No. 25-347

In the Supreme Court of the United States

UNITED STATES OF AMERICA AND STATE OF MICHIGAN EX REL. ERIK OLSEN, M.D., WILLIAM BERK, M.D., AND SAJITH MATTHEWS, M.D.,

Petitioners,

v.

TENET HEALTHCARE CORPORATION; DETROIT MEDICAL CENTER,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The petition explained that the circuits are divided over whether Rule 9(b) requires False Claims Act relators to identify specific false claims at the pleading stage, even when they have detailed firsthand knowledge of a fraudulent scheme but lack access to billing records in defendants' exclusive control. Respondents do not dispute that the Question Presented has generated petitions from both relators and defendants, three requests for the Solicitor General's views, and explicit acknowledgments of the split from circuits on both sides. *See* BIO 8-9. Respondents' opposition only confirms that certiorari is warranted.

Respondents suggest there has been further convergence since the last CVSG, *see* BIO 13, but they are wrong about the cases they choose to address and say nothing about *United States ex rel. Senters v. Quest Diagnostics Inc.*, 2025 WL 1951196 (11th Cir. July 16, 2025). *See* Pet. 14-15. A petition presenting the question is forthcoming in that case next week. *See* Appl. To Extend Time to File Pet. for Writ of Cert., No. 25A541 (Nov. 6, 2025).

Respondents' vehicle objections confirm the issue is cleanly presented. They fault petitioners for declining to contest binding circuit precedent, but this Court does not require litigants to mount quixotic challenges. And the Sixth Circuit passed on the question when it affirmed that "petitioners failed to plead any false claim with particularity," declining to reach respondents' alternative grounds. BIO 6. This Court "permit[s] review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. 36, 41 (1992).

Respondents argue that petitioners failed to allege the "who" of the fraud because they cannot identify who "keys in the bills." *See* BIO 14-15 (quoting Pet. App. 14a). But this assumes the Sixth Circuit's answer to the Question. Circuits on the other side of the split do not require plaintiffs to identify specific billing employees. And the FCA imposes liability on anyone who "presents, *or causes to be presented*," a false claim and who acts with "deliberate ignorance" or "reckless disregard" of the falsity, 31 U.S.C. §§ 3729(a)(1)(A) (emphasis added), 3729(b)(1)(A).

It is time to finally resolve the split—here and/or in *Senters*. At a minimum, the Court should not deny the petition without asking this administration if it still believes the conflict will resolve itself.

ARGUMENT

I. The Question Presented Divides The Circuits, Frequently Recurs, And Is Outcome-Determinative.

1. Respondents argue the Solicitor General correctly advised in 2022 that the circuits have "converged," BIO 11, but they cannot dispute that circuits on both sides have long said otherwise. *See, e.g.*, *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155 (3d Cir. 2014) (the "various Circuits disagree as to what a plaintiff ... must show at the pleading stage to satisfy the 'particularity' requirement of Rule 9(b) in the context of a claim under the FCA"); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010) ("We do not ... require a relator to identify representative examples of false claims to support every allegation, although we recognize that this requirement has been adopted by some of our sister circuits."); *see also United States ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 874 F.3d 905, 924 (6th Cir.

2017) (Stranch, J., dissenting in part because, "as our sister circuits have concluded, particularity is not necessarily synonymous with representative examples").

Qui tam defendants also recognize the circuit division and agree the answer to the Question Presented matters to the outcome of real cases. The defendants in *Molina Healthcare of Illinois, Inc. v. Prose*, No. 21-1145 (U.S. 2022), for example, explained that the Solicitor General's convergence theory elided the Sixth Circuit's requirement that inferences support "*particular identified*" claims. Petr. First Supp. Br. 3 (quoting *United States ex rel. Owsley v. Fazzi Assocs., Inc.*, 16 F.4th 192, 194-97 (6th Cir. 2021)). The Sixth Circuit does not permit relators to proceed on an inference that *some* false claims were submitted—they must identify *which* claims. *See Molina*, Petr. Second Supp. Br. 3-4. The *Molina* defendants thus argued that "the Eleventh and Sixth Circuits would have dismissed the complaint in [that] case, while the Seventh Circuit would have allowed the claims in *Bethany Hospice* and *Owsley* to advance into discovery." Petr. First Supp. Br. 2. "Everyone but the Solicitor General agrees that the circuits are hopelessly divided." *See id.* at 3 ("Relators, defendants, and amici all agree this is an 'entrenched' split."). Disagreement among the circuits "cannot simply be chalked up to 'fact-intensive' variations among cases"; it is "'a choice among competing legal standards.'" *Molina*, Petr. Second Supp. Br. 4 (cleaned up). When both sides of the "v." agree the split is real and outcome-determinative, it probably is.

