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

BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS

JONATHAN S. FRANKLIN
Counsel of Record
JOHN W. AKIN
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 662-0466
jonathan.franklin@nortonrosefulbright.com

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

MELISSA B. KIMMEL
PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA
950 F Street, N.W.
Suite 300
Washington, D.C. 20004
(202) 835-3400

MARIA GHAZAL
BUSINESS ROUNDTABLE
300 New Jersey Avenue, N.W.
Suite 800
Washington, D.C. 20001
(202) 872-1260

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.................................... iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

REASONS FOR GRANTING CERTIORARI 4

I. THE DECISION BELOW ENTRENCHES A CONFLICT AMONG THE CIRCUITS AND ENCOURAGES FORUM SHOPPING. 4

II. RELAXING RULE 9(b) FOR FCA CLAIMS SIGNIFICANTLY HARMS U.S. BUSINESSES. 9

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES:

Bailey v. *Shell W. E&P, Inc.*, 609 F.3d 710 (5th Cir. 2010) 8

Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007) 5

Chesbrough v. *VPA, P.C.*, 655 F.3d 461 (6th Cir. 2011) 5

Ebeid ex rel. U.S. v. *Lungwitz*, 616 F.3d 993 (9th Cir. 2010) 6

Foglia v. *Renal Ventures Mgmt., LLC*, 754 F.3d 153 (3d Cir. 2014) 6

Hughes Aircraft Co. v. *U.S. ex rel. Schumer*, 520 U.S. 939 (1997) 12–13

Sanderson v. *HCA-The Healthcare Co.*, 447 F.3d 873 (6th Cir. 2006)............................. 13

U.S. ex rel. Clausen v. *Lab Corp. of Am.*, 290 F.3d 1301 (11th Cir. 2002)................ 5–6, 16

U.S. ex rel. Dunn v. *N. Mem'l Health Care*, 739 F.3d 417 (8th Cir. 2014)..................... 5

U.S. ex rel. Duxbury v. *Ortho Biotech Prods., L.P.*, 579 F.3d 13 (1st Cir. 2009)............ 6

U.S. ex rel. Grubbs v. *Kanneganti*, 565 F.3d 180 (5th Cir. 2009).................................. 6–7

U.S. ex rel. Lemmon v. *Envirocare of Utah, Inc.*, 614 F.3d 1163 (10th Cir. 2010) 6

U.S. ex rel. Lusby v. *Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009)............................... 6

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. ex rel. Nathan v. *Takeda Pharms. N. Am., Inc.*, 134 S. Ct. 1759 (2014) 9

U.S. ex rel. Nathan v. *Takeda Pharms. N. Am., Inc.*, 707 F.3d 451 (4th Cir. 2013) 5

Vt. Agency of Nat. Res. v. *U.S. ex rel. Stevens*, 529 U.S. 765 (2000) 10

STATUTES:

31 U.S.C. §§ 3729–3733 4

31 U.S.C. § 3729(a)(1) 10–11

31 U.S.C. § 3729(a)(1)(A) 7

31 U.S.C. § 3730(c)(2)(A) 14

31 U.S.C. § 3732(a) 8

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) 10

Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009) 10

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) 10

REGULATION:

28 C.F.R. § 85.3(a)(9) 11

Page(s)

FEDERAL RULE:

Fed. R. Civ. P. 9(b)......................................*passim*

OTHER AUTHORITIES:

James J. Belanger & Scott M. Bennett, *The Continued Expansion of the False Claims Act*, 4 J. Health & Life Sci. L. 26 (2010).. 12

Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949 (2007) 13–14

Todd J. Canni, *Who's Making False Claims, the Qui Tam Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1 (2007) 13, 15–16

Beverly Cohen, *KABOOM! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 Penn. St. L. Rev. 77 (2011)......................... 11–12

David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum. L. Rev. 1244 (2012) 13

David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689 (2013).. 11, 14

TABLE OF AUTHORITIES—Continued

Page(s)

William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201 (1998) 8–9

Peter Loftus, *Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich*, Wall St. J. (July 24, 2014)... 11

Kurt Orzeck, *Litigators Say ACA, Shaky Economy Will Spur Suits in 2014*, Law 360 (Jan. 1, 2014).. 12

Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233 (2008).. 14–15

U.S. Chamber Inst. for Legal Reform, *Fixing the False Claims Act* (Oct. 2013) 14

U.S. Chamber Inst. for Legal Reform, *Lawsuit Ecosystem II* (Dec. 2014) 12

U.S. Chamber Inst. for Legal Reform, *The New Lawsuit Ecosystem* (Oct. 2013).. 13

