No. 15-363

IN THE
Supreme Court of the United States

AT&T, INC., *ET AL.*,
Petitioners,
v.
UNITED STATES, EX REL. TODD HEATH,
Respondent.

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

BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* SUPPORTING PETITIONERS

THOMAS C. POWER
CTIA—THE WIRELESS ASSOCIATION®
1400 16TH STREET, NW
SUITE 600
WASHINGTON, DC 20036
(202) 785-0081

BRYAN N. TRAMONT
Counsel of Record
RUSSELL P. HANSER
CRAIG E. GILMORE
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW
Suite 800N
Washington, DC 20036
(202) 783-4141
btramont@wbklaw.com

October 23, 2015

Counsel for *Amicus Curiae*

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

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BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* SUPPORTING PETITIONERS

STATEMENT OF INTEREST[1]

CTIA—The Wireless Association® ("CTIA") respectfully submits this brief as *amicus curiae* in support of Petitioners AT&T, Inc., *et al.* ("AT&T").[2]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represent that they authored this brief in its entirety and that no party or counsel for a party, other than *amicus curiae*, its members, or its counsel, made any monetary contribution to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief.

[2] CTIA was founded in 1984 as the Cellular Telecommunications Industry Association. In 2000, CTIA merged with the Wireless Data Forum and became the Cellular

CTIA is an international nonprofit organization that represents the wireless communications industry. CTIA's members include wireless carriers, suppliers, manufacturers, providers of data services and products, and countless other contributors to the wireless ecosystem, including providers of telecommunications services. CTIA regularly appears before the Court in cases presenting issues of importance to its members. *See*, *e.g.*, *T-Mobile South, L.L.C. v. City of Roswell*, 135 S. Ct. 808 (2015); *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111 (2014); *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584 (2013); *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013); *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333 (2011).

This is such a case. The question presented—whether a *qui tam* relator's False Claims Act ("FCA") complaint must plead the particular details of at least one false claim—has elicited conflicting results in the federal appeals courts. CTIA has an interest in this case because the proliferation of FCA lawsuits affects telecommunications carriers, including CTIA's members. Like all companies doing business with the Government, CTIA's telecommunications carrier members have an interest in ensuring uniform nationwide pleading rules that distinguish between lawsuits prosecuted by individuals with credible knowledge of undisclosed fraud, and unfounded cases filed solely for the purpose of extracting large settlements.

Telecommunications & Internet Association. In 2004, the name was changed to CTIA—The Wireless Association®.

Previously, the Fourth, Sixth, Eighth, and Eleventh Circuits have held that Federal Rule of Civil Procedure 9(b) requires an FCA relator to plead at least one specific false claim. In this case, the United States Court of Appeals for the D.C. Circuit joined the First, Third, Fifth, Seventh, Ninth, and Tenth Circuits in holding that there is no such requirement—*i.e.*, that plaintiffs may allege a pattern without identifying specific instances of fraud. Given the FCA's broad venue provisions, CTIA is concerned that the circuit split, unless resolved, will encourage individuals without specific knowledge of any false claims to forum shop for a circuit that will allow such a suit to move forward. When the defendant is a large corporation doing business nationwide, or when the alleged scheme is widespread, the relator enjoys a nearly limitless choice among possible fora. Indeed, the telecommunications sector includes some of the nation's largest and more geographically widespread businesses, making insufficiently pled FCA lawsuits a particular concern for CTIA and its members. *See* FORTUNE, *Fortune 500* (2015), http://fortune.com/fortune500/.

