No. 05-1272

IN THE
Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP.
AND BOEING NORTH AMERICAN, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,
Respondents.

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

BRIEF AMICI CURIAE FOR THE AMERICAN HOSPITAL ASSOCIATION, THE FEDERATION OF AMERICAN HOSPITALS, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, AND THE AMERICAN HEALTH CARE ASSOCIATION IN SUPPORT OF PETITIONERS

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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 represents approximately 5,000 hospitals, health care systems, and other health care organizations, as well as 35,000 individual members. AHA leads, represents, and serves health care provider organizations that are committed to health care improvement.

The Federation of American Hospitals (FAH) is the national representative of investor-owned or managed community hospitals and health systems throughout the United States. FAH's members include rural and urban teaching and non-teaching hospitals and provide a wide range of ambulatory, acute and post-acute services.

The Association of American Medical Colleges (AAMC) is a nonprofit association representing all 125 accredited United States and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems, including 68 Department of Veterans Affairs medical centers; and 96 academic and scientific societies. Through these institutions and organizations, AAMC represents 109,000 faculty members, 67,000 medical students, and 104,000 resident physicians.

The American Health Care Association (AHCA) is one of the nation's leading long-term care organizations. AHCA represents more than 10,000 non-profit and proprietary facilities dedicated to improving the delivery of professional

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. All parties have consented to the filing of this brief; their consent letters have been filed with the Clerk.

and compassionate care provided daily to more than 2.5 million frail, elderly, and disabled citizens who live in nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities.

One way in which the AHA, FAH, AAMC, and AHCA promote the interests of their members is by participating as amici curiae in cases with important and far-ranging consequences for their members—including cases arising under the False Claims Act. *See*, *e.g.*, *HCA Inc.* v. *Commissioner*, 543 U.S. 813 (2004) (FAH amicus brief); *Allina Health Sys. Corp.* v. *United States ex rel. Minnesota Ass'n of Nurse Anesthetists*, 537 U.S. 944 (2002) (AHA amicus brief); *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473 (2002) (AHCA amicus brief); *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) (AHA amicus brief); *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) (AHA amicus brief); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) (AAMC amicus brief).

The question presented in this petition is of tremendous importance to amici's members. The federal government funds in full or in part a substantial percentage of the health services amici 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); *see also Friedman* v. *Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976) (Friendly, J.) (noting that the Social Security Act is "almost unintelligible to the uninitiated"); *Rehabilitation Ass'n of Va., Inc.* v. *Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994) (Medicare statutes and regulations "are among the most completely impenetrable texts within human experience").

Hospitals and health systems constantly navigate the "morass of bureaucratic complexity" of the federal health care programs, *Herweg* v. *Ray*, 455 U.S. 265, 279 (1982) (Burger, C.J., dissenting), submitting, on average, nearly 200,000 claims a day to the Medicare program alone. *See Medicare Enforcement Actions: The Federal Government's Anti-Fraud Efforts: Hearing Before the Senate Special Comm. on Aging*, 107th Cong. 1, 161 (2001) (testimony of AHA). When providers cross one of the lines in Medicare's "impenetrable" text, *Rehabilitation Ass'n of Va.*, 42 F.3d at 1450, they expose themselves to potential liability under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, which provides for treble damages and penalties of $5,000-$10,000 for every "false claim" knowingly presented to the government. 31 U.S.C. § 3729(a).[2] The Act's *qui tam* provisions, under which private citizens may sue defendants on the government's behalf, augment its powerful arsenal of remedies—and also heighten the risk that violation of a technical rule will be elevated to an allegation of fraud. *See* 31 U.S.C. § 3730(b); *see also United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 n.5 (1943) (Act's *qui tam* provisions were founded " 'upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain' ") (quoting *United States* v. *Griswold*, 24 F. 361, 366 (D. Or. 1885)).

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[2] Effective September 29, 1999, the Department of Justice adjusted the penalties range from $5,000 - $10,000 to $5,500 - $11,000, pursuant to the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, § 31001. *See* 64 Fed. Reg. 47099, 47104 (Aug. 30, 1999), *codified at* 28 C.F.R. § 85.3(9).

False Claims Act lawsuits have proliferated over the past two decades; and the largest subset of False Claims Act suits is in health care.[3] While the United States government pursues about one-third of those lawsuits, many of the remaining actions are prosecuted by relators alone, motivated largely by the statute's contingent bounty provision, and not constrained by the discretion that tempers the zeal of federal prosecutors. *Cf. Hughes Aircraft Co.*, 520 U.S. at 949 ("*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."). The overwhelming majority of those declined health care *qui tam* cases produce *no* recovery for the United States (or the relator) and a substantial number of those cases are dismissed, but only after burdensome and expensive pre-trial litigation. *See, e.g., United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 556-561 (8th Cir.), *cert. denied* (No. 06-12), 2006 WL 1880380 (Oct. 2, 2006); *United States ex rel. Karvelas* v. *Melrose-Wakefield Hosp.*, 360 F.3d 220, 227-228 (1st Cir. 2004); *United States ex rel. Clausen* v. *Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1309 (11th Cir. 2002); *United States ex rel. Aflatooni* v. *Kitsap Physician Servs.*, 163 F.3d 516 (9th Cir. 1999).

