No. 21-462

IN THE

Supreme Court of the United States

JOLIE JOHNSON & ESTATE OF DEBBIE HELMLY,
Petitioners,

v.

BETHANY HOSPICE AND PALLIATIVE CARE LLC,
Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

When a plaintiff asserting claims under the False Claims Act (FCA) concedes she is unable to allege the submission of a single actual false claim to the government, whether Rule 9(b) permits a district court to dismiss the FCA claims when the plaintiff's allegations lack sufficient indicia of reliability to infer the submission of any false claim to the government, or whether courts must apply a more "lenient" standard.

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INTRODUCTION

In a per curiam, unpublished opinion—after the court deemed oral argument unnecessary—the Eleventh Circuit affirmed dismissal of petitioners' claims under the False Claims Act (FCA). The court chose to address only one of the district court's case-dispositive rulings to affirm the dismissal: petitioners did not sufficiently plead with particularity the submission of any false claim to the government. Petitioners did not seek rehearing or rehearing en banc.

This outcome is unsurprising, as petitioners' speculative allegations—contained in their *fourth attempt* to plead sufficient claims—are precisely what Rule 9(b) proscribes. Indeed, petitioners never even worked for respondent. Instead, in their mere seven months of employment for what they deem a "related" company, they claimed they *could have* gained *access* to records that *could have* shown actual claims to the government. Yet petitioners were unable to specifically allege a single one. Rule 9(b)'s demand for pleading with particularity prevents such speculation from stating a claim.

Petitioners attempt to paint the Eleventh Circuit's opinion as out of sync with other circuits. That portrayal is inaccurate. But whatever disagreement exists among the circuits on the application of Rule 9(b) in FCA cases, this case is a poor vehicle to resolve them for three reasons.

First, in addition to petitioners' failure to sufficiently plead the submission of a false claim to the government, the district court *also* ruled that petitioners failed to state a claim for any violation of

the Antikickback Statute (AKS). The Eleventh Circuit did not need to reach this issue because its decision to affirm on petitioners' failure to plead the submission of a false claim disposed of the case. Accordingly, a ruling from this Court on the question presented would not save petitioner's own case.

Second, in the mine run of FCA cases, tenured employees of the defendant company itself present claims based upon their own experiences. Here, to the contrary, petitioners never even worked for respondent, and they only worked at what they deem a sufficiently "related" company for seven months. That unique lack of information resulted in the uniformly insufficient allegations the courts rejected below. If this Court wishes to further grapple with the proper pleading standard for the submission of false claims to the government, it should do so in a case presenting the more traditional posture, where actual employees of the defendant make allegations based upon their specific experiences. As petitioners concede, there are no shortage of cases for this Court to consider later.

Third, this is a particularly poor case to address the question presented, because under any circuit's articulation of the FCA pleading standard under Rule 9(b), petitioners did not sufficiently plead a false claim to the government. Even under the case law of circuits petitioners portray as more "lenient" than the Eleventh Circuit, petitioners' allegations are insufficient. Thus, once again, this Court should wait for a case that presents it with the opportunity to delineate between sufficient and insufficient allegations. Each of these three grounds should

cause this Court to deny the petition as an improper vehicle to resolve the question presented.

Further, petitioners overstate any disagreement among the circuits. At the outset, petitioners attempt to paint the Eleventh Circuit as alone on an island, applying draconian pleading rules to squelch valid FCA claims. Not so. In fact, the attributes of the more "lenient" cases petitioners advocate are found in the Eleventh Circuit's own precedents, including the opinion below. To be sure, some circuits have noted that their semantic articulation of the Rule 9(b) pleading standard in FCA cases is distinct from how other circuits articulate it. But that is far from a disparity in outcomes among the circuits. As the circuits' case law continues to converge, this Court should not attempt to redefine the standard.

Finally, the decision below is correct. Rule 9(b) must play a meaningful role, especially in FCA cases where defendants are subjected to potentially crippling monetary liability and treble damages. While petitioners would undoubtedly prefer a pleading standard akin to Rule 8 for their FCA claims, the law—for good reason—requires more. And here, on claims that do not approach sufficiency under Rule 9(b), the Eleventh Circuit properly affirmed the district court's dismissal.

This Court should deny the petition.

STATEMENT OF THE CASE

I. Relevant Allegations In The Third Amended Complaint.

Bethany Hospice and Palliative Care, LLC, respondent here, provides hospice services in

southeast Georgia and maintains offices in four cities. *See* Pet. App. 3a. Petitioners never worked for respondent. *See ibid.* Rather, petitioners worked for Bethany Hospice and Palliative Care of Coastal Georgia, LLC ("Bethany Coastal"), which operates in a different geographic market and has its home office in a different city. *See ibid.* Respondent and Bethany Coastal have some common ownership and management, but Bethany Coastal is organized as a separate company and has a different hospice license number. *Ibid.*

Petitioner Johnson was a "marketer" for Bethany Coastal for seven months (December 2014 to July 2015). Pet. App. 3a. Petitioner Helmly, now deceased, was an "administrator" for Bethany Coastal for the same seven-month period. *Ibid.* Despite never working for respondent, petitioners claim an overlap in personnel, resources, and management software, including the same computer platform to organize patient records. *Id.* at 81a-82a. Petitioners claim these similarities "effectively made [them] corporate insiders of Bethany Hospice." *Id.* at 81a.

In their short tenure at Bethany Coastal, petitioners claim they became aware of a scheme at respondent in which doctors were improperly paid "kickbacks" for the referral of patients to respondent's facilities. Pet. App. 54a-55a. In particular, petitioners alleged that four of the doctors who served as respondent's medical directors received "kickbacks" for patient referrals they allegedly made to respondent, and that respondent submitted claims to Medicare for payment for the

services respondent provided to those patients. *Id.* at 61a-64a.