The prospect for forum-shopping by FCA relators is especially chilling given that the vast majority of FCA claims—75 percent of all *qui tam* claims— eventuate in dismissal. DEP'T OF JUSTICE, FRAUD STATISTICS OVERVIEW: OCT. 1, 1987 – SEPT. 30, 2009, *available at* http://www.taf.org/FCAstats2009.pdf (last visited Oct. 19, 2015) [hereinafter 2009 FCA STATISTICS]. Under these circumstances, a persistent circuit split will result in strategically filed suits imposing severe costs not only on defendants but on the judicial system itself. As this

Court has held, pleading requirements must be configured to ensure that cases proceed only where a plaintiff could be expected, through discovery, to adduce evidence of illegal conduct. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Unless and until the Court resolves the circuit split at issue, this will not be the case in the context of *qui tam* FCA suits.

CTIA thus supports Petitioners' request that this Court grant its Petition for Writ of Certiorari ("Petition").

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns an issue that has divided the courts of appeals: the proper application of Federal Rule of Civil Procedure 9(b)—which requires that a complaint "state with particularity the circumstances constituting fraud"—to claims brought under the FCA, 31 U.S.C. § 3729 *et seq*. While four courts of appeals correctly require an FCA plaintiff to allege the particular details of at least one false claim to satisfy Rule 9(b), the court below—like six other circuits—requires plaintiffs to plead only the details of a fraudulent "scheme." *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015).

The ramifications of the instant circuit split are significant. The FCA's *qui tam* provisions encourage private individuals with knowledge of fraud committed against the Government to sue on behalf of the United States. In exchange, these "relators" are entitled to share up to 30 percent of all recoveries. 31 U.S.C. § 3730 (2012). The FCA's

bounty provisions are intended to promote private suits, and the inducements for would-be relators to file suit are inarguably strong: According to statistics published by the Department of Justice ("Justice Department"), individual FCA relators have collected awards totaling over *$4.7 billion* since 1986. DEP'T OF JUSTICE, FRAUD STATISTICS OVERVIEW: OCT. 1, 1987 – SEPT. 30, 2014, *available at* http://www.justice.gov/file/fcastatspdf/download (last visited Oct. 19, 2015) [hereinafter 2014 FCA STATISTICS]. In the face of such incentives, Rule 9(b)'s requirement that a party alleging fraud plead a case with particularity is an important check against the potential for abuse.[3] *Qui tam* lawsuits are expensive to investigate and defend, especially when brought by plaintiffs seduced by potentially lucrative FCA awards.

The D.C. Circuit's decision—and the circuit split it exacerbates, if not resolved—will only encourage the filing of still more dubious *qui tam* lawsuits based on hunch and speculation rather than actual knowledge of false claims. The Court should act now to resolve the circuit split and confirm that Rule 9(b)'s heightened pleading standard requires plaintiffs to allege at least one specific false claim in an FCA complaint.

This case presents an ideal vehicle for resolving the circuit split. Twice within the last five

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[3] There is no dispute that Rule 9(b) applies to claims brought under the FCA. Pet. at 3-4; *see In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1310-11 (Fed. Cir. 2011) ("[E]very regional circuit has held that a relator must meet the requirements of Rule 9(b) when bringing [FCA] complaints on behalf of the government.") (citing cases).

years the United States has itself acknowledged the conflict. Last year it stated that the conflict "warrant[s] the Court's review" in an appropriate case where the Rule 9(b) question is "outcome-determinative." Brief for the United States as *Amicus Curiae* Supporting Respondents, at 9, *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury*, *cert. denied*, 561 U.S. 1005 (2010) (No. 09-654) [hereinafter U.S. Duxbury Br.]; *see* Brief for United States as *Amicus Curiae* Supporting Petitioners, at 10, *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, *cert. denied* 134 S. Ct. 1759 (2014) (No. 12-1349) [hereinafter U.S. Nathan Br.]. This is that case. The outcome of this case unquestionably turns on which Rule 9(b) standard is applied to the complaint, and no other jurisdictional or antecedent issues are presented. Nor is there any reason to delay review; the conflict among the federal appeals courts is well pronounced and shows no sign of abating.