Amici accordingly have a strong interest in maintaining rigorous and easily applicable rules for discerning between cases prosecuted by legitimate relators with credible direct

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[3] *See* 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 that 45.98 percent of *qui tam* cases involved alleged health care fraud) (hereinafter "GAO 2006 Report"). One commentator has posited that the reason for the spike in health-care-related False Claims Act suits is "that health-care regulations have just become too complicated to understand." Uwe E. Reinhardt, *Medicare Can Turn Anyone Into A Crook*, Wall St. J., Jan. 21, 2000, at A18.

allegations of fraud and what have been described as "parasitic" False Claims Act 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).

SUMMARY OF ARGUMENT

A relator who brings a False Claims Act *qui tam* action based on publicly disclosed allegations must be an "original source" of the information on which the allegations are based; a court lacks jurisdiction to hear the suit otherwise. 31 U.S.C. § 3730(e)(4). The measure by which to determine whether a putative relator is an "original source" should be taken with a keen eye toward the Act's other requirements, and in particular other threshold predicates imposed by Congress and the courts on relators who purport to bring their actions on behalf of the United States.

The False Claims Act is a fraud statute, and courts have long held that fraud allegations are not to be lightly brought or allowed. Courts analyzing a relator's fraud claims brought under the False Claims Act's *qui tam* provisions therefore impose scrupulous standards for determining whether that relator is in fact a proper person to bring a suit—and to wear the mantle of the government when suing. Without fail courts apply the heightened pleading standard articulated in Federal Rule of Civil Procedure 9(b) when assessing a relator's claims of fraud against the government. They similarly apply, without exception, a strong "first-to-file" rule—a statutory prohibition against empowering more than one relator per alleged scheme—barring even legitimate subsequent relators from garnering a bounty if they arrive after a qualified relator already has staked his claim. At the

heart of each of these rigorous requirements is the same basic principle: a proper False Claims Act relator is one who has sufficient firsthand knowledge of false or fraudulent claims to put the government on notice of their existence and vindicate the interests of the United States in court.

Courts should apply a no less rigorous standard to determine whether a putative relator qualifies as an "original source." A court may take jurisdiction over a *qui tam* "action based upon the public disclosure of allegations or transactions" only if "the person bringing the action is an original source of the information"—meaning that he or she has "direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing" the *qui tam* action. 31 U.S.C. § 3730(e)(4)(A), (B). Until the decision below, courts had rigorously applied the "original source" requirement, just as they had unfailingly applied rigorous pleading and timing inquiries to a relator's claims.

The Tenth Circuit, however, applied a far more lenient test of the relator's status as an "original source," requiring only that the relator have obtained knowledge of some of the background facts relevant to the claim. No matter that the relator's direct knowledge, such as it was, was stale, vague, and admittedly premised on layers of surmise; the Tenth Circuit inferred, and found sufficient, a tenuous connection to the false claims articulated in the relator's complaint.

The Tenth Circuit's decision substantially watered down one of the fundamental predicates of a *qui tam* claim. If the court of appeals' overly accommodating "original source" standard remains in place, it will threaten amici's members with increased exposure to ill-supported False Claims Act lawsuits pursued by opportunistic relators, diverting precious resources away from patient care and other essential mis-

sions—and most often into the defense of costly litigation the alleged victim of the fraud has elected *not* to pursue.

ARGUMENT

TO QUALIFY AS A PROPER *QUI TAM* RELATOR, A PLAINTIFF MUST SATISFY A NUMBER OF RIGOROUS STANDARDS UNDER THE FALSE CLAIMS ACT—THE "ORIGINAL SOURCE" RULE AMONG THEM

A. *Qui Tam* Relators Must Plead False Claims Act Violations With Specificity.

The False Claims Act is an anti-fraud statute; all of the courts to have addressed the issue agree on that. *See* 31 U.S.C. § 3729(a)(1) (prohibiting submission to the federal government of "false or fraudulent" claims); *Stevens*, 529 U.S. at 781 (noting the "unobjectionable proposition * * * that the [False Claims Act] was intended to cover all types of fraud"); *United States ex rel. Bledsoe* v. *Cmty. Health Sys., Inc.*, 342 F.3d 634, 640 (6th Cir. 2003); *Bly-Magee* v. *California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *Gold* v. *Morrison-Knudsen Co.*, 68 F.3d 1475, 1476 (2d Cir. 1995). In cases arising under the False Claims Act—as in other cases in which claims of fraud are made—courts accordingly apply the stringent pleading standard articulated in Federal Rule of Civil Procedure 9(b) to determine whether a claim may move forward beyond the pleading stage.[4]

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[4] *See, e.g.*, *Karvelas*, 360 F.3d at 227; *Clausen*, 290 F.3d at 1309; *Yuhasz* v. *Brush Wellman, Inc.*, 341 F.3d 559, 562-563 (6th Cir. 2003); *United States ex rel. Totten* v. *Bombardier Corp.*, 286 F.3d 542, 551-552 (D.C. Cir. 2002); *Harrison* v. *Westinghouse Savannah River Co.*, 176 F.3d 776, 783-784 (4th Cir. 1999); *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir.