U.S. Dep't of Justice, *Fraud Statistics—Health and Human Services: Oct. 1, 1987–Sept. 30, 2014* (2015)......................... 12, 14

U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987–Sept. 30, 2014* (2015).. 9–10, 14

IN THE

Supreme Court of the United States

No. 15-363

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

BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties were timely notified of

members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files amicus curiae briefs in cases raising issues of vital concern to the Nation's business community, including cases involving the False Claims Act.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the Nation's leading biopharmaceutical researchers and biotechnology companies. PhRMA's member companies are dedicated to discovering medicines that enable patients to lead longer, healthier, and more productive lives. During 2014 alone, PhRMA members invested an estimated $51.2 billion in efforts to discover and develop new medicines. PhRMA's mission is to advocate for public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA closely monitors legal issues that impact the pharmaceutical industry and frequently participates as amicus in this Court.

Business Roundtable is an association of chief executive officers of leading U.S. companies with $7.2 trillion in annual revenues and nearly 16 million employees. Member companies constitute more than a quarter of the total value of the U.S. stock market. Annually, they return more than $230 billion in dividends to shareholders and the economy

---

the intent to file this brief more than 10 days in advance and have consented to its filing.

and give more than $3 billion a year in combined charitable contributions. Business Roundtable companies invest $190 billion annually in research and development—equal to 70 percent of the total private R&D spending in the U.S.

SUMMARY OF THE ARGUMENT

Amici have a strong interest in apprising the Court of the significant negative consequences for the Nation's businesses if the decision below is allowed to stand. In conflict with the decisions of other circuits, the D.C. Circuit has adopted a watered-down interpretation of Fed. R. Civ. P. 9(b) ("Rule 9(b)") that allows False Claims Act ("FCA") relators to avoid having to plead a central element of their claim. The FCA imposes liability only for the knowing or reckless submission of a false claim to the government, and Rule 9(b) requires that the facts supporting such claims be pleaded with particularity. Yet the court below has wrongly held that a *qui tam* relator need not even plead the particulars of a single false claim. This is not a heightened pleading standard at all, and it subjects businesses to precisely the kind of baseless fraud allegations that Rule 9(b) was expressly intended to avoid.

The D.C. Circuit's decision only adds to a longstanding and robust circuit conflict. And it is particularly worrisome for companies that contract with the federal government. Because the FCA's venue provision will allow many if not most federal contractors to be sued in the District of Columbia, the D.C. Circuit's indulgent application of Rule 9(b) will only encourage relators who lack evidence for their claims to forum-shop by bringing claims in that circuit that could not pass muster elsewhere. This Court should grant plenary review now to remove

these incentives and bring certainty and uniformity to the law.

It is particularly important that the requirements of Rule 9(b) not be relaxed in FCA cases. There has been an explosion in FCA actions filed by self-appointed *qui tam* relators, which greatly outnumber those filed by the government. And the vast majority of *qui tam* claims are proven baseless. In part because they have no personal stake in the case, relators have an incentive to file groundless claims in the hope of using the discovery process to extort unwarranted settlements. These are precisely the kind of abusive tactics that Rule 9(b) seeks to avoid. Allowing relators to level fraud allegations without making a particularized showing of wrongdoing subjects businesses to enormous litigation costs and reputational damage before the defendants are able to gain dismissal. It is therefore vital that the check of Rule 9(b) be applied at the pleading stage, before relators are able to wield the federal discovery apparatus in an attempt to engage in fishing expeditions and extract settlements.

For these reasons, and those in the petition, amici urge the Court to grant a writ of certiorari.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION BELOW ENTRENCHES A CONFLICT AMONG THE CIRCUITS AND ENCOURAGES FORUM SHOPPING.

This case involves the intersection of the FCA and Rule 9(b). The FCA, which is enforceable in part by private relators, imposes liability for the knowing or reckless submission of false claims for payment to the federal government or within a federally funded program. *See* 31 U.S.C. §§ 3729–3733. Rule 9(b)

requires litigants to plead facts in specific detail when allegations involve "certain subjects understood to raise a high risk of abusive litigation." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 569 n.14 (2007). Among the subjects raising this high risk of abusive litigation is fraud. Under Rule 9(b), "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Because the FCA is an anti-fraud statute, there is no dispute that FCA claims are subject to this heightened pleading requirement. There is a sharp divide among the circuit courts, however, over how to properly apply Rule 9(b) to FCA claims.

