No. 17-1108

In The Supreme Court of the United States

MEDICAL DEVICE BUSINESS SERVICES, INC., f/k/a DEPUY ORTHOPAEDICS, INC., *et al.*,

Petitioners,

v.

UNITED STATES *ex rel.* ANTONI NARGOL and DAVID LANGTON, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE COALITION FOR GOVERNMENT PROCUREMENT, NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, & PROFESSIONAL SERVICES COUNCIL– THE VOICE OF THE GOVERNMENT SERVICES INDUSTRY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

LAWRENCE S. EBNER
Counsel of Record
CAPITAL APPELLATE ADVOCACY PLLC
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@capitalappellate.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

The Coalition for Government Procurement ("The Coalition") is a non-profit association of small, medium, and large companies that sell commercial services and products to the Federal Government. As the single most effective voice for commercial services and product companies selling in the federal market, the Coalition's members collectively account for a significant percentage of the sales generated through the General Services Administration and Department of Veterans Affairs Multiple Award Schedules programs. Coalition members also are responsible for many of the commercial item solutions purchased directly by numerous federal departments and agencies. The Coalition is proud to have worked with government officials for more than 35 years towards the mutual goal of common-sense acquisition.

The National Defense Industrial Association ("NDIA") is a non-partisan and non-profit organization comprised of more than 1,650 corporations and 75,000 individuals spanning the entire spectrum of the defense industry. NDIA's

---

[1] In accordance with Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amici*, their members, and their counsel, made a monetary contribution intended to fund preparation or submission of this brief. As required by Supreme Court Rule 37.2(a), the parties' counsel of record received timely notice of *amici*'s intent to file this brief. Petitioners' counsel of record has submitted to the Clerk a letter granting blanket consent for the filing of *amicus* briefs. Respondents' counsel of record has consented to the filing of this brief.

corporate members include not only some of the nation's largest military equipment contractors, but also companies that provide the U.S. military and other federal departments and agencies with a multitude of professional, logistical, and technological services, both domestically and in overseas combat zones and other dangerous locations. Individuals who are members of NDIA come from the Federal Government, the military services, small businesses, corporations, prime contractors, academia, and the international community.

The Professional Services Council–The Voice of the Government Services Industry ("PSC") is the national trade association for the government professional and technology services industry. Many of PSC's more than 400 small, medium, and large member companies directly support the U.S. Government, both domestically and abroad, through contracts with the Department of Defense and other departments and agencies with national security or humanitarian-related missions. PSC's members provide a wide range of professional and technology services, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, and scientific, social, and environmental services. Collectively, PSC's members employ hundreds of thousands of Americans in all 50 States and abroad.

* * *

The Coalition, NDIA, and PSC each participates as *amicus curiae* in carefully selected appeals which

present questions that are exceptionally important to government contractors and the operation of the federal procurement system. The question presented here—whether a False Claims Act *qui tam* relator can satisfy Federal Rule of Civil Procedure 9(b)'s pleading-stage "particularity" requirement without alleging details about any specific false claim—is such an issue.

As this case illustrates, opportunistic relators, lured by the prospect of lucrative bounties, continue to file speculative *qui tam* suits with alarming abandon. Even where, as here, the Department of Justice investigates a *qui tam* complaint and then declines to intervene, a relator can pocket a very generous, statutorily authorized reward by exacting a multi-million dollar settlement from a government contractor without ever having to prove in court that a false or fraudulent claim was knowingly submitted or induced.

Federal Rule of Civil Procedure 9(b)—which requires a party "alleging fraud [to] state with *particularity* the circumstances constituting fraud" (emphasis added)—is a crucial safeguard against vague, generalized, or speculative *qui tam* suits. A *qui tam* suit which fails to satisfy Rule 9(b) should be dismissed at the threshold. Strict, nationally uniform judicial enforcement of Rule 9(b)'s heightened pleading standard is essential for preventing abuse of the False Claims Act's *qui tam* mechanism.

