose's amended complaint because he "plead[ed] almost no information about the content of" Molina's enrollment forms and "pointed to no express falsehoods in the enrollment forms." App.86. The court suggested that Molina's enrollment forms could be false even though they merely requested payment without making any representations about compliance, but dismissed Prose's claims because he had not adequately alleged that Molina knew that its alleged failure to provide SNFist-specific care coordination was material. App.94 n.1, App.98.

A divided panel of the Seventh Circuit reversed, with Chief Judge Sykes dissenting. The majority held that Prose's allegations satisfied Rule 9(b), concluding that "Prose cannot be expected to provide . . . factual particulars at the pleading stage." App.11-13; App.29 (Sykes, C.J., dissenting). Instead, it held that the contents of allegedly false claims are a "granular detail" that Rule 9(b) does not require. App.13. It also held that each "request for payment . . . was impliedly false because it requested payment of the [nursing-facility] capitation rate," and that "by submitting enrollment forms . . . Molina implicitly falsely certified that Nursing Facility enrollees had access to SNF services." App.17-18 (quoting App.94). But it never identified—because Prose never alleged—any specific representation about the goods or services provided in any of Molina's enrollment forms. Instead, it allowed Prose to rely on generic allegations based on information and belief to "plausibly support[] the inference that Molina included false information about the pertinent services for new enrollees" in its claims for payment. App.51. The majority also allowed

Prose to proceed on his fraudulent inducement claim even though he did not allege "any details about the contract-renewal negotiations" during which he claimed Molina made false representations. App.51.

Because courts "are not at liberty to loosen pleading standards under circumstances where a specific false statement is hard to identify," the dissent would have held that Prose did not "satisfy [Rule 9(b)]'s heightened pleading standard under *any* of [his] theories." App.27, 29 (Sykes, C.J., dissenting). By "loosen[ing] pleading standards," the dissent wrote, the majority had blessed "the very 'fishing expedition' that Rule 9(b) is meant to avoid." App.29 (Sykes, C.J., dissenting) (quoting *Vicom, Inc. v. Harbridge Merch. Servs., Inc.,* 20 F.3d 771, 777 (7th Cir. 1994)). Moreover, under the majority's approach, "*any* claim for payment while in material noncompliance with a contract or governing law is an actionable violation of the FCA." App.39 (Sykes, C.J., dissenting). As Chief Judge Sykes explained, that approach was in tension with *Escobar*, App.30-35 (Sykes, C.J., dissenting), and put the Seventh Circuit in the minority of circuits holding that a mere request for payment can be false without any specific representation about the goods or services provided. *E.g.*, *Triple Canopy,* 857 F.3d at 178 n.3.

After issuing an amended opinion making minor changes, the Seventh Circuit denied Molina's petition for rehearing and rehearing en banc. App.110.

REASONS FOR GRANTING THE PETITION

This petition presents two important, recurring questions of federal law that have divided the lower

courts. This case is an ideal vehicle for efficiently addressing both. If the Court does not grant this petition, it should at a minimum grant review in either *Bethany Hospice* or *Owsley* and hold this petition pending a decision on the Rule 9(b) issue raised in all three petitions.

I. The circuits are split over both questions presented.

A. The circuits are split over Rule 9(b)'s applicability to the "false claim" element.

The circuits are deeply divided over whether Rule 9(b) requires FCA plaintiffs to plead with particularity the allegedly false claims that form the basis of their FCA actions. Courts on both sides of the split have acknowledged this disagreement. *E.g.*, *United States ex rel. Eberhard v. Physicians Choice Lab. Servs., LLC*, 642 F. App'x 547, 550-51 (6th Cir. 2016); *Foglia*, 754 F.3d at 155-56; *Ebeid*, 616 F.3d at 998-99. Half of the circuits recognize that because what the FCA prohibits is the submission of a false claim, Rule 9(b) requires (with rare exceptions) that FCA plaintiffs plead with particularity the details of at least one actual claim—its "time, place, and content"—to adequately allege that element. *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (quoting *Yuhasz v. Brush Wellman, Inc.,* 341 F.3d 559, 563 (6th Cir. 2003)). The other half—including the Seventh Circuit here—do not require plaintiffs to plead *any* details about actual claims submitted. *E.g.*, *Presser*, 836 F.3d at 777; *Ebeid*, 616 F.3d at 998-99.

