No. 15-363

In the Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. TODD HEATH,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The petition presents a question of great practical importance—whether a relator suing under the False Claims Act must allege representative examples of allegedly false claims in order to satisfy Rule 9(b)'s particular pleading requirement. The circuits are clearly and intractably divided, the question recurs with great frequency, and the issue is important because of Rule 9(b)'s critical role in weeding out unjustified FCA claims.

The five *amicus* briefs filed on behalf of a broad array of government contractors confirm the significant real-world impact of the circuit conflict and the need for intervention by this Court to eliminate forum-shopping and ensure that Rule 9(b) will perform its essential screening function.

Respondent's principal response is to claim that there is no conflict—that the courts of appeals supposedly are "harmonizing" (Opp. 4-11). That is simply false: recent decisions leave no doubt that the conflict is clear and persistent.

Respondent also contends that his complaint satisfies the "strict" understanding of Rule 9(b) (Opp. 11-15), that the record is undeveloped (*id.* at 15-16), and that the question is unimportant (*id.* at 16-19). In fact, respondent's complaint plainly fails the pleading standard applied by four circuits; no record development is necessary or appropriate to decide the proper pleading standard; and the petition presents a question of very substantial importance.

Respondent, moreover, acknowledges that he is a corporate outsider who lacks personal knowledge of the allegedly false claims, and he implicitly concedes

that his complaint fails to identify *any* details regarding *any* allegedly-false claim. The legal question—whether such a claim satisfies Rule 9(b)—is thus squarely presented here.

Certiorari is therefore plainly warranted.

A. The Courts Of Appeals Are Divided.

In the petition, we demonstrated that the decision below conflicts with holdings of the Fourth, Sixth, Eighth, and Eleventh Circuits. Pet. 9-16. In these circuits, an FCA relator must allege the particulars of at least one representative false claim. These courts squarely hold that a relator may not satisfy Rule 9(b) by alleging details of a broader *scheme*; rather, details regarding at least one concrete, allegedly false claim are required.

In response, respondent parrots the government's *amicus* brief in *United States* ex rel. *Nathan* v. *Takeda*, arguing that the circuits are "harmonizing." Opp. 4-11. That simply is not true with respect to allegations like those in the complaint here, which are typical of a large number of FCA claims: respondent's complaint would be dismissed in the Fourth, Sixth, Eighth, and Eleventh Circuits.

"[H]armoniz[ation]," if any, is limited to the situation, not presented here, where the relator is a corporate insider with personal knowledge of the defendant's billing practices. Pet. 14-16. Some courts have indicated that, in that particular factual context, an inference based on the insider's personal knowledge may be sufficient to satisfy Rule 9(b). Whatever the merit of that approach, it says absolutely nothing about the legal standard that controls this case: whether an *outsider* must plead representative claims with particularity.

On that point, the legal standard that governs this case, the circuits are starkly divided.

With respect to the **Sixth Circuit**, respondent suggests (Opp. 7, 8-9, 13, 14) that *Chesbrough* v. *VPA, P.C.*, 655 F.3d 461 (6th Cir. 2011), "relaxe[s]" the Rule 9(b) requirement in certain circumstances. *Id.* at 471. But that could be true only "when the relator has 'personal knowledge that the claims were submitted by Defendants . . . for payment.'" 655 F.3d at 471 (quoting *United States* ex rel. *Lane* v. *Murfreesboro Dermatology Clinic, PLC*, 2010 WL 1926131, at *4 (E.D. Tenn. 2010)). Indeed, *Lane* involved a plaintiff who had "personal knowledge of the false billing patterns by virtue of her employment as a billing specialist at Defendant Clinic for four years." *Lane*, 2010 WL 1926131, at *4. See also Pet. 14.

Chesbrough is thus clear that a "relaxed" standard could apply only if the plaintiff has "personal knowledge." In the situation presented here, where there is no such personal knowledge, the facts of a representative false claim must be alleged. In fact, *Chesbrough* itself declined to apply any relaxed standard, and it affirmed dismissal of the complaint because the relators could not "identify actual false claims." 655 F.3d at 472.

