No. 09-_____

IN THE
# Supreme Court of the United States

ORTHO BIOTECH PRODUCTS, L.P.,

*Petitioner,*

v.

UNITED STATES EX REL.
MARK EUGENE DUXBURY,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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December 3, 2009

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## QUESTIONS PRESENTED

1. Whether a federal court lacks subject-matter jurisdiction over a *qui tam* suit under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, that repeats publicly disclosed allegations from prior litigation, where the FCA relator did not provide the government with information on the suit's allegations before the public disclosure.

2. Whether an FCA relator, alleging that the defendant induced a third party to submit false or fraudulent claims, can satisfy Rule 9(b) of the Federal Rules of Civil Procedure without identifying a single false or fraudulent claim, but merely by alleging facts sufficient "to strengthen the inference of fraud beyond possibility."

## PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The following list provides the names of all parties to the proceedings below.

The Petitioner, Ortho Biotech Products, L.P. ("OBP"), was the defendant-appellee in the appeal below. OBP is a New Jersey corporation and subsidiary of parent corporation Johnson & Johnson, also a New Jersey corporation. No publicly held corporation other than Johnson & Johnson owns 10% or more of OBP's stock.

The Respondent, Relator Mark Eugene Duxbury, was a plaintiff-appellee in the appeal below. Duxbury's counsel has moved in the district court to substitute Duxbury's spouse for Relator Duxbury, who died after the court of appeals issued its decision.

The only other party to the appeal below was Relator Dean McClellan, a co-plaintiff-appellee with Relator Duxbury in that appeal. The court of appeals affirmed the dismissal of all of Relator McClellan's claims, and none of his claims are at issue in this petition.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Ortho Biotech Products, L.P. ("OBP") respectfully submits this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit. This petition presents the Court with an opportunity to eliminate conflicts among the federal circuits as to (1) the "original source" exception to the "public disclosure bar" of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, and (2) the application of Rule 9(b) of the Federal Rules of Civil Procedure to allegations of FCA violations.

On the "original source" issue, the First Circuit held—in accord with the Fourth and Eighth Circuits, but contrary to the Second, Sixth, Ninth, and D.C. Circuits—that an "original source" need not inform the government about an alleged fraud before someone else independently discloses the same allegations. As the United States explained in the amicus brief it filed in this case, "proper application of the FCA's public disclosure bar is critical to enforcement of that statute." Brief for the United States as Amicus Curiae, No. 08-1409, at 3 (Aug. 28, 2008). Because the First Circuit rejected the United States' view on the FCA's "proper application," and because the First Circuit's approach permits relators who are not true whistleblowers to qualify as an original source, the conflict on the "original source" question merits further review.

On Rule 9(b), the First Circuit held that an FCA relator is entitled to a "more flexible standard" that requires only the pleading of facts that "strengthen the inference of fraud beyond possibility." Pet. App.

33a, 38a. That rule is no more demanding than the Rule 8 standard this Court applied in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and is contrary to decisions of the Sixth, Eighth, and Eleventh Circuits that have rejected relaxing Rule 9(b) based on a relator's asserted lack of access to necessary information. Because the First Circuit's holding prevents Rule 9(b) in the context of the FCA from achieving its purpose of reducing the number of meritless and costly suits, the Rule 9(b) question also warrants this Court's review.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 579 F.3d 13. The decision of the district court (Pet. App. 44a) is reported at 551 F. Supp. 2d 100.

## JURISDICTION

The judgment of the court of appeals was entered on August 12, 2009. Pet. App. 2a. A petition for rehearing en banc was denied on September 4, 2009. *Id.* at 79a-80a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The provisions of the False Claims Act and Federal Rules of Civil Procedure involved are, in relevant part, as follows:

## False Claims Act Provisions

31 U.S.C. § 3729(a)(1)

> [A]ny person who –
>
> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; [or]
>
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;[1]
>
> . . . .
>
> is liable to the United States Government for a civil penalty . . . plus 3 times the amount of damages which the Government sustains because of the act of that person.

---

[1] Section 4(a) of the Fraud Enforcement And Recovery Act Of 2009, Pub. L. No. 111-21, 123 Stat. 1617, 1621-23 (May 20, 2009), amended 31 U.S.C. § 3729(a)(2) (1986), which made liable for an FCA violation anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." According to the Act, the amended version "shall . . . apply to all claims . . . that are pending on or after [June 7, 2008]." *See* PL 111-21, at 1625. This petition refers to the new provision, although for purposes of this petition nothing turns on the changes in the provision's language because, among other things, the relator has failed to plead with particularity any false claims or any false records or statements allegedly linked to such claims.

31 U.S.C. § 3730(b)

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. . . .

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. . . .

. . . .

(4) Before the expiration of the 60-day period or any extensions [thereto] . . . the Government shall – (A) proceed with the action . . . or (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action. . . .

31 U.S.C. § 3730(e)(4) ("Public Disclosure Bar")

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.

(B) ["Original Source" Provision:] For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

**Federal Rules of Civil Procedure Provisions**

Fed. R. Civ. P. 8(a): "**Claim for Relief.** A pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."

Fed. R. Civ. P. 9(b): "**Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

## STATEMENT OF THE CASE

1. a. The False Claims Act ("FCA") prohibits (among other things) knowingly submitting, or causing a third party to submit, to the government a "false or fraudulent claim" for payment, or knowingly using a "false record or statement" linked to such a claim. 31 U.S.C. § 3729(a)(1)(A)-(B). It contains "whistleblower" provisions that allow private citizens to sue on the government's behalf as "relators," *see id.* § 3730(b), through so-called "*qui tam*" suits. An FCA relator must initially file a complaint under seal and serve it on the government with a "written disclosure of substantially all material evidence and

information the person possesses." *Id.* § 3730(b)(2). The government then has at least sixty days to decide whether or not to intervene and take over the suit. *Id.* § 3730(b)(2), (4).

