No. 09-654

IN THE

Supreme Court of the United States

ORTHO BIOTECH PRODUCTS, L.P.,
Petitioner,

v.

UNITED STATES EX REL. MARK EUGENE DUXBURY,
Respondent.

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

BRIEF AMICUS CURIAE OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Founded in 1898, the American Hospital Association ("AHA") is the national advocacy organization for hospitals in this country. It

[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* notes that no counsel for a party authored this brief in whole or in part, and no counsel or party, other than *amicus curiae* and its members, made a monetary contribution intended to fund the preparation or submission of this brief. Consent letters from the parties have been filed with the Clerk, and the parties were provided the notice required by Sup. Ct. R. 37.2.

represents approximately 5,000 hospitals, health care systems, and other health care organizations, as well as 37,000 individual members. AHA's mission is to promote high quality health care and health services through leadership and assistance to hospitals in meeting the health care needs of their communities. AHA advocates on behalf of its members in legislative, regulatory, and judicial fora as part of its commitment to improving health care policy and health care delivery for the communities that its members serve.

One way in which AHA promotes the interests of its members is by participating as *amicus curiae* in cases with important and far-ranging consequences for its members—including cases arising under the False Claims Act ("FCA"). *See*, *e.g.*, *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 129 S. Ct. 2824 (2009); *Allison Engine Co., Inc.* v. *United States ex rel. Sanders*, 128 S. Ct. 2123 (2008); *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457 (2007); *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000).

This is such a case. The questions presented in this petition are of great importance to AHA's members. The Federal Government funds in full or in part a substantial percentage of the health care services AHA's members provide, including under the Medicare and Medicaid statutes and accompanying regulations—described by this Court as "Byzantine" texts "among the most intricate ever drafted by Congress." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981).

AHA is concerned that the First Circuit's decision, if not reversed, will undermine two critical requirements for FCA actions: that a relator not

trade on allegations of fraud already disclosed to the public (the jurisdictional limitation in the public disclosure bar) and that a relator have specific pre-filing knowledge of some false or fraudulent claims (the Rule 9(b) pleading standard). Both requirements impose important limitations on who can bring an FCA suit and what knowledge of wrongdoing a plaintiff must have before filing suit. The decision below, however, improperly extends the Act's jurisdictional reach to relators who file tag-along law suits *after* public disclosures of allegedly false claims have already brought to light an alleged fraud. It also improperly permits relators to pursue claims under the *False Claims* Act notwithstanding a lack of specific knowledge of *any false claims*.

These twin holdings—and the circuit splits they exacerbate—will only encourage the filing of dubious *qui tam* suits based on publicly disclosed allegations of fraud or on mere hunch and speculation, given that the FCA has become the clear tool of choice to extract large damage awards and settlements for alleged missteps in Government-funded health care programs. The AHA anticipates that the First Circuit's decision will create additional improper incentives for the filing of questionable (at best) *qui tam* lawsuits. *Qui tam* lawsuits are expensive to investigate and defend, especially when brought by a growing cottage industry that is enticed by the financial prospects of FCA settlements. The *qui tam* provision should not be a vehicle for plaintiffs who hope that the discovery process may unearth some impropriety in a defendant's compliance with the "morass of bureaucratic complexity" of the federal health care programs. *Herweg* v. *Ray*, 455 U.S. 265, 279 (1982) (Burger, C.J., dissenting). The First

Circuit's decision furthers abuse of the FCA in just that way.

FCA *qui tam* lawsuits have proliferated over the past two decades. In 1987, there were 30 such cases filed; in 2009, *433* were filed—and the majority involved health care entities. *See* United States Dep't of Justice, Civil Division, *Fraud Statistics—Overview, Oct. 1, 1987-Sept. 30, 2009*, *available at* http://www.justice.gov/civil/frauds/fcastats.html. In fact, over 61% of the *qui tam* actions filed from 2000-2009 involved allegations of health care fraud. *Id.*; *see also* GAO, Letter to Hon. F. James Sensenbrenner, Jr., Hon. Chris Cannon, and Hon. Charles E. Grassley, *Information on False Claims Act Litigation* 28 (Jan. 31, 2006) (noting prevalence of *qui tam* cases involving allegations of health care fraud), *available at* http://www.gao.gov/new.items/d06320r.pdf. The public disclosure and Rule 9(b) limitations on FCA actions are important to hospitals and health care organizations, which are prime targets for abusive *qui tam* lawsuits for two reasons: they are subject to numerous extraordinarily complicated and often ambiguous statutes and regulations; and they submit a substantial number of claims (and receive a substantial amount of federal funds) for providing care to individuals participating in federal health programs.

