No. 16-1398

IN THE

Supreme Court of the United States

VICTAULIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA EX REL. CUSTOMS FRAUD INVESTIGATIONS, LLC,
Respondent.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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June 22, 2017

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private sector research and development in the nation. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

NAM has a direct interest in the outcome of this case. Numerous NAM members contract directly or indirectly with the United States Government for the provision of goods and/or services. These members are subject to the False Claims Act, 31 U.S.C. §§ 3729–3733 ("FCA"), as interpreted and applied by the federal courts, including judicial enforcement of pleading requirements for claims initiated under the FCA's *qui tam* provisions. NAM has appeared before this Court and other federal

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus* has made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. The parties were provided the notice required by Supreme Court Rule 37.2, and consent letters have been filed with the Clerk.

courts in cases addressing these and other important issues with respect to the FCA. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); *AT&T, Inc. v. United States ex rel. Heath*, *petition for cert. filed*, No. 15-363 (U.S. Sept. 21, 2015); *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015); *United States ex rel. Harman v. Trinity Indus., Inc.*, No. 15-41172 (5th Cir. Mar. 28, 2016); *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015).

NAM has a particular concern about the proliferation of unfounded *qui tam* FCA cases, the number of which has increased dramatically over just the past few years. According to the Justice Department, relators filed 702 *qui tam* cases in fiscal year 2016, compared with 379 in fiscal year 2008.[2] The United States routinely declines to intervene in the vast majority of these cases. In a declined case, if the action proceeds, it is on the basis of the pleading filed by the relator, 31 U.S.C. §§ 3730(b)(3) & (c)(3), but without any Department of Justice sponsorship, oversight, or approval of the relator's allegations. As a result, many relator complaints proceed following Justice Department declination notwithstanding that they contain allegations of fraudulent conduct that are misguided, ill-considered, and unfounded.

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[2] *See* Department of Justice, Fraud Statistics – Overview, *available at* https://www.justice.gov/civil/page/file/918371/download.

Indeed, relators have a strong financial motivation to plead marginal and speculative FCA claims in the hope that either the Justice Department will investigate, uncover some wrong, and intervene in the matter to pursue a recovery, or the defendant will succumb to business pressures, including the significant risk of reputational harm that often accompanies an accusation of fraud against the United States and the cost of extensive discovery, to settle the claims. Many of the factors that should inform the Government's decision to pursue an FCA claim — such as the impact of the litigation on the Government, prosecutorial discretion, and fairness to potential defendants — play no role in a relator's decision to file and pursue an FCA suit. Instead, a powerful financial reward (*i.e.*, the prospect of reaping a bounty of up to 30 percent of the monetary recovery) often incentivizes relators to allege fraud broadly and assert speculation and conclusions in the absence of specific facts.

NAM's members, along with other companies that supply goods or services to the Government, are frequent targets of FCA *qui tam* complaints. As such, they incur the substantial costs and the reputational harm that accompany the mere publication of unproven FCA allegations. Moreover, where *qui tam* cases are permitted to proceed on the basis of generalized accusations of fraudulent schemes, on the basis of unspecified false claims for payment, or under the alarmingly expansive "opportunity for fraud" standard created by the Third Circuit below, these businesses bear not only additional reputational harm stemming from having

an ultimately meritless complaint survive an early court challenge, but also the expense, distraction, and business disruption generated by discovery and motions practice.

Abusive, unfounded FCA *qui tam* litigation against manufacturers harms those businesses, their employees, their owners, their shareholders, the public at large, and even the Government. The growing volume of non-meritorious FCA suits threatens and impedes the legitimate business activities of NAM's members. NAM therefore has a strong interest in ensuring that the courts uniformly and properly enforce the existing safeguards against non-particularized FCA pleadings, including Federal Rule of Civil Procedure 9(b) ("Rule 9(b)").