Most federal civil complaints need only articulate a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Rule 9(b) requires more: "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b).

In addition to providing a fraud defendant notice of a plaintiff's claim, Rule 9(b) has the "equally strong purpose," *Clausen*, 290 F.3d at 1313 n.24, of protecting defendants from "harm to [their] reputation or goodwill" resulting from poorly supported but potentially poisonous allegations of fraud. *Stern* v. *Leucadia Nat'l Corp.*, 844 F.2d 997, 1003 (2d Cir. 1988); *see also Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (Rule 9(b) "protect[s] defendants against spurious charges"); *Karvelas*, 360 F.3d at 226 (Rule 9(b) "give[s] notice to defendants of the plaintiffs' claim, * * * protect[s] defendants whose reputation may be harmed by meritless claims of fraud, * * * discourage[s] 'strike suits' and * * * prevent[s] the filing of suits that simply hope to uncover relevant information during discovery") (quotation omitted). Those protections are all the more warranted in False Claims Act *qui tam* cases, where the promise of a cut of treble damages and penalties lures would-be relators. *See* 31 U.S.C. 3729(a); *Stevens*, 529 U.S. at 784-785 (observing that the False Claims Act "imposes damages that are essentially punitive in nature"); *Clausen*, 290 F.3d at 1313 n.24 (*qui tam* cases should be scrutinized under Rule 9(b) because the False Claims Act "provides a windfall for the first person to file").

There are other reasons largely unique to False Claims Act *qui tam* cases that demonstrate the importance and efficacy of Rule 9(b)'s heightened pleading standard. To begin with,

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1998); *United States ex rel. Thompson* v. *Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997).

a relator brings a False Claims Act 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, coupled with the Act's other predicates, guarantees that the relator deserves that unique station and is equipped to carry out that weighty charge. The False Claims Act also requires the government (absent an extension) to opt to intervene, or to decline to intervene, in a False Claims Act lawsuit within 60 days of its filing under seal. 31 U.S.C. § 3730(b)(2). A rigorous pleading standard ensures that the government is privy to sufficient detail about the relator's allegations, at the earliest possible stage, to facilitate an informed choice to investigate and to intervene or decline to intervene. As the First Circuit has observed, "allowing a relator to plead generally at the outset and amend the complaint * * * after discovery would be at odds with the FCA's procedures for filing a *qui tam* action and its protections for the government (which is, of course, the real party in interest in a *qui tam* action)." *Karvelas*, 360 F.3d at 231.

Courts accordingly invoke Rule 9(b) in False Claims Act cases to require that a relator provide details identifying particular allegedly false claims for payment submitted to the government. *See Clausen*, 290 F.3d at 1311 ("if Rule 9(b) is to be adhered to, some indicia of reliability must be given in the complaint to support the allegation of an *actual false claim* for payment"). A relator's complaint must identify the parties, contracts, or fraudulent acts that form the basis of the fraud allegations. *See Harrison*, 176 F.3d at 784; *Thompson*, 125 F.3d at 903 ("At a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where, and how' of the alleged fraud.") (internal quotation omitted). Rule 9(b)'s basic menu of requirements thus aids in discerning 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* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 680

(D.C. Cir. 1997) (quotation omitted); *see also 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"); *cf. Joshi*, 441 F.3d at 558 (pleading on "information and belief" insufficient to meet the heightened pleading standard of Rule 9(b)). A False Claims Act complaint that fails to meet Rule 9(b)'s requisite level of specificity will be dismissed. *See, e.g.*, *Karvelas*, 360 F.3d at 233; *Yuhasz*, 341 F.3d at 566.

In *Karvelas*, for example, the relator alleged that the defendants had committed serious violations of patient care standards. The First Circuit affirmed the district court's dismissal of the relator's complaint for failure to allege "the particulars of any of his allegations concerning the presentation of false claims to the government." 360 F.3d at 233 n.17. The relator had attempted to "describe at considerable length" sixteen different fraud schemes, but he had never "specifie[d] the dates or content of *any* particular false or fraudulent claim allegedly submitted for reimbursement." *Id.* (emphasis added). The relator had at most alleged violations of federal regulations; but a False Claims Act case is predicated on specific allegations of fraud, not assertions of regulatory noncompliance. *Id.* at 234; *see also Yuhasz*, 341 F.3d at 564 (relator's complaint found deficient under Rule 9(b) where it failed to identify parties, contracts, or details of the fraudulent scheme, stating only that "certain" testing conducted by a contractor resulted in the submission of false claims to the government).

Courts reviewing False Claims Act complaints thus consistently employ Rule 9(b) as a tool for determining whether putative relators possess sufficiently detailed information about the alleged fraudulent scheme to bring a claim on

behalf of the United States. That pleading rule disadvantages only those individuals unequipped to press a *qui tam* suit; for "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; *see also In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996) (Rule 9(b) prevents less-than-worthy fraud plaintiffs from " 'unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis' ") (citation omitted).

