No. 21-936

In the Supreme Court of the United States

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

v.

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

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a non-textual exemption from Federal Rule of Civil Procedure 9(b) should be implied for False Claims Act cases to the otherwise universal rule requiring that a plaintiff plead with particularity and specificity the circumstances of the alleged fraud.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, respondents respectfully state:

No parent or publicly held company owns 10% or more of Fazzi Associates, Inc.'s stock.

Care Connection of Cincinnati, LLC, Gem City Home Care, LLC, and Envision Healthcare Corporation are owned, through several other entities, by Enterprise Parent Holdings, Inc., which is majority owned, indirectly, by investment vehicles managed by one or more subsidiaries of KKR & Co., Inc., which is a publicly traded corporation listed on the New York Stock Exchange. Based on United States Securities and Exchange Commission filings, there is no corporation that owns 10% or more of the NYSE-listed common stock of KKR & Co., Inc.

No parent or publicly held company owns 10% or more of Ascension's stock.

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Petitioner asks the Court to grant certiorari and establish a non-textual exemption from the generally applied heightened pleading standard of Federal Rule of Civil Procedure 9(b) for claims made by *qui tam* relators under the federal False Claims Act, 31 U.S.C. 3729 *et seq.* (FCA). There is no textual basis, either in Rule 9(b) or the FCA, for doing so. Further, because there is no genuine conflict among the federal circuits on the issue, there is no need for this Court's review. That is especially so in this case, which would fail under any articulation of the Rule 9(b) standard for the reasons explained by the Sixth Circuit.

Contrary to petitioner's assertion, the circuits' applications of Rule 9(b) in the FCA context are converging; the varying terminology employed by the courts of appeals to describe the principles that they apply in evaluating the sufficiency of FCA pleadings does not constitute a genuine split in authority. This case illustrates the point. Petitioner's claims, which were devoid of any specificity regarding patient names, attending practitioners, dates of billing and payment, or amounts billed, would not have survived scrutiny anywhere.

While petitioner advocates for what she characterizes as a more "flexible" approach to Rule 9(b), what she is actually seeking is an exception for FCA *qui tam* actions from the established Rule 9(b) standard applicable to all varieties of fraud claims. Rule 9(b) applies to many types of fraud claims beside FCA claims, and petitioner's claim would easily fail under the standard generally applied in those other contexts. But there is no basis for excepting FCA actions from the same standard under Rule 9(b) as applies generally. There is no textual basis for an exception; nor would it make sense as a matter of policy. Faithful application of Rule 9(b) to *qui tam* actions ensures that neither the defendant nor the government is burdened by unnecessary, vague allegations of fraud that merely hold defendants hostage for settlements and offer the government little help in identifying real fraud against the public fisc. If the Department of Justice believes a *qui tam* complaint is meritorious, but lacks sufficient detail to satisfy Rule 9(b), the government has ample resources to identify and plead the requisite details.

Because petitioner's complaint fails, and the Sixth Circuit's decision is correct under any articulation of the

applicable pleading standard, this case is a poor candidate for review, even if the issue otherwise warrants it. Petitioner's belated offer that she had more details that she could have included in the Amended Complaint, but chose not to, is irrelevant in light of the Sixth Circuit's rule precluding such belated amendment, where no request was made in the district court. Petitioner thus could not even benefit from a ruling by this Court loosening the standard from what the Sixth Circuit applied.

Given that there is no material division among the circuits, and petitioner could not satisfy any standard the Court might reasonably adopt, respondents respectfully submit that the petition should be denied.

STATEMENT OF THE CASE

I. PETITIONER'S ALLEGATIONS IN THE AMENDED COMPLAINT

Respondent Fazzi Associates, Inc. (Fazzi) contracts with home health agencies to perform coding reviews of patient assessment forms, known as Outcome and Assessment Information Set (OASIS) forms. Pet. App. 37a (¶ 7), 48a (¶ 35). Fazzi performs such reviews based on information contained in a patient's medical record as well as its expertise in the OASIS Manual, Coding Guidelines, and other Centers for Medicare and Medicaid Services (CMS) guidance. *Ibid.* For example, a laceration to the leg that might be coded in one fashion for a healthy young adult, might properly be coded in another fashion if the patient was an older, over-weight person who suffered from diabetes.

Respondent Envision Healthcare Holdings, Inc.[1] (Envision) is a national healthcare corporation specializing, indirectly through its subsidiary entities, in post-acute care management of patients with advanced illnesses and chronic diseases. Envision provides that care management through its affiliated home health agencies, including Respondent Gem City Home Care (Gem City) and Respondent Care Connection of Cincinnati (Care Connection). Pet. App. 37a-38a (¶¶ 8-10). Respondent Ascension Home Care has a joint venture agreement with Envision entities to provide home health care services. *Id.* at 38a (¶ 11). Fazzi began providing coding review services at Care Connection, Gem City, and other of Envision's home health agency locations starting in December 2014. *Id.* at 37a-38a, 48a (¶¶ 7, 10, 35).