SUMMARY OF ARGUMENT

This Court recently has reinforced the important role Rule 9(b) can play in dismissing FCA claims that are not pleaded with particularity, *see Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2004 n.6 (2016), but this Court has not addressed the Rule 9(b) pleading standard itself as applied to FCA causes of action. Although it is universally accepted that Rule 9(b) serves a gatekeeping function intended, at least in part, to protect defendants against unfounded accusations of fraud, and although there is no dispute that Rule 9(b) applies to FCA claims,[3] the

[3] Even prior to *Escobar*, there was no judicial conflict or controversy on the question of whether Rule 9(b) applies to FCA pleadings. *See, e.g.*, *United States ex rel. Dunn v. N. Mem'l Health Care*, 739 F.3d 417, 420 (8th Cir. 2014) (Rule

lower courts have been divided sharply over the proper standard for application of Rule 9(b). Pet. at 15–23. This conflict among the circuits is well-established and well-recognized. *See, e.g.*, *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155 (3d Cir. 2014) ("[T]he 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[.]").

In short, on the one hand, the Fourth, Sixth, Eighth, and Eleventh Circuits require FCA complaints to set forth the who, what, where, when, and how of alleged false claims,[4] and enforce the fundamental principle that "the submission of a false claim is the *sine qua non* of a False Claims Act violation." *See, e.g.*, *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1328 (11th Cir. 2009) (citation and internal quotation marks omitted); *Sanderson v. HCA – The Healthcare Co.*, 447 F.3d 873, 878 (6th Cir. 2006). On the other hand, the First, Fifth,

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9(b)'s particularity requirement requires dismissal of FCA complaint alleging broadly that "every claim submitted from 1996 until the present is false."); *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551–52 (D.C. Cir. 2002) ("Every circuit to consider the issue has held that, because the False Claims Act is self-evidently an anti-fraud statute, complaints brought under it must comply with Rule 9(b).").

[4] The same is true with respect to obligations avoided (*i.e.*, "reverse" false claims). It is well accepted that Rule 9(b)'s particularity requirements apply to FCA "reverse false claim" causes of action. *See, e.g.*, *United States ex rel. Matheny v. Medco Health Solutions, Inc.*, 671 F.3d 1217, 1222 (11th Cir. 2012); *United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 328–29 (5th Cir. 2003).

Seventh, Ninth, Tenth, and District of Columbia Circuits apply a more lenient Rule 9(b) standard and require the relator to plead only "particular details" of a scheme "paired with reliable indicia" that false claims actually were submitted or obligations actually were avoided. *See, e.g.*, *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 126 (D.C. Cir. 2015); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998–99 (9th Cir. 2010). The Third Circuit, too, followed this approach prior to its decision below. *See Foglia*, 754 F.3d at 156–57.

In the ruling at issue in the Petition, the Third Circuit's divided panel abandoned that already lenient standard in favor of an even weaker one. As a result, a new (and third) Rule 9(b) pleading standard has emerged, one under which an FCA claim can pass pleading muster by merely describing an "opportunity for fraud." The decision below thus compounds the circuit court split.

The Third Circuit's decision also exacerbates conflict among the circuits in another important manner, this time by extending additional pleading leeway to "outsider" relators — like Respondent Customs Fraud Investigations, LLC ("CFI") — on the rationale that such relators would not have ready access to fraud particulars that are within the defendant company's exclusive possession. This holding conflicts with Rule 9(b) protections recognized by certain other circuits, which have refused to relax Rule 9(b) requirements in similar circumstances. *See United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1314 (11th Cir. 2002) ("But, while an insider might have an

easier time obtaining information … neither the Federal Rules nor the [FCA] offers any special leniency under these particular circumstances to justify [an outsider] failing to allege with the required specificity the circumstances of the fraudulent conduct he asserts in his action.").