1. The First, Sixth, Eighth, and Eleventh Circuits all hold that "[b]ecause it is the submission of a fraudulent claim that gives rise to liability under the [FCA], that submission must be pleaded with particularity and not inferred from the circumstances." *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005) (per curiam); *see also Owsley,* 16 F.4th at 196; *United States ex rel. Benaissa v. Trinity Health*, 963 F.3d 733, 739 (8th Cir. 2020); *Karvelas*, 360 F.3d at 232-33. Accordingly, courts on this side of the split have held that, under Rule 9(b), FCA plaintiffs cannot "rely on mathematical probability to conclude that the [defendant] surely must have submitted a false claim at some point," or contend that "a pattern of improper practices of the defendants leads to the inference that fraudulent claims were submitted to the government." *Carrel v. AIDS Healthcare Found., Inc.*, 898 F.3d 1267, 1277 (11th Cir. 2018); *Corsello*, 428 F.3d at 1013. Instead, FCA plaintiffs must identify "actual, and not merely possible or likely, claims," *Clausen*, 290 F.3d at 1313, and plead "specific details" that explain "when, where, and what" false claims were submitted, *Carrel*, 898 F.3d at 1275-76; *Corsello*, 428 F.3d at 1013.

As the relators' petition in *Bethany Hospice* explains, the Eleventh Circuit's decision in that case presents an "especially acute" conflict with the Seventh Circuit's decision here. *Bethany Hospice* Pet. 24. The relators in *Bethany Hospice* alleged that the defendant "operated an illegal kickback referral scheme" to "pa[y] doctors in exchange for referring Medicare beneficiaries." *Estate of Helmly v. Bethany Hospice & Palliative Care of Coastal Ga., LLC*, 853 F. App'x 496, 497 (11th Cir. 2021) (per curiam). The

Eleventh Circuit held that the relators did not satisfy Rule 9(b) because they did not "identify even a single, concrete example of a false claim" or "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." *Id.* at 501-02 (cleaned up). The court refused to "infer[]" the submission of a false claim "from the circumstances" because "such an assumption would strip all meaning from Rule 9(b)'s requirements of specificity." *Id.* at 502-03 (cleaned up).

Similarly, in *Owsley*, the Sixth Circuit held that Rule 9(b) "imposed a 'clear and unequivocal requirement that a relator allege specific false claims." *Owsley,* 16 F.4th at 196 (quoting *United States ex rel. Sheldon v. Kettering Health Network,* 816 F.3d 399, 411 (6th Cir. 2016)). Accordingly, a relator cannot plead "a private scheme in detail" and then simply infer "that claims requesting illegal payments must have been submitted." *Id.* (cleaned up). The relator must instead "identif[y] at least one false claim with specificity." *Id.* The *Owsley* relator "describe[d], in detail, a fraudulent scheme," alleging with particularity that the defendant fraudulently overstated the care it provided to increase its per-patient Medicare payments. *Id.* at 194-97. She also provided sample forms identifying the type of information that would be included in a claim for payment. *Id.* But that was not enough to satisfy Rule 9(b) because although she pleaded a fraudulent *scheme* with specificity, she "did not allege facts that identify any specific fraudulent *claims*." *Id.* at 196-97 (emphasis added).

2. The Second and Fourth Circuit also generally require FCA plaintiffs to plead details of specific claims. In the Second Circuit, a plaintiff "who *can* identify examples of actual claims *must* do so at the pleading stage." *Chorches*, 865 F.3d at 86. That rule may be relaxed only if "the information that would permit further identification of those claims is peculiarly within the opposing party's knowledge." *Id.* For its part, the Fourth Circuit has held that there are only two ways a relator can satisfy Rule 9(b): (1) describing specific false claims; or (2) "alleg[ing] a pattern of conduct that would *necessarily*"—not possibly or even probably—"have led to submission of false claims to the government." *United States ex rel. Grant v. United Airlines, Inc.*, 912 F.3d 190, 197 (4th Cir. 2018) (cleaned up; emphasis in original); *see also Nathan*, 707 F.3d at 456.[1]

3. In stark contrast, the Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits do not require FCA plaintiffs to "identify a specific claim for payment at the pleading stage." *Foglia*, 754 F.3d at 156 (cleaned up); *Colquitt*, 858 F.3d at 372; *Ebeid*, 616 F.3d at 998; *Heath*, 791 F.3d at 126. Taking a "flexible" approach to Rule 9(b) "to achieve the remedial purpose of the" FCA, *Colquitt*, 858 F.3d at 372 (cleaned up), the Third, Fifth, Ninth, and D.C. Circuits have held it "sufficient for a plaintiff to allege 'particular details of a scheme to submit false claims paired with reliable indicia that

