No. 21-936

In the Supreme Court of the United States

UNITED STATES, ET AL., EX REL. CATHY OWSLEY,
PETITIONER

v.

FAZZI ASSOCIATES, INC., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether petitioner's complaint in her qui tam action under the False Claims Act, 31 U.S.C. 3729 *et seq.*, pleaded respondents' submission to the government of false claims for payment with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b).

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

A. Legal Background

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, imposes civil liability for a variety of deceptive practices involving government funds and property. *Inter alia*, the Act imposes liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1)(A). The "claim[s]" subject to the FCA include "any request or demand * * * for money

or property" that is "presented to an officer, employee, or agent of the United States." 31 U.S.C. 3729(b)(2)(A)(i).

The Attorney General may bring a civil action if he finds that a person has violated the FCA. 31 U.S.C. 3730(a). Alternatively, the Act permits private parties (known as relators) to bring suit "in the name of the Government" against persons who have violated the Act, 31 U.S.C. 3730(b)(1), through a mechanism commonly known as a "qui tam" action. When a qui tam suit is filed, the government may "elect to intervene and proceed with the action" during an initial 60-day period (which may be extended "for good cause shown") while the relator's complaint remains under seal. 31 U.S.C. 3730(b)(2) and (3). If the government intervenes during the seal period, "the action shall be conducted by the Government." 31 U.S.C. 3730(b)(4)(A). If the government declines to intervene, the relator may proceed with the litigation, 31 U.S.C. 3730(b)(4)(B), though the district court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3). If a qui tam action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

2. This qui tam action alleges that respondents, providers of home health services and related entities, violated the FCA by submitting inflated claims for reimbursement to federal healthcare programs including Medicare, which provides federally funded health insurance to eligible elderly and disabled persons. See Medicare Act, 42 U.S.C. 1395 *et seq.* In general, when a healthcare provider performs a Medicare-covered service for an eligible patient, the provider submits a claim for payment to a federal contractor, which reimburses

the provider on behalf of the United States for the service in accordance with the Medicare Act and applicable regulations. See 42 U.S.C. 1395h.[1]

Medicare coverage includes some home health services—that is, services that are provided at a patient's home and furnished or arranged by private home health agencies. See 42 U.S.C. 1395f, 1395d(a)(3), and 1395x(m). Medicare reimburses a home health agency using a prospective payment system, under which a qualified physician or registered nurse assesses the patient at the outset of the episode of care, and the home health agency requests and obtains an initial payment based on a projection of the cost of the patient's care. See 42 C.F.R. 484.45, 484.55. When the care concludes, the home health agency submits a final claim to obtain a residual final payment. 42 C.F.R. 484.205.

In order for home health agencies' services to be eligible for Medicare reimbursement, each patient must be regularly assessed by a qualified medical professional. See 42 C.F.R. 484.55. That assessment evaluates, among other things, the patient's eligibility for home health services, her "current health, psychosocial, functional, and cognitive status," and her care needs. 42 C.F.R. 484.55(c). During the assessment, a qualified professional must complete the Outcome and Assessment Information Set (OASIS), a tool used by the Cen-

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[1] Petitioner alleges that respondents also submitted claims for reimbursement for patients covered by two other government healthcare programs: Medicaid and CHAMPUS/TRICARE. See Pet. App. 36a, 42a; see also *id.* at 49a-50a. But petitioner has not identified any relevant distinctions between the programs, and she describes Medicare as the program through which the government "principally" pays for the home health services at issue in this case. Pet. 2. This brief accordingly focuses on Medicare.

ters for Medicare & Medicaid Services to collect data about patients. See 42 C.F.R. 484.55(c)(8). OASIS data are used to establish a patient's plan of care and to complete a home health agency's requests for reimbursement. See 42 C.F.R. 484.60, 484.205(c).

B. The Present Controversy

1. Respondents are healthcare organizations, home health agencies, and a contractor (Fazzi Associates) that those entities hired to handle their healthcare coding. Pet. App. 11a-12a. Petitioner worked as a quality assurance nurse at Care Connection of Cincinnati, one of the respondent home health agencies. *Id.* at 4a.

