No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act ("FCA") imposes a civil penalty and treble damages upon any person who presents a false or fraudulent claim to the United States government. 31 U.S.C. § 3729(a)(1). Federal Rule of Civil Procedure 9(b) requires a party pleading fraud to "state with particularity the circumstances constituting fraud."

The question presented is:

Whether a relator asserting a claim under the False Claims Act can satisfy Federal Rule of Civil Procedure 9(b)'s particular pleading requirement without setting forth specific facts regarding at least one allegedly false or fraudulent claim submitted to the government.

PARTIES TO THE PROCEEDINGS

Petitioners (defendants in the district court and appellees in the court of appeals) are AT&T, Inc., AT&T Corp., AT&T Datacomm, Inc., AT&T Mobility, Alascom, Inc., Bellsouth Communications Systems, LLC, Bellsouth Long Distance, Inc., Bellsouth Telecommunications, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Nevada Bell Telephone Company, Ohio Bell Telephone Company, Pacific Bell Telephone Company, SBC Long Distance, Inc., SBC Internet Services, Inc., Southern New England Telephone Company, Southwestern Bell Telephone Company, and Wisconsin Bell, Inc.

With the exception of AT&T, Inc. itself, each of the other Petitioners is a direct or indirect subsidiary of AT&T, Inc., a publically held company. AT&T, Inc. is the only publically-held company that has a 10% or greater ownership interest in the other Petitioners. No publically-held company has a 10% or greater ownership interest in AT&T, Inc.

Respondent (plaintiff in the district court and appellee in the court of appeals) is Todd Heath, a relator.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, AT&T, Inc., *et al*. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 791 F.3d 112. The decision of the district court (App., *infra*, 28a-36a) is reported at 47 F. Supp. 3d 42.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Title 31, U.S. Code § 3729(a) provides in pertinent part:

> (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 claim [or]
>
> * * *
>
> (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and im-

> properly avoids or decreases an obligation to pay or transmit money or property to the Government,
>
> * * *
>
> is liable to the United States Government for a civil pentalty of not less than $5,000 and not more than $10,000 * * * plus 3 times the amount of damages which the Government sustains because of the act of that person.

Rule 9 of the Federal Rules of Civil Procedure provides in pertinent part:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.

STATEMENT

This petition presents an important and frequently recurring question that has divided the courts of appeals—whether, to satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b), a relator asserting a claim under the FCA must allege the particulars of at least a single false or fraudulent claim submitted to the government. The United States has twice within the last five years acknowledged the conflict among the circuits and indicated that this Court's review may be warranted in an appropriate case. See Brief for United States as *Amicus Curiae* at 10, *United States ex rel. Nathan* v. *Takeda Pharm. N. Am., Inc.*, No. 12-1349 (U.S. Feb. 25, 2014) ("U.S. *Nathan* Br."); Brief for the United States as *Amicus Curiae* at 17, *Ortho Biotech Prods., L.P.* v. *United States ex rel. Duxbury*, No. 09-654 (U.S. May 19, 2010) ("U.S. *Duxbury* Br.").

This case presents the Court with a clear opportunity to resolve this significant question. The relator here asserts that petitioners engaged in a scheme that resulted in charging schools too much for telecommunication services. While the core requirement of the FCA is the submission of a false claim for payment by the United States, the respondent does not identify even one example of such a claim. For that reason, this complaint would have been dismissed if it had been filed in the Fourth, Sixth, Eighth, or Eleventh Circuits. But the court below, like six other circuits, permits an FCA suit to proceed without identifying even a single false claim. This Court's intervention is warranted.

A. Statutory Background.

The False Claims Act was enacted in 1863 "in order to combat rampant fraud in Civil War defense contracts." *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 135 S. Ct. 1970, 1973 (2015) (quotation omitted). The Act authorizes the government to bring an action against "[a]ny person" who "knowingly, presents, or causes to be presented" to an "officer or employee of the United States Government" a "false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). A liable defendant faces treble damages and a civil penalty up to $10,000. *Ibid.* In addition, a private party (known as a "relator") may bring an action "for the person and for the United States Government" against the defendant "in the name of the Government." *Id.* § 3730(b)(1).

Rule 9(b) requires a party, when "alleging fraud or mistake" to "state with particularity the circumstances constituting fraud or mistake." And, "because the False Claims Act condemns fraud," "every re-

gional circuit has held that a relator must meet the requirements of Rule 9(b) when bringing complaints on behalf of the government." *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1310-1311 (Fed. Cir. 2011) (citing cases).

B. Proceedings Below.

1. The complaint in this case involves the Universal Service Schools and Libraries Program (the "E-Rate program"). App., *infra*, 6a, 31a. The E-Rate program, a product of the Telecommunications Act of 1996, is administered by the Federal Communications Commission. See 47 U.S.C. § 254(h)(1)(B). Pursuant to the program, telecommunications carriers provide services to eligible schools and libraries at discounted rates, which are then subsidized through the Universal Service Fund ("USF"). *Id.* § 254(d). The USF is funded through assessments on telecommunications carriers. *Ibid.* The E-Rate regulations prohibit the service provider from charging participating schools "a price above the lowest corresponding price for supported services." *Id.* § 54.511(b).