Four circuits adhere firmly to Rule 9(b) and require a litigant alleging an FCA violation to plead the particulars of at least one specific false claim that was actually submitted to the government. *See, e.g.*, *U.S. ex rel. Dunn* v. *N. Mem'l Health Care*, 739 F.3d 417, 420 (8th Cir. 2014) (relator "may not simply rely on the generalized conclusion that [defendant] engaged in noncompliant conduct, and in doing so, caused thousands of instances of fraudulent billing," but instead must "provide some representative examples" of the fraudulent conduct) (citation omitted); *U.S. ex rel. Nathan* v. *Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013) ("[W]hen a defendant's actions, as alleged and as reasonably inferred from the allegations *could* have led, but *need not necessarily* have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment.") (emphases in original); *Chesbrough* v. *VPA, P.C.*, 655 F.3d 461, 472 (6th Cir. 2011) (applying "a strict requirement that relators identify actual false claims"); *U.S. ex rel. Clausen* v.

Lab Corp. of Am., 290 F.3d 1301, 1312 (11th Cir. 2002) (requiring an "allegation, stated with particularity, of a false claim actually being submitted to the Government").

Other circuits—including the court below—apply a more lenient interpretation of Rule 9(b) and do not require an FCA *qui tam* relator to allege any specific example of a false claim submitted to the government. *See, e.g.*, *Foglia* v. *Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156–57 (3d Cir. 2014); *Ebeid ex rel. U.S.* v. *Lungwitz*, 616 F.3d 993, 998–99 (9th Cir. 2010); *U.S. ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172–73 (10th Cir. 2010); *U.S. ex rel. Lusby* v. *Rolls-Royce Corp.*, 570 F.3d 849, 854–55 (7th Cir. 2009); *U.S. ex rel. Duxbury* v. *Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (1st Cir. 2009); *U.S. ex rel. Grubbs* v. *Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009). In these circuits, a relator need only allege "particular details of a *scheme* to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Grubbs*, 565 F.3d at 190 (emphasis added).

Amici share petitioners' view that a litigant should not be able to satisfy the heightened pleading standard of Rule 9(b) without setting forth specific facts regarding at least one allegedly false or fraudulent claim submitted to the government. The decision below effectively ignores the plain language of the FCA and treats the act of submitting a claim as a mere ministerial detail to be disregarded when a relator alleges an underlying fraudulent scheme. This is no mere detail. The submission of a false or fraudulent claim to the government is the *sine qua non* of an FCA violation. *Clausen*, 290 F.3d at 1311. The FCA imposes liability for false or fraudulent

claims—not fraudulent *schemes*. *See* 31 U.S.C. § 3729(a)(1)(A). It is not, and was never intended to be, an all-purpose anti-fraud statute, untethered to the submission of a false claim.

By holding that a *qui tam* relator can satisfy the heightened pleading standard of Rule 9(b) without ever alleging the particulars of even one specific false claim, the D.C. Circuit and the other circuits sharing its view have expanded the reach of the FCA, thereby exposing U.S. businesses to an increased risk of baseless litigation. Allowing a plaintiff to proceed with a complaint based on a mere "inference" that actionable fraud has been committed, Pet. App. 25a; *Grubbs*, 565 F.3d at 190, is not a heightened pleading standard at all; it is merely the sort of notice pleading that applies to ordinary cases, but not fraud claims such as those under the FCA. By dispensing with the requirement that a *qui tam* plaintiff allege a false claim, and instead focusing on an alleged fraudulent scheme, the decision below not only disregards the limiting statutory language of the FCA but risks allowing meritless cases to survive dismissal and proceed to discovery where the relator is unable even to allege any evidence in support of the *central element* of their claim. That is precisely the type of damaging and unfounded litigation that Rule 9(b) was designed to avoid.

The costs of the ruling below cannot be dismissed as merely the ruling of a single circuit. There is now an entrenched circuit split, with nearly every circuit having weighed in. Moreover, the D.C. Circuit is a particularly important venue for FCA litigation. FCA claims frequently target federal government contractors, many of whom either regularly do business with the government in the District of

Columbia or have done so with regard to an alleged false claim. Many government contractors might be subject to FCA actions within the District of Columbia by virtue of their relationships with the U.S. government. *See* 31 U.S.C. § 3732(a) (FCA case "may be brought in any judicial district in which the defendant * * * can be found, resides, transacts business, or in which any act proscribed by [the FCA] occurred"). The liberal venue provision of the FCA might therefore allow many relators to file (or refile) their cases within the D.C. Circuit in order to take advantage of the ruling below.