Petitioner alleges that, during her employment with Care Connection, respondents regularly violated the FCA by using fraudulent patient data to submit inflated claims for Medicare reimbursement. Pet. App. 47a. Specifically, petitioner alleges that, after she and other medical professionals completed care assessments for patients, she observed Fazzi Associates employees "altering OASIS data by enhancing existing diagnosis codes and adding new codes that were not supported by any medical documentation." *Id.* at 48a; see *id.* at 47a-57a. Petitioner further alleges that respondents "use[d] the fraudulently altered OASIS data to complete Plans of Care" that called for higher rates of reimbursement and then submitted those plans to Medicare. *Id.* at 48a; see *id.* at 48a-50a. Petitioner alleges that she reported Fazzi's fraudulent "upcoding" practice to her supervisors but was ignored or dismissed. See *id.* at 50a-51a, 54a-55a. Petitioner also alleges that respondents' fraudulent upcoding has been occurring since approximately December 2014; that it affects nearly half of respondents' OASIS forms; and that it extends beyond

Care Connection to other home health agencies that use Fazzi's services. *Id.* at 5a, 22a-23a.

2. Petitioner filed the current (amended) complaint in March 2017. Pet. App. 34a-66a. As relevant here, petitioner alleges that respondents presented false claims for payment to the government in violation of the FCA, 31 U.S.C. 3729(a)(1)(A), by submitting claims for Medicare reimbursement based on falsified patient assessments and diagnoses. Pet. App. 61a; see *id.* at 46a-60a. The United States investigated petitioner's allegations and declined to intervene. *Id.* at 18a.

The district court dismissed petitioner's complaint with prejudice. Pet. App. 10a-33a. The court held that petitioner had failed to plead "with particularity," pursuant to Federal Rule of Civil Procedure 9(b), that respondents "present[ed], or caus[ed] to be presented, a false [or] fraudulent claim for payment or approval." Pet. App. 21a (quoting 31 U.S.C. 3729(a)(1)(A)); see *id.* at 21a-27a. The court found that, while petitioner had "provide[d] examples of allegedly altered OASIS data," *id.* at 23a, she "ha[d] not directly identified an example of a fraudulent bill that was submitted to the government," *ibid.*, or alleged that she was involved in submitting false claims for payment, *id.* at 25a.[2]

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[2] Petitioner's operative complaint additionally included claims for making or using false records in violation of the FCA, 31 U.S.C. 3729(a)(1)(G); conspiring to violate the FCA, 31 U.S.C. 3729(a)(1)(C); and violating the Indiana Medicaid False Claims and Whistleblower Protection Act, Ind. Code Ann. § 5-11-5.7-2(b) (LexisNexis 2020). Pet. App. 62a-65a. The district court determined that petitioner's failure to allege with particularity that respondents had submitted false claims for payment also required dismissal of her other federal FCA claims and her Indiana state-law claim. *Id.* at 27a-31a.

3. The court of appeals affirmed. Pet. App. 1a-9a.

Taking all of petitioner's factual allegations as true, Pet. App. 2a, the court of appeals held that petitioner's complaint "describe[d], in detail, a fraudulent [upcoding] scheme" by respondents, *id.* at 6a. The court also found, however, that petitioner had "ma[de] little effort * * * to 'identify any specific claims' that Care Connection submitted pursuant to the scheme." *Id.* at 7a (quoting *Sanderson* v. *HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir.), cert. denied, 549 U.S. 889 (2006)). The court observed that the FCA "attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the claim for payment." *Id.* at 6a (quoting *United States ex rel. Sheldon* v. *Kettering Health Network*, 816 F.3d 399, 411 (6th Cir. 2016)). "For that reason," the court stated, the Sixth Circuit "has imposed a 'clear and unequivocal requirement that a relator allege specific false claims when pleading a violation of' the Act." *Ibid.* (quoting *Sheldon*, 816 F.3d at 411).