AT&T's Petition also raises issues of exceptional importance. FCA *qui tam* lawsuits are increasingly common, and their rate of growth has accelerated over time. "[I]n a field so productive of federal litigation, the need for clear procedural rules governing access to the federal courts is imperative." *Mason v. Continental Group, Inc.*, 474 U.S. 1087, 1087-88 (1986) (White, J., and Brennan, J., dissenting). Telecommunications companies, including CTIA's members, are among those entities faced with the very real threat of FCA allegations. In the D.C. Circuit and elsewhere, however, these allegations need not describe any specific instance of fraud. And yet, the great majority of *qui tam* FCA cases—almost 75 percent of all such claims, and

a whopping 94 percent of cases in which the Justice Department chooses not to intervene—are ultimately dismissed. 2009 FCA STATISTICS, *supra*. Thus, 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 facts would alone warrant grant of the Petition, but certiorari is particularly necessary here, where the applicable venue provision invites and permits forum-shopping. Because the FCA allows suits to be filed wherever the defendant does business, 31 U.S.C. § 3732 (2012), relators that lack specific examples to plead their cases can simply pursue their claims in the more permissive circuits. This is the very type of opportunism Congress intended to curtail under the FCA. *Bailey v. Shell W. E&P, Inc.*, 609 F.3d 710, 721 n.3 (5th Cir. 2010) ("[F]orum shopping constitute[s] the opportunistic and parasitic behavior that the FCA seeks to preclude."). The Supreme Court's resolution of the Rule 9(b) standard will ensure that liability turns on facts and law, not geographical happenstance. Because the circuit split has "the troubling effect of encouraging forum shopping by plaintiffs," the conflict "can hardly be passed over as an unimportant one unworthy of this Court's attention." *Mason*, 474 U.S. at 1087-88 (White, J., and Brennan, J., dissenting).

For all these reasons, the Petition should be granted.

ARGUMENT

I. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE LONG-ACKNOWLEDGED CIRCUIT SPLIT.

The Petition explains in detail the direct conflict between the Rule 9(b) standard laid down by the D.C. Circuit's decision and the standards adopted by the Fourth, Sixth, Eighth, and Eleventh Circuits. Pet. at 9-19. As the Petition demonstrates, those four circuits require a relator to identify a representative example of an actual false claim presented to the Government in order to satisfy Rule 9(b)'s particularity requirement. *See*, *e.g.*, *United States ex rel. Nathan v. Takeda Pharm. N.A., Inc.*, 707 F.3d 451, 457-58 (4th Cir. 2013); *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504-05 (6th Cir. 2007); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556-57 (8th Cir. 2006); *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1312-13 (11th Cir. 2002).

Conversely, seven circuits—including the court below—apply a more relaxed construction, holding that Rule 9(b) does not oblige an FCA plaintiff to allege specific examples of false claims. *See*, *e.g.*, *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 126 (D.C. Cir. 2015); *Foglia v. Renal Ventures Mgmt., L.L.C.*, 754 F.3d 153, 155-56 (3d Cir. 2014); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010); *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13,

29 (1st Cir. 2009); *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009). As the Third Circuit has recognized, "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*, 754 F.3d at 155.

CTIA will not repeat the Petition's thorough explanation: review is warranted to resolve the conflict among the federal courts of appeals. CTIA writes separately to emphasize that this case represents precisely the type of "appropriate" case the United States has stated would merit this Court's review. *See* U.S. Duxbury Br., *supra*, at 9; U.S. Nathan Br., *supra*, at 10.

Five years ago, in the First Circuit's *Duxbury* case, the United States acknowledged the deepening "circuit conflict," explaining that the Rule 9(b) question is of "continuing importance" and that this Court's review "likely would be warranted in an appropriate case." *See* U.S. Duxbury Br., *supra*, at 9. It stated:

> [T]he overall body of appellate precedent creates substantial uncertainty as to whether a *qui tam* complaint that contains detailed allegations giving rise to a reasonable inference that false claims were submitted to the government, but that does not identify specific requests for payment, can be sufficiently

> particularized to withstand a motion to dismiss.