B. The "First-To-File" Bar Also Informs The Standard To Be Applied In Determining What Constitutes An Original Source.

Section 3730(b)(5) of the False Claims Act, "known colloquially as the Act's first-to-file bar," *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004), is another example of the standards by which the Act measures the qualifications of those who would allege, and litigate, fraud claims on behalf of the United States government. The first-to-file requirement states that when a person brings a *qui tam* claim, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The first-to-file bar thus limits to one the number of potential relators who can bring claims based on a particular fraud scheme giving rise to a False Claims Act *qui tam* claim. Under the first-to-file rule, there is only one proper *qui tam* relator: the first individual who gave the government notice of the fraud scheme's essential facts.

The courts of appeals have consistently applied this rule to bar claims by subsequent relators alleging the same elements of fraud as the earlier action. *See United States ex rel. Hampton* v. *Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003) (holding that "§ 3730(b)(5) bars any

action incorporating the same material elements of fraud as an action filed earlier"); *United States ex rel. Lujan* v. *Hughes Aircraft Corp.*, 243 F.3d 1181, 1189 (9th Cir. 2001) (holding that "§ 3730(b)(5) bars later-filed actions alleging the same material elements of fraud described in an earlier suit"); *SmithKline*, 149 F.3d at 233 (holding that the False Claims Act "bar[s] a later-filed action alleging the same elements of a fraud described in an earlier suit"); *accord Walburn* v. *Lockheed Martin Corp.*, 431 F.3d 966, 971 (6th Cir. 2005); *Grynberg*, 390 F.3d at 1279.

The bar on subsequent *qui tam* actions involving the same material fraud claim is "exception free." *Lujan*, 243 F.3d at 1183, 1187. It applies regardless of whether the subsequent action alleges new or additional facts about how the fraud occurred. *See Grynberg*, 390 F.3d at 1279 (barring subsequent *qui tam* action raising "the same essential claim" of fraudulently measuring natural gas output, even though subsequent action alleged specific fraudulent measurement techniques not included in first complaint); *Hampton*, 318 F.3d at 218 (barring subsequent *qui tam* action alleging fraud by a specific subsidiary of the defendant in the first-filed action and certain named employees of the subsidiary because "these are not differences in the material elements of the fraud" but "merely variations on the fraud" alleged in the first action); *Lujan*, 243 F.3d at 1189 (barring subsequent *qui tam* action alleging fraud within an aircraft program when first-filed complaint alleged fraud between two aircraft programs because subsequent actions are barred "regardless of whether the allegations incorporate somewhat different details"); *LaCorte*, 149 F.3d at 235-237 (barring subsequent *qui tam* action alleging new facts detailing more precisely how the defendant overcharged the government).

The first-to-file rule thereby balances two goals of the *qui tam* provisions: "preventing opportunistic suits, on the one hand, while encouraging citizens to act as whistleblowers, on

the other." *LaCorte*, 149 F.3d at 233. Strict application of the first-to-file bar recognizes that only the "first-filed claim provides the government notice of the essential facts of an alleged fraud." *Lujan*, 243 F.3d at 1187; *see also Walburn*, 431 F.3d at 970 (explaining that the *qui tam* provisions are designed to prevent would-be relators from "feed[ing] off a previous disclosure of fraud"). Once the government has notice of the essential elements of an alleged fraud, even those individuals in possession of additional particulars about the fraud—details that may be helpful to the government's investigation—are strictly barred from bringing suit. *See generally* John Boese, *Civil False Claims and* Qui Tam *Actions* § 4.03[C][2] (2005) ("[T]he fact that a subsequent suit relates to a different time frame, geographic area, or contract does not give rise to a sufficiently different cause of action to overcome the application of Section 3730(b)(5).").

The first-to-file rule also recognizes that as a matter of fairness, claimants alleging the same fraud should not share in any *qui tam* award because "their allegations are unlikely to increase the total recovery." *LaCorte*, 149 F.3d at 234. Indeed, "such duplicative claims do not help reduce fraud or return funds to the federal fisc." *Id.*; *see also Lujan*, 243 F.3d at 1189 (noting that subsequent claims "have no additional benefit to the government").

Limiting recovery to only the first person to notify the government of the fraud also avoids the practical effect of allowing subsequent claims to proceed, which would divide the bounty among more and more relators, and thereby reduce the incentive to come forward promptly with knowledge of fraudulent conduct. *United States ex rel. Ortega* v. *Columbia Healthcare Inc.*, 240 F. Supp. 2d 8, 12 (D.D.C. 2003). Not every citizen is entitled to a bounty for an act of public service, *id.* at 14, nor did Congress intend to provide bounties to would-be relators who perform "little if any public service" because the government already had been

made aware of the material elements of the fraud. *United States ex rel. Merena* v. *SmithKline Beecham Corp.*, 205 F.3d 97, 105 (3d Cir. 2000).