The court of appeals found that petitioner had not appropriately utilized either of the two methods that the court had previously accepted for pleading the submission of a false claim. The most common method is for an FCA relator to "identify a 'representative claim that was actually submitted to the government for payment.'" Pet. App. 7a (quoting *United States ex rel. Ibanez* v. *Bristol-Meyers Squibb Co.*, 874 F.3d 905, 915 (6th Cir. 2017), cert. denied, 138 S. Ct. 2582 (2018)). But petitioner "did not do that here." *Ibid.*

"Alternatively," the court of appeals explained, an FCA relator may "'otherwise allege facts—based on personal knowledge of [the defendant's] billing practices—supporting a strong inference that *particular identified*

claims were submitted to the government for payment.'" Pet. App. 7a (quoting *United States ex rel. Prather* v. *Brookdale Senior Living Communities, Inc.*, 838 F.3d 750, 771 (6th Cir. 2016)). But here, although petitioner's complaint "describe[d] several instances of upcoding," she "did not allege facts that identify any specific fraudulent claims" for payment that were submitted in connection with those patients. *Ibid.*; see *id.* at 7a-8a. The court observed that it had previously recognized various ways for an FCA relator to create a strong inference supporting the submission of specific false claims, *id.* at 8a-9a, and it described "the touchstone" of the inquiry as "whether the complaint provides the defendant with notice of a specific representative claim that the plaintiff thinks was fraudulent," *id.* at 9a. But the court found that petitioner had not provided adequate notice here because her complaint did not enable respondents to "pluck out"—from "the hundreds or likely thousands" of claims for payment that respondents had "presumably submitted" to the government—any particular claim that petitioner alleges was fraudulent. *Id.* at 2a, 9a. The court therefore concluded that petitioner's complaint "did not satisfy Civil Rule 9(b)." *Id.* at 9a.[3]

DISCUSSION

Petitioner urges this Court to grant review "to resolve" what she describes as "a longstanding circuit split about how Rule 9(b) works in FCA cases." Pet. 10. Petitioner also suggests (Pet. 20-21; Pet. Reply Br. 1-3) that the Sixth Circuit requires every FCA relator to

[3] The court of appeals also affirmed the district court's decision to dismiss petitioner's other claims and to deny petitioner leave to amend her complaint a second time. Pet. App. 9a.

plead, in addition to the details of a fraudulent scheme, the details of specifically identified false claims submitted to the government. If the courts of appeals were applying a per se rule that every relator must plead the details of specific false claims, this Court's intervention might be warranted. In recent years, however, the courts have largely converged on an approach that allows relators *either* to identify specific false claims *or* to plead other sufficiently reliable indicia supporting a strong inference that false claims were submitted to the government.

The Sixth Circuit's recent decisions, read as a whole, have adhered to that standard. The divergent outcomes in the courts of appeals that petitioner views as evidence of disarray simply reflect courts' application of a fact-intensive standard to a range of different types of allegations. Further review by this Court would not likely produce greater uniformity or materially clarify the Rule 9(b) pleading standard for FCA complaints. And the court of appeals' fact-bound conclusion that petitioner's particular allegations were insufficient to satisfy Rule 9(b) does not warrant this Court's review.

The petition for a writ of certiorari should be denied.

A. The Court Of Appeals Held That An FCA Complaint Must Allege Facts Supporting A Strong Inference That The Defendant Submitted False Claims, And Must Give The Defendant Adequate Notice Of Particular Claims That Are Alleged To Be False

Petitioner asserts (Pet. 20) that the Sixth Circuit has adopted a "rigid approach" to Rule 9(b) in FCA cases and that the decision below is representative of that approach. Petitioner points to the court of appeals' statement that "[i]t is not enough" for an FCA relator to plead facts describing a fraudulent scheme "'in

detail.'" Pet. Reply Br. 2 (quoting Pet. App. 6a). Rather, the relator must "allege specific false claims" and identify "at least one false claim with specificity." *Ibid.* (quoting Pet. App. 6a). Petitioner distills from those statements a firm rule that relators must "plead details of false claims in addition to details of fraudulent schemes," and that "the presentment of claims [cannot] be inferred from circumstances." Pet. 10.

