No. 15-363

In the Supreme Court of the United States

AT&T, INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA
EX REL. TODD HEATH,

Respondent.

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

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") correctly held that Respondent's complaint satisfied Rule 9(b) of the Federal Rules of Civil Procedure ("Rule 9(b)"), where the complaint alleged particularized details of a scheme to submit false claims to the government, together with reliable indicia leading to a strong inference that the claims were actually submitted to the government?

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COUNTER-STATEMENT OF THE CASE

This case is about the longstanding, continuing and deliberate failure of AT&T[1] to comply with the fundamental requirement of the Schools and Libraries Program (commonly known as the "E-Rate Program"), that AT&T and other telecommunications providers offer school districts and public libraries the lowest price charged to similarly situated customers (the "LCP") for their telecommunications services. *See* 47 U.S.C. § 254(h)(1)(B); 47 C.F.R. §§ 54.500(f), 54.511(b). As a consequence of AT&T's knowing LCP violations, AT&T submitted, and caused its school and library customers to submit, false E-Rate claims to the government.

On October 28, 2011, Relator, Todd Heath ("Relator"), commenced this action in the United States District Court for the District of Columbia. The complaint identified, *inter alia*, the specific forms, certified by AT&T, as well as its school and library

[1] "AT&T" refers to AT&T, Inc. and its wholly-owned subsidiaries, AT&T Corp.; AT&T Corp. d/b/a AT&T Advanced Solutions; AT&T Datacomm, Inc. d/b/a AT&T Datacomm; AT&T Mobility; Alascom, Inc. d/b/a AT&T Alascom; BellSouth Communications, LLC d/b/a AT&T Communications Systems Southeast; BellSouth Long Distance, Inc. d/b/a AT&T Long Distance; BellSouth Telecommunications, Inc.; Illinois Bell Telephone Co. d/b/a AT&T Illinois; Indiana Bell Telephone Co. d/b/a AT&T Indiana; Michigan Bell Telephone Co. d/b/a AT&T Michigan; Nevada Bell Telephone Co. d/b/a AT&T Nevada; The Ohio Bell Telephone Co. d/b/a AT&T Ohio; Pacific Bell Telephone Co. d/b/a AT&T California; SBC Long Distance, LLC d/b/a AT&T Long Distance; SBC Internet Services, Inc. d/b/a AT&T Internet Services; The Southern New England Telephone Co. d/b/a AT&T Connecticut; Southwestern Bell Telephone Co.; and Wisconsin Bell, Inc. d/b/a AT&T Wisconsin.

customers, which establish the falsity of the E-Rate claims submitted to the government for reimbursement. *See United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 118, 124-25 (D.C. Cir. June 23, 2015); Pet. App. at 8a, 21a-22a. AT&T moved to dismiss Relator's complaint on January 7, 2014, arguing that the complaint was barred by both the first-to-file rule, 31 U.S.C. § 3730(b)(5), and the public disclosure bar, 31 U.S.C. § 3730(e)(4)(a), as well as on the alleged basis that it failed to satisfy the pleading requirements of, *inter alia*, Rule 9(b).

On June 6, 2014, the District Court entered its Order and Memorandum Opinion dismissing all of Relator's claims based upon the first-to-file rule. Importantly, but as AT&T avoids in its Petition, the District Court expressly did not reach AT&T's motion to dismiss on the ground that the complaint failed to satisfy the pleading requirements of Rule 9(b):

> Defendants also argue that the False Claims Act claim is barred by the Act's public disclosure bar and that the Complaint fails to meet the pleading requirements of Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6). Mot. to Dismiss [Dkt. #33]. ***Because the claim is barred by the first-to-file rule, I need not and do not reach the AT&T defendants' arguments regarding public disclosure and failure to satisfy the pleading requirements***.

Pet. App. at 29a n.2 (emphasis added).[2] Consequently, the District Court also made no determination regarding Relator's request that he be granted leave to file an amended complaint in the event the District Court found his allegations to be inadequate and to cure any deficiencies under Rule 9(b). Pet. App. at 28a-36a.

On June 23, 2015, the D.C. Circuit issued an Order reversing the District Court's decision dismissing the case on first-to-file grounds and holding that the complaint adequately pled sufficient factual allegations with particularity, as required by Rule 9(b), and remanded the case for further proceedings. *See Heath*, 791 F.3d at 127; Pet. App. at 1a-27a. On August 8, 2015, the D.C. Circuit issued its mandate. On September 21, 2015, AT&T filed the instant Petition for a Writ of Certiorari ("Petition").