Under the E-Rate program, a service provider must file annually a Form 473 asserting that it is in compliance with specified requirements of the program (not including the "lowest corresponding price" requirement). A school or library seeking E-Rate funds must submit a Form 471 identifying the particular services the school seeks and the rates it will be charged for those services, and submit a Form 472 to obtain reimbursement for those services.

Respondent is a self-styled telecommunications consultant who offers bill-auditing services. App., *infra*, 6a-7a. He commenced this action as a relator under the False Claims Act asserting that petition-

ers overcharged participating school districts and libraries by charging rates above the lowest corresponding price. *Id*. at 7a-8a.

The complaint asserts that *every* Form 473 relating to the E-Rate Program filed by *every* AT&T operating subsidiary between 1997 and 2009 was false; and *every* Form 472 and Form 471 filed by a recipient of services from *every* AT&T operating subsidiary during that twelve-year period was false—and constituted a violation of the False Claims Act, because of AT&T's alleged failure to comply with the "lowest corresponding price" requirement. App, *infra,* 7a, 20a.

The alleged failure of AT&T and each of its operating subsidiaries to comply with the "lowest corresponding price" requirement is stated in general terms. For example: "AT&T never once calculated and offered ['lowest corresponding price'] to a school or library." Compl. ¶ 62; *see also id*. ¶ 78 (referring to AT&T's "historical failure to comply with its ['lowest corresponding price'] obligations").

Respondent also alleges that petitioners had previously been subject to an administrative consent decree before the FCC resulting from alleged overbilling. App., *infra*, 21a. Additionally, respondent asserts that petitioners failed to adequately train their employees with respect to the "lowest corresponding price" requirement. *Id*. at 8a. And the respondent contends that a Detroit audit indicated that certain petitioners failed to appropriately price services. *Id*. at 21a.

2. The district court dismissed the complaint, observing that respondent had previously filed suit against one of petitioners' subsidiaries in federal

court in Wisconsin, making similar allegations relating to the E-Rate program's pricing scheme. App., *infra*, 34a-36a. In the district court's view, the False Claims Act's first-to-file rule therefore barred this suit. *Ibid*. The district court did not address petitioner's alternative argument that respondent's complaint lacks the particularity required by Rule 9(b). See *id*. at 29a, 36a.

3. The court of appeals reversed. App., *infra*, 1a-27a. The court first held that the first-to-file rule did not justify dismissal of respondent's complaint. *Id*. at 10a, 17a-19a.

The court also rejected petitioners' alternative argument that respondent's complaint fails to satisfy the minimum requirements of Rule 9(b). App., *infra*, 19a-26a. Citing decisions of the First, Third, Seventh, Ninth, and Tenth Circuits, the court of appeals indicated that it "join[ed] [its] sister circuits in holding that the precise details of individual claims are not, as a categorical rule, an indispensible requirement of a viable False Claims Act complaint." *Id*. at 24a. It rejected decisions of four other circuits holding, by contrast, that a plaintiff must plead representative examples of false claims. *Id*. at 25a-26a. The court reasoned that Rule 9(b) requires an FCA complaint merely 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." *Id*. at 25a (quotation omitted). Thus, the court acknowledged the applicability of Rule 9(b)'s particularity requirement, but did not require details of even one of the alleged false claims.

Based on this framework, the court found that respondent's complaint satisfied Rule 9(b). App., *infra*, 25a. The court of appeals did not identify an al-

legedly false claim specified in the complaint. *Ibid.* Instead, the court's analysis turned on the complaint's discussion of the allegedly fraudulent scheme—that the relator provided "specificity concerning the type of fraud, how it was implemented, and the training materials used." *Ibid.* And this broad, alleged scheme of fraud was, in the lower court's view, "corroborated by the concrete example of the Detroit audit" that alleged certain mispriced services. *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the deep and significant conflict among the courts of appeals regarding the application of Rule 9(b) to complaints asserting claims under the False Claims Act. Four circuits hold that, to satisfy the requirements of Rule 9(b), a relator must allege details regarding at least one representative example of the false claims alleged in the complaint. Here, however, the lower court joined six other circuits in concluding that a relator need not allege details as to any *specific* false claim. App., *infra*, 25a. The United States has twice acknowledged the conflict among the circuits and indicated that "this Court's review to clarify the applicable pleading standard may * * * be warranted in an appropriate case." U.S. *Nathan* Br. at 10. See also U.S. *Duxbury* Br. at 17. This is an appropriate case.

The question, moreover, is important. The Rule 9(b) standard applied by a court is often determinative of whether a complaint survives a motion to dismiss. That has significant practical consequences: because FCA litigation often involves enormous discovery and the risk of substantial liability, a complaint that survives a motion to dismiss exerts massive (and, in the context of a weak complaint, unjus-

tified) settlement pressure. National uniformity is especially important in this context, as FCA plaintiffs typically have broad discretion as to choice of venue—in light of this persistent circuit split, plaintiffs have both the ability and incentive to forum shop. Moreover, FCA litigation has exploded in recent years; we have identified more than 100 cases in which the question presented was determinative.

Finally, the decision below is wrong. Rule 9(b) requires a complaint alleging fraud to detail the particulars—the who, what, when, where, why, and how—of the fraudulent acts. This requirement is a fundamental safeguard for defendants, as wrongful allegations of fraud create needless cost, improper settlement pressure, and reputational damage.