In an invited amicus curiae brief in *United States ex rel. Nathan* v. *Takeda Pharmaceuticals North America, Inc.*, 572 U.S. 1033 (2014) (No. 12-1349), the United States (at 10) opposed "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." The government explained that such a "per se rule is unsupported by Rule 9(b) and undermines the FCA's effectiveness as a tool to combat fraud against the United States." *Ibid.* Instead, the government argued, "a relator's complaint satisfies Rule 9(b) if it '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.'" *Id.* at 11-12 (quoting *United States ex rel. Grubbs* v. *Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)) (brackets omitted).

The court of appeals in this case did not adopt a per se rule like the one the United States opposed in *Nathan*. To be sure, some of the court's statements, read in isolation, could suggest an unduly strict view of Rule 9(b) in FCA cases. See Pet. App. 6a ("[O]ur circuit has imposed a 'clear and unequivocal requirement that a relator allege specific false claims when pleading a[n FCA] violation.'") (citation omitted); *ibid.* ("[T]he identification of at least one false claim with specificity is an

indispensable element of a[n FCA] complaint.") (citation omitted). But the court went on to clarify that there is more than one way for an FCA relator to satisfy Rule 9(b). *Id.* at 7a.

While the "default" approach is to "identify a 'representative claim that was actually submitted to the government for payment,'" Pet. App. 7a (citation omitted), the decision below does not limit relators to that approach. The court of appeals endorsed its prior holding in *United States ex rel. Prather* v. *Brookdale Senior Living Communities, Inc.*, 838 F.3d 750 (6th Cir. 2016), that a relator can satisfy Rule 9(b) by "otherwise alleg[ing] facts—based on personal knowledge of billing practices—supporting a strong inference that *particular identified claims* were submitted to the government for payment," Pet. App. 7a (quoting 838 F.3d at 771), so long as the relator gives the defendant adequate "notice of a specific representative claim that the plaintiff thinks was fraudulent," *id.* at 9a. The court did not narrowly cabin the types of factual allegations that can create such a "strong inference"; rather, it identified some allegations that it had found sufficient in prior cases but also stated that such allegations are "not * * * require[d]" and that "the facts of a particular case should not be mistaken for its rule." *Id.* at 7a, 9a.

Taken as a whole, the court of appeals' opinion is best read to hold that an FCA relator must *either* plead details concerning specific false claims for payment presented to the government *or* identify another reliable basis for concluding that such claims were submitted and give the defendant sufficient notice of a claim that was allegedly fraudulent. That standard is not significantly different from the one that the United States endorsed in *Nathan*, see p. 9, *supra*, and that several

courts of appeals have applied in recent years, see Part B, *infra*.

Other Sixth Circuit decisions confirm that the court does not impose the sort of rigid Rule 9(b) requirements that the United States criticized in *Nathan*. In *Prather*, the court held that Rule 9(b) can be satisfied not only with details about particular false claims, but also by pleading "specific allegations of the defendant's fraudulent conduct" that "necessarily le[a]d to the plausible inference that false claims were presented to the government." 838 F.3d at 773 (quoting *United States ex rel. Nathan* v. *Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013), cert. denied, 572 U.S. 1033 (2014)). The *Prather* court observed that, while it had in the past required a relator to "'identify an actual false claim,'" it had also "consistently suggested that the exception" to that general rule "would apply" if the relator "'has pled facts which support a strong inference that a [false] claim was submitted.'" *Id.* at 769, 771 (quoting *Chesbrough* v. *VPA, P.C.*, 655 F.3d 461, 471 (6th Cir. 2011)); see also *United States ex rel. Sheldon* v. *Kettering Health Network*, 816 F.3d 399, 413-414 (6th Cir. 2016); *United States ex rel. Marlar* v. *BWXT Y-12, L.L.C.*, 525 F.3d 439, 446-447 (6th Cir. 2008); *United States ex rel. Bledsoe* v. *Community Health Sys., Inc.*, 501 F.3d 493, 504 n.12 (6th Cir. 2007).