Petitioner Cathy Owsley worked as a Quality Assurance Nurse at a single Envision location: Care Connection. Pet. App. 36a (¶ 6). There she was responsible for reviewing executed OASIS forms and developing from them Plans of Care. *Id.* at 36a (¶ 6), 47a-48a (¶ 34). Both the OASIS forms and Plans of Care were subsequently submitted to physicians for their review and signature, and then the information included on them was used by Care Connection to generate a Request for Anticipated Payment (RAP) form. *Id.* at 47a-48a (¶ 34). Petitioner claims that the RAP forms serve as the basis for billings submitted to government healthcare programs. *Ibid.*

Owsley alleged a scheme in which respondents defrauded the United States and the State of Indiana by

[1] In 2016, Envision Healthcare Holdings, Inc. was merged under the name Envision Healthcare Corporation.

allegedly altering and falsifying patient assessments to inflate the severity of home health patients' diagnoses and increase OASIS scores in order to qualify for higher reimbursement amounts from Medicare and Medicaid for home health care services. Pet. App. 35a (¶¶ 1-2). Petitioner did not allege that all reimbursement claims submitted by respondents were false (such as because respondents had violated a condition of participation in Medicare or Medicaid), but rather that some unidentified number of claims were false. Her pleadings demonstrate that her job did not involve personally preparing or generating the RAP forms, reviewing final claims for payment prior to their submission, delivering claims documents to the billing department, or receiving any type of confirmation that final claims had been submitted for payment. She alleged false claims were submitted at a number of facilities, but as the district court found and the circuit court affirmed, petitioner had no knowledge of events taking place beyond the single location where she worked.

Though petitioner had no direct involvement with Fazzi or its operations, petitioner asserted generally, without specificity, that "Fazzi coders were altering OASIS data by enhancing existing diagnosis codes and adding new codes that were not supported by any medical documentation." Pet. App. 48a (¶ 36). To the extent petitioner included allegations regarding specific patient claims, those allegations were de-identified to the point that no one could tell what particular patients or services petitioner was challenging. Paragraph 38 of the Amended Complaint, for example, identifies five instances, but each of these involves a patient referred to only as "Patient A," "Patient B," "Patient C," "Patient D," and "Patient E." See Pet. App. 8a (quoting Pet. App.

49a (¶ 8)); Pet. App. 14a-15a (same). For none of these pseudonymous patients did petitioner identify the nurse or physician who saw the patient, the dates of the care provided, or the coder at Fazzi who allegedly revised the coding. See *ibid.*[2]

Petitioner did not allege that she ever saw any RAP or claim actually submitted to the government for payment. She further claimed that the respondents' "falsified" OASIS scores led to higher "Star Ratings," a quality measure by which CMS categorize home health agencies. Pet. App. 52a-58a (¶¶ 46-62).

II. Course of Proceedings and Disposition Below

Petitioner filed her first complaint under seal on August 4, 2015. After investigating the allegations, the government chose not to intervene, and the complaint was unsealed. Petitioner served respondents with an amended complaint (Amended Complaint) dated March 7, 2017, alleging violations of provisions of the FCA and the Indiana False Claims and Whistleblower Protection Act, IC §§ 5-11-5.5 *et seq.* Pet. App. 61a-65a (¶¶ 71-90). Respondents moved to dismiss. Rather than seek leave to further amend to cure the deficiencies in her pleading, petitioner chose to stand on her Amended Complaint.

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[2] For one patient, identified only as "Patient G," petitioner's Amended Complaint did identify the name of the nurse who performed the assessment, date of the assessment, and name of the Fazzi coder. See Pet. App. 54a-55a (¶ 54). For that patient, however, the Amended Complaint did not allege that the patient was a Medicare or Medicaid patient, or what the condition or service was for which any claim might have been submitted. See *ibid.* As a consequence, the court of appeals did not address Patient G.

The district court held that the Amended Complaint was legally insufficient under Rule 9(b) because petitioner had (and "effectively concede[d]" she had) failed to identify any example of a fraudulent bill that was actually submitted to the government for payment. Pet. App. 10a-32a. The district court also held that petitioner omitted important details connecting her role to the actual submission of claims that might provide indicia of reliability for her allegations, and that the handful of examples in the Amended Complaint of patients whose diagnoses were allegedly "upcoded" lacked key identifying details, such as the date any claim was submitted or the amount of any payment requested. *Ibid.* The district court further held that petitioner had likewise failed to adequately plead her false record claim, reverse false claim, and conspiracy claim under the FCA, as well as her state law fraud claims. *Ibid.*

Petitioner appealed. The Sixth Circuit affirmed dismissal of the Amended Complaint. Pet. App. 1a-9a. The court stated that petitioner had alleged with some specificity a scheme to defraud through improper upcoding, and facts from which it could be inferred that any claims that included such upcoding would actually have been submitted. *Id.* at 6a-7a. Still, the Sixth Circuit held that the Amended Complaint failed at an even more basic level. Relator did not sufficiently allege details that would allow respondents to identify any specific false or fraudulent claims submitted to the government for payment. *Id.* at 6a-9a. While the court of appeals acknowledged that this burden *could* be met by "identify[ing] a representative claim that was actually submitted to the government for payment," it rejected any suggestion that such allegations were always required. *Id.* at 7a. Petitioner could, alternatively, the court held, allege facts

concerning "*particular identified claims*" together with facts "supporting a strong inference" that those claims "were submitted to the government for payment." *Ibid.* (citation omitted). Petitioner's assertion of a small number of instances of alleged upcoding failed this basic requirement. Those allegations were devoid of any dates, names, or billed amounts and thus insufficient for the defendants "reasonably to pluck" those claims from the "hundreds or likely thousands" of claims that they had submitted. *Id.* at 2a, 7a-9a. The Sixth Circuit also affirmed the district court's denial of leave to file an amended complaint because petitioner did not comply with procedural requirements. *Id.* at 9a. The court did not reach respondents' arguments for affirmance on alternate grounds.

REASONS FOR DENYING THE PETITION

I. PETITIONER VASTLY OVERSTATES THE PURPORTED SPLIT IN AUTHORITY

A. The circuits' applications of Rule 9(b) to FCA claims are converging

Contrary to petitioner's contentions, there is no material distinction among the federal circuits with respect to assessing the sufficiency of an FCA claim under Rule 9(b). Rather, as the Solicitor General predicted in 2014 in *United States ex rel. Nathan* v. *Takeda Pharmaceuticals North America, Inc.*, 707 F.3d 451 (4th Cir. 2013), cert. denied, 572 U.S. 1033 (2014), the circuits' applications of Rule 9(b) are converging.