Petitioners asserted that these supposed kickbacks took one of two forms. They first alleged that the four doctors were paid for the referrals through "monthly salary, dividends, and/or monthly bonuses." Pet. App. 58a. Petitioners did not allege the amount, timing, or manner of any actual payment, nor did they identify any specific patient admitted in connection with any referral or payment. Second, petitioners alleged that the four doctors were paid kickbacks through the opportunity to purchase ownership interests in respondent at below-market prices, then "after their referrals grow the company, they can 'cash out' for an unbelievably higher rate." Pet. App. 60a-61a. Petitioners did not allege the particulars of any ownership transaction (such as dates, rates, prices for any purchases, sales, or other forms of transaction) for any of the four doctors.[1]

The court of appeals opinion, and therefore this petition, involves petitioners' deficient allegations of false claims being submitted to the government. *See* Pet. App. 9a. Petitioners alleged they had "access" to billing information through the computer system,

[1] Several additional facts petitioners pleaded—and, perhaps more importantly, did *not* plead—undermine the existence of any viable claim for illegal kickbacks under the AKS, as the district court fully described. *See* Pet. App. 29a-34a. But because the court of appeals did not need to reach this issue, respondent does not elaborate on those deficiencies here. Suffice it to say, however, that petitioners' deficiencies in alleging a violation of the AKS are every bit as lacking as the allegations regarding the submission of a false claim to the government.

including billing records and patient census data. Pet. App. 80a. Petitioners do not allege they ever accessed these reports as they related to respondent's operations, much less the contents of any particular report. Further, petitioner Helmly claimed to have attended meetings where management "discussed site productivity and census numbers for all Bethany Hospice's and Bethany Coastal's sites." *Ibid.* Petitioners do not claim that any specific patients were discussed, that any of the four doctors allegedly receiving kickbacks were discussed, or that any related claims submitted to the government were discussed.

Petitioners also claimed to rely on conversations they had with other former employees, through which they claimed to have "confirmed" that the referrals made by the four doctors they identified resulted in claims to the government. Pet. App. 73a-74a. Yet no specifics as to any patients, doctors, or referrals were included in the description. And in perhaps the most tenuous, yet accusatory, set of allegations, petitioners asserted that another former employee of respondent, Robert Clements, heard from *other* unnamed former employees, and then relayed to petitioners, that "every single referral" from the four doctors "was for a Medicare or Medicaid beneficiary." *Id.* at 74a.

Lastly, petitioners pointed to generic Medicare claims data, which they believed illustrated that respondent had to have submitted claims to the government. Pet. App. 76a. Yet none of this data identified any patients, much less tie any patient to any alleged referral.

II. Legal Framework.

The FCA imposes liability if someone "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." 31 U.S.C. § 3729(a)(1)(A)-(B). The FCA includes a procedure through which individuals, known as "relators" (like petitioners here) can pursue a civil claim on behalf of the government in the event the government investigates the claim and decides not to pursue it in its own right. 31 U.S.C. § 3730(b).

The AKS makes it a felony if someone "knowingly and willfully offers or pays any renumeration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program." 42 U.S.C. § 1320a-7b(b)(2)(A). In addition to the criminal liability, and as relevant to this case, "a claim that includes items or services resulting from a violation of [the AKS] constitutes a false or fraudulent claim for purposes of [the FCA]." *Id.* § 1320a-7b(g).

In addition to an alleged statutory or regulatory violation (here, the supposed AKS violation), relators must also sufficiently plead the submission of a false claim to the government. *E.g.*, *United States ex rel. Clausen v. Lab'y Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002) ("The False Claims Act does not create liability merely for a health care provider's

disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe.")[2] Without the defendant presenting the allegedly false claim to the government, "there is simply no actionable damage to the public fisc as required under the False Claims Act." *Ibid.*

Additionally, these components of FCA claims—here, the AKS violation as well as the submission of a false claim to the government—must be pleaded with particularity pursuant to Rule 9(b). *See, e.g.*, *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 195 n.6 (2016) ("False Claims Act plaintiffs must also plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) . . . ."); *Clausen*, 290 F.3d at 1308-09 (collecting cases). Petitioners do not appear to challenge this general rule either. Pet. 4 ("Rule 9(b) applies to every FCA case . . . .").

III. The Proceedings Below.

Petitioners filed this case in November 2016, suing 49 separate defendants—including Bethany Coastal—alleging "a large hospice problem in Southern Georgia" because "hospice companies have

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[2] Petitioners do not appear to contest this general principle—that relators must plead the submission of a false claim to the government—as it is uniformly well established and required by the plain language of the statute. 31 U.S.C. § 3729(a); *see also, e.g.*, *Clausen*, 290 F.3d at 1311 (citing *United States v. Basin Elec. Power Coop.*, 248 F.3d 781, 803 (8th Cir. 2001); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999); *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)).

discovered that they can manipulate the system through kickbacks and admitting patients who do not qualify." *United States ex rel. Johnson v. Bethany Hospice of Coastal Ga., LLC*, No. 4:16-cv-00290-WTM-BKE, Complaint, Doc. 1 at 1, 2-3 (S.D. Ga. Nov. 4, 2016). As is the practice for claims asserted under the FCA (as well as the corresponding Georgia state law) the government investigated the claims. *Id.* Docs. 10, 14. Following that investigation, both the federal government and the State of Georgia declined to intervene. *Ibid.*

Through a litany of dispositive motions and amendments, petitioners' case dwindled. By the time petitioners were granted leave to file their Third Amended Complaint, only two defendants remained: Bethany Coastal and respondent. *See* Pet. App. 45a-47a. Petitioners asserted three claims. First, they alleged false or fraudulent claims for reimbursement based on illegal kickbacks, in violation of 31 U.S.C. § 3729(a)(1)(A) and the corresponding Georgia statute. *Id.* at 85a-86a. Second, they alleged false statements in certifying compliance with the AKS, in violation of 31 U.S.C. § 3729(a)(1)(B) and the corresponding Georgia statute. *Id.* at 86a-87a. Third, petitioners claimed Bethany Coastal retaliated against them. *Id.* at 87a.