The *Prather* court "confirm[ed] [its] adoption of that exception" and "formally applied it." 838 F.3d at 771-772. The court held that, although the relator there had not "sufficiently allege[d] the submission of particular requests for anticipated payment," *id.* at 769, she had satisfied Rule 9(b) by pleading sufficient facts based on her personal billing-related knowledge to establish a "strong inference" that the defendant had submitted

specific false claims for payment, *id.* at 769-771. The court based that conclusion on the relator's detailed allegations concerning the dates of care and of physician certifications for various patients, *id.* at 769-770, and on additional detailed allegations creating a "strong inference" that Medicare claims for those patients had ultimately been submitted, *id.* at 770. Since *Prather*, the Sixth Circuit has reiterated that an FCA relator can satisfy Rule 9(b) with "allegations showing 'specific personal knowledge' supporting a 'strong inference that a false claim was submitted.'" *United States ex rel. Ibanez* v. *Bristol-Meyers Squibb Co.*, 874 F.3d 905, 914 (2017) (quoting *Prather*, 838 F.3d at 769) (brackets omitted), cert. denied, 138 S. Ct. 2582 (2018).

Petitioner states (Pet. Reply Br. 3) that *Prather*'s rule is "not the same as" the one adopted by other courts of appeals because other circuits do not "require a plaintiff to identify particular claims based on her own personal knowledge of billing-related practices." But the Sixth Circuit has acknowledged the possibility that a relator can satisfy Rule 9(b) even without "personal knowledge of [the defendant's] claim submission procedures" if she "allege[s] facts 'from which it is highly likely that a claim was submitted to the government.'" *United States ex rel. Hirt* v. *Walgreen Co.*, 846 F.3d 879, 882 (6th Cir. 2017) (citation omitted); see *Chesbrough*, 655 F.3d at 471-472 (recognizing that "other situations"—beyond personal billing-related knowledge—could potentially "support a strong inference that a [false] claim was submitted"); *United States ex rel. Eberhard* v. *Physicians Choice Lab. Servs., LLC*, 642 Fed. Appx. 547, 553 (6th Cir. 2016) ("[P]ersonal knowledge is only one way in which a plaintiff may establish a 'strong inference' that false claims were submitted."). The court

has also recognized that "'particular' allegations of fraud may demand different things in different contexts." *Hirt*, 846 F.3d at 881. Those statements, especially in combination with the court's reminder that "the facts of a particular case should not be mistaken for its rule," Pet. App. 9a, show that the Sixth Circuit recognizes a variety of types of factual allegations by which FCA relators can creates a strong inference that the defendant submitted false claims.

Petitioner next observes (Pet. Reply Br. 3) that *Prather* is the court of appeals' only decision applying the "exception" it recognized, and she dismisses *Prather* as "the exception that proves the Sixth Circuit's generally rigid rule." But the court's other decisions have not undermined *Prather*; they have simply concluded, based on the particular facts alleged in the relevant complaints, that the relators had not given the defendants adequate notice of particular false claims that were alleged to be fraudulent. See, *e.g.*, Pet. App. 9a (finding that petitioner did not offer allegations like those that were found sufficient in *Prather*); *Hirt*, 846 F.3d at 881-882 (similar). Those fact-bound conclusions do not cast doubt on the court's continuing adherence to the descriptions in *Prather* and other Sixth Circuit opinions of the Rule 9(b) standard for FCA cases.

Finally, the court below affirmed the dismissal of the complaint in this case primarily because petitioner's complaint did not do "enough for [respondents] reasonably to pluck out—from all the other claims they submitted—the [ones] that [petitioner]" alleges violated the FCA. Pet. App. 9a. As stated above, the court described the "touchstone" for an adequate FCA complaint as whether it "provides the defendant with notice of a specific representative claim that the plaintiff

thinks was fraudulent." *Ibid.* Here, the court found that, while petitioner had described various instances of upcoding, *id.* at 7a-8a (quoting *id.* at 48a-50a ¶ 38), she had not included any details that would enable respondents to identify the claims for payment that were associated with those instances, or any other claims "that she thinks were fraudulent," *id.* at 2a; see *id.* at 8a-9a. Requiring that fraud allegations give defendants "notice of the particular misconduct which is alleged to constitute the fraud charged," so that the defendants can adequately "defend against the charge," is not an unduly rigid approach to Rule 9(b). *Ebeid* v. *Lungwitz*, 616 F.3d 993, 999 (9th Cir.) (citation omitted), cert. denied, 562 U.S. 1102 (2010); see *Foglia* v. *Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156-157 (3d Cir. 2014) (endorsing the United States' brief in *Nathan* and stating that "the more 'nuanced' approach" to Rule 9(b) in FCA cases can "provide[] defendants with fair notice of the plaintiffs' claims") (citation and footnote omitted; brackets in original).