Even as the number of *qui tam* suits has grown tenfold during the last decade, the United States Government—after investigating the allegations—continues to decline to pursue *more than two-thirds* of those lawsuits. That leaves those actions to be prosecuted by relators alone, motivated largely by

the statute's "essentially punitive" damages[2] and contingent bounty provision and not constrained by the institutional wisdom and discretion that tempers the zeal of federal prosecutors. *Cf. 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 with reporting requirements that involved no harm to the public fisc.").

AHA accordingly has a strong interest in the proper enforcement of the FCA's jurisdictional limitations and Rule 9(b)'s particularized pleading standard that accompanies allegations of FCA violations, like any fraud allegation. These boundaries of FCA jurisprudence are necessary aids to discerning between cases prosecuted by legitimate relators with credible knowledge of undisclosed fraud and "parasitic" FCA cases. *See False Claims Act Implementation: Hearing Before Subcomm. on Admin. Law and Gov't Relations of House Comm. on Judiciary*, 101st Cong., 2d Sess. 3 (1990) (1986 amendments to False Claims Act "sought to resolve the tension between * * * encouraging people to come forward with information and * * * preventing parasitic lawsuits") (statement of Sen. Grassley).

The costs of defending FCA suits are immense and increase the already substantial costs of doing

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[2] *Vermont Agency of Natural Res.*, 529 U.S. at 784. The FCA imposes treble damages and penalties of $5,500-$11,000 for every "false claim." 31 U.S.C. § 3729(a); 64 Fed. Reg. 47099, 47104 (Aug. 30, 1999), *codified at* 28 C.F.R. § 85.3(a)(9). Relators are entitled to 15-30 percent of the proceeds of an action or settlement of a claim. 31 U.S.C. § 3730(d)(1)-(2).

business for AHA's members, which in turn increases pressure on health care costs for all Americans and diverts needed resources from providing patient care. AHA thus supports Petitioner's request that this Court grant its petition for writ of certiorari.

SUMMARY OF ARGUMENT

The issues raised in this case involve the original source exception to the FCA's public disclosure bar and application of Rule 9(b)'s heightened pleading standard in the FCA context. The FCA's public disclosure bar, as the Court recognized three terms ago, is a "jurisdiction removing provision." *Rockwell Int'l Corp.*, 549 U.S. at 468. Under this bar, a court lacks jurisdiction over a *qui tam* claim that is based on publicly disclosed allegations *unless* the relator is an "original source" of the information on which the allegations are based. 31 U.S.C. § 3730(e)(4). How and when the bar—and its exception—applies is a frequently litigated issue. Just as frequently litigated is whether a *qui tam* complaint satisfies the heightened pleading requirement of Rule 9(b), which requires fraud plaintiffs (including relators) to plead "with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b).[3]

The First Circuit's decision substantially waters down both of these fundamental constraints on a relator's pursuit of a *qui tam* claim, and the bounty

[3] By our count, there have been over 100 lower court decisions discussing application of this jurisdictional bar and its exception just since the Court's *Rockwell* decision issued a few Terms ago. During this same time frame, there have been over 130 lower court decisions discussing the application of Rule 9(b) to FCA claims.

that accompanies it. Instead of interpreting the original source exception to further the statutory goal of ensuring that only true whistleblowers are deputized to pursue FCA actions on behalf of the United States—as the Second, Sixth, Ninth, and D.C. Circuits have done [4]—the First Circuit held that a relator can qualify as an original source even if his complaint merely rehashes allegations previously raised in other litigation, and even though he did not inform the Government of the alleged fraud before it was publicly disclosed to the Government through other channels.

