No. 15-363

In the Supreme Court of the United States

AT&T, INC., *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. TODD HEATH,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully submit this supplemental brief regarding this Court's decision in *Universal Health Services* v. *United States ex rel. Escobar*, No. 15-7 (June 16, 2016), and significant developments in the lower courts since the filing of petitioners' reply brief in November 2015.

The Court Should Grant Plenary Review To Resolve The Acknowledged Conflict Regarding The Application Of Rule 9(b) To False Claims Act Claims.

Universal Health Services recognizes that Rule 9(b)'s particularity requirement provides essential protection against abusive claims in False Claims Act ("FCA") litigation.

The defendant there argued that the materiality standard was "too fact intensive for courts to dismiss False Claims Act claims on a motion to dismiss or at summary judgment." Slip op. 16 n.6. This Court rejected that concern, stating that the materiality standard was "familiar and rigorous" and that "False Claims Act plaintiffs must plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b)." *Ibid.*

But the pleading standard today cannot fulfill this important role, because the lower courts are deeply divided regarding *how* Rule 9(b)'s particularity requirement applies to FCA claims. Some courts, including the D.C. Circuit in this case, hold that a claim may proceed even when the relator fails to plead particular facts regarding a single allegedly false claim. That issue is squarely presented in the petition, and the Court should grant plenary review

now to ensure that the pleading standard will apply uniformly across the country in fulfilling its important function of precluding unjustified and abusive claims.

As the petition explains (Pet. 9-19), four circuits—the Fourth, Sixth, Eighth, and Eleventh—require that an FCA relator plead particular facts describing at least one allegedly false claim that was presented to the government. *Id.* at 10-16. But seven circuits—including the court below—have substantially diluted Rule 9(b)'s protections, holding that a relator can proceed to discovery even if he or she cannot detail the particulars of a *single*, allegedly fraudulent claim. *Id.* at 17-19. The prior filings in this Court, including five *amicus* briefs signed by nine major trade associations, demonstrate how this approach to Rule 9(b) undermines its function of precluding unjustified FCA claims. See Cert. Reply 10-12.

Since the filing of the petition and reply brief, courts have continued to acknowledge this clear circuit divide. The Second Circuit, for example, recently recognized "the circuit split regarding whether, to satisfy Rule 9(b), an FCA relator alleging a fraudulent scheme must provide the details of specific examples of actual false claims presented to the government." *United States ex rel. Polansky* v. *Pfizer, Inc.*, __ F.3d __, 2016 WL 2865610, at *5 (2d Cir. 2016).

The Sixth Circuit also confirmed the division among the courts of appeals: "although some circuits hold that it is sufficient for a plaintiff to 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, we have

joined the Fourth, Eighth, and Eleventh Circuits in requiring 'representative samples' of the alleged fraudulent conduct." *United States ex rel. Eberhard* v. *Physicians Choice Lab. Servs., LLC*, 2016 WL 731843, at *4 (6th Cir. 2016) (alterations & quotations omitted). That interpretation of Rule 9(b) was fatal to the claim in *Eberhard*, because the relator "failed to identify the time, place, and content of [the defendant's] alleged misrepresentation." *Ibid*.

The issue arises with great frequency. The petition identified 110 cases in which it was addressed. See Pet. App. D. Since the filing of the reply brief six months ago, the issue has arisen in another 30 actions.

Courts have applied the "strict" approach in at least 20 cases in the Second,[1] Fourth,[2] Sixth,[3] Eighth,[4] and Eleventh[5] Circuits. By contrast, courts

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[1] *United States* v. *TEVA Pharm. USA, Inc.*, 2016 WL 750720, at *13 (S.D.N.Y. 2016); *United States ex rel. Platz* v. *Bank of Am. Corp.*, 2016 WL 1298985, at *11 (S.D.N.Y. 2016).

[2] *United States ex rel. Orgnon* v. *Chang*, 2016 WL 715746, at *4 (E.D. Va. 2016); *United States* v. *Odyssey Mktg. Grp., Inc.*, 2016 WL 649573, at *1 (E.D.N.C. 2016).