During briefing of motions to dismiss, petitioners and Bethany Coastal reached a resolution of the retaliation claim. Pet. App. 7a n.6. Petitioners dismissed all of their claims—including the FCA claims—against Bethany Coastal, their former employer, with prejudice. *See Johnson*, No. 4:16-cv-00290-WTM-BKE, Stipulation of Dismissal with Prejudice, Doc. 125. Thus, all that remained were

the two FCA claims against respondent. Respondent moved to dismiss, asserting that petitioners did not sufficiently plead their claims with particularity under Rule 9(b). *See* Pet. App. 25a-26a.

The district court agreed and dismissed the case with prejudice. Pet. App. 17a-44a. The court began by ruling that petitioners failed to plead with particularity any violation of the AKS. *Id.* at 29a-34a. Because that alleged violation underpinned the FCA claim, it failed as a matter of law. *Ibid.*

Second, as an independent and alternative basis to dismiss, the district court explained that petitioners failed to sufficiently plead the submission of a false claim to the government. Pet. App. 34a-43a. To begin, they failed to plead an example of any false claim submitted to the government. *Ibid.* Additionally, their allegations did not provide sufficient indicia of reliability to satisfy Rule 9(b) with respect to their assertion that respondent submitted false claims to the government. *Id.* at 38a-43a.

Finally, the district court summarily rejected petitioners' false-statements claim, because it was presented in only a single paragraph with no factual support. Pet. App. 36a n.11. The district court therefore dismissed the case with prejudice. *Ibid.*

Petitioners appealed. Following briefing, the Eleventh Circuit decided oral argument was unnecessary to resolve the appeal. In a per curiam, unanimous, unpublished opinion, the court of appeals affirmed. Pet. App. 1a-16a. The court explained all of the bases on which the district court dismissed the complaint and, importantly, decided to address *only* the failure to adequately plead the

submission of a false claim to the government. *Id.* at 9a. The court of appeals expressly chose not to address petitioners' separate pleading failures under the AKS, as it did not need to reach that issue to affirm. *Ibid.* That is important for several reasons as this Court evaluates this petition, most notably because petitioners use the "facts" supporting their AKS claim to bolster their argument here, without acknowledging the district court determined that the AKS allegations were insufficient as a matter of law. *See, e.g.*, Pet. 31.

With respect to the submission of false claims to the government, the court of appeals began by noting petitioners' concession that they "did not include any details about specific claims submitted to the government." Pet. App. 11a. The court also noted that despite petitioners generically alleging they had "intimate familiarity with and access to" respondent's billing system and practices, they "fail[ed] to identify even a single, concrete example of a false claim submitted to the government." *Id.* at 12a.

The court then noted that its precedents "do not always require a sample fraudulent claim because 'we are more tolerant toward complaints that leave out some particularities of the submissions of a false claim if the complaint also alleges personal knowledge or participation in the fraudulent conduct.'" Pet. App. 13a (citing *United States ex rel. Matheny v. Medco Health Sols., Inc.*, 671 F.3d 1217, 1230 (11th Cir. 2012)). The court described, however, that petitioners' factual allegations did not provide sufficient indicia of reliability to satisfy Rule 9(b). *Id.* at 13a-14a. Specifically, the type of "knowledge"

petitioners claimed they had was insufficient because petitioners could not describe how it gave them any knowledge of the submission of any claims, much less the dates or frequencies of any supposed claims. *Ibid.* Further, petitioners could not rely merely on respondent's business model to assume that there were at least some claims submitted; any contrary rule would strip all meaning from Rule 9(b) for any business who frequently did business with the government. *Id.* at 14a-15a. It is only the submission of a *false* claim to the government that is improper, and the failure to make that connection is what doomed petitioners' fourth attempt to state a claim.[3] *Id.* at 14a-16a.

Petitioners did not petition for rehearing or rehearing en banc. This petition follows.

REASONS FOR DENYING THE PETITION

The parties begin from common ground: everyone acknowledges petitioners are unable to identify the submission of a single false claim. Not one. Indeed, petitioners "concede that their complaint did not include any details about specific claims submitted to the government." Pet. App. 11a. Thus, in evaluating this petition, the Court can set aside all the cases in which relators provide actual claims, or examples of false claims, or even a description of actual claims. This petition has no bearing on those relators' ability to plead FCA claims.

Instead, petitioners ask this Court for a "lenient" pleading standard when relators provide none of that

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[3] The court of appeals also affirmed dismissal of the false-statement claim because it is contingent on the existence of a false claim in the first instance. *See* Pet. App. 16a.

specific information. To the extent this Court is interested in such an issue, this case presents a poor vehicle to analyze it. In any event, petitioners greatly overstate the split in authority present today, and they incorrectly characterize the decision below as out of step with those of other circuits. Finally, the decision below is correct. This Court should deny the petition.