Decisions of district courts within the Sixth Circuit confirm that conclusion. In *United States* ex rel. *Winkler* v. *BAE Sys., Inc.*, 957 F. Supp. 2d 856, 872 (E.D. Mich. 2013), the plaintiff there, like respondent here, "claim[ed] no *personal* knowledge" and therefore could not invoke *Chesbrough*'s "strong inference exception." *Id.* at 872-873. His "inability to identify a single actual claim" was therefore "fatal to his FCA Complaint." *Id.* at 872. Indeed, "the Sixth Circuit"

has "never backed away from the bedrock principle that an actual false claim presented to the Government is the *sine qua non* of a claim under the FCA." *Id*. at 874.

Other district courts apply the same test. When a "relator never worked as an employee" for the defendants, and "he does not allege any other facts showing that he has personal, first-hand knowledge or involvement with the defendants' billing and claim-submission process," the relator "has not alleged facts to warrant relaxation of Rule 9(b)'s 'strict requirement,'" and the complaint must be dismissed. *United States* ex rel. *Dennis* v. *Health Mgmt. Associates, Inc.*, 2013 WL 146048, at *16 (M.D. Tenn. 2013).[1] The court therefore dismissed the complaint. If this case had been filed in the Sixth Circuit, respondent's complaint clearly would have been held insufficient under Rule 9(b).

As to the **Eleventh Circuit**, respondent points (Opp. 7) to *United States* ex rel. *Clausen* v. *Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002), but that decision strongly supports the existence of the circuit conflict. See Pet. 11.

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[1] See also, *e.g.*, *Mcfeeters* v. *Nw. Hosp., LLC*, 2015 WL 328212, at *4 (M.D. Tenn. 2015) (the plaintiff "must identify with specificity 'characteristic examples that are illustrative of the class of all claims covered by the fraudulent scheme'"); *Hendricks* v. *Bronson Methodist Hosp., Inc.*, 2014 WL 3752917, at *6 (W.D. Mich. 2014) (declining to apply "a more relaxed pleading standard" in a case where the relator's "allegations do not reflect * * * personal knowledge"); *United States* ex rel. *McMullen* v. *Ascension Health*, 2013 WL 6073549, at *3 (M.D. Tenn. 2013).

Respondent also cites (Opp. 7, 9, 13, 15) *United States* ex rel. *Walker* v. *R&F Properties of Lake Cnty., Inc.*, 433 F.3d 1349 (11th Cir. 2005), but *Walker* expressly distinguished the circumstances there, where the plaintiff had personal knowledge through a "personal discussion," from cases involving a "corporate outsider" in which the particulars of a representative false claim must be identified. *Id.* at 1360.

Indeed, respondent fails to acknowledge, much less address, the multiple Eleventh Circuit decisions subsequent to *Walker* holding that complaints with allegations such as those here, with no claim of "inside" knowledge, must allege the particulars of a representative false claim in order to avoid dismissal. See *United States ex rel. Matheny* v. *Medco Health Solutions, Inc.*, 671 F.3d 1217, 1225 (11th Cir. 2012); *United States* ex rel. *Sanchez* v. *Lymphatx, Inc.*, 596 F.3d 1300, 1302 (11th Cir. 2010); *Hopper* v. *Solvay Pharm., Inc.*, 588 F.3d 1318, 1324 (11th Cir. 2009); *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1359 (11th Cir. 2006).

The Eleventh Circuit has, moreover, expressly and repeatedly held that *Walker* is limited to claims by a corporate insider. In *Hopper*, for example, the court explained: "This is not a case like [*Walker*], in which a relator alleged personal knowledge of the defendants' billing practices that gave rise to a well-founded belief that the defendant submitted actual false or fraudulent claims." 588 F.3d at 1326. "[U]nlike in *Walker*," the relators in *Hopper* did "not allege personal knowledge of the billing practices of any person or entity." *Ibid.* Without that personal knowledge, the relator was obligated "to assert the

'who, what, where, when, and how of fraudulent submissions to the government.'" *Id.* at 1327.

The court also explicitly "distinguish[ed]" *Walker* in *Sanchez*. 596 F.3d at 1303 n.4. The *Sanchez* relator did not allege personal knowledge. *Ibid.* The complaint was insufficient because the relator was required to, but could not, "allege at least some examples of actual false claims." *Id.* at 1303 (quotation omitted). (The Court also added that, "to the extent that *Walker* conflicts with the specificity requirements of *Clausen*, our prior-panel-precedent rule requires us to follow *Clausen*. *Ibid.*) In the Eleventh Circuit, as in the Sixth Circuit, the complaint here would have been dismissed.