[2] Citations in the "Pet. App. at __" format are to the Appendices accompanying AT&T's Petition. Similarly, citations in the "Pet. at __" format are to AT&T's Petition.

REASONS FOR DENYING THE WRIT

I. THERE IS NO GENUINE OR FULLY DEVELOPED CONFLICT AMONG THE CIRCUITS REGARDING THE PROPER APPLICATION OF RULE 9(b) TO FCA COMPLAINTS THAT NECESSITATES REVIEW BY THE COURT AT THIS TIME

Contrary to AT&T's assertions, the issue of Rule 9(b)'s application to complaints brought under the FCA does not involve a "deep," "significant," or "persistent" conflict among the federal courts of appeal. Pet. at 7, 9. In actuality, the courts of appeal are harmonizing toward a functional and flexible application of Rule 9(b), which the D.C. Circuit correctly adopted below.

The U.S. Solicitor General, in an *amicus curiae* brief submitted just last year on a similar petition regarding Rule 9(b), is clear on this point:

> Although the disagreement is not as clearly defined as petitioner contends, lower courts have reached inconsistent conclusions about the precise manner in which a *qui tam* relator may satisfy the requirements of Rule 9(b). Several courts of appeals have correctly held that a *qui tam* complaint satisfies Rule 9(b) if it contains detailed allegations supporting a plausible inference that false claims were submitted to the government, even if the complaint does not identify specific requests for payment. Other decisions, however, have articulated a per se rule that a relator must plead the details of particular false claims—that is, the dates and

> contents of bills or other demands for payment—to overcome a motion to dismiss.
>
> This per se rule is unsupported by Rule 9(b) and undermines the FCA's effectiveness as a tool to combat fraud against the United States. ***Indeed, even those circuits that initially endorsed the per se rule have issued subsequent decisions that appear to adopt a more nuanced approach. The disagreement among the circuits therefore may be capable of resolution without [the Supreme Court's] intervention***. If that disagreement persists, however, this Court's review to clarify the applicable pleading standard may ultimately be warranted in an appropriate case.
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> * * *
>
> ***The current extent of the disagreement among the lower courts is thus uncertain, and the courts of appeals that have previously articulated a per se rule requiring relators to plead the details of specific false claims may have retreated from a rigid application of that rule.***

See Brief for the United States as *Amicus Curiae* at 10 and 14, *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, No. 12-1349 (Feb. 25, 2014) ("U.S. *Nathan* Br.") (emphasis added).

In fact, as the Solicitor General aptly explained, the circuit trend toward a more nuanced approach includes those circuits that AT&T claims are "persisting" in the

strict or *per se* application of Rule 9(b) – *i.e.*, the Fourth, Sixth, Eighth, and Eleventh Circuits:

> **The First and Fourth Circuits have also declined to adopt a *per se* rule requiring relators to plead specific false claims.** The First Circuit has held that where—as in this case—a *qui tam* complaint alleges that "the defendant induced *third parties* to file false claims with the government," the complaint can "satisfy Rule 9(b) by providing 'factual or statistical evidence to strengthen the inference of fraud beyond possibility' without necessarily providing details as to each false claim." *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (2009) (quoting *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720,733 (1st Cir. 2007)), cert. denied 130 S. Ct. 3454 (2010). **In the decision below [*U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013) cert. denied, 134 S. Ct. 1759 (2014)], the Fourth Circuit endorsed the results in *Grubbs* and *Duxbury* and indicated that a relator need not identify particular false claims when "specific allegations of the defendant's fraudulent conduct necessarily [lead] to the plausible inference that false claims were presented to the government."** Pet. App. 9a.
>
> . . . [T]he Sixth, Eighth, Tenth, and Eleventh Circuits have issued decisions finding that particular *qui tam* complaints should be dismissed under Rule 9(b) because the relators

failed to identify specific requests for payment. [Citations omitted].