[1] Whether the Second and Fourth Circuits are classified as on one side of a binary split or falling somewhere in between, the fact is that twelve circuits—all but the Federal Circuit—have spoken on the issue and their respective approaches are settled and inconsistent.

lead to a strong inference that claims were actually submitted.'" *Foglia*, 754 F.3d at 156 (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)); *see Colquitt*, 858 F.3d at 372; *Ebeid*, 616 F.3d at 998. The Tenth Circuit has taken an especially relaxed view, holding that relators "need only show the specifics of a fraudulent scheme and provide an adequate basis for a *reasonable* inference that false claims were submitted as part of that scheme." *Lemmon*, 614 F.3d at 1172 (emphasis added).

As counsel for respondent in this case explained when seeking review in *Bethany Hospice*, the Seventh Circuit's decision here is one of the "strongest cases embodying" the relaxed approach to Rule 9(b). *Bethany Hospice* Reply 4. According to the Seventh Circuit, even though respondent here has not identified a single false claim, respondent's suit may nonetheless proceed based on allegations that "plausibly support[] the inference that [the defendant] included false information" in its communications with the government. App.12. Under that lax standard, "a plaintiff does not need to present, *or even include allegations about*, a specific document or bill that the defendants submitted to the Government." *Presser*, 836 F.3d at 777 (emphasis added). Likewise, the Seventh Circuit allowed respondent to proceed on a fraudulent inducement theory of FCA liability based on nothing more than "circumstantial evidence of promissory fraud in contract negotiations." App.12. In so holding, the Seventh Circuit not only sided with the circuits that do not require pleading information regarding the allegedly false claims, but took that lax view of Rule 9(b) even further by dispensing with particularity regarding the alleged fraudulent

inducement itself. Yet, in a fraudulent inducement FCA claim, no less than any other FCA claim, the submission of a false claim is the *sine qua non* of liability. *Clausen*, 290 F.3d at 1311. The Rule 9(b) split thus applies to all three of respondent's theories.

B. The circuits are split over whether a request for payment that contains no specific representations can be a false claim under the FCA.

Escobar held that a claim for payment can be "false or fraudulent" "at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." 579 U.S. at 190. It left open the question whether a claim that *does* "merely request payment" can be deemed false based on noncompliance with an underlying regulatory or contractual condition that the claim does not mention, on the theory that "all claims for payment implicitly represent that the billing party is legally entitled to payment." *Id.* at 188, 190.

Although *Escobar* did not formally reach that question, *Escobar*'s logic dictates the answer: a mere request for payment that contains neither an express false statement nor a misleading half-truth is not "false or fraudulent" within the meaning of the FCA. To interpret the term "false or fraudulent," *Escobar* looked to the common law of fraud. At common law, there is no duty to speak absent a fiduciary or other

special relationship. *Id.* at 188 n.3. If, however, a party chooses to speak, "he must disclose enough to prevent his words from being misleading." *Id.*; *Chiarella v. United States*, 445 U.S. 222, 235 (1980); *see also, e.g.*, Restatement (Second) of Torts § 551(1) (1977) (limiting liability for nondisclosure to situations in which one "is under a duty to [another] to exercise reasonable care to disclose the matter in question"). Under this well-established common law, a party has no duty to volunteer information in a claim for payment. If the government believes it needs certain information to determine whether to pay a claim, it can (and regularly does) ask for that information in the claim form. But where the government does not ask about compliance with an underlying regulatory or contractual condition and the claim says nothing about that condition, there is nothing in the claim that can be deemed a "misleading half-truth." *Escobar,* 579 U.S. at 190. *Escobar*'s own reasoning thus requires rejecting such pure "implied" certification as a theory of FCA liability.

Despite the force of *Escobar*'s reasoning, circuits have divided over whether a mere request for payment absent a false statement or half-truth can be deemed false or fraudulent. Unless this Court grants certiorari and holds that a request for payment that makes no specific representations cannot be treated as if it contains an implied false certification, the FCA will become precisely what this Court has warned against: "a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Escobar*, 579 U.S. at 194.