The Solicitor General (Amicus Br. at 1) recommended denial of certiorari in *Nathan*. *United States ex rel. Nathan* v. *Takeda Pharm. N. Am., Inc.*, No. 12-1349 (Feb. 25, 2014). In doing so, the Solicitor General noted

that certain courts of appeals had originally articulated "a per se rule" inconsistent with Rule 9(b) that required a relator to "plead the details of particular false claims," but that those courts had later issued decisions reflecting a more nuanced approach at the motion to dismiss stage. *Id.* at 10. The Solicitor General accordingly concluded that any disagreement among the circuits "may be capable of resolution without this Court's intervention." *Ibid.*

In the intervening years, the circuits' positions on the appropriate standard have become even more closely aligned. The Second Circuit agrees. "[T]he reports of a circuit split are, like those prematurely reporting Mark Twain's death, 'greatly exaggerated.' As the various [c]ircuits have confronted different factual variations, differences in broad pronouncements in early cases have been refined in ways that suggest a case-by-case approach that is more consistent than might at first appear." *United States ex rel. Chorches* v. *Am. Med. Response, Inc.*, 865 F.3d 71, 89 (2d Cir. 2017).

Petitioner's discussion of the Second Circuit's case law reinforces that there is no split. The Second Circuit requires that relators "who *can* identify examples of actual claims *must* do so at the pleading stage." *Chorches*, 865 F.3d at 86 (citing *United States ex rel. Clausen* v. *Lab'y Corp. of Am.*, 290 F.3d 1301, 1314 n.25 (11th Cir. 2002)). On the other hand, where "the information that would permit further identification of [specific false] claims is peculiarly within the opposing party's knowledge," a relator must "mak[e] plausible allegations creating a strong inference that specific false claims were submitted to the government." *Ibid.* The Second

Circuit characterizes this approach as "clearly consistent with the approach taken by the Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits, which have overtly adopted a 'more lenient' pleading standard." *Id.* at 89. Yet petitioner asserts that "[t]he alignment is not perfect," and attempts to distinguish the Second Circuit's approach from that of the other circuits that petitioner characterizes as more "flexible." Pet. 19. Notably, in the petition for certiorari in *Johnson* v. *Bethany Hospice & Palliative Care LLC*, the same counsel as represents petitioner here describes the Second Circuit as among the circuits applying a more rigid approach to Rule 9(b). Cert. Pet. at 28, *Johnson* v. *Bethany Hospice & Palliative Care LLC*, petition for cert pending, No. 21-462 (filed Sept. 23, 2021). The difficulty of locating a circuit among the purported "camps," in addition to the inconsistency between how the Second Circuit views its jurisprudence and how petitioner characterizes it, reveals that petitioner's assessment of whether a case falls on one side or the other of the purported "split" is essentially in the eyes of the beholder—based on whether petitioner views the result in an individual case as favorable or unfavorable to the relator.

The Eleventh Circuit's decision in *United States ex rel. Mastej* v. *Health Management Associates, Inc.*, 591 F. Appx. 693 (2014) (unpublished), likewise shows that the split is, in practice, not a split at all. Petitioner places the Eleventh Circuit among the "rigid" circuits, highlighting decisions in which the court required a relator to identify "actual, and not merely possible or likely, claims" for payment, Pet. 22 (citing *Clausen*, 290 F.3d at 1313), and where the court held that the submission of a

fraudulent claim cannot be "inferred from the circumstances," *ibid.* (citing *Corsello* v. *Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005) (per curiam)).

But in *Mastej*, 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. Appx. at 706. Instead, the relator alleged sufficient indicia of reliability that a claim was submitted, including by pleading that he attended meetings where the submission of particular patients' claims to the government was discussed. *Id.* at 707-708. The petition notably omits *Mastej* from its analysis, perhaps because it cannot be squared with petitioner's characterization of the Eleventh Circuit's purportedly "rigid" approach and because it evidences that the Solicitor General's prediction in *Nathan* of a convergence has come to pass.

Decisions from the courts of appeals on what petitioner characterizes as the "flexible" side of the purported split likewise demonstrate this convergence. In the Ninth Circuit's decision in *Ebeid ex rel. United States* v. *Lungwitz*, for instance, the court emphasized that "even under a relaxed standard," a relator must provide sufficient detail to provide the defendant with notice of the particular conduct alleged to constitute fraud. 616 F.3d 993, 999, cert. denied, 562 U.S. 1102 (2010). The *Ebeid* court held that the relator had failed to supply the requisite detail, *ibid.*, showing that even the "flexible" approach has its limits and undermining petitioner's claim of a stark divide among the circuits.

In yet another indication of the circuits' alignment in practice on their application of Rule 9(b) to FCA

claims, the courts of appeals regularly cite to decisions on both sides of the purported split in articulating the Rule 9(b) principles they apply. In *United States ex rel. Heath* v. *AT&T, Inc.*, for instance, the D.C. Circuit, which petitioner places on the "flexible" side of the purported split, cited a decision from the Sixth Circuit, which petitioner places on the "rigid" side, for the proposition that there is "the need for some functional flexibility in reviewing a complaint's allegations." 791 F.3d 112, 126 (2015) (citing *Chesbrough* v. *VPA, P.C.*, 655 F.3d 461, 471 (6th Cir. 2011)), cert. denied 136 S. Ct. 2505 (2016).