The FCA's "public disclosure bar" helps to ensure that only genuine "whistleblowers" become FCA relators. It precludes federal courts from exercising jurisdiction over any FCA suit that is "based upon" allegations that have already been publicly disclosed (in ways specified by the Act), unless the relator is an "original source." *Id.* § 3730(e)(4)(A). An "original source" must, first, have "direct and independent knowledge of the information on which the allegations are based"; and, second, have "voluntarily provided the information to the Government before filing an action . . . ." *Id.* § 3730(e)(4)(B).

1. b. Rule 9(b) requires that plaintiffs alleging fraud—including FCA relators—"must state with particularity" the "circumstances constituting fraud." This "particularity" requirement supplements Rule 8, which requires all plaintiffs to plead a "plausible," and not merely "possib[le]," right to relief. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50, 1954 (2009) (discussing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). In pleading the "circumstances constituting fraud," a plaintiff must specify "matters such as the time, place, and contents of the false representations . . . as well as the identity of the person making the misrepresentation . . . ." 5A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1297 (3d ed. 2009). *See also, e.g., United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008); *United States ex rel. Rafizadeh v. Continental Common, Inc.*, 553 F.3d 869, 873 (5th Cir. 2008);

*United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 518 (6th Cir. 2009); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006).

A plaintiff must allege specifics as to all of a fraud's legal elements other than mens rea, which Rule 9(b) exempts from heightened pleading. *See, e.g., United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 505 (6th Cir. 2008) (Rule 9(b) requires specifics about all "elements" other than "state of mind"). Essential to FCA fraud, and the focus of this petition, is "a false or fraudulent claim" for payment, *see* 31 U.S.C. § 3729(a)(1)(A)-(B), as well as, under § 3729(a)(1)(B), a "false record or statement" linked to such a claim.

Rule 9(b)'s "particularity" requirement serves important purposes. It helps to ensure that allegations are detailed enough to "enable the defendant to respond specifically and quickly to the potentially damaging allegations." *Joshi*, 441 F.3d at 556 (internal quotation marks and citations omitted). It also protects defendants from harassing "strike suits" and "fishing expeditions," which impose upon courts, parties, and society "enormous social and economic costs." *See Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *see also, e.g.*, John T. Boese, *Civil False Claims and Qui Tam Actions* § 5.04, at 5-45 – 5-47 (3d ed. 2009) ("Boese").

2. Petitioner Ortho Biotech Products, L.P. ("OBP") markets and distributes Procrit® ("Procrit"). Procrit treats anemia caused by chemotherapy, chronic kidney disease, HIV infection, and blood loss from certain types of surgery. Pet. App. 5a. Respondent Duxbury worked for OBP from 1992

until July 1998. *Id.* In November 2003, over five years after leaving OBP, and after a highly publicized, multi-district lawsuit alleged "AWP" fraud by various drug companies, including OBP, *see In re Pharm. Indus. Avg. Wholesale Price Litig.*, No. 01-12257-PBS, MDL No. 1456 (D. Mass.) ("AWP MDL"), Duxbury initiated this FCA lawsuit, Pet. App. 5a-6a, using counsel that had filed the AWP MDL's Master Consolidated Class Action Complaint. Duxbury's original complaint alleged the very same "kickback" fraud scheme already publicized by the AWP MDL. *Id.* at 15a, 59a.

In October 2006, after the government declined to intervene, Duxbury amended his complaint. The Amended Complaint added a new relator, Dean McClellan, and pleaded three counts, one of which (Count II) basically repeated the AWP allegations from the Original Complaint. *See* Pet. App. 10a-11a. That count was later voluntarily dismissed. *Id.* at 10a n.5. The two remaining counts alleged as follows: Count I alleged that OBP provided unlawful "kickbacks" to healthcare providers ("Providers"); Count III alleged that OBP promoted the use of "off-label" doses of Procrit to Providers. *Id.* at 11a. Both counts alleged that OBP caused third parties, the Providers, to submit false claims to Medicare. *See id.* No allegation asserted that OBP itself submitted any false claims. *Id.* at 34a.

This petition concerns Duxbury's "kickback" claims, which are the only claims remaining after the court of appeals decision. These claims rehash allegations that had been publicly disclosed in the AWP MDL. Duxbury conceded on appeal that his "kickback" claims were "based upon" the AWP MDL complaint. Pet. App. 15a. He also conceded that he

had not informed the government of his "kickback" allegations before they were disclosed years earlier in the AWP MDL. *Id.* at 16a.

The Amended Complaint alleges that "Relator Duxbury has specific knowledge that approximately 80 percent of Procrit sales that he generated were submitted by his accounts as false or fraudulent claims for Medicare reimbursement." Pet. App. 95a (Am. Compl. ¶ 211). The Amended Complaint, however, does not identify a single false claim. Pet. App. 36a. It does not allege any date of a false-claim submission or reimbursement, the actual content of any false claim, the amount requested in any false claim, or anything else that would effectively identify a false claim. *See id.* at 85a-106a (Am. Compl. ¶¶ 91-130, 211, 211a-h, 226-47).