1. The Third, Fifth, Ninth, and Eleventh Circuits have held that a request for payment cannot be false merely because it fails to disclose noncompliance with a material statutory, regulatory, or contractual requirement. Rather, to be false, the claim must either explicitly misrepresent compliance or make specific representations that are rendered misleading by the undisclosed noncompliance. *See Ruckh*, 963 F.3d at 1109 (affirming dismissal of FCA claims that did not identify "specific representations regarding the services provided"); *Wallace*, 723 F. App'x at 255-56 (affirming summary judgment because the relator proved neither that the defendant's "claims themselves [were] explicitly false" nor that they "included 'specific representations' that were 'misleading half-truths'"); *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 332-33 (9th Cir. 2017) (affirming dismissal of FCA claim because the contractor's requests did not "contain[] any false or inaccurate statements" or "ma[k]e any specific representations about [its] performance" (citing *Escobar*, 579 U.S. at 190)); *accord Rose*, 909 F.3d at 1018; *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 901 (9th Cir. 2017); *Eastwick Coll.*, 657 F. App'x at 94.

2. On the other side of the split, the Fourth, D.C., and Seventh Circuits have held that a mere request for payment is "false or fraudulent" under *Escobar* any time it fails to disclose a material breach of contract.

For example, the Fourth Circuit held after *Escobar* that "*all* claims for payment implicitly represent that the billing party is legally entitled to payment" and that, as a result, a plaintiff "pleads a

false claim" any time "it alleges a request for payment under a contract where the contractor withheld information about its noncompliance with material contractual requirements." *Triple Canopy*, 857 F.3d at 178 n.3 (emphasis added); *see United States v. Triple Canopy, Inc.*, 775 F.3d 628, 636 (4th Cir. 2015).

And both before and after *Escobar*, the D.C. Circuit likewise has held that a claim for payment is false any time a "contractor withheld information about its noncompliance with material contractual requirements." *Sci. Applications Int'l Corp.*, 626 F.3d at 1269; *see United States v. DynCorp. Int'l, LLC*, 253 F. Supp. 3d 89, 99-100 (D.D.C. 2017). The D.C. Circuit thus held in *United States v. Dynamic Visions Inc.* that the defendant violated the FCA by "knowingly requesting reimbursement for home health care services while omitting" a violation of D.C. law, without requiring any specific representation about the services provided that could have constituted a misleading half-truth. 971 F.3d 330, 337 (D.C. Cir. 2020) (cleaned up).

Here, the Seventh Circuit followed the Fourth and D.C. Circuits' approach. The majority relied on Molina's mere request for payment coupled with alleged material noncompliance with a contract provision to hold that Prose had stated a cognizable FCA violation under an implied false certification theory. App.10.

II. The questions presented are important and recurring.

The Court should not wait to address these issues. The FCA is one of the most frequently litigated

statutes in the U.S. Code. *See* U.S. Dep't of Justice, *Fraud Statistics – Overview: Oct. 1, 1986 – Sept. 30, 2020*, https://bit.ly/3egHss4. Since 2010, relators have filed more than 600 *qui tam* actions each year. *See* U.S. Dep't of Justice, *Fraud Statistics – Overview: Oct. 1, 1986 – Sept. 30, 2021*, https://bit.ly/34vxS2K. Health care providers are an especially popular target. Of the 672 new *qui tam* actions filed in 2020, 68% were related to health care—the equivalent of more than one health care-related *qui tam* action being filed every day. George B. Breen et al., *DOJ False Claims Act Statistics 2020: Over 80% of all Recoveries Came from the Health Care Industry*, Nat'l L. Rev. (Jan. 21, 2021), https://bit.ly/327ig4G. In 2021, around 90% of all FCA recoveries came from health care-related defendants. Jeff Overley, *New FCA Stats Fuel Debate over Health Enforcement Fixation*, Law360 (Feb. 8, 2022), https://bit.ly/3GGtjjA.

In every one of those cases, the FCA's "punitive" remedies offer relators a chance at a massive windfall and expose defendants to potentially catastrophic liability. *Stevens*, 529 U.S. at 784-85. Even in cases that result in no recovery for relators, defendants face substantial litigation costs, particularly in circuits that have thrown the pleading gates wide open. Clarifying what constitutes an actionable "false or fraudulent" claim and what a relator must allege is thus critical.