Similarly, the Eighth Circuit, which is among the circuits petitioner characterizes as "rigid," has cited decisions from courts on the "flexible" side of the purported split for the proposition that "a relator can satisfy Rule 9(b) 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.' " See *United States ex rel. Thayer* v. *Planned Parenthood of the Heartland*, 765 F.3d 914, 917-918 (2014) (quoting *United States ex rel. Grubbs* v. *Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009); citing *United States ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010)). Accordingly, as was true when this Court denied certiorari in *Nathan*, any lingering disagreement among the circuits on this issue "may be capable of resolution without this Court's intervention." U.S. Amicus Br. at 10, *Nathan*, *supra* (No. 12-1349).

B. Petitioner's attempt to locate the Sixth Circuit decision in this case among the most "rigid" of the courts of appeals misreads the opinion below and ignores its nuanced precedent

The Sixth Circuit's individualized application of Rule 9(b) to the facts as alleged in particular cases is consistent with opinions rendered in its sister circuits, including those that petitioner characterizes as more "flexible." Pet. 10. The Sixth Circuit's nuanced, fact-specific application of the standard betrays petitioner's attempted categorization.

The Sixth Circuit's decision in *United States ex rel. Prather* v. *Brookdale Senior Living Communities, Inc.*, 838 F.3d 750 (2016), illustrates the same convergence noted above for other circuits. There, the Sixth Circuit cited the Solicitor General's views in *Nathan* and noted that any split between the circuits "is not nearly as deep as it first appears." *Id.* at 772.

As articulated in *Prather*, the Sixth Circuit requires that a complaint "sufficiently allege the submission of particular requests for anticipated payment to the government." 838 F.3d at 769. But a relator need not do this by identifying an actual false claim that was submitted. *Ibid.* When a relator "is unable to produce an actual billing or invoice," then that relator may still sufficiently plead a false claim if the complaint alleges "facts which support a strong inference that a claim was submitted." *Chesbrough* v. *VPA, P.C.*, 655 F.3d 461, 471 (6th Cir. 2011). To do so, a relator's allegations must make it "highly likely that a claim was submitted to the government for payment." *Id.* at 472. In adopting this approach, the Sixth Circuit expressed agreement with the more

"stringent" circuits, but also noted that its approach "is not inconsistent with the many cases on the more permissive side." *Prather*, 838 F.3d at 773.

Notably, courts within the Sixth Circuit have, in appropriate cases, allowed FCA claims to proceed past a motion to dismiss even absent the identification of a specific false claim submitted to the government for payment, but where the complaint provided the kinds of details that were lacking in petitioner's pleading. In *United States ex rel. White* v. *Mobile Care EMS & Transportation, Inc.*, decided after this case, for example, the district court contrasted the allegations with petitioner's here to note that the *White* allegations provided sufficient detail—including dates of the services that were allegedly upcoded and the billed amounts—to allow the defendants to identify the claims at issue. No. 15-CV-555, 2021 WL 6064363, at *3, *14 (S.D. Ohio Dec. 21, 2021). And, consistent with *Prather*, a complaint providing "a log showing the patient information, date of service, amount, and payment status" for billings presented to the government has also been upheld as sufficient. See *United States ex rel. Lynch* v. *Univ. of Cincinnati Med. Ctr., LLC*, No. 18-CV-587, 2020 WL 1322790, at *27-29 (S.D. Ohio Mar. 20, 2020).

These cases and others demonstrate that, whatever subtle differences might exist in its articulation of the standard, the Sixth Circuit's application of Rule 9(b) is entirely consistent with the reasoning applied by the courts of appeals that petitioner places on the other side of the alleged circuit split, namely, the Seventh, Fifth, Third, Ninth, Tenth, D.C., and Second Circuits. Pet. 11.

Like the Sixth, the Seventh Circuit "do[es] not demand voluminous *documentation* substantiating fraud

at the pleading stage. All that is necessary are sufficiently detailed *allegations*." *United States ex rel. Prose* v. *Molina Healthcare of Ill., Inc.*, 17 F.4th 732, 741 (2021), petition for cert. pending, No. 21-1145 (filed Feb. 14, 2022). Thus, just as the Sixth Circuit held in *Prather*, it is sufficient in the Seventh Circuit for a relator to plead a "strong inference" that a defendant submitted false claims for reimbursement, provided that the complaint "plausibly supports the inference that [a defendant] included false information" in a claim to the government. *Id.* at 740-741. While an inference can suffice, relators must "inject[] precision and some measure of substantiation into their allegations of fraud." *United States ex rel. Presser* v. *Acacia Mental Health Clinic*, 836 F.3d 770, 776 (7th Cir. 2016).

In *Prose*, the Seventh Circuit held that the relator supplied precision to support a strong inference that false claims were submitted because the relator pled the "when, where, how, and to whom" details of the alleged fraud such that the defendant was alerted to the allegedly false claims for payment. 17 F.4th at 741. The Sixth Circuit applied the same analysis in *Prather* and similarly concluded that the Rule 9(b) standard was met. 838 F.3d at 768-771. There, the relator offered sufficiently detailed allegations regarding specific patients and "spreadsheets listing information regarding hundreds of other claims" that she alleged were submitted, along with details of her involvement in reviewing the final allegedly fraudulent claims for payment, such that the defendant could identify the claims at issue. *Id.* at 758, 768-771. Those details were precisely what were missing in the Amended Complaint here.

Similarly, in the Fifth Circuit, "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." *United States ex rel. Colquitt* v. *Abbott Lab'ys*, 858 F.3d 365, 372 (2017) (quoting *Grubbs*, 565 F.3d at 190). The Third Circuit expressly joined the Fifth Circuit in *Foglia* v. *Renal Ventures Management, LLC*, 754 F.3d 153, 156 (2014) (quoting *Grubbs*, 565 F.3d at 190).