I. This Case Is A Poor Vehicle To Address Any Disagreement Among The Circuits That Petitioners Believe Is Present.

As discussed in § II, *infra*, petitioners overstate any perceived disagreement among the circuits on the requisite pleading standard for FCA cases in which relators cannot provide allegations of any actual false claims to the government. To the extent the Court believes that, at some point, it needs to weigh in (as opposed to allowing the circuits' articulated standards to continue to converge), this case presents a decidedly poor vehicle to do so. On these bases alone, this Court should deny the petition.

A. The question presented does not resolve the numerous deficiencies in petitioners' complaint.

In addition to petitioners' failure to sufficiently plead the submission of a false claim to the government, they also failed to plead a violation of the AKS. The court of appeals expressly decided not to reach this issue, because petitioners' failure on the submission point was all that was necessary to affirm the district court's dismissal. *See* Pet. App. 9.

Thus, as opposed to the neat and clean issue petitioners portray, the question presented is not the "only issue in the case." *See* Pet. 29. Although petitioners' failure to sufficiently plead the submission of a claim may have been the only issue addressed by the *court of appeals*, it is far from the only issue in the *case*. Indeed, even if this Court were to announce some standard by which courts are to evaluate alleged claim submissions when relators concede they cannot allege any specific claim, that would still not avoid dismissal of petitioners' complaint due to the AKS failures. Tellingly, as petitioners admit, this was the precise reason the Solicitor General counseled this Court not to grant certiorari in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, No. 12-1349: "That case was 'not a suitable vehicle' because the lower courts had thrown out the complaint on multiple grounds, so that the 'suit could not go forward even under the pleading standard most favorable to relators.'" Pet. 34-35. The same is true here.

Further, perhaps the most significant impediment the AKS issue creates for this Court's effective review is the emphasis petitioners place on the "facts" underlying the alleged AKS violation in their discussion of the merits. *See* Pet. 31. Indeed, petitioners open their discussion of the merits with a bullet-pointed list of the facts they believe support an AKS violation. *Ibid.* But the only court to have evaluated these allegations—the district court—found them insufficient to state a claim (Pet. App. 29a-34a), which the court of appeals did not need to review (*id.* at 9a). It is unclear if petitioners are

attempting to somehow obtain review of that district court ruling (even though the court of appeals did not address it), but what is clear is petitioners' belief that the unreviewable AKS ruling should somehow be intertwined with this Court's analysis of the merits question here.

If this Court elects to review this case, it will do so against the backdrop of a failed substantive claim. Said differently, this Court would be crafting a pleading standard for the submission of a "false claim" when the only court to review the underlying substantive claim ruled there were insufficient facts to call it "false" in the first place. Such a ruling borders on advisory and, in any event, illustrates why this complex procedural posture warrants denial of the petition.

B. Petitioners' unique factual circumstances create a poor vehicle for review of the question presented.

Two unique circumstances in petitioners' allegations render their case a poor candidate for the Court to consider the question presented.

First, petitioners never worked for respondent. And although they asserted FCA claims against their own former employer at one point, they decided to dismiss those claims with prejudice and proceed *only* against respondent. That is much different than the typical formulation, in which an employee asserts FCA claims against her own employer related to information learned while performing specific work for that company. Here, the only allegation even holding petitioners' theory together is their conclusory assertion that they were somehow made "corporate insiders" of respondent by virtue of

respondent sharing management, resources, and a computer system with petitioners' former employer, Bethany Coastal.

To be clear, respondent is not suggesting that employees of a related company are not permitted to assert FCA claims. To the contrary, anyone who believes they actually possess sufficiently particularized facts giving rise to an FCA claim is free to pursue it. But it is far from the typical case. Choosing to review the question presented in this atypical context would force the Court to grapple with the additional vagaries created by petitioners never having worked for respondent. It is that process—announcing and applying the rule in a unique circumstance—where the Court would run the risk of unintended consequences from being forced to deal with petitioners' unique circumstances in applying the pleading standard.

Taking petitioners at their word, this Court will not have to wait long for an appropriate case to come around. Pet. 28-29. It should not force review now on such a remote factual scenario.

Second, petitioners worked for their own employer, Bethany Coastal, for only seven months. That is of particular note here, where petitioners are not attempting to base their claim on discrete false claims submitted to the government, but instead on some vast, long-standing alleged scheme whereby respondent was supposedly submitting false claims to the government on a consistent basis (even though petitioners are not able to specifically describe a single one). The short tenure of petitioners' employment—for a different employer—creates yet

another unique aspect of this factual pattern that the Court would need to unravel.

Once again, respondents are not suggesting that short-tenured employees are precluded from asserting FCA claims. Instead, if the Court is intent on announcing some sort of pleading rule in this area, it will be better off doing so in a case with more general applicability to the theories and fact patterns that the lower courts more commonly encounter. Petitioners' case runs the proverbial risk of "bad facts" making "bad law," or, perhaps more accurately, "'unusual facts' inspir[ing] unusual decisions." *Tharpe v. Sellers*, 138 S. Ct. 545, 547 (2018) (Thomas, J., dissenting).

This Court can, and should, avoid that risk here, especially when petitioners concede the frequency with which FCA cases arise.

C. Petitioners' claims fail under any standard.

As discussed in § II, *infra*, petitioners' claims fail under the substantive standards of any of the circuits they highlight. In addition to demonstrating that the alleged "split" in authority is not what petitioners make of it, this also demonstrates that this case is a bad candidate to resolve any disagreement. If the fact pattern at issue is not illustrative of any new legal standard the Court may adopt, it is not an ideal case for the task. Once again, if the Court is interested in this issue, it should wait for a more typical fact pattern to address it.