1. Because Rule 9(b) applies to every FCA complaint, *Escobar*, 579 U.S. at 195 n.6, motions to dismiss under Rule 9(b) "have become standard practice" in FCA litigation, Claire M. Sylvia, The False Claims Act: Fraud Against the Government § 10:59

(2021 update). Whether courts apply Rule 9(b) to require particularity for the false claim element will often make the difference between a speculative FCA claim being dismissed on the pleadings or proceeding into burdensome discovery. Claims brought in one circuit will survive when they would have failed in another. It is telling that both sides—the relators in two cases from the strict side of the split, and the defendant in this case from a circuit on the loose side of the split—agree that the Court's intervention is needed. *Owsley* Pet. 26-27; *Bethany Hospice* Pet. 28-29.

As the Eleventh Circuit has explained, "the 'true essence'" of FCA fraud "involves an actual claim for payment and not just a preparatory scheme." *Clausen*, 290 F.3d at 1312 n.21. Thus, circuits—like the Seventh—that do not require relators to plead the core element of an FCA claim with particularity "strip[] all meaning from Rule 9(b)'s requirement of specificity." *Id.* This extra-textual exemption from Rule 9(b)'s strictures is particularly problematic given the FCA's "first-to-file" and public disclosure bars, which preclude *qui tam* suits "based on the facts underlying [a] pending action," 31 U.S.C. § 3730(b)(5), or information previously disclosed to the public, and thus give potential relators every reason to file first and figure out the merit of their claims later.

Allowing FCA plaintiffs to satisfy Rule 9(b) despite failing to detail an actual false claim mistakes the FCA's focus. The FCA "does not create liability merely for a health care provider's disregard of Government regulations or improper internal policies," standing alone, but rather for the submission

of a false or fraudulent claim. *Clausen*, 290 F.3d at 1311. So no matter how specifically a plaintiff pleads the "improper practices" that allegedly led to the submission of false claims, that is not equivalent to "alleg[ing] . . . the 'who,' 'what,' 'where,' 'when,' and 'how'" of the element of an actual fraudulent submission to the government, as Rule 9(b) requires. *Corsello*, 428 F.3d at 1014. Put differently, "the circumstances constituting fraud," Fed. R. Civ. P. 9(b), in an FCA case by definition include the submission of the allegedly false or fraudulent claims.[2]

2. The meaning of the FCA's core requirement of a "false or fraudulent claim" is just as important. This Court recognized as much when granting review in *Escobar*. 579 U.S. at 186. Because all FCA cases involve claims that request payment, the question presented here—whether claims that "merely request payment" without "mak[ing] specific representations about the goods or services provided" can be deemed impliedly false has the potential to arise in *every* FCA

[2] This is equally true in an FCA case based on a fraudulent inducement theory. While fraudulent inducement of a contract can render "false or fraudulent" claims for payment subsequently submitted under the contract, it is still the submission of the claims that violates the FCA. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542-44 (1943); 31 U.S.C. § 3729(a)(1)-(2) (FCA liability is based on presentment of a "false or fraudulent claim"). As a result, while Rule 9(b) requires that the alleged fraudulent inducement be pleaded with particularity, it also requires that the alleged false claims in a fraudulent inducement case be pleaded with particularity just as in any other FCA case. *Cf. In re Baycol Prods. Litig.*, 732 F.3d 869, 876-77 (8th Cir. 2013) (requiring that the alleged fraudulent inducement be pleaded with particularity). The decision below doubly erred by declining to require particularity as to either element.

case. *Id.* at 190. Moreover, the lack of a clear answer to that question from this Court will encourage a flood of FCA cases, given that thousands of requests for payment are made under countless government programs and contracts every day, and every government program or contract involves a myriad of often detailed and technical conditions and requirements. If every request for payment impliedly certifies compliance with every underlying condition and requirement, the lure of an FCA bounty will leave courts swamped with *qui tam* actions. Finally, the majority of circuits have weighed in on that question, making further percolation unnecessary. This Court should step in now because as long as that split exists, it will only encourage relators to file in the forums friendliest to their claims.

The "falsity" rule applied in the relator-friendly forums is also wrong. It is divorced from the reasoning of *Escobar*—that, under the common law, omissions are not actionable as fraud absent a duty of disclosure, but that if one does speak, one "must disclose enough to prevent his words from being misleading." *Id.* at 187-88 & nn.2 & 3 (quoting W. Keeton et al., Prosser and Keeton on Law of Torts § 106, p. 738 (5th ed. 1984)). Accordingly, "*representations* that state the truth only so far as it goes, while omitting critical qualifying information," may fairly be deemed false or fraudulent. *Id.* (emphasis added). But if "all claims for payment implicitly represent that the billing party is legally entitled to payment," *id.*, then FCA liability turns not on any actual falsity in a claim to the government, but on the mere existence of an underlying regulatory or contractual breach. That would transform the FCA from a statute about *claims*

that are *false* into an all-purpose regulatory and contractual compliance enforcement mechanism, with draconian remedies suited to fraud and enforcement largely in the hands of private citizens. It thus directly implicates this Court's warnings against "expand[ing] the FCA well beyond its intended role of combating 'fraud against the Government.'" *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 669 (2008) (quoting *Rainwater v. United States*, 356 U.S. 590, 592 (1958)).