For government contractors and other U.S. businesses, the longstanding conflict among the circuits fosters uncertainty and burdensome, baseless litigation. *Qui tam* relators who cannot satisfy the heightened pleading standard of Rule 9(b) in one circuit will now be able to file or refile their actions in the D.C. Circuit to take advantage of its more relaxed interpretation of Rule 9(b), regardless of the fact that such "attempts at forum shopping constitute the opportunistic and parasitic behavior that the FCA seeks to preclude." *Bailey* v. *Shell W. E&P, Inc.*, 609 F.3d 710, 721 n.3 (5th Cir. 2010). The risk of such litigation also will increase costs for the consuming public and may disincentivize U.S. businesses from partnering with the government. *See* William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201, 203 (1998) ("Reducing idiosyncratic risks of doing business with federal purchasing agencies is a key step toward establishing effective public/private partnerships and eliminating the bifurcation between the civilian and government supplier

bases."). The need for national uniformity is particularly important in the modern business environment, where large businesses partner with the government and transact business across multiple jurisdictions in the United States.

The time is right for the Court to intervene. Although Rule 9(b) has existed in its present form since 1937, this Court has never directly opined on its requirements in any case. And since this Court last declined to resolve the divide over the proper application of Rule 9(b) to the FCA, *see U.S. ex rel. Nathan* v. *Takeda Pharms. N. Am., Inc.*, 134 S. Ct. 1759 (2014), the legal landscape has only grown more uncertain. The decision of the D.C. Circuit in this case further entrenches the conflict, overemphasizing the FCA as an all-purpose anti-fraud statute, and further exacerbating the already significant uncertainty for the Nation's businesses. And in 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. Amici therefore urge the Court to grant the petition to resolve the conflict among the circuits, restore national uniformity, and discourage forum shopping by opportunistic litigants.

II. RELAXING RULE 9(b) FOR FCA CLAIMS SIGNIFICANTLY HARMS U.S. BUSINESSES.

Most FCA actions today are filed by private relators. From 1994 to 2009, relators filed an average of 379 FCA *qui tam* actions per year. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987–Sept. 30, 2014*, at 1–2 (2015) (www.justice.gov/file/fcastatspdf/download). During the same time period, the government filed an annual average of

only 136 FCA actions. *See id.* Since the 2009 amendments to the FCA,[2] however, there has been a massive increase in the number of FCA claims filed by private relators. From 2010 to 2014, private relators filed an average of 666 *qui tam* actions per year. *See id.* at 2. At the same time, government FCA filings remained stable at an annual average of 120. *See id.* The two most recent years for which data is available, 2013 and 2014, are the first two years on record in which over 700 FCA *qui tam* actions were filed by private relators. *See id.* In each of these two years, *qui tam* filings outnumbered government-initiated cases by seven to one.

The record-breaking proliferation of FCA *qui tam* litigation is hardly surprising. As this Court has recognized, "the current version of the FCA imposes damages that are essentially punitive in nature." *Vt. Agency of Nat. Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 784 (2000). A company that violates the FCA is liable for up to three times the amount of the United States' damages and a civil penalty of between $5,500 and $11,000 per individual false claim. 31

[2] In 2009, Congress amended the FCA by passing the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617 (2009). FERA expanded the range of conduct subject to liability under the FCA and removed certain procedural requirements that the government and relators faced in pursuing FCA investigations and actions. *See id.* § 4, 123 Stat. at 1621–25 (amending 31 U.S.C. §§ 3729–3733). Congress further amended the FCA to expand liability through the Affordable Care Act and the Dodd-Frank Act. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901–02 (2010) (amending 31 U.S.C. § 3730(e)); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, 2079 (2010) (amending 31 U.S.C. § 3730(h)).

U.S.C. § 3729(a)(1); 28 C.F.R. § 85.3(a)(9). In cases where multiple invoices or prescriptions are issued for small dollar amounts, civil penalties for alleged violations can be far larger than any actual harm to the government.