The FCA's plain language does not envision extending special solicitude to "outsider" relators, nor does underlying policy support such leniency. As the Ninth Circuit reasoned, even under the more lenient of the two prior Rule 9(b) standards, "[t]o jettison the particularity requirement simply because it would facilitate a claim by an outsider is hardly grounds for overriding the general rule, especially because the FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government." *Ebeid*, 616 F.3d at 999.

Rule 9(b)'s pleading standard applies in every FCA case, and the material and growing disparity among the circuit courts in applying that standard needs to be resolved. Under the *status quo*, this conflict encourages relators to forum shop and file marginal and even meritless cases in circuits where the Rule 9(b) standard provides the greatest leeway for relator actions to proceed on the basis of speculative allegations. Indeed, the Third Circuit — with its new "opportunity for fraud" Rule 9(b) standard — could serve as a magnet for such actions.

As discussed below, in the absence of clear consensus among its sister circuits and without direction from this Court, the Third Circuit adopted

a new and ultimately "toothless" standard which, if allowed to stand, would result in an abdication of the courts' gatekeeping role to prevent non-particularized FCA complaints from going forward. And, as described in Section II.B below, over three years ago, the Government recognized the conflict among the circuits and acknowledged the need to have this Court address the problem if it did not resolve itself, which it has not.

Now, with eleven circuit courts weighing in on this issue, and with at least three different standards having emerged from their decisions, this Court should end the confusion, disparity, and uncertainty by rejecting the Third Circuit's weak standard and deciding the appropriate Rule 9(b) standard for FCA cases.

ARGUMENT

I. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT AND ENSURE THAT RULE 9(b) IS BEING APPLIED APPROPRIATELY AND CONSISTENTLY

Rule 9(b) operates as a gate – with courts as the gatekeeper – to prevent certain "abusive litigation" from proceeding. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) ("On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires."). As such, Rule 9(b) provides an important procedural safeguard against the proliferation of baseless claims and their attendant harms. *See, e.g.*, *United States*

ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 559 (8th Cir. 2006) (Rule 9(b) prevents "baseless allegations ... to extract settlements," a concern that applies especially to FCA actions because "a *qui tam* plaintiff, who has suffered no injury in fact, may be particularly likely to file suit as a pretext to uncover unknown wrongs." (citations and internal quotations omitted)); *United States ex rel. Clausen*, 290 F.3d at 1313 n.24 (Rule 9(b) protects defendants from frivolous suits and "spurious charges of immoral and fraudulent behavior." (citation and internal quotation omitted)); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (Rule 9(b) prohibits plaintiffs "from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." (citation and internal quotation omitted)).[5]

To enable Rule 9(b) to serve its function, the standard by which claims are evaluated under the rule must be clear and must be enforced. This is especially important given the frequency with which defendants raise Rule 9(b) challenges. Every FCA complaint must meet Rule 9(b). Thus, each of the 845 FCA complaints filed in fiscal year 2016 (702 of which were filed by *qui tam* relators) was required to comply with Rule 9(b) and was subject to dismissal

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[5] Rule 9(b)'s particularity requirement also permits courts to determine if the FCA's "first-to-file" or "public disclosure" bars are applicable. *See, e.g.*, *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 675 (8th Cir. 2003) (affirming dismissal of FCA complaint because the relator failed to plead facts supporting the assertion that he was an original source of the fraud allegations).

on those grounds if challenged and deemed noncompliant. Because it is a requirement for each FCA complaint, and because most FCA complaints are filed by relators, it is very common for courts to confront and resolve Rule 9(b) questions in FCA cases.[6]

Because of the frequency with which this issue arises, it matters greatly to the business community that courts ruling on Rule 9(b) challenges to the sufficiency of the allegations pleaded in FCA complaints apply a uniform standard.

A. So-Called "Controlled Discovery" Is Not an Adequate Substitute for a Meaningful Rule 9(b) Standard in FCA Cases

Rule 9(b) serves the important purpose of ensuring that the case proceeds to discovery, if at all, only on well-pleaded, particularized allegations. Rule 9(b) is especially necessary where the FCA allegations, as they often do, encompass multiple years of supposed wrongdoing involving hundreds or thousands of claims. Such cases impose enormous and disruptive discovery burdens on businesses.