Id. at 16. For these reasons, the United States called the Rule 9(b) question an "unsettled and significant" issue that "warrant[s] the Court's review" in "an appropriate case." *Id.* at 17.

Nevertheless, the United States argued that *Duxbury* was not itself a suitable vehicle for addressing the Rule 9(b) standard because it presented a threshold jurisdictional obstacle: the plaintiff there was not the "original source" of the allegedly false or fraudulent information, which (under since superseded statutory language) created a separate, jurisdictional barrier to review. *Id.* at 9, 17-18 & n.6. That antecedent jurisdictional question, the United States reasoned, "might prevent the Court from reaching" the Rule 9(b) question. *Id.*

More recently, in the Fourth Circuit's *Nathan* case, the United States reiterated that courts have reached "inconsistent conclusions" about how *qui tam* relators may satisfy Rule 9(b). U.S. Nathan Br., *supra*, at 10. It explained that "if that disagreement persists, . . . this Court's review to clarify the applicable pleading standard may ultimately be warranted." *Id*. at 11. The United States concluded, however, that *Nathan*—like *Duxbury* before it—was not the right vehicle. Because the complaint at issue failed plausibly to allege that false claims were presented to the Government, "this suit could not go forward even under the pleading standard most favorable to relators." *Id.* Thus, the United States again advised that this Court's consideration of the

Rule 9(b) question "should await a case in which it would be outcome-determinative." *Id.*[4]

This is just such a case. Here, the question of whether the respondent must plead the details of at least one false claim to satisfy Rule 9(b)'s particularity requirement *will* determine the outcome, distinguishing this case from *Nathan*. And unlike *Duxbury*, this case does not present an antecedent jurisdictional question. Moreover, the case below only deepens the circuit conflict that the United States recognized as problematic in *Duxbury* and *Nathan*. These factors make this the right case to address the Rule 9(b) question and resolve the circuit split.

II. THE ISSUES RAISED BY THE PETITION REQUIRE RESOLUTION.

A. FCA Lawsuits Are Widespread and Proliferating.

Qui tam cases under the FCA have grown exponentially since that statute was amended in 1986 to permit private citizens to bring suit on the government's behalf. According to the Justice Department's published statistics, Fiscal Year ("FY") 1987 saw just 30 *qui tam* cases. By FY 1996, that number had increased more than tenfold, to 341. Between 1997 and 2009, *qui tam* relators filed an

[4] While the United States in its prior amicus briefs has advocated the more relaxed construction of Rule 9(b), *see* Duxbury Br., *supra*, at 15; Nathan Br., *supra*, at 10, Petitioners explain in detail why this approach—and the approach taken by the court below—is wrong as a matter of law and policy and the heightened standard should apply. Pet. at 22-28.

average of 402.6 suits per year. Thereafter, the figures began to rise sharply again, averaging 666 annual suits between 2010 and 2014 (and exceeding 710 suits in both of the last two years reported). 2014 FCA STATISTICS, *supra*. The communications industry has been among those affected by the dramatic rise of FCA cases.[5]