With respect to the **Eighth Circuit**, respondent invokes (Opp. 9, 13, 15) *United States ex rel. Thayer* v. *Planned Parenthood of the Heartland*, 765 F.3d 914, 918 (8th Cir. 2014). That case, however, addressed individuals with personal knowledge, not outsiders like respondents. Pet. 15. Again, respondent offers no response.

Respondent also references *In re Baycol Products Litigation*, 732 F.3d 869 (8th Cir. 2013). But again, we explained in the petition that *Baycol* supports our position (Pet. 15 n.2) and respondents do not argue otherwise.

Finally, the **Fourth Circuit** standard also squarely conflicts with the holding below. Respondent points (Opp. 6, 9-10, 14) to language in *United States* ex rel. *Nathan* v. *Takeda Pharmaceuticals North America, Inc.*, 707 F.3d 451 (4th Cir. 2013). *Nathan*, however, expressly criticized the "more relaxed construction of Rule 9(b)." *Id.* at 457-458.

Any possible doubt as to *Nathan*'s holding is dispelled by the decisions of district courts within the Fourth Circuit. *Nathan*, one court explained, "[d]isavow[ed] the contrary views of other circuits as to a lenient pleading standard." *United States* ex rel. *Palmieri* v. *Alpharma, Inc.*, 2014 WL 1168953, at *9 (D. Md. 2014). Claims must be dismissed under *Nathan* when the complaint lacks "details such as the actual amount of any claim for reimbursement, the identity of any individual who submitted a claim, or the date on which any request for reimbursement was made." *Id.* at *10. This understanding of *Nathan* is widespread. See also, *e.g.*, *Phipps* v. *Agape Counseling & Therapeutic Servs., Inc.*, 2015 WL 2452448, at *5 (E.D. Va. 2015) ("The Complaint's failure to allege any claims for payment is fatal to Relator's First and Second claim."); *United States ex. rel. Walterspiel* v. *Bayer A.G.*, 2014 WL 7332303, at *4 (M.D.N.C. 2014) (failure to "identify any specific claim on the government for payment * * * alone warrants dismissal"); *United States ex rel. Weiner* v. *Ancillary Care Mgmt., Inc.*, 2013 WL 1310675, at *2 (D. Md. 2013).

In sum, each of these four circuits has adopted a Rule 9(b) pleading standard in FCA cases that would require dismissal of the complaint here. That, moreover, is the situation that arises with the greatest frequency: FCA claims by corporate insiders are a distinct minority. Only this Court can resolve this long-standing, oft-recurring, and deep conflict among the circuits.

B. The Rule 9(b) Issue Is Squarely Presented In This Case.

Respondent tries to argue that the Rule 9(b) issue is not properly presented. Again, respondent is wrong.

First, respondent claims that the allegations here would be found sufficient by the courts of appeals that apply the more demanding interpretation of Rule 9(b). But that argument is essentially a rehash of his contention that there is no conflict among the courts of appeals. He claims that no circuit would require him to allege the particulars of a representative false claim. Opp. 14-15. We already have explained why that contention is incorrect. See Pet. 9-19; pages 2-7, *supra*.

What respondent does *not* say, however, is most telling.

To begin with, respondent does not claim that he is a corporate insider. He never worked for petitioners, and he has no personal knowledge of their billing practices. Rather, respondent is a self-proclaimed "consultant" and a serial litigant with no first-hand insight. He acknowledges that he is a "corporate outsider[]." Opp. 8. The decisions of the courts of appeals applicable to "outsiders" therefore plainly govern this case—and there can be no doubt that those decisions conflict, and that resolution of that conflict is essential to produce uniform decision-making in FCA cases.

Respondent also does not try to argue that his complaint alleges *any* particulars as to *any* allegedly-false claim submitted by *any* petitioner. He does not identify any particular bill that he thinks was fraudulent, what individuals submitted the bills, bill

amounts, or dates on which bills were submitted. All that respondent's complaint alleges is a broad, allegedly-fraudulent *scheme* peppered with regulatory references. Respondent implicitly concedes this point.

Respondent's failure to dispute these issues renders this case a particularly attractive vehicle for resolving the question presented. All agree that respondent does not allege *any* detail about *any* allegedly false claim. The question could not be more cleanly presented.

Second, respondent's argument (Opp. 15-16) that the record below is "insufficiently complete" also lacks merit.