3. The district court dismissed Duxbury's Amended Complaint. Pet. App. 78a. With respect to Duxbury's kickback claims, it first ruled that they survived the FCA's "public disclosure" bar. While recognizing that the kickback claims were "based upon" the previously disclosed AWP MDL, the court determined that Duxbury qualified as an "original source" for the period of his employment at OBP (1992-1998). *See* Pet. App. 59a, 61a. The court concluded that it was immaterial that Duxbury had not brought the alleged "kickback" fraud to the government's attention before the AWP MDL disclosed it. *See id.* at 60a. In the court's view, the relator had direct and independent knowledge of fraud and did not need to inform the government of the alleged fraud before filing suit. *See id.*

The district court next held that Duxbury's "kickback" claims did not satisfy the heightened

pleading standard of Rule 9(b). Pet. App. 77a. Relying on *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir. 2004), and *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720 (1st Cir. 2007), the district court held that "[a]lthough Duxbury identifies providers and approximate amounts of free samples, discounts, 'off-invoice' rebates, or educational grants, he fails to identify a single false claim consequently filed by . . . providers." Pet. App. 75a. The court observed that even the most specific of Duxbury's allegations "fail[ed] to provide even one (much less 'some') of the specifics required by *Karvelas* for 'at least some of the claims,' *viz.*, the 'dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based upon those practices.'" *Id.* at 75a-76a (quoting *Karvelas*, 360 F.3d at 232-33)).

The district court acknowledged that, under First Circuit precedent, Rule 9(b) allows some "flexibility" where "the complaint as a whole is sufficiently particular to pass muster . . . although some questions remain unanswered." Pet. App. 74a. "[E]ven giving Duxbury the benefit of such flexibility," however, the court ruled that "the allegations are inadequate." *Id.* at 75a (internal quotation marks and citation omitted).

Although Duxbury had protested that he could not "identify all the false claims submitted . . . because the claims 'were submitted to

Providers with most of whom Relator has no dealings, and the records of the false claims are not within Relator's control,'" the district court observed that "this is precisely the point of requiring relators to identify particular claims" under Rule 9(b). Pet. App. 76a (quoting Am. Compl. ¶ 232, Pet. App. 102a). Because a "court is not permitted to surmise that false claims 'must have' occurred as a result of defendant's conduct," the court dismissed Duxbury's "kickback" claims pursuant to Rule 9(b). Pet. App. 76a-78a.

4. The First Circuit reversed the district court's decision dismissing Duxbury's "kickback" claims. Pet. App. 43a. The court of appeals agreed with the district court that the public disclosure bar did not preclude Duxbury's suit, because he qualified as an "original source" for the "kickback" claims. The court held that it sufficed for Duxbury to inform the government of his allegations before filing suit, notwithstanding his failure to do so before those allegations were publicly disclosed. *Id.* at 30a. The court recognized that its holding conflicts with decisions in four other circuits and with the position of the United States, which filed a brief as amicus curiae supporting OBP's contention that Duxbury did not qualify as an "original source." *Id.* at 16a-17a (citing *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990); *United States ex rel. McKenzie v. Bellsouth Telecomms., Inc.*, 123 F.3d 935 (6th Cir. 1997); *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997)); *see also* Brief for the United States as Amicus Curiae,

No. 08-1409, at 21-24 (Aug. 28, 2008) ("United States Brief").

Observing that "[b]y its terms, the 'original source' exception only requires the relator to 'provide[] the information to the Government before filing an action under this section which is based on the information," the First Circuit concluded that "the plain terms of § 3730(e)(4)(B) begin and end the matter." Pet. App. 18a (quoting 31 U.S.C. § 3730(e)(4)(B)). The court rejected the government's reliance on the plain meaning of the term "original source"—"[t]he originator or primary agent of an act, circumstance, or result"—because "the statute *defines* the term at § 3730(e)(4)(B)." Pet. App. 18a-19a (quoting *Black's Law Dictionary* 1522 (9th ed. 2009)). The court also found that the relator had direct and independent knowledge of the allegations even though they were based upon allegations previously disclosed by someone else and the relator could not even identify a single false claim.

The First Circuit further reasoned—in direct conflict with at least the D.C. and 6th Circuits—that the structure and history of Section 3730(e)(4)(B) supported its position. Pet. App. 22a-30a. The court explained that the statute's structure "mitigates" concerns about permitting relators who are not true whistleblowers to be rewarded. *Id.* at 22a. The court noted that "the 'first-to-file' rule *already* provides potential relators significant incentive not to sit on the sidelines." *Id.* at 22a.

The First Circuit also asserted that this Court's decision in *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007), "substantially undercuts" the alternative view presented by the

D.C. and Sixth Circuits. Pet. App. 22a. Citing *Rockwell*'s holding that the term "information" in Sections 3730(e)(4)(A) and 3730(e)(4)(B) "refers to the 'information underlying the allegations of the relator's action,' not the information underlying the public disclosure," the First Circuit explained that "*Rockwell* clarifies that the information that the original source has 'direct and independent knowledge' of does not have to be the same as the information upon which the public disclosure is based." *Id.* at 23a-24a (citation omitted). "[A]s a result of that clarification," the First Circuit continued, "*Rockwell* strongly suggests that situations can arise where the information upon which the public disclosure is based may be unavailable (such as a reporter protecting a source) or be of little value (if based on rumors), while a relator may have different information of the publicly disclosed fraud (such as eye-witness testimony, documents, etc.) of great significance." *Id.* at 24a. The court concluded that requiring a relator to inform the government of his information before a public disclosure "has the potential to bar productive suits." *Id.* at 25a.

As for history, the First Circuit observed that Congress amended the FCA in 1986 to "encourage more private enforcement suits." Pet. App. 26a (internal quotation marks omitted). All of these factors, the court concluded, supported its holding "that § 3730(e)(4)(B) only requires that a relator provide his or her information prior to the filing of the qui tam suit." *Id.* at 30a.