The potential for such staggering awards has spawned a veritable cottage industry of FCA *qui tam* litigation. The regime "is big and growing fast." David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1693 (2013). The current FCA regime has also spawned the emergence of so-called "serial whistleblowers." Since 1986, more than two dozen people or groups have each filed five or more *qui tam* actions. *See* Peter Loftus, *Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich*, Wall St. J. (July 24, 2014) (www.wsj.com/articles/invoking-anti-fraud-law-louisiana-doctor-gets-rich-1406169003). One entity has sued at least 35 healthcare companies. *Id.*

Amici support balanced and appropriate enforcement of the FCA and acknowledge that there is a role for relators who bring their personal knowledge of actual fraud to the government's attention. And amici's members devote substantial resources to internal compliance efforts to prevent fraud and abuse from ever occurring in the first place. But the need for vigorous enforcement does not justify allowing relators to proceed with allegations of fraud without satisfying the requirements of Rule 9(b).

The healthcare industry in particular has been rocked by an "explosion" in FCA *qui tam* litigation. *See* Beverly Cohen, *KABOOM! The Explosion of Qui Tam False Claims Under the Health Reform Law*,

116 Penn. St. L. Rev. 77 (2011); James J. Belanger & Scott M. Bennett, *The Continued Expansion of the False Claims Act*, 4 J. Health & Life Sci. L. 26 (2010). Two thirds of all FCA *qui tam* actions filed in 2014 targeted healthcare-related businesses. *See* U.S. Dep't of Justice, *Fraud Statistics—Health and Human Services: Oct. 1, 1987–Sept. 30, 2014*, at 2 (2015) (www.justice.gov/file/fcastatspdf/download). The number of *qui tam* actions filed against healthcare-related businesses, as well as the amount of settlements and judgments, has more than doubled since 2008. *See id.* At the same time, however, there has been a steady *decline* in the number of government-initiated FCA actions against healthcare-related businesses. In 2014, only 3.8% of the settlements and judgments related to allegations of healthcare fraud resulted from FCA actions initiated by the government. *See id.* This trend is almost certain to continue. The federal government's increased role in healthcare resulting from the Affordable Care Act all but assures that plaintiffs' lawyers will find opportunities to bring FCA claims. *See* U.S. Chamber Inst. for Legal Reform, *Lawsuit Ecosystem II*, at 51 (Dec. 2014) (www.institute forlegalreform.com/uploads/sites/1/evolving.pdf); *see also* Kurt Orzeck, *Litigators Say ACA, Shaky Economy Will Spur Suits in 2014*, Law 360 (Jan. 1, 2014) (www.law360.com/articles/489661/litigators-say-aca-shaky-economy-will-spur-suits-in-2014).

To be sure, some FCA actions can serve an important function by promoting accountability and combating fraud among those who transact business with the government. But "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by

prospects of monetary reward rather than the public good." *Hughes Aircraft Co.* v. *U.S. ex rel. Schumer*, 520 U.S. 939, 949 (1997). A relator's claims can be motivated by "opportunism rather than legitimate whistle-blowing," *Sanderson* v. *HCA-The Healthcare Co.*, 447 F.3d 873, 876 (6th Cir. 2006), and "in many situations the economic incentive encourages individuals to speculate," Todd J. Canni, *Who's Making False Claims, the Qui Tam Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1, 19 (2007). The problem is that "[p]rofit-driven enforcers will act whenever it pays to do so, even where the *social* cost of enforcement * * * exceeds any benefit." David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1254 (2012) (emphasis in original). This "indifference to social cost may lead profit-motivated private enforcers to initiate so-called *in terrorem* lawsuits, using the threat of massive discovery costs or bad publicity to extract settlements when the social cost of adjudication would exceed any possible benefit or, worse, where culpability is entirely absent." *Id.*

In fact, there is strong statistical evidence that most FCA *qui tam* litigation is meritless. The government generally intervenes in only about a quarter of filed *qui tam* actions.[3] When it declines to

---

[3] *See* U.S. Chamber Inst. for Legal Reform, *The New Lawsuit Ecosystem*, at 63 (Oct. 2013) (www.instituteforlegalreform.com/uploads/sites/1/The_New_Lawsuit_Ecosystem_pages_web.pdf); *see also* Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 971 (2007) (finding that the government intervened in roughly 22% of filed *qui tam* actions from 1987 to 2004).

intervene, the *qui tam* cases that proceed are almost universally meritless. Only 6% of non-intervened cases result in a favorable settlement or judgment.[4] From 1987 to 2014, only 3.5% of the total amount of *qui tam* settlements and judgments involved cases where the government declined to intervene. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview*, *supra*, at 2. For the healthcare industry, *qui tam* cases in which the government declined to participate resulted in less than 2.8% of all recoveries. *See* U.S. Dep't of Justice, *Fraud Statistics—Health and Human Services*, *supra*, at 2.