Besides conflicting with the interpretation of four sister circuits, the First Circuit's original source holding is contrary to the position of the United States—on whose behalf a relator like Duxbury purports to be litigating. Just last Term, the Court reiterated that the United States is "a 'real party in interest' in a case brought under the FCA." *United States ex rel. Eisenstein* v. *City of New York*, 129 S. Ct. 2230, 2232 (2009). And as that "real party in interest" explained in its *amicus* submission below: "Individuals who provide their information to the Government *after* that information has been publicly

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[4] *See United States ex rel. Dick* v. *Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990); *United States ex rel. McKenzie* v. *Bellsouth Telecomm., Inc.*, 123 F.3d 935 (6th Cir. 1997); *United States ex rel. Wang* v. *FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992); *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997). *But see United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1355 (4th Cir. 1994) (adopting same holding as First Circuit); *Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health System Corp.*, 276 F.3d 1032, 1051 (8th Cir. 2002) (same).

disclosed do little to assist the Government in identifying fraud, and *qui tam* cases filed by such individuals are largely unnecessary." U.S. Amicus Brief in *United States ex rel. Duxbury* v. *Ortho Biotech Products, LP*, 1st Cir. Case No. 08-1409, at 23 (emphasis in original). The First Circuit thus has adopted a minority interpretation that undermines the FCA's purposes and is contrary to the position of the real party in interest in whose name FCA claims are prosecuted.

The First Circuit's creation of what it called a "more flexible" Rule 9(b) pleading standard for FCA cases—apparently applicable when a relator cannot plead the specifics of any false claim that the defendant allegedly caused a third-party to submit—also merits review. Pet. App. 35a. The FCA is a fraud statute. Fraud allegations are not to be lightly brought or allowed. This Court has not had the occasion to analyze the pleading standard for fraud, and in particular, whether a party can meet that standard where it lacks any detailed allegations as to a core element of its claim. The FCA, to be clear, does not create liability for violations of federal law *independent* of a false claim. It creates liability for *false claims*—both for those who knowingly submit those claims and those who knowingly cause them to be submitted. But the First Circuit exempted relators like Duxbury from Rule 9(b)'s requirement to plead the circumstances of fraud—which in the FCA context includes the false or fraudulent claim—with particularity.

The standard adopted by the court below was that a relator need only allege facts from which a court can infer more than a possibility of fraud. Pet. App.

33a, 38a. This holding conflicts not only with the view of other circuits that recognize the false claim itself is the "*sine qua non*" of a FCA action,[5] but also demotes the Rule 9(b) particularized pleading requirement to nothing higher than the standard pleading requirement applicable under Rule 8(a). *See Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). To meet Rule 8(a)'s standard pleading burden, a claim must be facially plausible, i.e., the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and must provide "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949. The Rule 9(b) standard, which applies to "subjects understood to raise a high risk of abusive litigation," *Twombly*, 550 U.S. at 569 n.14, is something higher—but to date, this Court has not addressed what must be pleaded to satisfy that higher standard.

The petition's first question presented—on the original source exception—addresses an issue left unresolved in *Rockwell*. The second question presented—on the rigor of the Rule 9(b) pleading standard—logically relates to, and furthers, the

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[5] *See, e.g.*, *Hopper* v. *Solvay Pharms., Inc.*, -- F.3d --, 2009 WL 4429519, at *8 (11th Cir. Dec. 4, 2009) ("We have repeatedly held that the submission of a false claim is the '*sine qua non* of a False Claims Act violation.' ") (quoting *United States ex rel. Clausen* v. *Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002); *United States ex rel. Marlar* v. *BWXT Y-12, LLC*, 525 F.3d 439, 447 (6th Cir. 2008) (reiterating view that a "fraudulent claim is 'the *sine qua non* of a False Claims Act violation' ") (citations omitted).

Court's recent pleading standard decisions. The varying positions taken by the circuit courts on both issues in the questions presented create an unacceptable level of uncertainty. This uncertainty in turn increases the substantial incentives for plaintiffs to file *qui tam* actions based on already public allegations or speculative guesswork, and to forum-shop in the process. These questions are important and recurring and warrant certiorari review.

ARGUMENT

I. The Court Should Grant Certiorari To Resolve The Circuit Split As To When The Original-Source Exception Provides Federal Court Jurisdiction Over An FCA Claim.