The First Circuit then turned to Rule 9(b). The court acknowledged that "Duxbury does not identify specific [false] claims," Pet. App. 36a, but concluded

that it sufficed that he alleged "factual . . . evidence to strengthen the inference of fraud beyond possibility," *id.* at 33a (quoting *Rost*, 507 F.3d at 733). The court explained that this "more flexible standard," *id.* at 35a (internal quotation marks and citation omitted), is appropriate for *qui tam* cases in which the defendant is alleged to have "induced *third parties*" to file false claims with the government," *id.* at 32a-33a.

Under the "more flexible [Rule 9(b)] standard," the court held that Duxbury's allegations established the requisite "inference of fraud." The court held that a few of the "kickback" paragraphs in the complaint satisfied Rule 9(b) because, it claimed, the paragraphs sufficiently addressed "the medical providers (the who), the illegal kickbacks (the what), the rough time periods and locations (the where and when), and the filing of the false claims themselves," so as to support an inference that the commission of fraud was more than a "possibility." *Id.* at 36a, 38a.

5. OBP filed a petition for rehearing en banc, which the First Circuit denied on September 4, 2009. Pet. App. 79a-80a.

## REASONS FOR GRANTING THE WRIT

The First Circuit's decision merits this Court's review. The court held that a relator can be an original source where his complaint largely rehashes allegations in prior litigation and fails to identify a single specific false claim or false record and where the relator did not inform the government of the alleged fraud before it was publicly disclosed. This holding squarely conflicts with holdings in four other federal circuits. The court also held that a relator

who alleges that a defendant caused a third party to file false claims need only allege facts sufficient to "strengthen the inference of fraud beyond possibility." Pet. App. 33a, 38a. That holding conflicts with this Court's precedent on Rule 8 and Rule 9(b), which makes clear that the First Circuit's Rule 9(b) standard requires nothing more than Rule 8 does. That holding also conflicts with at least three federal circuits that have rejected relaxing the Rule 9(b) standard for relators who assert they lack access to information needed to satisfy an unrelaxed standard.

These conflicts should be resolved now. Allowing relators to bring FCA claims that only rehash information already in the public domain, as Duxbury did here, betrays Congress's goal of limiting FCA *qui tam* suits to those who bring new fraud to light. And allowing FCA relators to survive Rule 9(b) merely by meeting the pleading requirements of Rule 8 eviscerates Rule 9(b)'s protections for defendants facing fraud charges. It is particularly perverse to permit Duxbury to proceed as an "original source" on the basis of his asserted "direct and independent knowledge" while at the same time abandoning the Rule 9(b) pleading standard to accommodate his supposed lack of information needed to plead with particularity core elements of the alleged fraud, including false claims.

## I. The First Circuit's Construction Of The "Original Source" Exception To The Public Disclosure Bar Merits Further Review.

### A. The Circuits Are Split On When A Relator Must Provide Information On An Alleged Fraud To The Government To Qualify As An Original Source.

The First Circuit's decision that, to qualify as an original source, a relator need not provide information to the government before the alleged fraud is publicly disclosed, though in accord with decisions of the Fourth and Eighth Circuits, *see United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1355 (4th Cir. 1994); *United States ex rel. Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1050-51 (8th Cir. 2002), conflicts with holdings in four other circuits, *see* Pet. App. 17a (citing *Dick*, 912 F.2d 13 (2d Cir. 1990); *McKenzie*, 123 F.3d 935 (6th Cir. 1997); *Wang*, 975 F.2d 1412 (9th Cir. 1992); *Findley*, 105 F.3d 675 (D.C. Cir. 1997). Contrary to the First, Fourth, and Eighth Circuits, the Sixth and D.C. Circuits both require an original source to inform the government of fraud allegations *before* the allegations are publicly disclosed. *See, e.g.*, *McKenzie*, 123 F.3d at 942-43; *Findley*, 105 F.3d at 691. The Second and Ninth Circuits have similarly refused to qualify a relator as an original source, if the relator informs the government and files suit *only after* someone else has publicly disclosed the same fraud allegations, unless the relator "had a hand in the public disclosure of allegations that are a part of one's suit." *Wang*, 975 F.2d at 1418; *see Dick*, 912 F.2d at 18 (to surmount the public disclosure bar, "one must have

been a source to the entity that first publicly disclosed the information").[2]

In *Wang*, the Ninth Circuit addressed an FCA relator whose allegations of fraud had already been publicly disclosed. The relator had worked on a weapon system while employed by the defendant. After being fired, he informed the government of an alleged fraud involving the weapon system that newspapers had already independently revealed. He then filed an FCA suit repeating those allegations. The Ninth Circuit held that the relator was not an original source. Concluding that the text of the public disclosure bar is "ambiguous," the Ninth Circuit relied on the FCA's purpose and history in holding that *qui tam* jurisdiction "extend[s] only to those who . . . played a part in publicly disclosing the allegations and information on which their suits" are based. *Wang*, 975 F.2d at 1418. According to the Ninth Circuit, the FCA's *qui tam* provisions aim "to encourage insiders privy to a fraud on the

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[2] The holding in *United States ex rel. Cooper v. Blue Cross and Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 (11th Cir. 1994), suggests that the Eleventh Circuit might agree with the First, Fourth and Eighth Circuits, although it did not expressly address the issue. The Fifth Circuit may also have used this approach, without analysis, in *United States ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439, 442-43 & n.2 (5th Cir. 2008). The Seventh Circuit has noted its disagreement with the Second and Ninth Circuits' requirement that an original source have a hand in any prior public disclosure. *See United States ex rel. Matthews v. Bank of Farmington*, 166 F.3d 853, 865 (7th Cir. 1999), *overturned on other grounds* 570 F.3d 907 (7th Cir. 2009).

government to blow the whistle on the crime." *Id.* at 1419. And the court reasoned that Congress accomplished that goal by "permit[ing] one who publicly disclosed the information to bring a *qui tam* suit." *Id.* This understanding of the FCA led the Ninth Circuit to follow the Second Circuit, *see Dick*, 912 F.2d at 16-18, in requiring that an original source "have had a hand in" any public disclosure preceding suit. *See Wang*, 975 F.2d at 1418; *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998) (explaining *Wang*).