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[5] *See*, *e.g.*, *United States ex rel. Shupe v. Cisco Sys.*, 759 F.3d 379 (5th Cir. 2014); *Prather v. AT&T Inc.*, 996 F. Supp. 2d 861 (N.D. Cal. 2013); *United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 2012 U.S. App. LEXIS 15934 (D.C. Cir. 2012); *United States ex rel. Finney v. NextWave Telecom, Inc.*, 337 B.R. 479 (S.D.N.Y. 2006); *United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 340 (S.D.N.Y. 2004); *United States ex rel. Morwood Oaks Mgmt. Assocs. v. Sprint Nextel Corp.*, No. 10-03826 (E.D.N.Y. dismissed July 2014); *United States ex rel. Lyttle v. AT&T Corp*, No. 10-01376 (W.D. Pa. dismissed Dec. 2013); *Treas v. Sprint Nextel Corp.*, No. 10-00790 (D.D.C. dismissed May 2013); *Heath v. Verizon Commc'ns Inc.*, No. 12-00047 (D.D.C. dismissed Feb. 2013); *P-C Ventures, L.L.C. v. Verizon Wireless L.L.C.*, No. 12-00631 (E.D. Mo. dismissed Jan. 2013); *United States ex rel. Willson v. Alcatel-Lucent*, No. 08-1812 (W.D. Wash. dismissed Sept. 2012); *United States ex rel. Am. Fiber Sys. v. AT&T, Inc.*, No. 06-0389 (W.D. Mo. dismissed Nov. 5, 2009); *United States ex rel. J.A. Russo Assocs. v. AT&T Corp.*, No. 04-1142 (C.D. Cal. dismissed June 29, 2006); *United States ex rel. Gormley v. Sprint Corp.*, No. 03-00443 (S.D. Oh. dismissed Mar. 3, 2006); *United States ex rel. Mantero v. BellSouth Corp.*, No. 01-1565 (N.D. Ga. dismissed Feb. 4, 2005); *United States ex rel. Russo v. Sprint Corp.*, No. 02-03481 (C.D. Cal. dismissed June 27, 2003); *Knudsen v. Cellco P'ship*, No. 13-04465 (N.D. Cal. filed Sept. 2013); *United States ex rel. Heath v. Wisc. Bell, Inc.*, No. 08-00724 (E.D. Wis. filed Aug. 26, 2008).

B. The High Costs Imposed by Often-Meritless *Qui Tam* Suits Necessitate Uniform and Appropriate Pleading Standards.

The explosion in *qui tam* FCA litigation has generated an exceptionally high number of meritless claims, leading to an extremely high rate of dismissal and the expenditure of substantial resources by parties and the judiciary.

The Justice Department's own statistics show that of the 5,055 *qui tam* cases that had been resolved as of September 30, 2009, fully 3,739—nearly 75 percent—had been dismissed. 2009 FCA STATISTICS, *supra.*[6] In cases such as the one at bar, in which the United States *declines* to intervene, the figures are far higher: of the 3,921 "unintervened" cases that had been resolved, some 3,681—*94 percent*—had been dismissed, while only 239 had ended in settlement or judgment. *Id.*[7]

These facts underscore the public importance of the question on which AT&T seeks certiorari. While the Justice Department does not report on when, in the course of litigation, a particular FCA case was dismissed, many such cases are dismissed only following significant discovery and/or briefing. *See*, *e.g.*, *Cole v. Board of Trustees*, 497 F.3d 770 (7th Cir. 2007); *United Phosophorous, Ltd. v. Angus Chemical Co*. 322 F.3d 942 (7th Cir. 2003); *Galvan v.*

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[6] The statistics also reported 577 still-active cases. *Id.*

[7] The statistics also reported 445 still-active unintervened cases. *Id.* Although the Justice Department continues to publish data on its successes, it has ceased to publish data on the number of *qui tam* cases that are dismissed.

Fed. Prison Ind., 199 F.3d 461 (D.C. Cir. 1999); *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1998); *United States v. King Features Entm't, Inc.*, 843 F.2d 394 (9th Cir. 1988); *United States ex rel. Totten v. Bombardier*, 2003 U.S. Dist. LEXIS 25790 (D.D.C 2003). Thus, FCA defendants are forced to defend thousands upon thousands of *qui tam* suits, even though the vast majority will ultimately be dismissed.