The FCA provides a significant economic incentive for relators to file claims—potential recoveries for relators can and do range into the tens of millions of dollars, or more. Rule 9(b)'s pleading requirement is a critical protection against the filing of abusive and unjustified claims.

Because the falsity of a claim submitted to the government is the defining element of an action under the FCA, Rule 9(b) must require an FCA plaintiff to allege the particular details of at least one false claim. Here, the court of appeals relieved a plaintiff of this burden, holding it was enough to allege details of the fraudulent *scheme*, without ever detailing a single fraudulent claim.

For all of these reasons, the Court's review is warranted.

A. The Courts of Appeals Are Divided.

The conflict among the courts of appeals is widely recognized, longstanding, and persistent. The Third Circuit, for example, recently explained that "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." *Foglia* v. *Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155 (3d Cir. 2014). And the Fourth Circuit court expressly "disagree[d]" with the "more relaxed construction of Rule 9(b)" adopted by the First and Fifth Circuits. *United States ex rel. Nathan* v. *Takeda Pharm. N.A., Inc.*, 707 F.3d 451, 457-458 (4th Cir. 2013). See also *Ebeid ex rel. United States* v. *Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (identifying disagreement among the circuits).[1]

The United States, in amicus briefs filed at the certiorari stage, has twice recognized the division in authority. In 2014, the United States explained that "lower courts have reached inconsistent conclusions about the precise manner in which a *qui tam* relator

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[1] District courts frequently acknowledge the division. See *e.g., United States ex rel. Ryan* v. *Endo Pharm., Inc.*, 27 F. Supp. 3d 615, 623 (E.D. Pa. 2014); ("The Circuits are split on the degree of specificity required in alleging [False Claims Act] claims."); *United States ex rel. Kester* v. *Novartis Pharm. Corp.*, 23 F. Supp. 3d 242, 253 (S.D.N.Y. 2014) (observing that courts "differ over what constitutes 'particularity'" in the context of FCA complaints); *United States ex rel. Palmieri* v. *Alpharma, Inc.*, 928 F. Supp. 2d 840, 854 (D. Md. 2013) (noting "an emerging circuit split on this issue"); *United States* v. *N.Y. Soc'y for Relief of Ruptured & Crippled*, 2014 WL 3905742, at *12 (S.D.N.Y. 2014) (recognizing the circuit split); *United States* v. *Countrywide Fin. Corp.*, 961 F. Supp. 2d 598, 609 (S.D.N.Y. 2013) (same).

may satisfy the requirements of Rule 9(b)." U.S. *Nathan* Br. at 10. Earlier, the United States recognized the "substantial uncertainty" as to the governing law. U.S. *Duxbury* Br. at 16.

1. Four circuits would have dismissed this complaint because it does not allege specific facts regarding at least one supposed false claim actually presented for payment to the United States.

The **Sixth Circuit** characterizes the "requirement" that a relator allege specific false claims as "clear and unequivocal." *United States ex rel. Bledsoe* v. *Cmty. Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007). In order to satisfy the particularity requirement, "'at a minimum,' the complaint must 'allege the time, place, and content of the alleged misrepresentation on which he or she relied.'" *Id.* at 505 (emphasis omitted). And "[a] relator cannot meet this standard without alleging *which specific* false claims constitute a violation of the FCA." *Ibid.* (emphasis added).

"[W]here a relator alleges a 'complex and far-reaching fraudulent scheme,'" that violates the FCA, "it is insufficient to simply plead the scheme; he must also identify a representative false claim that was actually submitted to the government." *Chesbrough* v. *VPA, P.C.*, 655 F.3d 461, 470 (6th Cir. 2011). Importantly, it is not enough for an FCA plaintiff to "plead[] a *false scheme* with particularity;" instead, "pleading an actual false claim with particularity is an indispensable element of a complaint that alleges a FCA violation in compliance with Rule 9(b)." *Bledsoe*, 501 F.3d at 504.

The court has reaffirmed this principle frequently. See, *e.g.*, *United States ex rel. Poteet* v. *Medtronic,*

Inc., 552 F.3d 503, 518 (6th Cir. 2009) ("In the particular context of FCA *qui tam* complaints," Rule 9(b) "requires a relator to 'alleg[e] which specific false claims constitute a violation of the FCA.'"); *United States ex rel. Marlar* v. *BWXT Y-12, L.L.C.*, 525 F.3d 439, 444-445 (6th Cir. 2008) ("Where a complaint alleges 'a complex and far-reaching fraudulent scheme,' then that scheme must be pleaded with particularity and the complaint must also 'provide examples of specific' fraudulent conduct that are 'representative samples' of the scheme."); *United States ex rel. SNAPP, Inc.* v. *Ford Motor Co.*, 532 F.3d 496, 506 (6th Cir. 2008) (an FCA plaintiff must "plead with specificity characteristic examples that are illustrative of the class of all claims covered by the fraudulent scheme") (alterations and quotation omitted).