II. Petitioners Vastly Overstate The Alleged Split In Authority.

Aside from this case being a poor vehicle to review any disagreement in authority, the case law demonstrates that the circuits' applications of Rule 9(b) are converging and that decisions are made based upon the specific facts alleged, not tangible variances in legal standards. Arguing otherwise, petitioners begin with an incomplete description of Eleventh Circuit precedents, even omitting critical discussions in the opinion below to unfairly characterize the court of appeals as out of step with all of its sister circuits. Using petitioners' own allegations as a test for other circuits' legal standards that petitioners believe are more favorable illustrates that the circuits' standards do not vary greatly in practice. Indeed, petitioners' own claims fail under the very standards they believe this Court should adopt.

A. Petitioners mischaracterize the Eleventh Circuit's precedents.

Petitioners begin by proclaiming that the Eleventh Circuit "adopts the most rigid approach to Rule 9(b)." Pet. 16. They highlight a handful of Eleventh Circuit precedents in which the court rejected FCA claims where the relators did not identify particular false claims and relied instead on vague and generic allegations of fraudulent "schemes" to try to satisfy the submission requirement. Pet. 16-17 (citing, *inter alia*, *Clausen*, 290 F.3d at 1311-13; *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013-14 (11th Cir. 2005) (per curiam); *Carrel v. AIDS Healthcare Foundation, Inc.*, 898 F.3d 1267, 1275-77 (11th Cir. 2018)). Petitioners claim

that the court below relied "heavily" on this line of authority to reject their claims. Pet. 18. Petitioners then conclude that under the Eleventh Circuit's "rule," "the existence of false claims can never be inferred from the circumstances." *Ibid.* (citing Pet. App. 11a-12a).

This myopic discussion, however, ignores a substantial and significant portion of the court of appeals' opinion. Indeed, contrary to what petitioners represent, the court began the very next paragraph by expressly stating: "To be sure, we do not always require a sample fraudulent claim because 'we are more tolerant toward complaints that leave out some particularities of the submissions of a false claim if the complaint also alleges personal knowledge or participation in the fraudulent conduct.'" Pet. App. 13a (quoting *United States ex rel. Matheny v. Medco Health Sols., Inc.*, 671 F.3d 1217, 1230 (11th Cir. 2012)). Thus, contrary to petitioners' characterization, the Eleventh Circuit permits relators to proceed in the absence of actual specific fraudulent claims when there are sufficient allegations of "personal knowledge" of, or "participation in," the alleged fraudulent conduct.

The remainder of the court of appeals' discussion focused on the lack of "indicia of reliability" in petitioners' own allegations: their claim failed not because of some overly strict legal rule, but because their allegations did not have sufficient indicia of reliability. *See* Pet. App. 13a-16a

Case law confirms that the Eleventh Circuit applies this same approach to *allow* claims in cases that *do* possess indicia of reliability. For example, in

United States ex rel. Mastej v. Health Management Associates, Inc., the Eleventh Circuit held that a relator could proceed on a claim even though the complaint did "not identify an actual representative interim claim or identify a single Medicare claim that was for a patient referred by any one of the ten doctors." 591 F. App'x 693, 706 (11th Cir. 2014). The court went on:

> The complaint also does not provide any specifics regarding (1) the dates or frequency with which the ten doctors, or any one of them, referred patients; (2) the dates or frequency with which the Defendants treated such referred patients; or (3) the dates, frequency, or amounts of any actual interim claims for such referred patients submitted by the Defendants and paid by Medicare. There is even no allegation of the number of referred patients (whether per week, per month, or per year); the number or amounts of claims for referred patients; or the amount of payments received for referred patients. Through four versions of the complaint, Mastej never pleaded any details as to the referred patients, or any specifics as to any interim claim submissions or payments for the referred patients. *At bottom, the complaint does not specify a single claim for a single referred patient by a single one of the ten doctors and thus does not sufficiently allege any actual false claim.*

Id. at 706-07 (emphasis added).

The court remarked that it would have ended its analysis there "but for the fact that such detailed

information about a representative claim is not the only way a relator can establish 'some indicia of reliability . . . to support the allegation of an actual false claim for payment being made to the Government.'" *Id.* at 707 (quoting *Clausen*, 290 F.3d at 1311, 1312 & n.21). The court then detailed the ways in which the relator alleged sufficient indicia of reliability for his claims. Unlike petitioners, Mastej was a high-level executive employed by the actual defendant and overseeing specific healthcare facilities. *Id.* at 707-08. Unlike petitioners, Mastej attended meetings at which "every patient was reviewed, *including how the services were being billed to each patient*." *Id.* at 707 (emphasis added). And unlike petitioners, Mastej was "in the very meetings where Medicare patients and the submission of claims to Medicare were discussed." *Id.* at 708; *see also United States ex rel. Walker v. R&F Props. of Lake Cty., Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005) (relator's own experience and participation in the activity provide sufficient reliability even absent allegations of specific false claims).

Petitioners' description of Eleventh Circuit authority as holding that "the existence of false claims can never be inferred from the circumstances" (Pet. 18) simply cannot be squared with *Mastej* and *Walker*. Petitioners are unhappy that the district court and the court of appeals both held that petitioners' allegations lacked the same indicia of reliability as the relators in those cases, but that is no basis for this Court's involvement (nor is it incorrect, as petitioners' allegations are markedly weaker and more conclusory).

Simply put, petitioners are wrong to characterize the Eleventh Circuit as out of step with all other circuits. That is far from accurate, as even the opinion below demonstrates.

B. The Eleventh Circuit's precedents are consistent with—if not more "lenient" than—the circuits petitioners characterize as stricter than the standard they desire, and petitioners' claims fail under each of these circuits' standards.