Perhaps because of its absolute consequences, courts invoke the first-to-file rule only after an initial assessment that the first-filed *qui tam* claims have been advanced by a proper relator—including whether the first-filed claims pass muster under Rule 9(b). A *qui tam* complaint that *fails* to plead a False Claims Act violation with the specificity required by Rule 9(b) will not bar a subsequent *qui tam* action that *does* satisfy that standard. *See Walburn*, 431 F.3d at 972 (complaint must allege violations of the FCA with particularity before it can be said to give the government notice of the essential elements of a fraudulent scheme); *LaCorte*, 149 F.3d at 234 (incorporating Fed. R. Civ. P. 9(b) standard to first-to-file rule). Only a relator who has pled facts sufficient to give the government actual notice of the essential elements of a fraudulent scheme (and not merely of some facts that upon investigation would reveal that a fraud had occurred) will be recognized as *the* relator for that scheme. The two requirements—the heightened pleading rule and the strict first-in-time rule—thus work in tandem to ensure the legitimacy of any relator's license to prosecute fraud claims on behalf of the United States government.

C. The Original Source Exception Must Be Applied With Similar Rigor.

So, too, with the "original source" rule. That inquiry serves an equally important purpose and should be applied as rigorously as the heightened pleading standard and the Act's strict first-in-time bar.

When Congress amended the Act's *qui tam* provisions in 1986, it aimed "to encourage private citizens with first-hand knowledge to expose fraud," while at the same time seeking "to avoid civil actions by opportunists attempting to capital-

ize on public information without seriously contributing to the disclosure of the fraud." *United States ex rel. Holmes* v. *Consumer Ins. Group*, 318 F.3d 1199, 1222 (10th Cir. 2003) (quotation marks and citations omitted); *see also, e.g., United States ex rel. Siller* v. *Becton Dickinson Co.*, 21 F.3d 1339, 1347 (1994) (Congress in the 1986 amendments sought to "encourage more private enforcement suits" while preventing "parasitic *qui tam* actions in which relators, rather than bringing to light independently-discovered information of fraud, simply feed off of previous disclosures of government fraud.") (quotation marks and citations omitted).

To those ends, Congress limited a federal court's jurisdiction over False Claims Act *qui tam* claims:

> No court shall have jurisdiction over an action [under the False Claims Act] based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. [31 U.S.C. § 3730(e)(4)(A).]

For purposes of this "public disclosure bar," the Act defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* § 3730(e)(4)(B); *see also United States* v. *Bank of Farmington*, 166 F.3d 853, 865 (7th Cir. 1999) ("To be 'original' the plaintiff must have 'direct and independent knowledge of the information on which the allegations are based.' To be a 'source' the plaintiff must have 'voluntarily provided the information to the Government before filing an action[.]'").

Congress thus specified in Section 3730(e)(4) that where a *qui tam* action is based upon allegations or transactions already in the public domain, a relator may pursue such an action to vindicate an alleged fraud on the federal fisc only when the relator qualifies as an original source; a court lacks jurisdiction over the suit otherwise. That jurisdictional requirement must be interpreted in a manner that is true to statutory text. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2620 (2005). The Tenth Circuit's holding that the relator in *Rockwell* knew and disclosed to the government "the information on which the allegations are based," so as to qualify as an original source, is anything but true to the text of the original source rule.

In his *qui tam* complaint, Stone, the *Rockwell* relator, alleged that he had personal knowledge of actual violations of the False Claims Act. Alleging that Rockwell had "committed numerous violations" of a laundry list of federal and state environmental laws and rules, Stone then recited the elements of a False Claims Act violation:

> [I]n order to induce the government to make payments or approvals, Rockwell violated § 3729(a) of the FCA by, inter alia, knowingly presenting or causing to be presented to an officer or employee of the United States government, false and fraudulent claims for payment or approval, including requests or statements for payment, statements for reimbursement of costs, and applications for bonuses in connection with or under the Rockwell-DOE contracts; and knowingly making, using, or causing to be made or used, false records or statements intended to obtain approval and payment of these monies. [Pet. App. 6a (quotation marks and citation omitted)].

But as the case moved into discovery, Stone conceded that he had no knowledge—direct or indirect, independent or otherwise—on which these essential allegations were based. In fact, Stone conceded that he had no firsthand knowledge

that anyone at Rockwell had made a specific false statement to the government, nor did he have knowledge of any specific false record or claim. *Id.* at 13a. The Tenth Circuit nevertheless concluded that Stone's "direct and independent knowledge," limited to a belief that certain flaws in a proposed Rockwell design led to "the release of toxic waste," and the recollection that one Rockwell manager years earlier "forbade him from discussing any environmental problems at Rocky Flats with DOE," established "that he had direct and independent knowledge of the information on which his [False Claims Act] claim was based." *Id.* at 17a, 19a, 20a.

Similarly without reference to any evidence of an actual False Claims Act violation, the court then concluded that Stone satisfied the second component of the original source rule—requiring the relator to provide to the government the information on which the False Claims Act allegations are based before filing his claim. The court found Stone met this important burden by providing the government with one document—an "Engineering Order" with a margin note from Stone—that did not address a single false claim allegedly submitted, nor a single false statement allegedly made, to the United States (nor, for that matter, "the release of toxic waste" on which the court found his allegations to be based). *See id.* at 51a.