The **Eleventh Circuit** also requires an FCA plaintiff to provide a specific "allegation, stated with particularity, of a false claim actually being submitted to the Government" in order to satisfy Rule 9(b). *United States ex rel. Clausen* v. *Lab. Corp. of Am.*, 290 F.3d 1301, 1312 (11th Cir. 2002). A plaintiff, therefore, must identify "items on particular claim forms and the dates on which they were submitted to the Government." *Id.* at 1313; accord, *Hopper* v. *Solvay Pharm., Inc.*, 588 F.3d 1318, 1324 (11th Cir. 2009) (FCA relator must "set[] forth 'facts as to time, place, and substance of the defendant's alleged fraud,' specifically 'the details of the defendants allegedly fraudulent acts, when they occurred, and who engaged in them.'").

Rule 9(b) does not permit "a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated

reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government." *Clausen*, 290 F.3d at 1311. See also *Hopper*, 588 F.3d at 1325-1326 ("detailed allegations of an illegal scheme to cause the government to pay amounts it did not owe" do not suffice).

And the issue recurs often in the Eleventh Circuit. See, *e.g.*, *United States ex rel. Matheny* v. *Medco Health Solutions, Inc.*, 671 F.3d 1217, 1225 (11th Cir. 2012) ("In order to plead the submission of a false claim with particularity, a relator must identify the particular document and statement alleged to be false, who made or used it, when the statement was made, how the statement was false, and what the defendants obtained as a result."); *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1359 (11th Cir. 2006) ("Atkins fails to provide the next link in the FCA liability chain: showing that the defendants *actually submitted* reimbursement claims for the services he describes."); *Corsello* v. *Lincare, Inc.*, 428 F.3d 1008, 1014 (11th Cir. 2005) ("Underlying improper practices alone are insufficient to state a claim under the False Claims Act absent allegations that a specific fraudulent claim was in fact submitted to the government.").

The **Eighth Circuit** similarly holds that a relator must "provide some representative examples of [defendant's] fraudulent conduct, specifying the time, place, and content of their acts and the identity of the actors." *United States ex rel. Dunn* v. *N. Mem'l Health Care*, 739 F.3d 417, 420 (8th Cir. 2014) (quotation omitted). A relator may not, for example, "rely on the broad allegation that every claim submitted from 1996 until the present is false in order to satisfy

the particularity requirement." *Ibid.*; accord, *In re Baycol Prods. Litig.*, 732 F.3d 869, 879 (8th Cir. 2013) (FCA relator must allege at least some specific "representative false claims").

The Eighth Circuit also applies this rule regularly. See, *e.g.*, *United States ex rel. Ketroser* v. *Mayo Found.*, 729 F.3d 825, 829 (8th Cir. 2013) (identifying "the well-established principle that a relator who 'alleges a systematic practice of submitting fraudulent claims . . . must provide some representative examples of the alleged fraudulent conduct'"); *United States ex rel. Roop* v. *Hypoguard USA, Inc.*, 559 F.3d 818, 822 (8th Cir. 2009) (same); *United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 556-557 (8th Cir. 2006) (same).

Finally, the **Fourth Circuit** agrees that "a relator must allege with particularity that specific false claims actually were presented to the government for payment." *Nathan*, 707 F.3d at 457; accord *United States* v. *Triple Canopy, Inc.*, 775 F.3d 628, 640 (4th Cir. 2015) ("Rule 9(b) requires 'at a minimum' that [the plaintiff] 'describe the time, place, and contents of the false representations'"); *Murphy* v. *Capella Educ. Co.*, 589 F. App'x 646, 652 (4th Cir. 2014) (same).

If this case had been filed in the Fourth, Sixth, Eighth, or Eleventh Circuits, these precedents just discussed would have compelled dismissal of the complaint under Rule 9(b). The complaint does not allege specific facts relating to even one alleged false claim. Instead, the court below permitted the complaint to proceed only because it held that a relator need not "plead representative samples of claims actually submitted to the government." App., *infra*, 26a. Thus, the court pointed to allegations merely re-

lating to a "false scheme" *Id.* at 25a-26a. But those allegations are clearly insufficient under the precedents of these four circuits.

The court below attempted to paper over the clear conflict between its ruling and the standards applied by these four circuits. It asserted that these courts of appeals apply a more flexible standard, intimating that these courts might conclude that the complaint here satisfies Rule 9(b). App., *infra*, 25a-26a. That is not correct. The square holdings of these courts leave no doubt that the complaint here would be dismissed under Rule 9(b). The D.C. Circuit's attempt to disguise the conflict founders on the express language of the decisions of these other courts.

For example, the D.C. Circuit asserted (App., *infra*, 26a) that the Sixth Circuit has "not foreclose[d] the possibility that this court may apply a 'relaxed' version of Rule 9(b) in certain situations"—quoting *Chesbrough*, 655 F.3d at 471. App., *infra*, 26a; see also U.S. *Nathan* Br. at 13. But the "situation[]" addressed in *Chesbrough* was the hypothetical contention that a relaxed rule could apply "when the relator has 'personal knowledge that the claims were submitted by Defendants for payment.'" 655 F.3d at 471. Whether a relaxed pleading standard might apply to an *insider* with personal knowledge is irrelevant to *this* case. Here, as in *Chesbrough*, the relator lacks "personal knowledge of billing practices or contracts with the government." *Id.* at 471-472. *Chesbrough* (and the other cases cited above) make clear that in these circumstances, the Sixth Circuit requires a relator to allege a specific example of a false claim—and does not accept allegations regarding a general scheme. See page 10-11, *supra*.