Petitioners identify five additional circuits[4] that they believe take a more restrictive approach on the question presented than petitioners would like. Pet. 24-28. A brief discussion of these circuits illustrates that the standards in all circuits continue to converge and, not surprisingly, that petitioners' claims would fail in each of these jurisdictions.

Beginning with the First Circuit, petitioners believe its approach is similar to the Eleventh Circuit and concede their claims would fail there as well. Pet. 24-25.

Petitioners also characterize the Eighth Circuit's rule as similar, but then claim that court "slightly softened its rule, holding that representative examples are not always required." Pet. 25. As an initial matter, that description alone recognizes that the standards applied by the circuits are continuing to evolve and converge without this Court's involvement. In any event, petitioners believe the Eighth Circuit's rule is somewhat different because

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[4] According to petitioners, this includes the First, Second, Fourth, Sixth, and Eighth Circuits.

"when a relator is 'able to plead personal, first-hand knowledge of [the defendant's] submission of false claims,' that provides the requisite 'reliable indicia that lead to a strong inference that claims were actually submitted.'" Pet. 25 (quoting *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 917 (8th Cir. 2014)). But that is indistinguishable from an accurate representation of the Eleventh Circuit's approach, as the opinion below shows. Pet. App. 13a-14a; *see also* § II.A., *supra*. Indeed, petitioners go on to describe that relators in the Eighth Circuit who have "firsthand knowledge" may sometimes succeed, but others may not, depending on the particularity of their allegations. Pet. 25-26. So too in the Eleventh Circuit, where petitioners' claims failed, but Mastej's did not. For the same reasons, petitioners' claims would fail in the Eighth Circuit too. Once again, the results turn on the sufficiency of allegations, not on the application of different legal rules.

Petitioners characterize the Sixth Circuit as similar to the Eighth, in that it requires actual claims except in "narrow" circumstances "when the relator has a high degree of billing-related knowledge. Pet. 26 (citing *United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 838 F.3d 750, 769-70 (6th Cir. 2016); *United States ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 874 F.3d 905, 920 (6th Cir. 2017)). Once again, this is indistinguishable from how the court below described the Eleventh Circuit standard. Petitioners then suggest they may be able to meet these standards because they "personally know of" respondent's billing practices. Pet. 26-27. But those were not the allegations, and petitioners

did not assert firsthand knowledge of actual billing (especially for a company that was not their employer). Rather, they claimed to have *access* to reports that could have shown billing information. Those allegations would fail the Eighth and Sixth Circuit's standards, just as they did the Eleventh's.

Relators claim the Fourth Circuit has a rule that permits a relator to allege "a pattern of conduct that would necessarily have led to submission of false claims to the government for payment." Pet. 27 (citing *United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 197 (4th Cir. 2018)). But that rule was not described or applied in *Grant*; instead, the court cited to another Fourth Circuit decision expanding on that principle. *Grant*, 912 F.3d at 197 (citing *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013)). *Nathan*, in turn, makes clear that this exception applies only in cases where relators have pleaded such specific details of the fraudulent conduct—e.g., specific dates of services, specific patients, specific amounts of claims, specific dates internal payment requests were made—that the allegations demonstrate that the conduct *necessarily* would have led to the submission of false claims. 707 F.3d at 456-58 (discussing *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180 (5th Cir. 2009); *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 30 (1st Cir. 2009); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010)). [5] The court

[5] This analysis foreshadows the discussion of the cases petitioners categorize on the more "lenient" side of the "split," including both *Grubbs* (Fifth Circuit) and *Lemmon* (Tenth

distinguished that situation from ones in which relators only have generic allegations that could have led to false claims: "we hold that when a defendant's actions, as alleged and as reasonably inferred from the allegations, *could* have led, *but need not necessarily* have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment." *Id.* at 457.

Here, of course, petitioners' allegations come nowhere near what the Fourth Circuit considers sufficient to show that claims would necessarily have been submitted to the government. Petitioners did not include specific enough allegations to state an AKS claim in the first place so, by definition, those same allegations could not meet this additional burden as well.

Finally, petitioners' discussion of the Second Circuit's case law provides perhaps the most compelling indication that the alleged "split" is, in practice, no split at all. The Second Circuit held that allegations creating a "strong inference" of the submission of false claims are reserved for situations in which "the particulars of those claims were peculiarly within the opposing party's knowledge." *United States ex rel. Chorches for Bankr. Est. of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 86

Circuit), two cases petitioners expressly include on the "other" side of the "split." Pet. 20, 23. The fact that the Fourth Circuit is not only discussing these cases, but is determining how to incorporate their principles into its own jurisprudence is further proof that the courts of appeals are all working with the same set of principles and the "standards" they are implementing continue to converge.

(2d Cir. 2017). "Those requirements ensure that those who *can* identify examples of actual claims *must* do so at the pleading stage."[6] *Ibid.*

In announcing this rule, the Second Circuit expressly stated that it was consistent with "the Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits"—those that petitioners describe as on the more "lenient" side of the "split." *Id.* at 89. But that description does not fit petitioners' narrative in this petition, so petitioners suggest they "are not so sure" about the court's characterization of its own legal rule, so petitioners instead move it to the opposite side of the ledger. Pet. 28. These semantic games illustrate the lack of any meaningful circuit split.

Indeed, the Second Circuit went through a detailed analysis of the rules announced by several circuits, including several cases involved in the so-called split. When discussing the decisions from the "stricter" side of the "split," the court wisely remarked: "However, the decisions from those Circuits are in fact more nuanced (as are those from the Circuits adopting a more 'lenient' standard) and leave open unresolved possibilities such that any 'split' between them and decisions from the more lenient circuits is not, we think, a sharp one." *Chorches*, 865 F.3d at 90. Precisely. The standards continue to converge, and any rhetorical differences are swallowed by the practical realities of how the

[6] This would categorically exclude petitioners' claims, of course, because they claim they had direct access to the reports that would have given them examples of any alleged false claims.

courts are applying their own law and incorporating principles from other circuits as well.