The alternative to strict enforcement—a relaxed interpretation of Rule 9(b) that allows a *qui tam* complaint to survive a motion to dismiss without

having to allege even one false claim with specificity—would pressure many federal government contractors that are unjustifiably targeted by voracious *qui tam* relators to expend substantial sums to settle unfounded claims rather than incur the risk of significant civil penalties, treble damages, and reputational harm. As this *amicus* brief explains, Supreme Court review is needed to ensure that the federal procurement system, which is vital to the functioning of the Federal Government, is not undermined by a lax interpretation that effectively expunges from Rule 9(b) the requirement to plead fraud with particularity.

SUMMARY OF ARGUMENT

The manner in which district courts apply Federal Rule of Civil Procedure 9(b) to False Claims Act *qui tam* complaints is enormously important to government contractors, which provide an endless variety of services and products to federal departments, agencies, and commissions. Rule 9(b), which indisputably applies to *qui tam* suits, interposes a high, pleading-stage hurdle that any plaintiff alleging fraud must overcome. The rule's "state with particularity" requirement not only protects *qui tam* defendants from having to litigate or settle vague, generalized, or speculative allegations of fraud, but also preserves the integrity of the federal procurement system.

During the past decade, *qui tam* suits have surged. Much is at stake for government contractors—the threat of heavy civil penalties, multi-million dollar treble damages judgments, and

reputational harm that can affect a company's ability to compete for contracts. Because False Claims Act "liability is 'essentially punitive in nature,'" *Universal Health Services, Inc. v. United States and Massachusetts ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (quoting *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000)), there is immense pressure to settle even a baseless *qui tam* suit that survives a motion to dismiss. Relators also are motivated to settle: They receive a generous 15%-30% share of settlement proceeds without having to incur the costs and risks of litigation. The intense pressure to enter into pretrial settlements of *qui tam* suits is all the more reason for federal courts to vigorously enforce Rule 9(b)'s threshold particularity requirement in the False Claims Act context.

Any lax interpretation of Rule 9(b)—such as the First Circuit's "flexible" standard for *qui tam* cases involving "indirect" fraud, *see* App-19—would frustrate the purpose of the rule. That in turn would impair the operation of the federal procurement system: Competition for government contracts would be diminished by companies that are unwilling to risk being forced to settle or litigate specious *qui tam* complaints, or that are blocked from obtaining government work by injudicious contracting officers influenced by *qui tam* relators' vague and unfounded allegations. Companies that still are willing and able to bid on government contracts might increase their prices as a hedge against the persistent threat of runaway *qui tam* suits. At the least, the mutual trust and working relationship between the Federal

Government and the contractors on which it is so dependent would be eroded.

The filing under seal of even a deficient *qui tam* complaint requires an investigation to be conducted by the Department of Justice, usually in conjunction with potentially affected departments and agencies. If warranted, the Justice Department has ample statutory authority to intervene and pursue remedial action on behalf of the United States. But where, as in the majority of cases, the United States declines to intervene, a district court should not hesitate to dismiss a *qui tam* suit that fails to satisfy Rule 9(b)'s particularity requirement.

ARGUMENT

REVIEW SHOULD BE GRANTED BECAUSE NATIONALLY UNIFORM ENFORCEMENT OF RULE 9(b) IN *QUI TAM* LITIGATION IS NEEDED TO MAINTAIN THE VIABILITY OF THE FEDERAL PROCUREMENT SYSTEM

A. Rule 9(b) Protects *Qui Tam* Defendants From Vague, Generalized, or Speculative Allegations of Fraud

Federal Rule of Civil Procedure 9(b) establishes "an elevated pleading standard" for alleging fraud. *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009). To comply with the rule, "a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *see Iqbal*, 556 U.S. at 686 (comparing "the particularity requirement applicable to fraud" with the same rule's statement that

"[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally").