Similarly, the court pointed (App., *infra*, 26a) to the Eighth Circuit's comment that "'stating with particularity the circumstances constituting fraud' does not necessarily and always mean stating the contents of a bill." *United States ex rel. Thayer* v. *Planned Parenthood of the Heartland*, 765 F.3d 914, 918 (8th Cir. 2014) (alteration omitted). But *Thayer*, like *Chesbrough*, involved *insiders*—those who can "plead[] personal knowledge of the defendant's submission of false claims." *Ibid*. The relator there, for example, "allege[d] that her position as center manager gave her access to [the defendant's] centralized billing system." *Id*. at 919. In fact, *Thayer* explained, expressly, that cases requiring details of specific claims were "distinguishable because the relators did not have access to the defendants' billing systems and were not able to plead personal knowledge of the defendants' submission of false claims." *Id*. at 917 n.2.[2]

This case, unlike *Thayer*, does not involve an insider. The Eighth Circuit precedents holding allegations regarding a scheme insufficient—discussed above (at page 12-13)—plainly control.

The United States in the *Nathan* invitation brief (at 14) pointed to the Eleventh Circuit's decision in *United States ex rel. Walker* v. *R&F Properties of Lake County, Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005). But, again, *Walker* expressly distinguished FCA complaints brought by "corporate outsider[s]" from those with inside knowledge of the alleged fraud. *Ibid*. The Eleventh Circuit cases rejecting

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[2] The United States points (U.S. *Nathan* Br. at 13-14) to *In re Baycol Prods. Litig.*, 732 F.3d at 876, but the court there expressly required "representative false claims." *Id*. at 879.

complaints alleging facts regarding the general scheme therefore control. See page 11-12, *supra*.

The D.C. Circuit noted (App., *infra*, 26a) that the Fourth Circuit in *Nathan* stated that it requires "some indicia of reliability" that a claim has been submitted. The court stated in clear terms that, in its view, this *requires* "plausible allegations of presentment" of a claim to the government. *Nathan*, 707 F.3d at 457. And to dispel all doubt, the Fourth Circuit also expressly disclaimed the more relaxed view of Rule 9(b): "To the extent that other cases apply a more relaxed construction of Rule 9(b) in such circumstances, we disagree with that approach." *Id.* at 457-458.

In short, the Fourth, Sixth, Eighth, and Eleventh Circuits unequivocally require a corporate outsider to plead at least a representative example of a specific, allegedly false claim that was presented to the government in order to satisfy Rule 9(b). Respondent, a corporate outsider, cannot make this showing—which the court of appeals implicitly recognized. Those circuits, accordingly, would dismiss this complaint for failure to plead fraud with particularity.

For these same reasons, the United States was wrong to suggest in *Nathan* that, although a circuit split existed, there was a possibility that the conflict could reconcile itself without this Court's intervention. U.S. *Nathan* Br. at 10. That has not happened. The courts holding that Rule 9(b) requires the pleading of specific details regarding at least one representative false claim have adhered to that position. See, *e.g.*, *Triple Canopy, Inc.*, 775 F.3d at 640; *Capella Educ.*, 589 F. App'x at 652.

2. Seven circuits—including the court below—disagree and hold that Rule 9(b) does not obligate an FCA plaintiff to allege specific examples of false claims.

The court below expressly rejected petitioner's argument that an FCA complaint must identify "'representative samples' of the claims that specify the time, place, and content of the bills." App., *infra*, 23a. Asserting that this requirement "goes too far" (*ibid.*), the court "join[ed]" its "sister circuits in holding that the precise details of individual claims are not, as a categorical rule, an indispensable requirement of a viable False Claims Act complaint." *Id.* at 24a. "The central question," the court concluded, "is whether the complaint alleges 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" *Id.* at 25a.

In reaching this result, the lower court expressly adopted the **Fifth Circuit's** approach in *United States ex rel. Grubbs* v. *Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009). There, the court held that, even if an FCA plaintiff "cannot allege the details of an actually submitted false claim," the complaint "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." *Ibid.*

The Fifth Circuit has continued to apply this rule. See, *e.g.*, *United States* v. *Bollinger Shipyards, Inc.*, 775 F.3d 255, 260 (5th Cir. 2014) ("[A]n FCA claim can meet Rule 9(b)'s standard 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.'"); *Unit-*

ed States ex rel. Nunnally v. *W. Calcasieu Cameron Hosp.*, 519 F. App'x 890, 893 (5th Cir. 2013) ("[A] relator may demonstrate a strong inference of fraud without necessitating that the relator detail the particular bill.").

Several other circuits have also adopted *Grubbs*. The **Ninth Circuit**, for example, expressly "join[ed] the Fifth Circuit" and held that an FCA relator need not always plead "representative examples." *Ebeid*, 616 F.3d at 998. While acknowledging that this "requirement has been adopted by some of our sister circuits," the court rejected the "categorical approach that would, as a matter of course, require a relator to identify representative examples of false claims." *Ibid.* Instead, invoking *Grubbs*, the court concluded that a plaintiff must merely 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.'" *Id.* at 998-999. See also *United States ex rel. Perry* v. *Hooker Creek Asphalt & Paving, LLC*, 565 F. App'x 669, 670 (9th Cir. 2014); *United States* v. *Kaplan, Inc.*, 517 F. App'x 534, 536 (9th Cir. 2013); *Frazier ex rel. United States* v. *Iasis Healthcare Corp.*, 392 F. App'x 535, 537 (9th Cir. 2010).