Just as in the Sixth Circuit, however, in the Fifth and Third Circuits, a relator must at least provide factual specifics as to the fraudulent scheme alleged. Indeed, in *Grubbs*, the relator's allegations included specific dates of specific services provided to specific patients; only the invoices themselves were missing. 565 F.3d at 192. The Sixth Circuit examined petitioner's pleading in this case for such details, but found them notably lacking. Pet. App. 8a-9a. And in *Colquitt*, the court held that statistical probabilities supported a strong inference that the hospitals at issue submitted allegedly false claims, but the relator had failed to plead the alleged scheme with sufficient particularity. 858 F.3d at 372. The Sixth Circuit approached this case analogously, but concluded that, while petitioner had pled a fraudulent scheme, that was insufficient under Rule 9(b) because her theory of liability related to a particular subset of false claims, which she failed sufficiently to identify; unlike in *Colquitt*, petitioner did not allege a theory of false claims under which statistical probabilities might be sufficient to establish that false claims were submitted.

Again like the Sixth Circuit, the Ninth Circuit does not require a relator to "identify representative examples of false claims to support every allegation" *if* she can "allege particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *United States* v. *United Healthcare Ins.*, 848 F.3d 1161, 1180 (2016) (internal quotations omitted). However, as in the Sixth Circuit: "[G]eneral allegations—lacking any details or facts setting out the 'who, what, when, where, and how'" of the alleged fraudulent claim are insufficient to state a claim. *Ebeid*, 616 F.3d at 1000. In *Ebeid*, the Ninth Circuit expressly declined "[t]o jettison the particularity requirement" of Rule 9(b) simply based on the relator's lack of access to billing-related information. *Id.* at 999. Here, the Sixth Circuit noted that there was even less reason to relieve petitioner of that burden; the court noted petitioner's familiarity with billing-related practices but her failure, despite this access and knowledge, to plead the required detail. Pet. App. 7a-9a.

In the Tenth Circuit, FCA claims must "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." *United States ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (2010). Just as in the Sixth Circuit, the Tenth Circuit's standard is based upon the strict premise that a viable FCA claim must be supported by factual specifics that demonstrate plausibility. In *Lemmon*, the relator pled many specific details to support the inference that false claims were submitted, including the dates of requests for payment. *Ibid.* Once again, petitioner's complaint here included no such details.

The D.C. Circuit, much like others, holds that "[t]he central question * * * is whether the complaint alleges 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" *Heath*, 791 F.3d at 126 (quoting *Grubbs*, 565 F.3d at 190). Again, like the Sixth Circuit, the D.C. Circuit demands particularity and reliable indicia of fraudulent claim submission, sufficient to give the defendant notice. As the D.C. Circuit noted in *Heath*, "Rule 9(b) does not inflexibly dictate adherence to a preordained checklist of 'must have' allegations," *id.* at 125, rather, "the point * * * is to ensure that there is sufficient substance to the allegations to both afford the defendant the opportunity to prepare a response and to warrant further judicial process." *Ibid.* Just so, and this is what petitioner failed to do.

The Sixth Circuit's decision below similarly disavowed any notion that certain types of details were essential to satisfy the Rule 9(b) standard, emphasizing instead the need for the complaint to put defendants on notice of the fraud alleged against them—which is the essential function of Rule 9(b):

> Owsley identifies neither the dates on which she reviewed the OASIS forms for these patients, nor the dates of any related claims for payment, nor the amounts of any of those claims. *That is not to say that our precedents require a plaintiff in one case to allege all the facts found sufficient in another; the facts of a particular case should not be mistaken for its rule. Instead, the touchstone is whether the complaint provides the defendant with notice of a specific representative claim that the plaintiff thinks was fraudulent.* And the diagnostic information in Owsley's complaint is simply

> not enough for Care Connection, Fazzi, or Envision reasonably to pluck out—from all the other claims they submitted—the five that Owsley was alluding to here.

Pet. App. 8a-9a (internal citations omitted; emphasis added). Consistent with *Heath*, the decision below expressly rejects the kind of rigid analysis that petitioner ascribes to the Sixth Circuit.

Finally, as discussed above at pp. 9-10, the Second Circuit requires that relators "who *can* identify examples of actual claims *must* do so at the pleading stage." *Chorches*, 865 F.3d at 86 (citing *Clausen*, 290 F.3d at 1314 n.25). But, the Second Circuit further holds that allegations creating a "strong inference" of the submission of false claims can suffice *if* "the particulars of those claims were peculiarly within the opposing party's knowledge." *Ibid.* In *Chorches*, the court held that the insider relator satisfied Rule 9(b) by pleading exactly the kind of detail that was lacking in petitioner's complaint here—*e.g.*, particular dates of services—and that, unlike in this case, information regarding particular bills submitted for government reimbursement was "peculiarly within the knowledge of [the defendant]." *Id.* at 82.[3] There is, accordingly, good reason to believe that the details alleged by the relator in *Chorches* would have been sufficient to survive a motion to dismiss in the Sixth Circuit as well.

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[3] Though not applicable here where petitioner is an insider relator, Sixth Circuit precedent interpreting Rule 9(b) has, like *Chorches*, acknowledged that a complaint need not be dismissed when certain facts that were peculiarly in the hands of defendants are omitted from the complaint. See, *e.g.*, *Michaels Bldg. Co.* v. *Ameritrust Co.*, 848 F.2d 674 (1988).

Irrespective of differences among the ways that the various circuits describe their analyses of the sufficiency of FCA pleadings, they uniformly apply Rule 9(b) to the facts as alleged in particular FCA complaints to determine whether an FCA claim has been pleaded with requisite specificity. Those facts drive the outcome on a motion to dismiss, not any particular circuit's articulation of the legal standard. As this Court grants certiorari to resolve legal questions, rather than to review application of settled law to specific facts, there is no warrant for this Court's review here.