As the First Circuit acknowledged here, Rule 9(b) serves several important purposes. *See* App-17. Because fraud is a "subject[] understood to raise a high risk of abusive litigation," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007), the rule's particularity requirement "is necessary to safeguard potential defendants from lightly made claims charging the commission of acts that involve some degree of moral turpitude." Charles Alan Wright et al., *Federal Practice and Procedure* § 1296 (3d ed. 2004). "The Rule acts as a safety valve to assure that only viable claims alleging fraud . . . are allowed to proceed to discovery." *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1310 (Fed. Cir. 2011). Rule 9(b) "thus guards against the institution of a fraud-based action in order to discover whether unknown wrongs actually have occurred—the classic fear of 'fishing expeditions.'" Wright et al., *supra.*

The rule's other equally important, interrelated objectives include "protect[ing] defendants from harm to their goodwill and reputation." *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 456 (4th Cir. 2013) (citation and internal quotation marks omitted) (alteration in original); *see Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999) ("Greater precomplaint investigation is warranted in fraud cases because public charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual)."); *see also* Wright et al., *supra* (discussing Rule 9(b)'s purposes); James Wm. Moore et al.,

Moore's Federal Practice § 9.03[1][a] (3d ed. 2015) (same); John T. Boese, Civil *False Claims and Qui Tam* Actions § 5.04 (4th ed. & Supp.) (same).

"[B]ecause the essence of a False Claims Act case is fraud," Boese, supra § 5.04 & n.229 (collecting circuit cases) (2012-1 Supp.), "[t]he applicability of Rule 9(b) to *qui tam* actions is by now beyond dispute." *Id.* § 5.04[A][2] & n.244 (2016-2 Supp.). "Pleading an actual false claim with particularity is an indispensable element of a complaint that alleges a FCA violation in compliance with Rule 9(b)." *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007).

More specifically, Rule 9(b)'s particularity requirement means that "a plaintiff asserting a claim under the [False Claims] Act 'must, at a minimum, describe the time, place, and contents of the false representation, as well as the identity of the person making the misrepresentation.'" *Nathan*, 707 F.3d at 455-56 (quoting *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008)); *see also* Boese, *supra*, § 5.04[B] (2016-2 & 2017-2 Supp.) (a *qui tam* complaint must "present the 'who, what, when, where, and how' of the fraud"). By "requiring detailed information about the actual false claims submitted to be pled," Rule 9(b) "allows a determination to be made as to whether the complaint should be dismissed on jurisdictional (i.e., under the first-to-file or public disclosure bars) or other grounds." *Id.* §§ 5.04, 5.04[B] (2017-1 Supp). Indeed, "[t]he multiple purposes of Rule 9(b) . . . may apply with particular force in the context of the [False Claims] Act, given the potential consequences

flowing from allegations of fraud by companies who transact business with the government." *Nathan*, 707 F.3d at 456. The leading treatise on *qui tam* litigation therefore explains that due to the "heightened possibility of spurious allegations in a *qui tam* suit," the "overwhelming majority of courts . . . recognize the need to provide *qui tam* defendants with the full protection provided by Rule 9(b)." Boese, *supra* § 504[A] (2016-2 Supp.).

B. Opportunistic *Qui Tam* Relators are Increasingly Targeting Government Contractors

"The potential for astronomical profits, as well as the ever-expanding theories of liability, makes [*qui tam*] actions the fastest-growing area of federal litigation." Sean Elameto, *Guarding the Guardians: Accountability In Qui Tam Litigation Under The Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 844 (2012). Prospective relators (and their counsel) have every incentive for pursuing government contractors until they agree to settle, no matter how vague, speculative, or unfounded a *qui tam* complaint's allegations may be.