The **Third Circuit** has reached the same conclusion. In *Foglia*, 754 F.3d at 155, the court acknowledged that "[t]he Fourth, Sixth, Eighth, and Eleventh Circuits have held that a plaintiff must show 'representative samples' of the alleged fraudulent conduct, specifying the time, place, and content of the acts and the identity of the actors." But the court instead found persuasive the contrary view from the "First, Fifth, and Ninth Circuits" and thus concluded that an FCA plaintiff need not allege "a

specific claim for payment *at the pleading stage*." *Id.* at 156. See also *United States ex rel. Judd* v. *Quest Diagnostics Inc.*, 2015 WL 5025447, at *5 (3d Cir. 2015) (explaining that the Third Circuit applies a "more lenient standard").

Also citing *Grubbs*, the **Tenth Circuit** holds that "claims under the FCA need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as a part of that scheme." *United States ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010).

The **First Circuit** also adopted the *Grubbs* approach to evaluating whether a *qui tam* complaint complies with Rule 9(b). See *United States ex rel. Duxbury* v. *Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (1st Cir. 2009). Thus, an FCA plaintiff may, in some circumstances, rely on "'factual or statistical evidence to strengthen the inference of fraud beyond possibility' without necessarily providing details as to each false claim." *Ibid.*

Finally, the **Seventh Circuit** holds that a relator need not plead "the specific request for payment" in order for a complaint to comply with Rule 9(b)'s particularity requirement. *United States ex rel. Lusby* v. *Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009). See also *Leveski* v. *ITT Educ. Servs., Inc.*, 719 F.3d 818, 839 (7th Cir. 2013) (applying same rule); *United States ex rel. Lamers* v. *City of Green Bay,* 168 F.3d 1013 (7th Cir. 1999) (same).

B. The Question Presented Is Important and Frequently Recurs.

Certiorari is appropriate because the question presented is of substantial practical importance and

recurs with considerable frequency in the lower courts.

1. The motion to dismiss standard has tremendous practical importance because it is often determinative of whether a relator's claim will survive a motion to dismiss and open the door to discovery. As the United States has observed, "[t]he proper application of Rule 9(b) in the FCA context is * * * a significant issue." U.S. *Nathan* Br. at 16. See also U.S. *Duxbury* Br. at 17 (describing the question presented as "both unsettled and significant"). The government thus agrees that, "[i]f one or more courts of appeals continue to adhere to the rigid view that petitioner attributes to the court below"—and lower courts have adhered to this view[3]—"this Court's intervention may be warranted in a case where application of that approach appears to be outcome-determinative." U.S. *Nathan* Br. at 16.

This observation by the United States is undoubtedly correct. The lack of uniformity among the circuits is especially troubling given the FCA's broad venue provisions. Pursuant to 31 U.S.C. § 3732(a), an FCA complaint may be filed "in any judicial district in which the defendant, or in the case of multiple defendants, any one defendant can be found, resides, transacts business, or, in which any [violation] occurred." When the defendant is a large corporation, or when a relator alleges a widespread scheme, the relator's choice of forum is nearly limitless.

The existence of a circuit split concerning a dispositive pleading requirement thus presents obvious incentives for plaintiffs who cannot satisfy the more

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[3] See, *e.g.*, *Triple Canopy,* 775 F.3d at 640.

stringent view of Rule 9(b) to choose the forum strategically. But such "forum shopping constitute[s] the opportunistic and parasitic behavior that the FCA seeks to preclude." *Bailey* v. *Shell W. E&P, Inc.*, 609 F.3d 710, 721 n.3 (5th Cir. 2010).

Discouraging forum shopping is particularly important in this context because of the "quasi-criminal nature of FCA violations (i.e., a violator is liable for treble damages)." *Atkins*, 470 F.3d at 1360. A plaintiff's choice of forum should not be the decisive factor as to whether his or her complaint survives a motion to dismiss—and thus opens a defendant to enormous potential discovery, litigation cost, and possible liability, all of which create significant settlement pressure. Whatever the proper standard may be, it should be uniform across the Nation.

2. The frequency with which this precise question recurs confirms that it is a matter of great importance.

FCA actions against government contractors have proliferated dramatically. In 1987, private FCA relators filed 30 civil suits. Fraud Statistics—Overview, Civil Div., U.S. Dep't of Justice (Oct. 1, 1987 – Sept. 30, 2014), http://goo.gl/zk6vxD. That number grew to 363 suits in 2000, and it ballooned to 754 new actions in fiscal year 2013. *Ibid.*

It is therefore no surprise that the question presented here arises with great frequency in the lower courts. We have identified 110 cases where the question presented was addressed and was determinative as to whether a complaint survived a motion to dismiss. And, given that many decisions are unpublished, this figure likely understates the actual number of cases in which the issue was implicated.