The government has done little to stem the tide of meritless *qui tam* litigation. The FCA authorizes the government to dismiss any *qui tam* action over the objections of the relator. 31 U.S.C. § 3730(c)(2)(A). The government rarely does so, however, and instead allows a substantial majority of *qui tam* relator actions to proceed unabated even without the government's intervention. *See* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1263–65 (2008). "The result is that the government does not dismiss, and relators are permitted to

---

[4] U.S. Chamber Inst. for Legal Reform, *Fixing the False Claims Act*, at 7 (Oct. 2013) (www.instituteforlegalreform.com/uploads/sites/1/Fixing_The_FCA_Pages_Web.pdf); *see also* Broderick, *supra*, at 975 (finding that roughly 92% of the filed *qui tam* actions from 1987 to 2004 in which the government declined to intervene were dismissed without recovery); Engstrom, *Public Regulation of Private Enforcement*, *supra*, at 1720–21 (From 1986 to 2011, "intervened cases have generated recoveries a whopping 90% of the time, with declined cases failing to achieve recoveries at the same overwhelming rate.").

proceed with, thousands of non-meritorious qui tam suits." *Id.* at 1264–65 (footnote omitted).

Predictably, "most non-intervened suits exact a net cost on the public." *Id.* at 1264. In part, this is because even meritless allegations of fraud are immensely costly and damaging. For a business or government contractor, "merely being the subject of an FCA suit carries grave consequences." Canni, *supra*, at 11. In addition to the reputational damage that stems from allegations of fraud, the burdens of discovery and litigation can be enormous. Meritless litigation can continue for years, during which time it drains the business of "hundreds of thousands of dollars, if not millions," *id.*, and requires a "tremendous expenditure of time and energy," *id.* at 11 n.66.

And, while the wheels of litigation slowly turn, the lingering stigma of fraud can negatively impact the business opportunities and operations of even the most scrupulous defendants. For example, the "potential for a large damages verdict, however remote, may cause financial institutions to decline a government contractor's request for a business loan," *id.* at 11 n.65, and where a contractor "depends upon repeat business from the same government agencies, the mere presence of allegations of fraud may cause those agencies to question the contractor's business practices," *id.* at 11. With these consequences in mind, "even where a contractor knows he has done nothing wrong, the costs of defending a *qui tam* suit can motivate the contractor to settle the matter," no matter how anemic the claims. *Id.* at 11–12. These huge costs may ultimately bankrupt the contractor, result in job loss, raise prices, or discourage the

contractor from seeking further government work. *Id.* "In all cases, the taxpayers lose out." *Id.* at 12.

For the healthcare industry and other businesses that find themselves in the crosshairs of the *qui tam* plaintiffs' bar, Rule 9(b) is a critical bulwark against such abusive litigation tactics. The FCA itself "offers little protection to government contractors having to fend off frivolous *qui tam* suits," and it "provides no mechanism by which to test or check these lawsuits at the initial stage." *Id.* at 10. Instead, businesses and contractors rely on the heightened pleading standard of Rule 9(b) at the dismissal stage to ensure that claims contain actual substance before *qui tam* plaintiffs can proceed to impose the federal discovery apparatus against them. When a plaintiff fails to specifically allege an essential element of its claim, relaxing Rule 9(b) to allow them to avoid dismissal "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." *Clausen*, 290 F.3d at 1313 n.24.

A proper application of Rule 9(b) offers vital protection against meritless *qui tam* claims and other abusive litigation tactics. As FCA litigation continues to proliferate at a record pace, the protection of a heightened pleading standard will become increasingly important. The permissive application of Rule 9(b) applied by the court below, on the other hand, only serves to encourage these fishing expeditions in the hopes of pressuring a defendant to settle rather than incur continued litigation and reputational costs. Amici urge the Court to grant the petition, resolve the festering conflict in the circuits, and reject this erroneous

interpretation of Rule 9(b) before it causes further harm to the Nation's businesses.

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should grant a writ of certiorari.

Respectfully submitted,

JONATHAN S. FRANKLIN
Counsel of Record
JOHN W. AKIN
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 662-0466
jonathan.franklin@nortonrosefulbright.com

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

MELISSA B. KIMMEL
PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA
950 F Street, N.W.
Suite 300
Washington, D.C. 20004
(202) 835-3400

MARIA GHAZAL
BUSINESS ROUNDTABLE
300 New Jersey Avenue, N.W.
Suite 800
Washington, D.C. 20001
(202) 872-1260

Counsel for Amici Curiae