The False Claims Act promises relators and their counsel a rich pot of gold without ever having to prove fraud: Relators receive between 15% and 25% "of the proceeds of the action *or settlement* of the claim" if the United States intervenes. 31 U.S.C. § 3730(d)(1) (emphasis added). They receive an even larger award, between 25% and 30% of the proceeds or settlement, if—as in the vast majority of cases—the Justice Department declines to intervene following completion of its investigation. *Id.*

§ 3730(d)(2). And members of the rapidly growing "*qui tam* bar" usually collect between 30%-50% of relator recoveries. Elameto, *supra* at 843. All this if a relator's complaint survives a defendant's motion to dismiss for failure to satisfy Rule 9(b), and then, as is typical, the defendant caves in to settlement pressures rather than endures the burdens, costs, and risks of litigation.

Justice Department statistics reflect the booming *qui tam* industry. More than half of the 11,980 *qui tam* suits filed since enactment of significant False Claims Act amendments in 1986 were commenced during the past decade. *See* Fraud Statistics–Overview, Civil Div., U.S. Dep't of Justice (Dec. 19, 2017), https://goo.gl/YsxDMR. This 10-year tally includes almost one-third of all *qui tam* suits since 1986 alleging false or fraudulent submissions to the Department of Defense. *See* Fraud Statistics–Department of Defense, Civil Div., U.S. Dep't of Justice (Dec. 19, 2017), https://goo.gl/FPTvJv. Along these lines, the Justice Department emphasized in a in a December 2017 news release that "[t]he number of lawsuits under the qui tam provisions of the [False Claims] Act has grown significantly since 1986, with 669 qui tam suits filed this past year – an average of more than 12 new cases every week." *Justice News*, Office of Public Affairs, U.S. Dep't of Justice (Dec. 21, 2017), https://goo.gl/ji5PYr.

Between FY 1987-2017, *qui tam* settlements and judgments totaled more than $40.5 billion. Fraud Statistics–Overview, *supra.* Relators were awarded more than $6.5 billion of that amount. *Id.* During FY 2017 alone, the government reported $3.4 billion

in *qui tam* settlements and judgments, and almost $400 million in relator awards. *Justice News*, *supra.* This includes almost $210 million in *qui tam* settlements and judgments, and almost $43 million in relator awards, involving alleged fraud against the Defense Department. *See* Fraud Statistics–Department of Defense, *supra.* No wonder "[t]he publicity garnered by large settlements . . . serves to encourage additional would-be whistleblowers, many of whom are looking to get rich quick." Elameto, *supra* at 843-44.

The federal procurement market provides an enormous target for ambitious *qui tam* relators and their counsel. For example, during FY 2017 the Department of Defense awarded almost $324 billion for prime contracts. The Department of Veterans Affairs (VA) awarded more than $164 billion, and the General Services Administration (GSA) more than $11.8 billion. *See* Agency Profiles, USAspending.gov, https://goo.gl/atJrE4; *see also* Beginner's Guide To GSA Schedule Contracts (2017) at 3, https://goo.gl/pDEei5 (indicating that federal departments and agencies spend $45 billion annually through the GSA Schedules Program); VA Federal Supply Schedule Service, https://www.fss.va.gov (indicating that the VA manages over $14 billion in annual sales to support military veterans' healthcare needs).

In their hunt for *qui tam* bounties, relators have been emboldened by this Court's 2016 decision in *Universal Health Services, Inc. v. United States and Massachusetts ex rel. Escobar*, 136 S. Ct. at 1999, holding that "the implied false certification theory

can, at least in some circumstances, provide a basis for [False Claims Act] liability." Often oblivious to the Court's admonition that "a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be *material* to the government's payment decision," *id.* at 2002 (emphasis added), relators have been filing *qui tam* suits alleging false certifications of compliance with a broad range of contractual and regulatory requirements.

Federal government contractors are required to provide and annually update numerous separate representations and certifications. *See* 48 C.F.R. § 4.1202. Unlike private-sector commercial contracts, federal procurement of commercial items involves many regulatory and contractual obligations unique to government contracts, ranging from limitations on the countries where a product can be manufactured, *see id.* § 52.225-5, to a requirement for "affirmative action by the contractor to employ and advance in employment qualified . . . veterans," *id.* § 52.222-35(b). Contracts for products or services that are not commercial items contain dozens of additional clauses. *See* 48 C.F.R. pt. 52 ("solicitation provisions and contract clauses").