In the four circuits that require a relator to plead the existence of an actual false claim with particularity, we have identified 44 cases in which this question has arisen. See App. D, *infra*, 38a-46a. (8 cases in the Fourth Circuit, 12 in the Sixth, 12 in the Eighth, and 12 in the Eleventh.) Likewise, the issue has arisen 56 times in the seven circuits that do not require a relator to make this showing. *Ibid*. (4 cases in the First Circuit, 14 in the Third, 12 in the Fifth, 9 in the Seventh, 9 in the Ninth, 4 in the Tenth, and 4 in D.C.)

In addition, although the Second Circuit itself has not squarely addressed conflict, we have located 10 district court cases from the Second Circuit deciding this question. Those courts unanimously hold that an FCA relator must identify actual false claims submitted to the government for payment. App. D, *infra*, 38a-39a. See also, *e.g.*, *United States ex rel. Kester* v. *Novartis Pharm. Corp.*, 23 F. Supp. 3d 242, 257 (S.D.N.Y. 2014) ("[I]t seems highly unlikely that the Second Circuit would adopt the *Grubbs* rule.").

Given the persistent recurrence of this important issue, this Court's review is urgently needed.

C. The Decision Below Is Wrong.

The existence of a deep, acknowledged conflict among the circuits is, on its own, sufficient to warrant a grant of certiorari. In addition, the decision of the court of appeals below is wrong.

1. To begin with, there is no dispute that Rule 9(b) applies to FCA complaints. The very purpose of the FCA is to "prohibit[] submitting *false* or *fraudulent* claims for payment to the United States." *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1889 (2011) (emphasis added).

And Rule 9(b) requires a plaintiff, when alleging "fraud or mistake," to "state with particularity the circumstances constituting fraud or mistake." Therefore, "every regional circuit has held that a relator must meet the requirements of Rule 9(b) when bringing complaints on behalf of the government." *In re BP Lubricants*, 637 F.3d at 1310 (collecting cases).

Rule 9(b)'s reference to "circumstances" requires a plaintiff to plead "matters such as the time, place, and contents of the false representations or omissions, as well as the identity of the person making the misrepresentation or failing to make a complete disclosure and what that defendant obtained thereby." 5A Charles A. Wright et al., Federal Practice & Procedure § 1297 (3d ed. 1998). This is often termed "the who, what, when, where, and how" of the fraud. *Ibid*. Thus, "[t]o satisfy this particularity requirement, the pleader must set out the 'time, place, and content of the alleged misrepresentation with specificity.'" *Garcia-Monagas* v. *De Arellano*, 674 F.3d 45, 54 n.11 (1st Cir. 2012).

2. The text and structure of the FCA compel the conclusion that a relator satisfies Rule 9(b) if, and only if, the relator alleges specific details regarding at least one representative false claim. Because the essence of an FCA violation is a false or fraudulent *claim*, it follows that, to satisfy Rule 9(b), a plaintiff must allege the occurrence of at least one such claim with particularity. Allegations regarding a fraudulent scheme, absent specific claims, do not suffice.

The FCA permits "private *qui tam* relators to recover from persons who make *false or fraudulent claims* for payment to the United States." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 283 (2010) (em-

phasis added). 31 U.S.C. § 3729(a)(1)(A) imposes liability on one who "knowingly *presents* * * * a false or fraudulent *claim* for payment or approval." (Emphasis added). Likewise, Section 3729(a)(1)(B) turns on whether the defendant "knowingly makes, uses, or causes to be made or used, a false record or statement material to a *false or fraudulent claim*." (Emphasis added.) And Section 3729(a)(1)(G) requires "a false *record* or *statement* material to *an obligation to pay or transmit* money or property to the Government." (Emphasis added).

Thus, "the False Claims Act does not create liability merely for a [contractor's] disregard of Government regulations or improper internal policies." *Clausen*, 290 F.3d at 1311. While "[u]nderlying schemes and other wrongful activities that result in the submission of fraudulent claims are included in the 'circumstances constituting fraud or mistake' that must be plead with particularity under Rule 9(b)" (*United States ex rel. Karvelas* v. *Melrose-Wakefield Hosp.*, 360 F.3d 220, 232 (1st Cir. 2004)), such schemes are not actionable under the False Claims Act without "a claim actually presented to the government for payment." *Nathan*, 707 F.3d at 456.

As this Court has explained, "it is * * * clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government." *United States* v. *McNinch*, 356 U.S. 595, 599 (1958). "Liability under the Act attaches *only* to a claim actually presented to the government for payment, not to the underlying fraudulent scheme." *Nathan*, 707 F.3d at 457 (emphasis added).

In sum, the essence of an FCA claim is the presentment of "false or fraudulent claims for payment

to the United States." *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 463 (2007). Because Rule 9(b) applies to FCA claims, it necessarily also applies to the critical ingredient of the violation itself—the allegation that a claim for payment was submitted to the government. It follows that the Rule 9(b) standard—the who, what, when, where, why, and how of the fraud—must be satisfied with respect to at least *one* representative claim. That is essential to ensure a court will not "be left wondering whether a plaintiff has offered mere conjecture or a specifically pleaded allegation on an essential element of the lawsuit." *Clausen*, 290 F.3d at 1313.