1. As the petition explains, the circuits are split on when a relator must provide information on an alleged fraud to the Government to qualify as an original source and thereby invoke court federal jurisdiction. Pet. 16-21.[6] Whether the federal courts

[6] In addition to the seven-circuit split discussed in the petition, district courts in circuits that have not directly addressed this issue are also split. *Compare United States ex rel. Merena* v. *Smithkline Beecham Corp.*, 114 F. Supp. 2d 352, 361 (E.D. Pa. 2000) (disagreeing "with the government's argument that a relator must 'come forward with his "voluntary disclosure to the government" before the public disclosure of the allegations and transactions involved in his complaint to qualify as an "original source" ' ") *with United States ex rel. Eaton* v. *Kansas Healthcare Investors, II, LP*, 22 F. Supp. 2d 1230, 1236 (D. Kan. 1998) (recognizing that the Sixth and D.C. Circuits interpret the original source exception as met only when a relator informs the Government of the alleged fraud prior

have jurisdiction over a claim should not turn on flukes of geography. That is especially so in this context, given a potential relator's option to forum-shop for the best circuit's law in which to bring a claim under the FCA's broad venue provision. *See* 31 U.S.C. § 3732(a) (FCA action "may be brought 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 act proscribed by section 3729 occurred.").[7]

Here, in fact, the (unidentified) false claims that Petitioner allegedly "caused" to be submitted were submitted in Washington State, which lies in the Ninth Circuit. *See* Pet. App. 34a. But by bringing suit in Massachusetts instead, Duxbury was able to circumvent Ninth Circuit precedent on the original source exception to the public disclosure bar—precedent under which his claims would have clearly been jurisdictionally barred. Under the Ninth Circuit's standard, *qui tam* jurisdiction "extend[s]

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to public disclosures and holding that "[t]he court believes the Tenth Circuit would likely adopt this requirement").

[7] One commentator specifically advocates for such forum-shopping based on the varying interpretations of the public disclosure bar and original source exception. Carolyn V. Metnick, *The Jurisdictional Bar Provision: Who is an Appropriate Relator?*, 17 Annals Health L. 101, 103 (Winter 2008) (advocating that "where a large, national healthcare entity is involved, multiple courts may have jurisdiction and venue to hear a given case," and a relator "should determine which court will view his case most favorably" and specifically should consider each court's "analysis of the jurisdictional bar provision") (emphasis added); *see also id.* at 104, 132-133.

only to those who * * * played a part in publicly disclosing the allegations and information on which their suits" are based. *United States ex rel. Wang*, 975 F.2d at 1418. According to the Ninth Circuit, the FCA's *qui tam* provisions aim "to encourage insiders privy to a fraud on the government to blow the whistle on the crime" while avoiding rewards paid from the public fisc for a "second toot" on that whistle. *Id.* at 1419; *see also United States* v. *Johnson Controls, Inc.*, 457 F.3d 1009, 1018 (9th Cir. 2006) (noting the circuit conflict and explaining that "[u]nder our interpretation of that [original source] exception, then, relators *must* provide a useful information-providing role or they cannot file suit"). Federal court jurisdiction should not emerge from such blatant forum-shopping.

2. Granting this petition will resolve the circuit split and close a hole left open in the Court's *Rockwell* decision. As the United States explained in its amicus brief to the First Circuit below:

> In *Rockwell*, the Supreme Court clarified what qualifies as "direct and independent knowledge" sufficient to qualify as an original source, *Rockwell*, 127 S. Ct. 1407-10, but the courts of appeals remain somewhat divided on the question of *when* a relator must provide his information to the Government in order to qualify as an original source.

U.S. Amicus Brief at 21 (discussing the varying interpretations offered by the Second, Fourth, Sixth, Ninth, and D.C. Circuits on this issue).[8] The United

[8] *See also* Metnick, *supra*, 17 Annals Health L. at 132-133 ("Although the United States Supreme Court has

States asserted that "the most natural construction" of the provision "is that it requires a relator to provide information to the Government that is not already in the public domain." *Id.* at 22. A relator should qualify as an original source and thus be granted jurisdiction to pursue claims for the "large bounties" available to FCA relators only where the relator provides valuable non-publicly disclosed information to the Government. *Id.* at 22-23. Given that the Government itself views Duxbury's *qui tam* lawsuit as an attempt to improperly claim monies that, if recovered, should flow to the public fisc and its health care trust funds, the First Circuit's decision to find jurisdiction for Duxbury's "second toot" is at best questionable.