The issue here is the proper pleading standard, whether the *complaint* contains allegations, taken as true at this juncture, that satisfy Rule 9(b). Nothing beyond the complaint itself is necessary, or even relevant, to that question. And, while the district court declined to decide petitioners' Rule 9(b) argument (Opp. 15), the court of appeals did. See App. 19a-26a. Unless this Court intervenes, that decision will govern this case—and all future False Claims Act lawsuits brought in the District of Columbia.

Respondent suggests that he could amend his pleading "to provide additional details regarding the fraudulent scheme and the false claims at issue." Opp. 15-16. Respondent, however, does not even hint as to the allegations he has a good-faith basis to allege, but omitted from his complaint. In any event, whether respondent should later be afforded the opportunity to amend his complaint is a question for remand, only after this Court settles the threshold question as to the proper standard that governs this

case—and the myriad more that have flooded the lower courts. See Pet. 21-22.

C. The Question Presented Is Important.

As we explained in the petition (Pet. 19-22), and the *amici* further confirm, the question presented has tremendous practical significance.

First, there is no dispute that this question arises often. In the petition, we documented more than 100 cases in just the past few years in which this question has arisen. Pet. 21-22; 38a-47a. *Amici* have identified 229 decisions involving the application of Rule 9(b) to FCA cases since 2010. See National Association of Manufacturers *Amicus* 16-17. Further, this issue will continue to be important given the "record-breaking proliferation of FCA *qui tam* litigation," and the "veritable cottage industry of FCA *qui tam* litigation." Chamber *Amicus* Br. 10-11. See also CTIA *Amicus* 11-12. This Court should resolve the issue, so that the lower courts apply the same legal rule in resolving this frequently-recurring question.

The issue is especially significant, moreover, because the circuit divide inevitably produces forum shopping. See National Association of Manufacturers *Amicus* 8-10; CTIA *Amicus* 16-22. And, as *amici* demonstrate, the D.C. Circuit is a particularly important court in this analysis, because the FCA venue provisions often permit plaintiffs to elect to sue there. Chamber *Amicus* 7-9. "[I]n light of the liberal venue provision of the FCA, this latest discordant addition to the cacophony of circuit court views uniquely facilitates forum shopping of FCA *qui tam* claims." *Id*. at 9. FCA plaintiffs should not be able to select a more lenient pleading standard through their choice of venue.

Second, application of the proper pleading standard is particularly important in the FCA context because of the enormous monetary claims and invasive discovery that these suits entail. Erroneously permitting cases to proceed past the motion to dismiss stage imposes significant costs. Profit-driven relators will act whenever it is in their personal financial interest to assert a claim, regardless of the social benefits of bringing the suit. See Chamber *Amicus* 13; DRI *Amicus* 7-8.

There is, in fact, good reason to carefully police these suits. Statistics demonstrate that, when the government declines to intervene, about 94% of these cases are concluded adversely to the relators. See CTIA *Amicus* Br. 13-14. In light of the substantial hypothetical reward, it is not surprising that relators bring a glut of low-quality suits. The pleading standard is the essential bulwark against this abusive litigation and its attendant costs.

Third, the proliferation of low-quality FCA litigation imposes costs far beyond wasteful attorney's fees and nuisance-value settlements. The mere pendency of an FCA suit can cause government contractors to lose new or existing contracts. See Coalition for Government Procurement & Professional Services Council *Amicus* 11-15. These effects, even in the face of suits that ultimately prove meritless, can irreparably injure government contractors, potentially dealing such defendants a "death-blow." *Ibid*. See also DRI *Amicus* 10-12.

Fourth, proper application of the Rule 9(b) requirement is especially important given the rise of "professional" FCA relators. The FCA is designed to encourage individuals with *non-public* knowledge of fraud to pursue claims. In recent years, however, an

increasing number of FCA claims are being brought by individuals with no first-hand, personal knowledge at all. One entity has brought 35 FCA actions, and dozens have brought five or more cases. See Chamber *Amicus* 11-13.

Holdings like the decision below facilitate this model, permitting a relator to allege a scheme at a high level of generality and then use the discovery process as the means to inflict costs that coerce a settlement. It is critically important for this Court to decide whether Rule 9(b) and the FCA permit a plaintiff, who lacks any personal knowledge and knows no detail as to any allegedly false claim, to enter into wide-ranging discovery in the hopes of backfilling necessary allegations.

For all of these reasons, and the many more identified in the *amicus* briefs, this issue warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2015