C. Lax Enforcement of Rule 9(b) Undermines the Federal Procurement System

"[S]ubstandard [*qui tam*] cases in no way serve the public interest." Elameto, *supra* at 827. Relaxing Rule 9(b)'s pleading standard "may permit relators with little knowledge of fraud to make speculative allegations," which then "could be used to

extract settlements from defendants who hope to avoid even more expensive litigation costs." *Id.* at 823, 824. Allowing a poorly pleaded, non-intervened *qui tam* suit to proceed in this manner would "produce unwanted social costs," including "serious economic and reputational harm" to government contractors that have not violated the False Claims Act. *Id.* at 826; *see also* Michael Lockman, Comment, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev. 1559, 1607 (2015) ("The threats of socially suboptimal fraud enforcement, warped actor incentives and gamesmanship, and systemic agency inefficiency should make courts think twice before tossing the strict pleading standard of Rule 9(b) into the wastebasket of procedural history.").

If Rule 9(b) is interpreted in a way that would "open the door to more speculative and frivolous [*qui tam*] suits," risk-averse companies "may not wish to do business with the Government, thereby eroding the Government's goal of obtaining maximum competition in contracting" and "negatively impact[ing] the economy as a whole." Elameto, *supra* at 823, 827. Similarly, federal departments and agencies may not be able to do business with particular contractors, even though they are unwarranted targets of inadequately pleaded *qui tam* complaints.

"Like private contracting parties, the federal government generally 'enjoys the unrestricted power . . . to determine those with whom it will deal[] and fix the terms and conditions upon which it will make needed purchases.'" Kate M. Manuel, Cong.

Research Serv., R40633, Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures 1 (2013) (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940)) (alterations in original). One of the federal procurement system's foundational principles is that the government will conduct business with, i.e., award contracts to, only "*responsible* prospective contractors." 48 C.F.R. § 9.103(a) (emphasis added); *id.* ("Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only."). "No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility." *Id.* § 9.103(b); *see also id.* § 14.408-2(a) ("The contracting officer shall determine that a prospective contractor is responsible . . . before awarding the contract."). "To be determined responsible, a contractor must," *inter alia*, "[h]ave a satisfactory record of integrity and business ethics." *Id.* § 9.104-1(d).

Federal contracting officers "determine prospective contractors' responsibility prior to each contract award," and "have substantial discretion" in making such determinations. Manuel, *supra* at Summary. Before making an affirmative determination of responsibility, federal procurement regulations require or encourage contracting officers to consider information from multiple sources. *See* 48 C.F.R. § 9.105-1(c)(5); *see also John C. Grimberg Co. v. United States*, 185 F.3d 1297, 1303 (Fed. Cir. 1999) ("[T]he contracting officer is the arbiter of what, and how much, information he needs.").

False Claims Act allegations, including those contained in *qui tam* complaints, are among the "sources of information," 48 C.F.R. § 9.105-1(c), that contracting officers consider when determining whether a prospective contractor has "a satisfactory record of integrity and business ethics." *Id.* § 9.104-1(d); *see, e.g.*, *In re FCi Fed., Inc.*, B-408558.4 et al., 2014 WL 5374675 (Comp. Gen. Oct. 20, 2014) (contract award protest sustained where contracting officer made favorable contractor responsibility determination without adequately investigating allegations in pending *qui tam* suit); *see also* 48 C.F.R. § 52.209-5 (contracting officer must consider whether a contractor is currently civilly charged by a government entity with fraud when making a responsibility determination). At the least, a prospective contractor targeted in a *qui tam* suit may be confronted with the task of persuading a contracting officer that despite the relator's allegations, it has sufficient integrity to qualify for the affirmative responsibility determination needed to be awarded a contract. Convincing the contracting officer may be problematic if a district court, contrary to Rule 9(b), has denied a motion to dismiss a *qui tam* complaint that consists only of vague, generalized, or speculative allegations, such as mere statistical inferences of third-party fraudulent submissions. If the contracting officer issues a "determination of nonresponsibility," the prospective contractor will be deemed ineligible for the contract (or subcontract) award. *Id.* § 9.103(b).