II. The Rule 9(b) Pleading Standard Should Not Be Relaxed For FCA Cases

Petitioner does not dispute that Rule 9(b) applies to complaints filed under the FCA which, as its title indicates, is a fraud statute. The FCA imposes liability on persons or entities that receive or attempt to receive payments from the federal government, or to avoid making them, by false or fraudulent means. As the previous discussion illustrates, every federal circuit that analyzes the sufficiency of FCA pleadings does so with reference to Rule 9(b). And this Court has itself recognized that "False Claims Act plaintiffs must also plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) by, for instance, pleading facts to support allegations of materiality." *Universal Health Servs.* v. *United States ex rel. Escobar*, 579 U.S. 176, 195 n.6 (2016).

Federal Rule of Civil Procedure 9(b) provides that: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." This heightened pleading standard requires a complaint to identify "the time, place, and contents of the

false representations or omissions, as well as the identity of the person making the misrepresentation or failing to make a complete disclosure and what the defendant obtained thereby." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1297 (3d ed. 2008). As this Court has noted in other contexts, Rule 9(b) requires "greater particularity in all averments of fraud or mistake." *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 513 (2002); see also *Leatherman* v. *Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993).

Rule 9(b), like all of the Federal Rules of Civil Procedure, "provide[s] uniform guidelines for all federal procedural matters," thereby ensuring the consistent adjudication of disputes throughout the federal courts. See *Sayre ex rel. Estate of Sayre* v. *Musicland Grp., Inc.*, 850 F.2d 350, 354 (8th Cir. 1988). A survey of cases from across the country applying Rule 9(b)'s heightened pleading standard outside of the FCA context confirms that the standard applied by the Sixth Circuit here was fully in keeping with how the Rule has consistently been applied to other fraud claims. In the securities fraud context, for example, the Fifth Circuit (which petitioner puts on the "flexible" side of the purported split) has stressed that a plaintiff pleading a false or misleading statement or omission as the basis for a securities fraud claim must: "(1) specify * * * each statement alleged to have been misleading, *i.e.*, contended to be fraudulent; (2) identify the speaker; (3) state when and where the statement was made; (4) plead with particularity the contents of the false representations; (5) plead with particularity what the person making the misrepresentation obtained thereby; and (6) explain the reason or rea-

sons why the statement is misleading, *i.e.*, why the statement is fraudulent." *ABC Arbitrage Plaintiffs Grp.* v. *Tchuruk*, 291 F.3d 336, 350 (2002). The Ninth Circuit, which petitioner again places on the more "flexible" side of the purported split, similarly has held in a securities fraud action that "Rule 9(b) requires particularized allegations of the circumstances constituting fraud, including identifying the statements at issue and setting forth what is false or misleading about the statement and why the statements were false or misleading at the time they were made." *In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 876 (2012). These are precisely the same details that petitioner failed to include in connection with the purported instances of fraudulent upcoding. Courts have applied a similar standard to common-law fraud claims, *SFS Check, LLC* v. *First Bank of Del.*, 774 F.3d 351, 358-359 (6th Cir. 2014), and fraud claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), *In re Sumitomo Copper Litig.*, 104 F. Supp. 2d 314, 319 (S.D.N.Y. 2000) (emphasizing the importance of strict application of Rule 9(b) in RICO cases where a defendant can be unfairly branded a "racketeer" without obstructing plaintiffs with valid claims from initiating such actions).

Given that Rule 9(b) has consistently been construed in other contexts to require the plaintiff to allege the "who, what, when, where, why, and how" of the alleged fraud—which petitioner's Amended Complaint fails to do—petitioner's argument amounts to seeking a non-textual exemption to this heightened pleading standard for non-intervened FCA suits. But there is no basis for the Court to engraft such an exception onto Rule 9(b). Petitioner points to nothing in the text of the Rule or the FCA that would excuse a *qui tam* relator

from the need to satisfy the same standard applicable to other plaintiffs. Further, the purpose behind Rule 9(b)'s standard—*i.e.*, to "give notice to defendants of the plaintiffs' claim, to protect defendants whose reputation may be harmed by meritless claims of fraud, to discourage 'strike suits,' and to prevent the filing of suits that simply hope to uncover relevant information during discovery," see *United States ex rel. Karvelas* v. *Melrose-Wakefield Hosp.*, 360 F.3d 220, 226 (1st Cir.) (internal quotations omitted), cert. denied, 125 S. Ct. (2004)—applies with equal if not stronger force to suits under the FCA, which allows for treble damages and possible debarment from healthcare programs. See also *Nathan*, 707 F.3d at 456 (stating Rule 9(b) furthers the important goals of "providing notice to a defendant of its alleged misconduct"; "preventing frivolous suits"; "protect[ing] defendants from harm to their goodwill and reputation"; and "eliminat[ing] fraud actions in which all the facts are learned after discovery").

Petitioner seems to be seeking a more lenient pleading standard *for qui tam relators* than would apply to the government when it intervenes in FCA cases. After all, the government, with access to all the claims information and to pre-complaint investigatory resources that no private party enjoys, has no need for a more lenient standard. But there is no reason that the Rule 9(b) standard should be weakened merely because the United States chooses to partially assign its cause of action to a relator.