These courts, however, have not consistently adhered to this rigid understanding of Rule 9(b). **The Sixth Circuit recently left open the possibility "that the requirement that a relator identify an actual false claim may be relaxed when, even though the relator is unable to produce an actual billing or invoice, he or she has pled facts which support a strong inference that a claim was submitted."** ***Chesbrough v. VPA, P.C.*****, 655 F.3d 461, 471 (2011).** The Tenth Circuit has likewise stated that an FCA complaint "need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme." *United States ex rel. Lemmon v. Envirocare of Utah, Inc*., 614 F.3d 1163, 1172 (2010) (citing *Duxbury*, 579 F.3d at 29; *Lusby*, 570 F.3d at 854-855; *Grubbs*, 565 F.3d at 190). **And both the Eighth and Eleventh Circuits have allowed *qui tam* complaints to proceed notwithstanding relators' failure to identify "specific fraudulent claims for payment submitted to the government."** ***In re Baycol Prods. Litig*****., 732 F.3d 869, 875-877 (8th Cir. 2013);** ***see United States ex rel. Walker v. R&F Props. of Lake Cnty., Inc*****., 433 F.3d 1349, 1360 (11th Cir. 2005), cert. denied, 549 U.S. 1027 (2006);** ***see also United States ex rel. Clausen v. Laboratory Corp. of Am*****., 290 F.3d 1301, 1311 (11th Cir. 2002) (stating that**

> **a *qui tam* complaint must contain "some indicia of reliability * * * to support the allegation of an actual false claim for payment") (emphasis omitted), cert. denied, 537 U.S. 1105 (2003).**

U.S. *Nathan* Br. at 12-14 (emphasis added). Clearly, none of these circuits categorically hold – as AT&T suggests – that every relator, in every FCA case, must allege at least one representative example of a false claim to satisfy Rule 9(b).

To promote its effective attempt to re-write the text of and jurisprudence applying Rule 9(b), AT&T unfortunately resorts to misstatements of certain decisions of the Fourth, Sixth, Eighth, and Eleventh Circuits as part of its attempt to suggest that they categorically oppose a flexible application of Rule 9(b). AT&T argues, for instance, that the decisions of the Sixth, Eighth, and Eleventh Circuits expressly permitting a functional and flexible approach, *see* U.S. *Nathan* Br. at 12-14, should be disregarded because those decisions involved corporate insiders, as opposed to corporate outsiders, such as Relator. Pet. at 14-16. AT&T then asserts, without any support, that these 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)." *Id*. at 16. Not so. In fact, these circuits expressly authorize a case-by-case, non-categorical approach to Rule 9(b), and they do so irrespective of a relator's status as a corporate insider or outsider. *See Chesbrough*, 655 F.3d at 471-72 (Sixth Circuit: "[W]e do not foreclose the possibility that this court may apply a 'relaxed'

version of Rule 9(b) in certain situations. . . . [T]he requirement . . . may be relaxed when . . . he or she has pled facts which support a strong inference that a claim was submitted. Such an inference may arise when the relator has 'personal knowledge that the claims were submitted by Defendants . . . for payment.' There may be other situations in which a relator alleges facts from which it is highly likely that a claim was submitted to the government for payment.") (internal citations omitted); *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 918 (8th Cir. 2014) (Eighth Circuit: "Rule 9(b) is context specific and flexible and must remain so to achieve the remedial purpose of the False Claim Act. . . . Accordingly, we conclude that a relator can satisfy Rule 9(b) without pleading representative examples of false claims if the relator can otherwise plead the particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.") (internal citations and quotations omitted); *Walker*, 433 F.3d at 1360 (Eleventh Circuit: analyzing the totality of relator's allegations and affirming the denial of a motion to dismiss on Rule 9(b) grounds because the allegations "are sufficient to explain why [she] believed [defendant] submitted false or fraudulent claims for services . . . ."). Indeed, none of the circuit decisions cited by AT&T articulate, much less mention, the corporate insider vs. outsider test that AT&T essentially attempts to self-create in its Petition.

Moreover, it is plainly incorrect, as AT&T argues, that the Fourth Circuit "expressly disclaimed the more relaxed view of Rule 9(b)." Pet. at 16. To the contrary, the Fourth Circuit (like the Sixth, Eighth, and

Eleventh Circuits) expressly left open the possibility of applying Rule 9(b) flexibly, on a case-by-case basis, when a relator asserts allegations that plausibly demonstrate the actual submission of false claims to the government: "[T]he standard we articulate today ***does not foreclose claims under the Act when a relator plausibly pleads that specific, identifiable claims actually were presented to the government for payment***. Of course, ***whether such factual allegations in a given case meet the required standard must be evaluated on a case-specific basis***." *Nathan*, 707 F.3d at 458 (emphasis added).