C. The Eleventh Circuit's precedents are consistent with the circuits petitioners characterize as more "lenient," and, in any event, petitioners' claims fail under each of these circuits' standards.

It follows from the prior discussion that the cases petitioners identify as more "lenient" do not actually demonstrate the existence of any material split in authority. Respondent will briefly discuss each circuit, but they all follow a similar path. These courts generally hold that when a relator is able to describe very specific details about the actual false claims themselves—specific dates, specific patients, payment amounts, etc.—and the necessary result of those specific allegations is a false claim being submitted to the government, a relator may be able to state a claim. But that approach is always tempered by the need for sufficiently specific and reliable allegations.

That is no different than the Eleventh Circuit's approach in this case. The court expressly stated that it does "not always require a sample fraudulent claim," and that a relator could attempt to state a claim by pleading "personal knowledge" of the false claims or "participation" in the alleged conduct. Pet. App. 13a. Petitioner's claims failed that standard because they lacked sufficient "indicia of reliability" to illustrate that any false claim was ever made to the government. *Ibid.* But, when allegations do have indicia of reliability, the Eleventh Circuit will reach the opposite outcome, despite no allegations of any specific claims. *Mastej*, 591 F. App'x at 706-07.

In other words, the Eleventh Circuit is applying—as it did here—legal standards just like those articulated by the circuits that supposedly have "lenient" standards. Petitioners' claims failed here because they lacked sufficient indicia of reliability, not due to any discrepancy in legal standards. Petitioners' claims would likewise fail in all other circuits, too.

Petitioners begin in the Seventh Circuit where (just like in the Eleventh), the "case law establishes that a plaintiff does not need to present, or even include allegations about, a specific document or bill that the defendants submitted to the Government." *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 777 (7th Cir. 2016). In describing what a relator *is* required to plead, however, the *Presser* court provided a useful description of the Seventh Circuit's prior decision in *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009). There, the relator was an engineer who claimed his employer was certifying to the government that non-compliant engine parts were being passed off as compliant. *Lusby*, 570 F.3d at 853-54. He described, with specificity, the parts sent, that the contract required certification of the parts, and that payment was received for the specific parts. *Ibid.* "The complaint names specific parts shipped on specific dates, and it relates details of payment." *Id.* at 854. The *only thing missing* was an allegation about the specific invoice itself, which the relator had not seen. *Ibid.* In that circumstance, given the specific allegations about the actual fraudulent claims themselves, the court permitted the claim to proceed. Here, as discussed, petitioners

have no specific allegations of actual claims, actual patients, payment amounts, etc.

Moreover, as the Seventh Circuit has also described, "it is not enough to allege, or even prove, that the pharmacy engaged in a practice that violated a federal regulation." *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1107 (7th Cir. 2014). "To comply with Rule 9(b) Grenadyor would have had to allege either that the pharmacy submitted a claim to Medicare (or Medicaid) on behalf of a specific patient who had received a kickback, or at least name a Medicare patient who had received a kickback . . . ." *Ibid.*[7] And because the complaint there contained no such allegations, it failed under Rule 9(b), just like petitioners' allegations would.

Petitioners then turn to the Fifth Circuit, which respondent briefly discussed above. *See* note 5, *supra*. There, "to plead with particularity the circumstances constituting fraud for a False Claims Act § 3729(a)(1) claim, a relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with *reliable indicia* that lead to a strong inference that claims were actually submitted." *Grubbs*, 565 F.3d at 190 (emphasis added). Just like the Eleventh Circuit's requirement of "indicia of reliability," the Fifth Circuit has the same requirement. And just like petitioners flunked that

[7] The Seventh Circuit's holding in *Grenadyor* would appear to fall squarely on the other side of the "split" petitioners believe exists, illustrating, once again, that the split is illusory.

test here, they would there too. Indeed, in *Grubbs*, the allegations included specific dates of specific services provided to specific patients, only the invoices themselves were missing. *Id.* at 192. That is far from petitioners' situation here.

The analysis is the same with respect to the Third Circuit, which expressly adopted the Fifth Circuit's rule that a relator must at least plead "particular details of a scheme to submit false claims *paired with reliable indicia* that lead to a strong inference that claims were actually submitted." *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156 (3d Cir. 2014) (emphasis added). So too with the Ninth Circuit, which expressly joined the Fifth Circuit and included the same, verbatim, quote of the standard. *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). So too with the D.C. Circuit, which expressly joined these other courts, and also included the same quote incorporating the same "reliable indicia" standard. *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 126 (D.C. Cir. 2015).

It is ironic that within this cluster of cases—all of which adopt the same language as one another—the governing standard is "reliable indicia," the exact standard the Eleventh Circuit applied to reject petitioners' claims here. Pet. App. 13a. Perhaps the Eleventh Circuit belongs among the more "lenient" side of the "split." Or perhaps, as the Second Circuit rightly observed, this "split" is not much of a split at all. *See Chorches*, 865 F.3d at 90.

Finally, the Tenth Circuit's position was also briefly discussed above. *See* note 5, *supra*. But much like the other cases discussed, the Tenth Circuit held

that in addition to adequately pleading a fraudulent scheme, a relator would have to "provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme." *Lemmon*, 614 F.3d at 1172. In *Lemmon*, similar to the cases in other circuits, the relator pleaded many specific details to support that inference, including specific dates of the violations, the dates of requests for payment, and details of the regulatory violations. Once again, petitioners have no similar allegations.