III. This case is an excellent vehicle to decide the questions presented.

This case provides an ideal vehicle to resolve the questions presented because both are cleanly presented and thoroughly debated by the majority and dissenting opinions.

1. The decision below squarely conflicts with Rule 9(b) decisions of other circuits—as counsel for respondent has conceded. *See supra* at 1. The allegations that the Seventh Circuit found sufficient here would not have survived in the circuits on the other side of the divide.

Like the *Bethany Hospice* plaintiffs, Prose "did not allege details of claims." *Bethany Hospice* Reply 3. He did not identify any individual false claim, describe its contents, or allege when it was submitted. App.51-52. But because he alleged that Molina did not provide one of the means of care coordination required by its contract, the majority was willing to "infer[] that Molina included false information" in those claims. App.12, 51-52.

If anything, the inferences that the majority below held sufficient are even more attenuated than those *Bethany Hospice* rejected. The alleged scheme there was to pay kickbacks for particular services. *Bethany Hospice* Pet. 5-12. By statute, a reimbursement request for services resulting from a kickback is automatically false under the FCA. 42 U.S.C. § 1320a-7b(g). But here, Molina received monthly capitation payments that were fixed and thus did not reimburse for particular services, and no statute makes Molina's alleged contractual breach a *per se* FCA violation.

Nor would Prose's action have survived in any circuit on the other side of the split. Prose provided less detail in his complaint than the *Owsley* relator. Like her, he did not "identify any specific fraudulent claim" or plead "the dates of any . . . claims for payments." *Owsley*, 16 F.4th at 196-97. But unlike her, he did not identify any patient for whom Molina allegedly submitted a false claim. He did not describe or provide examples of the content of Molina's requests. And unlike the payments in *Owsley*, Molina's capitation payments did not reimburse it for particular services and so could not be linked to the specific SNFist service Molina allegedly did not provide. Prose's allegations thus fell far short of satisfying Rule 9(b)'s requirement of sufficient particularity to "provide[] [Molina] with notice of a specific representative claim that [he] thinks was fraudulent," as the Sixth Circuit interprets the rule. *Id.* at 197.

2. Granting this petition along with or instead of *Bethany Hospice* or *Owsley* will allow the Court to

simultaneously consider the second question presented here: whether a mere request for payment from the government, coupled with material noncompliance with a contractual condition, is a "false or fraudulent claim" absent any specific false or misleading representation about the goods or services provided.

If some representation about the goods or services is required, Prose's implied certification claim fails. Molina's enrollment forms do not request payment for specified services or make any specific representation about what goods or services have been or will be provided. They simply enroll beneficiaries by rate cell, which designates the monthly amount paid for a given enrollee. Those rates are fixed regardless of the number or type of services provided to the enrolled member. In any of the circuits on the other side of the split, a mere request for payment like that would not be a "false or fraudulent claim." Under the Seventh Circuit's approach, though, any claim for payment can be deemed "false or fraudulent" by "implying" a certification about matters the claim does not mention. That radical approach "expand[s] the FCA well beyond its intended role" and makes the FCA's reach "'almost boundless.'" *Sanders*, 553 U.S. at 669 (quoting *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 496 (D.C. Cir. 2004) (Roberts, J.)).

While *Bethany Hospice* and *Owsley* appear to be suitable vehicles to decide the Rule 9(b) issue, this case is an even better vehicle because it allows the Court to resolve both the Rule 9(b) split and the post-*Escobar* split regarding "implied" falsity. Deciding what the statute's "false or fraudulent claim" element

means may inform the Court's consideration of what an FCA plaintiff must plead regarding that element. In all events, however, the Court should at least hold this petition if it grants review in *Bethany Hospice* or *Owsley*.

CONCLUSION

The Court should grant the petition for certiorari. In the alternative, the Court should hold the petition pending a decision in *Bethany Hospice* or *Owsley* if it grants review in one or both of those cases.

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