The Sixth and D.C. Circuits' approach, while not requiring a relator to be the source of the public disclosure to qualify as an original source, also conflicts with the First Circuit's decision because it requires a relator to provide the government information about the fraud *before* any public disclosure. In *Findley*, the D.C. Circuit observed that "[v]irtually every court of appeals that has considered the public disclosure bar explicitly or implicitly agrees . . . [that] the language of the statute is not so plain as to clearly describe which cases Congress intended to bar." 105 F.3d at 681. It thus interpreted the "original source" provision based on the FCA's structure and congressional intent, as well as its language. In doing so, the court criticized the approach taken by the court of appeals here. That approach, according to the D.C. Circuit, renders part of the "original source" requirement "extraneous." 105 F.3d at 690-91. Another FCA provision already requires *every* relator to inform the government of the alleged fraud at the time of suit, and allows the government at least sixty days to consider the information. *See id.*; 31 U.S.C. § 3730(b)(2). Separately requiring an original source

to provide information to the government before filing suit would thus be "extraneous." *Findley*, 105 F.3d at 690-91. To avoid this result and honor Congress's intent that FCA relators be "whistleblowers" who *expose* fraud, the D.C. Circuit held that an original source must inform the government of the alleged fraud *before any public disclosure*. *Id.* at 690. This meant that the relator was not an original source because he provided no information to the government before "echo[ing]" publicly available allegations. *Id.* at 688 (internal quotation marks and citation omitted).

The Sixth Circuit adopted the same interpretation in *McKenzie*, relying on a detailed analysis of congressional purpose and the holding of *Findley*. *See* 123 F.3d at 942-43 (focusing on Congressional intent that FCA relators be "whistleblowers"). In *McKenzie*, the relator's allegations had been publicly disclosed in previously filed lawsuits. 123 F.3d at 943. Because the relator did not inform the government of her allegations before the public disclosures, the Sixth Circuit held that her *qui tam* action was barred. *Id.*

In rejecting that approach, the First Circuit reasoned that this Court's decision in *Rockwell*, 549 U.S. 457, "substantially undercuts the conclusion by the D.C. and Sixth Circuits that 'little incentive' is necessary for suits brought after a public disclosure." Pet. App. 22a. *Rockwell* did not address the questions presented here, however. Rather, it addressed the "direct and independent knowledge" requirement of the "original source" exception. *See* 31 U.S.C. § 3730(e)(4)(B) (requiring a relator to have "direct and independent knowledge of the information on which the allegations are based").

And *Rockwell*'s holding certainly cannot support the court's conclusion that the relator had direct and independent knowledge when his allegations were previously disclosed by someone else and he cannot allege a single specific false claim. *See* Linda Baumann, *Health Care Fraud and Abuse: Practical Perspectives*, at 297-98 (2d ed. 2007) (noting that, after *Rockwell*, a relator "must have firsthand information" and "essentially must be the employee on the shop floor" where the fraud occurs) ("Baumann").

Although the First Circuit concluded that the *Rockwell* Court's interpretation of the word "information" supported its resolution of the question, Pet. App. 24a, the Sixth and Ninth Circuits have continued explicitly to follow their rules in the wake of *Rockwell*. *See Poteet*, 552 F.3d at 515 (6th Cir.) (citing *McKenzie* and *Rockwell* in holding that relator's *qui tam* complaint "is jurisdictionally barred" partly because she failed to provide the government with the information underlying her complaint before the alleged fraud was publicly disclosed); *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1201-03 (9th Cir. 2009) (citing *Wang* and *Rockwell* in holding that relators were not original sources because, among other reasons, they did not establish that they "had a hand in the public disclosure"). Accordingly, this Court should grant review to resolve the circuit conflict that persists in the wake of *Rockwell*. *See* Boese, § 4.02[D], at 4-113 ("The decision in *Findley* demonstrates the deep divisions between the circuits on these complex jurisdictional bar issues. . . . [S]ection 3730(e)(4) clearly requires additional

clarification and the circuit splits are becoming more obvious.").

### B. The "Original Source" Question Is Recurring and Important.

The circuit conflict on the "original source" exception is sufficiently important to warrant this Court's review. "Each of the original source provision's key terms has been interpreted and defined—generally in conflicting ways—in a number of cases. Indeed, since its enactment in 1986, the 'original source' rule has become (along with 'public disclosure') the most litigated—and confused—issue under the *qui tam* provisions." Boese, § 4.02[D], at 4-99.[3] That at least seven circuits have squarely addressed the question presented, with at least two circuits applying their approaches after *Rockwell*, *see Poteet* and *Meyer*, *supra*, illustrates that the issue is recurring. And the question is important because it implicates the federal subject-matter jurisdiction and because, as the United States explained in its amicus brief in the court of appeals, "proper application of the FCA's public disclosure bar is critical to enforcement of that statute." United States Brief, at 3. It is unfair to both relators and *qui tam* defendants to have the availability of an FCA action turn on the happenstance of geography. This Court

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[3] *See also* Transcript of Oral Argument at *21, *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, No. 08-304, 2009 WL 4249114 (U.S. Nov. 30, 2009) (Justice Scalia alluding to the "random nature of the whole [public disclosure bar] provision").

should grant review to establish a uniform rule on when a relator must provide information to the government to qualify as an "original source."