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[6] FCA practitioners understand this reality, but even a simple legal database search will lead a non-practitioner to the same conclusion. For example, a Westlaw search for calendar years 2015 and 2016 decisions with the phrase "False Claims Act" appearing in the synopsis or digest of the opinion identified 312 decisions, of which 117 (nearly 40%) discussed Rule 9(b).

Because Rule 9(b) limits the issues in the case to those that are pleaded with particularity, the rule serves as a procedural bulwark against unsubstantiated allegations and abusive discovery. *See, e.g.*, *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 191 (5th Cir. 2009) ("Rule 9(b) also prevents nuisance suits and the filing of baseless claims as a pretext to gain access to a 'fishing expedition.'"). Rule 9(b) is a mechanism that "weed[s] out unmeritorious claims sooner rather than later," instead of forcing the courts and litigants to rely on discovery controls and summary judgment to serve that function. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993).

This Court's adoption of a common Rule 9(b) standard applicable to FCA complaints — and one which responds to the important safeguards this gatekeeping rule was designed to provide — will protect against pleading overreach. In the absence of such uniform protections, relators will have every incentive to plead speculation, not facts, to help themselves to discovery that is burdensome and costly, not only for defendants, but also for the judiciary and the Government.[7]

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[7] As the real party in interest, the Government, even in a non-intervened FCA *qui tam* case, may be subject to discovery requests from the defendant and/or the relator. *See, e.g.*, *Williams v. C. Martin Co. Inc.*, No. 07-6592, 2014 WL 3095161 (E.D. La. July 7, 2014) (compelling FEMA to submit to Fed. R. Civ. P. 30(b)(6) deposition in non-intervened FCA case, to address 26,000 pages produced by FEMA in discovery). Moreover, inconsistent, lax standards encourage marginal and

In seeking to justify its lenient "opportunity for fraud" standard, the Third Circuit below appeared to suggest that these costly burdens can be mitigated through "controlled discovery." Pet. App. at 32a. While trial courts properly have tools and discretion to manage and control discovery and curb abuses — tools that NAM encourages courts to employ more regularly — the availability of these case management techniques should not be viewed as a substitute for Rule 9(b). These are separate considerations, and the Rule 9(b) question must be addressed first.

Indeed, this Court already has considered and rejected – in the Rule 8 context – the notion that it might be appropriate to relax pleading requirements in light of discovery controls. *See Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009); *Twombly*, 550 U.S. at 559 ("It is no answer to say that a claim just shy of …

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frivolous filings, all of which the Government is statutorily obliged to investigate. 31 U.S.C. § 3730(a) ("The Attorney General diligently shall investigate a violation under section 3729."). Consistent application of a rigorous Rule 9(b) standard can be expected to deter some speculative *qui tam* filings, thereby freeing up Government resources to investigate and pursue actions based on particularized fraud allegations. Further, in at least some scenarios, the Government itself pays (albeit indirectly) for the cost of defending against unsuccessful *qui tam* allegations because a contractor's costs in successfully defending against a *qui tam* action may be recouped under the Federal Acquisition Regulation. *See* 48 C.F.R. § 31.205-47(b) & (e) (allowing successful contractors to recover up to 80% of legal costs in certain instances).

plausible … can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side[.]" (internal quotation marks and citation omitted)). This same reasoning should apply when the pleading challenge arises under Rule 9(b).