Indeed, there are strong policy reasons to insist that a *qui tam* relator satisfy the traditional Rule 9(b) standard as a prerequisite to proceeding under the FCA's *qui tam* provisions. Those provisions envision, as part of the

government's decision on intervention, a thorough investigation of the relator's fraud allegations. See Justice Manual, Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act, § 932 (detailing Department of Justice procedure to assess whether to intervene in *qui tam* suit). The *qui tam* relator proceeds alone, in a non-intervened case, only after the government has reviewed the relator's allegations and determined not to intervene to take over the litigation or to request dismissal of the relator's suit. Rule 9(b) serves a critical role in facilitating that investigation and determination by the government; relators who fail to plead particularized details of any false claims are unlikely to be able to supply insider information that the government lacks or to help the government to uncover serious fraud. See *United States ex rel. Hirt* v. *Walgreen Co.*, 846 F.3d 879, 882 (6th Cir. 2017) ("If Hirt lacked the information to do even this, he was not the right plaintiff to bring this *qui tam* claim."). The FCA gives a relator a part of the United States' recovery precisely because the relator has brought incidents of fraud to the government's attention about which it would not otherwise have been aware. This presumes that relators *have access* to the information necessary to make out an allegation of fraud. It is hardly an excuse to give relators an *easier* standard than is applicable even to private parties in other contexts.

Faithful application of the Rule 9(b) standard also assists the government by ensuring that its resources are spent pursuing serious allegations of fraud, rather than supporting an opportunistic gadfly seeking to capitalize on what is rightfully the government's claim or to shake down a government contractor for a cost-of-defense settlement. Since the *qui tam* amendments to the

FCA became effective in 1986, FCA filings have consistently risen, and the government has declined to intervene in or otherwise pursue approximately 80% of FCA filings—cases that, upon investigation, have been found wanting by the Department of Justice.[4] U.S. Dep't of Just., Civ. Div., *False Claims Act Fiscal Year 2021 Statistics* (Feb. 1, 2022), https://www.justice.gov/opa/press-release/file/1467811/download (detailing the number of FCA suits, including whether Department of Justice intervened or declined, filed from October 1, 1986 through September 30, 2021). Yet these non-intervened cases, while making up the vast majority of FCA actions, account for a very modest portion of the government's FCA recoveries. In the FCA cases where the Department does decide to intervene, or where it originates, it sees particularly high returns, but much less so in non-intervened cases. See U.S. Dep't of Just., Off. of Pub. Affs., *Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021* (Feb. 1, 2022), https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.

Relaxing the pleading standard would gratuitously give a free pass to petitioner, and other relators, to make FCA claims compelling expensive and time-consuming discovery without a prior demonstration of a basis in law to litigate, while needlessly burdening FCA defendants

[4] The government has never argued that it faces any difficulty in satisfying Rule 9(b)'s heightened pleading requirements in the cases where it does takes charge. Nor has it argued that Rule 9(b) should be amended through normal processes or by judicial fiat, as petitioner implicitly argues here.

without any benefit (and indeed imposing extra monitoring costs) for the government. With an arbitrarily-reduced threshold to survive a motion to dismiss, relators would defeat the orderly review process that currently exists, thereby allowing them to bring claims that the government already has determined are meritless, in the hopes that discovery and document production might uncover materials that may cause a defendant to settle a matter, or even more likely, impose large processing costs that lead to otherwise unjustifiable settlements. This precise situation is what Rule 9(b) was intended to avoid. *Chesbrough*, 655 F.3d at 466 ("The heightened pleading standard is also designed to prevent fishing expeditions, to protect defendants' reputations from allegations of fraud, and to narrow potentially wide-ranging discovery to relevant matters." (citations and internal quotations omitted)).

Application of the general Rule 9(b) standard, by contrast, would not harm the government's legitimate interests. The government may, under the FCA, intervene at any time. The Department of Justice is thus able to step in to file a complaint in intervention that provides the requisite details to satisfy Rule 9(b) where it deems it appropriate. The Court should, for these reasons, decline petitioner's invitation to amend Rule 9(b) ex cathedra simply to save otherwise inadequate complaints.

III. Petitioner's Case Provides A Poor Vehicle For This Court To Resolve Any Alleged Circuit Split

As demonstrated above, petitioner's False Claims Act allegations are fundamentally deficient, and she likely would have fared as badly in any other circuit as she has in the Sixth. Thus, her petition provides a poor

vehicle for this Court to resolve any alleged circuit split, assuming arguendo that there were a consequential one. Petitioner brought an excessively vague and broad complaint straying well beyond the one home health agency at which she worked and providing no specificity with respect to the billing for, or the care provided (or not provided) to patients, or any demonstrable factual basis that might have led to a supportable inference of fraud. Her admitted lack of first-hand knowledge as to the most critical allegations, and failure even to proffer additional evidence or supportable factual detail or move to amend her pleading before the district court, demonstrates that her situation would not improve were this case to proceed.

Whether the pleading standard is characterized as "rigid" or "flexible," petitioner's complaint would be deficient. Alleging an unspecified and unbounded fraudulent scheme without making a particularized allegation regarding the false or fraudulent claims that were purportedly submitted would be an insufficient pleading under any circuit court's standard. A blanket assertion like petitioner's that a defendant sought excessive reimbursement for some of its services without being able to describe with some level of specificity the circumstances of the allegedly fraudulent claims is not enough to survive a motion to dismiss. *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr.* v. *Walgreen Co.*, 631 F.3d 436 (7th Cir. 2011).

Petitioner's complaint did not just fail 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. While petitioner alleged upcod-

ing, she failed to identify any specifics, for example, describing what patients were affected, what claims were formulated or even submitted for payment, who provided the billed services or to whom and when the services were purportedly provided. Although these deficiencies might have been curable in theory by the provision of or reference to specific documents or personal observations, detailing matters like "the date of submission"; "the amount sought"; "the dates on which specific violations took place"; "the dates on which payment requests were submitted" and "the specific site area where the violations occurred," *Lemmon*, 614 F.3d at 1172, petitioner admittedly provided none. As the Sixth Circuit noted, petitioner's allegations regarding "Patient A" through "Patient E" not only failed to identify the patient by name, they also did not identify the nurse or doctor who provided the services, the dates of those services, or the name or dates of the Fazzi reviewers who suggested changes to the coding. Pet. App. 8a-9a. In sum, as the circuit court noted: "Owsley's complaint provided few details that would allow the defendants to identify any specific claims—of the hundreds or likely thousands they presumably submitted—that she thinks were fraudulent." *Id.* at 2a.