And respondents have nothing to say about commentary cited in the petition, which agrees the split is real, deep, entrenched, and important to both sides of the *qui tam* bar. *See* Pet. 26 (citing Jennifer

Doherty, *Attys Hope for Clarity with Justices' Interest in Fraud Claims*, Law360 (Oct. 15, 2021)).

Legal observers continue to document the split and plead for this Court to intervene. In 2023, Gibson Dunn put out an alert warning clients that the circuits' standards "exist on a spectrum, ranging from the Eleventh Circuit and Sixth Circuit," which require "details of a specific false claim," to "the Seventh ... , Third, Fifth, Ninth, Tenth, and D.C. Circuits[,] which have held that Rule 9(b) may be satisfied if the relator makes specific factual allegations as to a scheme to defraud and facts constituting reliable indicia that false claims resulted from the scheme." Gibson Dunn, *2022 Year-End False Claims Act Update* (Feb. 8, 2023), https://tinyurl.com/36xc2sv2. "By denying the petitions for writ of certiorari in *Bethany Hospice*, [*Molina*], and *Owsley*," the firm cautioned, this "Court ha[d] effectively declined to resolve this circuit split ... and as a result left open the possibility that plaintiffs will forum-shop for the most favorable pleading standard when pursuing FCA cases." *Ibid.*

Troutman Pepper Locke similarly cautioned that "the continued lack of uniformity in pleading requirements poses problems for companies that face increased risk of finding themselves subject to FCA lawsuits and concomitant federal investigations." Callan G. Stein et al., *Cos. Need Clarity on Divergent FCA Pleading Standard*, Troutman Pepper Locke (Mar. 20, 2023), https://tinyurl.com/2zmd2b4a. The firm thus advised that "companies must contend with this pleading circuit split and plan accordingly." *Ibid.*

2. Respondents can't contest the Question's importance. They acknowledge this Court has thrice called for the Solicitor General's views, *see* BIO 7-8, and do not dispute that Rule 9(b) challenges arise in

thousands of FCA cases, *see* Pet. 26-27. And they ignore *United States ex rel. Senters v. Quest Diagnostics Inc.*, 2025 WL 1951196 (11th Cir. July 16, 2025), where the Eleventh Circuit dismissed detailed scheme allegations because the relator could not identify specific false claims. *Id.* at *3-4. A petition in that case is forthcoming and will explain that the same complaint likely would survive in the Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits. *See* Appl. To Extend Time to File Pet. for Writ of Cert., No. 25A541, at 4-6 (Nov. 6, 2025).[1]

3. Respondents suggest the differing articulations produce only "fact-bound" differences. BIO 10-11, 17. The allegations here refute that claim. Respondents implemented a policy of "boarding" admitted patients they knew or should have known were not receiving inpatient care, as tracked through electronic systems and daily reports. Pet. App. 3a-6a. In the Fifth Circuit, relators need not show at the pleading stage that the fraud scheme "actually caused a claim to be presented to the Government." *See, e.g.*, *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 193 (5th Cir. 2009). In the Second Circuit, such allegations "support a strong inference that claims were submitted," and petitioners' inability to access billing records "peculiarly" within respondents' control would be excused. *See United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 86, 91 (2d Cir. 2017) (quotation marks omitted). Yet in the Sixth Circuit, those same allegations "require[] dismissal." Pet. App. 8a (footnote omitted).

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[1] The Court could hold this case for resolution of *Senters*, hold *Senters* for this one, or grant both petitions and consider them together.

The nation's leading emergency physician organizations confirm this reality. "Emergency physicians frequently witness boarding" and "may also know that their hospitals' billing protocols include submissions of claims for inpatient care for boarded patients." AAEM & ACEP *Amici Curiae* Br. 12. "But because emergency physicians generally lack visibility into hospitals' billing records, such physicians are powerless, in five federal circuits, to protect patients by blowing the whistle." *Ibid.*

Respondents invoke various circuit-specific "exceptions," BIO 11-13, but vast numbers of relators cannot proceed in cases that would survive in other fora—and that is the problem. *See supra* pp. 2-4. "There can be no question that the application of" the "default rule in the Eleventh, Fourth, Sixth and Eighth Circuits .... will continue to result in a much higher rate of *qui tam* dismissals than in the Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits, which do not require examples of specific fraudulent claims." *See* Kenneth M. Abell & Katherine Kulkarni, *Justices Should Resolve FCA Cases' Rule 9(b) Circuit Split*, AEL Law (June 28, 2022), https://tinyurl.com/2swjne3c.