Moreover, the contention that relators should be permitted to test their speculative theories even through "controlled discovery" lacks resonance in FCA *qui tam* cases because — by the time the complaint is unsealed and served — the Government already has undertaken the statutorily-mandated investigation of the allegations and has declined to intervene in the action. To facilitate its investigation, the Government has available to it a full arsenal of one-sided "discovery" tools, including the ability to compel testimony, propound interrogatories, and obtain documents through Civil Investigative Demands and subpoenas.[8] Thus, it is even more inappropriate to relax Rule 9(b) standards and allow relators (*i.e.*, a party who has suffered no injury in fact)[9] to proceed to discovery on marginal

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[8] 31 U.S.C. § 3733. The Government is not restricted in sharing information obtained with relators, reducing the likelihood of any information asymmetry between the Government and relators. *See* Michael Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev. 1559, 1586 (2015).

[9] *See, e.g.*, *United States ex rel. Joshi*, 441 F.3d at 559 ("[A] *qui tam* plaintiff, who has suffered no injury in fact, may be particularly likely to file suit as a pretext to uncover unknown

claims in the FCA context because the Government (*i.e.*, the real party in interest) already has investigated and evaluated any possible FCA violations,[10] and not merely the "opportunity for fraud."

B. FCA Policy Considerations Require a Consistent, Stringent Rule 9(b) Standard to Discourage Speculation by Outsider Relators

The Third Circuit below suggested that "skepticism is misplaced at the [motion to dismiss] stage," Pet. App. at 29a, but the FCA requires that this type of scrutiny be applied early in the case in order to prevent parasitic suits. *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) (The FCA seeks "to resolve the tension between ... encouraging people to come forward with information and ...

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wrongs." (quoting *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 231 (1st Cir. 2004))).

[10] *See* 31 U.S.C. §§ 3730, 3733. While not necessarily dispositive on the merits, the Government's declination following investigation can be of consequence. *See United States v. Triple Canopy, Inc.*, 857 F.3d 174, 179 (4th Cir. 2017) ("Here, the Government did not renew its contract for base security with Triple Canopy and immediately intervened in the litigation. Both of these actions are evidence that Triple Canopy's falsehood affected the Government's decision to pay.").

preventing parasitic lawsuits.") (statement of Sen. Grassley).[11]

The prospect of large FCA bounties has led to steadily increased *qui tam* filings. *Supra* at 2. The FCA's financial incentives also have spawned an increasing number of "professional relators," including sole-purpose entities formed to bring *qui tam* suits, organizations that are assigned the rights to pursue *qui tam* actions, and outsiders who file seriatim *qui tam* cases against whole industries on identical theories of liability.[12] CFI, the relator in

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[11] The Government has recognized the adverse impact of the circuit split on legitimate relator activity, explaining that "the overall body of appellate precedent creates substantial uncertainty" regarding the application of Rule 9(b) in FCA cases and "[t]hat uncertainty hinders the ability of *qui tam* relators to perform the role that Congress intended them to play in the detection and remediation of fraud against the United States." U.S. *Amicus* Br. at 16, *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury*, No. 09-654 (May 19, 2010), *cert. denied*, 561 U.S. 1005 (2010).

[12] *See, e.g.*, John T. Boese, Civil False Claims and Qui Tam Actions § 4.01[B] at 4-17–4-18, 4-20–4-23, 4-36 (Wolters Kluwer, 4th ed. 2011 & 2017-1 Supplement) (collecting cases where competitors, special interest groups, and other outsiders have acted as relators); Mathew Andrews, Note, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 Yale L.J. 2422 (2014) (examining the increasing participation of third party litigation financers in *qui tam* actions); McDermott Will & Emery, *Illinois Law Firm Continues to Clog Court System with Tax-Related False Claims Act Allegations – but Proposed Legislation May Offer Relief*, Nat'l L. Rev., Jan. 14, 2015, *available at* http://www.natlawreview.com/article/illinois-law-firm-continues-to-clog-court-system-tax-related-false-claims-act

this case, easily matches this description, as it is an outsider to Petitioner and "appears to be a legal entity created solely for the purpose of bringing this case." Pet. App. at 34a n.1.