3. The policies animating Rule 9(b) also weigh heavily in favor of requiring a relator to plead, with particularity, the details regarding a specific false claim submitted to the United States.

First, this Court has recognized that, because fraud claims "raise a high risk of abusive litigation," Rule 9(b) demands that a plaintiff "state factual allegations with greater particularity than Rule 8 requires." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 569 n.14 (2007). The particularity requirement "discourages fishing expeditions and strike suits which appear more likely to consume a defendant's resources than to reveal evidences of wrongdoing." *SNAPP*, 532 F.3d at 504.

The risks of abusive litigation are especially acute in the context of FCA *qui tam* suits; Rule 9(b) "ensures that the relator's strong financial incentive to bring an FCA claim—the possibility of recovering between fifteen and thirty percent of a treble damages award—does not precipitate the filing of frivolous suits." *Atkins*, 470 F.3d at 1360. Given the enormous stakes—and the massive costs of discovery alone—an

FCA claim that survives a motion to dismiss "will push cost-conscious defendants to settle even anemic cases." *Twombly*, 550 U.S. at 559.

Rule 9(b)'s heightened standard provides additional protection when the risks imposed on defendants are, as here, heightened. In sum, "[t]he particularity requirement of Rule 9 is a nullity if Plaintiff gets a ticket to the discovery process without identifying a single claim." *Atkins*, 470 F.3d at 1359 (quotation omitted).

Second, "the FCA imposes damages that are essentially punitive in nature." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). Given that "it is very easy to accuse someone of fraud and it is clear that the mere accusation of fraud can be damaging to a defendant's reputation" (*Banca Cremi, S.A.* v. *Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1036 (4th Cir. 1997)), appropriately rigorous application of Rule 9(b) safeguards defendants from "spurious charges of immoral and fraudulent behavior." *Bledsoe*, 501 F.3d at 510 (quotation omitted).

Third, the proper application of Rule 9(b) is necessary to "discourage the filing of suits as a pretext for the discovery of unknown wrongs." *Kester*, 23 F. Supp. 3d at 256. Courts should guard against FCA claims that "rest primarily on facts learned through the costly process of discovery," which is "precisely what Rule 9(b) seeks to prevent." *United States ex rel. Wilson* v. *Kellogg Brown & Root, Inc.*, 525 F.3d 370, 380 (4th Cir. 2008).

Fourth, this understanding of Rule 9(b) is consistent with the purpose of the FCA, which limits private suits (via the public-disclosure bar and other

requirements) to only those relators who "have direct and independent knowledge of the information upon which his allegations were based." *Rockwell Int'l Corp.*, 549 U.S. at 476. Requiring a relator to detail specifics as to at least one claim submitted to the government ensures that the relator has the personal and independent knowledge required by the FCA.

4. The lower court did not supply any valid reason to conclude otherwise. It contended that an FCA plaintiff need not prove reliance on a specific statement or a monetary injury (App., *infra*, 24a)—but that is not our argument. Instead, the relator need only provide details of the false or fraudulent *claim*—and even the lower court recognizes that the core requirement that a defendant must have "presented fraudulent claims." *Ibid*.

The court below, moreover, contended that such specific allegations do not aid the government because the government "already has records of those payments and thus 'rarely if ever needs a relator's assistance to identify claims for payment that have been submitted.'" App., *infra*, 24a (quoting U.S. *Nathan* Br. at 16). That, too, is no answer. The purpose of Rule 9(b) is not to aid the government—it is to protect *defendants* against meritless, but substantially costly, litigation.

This observation does, however, demonstrate why proper application of Rule 9(b) will have no harmful effect on the government's use of the FCA. As the Eleventh Circuit observed, because "the government already possesses the claims—false or otherwise—a potential defendant has submitted for payment," the government may "access those claims on its own and evaluate any FCA liability that it believes should attach *before* determining whether to

bring suit or intervene in a relator's *qui tam* action." *Atkins*, 470 F.3d at 1360 n.17.

Finally, the court below stated that requiring a plaintiff to allege representative examples of specific, allegedly false claims submitted to the government "would require relators, before discovery, to prove more than the law requires to be established at trial." App., *infra*, 26a. This is inaccurate: an essential requirement of an FCA claim is the submission of "false or fraudulent claims for payment to the United States." *Schindler Elevator Corp.*, 131 S. Ct. at 1889.

Absent proof of specific false or fraudulent claims, an FCA plaintiff could not carry its burden of proof. Summary judgment is appropriately granted to a defendant when the plaintiff fails to "describe even one, specific false claim." *United States* v. *Kistap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir. 2002). See also *United States ex rel. Crews* v. *NCS Healthcare of Ill., Inc.*, 460 F.3d 853, 858 (7th Cir. 2006) (an FCA violation "specifically requires a claimant to point to a specific claim"); *United States ex rel. Quinn* v. *Omnicare Inc.*, 382 F.3d 432, 440 (3d Cir. 2004) (affirming grant of summary judgment in favor of defendant where relator "did not come forward with a single claim that [the defendant] actually submitted to Medicaid"). Given that proof of a specific false or fraudulent claim is an inescapable element of proving an FCA violation, an FCA plaintiff must plead at least one such claim with particularity in the complaint.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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