The circuit split identified by petitioners is illusory. Nearly all circuits apply similar standards in appropriate cases, and any disparity in outcomes is driven by differences in the pleaded facts, not by a difference in legal rules.

III. The Decision Below Is Correct.

Throughout this opposition, respondent has detailed petitioners' failure to plead with particularity the submission of any false claim to the government. Both the district court (Pet. App. 34a-43a), and the court of appeals (*id.* at 11a-16a), explained that petitioners failed to allege any specifics of the allegedly false claims. They could not identify patients; they could not identify specific kickback payments; they could not identify specific dates; and they could not identify any amounts of claims. There were simply no allegations to illustrate the "indicia of reliability" required under Eleventh Circuit precedent, or under the governing law of petitioners' more favored circuits.

Two specific additional points are worth mention regarding petitioners' discussion of the merits. First, their discussion begins with a bullet-point list of allegations they believe constituted an AKS violation.

Pet. 31. Once again, the court of appeals did not review the district court's AKS ruling, so to the extent petitioners want this Court to do so, that request is improper. Contrary to petitioners' assertion, the court of appeals did not "deem all of" petitioners' cherry-picked AKS facts "irrelevant." *See ibid.* Instead, the court focused on the lack of any allegations that would provide sufficient indica of reliability about the submission of a false claim, which was all that was necessary to affirm.

Second, based upon petitioners' argument, it appears they are requesting a rule far broader than anything any circuit has adopted. According to petitioners, so long as an FCA relator sufficiently pleads the existence of a fraudulent scheme (which, to be clear, petitioners did not do here), there is no need to plead anything else; courts should just infer the existence of false claim submission. Indeed, the only "facts" petitioners offer in their merits discussion are facts going to the alleged AKS violation itself. But even petitioners' own authorities require more.

Take, for example, the Fifth Circuit's rule that has been adopted verbatim by several other circuits petitioners find favorable. That rule requires relators to plead "particular details of a scheme to submit false claims ***paired with*** reliable indicia that lead to a strong inference that claims were actually submitted." *Grubbs*, 565 F.3d at 190 (emphasis added). Details of the scheme itself are insufficient. Relators must then provide at least reliable indicia that there were actually false claims submitted to the government. Petitioners offered none below, and they offer none here, instead wanting the Court to

adopt a rule to dilute Rule 9(b) and excuse relators from pleading any facts to establish the submission of false claims to the government.

This Court should not accept the invitation. Rule 9(b) serves as an important gatekeeper to a cause of action that exposes companies to expansive liability. "Defendants are subjected to treble damages plus civil penalties of up to $10,000 per claim." *Universal Health*, 579 U.S. at 182 (citing 31 U.S.C. § 3729(a)). That monetary liability is "essentially punitive in nature," *ibid.* (citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000)), and it "carries potentially crippling consequences, particularly to private employers." *Grant*, 912 F.3d at 197. "Rule 9(b)'s purposes of providing defendants notice of their alleged misconduct, preventing frivolous suits, and eliminating fraud actions in which all the facts are learned after discovery apply with special force to FCA claims and the accompanying presentment requirement." *Ibid.* (citing *Nathan*, 707 F.3d at 456).

Further, because "a public accusation of fraud can do great damage to a firm before the firm is (if the accusation proves baseless) exonerated in litigation, Rule 9(b) . . . requires that 'in alleging fraud . . . a party must state with particularity the circumstances constituting fraud.'" *Grenadyor*, 772 F.3d at 1105-06. To that end, "Rule 9(b)'s particularity requirement serves as a necessary counterbalance to the gravity and 'quasi-criminal nature' of FCA liability. *Grant*, 912 F.3d at 197 (citing *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006)).

The entire line of authority being discussed in this petition governs situations in which FCA relators have already failed to provide any specific claim to the government, even an example claim. This Court should not dilute Rule 9(b) even further as petitioners suggest.

IV. This Court Should Not Call For The Views Of The Solicitor General.

As already discussed, petitioners concede that the Solicitor General recommended denial of certiorari in *Nathan* because the case had been disposed of below on multiple grounds. Pet. 34. Indeed, just like here, the *Nathan* district court dismissed the case on a separate "independent ground" and the "court of appeals found it unnecessary to address that alternative holding." U.S. Amicus Br. at 21 n.8. Thus, "[e]ven if this Court granted certiorari and held that petitioner had pleaded facts sufficient to create an inference that false claims were submitted, petitioner's suit could not go forward if the court of appeals on remand were to agree with the district court" on the alternative ground. *Ibid.* The same is true here, and there is no need to call for that same view again.

Moreover, the Solicitor General's brief in *Nathan* was concerned with certain circuit decisions articulating "a per se rule that a relator must plead the details of particular false claims—that is, the dates and contents of bills or other demands for payment—to overcome a motion to dismiss." U.S. Amicus Br. at 10. As § II, *supra*, illustrates, there is not a single circuit that adheres to that view now. Even at the time of *Nathan*, "those circuits that initially endorsed the per se rule have issued

subsequent decisions that appear to adopt a more nuanced approach." *Ibid.* "The disagreement among the circuits therefore may be capable of resolution without this Court's intervention." *Ibid.* That is precisely what has happened.

Finally, although the government is the real party in interest in FCA cases, the government has a diminished interest in the pleading standard applicable to relators. Procedurally, a motion to dismiss comes shortly after the government has investigated the case and made the decision not to pursue the matter on its own. And the pleading standard, of course, is not setting the governing substantive liability standard, in which the government's interest would be more significant.

This Court should not request that the Solicitor General use its resources to express its views on a case that is unworthy of this Court's review for myriad reasons.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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