This proliferation of *qui tam* filings and outsider "professional relators" has resulted in an increased number of non-particularized complaints that are based on speculation and assumptions. The magnet of windfall recoveries to persons who suffered no personal injuries, coupled with the "first-to-file" bar,[13] incentivizes relators to rush to the courthouse to plead broad FCA claims based on hunches and guesswork. Once filed, relators often rely on the Justice Department to investigate and uncover evidence that might support the relators' generalized claims. If the Government declines to intervene in the *qui tam* action,[14] relators know that the prospects of settlement are greatly increased if their complaints can survive a motion to dismiss.

(discussing over 200 Illinois state *qui tam* actions filed by the same law firm based only on internet investigations).

[13] *See* 31 U.S.C. § 3730(b)(5) ("When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.").

[14] While one circuit recently acknowledged that the Government's declination decision is evidence of the Government's view on the "materiality" of the claim, *Triple Canopy, Inc.*, 857 F.3d at 179, that viewpoint has yet to be widely accepted across the courts deciding FCA cases, leaving defendants to face meritless FCA claims following a Government investigation and declination.

This relator calculus is rational and borne out by experience. It is unfortunate, but no secret, that the Government rarely exercises its discretion to dismiss *qui tam* suits that lack merit, even when the Justice Department's own investigation fails to corroborate the allegations.[15] This Government inaction provides relators with unwarranted leverage to extract a settlement even in the most speculative of cases.[16] The sources of this leverage are the FCA's

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[15] *See, e.g.*, 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, 1717 & n.89 (2013) (identifying only 30 cases out of over 4000 where the Government exercised its dismissal authority and noting that "[n]early all of these dismissals, moreover, were based on DOJ's determination that a relator's claim was jurisdictionally barred ... or because of national security concerns ... not a judgment about the underlying case merits"); U.S. *Amicus* Br. at 18, *United States ex rel. Nathan v. Takeda Pharms.*, No. 12-1349 (2014), *cert. denied*, 134 S. Ct. 1759 (2014) (Government did not intervene to dismiss *qui tam* action even though the complaint's allegations were "implausible").

[16] *See* Lockman, *supra* note 8, at 1586 (describing the "'settle or die' dynamic" of the FCA due to the threat of suspension or debarment); Vicki W. Girard, *Punishing Pharmaceutical Companies for Unlawful Promotion of Approved Drugs: Why the False Claims Act is the Wrong Rx*, 12 J. Health Care L. & Pol'y 119, 136–37 (2009) ("The threat of exclusion from Medicare, Medicaid, and all other health care programs ... has been characterized as a corporate 'death sentence' for pharmaceutical companies. Indeed, the risk of losing millions of customers covered under these programs explains many companies' willingness to settle rather than litigate issues." (footnotes omitted)).

onerous treble damages and penalties provisions,[17] the prospect of broad discovery under the Federal Rules of Civil Procedure, and the prospect of drastic collateral consequences of FCA allegations and liability, which can include suspension, debarment, or program exclusion (results that would put many government contractors and healthcare providers out of business).[18]

Consistent, strict enforcement of Rule 9(b) provides one of the protections available to the business community under these circumstances.

C. The Circuit Split Fosters Forum Shopping

An FCA case 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." 31 U.S.C. § 3732(a). This generous, plaintiff-friendly venue provision means that, in a typical FCA case against even a medium-sized manufacturing business, venue may be proper in multiple judicial districts and circuits across the nation. Because the statute does

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[17] 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.5.

[18] *See* Federal Acquisition Regulation ("FAR") 9.406-2(a) (providing for debarment based on a civil judgment demonstrating fraud or a lack of honesty and integrity in business); FAR 9.406-2(b)(1)(vi)(B) (providing for debarment based on a knowing failure to disclose evidence of an FCA violation); 42 U.S.C. § 1320a-7(b)(7) (providing for exclusion from federal healthcare programs based on fraud or kickbacks).

not require the alleged violations to have any nexus to the forum, the venue possibilities are expansive.