### C. The Decision Below Is Incorrect.

"Statutory construction must begin with the language employed by Congress and the assumption that the . . . language accurately expresses the legislative purpose." *Engine Mftrs. Ass'n v. S. Coast Air Quality Mgt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks and citation omitted). "[E]ven the most basic general principles of statutory construction," however, "must yield to clear contrary evidence of legislative intent." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). Moreover, "well-established principles of statutory interpretation . . . require statutes to be construed in a manner that gives effect to all of their provisions." *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2234 (2009). Contrary to these principles, however, the First Circuit's interpretation of the "original source" exception (1) conflicts with the FCA's purpose, and (2) renders a statutory provision of no practical effect.

In designing the FCA *qui tam* provisions, Congress sought to provide "adequate incentives for whistle-blowing insiders with genuinely valuable information," while "discourag[ing] . . . opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994); *see also, e.g., Wang*, 975 F.2d at 1419 ("[FCA *qui tam*] suits are meant to encourage insiders privy to a fraud on the government to blow the whistle . . . . [T]here is little point in rewarding a

second toot."); *Dick*, 912 F.2d at 17 (observing that "a co-drafter of the legislation[] stated that a person is an 'original source' if, *inter alia*, the person 'had some of the information related to the claim which he made available to the government or the news media *in advance of the false claims being publicly disclosed*'" (quoting 132 Cong. Rec. H9389 (daily ed. Oct. 7, 1986) (statement of Rep. Berman) (emphasis in *Dick*)).

As the United States has explained, the First Circuit's construction of the 'original source' exception will permit FCA lawsuits by relators who, like Duxbury, "do little to assist the Government in identifying fraud" and thus do not facilitate proper enforcement of the statute. United States Brief, at 23. Indeed, it allows relators to avoid the public disclosure bar by providing the government with information on fraud the day before (or even minutes before) suing, when someone else has, as here, already disclosed the same allegations. The United States, the real FCA party in interest, has characterized this scenario as an "absurd" result of the First Circuit's approach. *See id.*; *see also* Michael Louks and Carol Lam, *Prosecuting and Defending Health Care Fraud Cases*, 2008 Cumulative Supplement, at 86 (criticizing the 4th Circuit minority view "in light of the history, structure, design, and intent" of the FCA). Permitting relators to pursue windfall recoveries for allegations of which the government is already aware—and may already be addressing—frustrates congressional intent to reward only those relators who are true "whistleblowers."

The First Circuit's interpretation also renders the "original source" requirement to provide information

to the government of no practical effect. Section 3730(b)(2) already requires *every* FCA relator to serve on the government a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses . . . ." As Judge Wald noted in *Findley*, 105 F.3d at 690-91, if a relator can satisfy the "original source" rule by providing information to the government just before filing, that rule would impose no meaningful obligation beyond what Section 3730(b)(2) requires.

The First Circuit's decision creates a rule that contravenes congressional intent, produces absurd results, and fails to give effect to every FCA provision. This Court should grant review and reject that rule in favor of the interpretation proposed by petitioner and the United States—one requiring an original source to inform the government of alleged fraud *before a public disclosure*. *See also* Baumann, at 286 (arguing that this view best interprets the "language, legislative history, and statutory purpose").

## II. The First Circuit's Ruling Exempting A Significant Category Of FCA Relators From The Rigors Of Rule 9(b) Merits Further Review.

### A. The First Circuit's Holding On Rule 9(b) Conflicts With This Court's Precedent, And Circuits Are Split Over What Rule 9(b) Requires.

The First Circuit held that a relator alleging that a defendant caused a third party to submit false claims is entitled to a "more flexible [Rule 9(b)] standard," Pet. App. 35a, under which the

allegations need only contain "factual . . . evidence to strengthen the inference of fraud beyond possibility." *id.* at 33a, 38a (internal quotation marks omitted). That holding merits further review because it conflicts with this Court's precedent and with holdings of other federal circuits.

This Court's recent pleading-standard cases make clear that Rule 8 already requires "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). As this Court explained in *Iqbal*, the Rule 8 "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949 (citation omitted). That "plausibility standard" can be met, this Court held, "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

The First Circuit's "more flexible [Rule 9(b)] standard" is indistinguishable from the generally applicable Rule 8 standard, as construed by *Iqbal* and *Twombly*. The First Circuit did not provide a clear rationale for exempting a *qui tam* relator from the more "rigid," "elevated pleading standard" of Rule 9(b), *Iqbal*, 129 S. Ct. at 1954, which requires that allegations of fraud be pleaded with particularity. However, the First Circuit suggested that it based its application of the relaxed standard on the "distinction between a qui tam action alleging that the defendant made false claims to the government, and a qui tam action in which the defendant induced *third parties* to file false claims with the government." Pet. App. at 32a (citing *Rost*,

507 F.3d at 732 (construing the latter action as "in a different category" from the former)).

The First Circuit's "more flexible standard" also conflicts with decisions of other circuits. Under the First Circuit's approach, if an FCA relator alleges that a defendant induced a third party to file false claims, the relator, like Duxbury here, can satisfy Rule 9(b) without identifying a single "false or fraudulent claim," even though such a claim is a core element of FCA fraud. *See* Pet. App. 36a (acknowledging that "Duxbury does not identify specific claims").[4]