The court's conclusion that Stone qualified as an original source was based on the faulty premise that the "gravamen" of Stone's False Claims Act claim was his prediction, upon "studying Rockwell's plans for manufacturing pondcrete[,] that the blocks would leak toxic waste." Pet. App. 21a. But the "gravamen" of a False Claims Act complaint is not a potential infraction of some other statute, rule, or regulation protecting the environment. *See, e.g.*, *United States ex rel. Hopper* v. *Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA."); *X Corp.* v. *Doe*, 816 F.

Supp. 1086, 1093 (E.D. Va. 1993) ("The heart of fraud is an intentional misrepresentation. A violation of a regulatory provision, in the absence of a *knowingly* false or misleading representation, does not amount to fraud.") (emphasis in original). The "gravamen" of a False Claims Act complaint is the knowing submission to the United States of a false claim for payment. *See, e.g.*, *Karvelas*, 360 F.3d at 234 ("alleged violations of federal regulations are insufficient to support a claim under the FCA"); *United States* v. *Kitsap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir. 2002) ("[I]t is the claim itself that is central to [an FCA] action"); *Clausen*, 290 F.3d at 1311 (submission to the government of a false claim for payment is "the *sine qua non* of a False Claims Act violation") (emphasis in original); *Harrison* v. *Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) ("the False Claims Act at least requires the presence of a claim—a call upon the government fisc—for liability to attach.").

The Tenth Circuit's holding that a *qui tam* relator may invoke the original source exception to the public disclosure bar merely by demonstrating direct and independent knowledge of a potential statutory or regulatory violation, and by voluntarily providing only that information to the government, does not square with Congress's intent "to encourage any individual knowing of Government *fraud* to bring that information forward." S. Rep. No. 99-345, at 1 (1986) (emphasis added). *See also, e.g.*, *United States ex rel. Fine* v. *Advanced Sciences, Inc.*, 99 F.3d 1000, 1004 (10th Cir. 1996) ("Congress sought to increase private enforcement of the False Claims Act by encouraging insiders with information of *fraud* to come forward.") (emphasis added).

The Tenth Circuit's standard also conflicts with those articulated by many other courts of appeals. Consistent with the purposes of the False Claims Act's *qui tam* provisions, the Third Circuit requires a relator whose claim is based upon publicly disclosed allegations or transactions to have "'direct

and independent knowledge' of the most critical element of its claims"—that is, "the alleged misrepresentations to [the Government]." *United States ex rel. Mistick PBT* v. *Housing Auth. of Pittsburgh*, 186 F.3d 376, 388 (3d Cir. 1999) (Alito, J.). Under the Third Circuit's standard, "a relator cannot be said to have 'direct and independent knowledge of the information on which [its fraud] allegations are based,' 31 U.S.C. § 3730(e)(4)(B), if the relator has no direct and independent knowledge of the allegedly fraudulent statements." *Id.* at 389. Likewise, in *Cooper* v. *Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 567 (11th Cir. 1994), the Eleventh Circuit ruled that a relator qualified as an original source where he had direct and independent knowledge, and disclosed to the government, the fraud alleged in the *qui tam* complaint: that an insurance company submitted claims for payment to Medicare knowing that the insurance company, and not Medicare, was responsible to pay those claims. *Id.* at 564-568.

The Ninth Circuit similarly requires that, to qualify as an original source, would-be relators must "see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else." *United States ex rel. Devlin* v. *California*, 84 F.3d 358, 361 (9th Cir. 1996). In *Aflatooni*, 163 F.3d 516, the Ninth Circuit considered a case in which a physician purported to bring a *qui tam* action alleging, among other things, that a Medicare provider and certain other defendants "submitted or caused the submission of claims to Medicare for services that either were not medically necessary * * *, were not performed at all, or were billed as separate services when they should have been billed as one service[.]" *Id.* at 520. The court held that the physician's allegations against those defendants were based upon public disclosures within the meaning of 31 U.S.C. § 3730(e)(4)(A), and rejected the physician's argument that he was an "original source" with respect to those claims, because the physician had failed to show that he had "first-

hand knowledge of the alleged fraud." *Aflatooni*, 163 F.3d at 522-525. The physician "could not recall the name of any *Medicare* person (patient) who was [allegedly] charged for unnecessary medical procedures," nor did he "point to any other evidence in the record which suggests that he has 'information,' as opposed to speculation, of [the defendants'] involvement in the submission of false Medicare claims." *Id.* at 526 (emphasis in original).

The D.C. and Eighth Circuits' interpretation of the original source rule "does not require that the *qui tam* relator possess direct and independent knowledge of *all* of the vital ingredients to a fraudulent *transaction*," but rather, that the relator have direct and independent knowledge of an "essential element underlying the fraud transaction." *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 656-657 (D.C. Cir. 1994) (emphases in original); *Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2002) (same). But under this standard, too, information about a statutory or regulatory violation—or, in Stone's case, general speculation about an inchoate violation—does not, without more, establish a relator as an original source, because it is not information on which an allegation of *fraud* can be based. *See, e.g.*, *Hopper*, 91 F.3d at 1266 ("It is the false *certification* of compliance [with laws, rules, or regulations] which creates [False Claims Act] liability when certification is a prerequisite to obtaining a government benefit.") (emphasis in original).