The FCA's sweeping venue provision, coupled with its nationwide service of process authority,[19] encourages forum shopping in circumstances where, as here, the circuit courts are divided on a threshold question of FCA law and forum selection can make a difference. Why would a *qui tam* relator lacking facts about any false claim — or concerned about the prospect of dismissal because of marginal, weak, or tenuous allegations of false claims — file suit outside of the Third Circuit, given its new "opportunity for fraud" standard?[20]

The Court should remove these inappropriate incentives by setting one appropriately stringent

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[19] *See* 31 U.S.C. § 3732(a) ("A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States."). This nationwide service of process provision means that, in determining personal jurisdiction, the court undertakes a "national contacts" analysis as opposed to a forum-specific contacts inquiry. *See* Boese, *supra* note 12, § 5.06[E] at 5-147 ("When the nationwide service of process and nationwide venue are combined, they can easily require individuals and corporations to defend False Claims Act cases far from their homes and far from where the corporations or individuals have ever conducted business.").

[20] That transfer of venue may be available — in theory — under 28 U.S.C. § 1404 does little to alleviate this concern, given the historic deference afforded to a plaintiff's selection of a forum. Nor is it fair or efficient to address forum shopping through motions practice, as opposed to having this Court resolve the underlying problem: inconsistent law.

Rule 9(b) standard. The efficient administration of justice is not served when relators can escape pleading requirements by picking and choosing the most favorable forum. Nor is it fair that defendants must litigate in a forum selected not for its convenience but for its lenient pleading standard.

II. THIS CASE IS THE CORRECT VEHICLE FOR THE COURT TO DECIDE THIS QUESTION

A. The Third Circuit's Decision Below Exacerbates the Circuit Split and Illustrates the Harms of Inconsistent and Inappropriate Rule 9(b) Application

Even prior to the Third Circuit's decision below, two competing Rule 9(b) standards had emerged in the circuit courts, creating confusion and uncertainty for FCA litigants. The lack of clarity on this issue led the Third Circuit to adopt a third, even more lenient standard, and one which permits *qui tam* actions to proceed where the complaint alleges little more than an "opportunity for fraud."

The circumstances of Petitioner's case demonstrate the mischief that results from a non-uniform, lax Rule 9(b) standard. CFI's First Amended Complaint, *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, No. 13-2983 (E.D. Pa. May 5, 2017), ECF No. 52 ("Complaint" or "Compl."), alleges that Victaulic engaged in a ten-year-long scheme to avoid payment of marking duties on its imported pipe fittings, yet the Complaint does not identify even one mismarked or unmarked pipe that Victaulic knowingly released

into the U.S. stream of commerce. Instead, CFI relies on data detailing Victaulic's pipe fitting imports over the period and leaps to the conclusion of marking violations by resort to an internet survey of Victaulic pipes offered for sale in the U.S. by third parties.

Rather than pleading any particular facts about particular imports of unmarked pipe fittings on particular days that were released into the stream of commerce, the Complaint's allegations rest upon a faulty statistical analysis derived from unfounded assumptions and supposition. CFI speculates that because the analysis — conducted by reviewing non-randomized listings of supposed "Victaulic" products for sale by third parties on eBay — did not identify what CFI alleges to be a sufficient number of country of origin markings in the associated, unverified photographs, it is fair to allege that "Victaulic unquestionably falsified its entry documents and misrepresented to CBP that no such marking duties were owed." Compl. ¶ 11. CFI's analysis contains no particulars even as to the nine pipe fittings physically examined, such as where they were manufactured and where or when they were imported. Yet, from these "data," CFI surmises — and alleges in its Complaint — that Victaulic must have concocted a scheme to avoid paying marking duties and to conceal the foreign origin of the pipe fittings.