3. The First Circuit's opinion—unlike the Second, Sixth, Ninth, and D.C. Circuits—runs afoul of at least three principles of statutory construction that demonstrate the error of its decision. *First*, the First Circuit's interpretation is contrary to the purpose of the public disclosure bar—removing jurisdiction over claims based on public disclosures unless the claim does not amount to a tag-along parasitic lawsuit. A statute should not be construed in a way that "frustrate[s] Congress' manifest purpose." *United States* v. *Hayes*, 129 S. Ct. 1079, 1087 (2009). *See*,

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provided [in *Rockwell*] some much needed clarification on the issue of the 'direct and independent knowledge' needed to satisfy the original source exception, much of the language in the jurisdictional bar provision remains unclear. Whether a relator will proceed beyond the jurisdictional bar depends significantly on the circuit in which he files the *qui tam* suit. * * * Despite some clarification, the circuits remain split over the meaning of original source.").

e.g., *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 961 (10th Cir. 2009) (the public disclosure bar "function[s] to weed out parasitic claims") (citing *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) ("Once the government is put on notice of its potential fraud claim, the purpose behind allowing *qui tam* litigation is satisfied.")).

Second, the First Circuit's interpretation leads to absurd, and inequitable, results. *See*, *e.g.*, *Rowland* v. *California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200-201 (1993) (noting "the common mandate of statutory construction to avoid absurd results"); *United States* v. *Brown*, 333 U.S. 18, 26 (1948) (explaining that statutes should not be interpreted to "lead to bizarre results" that "frustrate[ ]" congressional purpose). An example of the absurdity that flows from the decision below: If the U.S. Government Accountability Office (GAO) released a public report disclosing fraudulent claims submitted by a government contractor in Iraq, a savvy relator who read the GAO report *and* had some direct and independent knowledge of those claims could then file a *qui tam* suit and qualify as an original source—thereby claiming a sizeable portion of any recovery returned to the U.S. Treasury—just by giving the Government information duplicative to that disclosed in the GAO's report the day before filing suit.[9]

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[9] *See, e.g., United States ex rel. McKenzie*, 123 F.3d at 942 (explaining that the purpose of the FCA is to reward "true whistleblowers" and that "it is difficult to understand how one can be a 'true whistleblower' unless she is responsible for alerting the government to the

And *finally*, the First Circuit's interpretation ignores that, as courts of limited jurisdiction, "[t]he public disclosure bar must be strictly construed, with all doubts resolved against jurisdiction." U.S. Amicus Brief in *United States ex rel. Kennard* v. *Comstock Resources*, 10th Cir. Case No. 03-8012 (filed Apr. 29, 2003) (citations omitted), *available at* 2003 WL 24167056. *Accord United States ex rel. Holmes* v. *Consumer Ins. Group*, 318 F.3d 1199, 1215 (10th Cir. 2003) ("When considering federal subject-matter jurisdiction, we must presume that jurisdiction is lacking, require the party asserting jurisdiction to prove that it exists, and resolve all doubts against jurisdiction."); *United States ex rel. Coleman* v. *Indiana*, 2000 WL 1357791, at *9 (S.D. Ind. 2000) (holding that because "[a] federal court is a court of limited jurisdiction," then "[a]ny doubt as to the court's jurisdiction should be resolved against jurisdiction") (citing, *inter alia*, *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)); *Wercinski* v. *Int'l Bus. Mach. Corp.* 982 F. Supp. 449, 453 (S.D. Tex. 1997) (same, also in FCA context).

This burgeoning circuit conflict should be resolved now. Permitting a relator like Duxbury to bring a FCA claim that restates information already in the public domain contradicts Congress's goal of limiting jurisdiction to *qui tam* lawsuits that bring new fraud to light—i.e., suits by true whistleblowers. And it undermines the goal of preventing windfall recoveries by savvy relators with direct and independent knowledge of allegations that are

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alleged fraud before such information is in the public domain").

already known to the Government because they were publicly disclosed by someone else.

II. The Court Should Grant Certiorari To Restore The Strict Rule 9(b) Particularity Pleading Requirement To All FCA Cases.

1. The FCA is an anti-fraud statute. A *qui tam* complaint therefore must satisfy Rule 9(b)'s pleading requirements. And unlike pure notice pleading, Rule 9(b) requires that "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "The reference to 'circumstances' in the rule is to 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." Charles A. Wright & Arthur R. Miller, 5A *Fed. Prac. & Proc. Civ.* § 1297 (3d ed. 2004) (emphases added). In the FCA context, as the name implies, it is the *claim* for payment itself that is false or fraudulent; liability thus hinges on the falsity or fraudulent nature of a *claim*—not on details of the broader underlying scheme alone.