Most courts—save the Tenth Circuit—therefore assess whether a putative relator is a proper relator based on one general guiding rule: a proper relator is one who has pled and provided "the government notice of the essential facts of an alleged fraud." *Lujan*, 243 F.3d at 1187. To state a viable claim under the False Claims Act, a relator must allege with particularity the "who, what, when, where, and how" of the alleged fraud. *See supra* at 9-12. So, too, only a relator who

meets that standard of disclosing a fraudulent scheme in a sealed *qui tam* complaint provides sufficient notice to the government to lay claim to the first-to-file rule's exclusivity provision. *See supra* at 12-15. The "information" required for original source status can be no less than that required to support such allegations with respect to the essential elements of the fraud. *See Wang* v. *FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992) (by distinguishing between "allegations" and the "information on which the allegations are based," the FCA "appears to be invoking the common logical distinction between an assertion and its proof. * * * An allegation can be made public, even if its proof remains hidden.").

The Tenth Circuit erred in holding that the original source rule can be satisfied by knowledge and prior disclosure to the government of a statutory or regulatory violation, absent direct and independent knowledge and prior disclosure of any critical element of the alleged fraud itself. Under the standard adopted by the court of appeals in this case, a relator could prosecute a False Claims Act case against any highly regulated entity that receives federal funds, based upon already publicly disclosed allegations or transactions of which the government is aware, merely by coming forward with general information concerning some suspected regulatory infraction and a general awareness that the government pays some of its bills. *Cf. Hughes Aircraft Co.*, 520 U.S. at 949 ("*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."). Indeed, the Tenth Circuit's broad interpretation of the original source rule provides relators and their counsel with an incentive to refrain from disclosing to the government the details on which their False Claims Act allegations are based—potentially discouraging the government from intervening in the case, and thereby driving up relators' attorneys' fees and the relator's share of

any recovery. *See* 31 U.S.C. § 3730 (providing for a greater share of recovery to relators who advance claims in the absence of government intervention); *id.* § 3730(d)(1)-(2) (providing for recovery of relator's attorney's fees upon any settlement or judgment resulting in a recovery for the United States). Such an outcome cannot be what Congress intended in "[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own[.]" *Springfield Terminal Ry.*, 14 F.3d at 649.

D. Lenient *Qui Tam* Requirements And Opportunistic Relators Harm The Health Care Industry.

The False Claims Act has been a powerful tool for recovering dollars for the federal fisc; and many of those dollars have been recovered in health care *qui tam* cases. Several other facts, however, are equally beyond dispute. The government does not intervene in the vast majority of False Claims Act *qui tam* cases. *See* GAO 2006 Report at 27, 29. Ordinarily, litigation under the public disclosure bar arises in declined *qui tam* cases.[5] Because most declined *qui tam* cases are health care cases, many of those declined cases involving the public disclosure bar target health care businesses—providers and manufacturers. *See id.* at 29 (noting that 754 of the 1770 declined case since 1987 were in the health care field).

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[5] *See, e.g., United States ex rel. Zaretsky* v. *Johnson Controls, Inc.*, 457 F.3d 1009 (9th Cir. 2006); *Walburn*, 431 F.3d 966; *United States ex rel. Grynberg* v. *Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2964 (2005); *United States ex rel. Reagan* v. *East Texas Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168 (5th Cir. 2004); *Bannon* v. *Edgewater Med. Ctr.*, 406 F. Supp. 2d 907 (N.D. Ill. 2005).

This case is, in all practical effect, about those more common circumstances; and the Court's decision will clarify the rules such relators must follow before they may receive license to litigate on behalf of the United States. Amici have a strong interest in maintaining a clear and strict "original source" rule—a rule that recognizes and rewards legitimate relators while winnowing out opportunistic bounty hunters. Any standard that would lower the bar to allow relators to bring *qui tam* actions based only on stale hunches and fresh news reports would impose high litigation costs on health care providers at the expense of patients.

According to a recent report from the Government Accountability Office, allegations of health care fraud accounted for 1,145 of the 2,490 *qui tam* cases filed between 1987 and 2005—almost half of all cases filed. GAO 2006 Report at 28. The Department of Health and Human Services was named in 54 percent of all *qui tam* actions initiated during this period—the great bulk of which were filed in the last decade. *Id.* at 26.

Despite this aggressive targeting of the health care field by *qui tam* relators, the Department of Justice has elected to pursue less than a third of all False Claims Act *qui tam* cases brought against health care defendants. *Id*. at 29.[6] This means that in a significant majority of all *qui tam* actions

[6] One recognized purpose of the public disclosure bar, in fact, is to preserve deference to the government's exercise of prosecutorial discretion in fraud matters. *See United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 685 (D.C. Cir. 1997). In health care cases, for example, the Department of Justice has issued guidelines through which its attorneys must assess their exercise of prosecutorial discretion. *See* Eric H. Holder, Jr., *Memorandum, Guidance on the Use of the False Claims Act in Civil Health Care Matters*, U.S. Dep't of Justice (June 3, 1998), *available at* www.usdoj.gov/dag/readingroom/chcm.htm. Relators are not similarly constrained.

involving health care providers, the government consciously has chosen not to pursue the relator's claims. Instead, these relators have been left free to pursue their claims—and their own pecuniary interests—without the supervision of government officials but with all the trappings of a public charge. *See Hughes Aircraft Co.*, 520 U.S. at 949 ("*qui tam* relators are * * * motivated primarily by prospects of monetary reward rather than the public good"); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 574 (June 2000) (explaining that relators "pursue different goals and respond to different incentives than do public agencies" and have no "direct accountability to the electorate").