Other courts of appeals have held that a relator alleging FCA fraud must identify a false claim and have refused to create an exception, as the First Circuit has done, for a relator who contends that he lacks the necessary access to specify false claims with particularity. In *Joshi*, 441 F.3d at 560, the Eighth Circuit held that an FCA relator must specify "*some* representative examples" of false claims to support allegations of a wide-ranging fraud. In so holding, the court expressly rejected the relator's

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[4] Duxbury conceded that he "cannot identify at this time all of the false claims caused by Defendant. The false claims were submitted by Providers with most of whom Relator has had no dealings, and the records of the false claims are not within Relator's control." Pet. App. 102a (Am. Compl. ¶ 232). As the district court noted, however, Rule 9(b)'s very purpose is to ensure that a plaintiff has sufficient information that a defendant committed fraud to justify permitting the potentially damaging suit to proceed. Pet. App. 76a. And while Duxbury alleged that he was unable to identify "all of the false claims," he actually identified none.

request "to relax Rule 9(b)'s pleading requirements by allowing him to plead his complaint generally at the outset and to 'fill in the blanks' following discovery." *Id.* at 559.

The relator offered several reasons to justify his request: that the "fraudulent scheme was complex, the fraudulent conduct took place over a long period of time, and information concerning the alleged fraud is uniquely within the defendants' control." *Id.* at 560. The Eighth Circuit rejected all of them.

Recognizing that the relator, who was not a member of the defendant's billing or claims department, "may not have [been] privy to certain details relevant to his complaint," the court noted the oddity of an FCA relator requesting special leniency under the pleading rules, observing that "[t]he [FCA] is intended to encourage individuals who are either close observers or involved in the fraudulent activity to come forward, and is not intended to create windfalls for people with secondhand knowledge of the wrongdoing." *Id.* at 561 (internal quotation marks and citation omitted); *see also id.* at 560 (observing that the relator's request for a relaxed pleading standard "conflicts with his allegation [that] he is an 'original source'"). The court also expressed concern that relaxing Rule 9(b) would undermine the important protections it offers defendants, including preventing needless harm to a defendant's "goodwill and reputation" wrought by "a suit that is, at best, missing some of its core underpinnings, and, at worst," makes "baseless allegations . . . to extract settlements." *Id.* at 559 (internal quotation marks omitted). This concern is especially applicable to FCA actions, the court explained, because "a qui tam plaintiff, who has suffered no injury in fact, may be

particularly likely to file suit as a pretext to uncover unknown wrongs." *Id.* (internal quotation marks and citation omitted).

Finally, the Eighth Circuit concluded that allowing a relaxed Rule 9(b) standard would be "inconsistent with the relator's procedural obligations under the FCA," which require a relator to "serve a copy of the complaint on the government and disclose all material evidence and information known to the relator in order to allow the government to decide whether or not to intervene." 441 F.3d at 559-60. All of the reasons that the Eighth Circuit identified for rejecting a relaxed Rule 9(b) standard in FCA cases apply to a relator, such as Duxbury, who alleges difficulty identifying false claims that third parties allegedly filed.

The Sixth and Eleventh Circuits have also required relators to specify false claims, and have expressed a willingness to relax that requirement if, and only if, the relator adequately alleges that information needed to identify a false claim is *exclusively* within the *defendant's* control. In *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. 2003), the Sixth Circuit expressly rejected relaxing Rule 9(b), where, as here, "third parties possess information concerning the [alleged fraud at issue]." In so holding, the court observed that "[t]he requirement that fraud be plead[ed] with particularity need not be relaxed in FCA cases in order to protect the public because the government's ability to intervene on the basis of information brought to its attention vindicates the public interest." *Id.* at 563.

In *United States ex rel. Clausen v. Laboratory Corp. of America*, the Eleventh Circuit similarly held that a relator failed Rule 9(b) because his complaint failed to contain "some indicia of reliability . . . to support the allegation of an *actual false claim* for payment being made to the Government." 290 F.3d 1301, 1311 (11th Cir. 2002). The relator offered no "examples of actual false claims"—the "*sine qua non* of a False Claims Act violation"—and the court concluded that the relator's allegations were merely "conclusory statements . . . [that] d[id] not adequately allege when—or even if—the schemes were brought to fruition." *Id.* at 1311-12, 1314 n.25, 1315. The Eleventh Circuit rejected the notion that Rule 9(b) should be relaxed to account for the fact that the relator was not in a position to know the details of the false claims. The court explained that "while an insider might have an easier time obtaining information about billing practices . . . , neither the Federal Rules nor the [FCA] offer any special leniency" to an "outsider" who "fail[s] to allege with the required specificity the circumstances of the fraudulent conduct he asserts in his action." *Id.* at 1314.[5] *See also United States ex rel. Lacy v.*

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[5] The application of the "indicia of reliability test" in the Eleventh Circuit has generally required the identification of specific false claims. *See, e.g., United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1358-60 (11th Cir. 2006). In two exceptional cases, the court concluded that the relator met that test, through detailed allegations of first-hand knowledge of such things as improper billing codes and billing procedures. *See United States ex rel. Walker v. R&F Props. of Lake County, Inc.*, 443 F.3d 1349, 1360 (11th Cir. 2005); *Hill v. Morehouse Med. Assocs., Inc.*, No. 02-14429, 2003 WL 22019936, at *4-5 (continued...)