The Sixth Circuit centered its analysis on Rule 9(b)'s core purpose in identifying petitioner's failure to plead basic details, holding that "the touchstone is whether the complaint provides the defendant with notice of a specific representative claim that the plaintiff thinks was fraudulent." Pet. App. 2a.

The defects in petitioner's pleading get to the fundamental purpose of Rule 9(b): notice to defendants of the claims against them. Even if, contrary to the points

above, there were an argument for reducing the pleading burden for relators who lack access to certain information, this is not a case in which such an exception would apply. This is not a case that hinges on whether a relator had access to a defendant's files or specific knowledge of billing practices. Here, petitioner alleged she was familiar with Care Connection's billing practices and claimed to know of specific instances of upcoding relating to particular patients. In other words, petitioner purports to be an insider equipped with all the relevant detail to meet the Rule 9(b) standard—the who, what, when, where, and how details of the alleged representative false claims—but she simply chose not to provide those details in the pleading.

The petition attempts to explain that failure by claiming it stems from an effort "[t]o comply with patient health privacy laws [by] not identify[ing] these patients by name." Pet. 5-6. Said otherwise, petitioner acknowledges she had more detail but chose not to plead it, leaving respondents unfairly to guess which claims are at issue. (There are, of course, ways to comply with confidentiality laws while also satisfying the purposes of Rule 9(b).) Nor does this purported excuse explain why petitioner did not include the names of the doctor or nurse or the dates of service. Critically, the Sixth Circuit indicated that information not included on the claim for payment—like the dates petitioner reviewed the OASIS forms—might suffice to provide respondents with adequate notice. Pet. App. 8a-9a. That information was within petitioner's knowledge, but she failed to plead it.

Petitioner was an *insider* with access to information that *could have* satisfied Rule 9(b). This stands in stark contrast to many of the cases that petitioner attempts to

analogize to this one, wherein the relator was an *outsider* and, as a result, the matter survived a motion to dismiss. See, *e.g.*, *Prose*, 17 F.4th 732 (holding that an outsider *qui tam* relator with no access to defendant's files had satisfied the pleading standard). Here, petitioner (an employee who claims to have been the "last set of eyes" on Care Connection's "[p]lans of [c]are before the resulting RAP [was] produced," Pet. App. 47a (¶ 34)—in other words, a consummate insider) failed to identify in her pleading critical details that she apparently possessed but chose not to plead. The Sixth Circuit's decision below does not purport to address how it would apply Rule 9(b) in the case of an outsider relator like that in *Prose*. Nor does the Seventh Circuit's decision in *Prose* shed any light on how it would apply Rule 9(b) to an insider relator who apparently intentionally omitted details in her possession that were critical to providing notice to a defendant.

Notably, the petition also does not present a scenario where a relator alleges that an entire category of claims was false. See, *e.g.*, *Lemmon*, 614 F.3d at 1170-1173 (holding that relator satisfied pleading standard where relator alleged defendant falsely certified compliance with government contract requirements and therefore claims submitted pursuant to the contract were all false); *United States ex rel. Silingo* v. *WellPoint, Inc.*, 904 F.3d 667 (9th Cir. 2018) (holding that non-employee relator had satisfied pleading standard where relator alleged that specific diseases and conditions were routinely falsely diagnosed and improperly included in risk adjustment data that was attested to and submitted to the government by certain of the defendants). Instead, petitioner's theory is that specific claims were inflated—

a theory that necessarily hinges on the particulars of those allegedly false claims, which she does not provide.

The deficiency of petitioner's case as a vehicle for this Court to review Rule 9(b)'s heighted fraud pleading standard in the context of an FCA case is further demonstrated by the fact that, under the rules of the Sixth Circuit, she could not further amend her complaint. Because petitioner failed to "move[] formally to amend" or "proffer[] a proposed amended complaint," as is procedurally necessary in the Sixth Circuit, the Sixth Circuit, citing *Begala* v. *PNC Bank*, 214 F.3d 776, 783-784 (6th Cir. 2000), affirmed the district court's ruling that this failure was an additional ground for dismissal. Pet. App. 9a. Petitioner does not ask this Court to review that ruling.

As a result, petitioner would be permanently stuck in a situation where, at most, she vaguely described only a handful of claims for unidentified patients who received care on unidentified dates by unidentified practitioners whose services were billed on unidentified dates for unidentified amounts. As the Sixth Circuit properly concluded: "the diagnostic information in Owsley's complaint is simply not enough for [respondents] reasonably to pluck out—from all the other claims they submitted—the five that Owsley was alluding to here." Pet. App. 9a. Under that court's rules, even if Owsley's case were remanded for further consideration, she would not have—and could never produce—any further specific factual allegations to plead.

CONCLUSION

Respondents respectfully submit that there is no material split among the circuit courts of appeals concerning the application of Federal Rule of Civil Procedure 9(b) to claims brought under the federal False Claims Act, that there is no reason for this Court to create a more lenient special rule applicable to False Claims Act cases than the heightened fraud pleading standard generally applicable under Rule 9(b), and, in any event, petitioner's case is a deficient vehicle for resolution of the issue presented. For these reasons, the petition should be denied.

Respectfully submitted,

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