[3] *United States ex rel. Sheldon* v. *Kettering Health Network*, 816 F.3d 399, 408 (6th Cir. 2016); *United States ex rel. Hirt* v. *Walgreen Co.*, 2016 WL 1367182, at *3 (M.D. Tenn. 2016); *Potterf* v. *Ohio State Univ.*, 2016 WL 224028, at *3 (S.D. Ohio 2016); *United States ex rel. Polukoff* v. *St. Mark's Hosp.*, 2016 WL 1449219, at *3 (M.D. Tenn. 2016); *United States ex rel. Doe* v. *Jan-Care Ambulance Serv.*, 2016 WL 2843909, at *3 (E.D. Ky. 2016); *United States ex rel. Harper* v. *Muskingum Watershed Conservancy Dist.*, 2015 WL 7575937, at *4 (N.D. Ohio 2015).

[4] *United States ex rel. Lager* v. *CSL Behring, LLC*, 2016 WL 233245, at *2 (E.D. Mo. 2016).

have applied the "lax" understanding of Rule 9(b) in at least 10 actions in the Third,[6] Fifth,[7] Ninth,[8] and Tenth[9] Circuits.

The frequency with which the issue continues to arise demonstrates that this Court's intervention is urgently required—particularly in light of *Universal Health Services*' recognition of the important role that Rule 9(b) serves in the FCA context. These ac-

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[5] *Britton ex rel. U.S.* v. *Lincare Inc.*, 634 F. App'x 238, 240 (11th Cir. 2015); *United States* v. *Healogics, Inc.*, 2016 WL 2744949, at *5 (M.D. Fla. 2016); *United States ex rel. Marsteller* v. *Tilton*, 2016 WL 1270586, at *2 (N.D. Ala. 2016); *United States* v. *Dentsply Int'l, Inc.*, 2016 WL 1403991, at *2 (E.D. Pa. 2016); *United States* v. *Wellcare Health Plans, Inc.*, 2016 WL 1077359, at *2 (M.D. Fla. 2016); *United States Bingham* v. *HCA, Inc.*, 2016 WL 344887, at *5 (S.D. Fla. 2016); *United States* v. *Medtronic, Inc.*, 2016 WL 2993167, at *8 (D. Mass. 2016); *United States* v. *Liberty Ambulance Serv., Inc.*, 2016 WL 81355, at *3 (M.D. Fla. 2016); *United States ex rel. Childress* v. *Ocala Heart Inst., Inc.*, 2015 WL 10742765, at *3 (M.D. Fla. 2015).

[6] *United States ex rel. Freedom Unlimited, Inc.* v. *City of Pittsburgh, Pa.*, 2016 WL 1255294, at *2 (W.D. Pa. 2016); *United States ex rel. Thomas* v. *Lockheed Martin Aeroparts, Inc.*, 2016 WL 47882, at *3 (W.D. Pa. 2016); *United States ex rel. Brown* v. *Pfizer, Inc.*, 2016 WL 807363, at *4 (E.D. Pa. 2016); *Negron* v. *Progressive Cas. Ins. Co.*, 2016 WL 796888, at *4-5 (D.N.J. 2016); *Druding* v. *Care Alternatives, Inc.*, 2016 WL 727116, at *2 (D.N.J. 2016); *Flanagan* v. *Bahal*, 2015 WL 9450826, at *5 (D.N.J. 2015).

[7] *United States ex rel. King* v. *Solvay S.A.*, 2015 WL 8480148, at *5 (S.D. Tex. 2015).

[8] *United States ex rel. Vatan* v. *QTC Med. Servs., Inc.*, 2016 WL 795738, at *4 (C.D. Cal. 2016); *United States ex rel. Dalitz* v. *Amsurg Corp.*, 2016 WL 304567, at *7 (E.D. Cal. 2016).

[9] *United States ex rel. Blyn* v. *Triumph Grp., Inc.*, 2016 WL 1664904, at *7 (D. Utah 2016).

tions should be subject to a single, uniform standard, not varying rules depending on where suit is filed.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

[10] There is no basis for remanding this case to the D.C. Circuit for reconsideration of that court's Rule 9(b) standard in light of this Court's decision in *Universal Health Services*. The reference to Rule 9(b) in footnote 6 of the *Universal Health Services* opinion reiterates the applicability and importance of Rule 9(b)'s particularity requirement, but does not provide any indication of how that requirement applies to FCA claims or otherwise address the different Rule 9(b) standards applied by the courts of appeals. This Court's statement therefore would provide no reason for the D.C. Circuit to reconsider its Rule 9(b) ruling. Plenary review by this Court is the only way to resolve the conflict among the lower courts.

Respectfully submitted.

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