On this record, the Third Circuit held that the Complaint satisfied Rule 9(b) because it "contains just enough reference to hard facts, combined with other allegations and an expert's declaration, to

allege a plausible course of conduct." Pet. App. at 31a. But even if the Complaint fairly could be characterized as "plausible" — itself a debatable point — such a finding would not satisfy the fundamental purposes served by Rule 9(b)'s requirement for more than "plausibility" in the form of "particularity," including protecting against baseless claims, burdensome discovery, and reputational harm to the defendant.

The decision below — which required only "an opportunity for fraud" coupled with a non-specific statistical analysis[21] — is far more lenient than any other previously articulated circuit court Rule 9(b) standard in FCA cases and creates even more urgency and need for this Court to act to provide a uniform standard consistent with Rule 9(b)'s plain language and intended purpose. The Court should grant the Petition because the decision below, if allowed to stand, would severely undermine the effectiveness of Rule 9(b) in FCA cases. For the Rule's safeguards to operate properly, they must be applied as written: A complaint "*must* state with *particularity* the circumstances constituting fraud." Fed. R. Civ. P. 9(b) (emphasis added).

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[21] While the Third Circuit majority indicated that at least one limit should be placed on "opportunity" pleading — the requirement of reliable methodology for the accompanying analysis — it did not ensure that this requirement had been satisfied. As the dissent aptly laid out, CFI's statistical methodology was based on faulty assumptions and infected with unreliability. Pet. App. at 48a–49a.

B. Prior Briefing by the United States Supports Granting the Petition on the Rule 9(b) Question

The Government already is on record with this Court conceding the circuit court conflict and suggesting that "[i]f that disagreement persists, ... this Court's review to clarify the applicable pleading standard may ultimately be warranted in an appropriate case." U.S. *Amicus* Br. at 10, *Nathan*, No. 12-1349. At the time it made this concession three years ago, however, the United States argued that *Nathan* was not a "suitable vehicle" for resolving the Rule 9(b) disagreement among the circuits because (1) "[t]he disagreement among the circuits ... may be capable of resolution without this Court's intervention," and (2) the court below held that the complaint failed under Rule 9(b) and under Rule 8, meaning that this Court could have decided the case without ever reaching the Rule 9(b) question. *Id.* at 10–11 ("Particularly because the issue continues to percolate in the lower courts, this Court's consideration of the question presented should await a case in which it would be outcome-determinative.").

Neither reason for further delaying this Court's review of the Rule 9(b) question exists here. First, in the years after the Government's brief in *Nathan*, the disagreement among the circuits not only remains but has been exacerbated. Second, this case

is in the exact opposite posture of *Nathan*, making the Rule 9(b) question "outcome-determinative."[22]

CONCLUSION

As it stands now, the ability of an FCA *qui tam* complaint to survive a Rule 9(b) challenge depends greatly on the judicial circuit in which the action is filed. In one set of circuits, courts apply a strict Rule 9(b) standard, demanding particularized allegations and dismissing complaints that do not plead the necessary facts. In another set of circuits, the standard is more relaxed, allowing certain speculative pleading to withstand Rule 9(b) scrutiny. And, now, with the Third Circuit decision below, an even more lenient standard has emerged which would empower relators to bring claims and survive early dismissal motions where their complaints merely allege an "opportunity for fraud." These disparate and conflicting Rule 9(b) standards create the opportunity for forum shopping by relators and uncertainty for the business community. Resolving the circuit conflict would reinforce important Rule 9(b) objectives, including: eliminating speculative, unsupported fraud accusations and the reputational

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[22] The Government filed an *amicus curiae* brief in the Third Circuit with respect to the viability of the relator's reverse false claims liability theory (*i.e.*, Question 2 from the Petition), but it affirmatively chose not to take a position on whether or not dismissal of the complaint on Rule 9(b) grounds was appropriate. U.S. *Amicus* Br. at 1, *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242 (3d Cir. 2016).

harms and undue burdens they inflict upon defendants.

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

Respectfully submitted,

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JUNE 22, 2017