The result: hundreds of actions against health care providers by relators who are unsupervised at best and unscrupulous at worst. Relators in declined health care *qui tam* cases often bring claims based on highly creative theories of liability, and often bring them in cases where health care providers unwittingly ran afoul of complex federal requirements. *See* Joan H. Krause, *"Promises to Keep": Health Care Providers and the Civil False Claims Act*, 23 Cardozo L. Rev. 1363, 1368 (Mar. 2002) (explaining this phenomenon). And at their worst, these relators bring picayune or meritless claims the defense of which drains health care providers of badly needed resources. *See Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 767 n.24 (5th Cir. 2001) (Smith, J., dissenting) (noting that "[o]f the 1,966 [of all *qui tam*] cases that the government has refused to join, only 100 have resulted in recoveries (5%)"); *see also* GAO 2006 Report at 36 (noting that the median recovery in declined *qui tam* cases is just over $22,000). And even the GAO's statistics likely inflate the merit of such claims, where the risk of huge per-claim penalty awards and the inevitable high cost of protracted litigation forces providers to settle these cases—often for large sums—despite the absence of any

culpable wrongdoing on their part. *See* Krause, *supra*, at 1368.[7]

Not only is this inconsistent with the purpose of *qui tam* actions—which are designed to prevent fraud on the government, not punish misinterpretations of complex federal law—it is harmful to the interests of patients and the communities these providers serve. Available statistics do not account for the resources health care providers must also expend in defending *qui tam* suits—including meritless *qui tam* suits—not to mention the hefty attorney's fees providers must pay in cases they settle to avoid further defense costs.[8]

Although some recoveries under the Act are unquestionably legitimate, others are the result of health care providers making the rational business decision not to challenge tenuous claims that would require long and expensive litigation to expose and defeat. *See* Reinhardt, *supra*, at A18 ("Rather than engaging in a long, protracted fight to set the record straight, throughout which share prices suffer and business slumps, a health company's best bet may simply be to hand over the fines and get on with business."). These questionable cases—whether settled early or litigated to a conclusion—divert enormous resources away from providers' core responsibility: caring for patients. *See* Keith D.

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[7] Unlike procurement cases, like this one, where the damages trebled on any one claim far exceed the penalty imposed on that claim, health care cases often involve the prospect of small per-claim damages dwarfed exponentially by penalties awarded at $5,000 to $10,000 per claim *See*, *e.g.*, *Hays* v. *Hoffman*, 325 F.3d 982, 992-994 (8th Cir. 2003).

[8] Unlike defense and other contractors, moreover—which typically are indemnified by the government for attorney's fees in cases where no wrongdoing is found, *see Fluor Hanford, Inc.* v. *United States*, 66 Fed. Cl. 230, 231 (2005)—most health care providers must shoulder such costs regardless of the result.

Barber *et al.*, *Prolific Plaintiffs or Rabid Relators? Recent Developments in False Claims Act Litigation*, 1 Ind. Health L. Rev. 131, 172 (2004) ("unjust settlements * * * often include payment of penalties that further divert resources from the provision of health care").

One hospital's story stands as an illuminating example. In early 2003, Good Shepherd Medical Center in Hermiston, Oregon, was the subject of an FBI raid after a relator filed a sealed *qui tam* complaint alleging vast irregularities in the hospital's billing practices. *See* Letter from Dennis E. Burke, President, Good Shepherd Health Care System, to Senator Ron Wyden (Aug. 23, 2006), *available at* http://www.aha.org/aha/content/2006/pdf/wydenltr.pdf. During an arduous three-year investigation of the claims, the alleged irregularities—"unbundling," kickbacks, over-coding, billing for services not provided, among others—dropped away one by one until so little of substance remained that the federal government discontinued its investigation. *Id.* at 2.[9] The hospital incurred over one million dollars in fees and costs relating to the investigation. *Id.*

A clear, consistent, and strict "original source" rule, applied in tandem with the Act's other gatekeeping mechanisms, gives courts and defendants a powerful tool to identify and ward off illegitimate *qui tam* strike suits like those sometimes aimed at amici's members. The relators who

[9] An audit of the hospital's emergency billing records revealed that a computer programming error had resulted in the names of the treating ER physician and the hospital's former ER medical director being entered in the wrong boxes in the electronic claims form. That revelation triggered a third-party audit, which showed that all ER services had been provided by qualified physicians and had been appropriately coded—indeed, sometimes undercoded. *Id.*

clear the False Claims Act's intentionally demanding gauntlet will have had their bona fides established, while less principled relators will be winnowed out. The government, the courts, and defendants *all* would benefit from that rigorous inquiry. Only the bounty hunters would complain.

CONCLUSION

For the foregoing reasons, as well as those in petitioner's brief, the Tenth Circuit's decision should be reversed.

Respectfully submitted,

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