In sum, when the decision below is read as a whole and against the backdrop of relevant Sixth Circuit precedent, that decision does not reflect an outlier standard for applying Rule 9(b) to FCA complaints. And the court of appeals' fact-bound conclusion that petitioner's particular allegations here were insufficient does not warrant this Court's review.

B. The Courts Of Appeals Have Largely Converged On The Rule 9(b) Pleading Standard In FCA Cases

Petitioner contends (Pet. 25) that the question presented is the subject of an "open and acknowledged circuit split" that is "entrenched." After surveying multiple decisions applying Rule 9(b) in FCA cases, however, courts of appeals have observed that "the reports of a

circuit split are * * * 'greatly exaggerated.'" *United States ex rel. Chorches for the Bankr. Estate of Fabula* v. *American Med. Response, Inc.*, 865 F.3d 71, 89 (2d Cir. 2017); see *Prather*, 838 F.3d at 772 ("This split is not nearly as deep as it first appears."). "As the various Circuits 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." *Chorches*, 865 F.3d at 89.

1. The United States' 2014 amicus brief in *Nathan*, *supra* (No. 12-1349), explained (at 10-14) that, while some courts of appeals had erroneously articulated a per se rule requiring all FCA relators to plead the details of specific false claims, those courts "ha[d] not consistently adhered to th[at] rigid understanding of Rule 9(b)," so that the "extent of the disagreement among the lower courts" was "uncertain" and might "be capable of resolution without this Court's intervention." Since then, the specific disagreement that was the focus of the United States' brief in *Nathan* has been largely resolved. No court of appeals now applies a per se rule requiring every FCA complaint to identify representative examples of specific false claims. See *Prather*, 838 F.3d at 772 ("Every circuit" that previously required relators to plead specific false claims "has retreated from such a requirement in cases in which other detailed factual allegations support a strong inference that claims were submitted."); see also Br. in Opp. 8-12.

Instead, the courts of appeals have largely converged on a more flexible standard, asking whether an FCA relator's complaint—in addition to providing detailed allegations describing the defendant's fraudulent scheme—contains some "indicia of reliability" to sup-

port a strong inference that the defendant submitted false claims for payment to the government. The Eleventh Circuit has endorsed that standard, notwithstanding petitioner's characterization of that court (Pet. 20) as having taken a "rigid approach to Rule 9(b)." See, *e.g.*, *United States ex rel. Clausen* v. *Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) (stating that "some indicia of reliability must be given in the complaint to support the allegation of *an actual false claim* for payment being made to the Government"), cert. denied, 537 U.S. 1105 (2003). Five other courts of appeals have articulated essentially the same standard, under which an FCA complaint satisfies Rule 9(b) if it "alleg[es] 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 (5th Cir.); see *United States ex rel. Strubbe* v. *Crawford County Mem'l Hosp.*, 915 F.3d 1158, 1163 (8th Cir.), cert. denied, 140 S. Ct. 553 (2019); *United States ex rel. Customs Fraud Investigations, LLC.* v. *Victaulic Co.*, 839 F.3d 242, 258 (3d Cir. 2016), cert. denied, 138 S. Ct. 107 (2017); *United States ex rel. Heath* v. *AT&T, Inc.*, 791 F.3d 112, 126 (D.C. Cir. 2015), cert. denied, 579 U.S. 927 (2016); *Ebeid*, 616 F.3d at 998-999 (9th Cir.).