Respondents cling to *United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 838 F.3d 750 (6th Cir. 2016). *See* BIO 9, 14. But *Prather* cabins itself to relators with personal "billing-related" knowledge. *See* 838 F.3d at 769-73. In the circuit's own words, "the only time" the Sixth Circuit "has ever applied [this] personal knowledge exception ... was in *Prather* itself," nearly a decade ago. *See Bristol-Myers Squibb*, 874 F.3d at 915. Respondents have not identified any counterexample. These are not features of a "flexible" standard—they are ad hoc carveouts that only underscore the split's arbitrary consequences.

Outside of the Sixth Circuit, respondents claim *Vargas v. Lincare*, 134 F.4th 1150 (11th Cir. 2025), and *Flanagan v. Fresenius*, 142 F.4th 25 (1st Cir. 2025), are "consistent with" convergence. *See* BIO 13. Not so. *See* Pet. 23. As the petition explained, in *Vargas*, the Eleventh Circuit allowed *only* the claim where relators had billing records providing "specific instances" with "dates, amounts, and billing codes"—and dismissed three other fraud theories against the same defendant because relators lacked such records despite their detailed insider knowledge. 134 F.4th at 1160-62. In *Flanagan*, detailed allegations of a kickback scheme were insufficient because the relator could not identify "what [the defendant] actually submitted." 142 F.4th at 37. In circuits rejecting the categorical bar, such scheme allegations would suffice.

II. This Case Is An Excellent Vehicle.

A. Petitioners Were Not Required To Challenge Binding Circuit Precedent.

Respondents argue that petitioners "accepted existing Sixth Circuit precedent" and failed to seek rehearing. BIO 16-17. Neither is a bar to certiorari.

This Court has never required litigants to mount futile challenges to binding precedent. It is sufficient that the court below "passed upon" the matter, even if the "issue [was] not pressed." *See United States v. Williams*, 504 U.S. 36, 41 (1992); *see, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 330 (2010) (resolving merits question the district court "passed upon" (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)).

Nor does declining to seek en banc rehearing forfeit certiorari. No Supreme Court rule *requires* exhaustion of rehearing remedies. *Cf.* Sup. Ct. R. 13

(cert. petition may be filed after panel decision); *see, e.g.*, *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1229 n.6 (11th Cir. 2005) (per curiam) ("A petition for rehearing or suggestion for rehearing en banc is not, of course, required before a petition for certiorari may be filed in the United States Supreme Court."). In fact, "rehearing en banc is not favored" under the Federal Rules. *See* Fed. R. App. P. 40(a).

B. Alternative Grounds For Affirmance Are Not A Vehicle Problem.

Respondents admit that the Sixth Circuit did not reach their alternative arguments for affirmance. *See* BIO 6, 15. That concedes the Question is cleanly presented; it is not a vehicle issue.

As the United States often points out, "when an issue resolved by a court of appeals warrants review, the existence of a potential alternative ground to defend the judgment is not a barrier to review—particularly where, as here, that ground ... was not addressed by the court of appeals." *See, e.g.*, U.S. Pet. Reply 9, *Comm'r Internal Revenue v. Estate of Jelke*, No. 07-1582 (U.S. 2008), 2008 WL 4066478. This Court routinely grants certiorari to resolve legal questions and remands for lower courts to address remaining arguments. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to consider arguments not addressed below because this Court is "a court of review, not of first view"); *Stinson v. United States*, 508 U.S. 36, 47-48 (1993) (declining to address alternative argument and leaving it "to be addressed by the Court of Appeals on remand"). Just last Term, this Court granted certiorari to review the Fifth Circuit's Fourth Amendment "moment of threat" doctrine over the respondent's objection that he "would still be entitled

to qualified immunity." BIO 14, *Barnes v. Felix*, 605 U.S. 73 (2025) (No. 23-1239).