Lastly, AT&T's reliance upon *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 640 (4th Cir. 2015) and *Murphy v. Capella Educ. Co.*, 589 F. App'x 646, 652 (4th Cir. 2014), to buttress its claim that a circuit divide still persists, is unavailing, as neither case demonstrates any continuing conflict between the circuits regarding Rule 9(b). Pet. at 16. Indeed, both *Triple Canopy* and *Murphy* merely reiterate the uncontroversial principle that "Rule 9(b) requires 'at a minimum' that [relator] 'describe the time, place, and contents of the false representations[.]'" *Triple Canopy,* 775 F.3d at 640 (internal citations omitted). It strains credulity for AT&T to cite these unremarkable decisions alone to audaciously support its declaration that the Solicitor General was "wrong" to conclude that "there was a possibility that the conflict would reconcile itself without this Court's intervention." Pet. at 16.

In short, there is no irreconcilable or persistent conflict among the circuits regarding the proper application of Rule 9(b) to FCA claims that warrants

this Court's intervention at this time. Under these circumstances, Respondent respectfully submits that AT&T's Petition should be denied.

II. THIS CASE IS NOT THE PROPER VEHICLE FOR RESOLVING THE QUESTION PRESENTED BY AT&T'S PETITION

A. Respondent's Complaint is Well-Pled Under Either a Strict or Flexible Application of Rule 9(b)

The D.C. Circuit's application of Rule 9(b) to Relator's FCA complaint is consistent with longstanding Rule 9(b) jurisprudence, as well as basic pleading principles that are applied by all circuits when analyzing Rule 9(b) issues. Simply put, the D.C. Circuit applied Rule 9(b) in exactly the same fashion as all other circuits would have done if reviewing Relator's complaint, including each of the purportedly "strict" circuits:

> Rule 9(b) requires Heath to "state with particularity the circumstances constituting fraud[.]" Fed.R.Civ.P. 9(b). The rule serves to "discourage [ ] the initiation of suits brought solely for their nuisance value, and safeguards potential defendants from frivolous accusations of moral turpitude." *United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981)). In addition, "because 'fraud' encompasses a wide variety of activities," the complaint must be particular enough to

"guarantee all defendants sufficient information to allow for preparation of a response." *Id*.

Heath's AT&T Nationwide Complaint satisfies Rule 9(b). It sets forth in sufficient detail the time, place, and manner of AT&T's scheme to defraud the Universal Service Fund. From 1997 to 2009, the complaint alleges, AT&T knowingly failed to enforce institutional compliance with the lowest-corresponding-price requirement. AT&T Nationwide Complaint ¶¶ 61-62. That behavior continued even after the 2004 consent decree obligated AT&T to standardize billing practices and to train its employees. *Id*. ¶¶ 64-70. Because AT&T "continued to ignore the Company's responsibility to offer" the lowest corresponding price, AT&T's employees remained ignorant of the requirement and consistently overcharged E-Rate eligible schools and libraries. *Id*. ¶ 71. As a result, AT&T "knowingly has caused school districts and libraries to submit false claims for payment to [the Universal Service Administrative Company], knowing that such false claims would be submitted * * * for reimbursement" from the federal program. *Id*. ¶ 108.

To support those allegations, the complaint includes copies of AT&T's training materials. AT&T Nationwide Complaint Exhibit 3, Appendix 150-279. The complaint also alleges that an audit of AT&T's bills to the Detroit public school system revealed that, between 2005 and 2010, AT&T overbilled the E-Rate

> eligible schools by at least $2.8 million. AT&T Nationwide Complaint ¶¶ 103-104.
>
> In short, Rule 9(b)'s requirements of particularity as to who (AT&T), what (detailed identification of a centralized and institutionalized failure to comply with the lowest-corresponding-price requirement, which resulted in massive overbilling of a governmental program), where (through nineteen subsidiaries and their interactions with E-Rate schools and libraries across the Country), and when (1997 to 2009) have been satisfied. The complaint thus put AT&T on fair notice of the fraud of which it is accused: That, even in the wake of a consent decree pertaining to pervasive E-Rate problems, AT&T persisted in knowingly or recklessly failing to comply with the lowest-corresponding-price requirement, which it knew was a material condition for E-Rate reimbursement, which caused false claims to be submitted and their payment later concealed.