The Seventh Circuit has not used the term "reliable indicia," but its articulation of the Rule 9(b) standard does not appear to be meaningfully different. In *United States ex rel. Mamalakis* v. *Anesthetix Mgmt. LLC*, 20 F.4th 295 (7th Cir. 2021), the court stated that an FCA relator can plead the submission of false claims "by including particularized factual allegations that give rise to a plausible inference of fraud," even if the relator "has not identified specific false invoices." *Id.* at

301; see *ibid.* (stating that it is "'essential [for a relator] to show a false statement,'" but "the relator need not 'produce the invoices (and accompanying representations) at the outset of the suit'") (quoting *United States ex rel. Lusby* v. *Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009)).[4]

The Tenth Circuit has similarly stated that an FCA relator "need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme." *United States ex rel. Polukoff* v. *St. Mark's Hosp.*, 895 F.3d 730, 745 (2018) (citation omitted), cert. dismissed, 139 S. Ct. 2690 (2019). The Second Circuit's standard is similar with one caveat: it holds that relators can satisfy Rule 9(b) with "plausible allegations * * * that lead to a strong inference that specific claims were indeed submitted," as opposed to "details of actual bills or invoices submitted to the

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[4] Another Seventh Circuit panel recently invoked *Mamalakis* for the proposition that, "[u]nder Rule 9(b), * * * to defeat dismissal, 'specific representative examples' of false submissions are required." *United States ex rel. Sibley* v. *University of Chicago Med. Ctr.*, 44 F.4th 646, 656 (2022) (quoting 20 F.4th at 301-302); see *id.* at 659. But the *Sibley* panel appears merely to have recognized that, in *Mamalakis*, it was the relator's alleged "specific representative examples of fraudulent billing" that caused that complaint to satisfy Rule 9(b), 20 F.4th at 301-302, and to have determined that similarly specific allegations were necessary to give indicia of reliability to the scheme at issue in *Sibley*. See *Sibley*, 44 F.4th at 656 ("*Mamalakis* teaches that the relators here must allege specific examples of patient debts."). Reading *Mamalakis* to hold that specific examples of invoices are *always* required would mistake the facts of that case for its rule, and would contradict the Seventh Circuit's explicit—and repeated—holding that a relator "need not 'produce the invoices * * * at the outset of the suit.'" 20 F.4th at 301 (quoting *Lusby*, 570 F.3d at 854).

government"—"so long as" the relator alleges "that information about the details of the claims submitted are peculiarly within the opposing party's knowledge." *Chorches*, 865 F.3d at 93.

Although the First, Fourth, and Sixth Circuits have placed greater emphasis than other courts of appeals on FCA relators pleading details regarding specific false claims for payment, each of those courts has recognized that such details are not invariably required.

As discussed above, the Sixth Circuit has stated that it usually requires specific allegations concerning the defendant's claims for payment, but it has also allowed a relator to satisfy Rule 9(b) by pleading other facts "supporting a strong inference that particular identified claims were submitted to the government for payment." *Prather*, 838 F.3d at 771; see pp. 10-13, *supra*.

The First Circuit generally expects relators to "allege the essential particulars of at least some [specific] false claims," but it recognizes that, "where the defendant allegedly 'induced *third parties* to file false claims with the government[,] a relator could satisfy Rule 9(b) * * * without necessarily providing details as to each false claim'" by alleging "the details of the scheme" combined with "'reliable indicia that lead to a strong inference that claims were actually submitted.'" *United States ex rel. Nargol* v. *DePuy Orthopaedics, Inc.*, 865 F.3d 29, 39 (2017) (citation and ellipsis omitted), cert. denied, 138 S. Ct. 1551 (2018). The Fourth Circuit likewise generally requires relators to describe specific false claims, but it has also permitted relators to "allege a pattern of conduct that would '*necessarily* have led to the submission of false claims' to the government for payment." *United States ex rel. Grant* v. *United Air-*

lines Inc., 912 F.3d 190, 197 (2018) (brackets and citation omitted).

In sum, the circuit disagreement identified in the United States' *Nathan* brief has now subsided, and the courts of appeals permit at least some FCA relators to plead the defendant's submission of false claims for payment even without identifying representative examples or specific details of the defendant's claims.

2. Petitioner contends (Pet. Reply Br. 1-2) that the courts of appeals continue to disagree over whether, "when the plaintiff pleads a fraudulent scheme with particularity, it is plausible to infer that false claims were presented to the government," or whether instead the relator must "*also* plead the presentment of specific false claims with particularity." But no court of appeals holds that alleging a fraudulent scheme with particularity is sufficient by itself to support a strong inference that the defendant submitted false claims. Instead, the courts consider each FCA complaint individually to determine whether it contains reliable indicia to support that inference. Compare, *e.g.*, *Prather*, 838 F.3d at 773 (yes), with *Hirt*, 846 F.3d at 882 (no).