*New Horizons, Inc.*, No. 08-6248, 2009 WL 3241299, at *3 (10th Cir. Oct. 9, 2009) (affirming dismissal of FCA claim under Rule 9(b) because the relator "has supplied no specific details concerning *any particular false claim*").[6]

Under the Sixth, Eighth and Eleventh Circuit standards, Duxbury's allegations would clearly fail Rule 9(b). He did not plead with particularity any false claims or any false statements or records linked to such claims, and Duxbury does not allege that the information needed to plead such particulars is exclusively within OBP's control. The First Circuit nevertheless held that Duxbury's allegations survive

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(11th Cir. Aug. 15, 2003) (unpublished). The Eleventh Circuit has rejected subsequent attempts to extend or broaden the narrow exception recognized in such cases. *See, e.g., United States ex rel. Shurick v. Boeing Co.*, 330 Fed. Appx. 781, 784 (11th Cir. 2009) (unpublished) ("[Relator's] complaint fails to state a claim because it does not allege with particularity the submission of a fraudulent claim . . . [and relator] lacks personal knowledge of the invoices and fails to allege facts that establish that invoices were actually submitted . . . ."); *Atkins*, 470 F.3d at 1359 ("The particularity requirement of Rule 9[(b)] is a nullity if Plaintiff gets a ticket to the discovery process without identifying a single claim.") (citations omitted).

[6] In *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180 (5th Cir. 2009), the Fifth Circuit held that relators who "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." *Id.* at 190. This "strong inference" test offers yet another approach to Rule 9(b) in FCA cases.

under a "more flexible [Rule 9(b)] standard" that requires a relator's pleadings to do nothing more than satisfy Rule 8 and whose *apparent* justification is one that these other circuits have roundly rejected—namely, that the relator is simply not in a position to know the details of any false claim that was allegedly submitted, or false record or statement linked to a false claim. This Court should grant review to resolve the conflict between the First Circuit's approach and precedents of this Court and other circuits.

### B. The Rule 9(b) Question Is Recurring And Important.

By screening out allegations of fraud that are not sufficiently particularized, Rule 9(b) serves an important gate-keeping function that protects defendants from harassing "strike suits" and "fishing expeditions" that impose on courts, parties, and society "enormous social and economic costs." *See Bly-Magee*, 236 F.3d at 1018. Rule 9(b) plays an especially important role in FCA cases, where relators seek the privilege of stepping into the shoes of the federal government to pursue potentially ruinous damage awards against defendants. The First Circuit has exempted a significant category of FCA relators from the rigors of Rule 9(b) on the paradoxical theory that these relators deserve special leniency as to key aspects of the alleged fraud. The First Circuit's rule merits this Court's review to address a circuit split and because it deprives FCA defendants of the critical protections to which they are entitled under Rule 9(b).

### C. The First Circuit's Decision On Rule 9(b) Is Incorrect.

The First Circuit's "more flexible [Rule 9(b)] standard" for FCA relators, allowing relators to survive Rule 9(b) by pleading facts that "strengthen the inference of fraud beyond possibility," Pet. App. 33a, 38a, conflicts with this Court's decisions in *Twombly* and *Iqbal*. Those cases construe Rule 8 to require *all* plaintiffs to plead facts showing that their right to relief is more than a mere possibility. *See Iqbal*, 129 S. Ct. at 1954; *Twombly*, 550 U.S. at 557.

The First Circuit did not identify any justification for exempting a category of relators from the rigors of Rule 9(b). The apparent rationale—that a relator alleging that the defendant caused a third party to file false claims is not in position to know the details of the claims allegedly filed by the third party—is unpersuasive. "Since Rule 9(b) is a pleading requirement, not a 'capacity of the party' requirement, the identity or insider status of the relator is not a proper basis for relaxing the rigorous pleading requirements that apply to all FCA complaints." Boese, § 5.04[B][2], at 5-62.5 – 5-62.6. Moreover, the false claim under Section 3729(a)(1)(A) (and the "false record or statement material to a false or fraudulent claim" under Section 3729(a)(1)(B)) is the key element of the cause of action, and the FCA is designed to reward those with *knowledge* of the fraud, not those seeking to discover whether there was a fraud. *See* Boese, § 5.04[C], at 5-62.13 – 5.63 ("[T]he better-reasoned [Rule 9(b)] decisions . . . hold that Rule 9(b) should prohibit fraud actions in which the facts must be learned through discovery."). It is especially anomalous to

exempt from Rule 9(b) a relator such as Duxbury, and then qualify him as an original source, who asserts that he has direct and independent knowledge of the alleged fraud and "specific knowledge" of false claims. *See* Pet. App. 95a (Am. Compl. ¶ 211). Someone with such knowledge should need no relaxed rule to plead fraud with particularity.

Under Rule 9(b), the "circumstances constituting fraud" must be stated with particularity. Fed. R. Civ. P. 9(b). Those circumstances include "a false or fraudulent claim." *See* 31 U.S.C. § 3729(a)(1)(A)-(B) (and also, under § 3729(a)(1)(B), "a false record or statement" material to "a false or fraudulent claim"). Under the most natural reading of Rule 9(b), as several courts of appeals have held, *see supra* Part II.A, this means that an FCA plaintiff must allege facts that in some way identify a *particular* "false or fraudulent claim." Duxbury did not do this.

FCA *qui tam* suits "are meant to encourage *insiders privy to a fraud on the government* to blow the whistle . . . . [S]uch insiders should be able to comply with Rule 9(b)." *Bly-Magee*, 236 F.3d at 1019 (internal quotation marks and citation omitted). Because Duxbury has not done so, the First Circuit should have affirmed the district court's dismissal of his "kickback" allegations under Rule 9(b).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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