The First Circuit's Rule 9(b) ruling, however, created a "more flexible" pleading standard that exempts FCA relators like Duxbury from having to plead any particular details of any allegedly false claim. Relators need only plead allegations that "'strengthen the inference of fraud beyond possibility'" without necessarily providing details as to the claims. Pet. App. 33a. In so ruling, the court of appeals diluted the stringent Rule 9(b) pleading standard to nothing more than the Rule 8(a) notice

pleading standard set out by this Court in *Twombly* and *Iqbal*. The First Circuit's "beyond possibility" standard is certainly no higher—and may even be *lower*—than the "more than a sheer possibility" and "facially plausible" standard articulated in *Twombly* and *Iqbal*.

The conflict with this Court's precedent alone warrants review. Pet. 24-25. While this Court has addressed the Rule 8 pleading standard repeatedly and has addressed heightened pleading standards in other contexts, *see Swierkiewicz* v. *Sorema NA*, 534 U.S. 506 (2002) (considering propriety of heightened pleading standard applied by Courts of Appeals in employment discrimination cases); *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (considering propriety of heightened pleading standard applied by Courts of Appeals in municipal liability context), the Court has not to date directly tackled the Rule 9(b) pleading-with-particularity standard. This case presents a strong vehicle for doing so, as the argument is fully developed and the time is ripe for addressing the issue

2. When faced with similar arguments for softening the Rule 9(b) standard for *qui tam* relators, other circuits have refused the invitation. As the Fifth Circuit has explained, "[a] special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process that the statute itself does not contemplate." *United States ex rel. Russell* v. *Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999); *see also Wood ex rel. United States* v. *Applied Research Assocs., Inc.*, 328 F. App'x 744, 747, 2009 WL 2143829, at *2 (2d Cir. July 16, 2009) (" 'One of

the [further] purposes of Rule 9(b) is to discourage the filing of complaints as a pretext for discovery of unknown wrongs. [A relator's] contention, that discovery will unearth information tending to prove his contention of fraud, is precisely what Rule 9(b) attempts to discourage.' ") (alterations in original, citation omitted)); *United States ex rel. Sikkenga* v. *Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 728 (10th Cir. 2006) (affirming dismissal of *qui tam* complaint because "Rule 9(b) does not excuse the general and speculative nature of [relator's] allegations").

Because a relator brings a FCA case not for his own alleged injury, but for that of the United States, 31 U.S.C. § 3730, Rule 9(b)'s strict pleading standard ensures that relators both deserve that unique station and are equipped to carry out that weighty charge. Among the numerous purposes Rule 9(b) serves in the FCA context are protecting defendants from "fishing expeditions and strike suits," *United States ex rel. Bledsoe* v. *Community Health Sys. Inc.*, 501 F.3d 493, 510 (6th Cir. 2007), "ensur[ing] 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), and shielding defendants from " 'spurious charges of immoral and fraudulent behavior.' " *Sanderson* v. *HCA–The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (citations omitted).[10]

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[10] A*ccord United States ex rel. Fowler* v. *Caremark RX, LLC,* 496 F.3d 730, 740 (7th Cir. 2007) (" 'Greater

Rule 9(b)'s pleading standard helps courts discern between "whistle-blowing insiders with genuinely valuable information" and "opportunistic plaintiffs who have no significant information to contribute on their own." *United States ex rel. Findley*, 105 F.3d at 680 (quotation omitted); *see also United States ex rel. Clausen*, 290 F.3d at 1313 n.24 (permitting a plaintiff "to learn the complaint's bare essentials through discovery * * * may needlessly harm a defendant's goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, [contains] baseless allegations used to extract settlements"). Rule 9(b) furthers the FCA's intent of encouraging those with actual knowledge of false claims to come forward, without creating windfalls for individuals with secondhand conjecture or water cooler gossip about wrongdoing. *United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 558 (8th Cir. 2006).

3. The First Circuit failed to recognize that strict application of Rule 9(b) disadvantages only those

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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 (or individual)).' ") (citation omitted); *Bly-Magee* v. *California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (Strict application of Rule 9(b) in FCA context "serves not only to give notice to defendants of the specific fraudulent conduct against which they must defend, but also 'to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.' ") (citation omitted).

individuals unequipped to press a *qui tam* suit. When a "complaint does little more than hazard a guess that unknown third parties submitted false claims for Medicaid reimbursement," a *qui tam* relator has not met the applicable pleading burden to pursue such fraud claims. *Hopper*, -- F.3d --, 2009 WL 4429519, at *6. There should be no question that "insiders privy to a fraud on the government should have adequate knowledge of the wrongdoing at issue, [and] * * * should be able to comply with Rule 9(b)." *Bly-Magee*, 236 F.3d at 1019.