To the extent that petitioner has identified disagreement among the courts of appeals, that disagreement concerns the kinds of allegations that can adequately substitute for representative examples in supplying reliable indicia that false claims were submitted. Cf. Pet. Reply Br. at 1, *Johnson* v. *Bethany Hospice & Palliative Care LLC*, No. 21-462 (filed Dec. 28, 2021) (arguing that "the split is over what a relator must plead if she lacks representative examples, *i.e.*, what counts as 'reliable indicia'") (emphasis omitted). But it is unsurprising that various courts of appeals, in the course of applying the fact-intensive "reliable indicia" standard,

have reached divergent results across cases involving a wide range of factual allegations.

In addition, while courts of appeals have expressed different degrees of willingness to infer the submission of false claims from probability, circumstantial evidence, and logic, the courts' statements generally appear to reflect different judges' subjective assessments of the reliability of the particular allegations at issue, rather than a choice among competing legal standards. Compare, *e.g.*, *Chorches*, 865 F.3d at 84-85 (discussed at Pet. 16-19) (finding that complaint created "a strong inference that" "false claims were submitted to the government" by alleging, *inter alia*, "specific instances in which [defendant's] supervisors expressly asked for a [patient report] to be falsified in order to qualify a [service] for Medicare reimbursement"), with *Strubbe*, 915 F.3d at 1164-1165 (discussed at Pet. 22) (finding that complaint lacked "sufficient indicia of reliability leading to a strong inference that claims were actually submitted" where relators "did not include any details about [defendant's] billing practices," did not allege "personal knowledge of the billing system or the submission of false claims," and "pleaded many key facts upon information and belief, without providing a 'statement of facts on which the belief is founded'") (citation omitted), and *Carrel* v. *AIDS Healthcare Found., Inc.*, 898 F.3d 1267, 1277 (11th Cir. 2018) (discussed at Pet. 23-24) (finding that relators "failed to offer sufficient 'indicia of reliability . . . to support'" the submission of false claims for payment where they "allege[d] a mosaic of circumstances that are perhaps consistent with their accusations that the [defendant] made false claims," but "fail[ed] to allege with particularity that these back-

ground factors ever converged and produced an actual false claim") (citation omitted).

Moreover, the question that once divided the circuits—whether qui tam relators are categorically required to identify illustrative false claims in order to plead fraud with the "particularity" that Rule 9(b) requires—presented the courts with a binary choice and was susceptible of definitive resolution through a yes-or-no answer. As events transpired, the courts of appeals have effectively resolved that question in the negative without this Court's intervention. See pp. 15-19, *supra*. By contrast, the question "What allegations will provide sufficient indicia of reliability in cases where illustrative false claims are unavailable?" is not subject to any single answer. The existing disuniformity in lower court decisions does not appear to be materially greater than what would be expected from the application of a fact-intensive standard. And under any formulation of the governing standard that this Court might announce, lower courts would still be required to evaluate whether each FCA complaint satisfies Rule 9(b) "on a case-by-case basis." *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1358 (11th Cir. 2006).

C. The Court Of Appeals' Decision Does Not Warrant This Court's Review

As a result of the courts of appeals' general convergence toward a fact-driven and flexible Rule 9(b) standard in FCA cases, the question of the appropriate pleading standard does not warrant this Court's review. Even if every court of appeals articulated precisely the same standard for applying Rule 9(b) in FCA cases, the application of such a general standard to each case's individual facts would necessarily produce some variations and differing glosses. This Court's review there-

fore could not reasonably be expected to produce a bright-line rule or otherwise eliminate all disuniformity among the courts of appeals.

Moreover, the question presented arises only in the subset of FCA cases where the plaintiff can describe in detail the defendant's fraudulent scheme, but is unable to plead details concerning the false claims for payment that the defendant submitted to the government. FCA claims litigated by the United States should rarely if ever present that circumstance, because the United States will typically have access to any claims for payment that the defendant submitted. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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