Litigation in these cases consumes substantial amounts of time and resources. *See*, *e.g.*, *Sprint Commc'ns Co. v. APCC Services, Inc.*, 554 U.S. 269, 271 (2008) ("[L]itigation is expensive [and] the evidentiary demands of a single suit are often great."); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (1999) ("[L]itigation is slow and expensive."). As this Court has explained, "[m]ounting a defense to even frivolous claims may consume . . . time and resources." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2496 (2011); *id.* (citing "the substantial costs imposed by litigation"). Moreover, the Court has recognized in various contexts that "the costs of litigation, including the expense of discovery and experts, may 'push cost-conscious defendants to settle even anemic cases.'" *Texas Dept. of Housing and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2549 (2015) (quoting *Twombly*, 550 U.S. at 559). "Defendants may feel compelled to 'abandon substantial defenses and . . . pay settlements in order to avoid the expense and risk of going to trial.'" *Id.* (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994)). *Qui tam* defendants also face settlement pressure arising from the potential for significant

reputational harm from such lawsuits. Todd J. Canni, *Who's Making False Claims, the Qui Tam Plaintiff or the Government Contractor*, 37 PUB. CONT. L.J. 1, 11 (2007) ("[T]he mere presence of allegations of fraud may cause the [federal] agencies to question the contractor's business practices."); *see United States ex rel. Fowler v. Caremark RX, L.L.C.*, 496 F.3d 730, 740 (7th Cir. 2007) ("Greater precomplaint investigation is warranted in fraud cases because public charges of fraud can do great harm to the reputation of a business firm or other enterprise . . . .") (citation omitted).

The huge costs (financial and otherwise) occasioned by the unusually high rate of meritless *qui tam* FCA cases are exacerbated by the permissive pleading standard endorsed by the D.C. Circuit here. Pleading requirements play a central role in conserving judicial and private resources when a plaintiff is unable to allege facts sufficient to warrant relief. Thus, even in the context of Federal Rule of Civil Procedure 8(a)'s general pleading standard—which is less demanding than the heightened Rule 9(b) standard at issue here—the Court has held that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56 (citing 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE ¶ 1216 (3d ed. 2004)) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action."). A complaint must include "enough factual matter" to "raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Twombly*, 550 U.S. at 556. Hence, "when the allegations in a

complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id.* at 558 (quoting 5 WRIGHT & MILLER ¶ 1216) (internal quotation and citation omitted). In short, the requirement for specificity even in a system built on notice pleading is meant to ensure that the trial court can dismiss meritless claims "before allowing a potentially massive factual controversy to spread." *Assoc'd Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

In short, the Court should grant the Petition to ensure that defendants in *qui tam* FCA cases—cases that ultimately are dismissed at very high rates—are not unduly subjected to the costs and pressures of litigation in the face of allegations that, even if proven, would not demonstrate unlawful behavior.

C. The Circuit Split Encourages Forum Shopping.

The severe burdens placed on FCA defendants in the face of often-dismissed *qui tam* suits justify grant of AT&T's Petition on their own, and certiorari would be critical even if this dispute involved a simple circuit split subjecting similar cases to different pleading standards. But review is especially important here because the FCA's extremely broad venue provisions allow would-be relators to bring suit in virtually any circuit. This invitation to forum shopping substantially heightens the importance of Supreme Court review. *See*, *e.g.*, *Southland v. Keating*, 465 U.S. 1 (1984) (explaining

that conflict and confusion in the law promote inconsistency and unfairness, and "encourage and reward forum shopping").

Indeed, forum shopping itself leads to other harmful jurisprudential consequences, including the harm to judicial integrity that results when federal courts reach different results on the same facts. *See Elemary v. Holzmann*, 533 F. Supp. 2d 116, 125 (D.D.C. 2008); Joan E. Schaffner, *Federal Circuit "Choice of Law": Erie Through the Looking Glass*, 81 IOWA L. REV. 1173, 1192-93 (1996); Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 167-68, 200 (2000). Forum shopping also overburdens certain courts and creates expenses when litigants seek the most favorable jurisdiction. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1684 (1990); Richard Maloy, *Forum Shopping? What's Wrong with That?*, 24 QUINNIPIAC L. REV. 25, 26 (2005). These harms render resolution by this Court even more critical.