All *qui tam* relators must meet Rule 9(b). The FCA is designed to reward those with knowledge of fraud with the right to litigate wearing the mantle of the United States. That mantle is not intended for those who would proceed on mere hunches or speculation. The Court should grant certiorari to restore the strict Rule 9(b) particularity pleading requirement to all FCA cases.

III. The Issues Raised By The Petition Are Important To The Health Care Industry And Recur With Frequency In False Claims Act Litigation.

In the last decade, the health care industry has become the primary target of *qui tam* lawsuits under the FCA. *See*, *e.g.*, United States Dep't of Justice, Civil Division, *Fraud Statistics—Overview, Oct. 1, 1987-Sept. 30, 2009*, *supra*; *FCA Settlements, Judgments in Fiscal 2009 Included $1.6 Billion From Health Care Fraud*, 13 BNA's Health Care Fraud Report 916 (Dec. 2, 2009) ("Of the $2.4 billion in False Claims Act settlements and judgments in fiscal year 2009, health care fraud recoveries accounted for two-thirds, or $1.6 billion[.]"). As of last month,

there were about 985 health care fraud FCA cases pending under investigation by the Department of Justice. *Id.* And the number of FCA cases filed against health care entities is expected to continue to grow. *See*, *e.g.*, *FCA Changes Likely to Generate More Cases Involving Overpayments, Attorney Panel Says*, 13 BNA Health Care Fraud Reporter 625 (Aug. 12, 2009) ("Amendments to the federal False Claims Act made earlier this year are expected to fuel a growth in whistleblower-generated health care cases.").

The surge in FCA litigation against participants in federal health care programs is of particular concern to health care providers, including AHA's members, given the magnitude of liability that attaches to violations of the FCA and the resulting pressure to settle rather than defend against such allegations. *Vermont Agency of Natural Res.*, 529 U.S. at 784-785 (FCA damages "are essentially punitive in nature"). The relator's bar has shown relentless creativity in crafting new and ever expanding theories of FCA liability and in stretching the *qui tam* provisions to enable private enforcement of the myriad statutory and regulatory regimes that govern health care—through the guise of the FCA's essentially punitive regime.

Relators have attempted to shoehorn the FCA into a mechanism for private citizens to bring suit—as deputized federal prosecutors not bound by prosecutorial discretion—for alleged *criminal* violations of the Anti-kickback Statute, 42 U.S.C. § 1320a-7b, and the Stark Law, 42 U.S.C. § 1395nn. Relators also rely on the FCA to attempt to privately enforce the Food, Drug, and Cosmetic Act of 1938 and its prohibitions against the promotion of off-label

uses of FDA approved drugs. Other theories underlying FCA suits range from false express certifications of compliance to false implied certifications of compliance to medically unnecessary treatments to overpayments (also known as "reverse false claims").

No matter the theory of FCA liability alleged in a given case, before licensing a relator to litigate reputationally harmful allegations in the name of the United States, it is critical to ensure that the court has jurisdiction and the relator has satisfied Rule 9(b)'s particularized pleading standard. These two issues apply with force across the gamut of FCA claims that come before the lower courts. The lucrative nature of FCA actions provides an incentive for plaintiffs to stretch whether they have a jurisdictionally valid claim and to fudge whether they have the necessary quantum of information (rather than just a hunch, guesswork, or speculation) about any false or fraudulent claims to subject a defendant to expensive litigation. That fact increases the importance of rigorous enforcement of the jurisdictional and pleading standards that apply to FCA actions. More than two-thirds of cases are pursued by relators alone because the Department of Justice, after investigation, has declined to pursue the allegations. For defendants, however, the costs of *qui tam* litigation only increase after the Government bows out.

The Court should grant certiorari to resolve the circuit splits on these two critical threshold issues. The Court should embrace a clear, consistent, and meaningful "original source" rule and should construe Rule 9(b) with sufficient rigor to ensure that illegitimate *qui tam* strike suits are properly

dismissed at the outset. Resolving the circuit splits on these fundamentals of FCA litigation will help guarantee that only true whistleblowers who provide useful, timely information to the Government about false claims can demand a bounty from any recovery. That standard will benefit the Government, the courts, and defendants alike.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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