The FCA context is no different. In *Universal Health Services, Inc. v. United States ex rel. Escobar*, 576 U.S. 176 (2016), this Court clarified the legal standard and then let lower courts apply it. *Id.* at 196. The Court took the same approach in *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739 (2023), where it resolved the legal question and declined to "address any of the other factual or legal disputes" that remained. *Id.* at 757. Pending constitutional questions about *qui tam* enforcement likewise do not counsel against review. *Contra* BIO 13 n.*. The Court granted the petitions and reached the merits in *SuperValu* and *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023), despite those lurking concerns.

C. Respondents' "Who" Argument Proves The *Split*, Not The Merits.

Respondents devote much of their opposition to arguing that petitioners failed to plead the "who" of the fraud because they "do not know at this stage of the litigation precisely which entity keys in the bills." BIO 14-15. But that *is* the Question Presented; it is not a reason to deny review.

Petitioners know the "who" of the *fraud scheme*: Tenet, DMC, and the executives who implemented the boarding policy. What petitioners do not know is who submitted the paperwork. In circuits on the other side of the split, petitioners have pleaded enough. The D.C. Circuit holds that a corporation may be the "specific actor" for such purpose; there is no need to identify specific individuals. *See United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 125-26 (D.C. Cir. 2015); *see also, e.g.*, *United States ex rel. Grubbs v. Kanneganti*,

565 F.3d 180, 193 (5th Cir. 2009) (relators need not establish at pleading stage that defendants "actually caused a claim to be presented").

Respondents' argument also flouts the FCA's text. Liability attaches to anyone who "knowingly presents, *or causes to be presented*," a false claim. 31 U.S.C. § 3729(a)(1)(A) (emphasis added). When respondents admitted Medicare and Medicaid patients who did not *receive* inpatient care while boarded despite their automatic inpatient coding, billing for services that were never rendered was the inevitable result. It "would stretch the imagination" to infer otherwise. *Grubbs*, 565 F.3d at 190-92. Petitioners need not name the billing clerk who pressed "submit."

III. Respondents' Remaining Arguments Are Not Relevant To The Case's Certworthiness.

Respondents argue Rule 9(b) requires "greater particularity" than Rule 8 and that a flexible pleading standard invites strike suits. BIO 18-19. These are merits and policy arguments, not reasons to deny certiorari. Whoever is right, half the circuits are wrong.

In any event, petitioners have the better of it. Three times, the Government has argued that "a *qui tam* complaint satisfies Rule 9(b) if it contains detailed allegations supporting a plausible inference that false claims were submitted ... , even if the complaint does not identify specific requests for payment." U.S. *Amicus Curiae* Br. 10, *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, No. 12-1349 (U.S. Feb. 25, 2014); U.S. *Amicus Curiae* Br. 11-12, 14, *Johnson v. Bethany Hospice & Palliative Care LLC*, No. 21-462 (U.S. May 24, 2022) (same); U.S. *Amicus Curiae* Br. 9, 15, *United States ex rel. Owsley v. Fazzi*

Assocs., Inc., No. 21-936 (U.S. Sept. 9, 2022) (same). Respondents do not disagree.

Respondents also attempt to obscure the fraud theory by noting that classifying emergency department patients as inpatient upon entry of an admission order "is consistent with 42 C.F.R. 412.3(a)." BIO 3, 5-6. This too is a merits argument. And in any event, respondents are wrong because they conflate patient *classification* with *billing*. Petitioners do not challenge the classification of ER patients as inpatient upon admission. Instead, their fraud claim lies in billing at inpatient rates while failing to *provide* inpatient services. Respondents do not suggest *that* practice is legitimate. As amici AAEM and ACEP explained, "the law *does* prohibit billing for inpatient services that are not provided," even if the practice of boarding, while problematic, is not a fraud on its own. *See* AAEM & ACEP *Amici Curiae* Br. 12.

Respondents' own Chief of Emergency Medicine questioned the legitimacy of billing as if "the upstairs team" were providing care when "the upstairs doctors cannot be reached" for "100+ hrs." Pet. App. 62a. Respondents attempt to downplay this allegation as "hearsay," BIO 4, but well-pleaded facts are accepted as true at the pleading stage, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). At any rate, the statement was made by one of respondent DMC's own executives; an admission by a party-opponent isn't hearsay at all. *See* Fed. R. Evid. 801(d)(2)(D).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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December 10, 2025