Heath, 791 F.3d at 123-24; Pet. App. at 19a-21a. *Cf. Chesbrough*, 655 F.3d at 466-67 (Sixth Circuit) ("To plead fraud with particularity, the plaintiff must allege (1) the time, place, and content of the alleged misrepresentation, (2) the fraudulent scheme, (3) the defendant's fraudulent intent, and (4) the resulting injury" and "[t]he Rule's purpose is to alert defendants as to the particulars of their alleged misconduct so that they may respond.") (internal citations and quotations omitted); *Thayer*, 765 F.3d at 916-19 (Eighth Circuit) (same); *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318,

1324 (11th Cir. 2009) (same); *Nathan*, 707 F.3d at 455-57 (Fourth Circuit) (same).

It is of no moment that, in finding Relator's allegations to be particularized and sufficient under Rule 9(b), the D.C. Circuit refused to adopt a standard requiring a relator to ***always*** plead specific, representative samples of false claims. *Heath*, 791 F.3d at 126; Pet. App. at 23a. In so holding, the D.C. Circuit articulated a position that is entirely consistent with the position that each of the purportedly "strict" circuits have more recently taken on this issue:

> The central question, instead, 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."*** *Grubbs*, 565 F.3d at 190.
>
> Heath's complaint passes that test. He provides factual specificity concerning the type of fraud, how it was implemented, and the training materials used, all of which is then corroborated by the concrete example of the Detroit audit documenting the very type of overbilling that follows the complaint's pattern.

Id. at 126 (emphasis added); Pet. App. at 25a. *Cf*. *Nathan*, 707 F.3d at 457 (Fourth Circuit) (a relator need not identify particular false claims when "specific allegations of the defendant's fraudulent conduct necessarily [lead] to the plausible inference that false claims were presented to the government."); *Chesbrough*, 655 F.3d at 471 (Sixth Circuit) ("[T]he requirement that a relator identify an actual false

claim may be relaxed when, even though the relator is unable to produce an actual billing or invoice, he or she has pled facts which support a strong inference that a claim was submitted."); *Thayer*, 765 F.3d at 918 (Eighth Circuit) ("[A] relator can satisfy Rule 9(b) without pleading representative examples of false claims if the relator can otherwise plead the particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.") (internal citations and quotations omitted); *Walker*, 433 F.3d at 1360 (Eleventh Circuit) (analyzing the totality of relator's allegations and affirming the denial of a motion to dismiss on Rule 9(b) grounds because the allegations "are sufficient to explain why [she] believed [defendant] submitted false or fraudulent claims for services . . . .").

Thus, even under the prevailing jurisprudence of the purportedly "strict" Fourth, Sixth, Eighth, and Eleventh Circuits concerning Rule 9(b), it is apparent that Relator's allegations and their adequacy under Rule 9(b)'s particularized pleading requirements, would be upheld if this case were adjudicated in those circuits.

B. The Record Below is Insufficiently Complete to Warrant Review

Even if the Court were otherwise inclined to consider the issues raised in AT&T's Petition, the instant case is an ill-suited vehicle to accomplish such a review. As noted above, the District Court expressly refused to consider, much less rule on, any of the pleading arguments raised by AT&T on its motion to dismiss. Likewise, Relator has neither amended his initial complaint, nor been provided with the

opportunity to amend the complaint to provide additional details regarding the fraudulent scheme and the false claims at issue, if somehow deemed necessary, as a result of the District Court's decision to dismiss Relator's complaint on other grounds and not to address AT&T's arguments regarding the pleading sufficiency of Relator's initial pleading. In opposing AT&T's motion to dismiss his complaint, Relator specifically requested leave to amend his complaint to address any pleading deficiencies identified in the complaint. Accordingly, Relator respectfully submits that this case is neither a legally nor factually appropriate vehicle for resolving the question presented by AT&T's Petition in light of the limited record developed below and, for this additional reason, the Petition should be denied.