1. Forum shopping is particularly "unacceptable where—as here—it comes as the consequence of judge-made rules." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 415-16 (2010). As now-Federal Circuit Judge Kimberly Moore has explained, forum shopping fundamentally should be discouraged, as it "thwarts the ideal of neutrality in a system whose objective is to create a level playing field for resolution of disputes." Kimberly Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 924 (2001). "The ultimate result is unpredictability and inconsistency in the application of the law . . . . This instability

erodes public confidence in the law and its enforcement and creates doubt about the fairness of the system." *Id.* Indeed, the Federal Courts Study Committee has recognized that an inter-circuit conflict may be particularly "intolerable" if, *inter alia*, it "impose[s] economic costs or other harm to multi-circuit actors, such as firms engaged in maritime and interstate commerce" (*i.e.*, companies like many of CTIA's members) or "encourage[s] forum shopping among circuits, especially since venue is frequently available to litigants in different fora." *See* FED. CT. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 125 (Apr. 2, 1990), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/repfcsc.pdf/$file/repfcsc.pdf.

Simply put, "[c]ircuit splits are always jurisprudentially difficult, because they create strong incentives for forum shopping and undermine precepts of fairness and consistency in the way laws are applied." Ann Bartow, *When Bias Is Bipartisan: Teaching About the Democratic Process in an Intellectual Property Law Republic*, 52 ST. LOUIS L.J. 715, 725 (2008). The Court can eliminate the particularly egregious inefficiencies and injustice that result from forum shopping here if it resolves the conflict among the courts of appeals and creates uniformity in the law.

2. Forum shopping is particularly problematic in the FCA context, given (i) extremely broad venue provisions, which make it easy to file suit in favorable circuits when large multi-circuit actors are involved; (ii) significant financial incentives for *qui tam* relators, which increase the likelihood of parasitic claims; (iii) the ability of *qui tam* suits to

move forward without Government involvement, which would otherwise constrain meritless claims; and (iv) Rule 9(b)'s purpose, which is, in part, to preclude accusers from using discovery to pursue "fishing expeditions." *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 465 (6th Cir. 2011). Together, these factors make a uniform interpretation of Rule 9(b) especially important.

First, the exceedingly generous venue provisions of the FCA virtually invite forum shopping. The FCA allows a relator to bring a *qui tam* claim in "any" judicial district in which the defendant "can be found, resides, transacts business, or in which an act proscribed by [the FCA] occurred." 31 U.S.C. § 3732(a) (2012). Given this "broad venue language," *United States ex rel. Sandager v. Dell Mktg., L.P.*, 872 F. Supp. 2d 801, 806 (D. Minn. 2012), the methods and permutations of forum shopping become "almost limitless." *See* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1679 (1990).

Large corporations, like AT&T and many other CTIA members that offer service across the country, are therefore potentially subject to FCA claims in virtually every district court. As a consequence, differing constructions of the Rule 9(b) pleading standard will continue to drive *qui tam* actions to the jurisdictions applying the more liberal pleading standard. Put differently, the circuit split allows a relator who lacks details of even a single claim of fraud to now choose to file suit in a district court in one of any of the seven circuits affording the weak Rule 9(b) construction. The Court should grant certiorari to ensure that a single standard

applies in all courts, and foreclose this open invitation to forum shop.

Second, the FCA's significant financial incentives entice relators with questionable claims unsupported by facts regarding a single actual falsehood to forum shop. The FCA imposes treble damages and penalties of $5,000 – $11,000 per false claim. 31 U.S.C. § 3729(a) (2012); 28 C.F.R. § 85.3(a)(9) (2015). In turn, relators are entitled to 15-25 percent of the proceeds of any action or settlement of claims if the Government proceeds with the action. 31 U.S.C. § 3730(d)(1) (2012). If, however, the Government does not proceed with the action—which as noted is so in the vast majority of cases—then relator is entitled to *25-30 percent*. *Id.* § 3730(d)(2); *see* Christina O. Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 971 (2007) (noting that the Government declined to participate in 78 percent of *qui tam* suits filed between 1987 and 2004). As noted above, FCA relators have collected over $4.7 billion since the 1986 amendments took effect.