III. THE "IMPORTANCE" ARGUMENTS RAISED BY AT&T AND *AMICI CURIAE* ARE UNPERSUASIVE

AT&T and the *amici curiae* assert a panoply of arguments regarding the importance of AT&T's Petition, none of which are tenable. Indeed, the arguments regarding the "importance" of the question presented by AT&T and its *amici curiae* only serve to confirm the reasons why the Court's intervention is neither necessary nor warranted.

First, certain *amici curiae* misstate the D.C. Circuit's holding and application of Rule 9(b) in an attempt to assign legal error where none exists. *See, e.g.*, Amicus Br. of National Association of Manufacturers at 4-5 (claiming, incorrectly, that "[t]he D.C. Circuit ruled that a *qui tam* relator need not plead the submission of a false claim to the Government in

order to comply with the particularity requirements of Rule 9(b)."); Amici Br. of Chamber of Commerce of the United States of America, Pharmaceutical Research and Manufacturers of America, and Business Roundtable at 6 ("The decision below effectively ignores the plain language of the FCA and treats the act of submitting a claim as a mere ministerial detail to be disregarded when a relator alleges an underlying fraudulent scheme."); Amicus Br. of DRI–The Voice of the Defense Bar at 6 ("The DC Circuit's decision vitiates Rule 9(b)'s purposes by effectively eliminating the particularity requirement for FCA claims.").

Not true. The D.C. Circuit expressly tested Relator's FCA complaint against the particularized pleading standard of Rule 9(b) and held that, to satisfy this standard, a relator must 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." *Heath*, 791 F.3d at 123-26 (internal citation omitted); Pet. App. at 19a-25a. That holding is entirely consistent with the FCA, Rule 9(b) and case law throughout the circuits on this very subject.

Second, AT&T and the *amici curiae* invoke "high" rhetoric regarding the supposed effect of the D.C. Circuit's holding in, *inter alia*, encouraging "opportunistic" relators to forum shop, fast-tracking relators to discovery, and enabling relators to extort substantial settlements from innocent defendants. *See, e.g.*, Pet. at 8 ("[I]n light of this persistent circuit split, plaintiffs have both the ability and incentive to forum shop."); Amicus Br. of DRI–The Voice of the Defense Bar at 12 ("The D.C. Circuit's approach undermines the

very purposes for which Rule 9(b) exists. It gives relators, regardless of the merits of their claims, tickets to discovery and thus severely threatens defendants with *in terrorem* settlements."); Amici Curiae Br. of the Coalition for Government Procurement and the Professional Services Council—The Voice of the Government Services Industry at 11 ("Allowing a poorly pleaded, non-intervened qui tam suit to proceed in this manner would 'produce unwanted social costs,' including 'serious economic and reputational harm' to government contractors that have not violated the False Claims Act.") (citations omitted); Amicus Br. of the Wireless Association® at 7 ("FCA defendants must routinely defend against unfounded claims, incurring massive costs and facing substantial pressure to offer settlements notwithstanding the absence of liability. This problem is only exacerbated by permissive pleading standards that allow feeble claims to flower into full-blown litigation.").

These assertions, although no doubt inflammatory, are neither grounded in fact, nor do they logically flow from the D.C. Circuit's application of Rule 9(b), which, like all circuits do, required that Relator's allegations of fraud be pled with particularity. *Heath*, 791 F.3d at 123 ("Rule 9(b) requires Heath to 'state with particularity the circumstances constituting fraud[.]'") (citation omitted); Pet. App. at 19a. Indeed, the arguments regarding the "importance" of the question presented by AT&T and the *amici curiae* amount to little more than an assertion by AT&T and these industry groups that they, as opposed to the United States of America, would be better off without the FCA. Relator respectfully submits that such coordinated

lobbying is better suited for the legislative branch than the judiciary.

Third and finally, as addressed above, the state of the circuit law regarding the application of Rule 9(b) is harmonizing toward the flexible and functional approach followed by the D.C. Circuit. Thus, AT&T's assertion that the issue continues to "frequently recur[ ]" among the district courts, Pet. at 19-22, does not provide a basis for review where, as here, the circuit courts have been reaching agreement between themselves on the subject.

In sum, none of the reasons advanced by AT&T and its *amici curiae* demonstrate the exceptional importance necessary to justify the Court's review at this time.

CONCLUSION

AT&T's Petition for a Writ of Certiorari should be denied.

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