In light of these significant financial incentives, the courts have long recognized the potential for "parasitic" FCA claims. *See*, *e.g.*, *False Claims Act Implementation: Hearing Before Subcomm. on Admin. Law and Gov't Relations of the House Comm. on Judiciary*, 101st Cong., 2d Sess. 3 (1990) (noting that the 1986 amendments to FCA, which introduced the private suit option, "sought to resolve the tension between . . . encouraging people to come forward with information and . . . preventing parasitic lawsuits") (statement of Sen.

Grassley); *see also In re Nat. Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 961 (10th Cir. 2009) (observing importance of "weed[ing] out parasitic claims"); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (noting that "overly generous *qui tam* provisions present the danger of parasitic exploitation of the public coffers"). For this reason, one of the critical purposes of *qui tam* claims is to "ensure 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 . . . ." *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006). The opportunity for a relator to forum shop to best position a *qui tam* claim only invites the precise "opportunistic and parasitic behavior that the FCA seeks to preclude." *Bailey*, 609 F.3d at 721 n.3.

Third, given the FCA's inarguable financial "bounty" incentives, relators are more likely than the Government to persist in litigating FCA claims, unconstrained by the institutional wisdom and discretion that cabin the Government in making such determinations. *See*, *e.g.*, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("*Qui tam* relators are . . . less likely than is the Government to forgo an action arguably based on a mere technical noncompliance . . . ."). Indeed, more than two-thirds of FCA actions brought between 2006 and 2014 were *qui tam* relator actions, with such actions accounting for nearly 90 percent of the total in 2014. 2014 FCA STATISTICS, *supra.* As noted, the Government declines to pursue the majority of these *qui tam* lawsuits, leaving

prosecution to relators motivated by the statute's "essentially punitive" damages. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000); *see also* Broderick, *supra*, at 971.

In addition, while the Government, pursuant to 31 U.S.C. § 3730(c)(2), may dismiss *qui tam* lawsuits in which it determines not to participate, it rarely does so. "[T]he result is that the government does not dismiss, and relators are permitted to proceed with, thousands of non-meritorious *qui tam* suits." Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigations Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1264-65 (2008). In fact, as detailed above, the vast majority of *qui tam* cases declined by the Government are meritless, with some 94 percent of such cases ultimately dismissed. Continued inconsistent application of Rule 9(b)'s pleading requirements will foster further inappropriate forum shopping by relators, exposing *qui tam* defendants to very real costs for largely meritless claims and the judiciary to the burden of addressing claims that should never have been asserted in the first place.

Fourth, forum-shopping is particularly problematic here because Rule 9(b) is specifically designed to "prevent fishing expeditions" that would otherwise allow a plaintiff to backfill the particulars of a claim through discovery. *Chesbrough*, 655 F.3d at 465; *see also United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999) ("A special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process . . . .").

* * *

The time has come for the Court to address this extensive circuit split in order to provide clear guidance on the Rule 9(b) pleading standard for FCA claims. This will help ensure that *qui tam* claims serve the legitimate purpose of encouraging individuals to come forward with important information relevant to the public fisc, rather than continuing to enable parasitic lawsuits that do not in any way serve the public interest. A relator's choice of forum should not be the determinative factor in whether the allegations setting forth an FCA complaint are sufficient to withstand a Rule 9(b) motion to dismiss.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Certiorari.

Respectfully submitted,

THOMAS C. POWER
CTIA—THE WIRELESS ASSOCIATION®
1400 16TH STREET, NW
SUITE 600
WASHINGTON, DC 20036
(202) 785-0081

BRYAN N. TRAMONT
Counsel of Record
RUSSELL P. HANSER
CRAIG E. GILMORE
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW
Suite 800N
Washington, DC 20036
(202) 783-4141
btramont@wbklaw.com

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Counsel for *Amicus Curiae*