Allowing a poorly pleaded *qui tam* complaint to survive a motion to dismiss based on failure to satisfy Rule 9(b)'s heightened pleading standard can have

consequences that are even more draconian for a government contractor. A pending or successful *qui tam* suit can subject a contractor to suspension from eligibility to receive *any* federal contracts or subcontracts. *See* 48 C.F.R. § 9.407-2(a) (federal agency "suspending official may suspend a contractor suspected, upon adequate evidence of . . . [c]ommission of fraud . . . in connection with . . . performing a public contract or subcontract"). Suspension can include "all divisions or other organizational elements of the contractor" and "any affiliates of the contractor if they are . . . specifically named." *Id.* § 9.407-1. Moreover, if a contractor targeted by a poorly pleaded *qui tam* complaint that has survived a Rule 9(b) motion to dismiss decides to take the substantial risk of litigating rather than settling, and then is subjected to civil penalties and a treble-damages judgment, the contractor also can suffer the death-blow of being debarred from eligibility to bid on government contracts. *See id.* § 9.406-2(a)(1) (causes for debarment include a "civil judgment for . . . [c]ommission of fraud . . . in connection with . . . performing a public contract or subcontract").

Insofar as a lax standard for judicial enforcement of Rule 9(b) in *qui tam* litigation deters qualified contractors from bidding on government work, or results in an unwarranted determination of nonresponsibility or even suspension or debarment, the federal procurement system is unnecessarily and unjustifiably undermined—ironically, by exploitation of a statute, the False Claims Act, intended to bolster the procurement system.

D. The United States Has Ample Authority To Investigate and Pursue Submitters of Actual, Specific False Claims

Amici agree that the public interest can be served by properly pleaded *qui tam* complaints. Indeed, Rule 9(b)'s particularity requirement does not pose an obstacle for achieving the *qui tam* provisions' fundamental purpose, which is to motivate individuals with actual, first-hand knowledge of false or fraudulent submissions to seek redress on behalf of the United States. But where a relator's complaint fails to satisfy Rule 9(b), and following an investigation the government declines to intervene, there is little chance that dismissal of a *qui tam* suit will allow actual fraudulent claims to slip through the cracks. "'Every day, dedicated attorneys, investigators, analysts, and support staff at every level of the Justice Department are working to root out fraud and hold accountable those who violate the law and exploit critical government programs. . . . fraud and dishonesty will not be tolerated.'" *Justice News*, *supra* (quoting Chad A. Readler, Acting Assistant Attorney General for the Civil Division).

The filing of a *qui tam* complaint—even one that ultimately is dismissed for failure to meet Rule 9(b)'s particularity requirement—triggers a Justice Department investigation of the relator's allegations. "In a *qui tam* suit under the [False Claims Act], the relator files a complaint under seal and serves the United States with a copy of the complaint and a disclosure of all material evidence." *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135

S. Ct. 1970, 1973 (2015) (citing 31 U.S.C. § 3730(b)(2)). The complaint remains sealed "for at least 60 days," 31 U.S.C. § 3730(b)(2), and often considerably longer, *see id.* § 3730(b)(3). "[T]he seal requirement [is] intended in the main to protect the Government's interests . . . ." *State Farm Fire & Casualty Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 443 (2016). More specifically, the seal period enables the Justice Department to investigate the relator's allegations and then determine what course to follow—intervene and assume primary responsibility for prosecuting the action, *id.* § 3730(b)(4)(A); decline to take over the action, *id.* § 3730(b)(4)(B); dismiss the action, *id.* § 3730(c)(1); or settle the action, *id.* § 3730(c)(2)(B). The seal requirement also is intended "to protect the reputation of a defendant in that the defendant is named in a fraud action brought in the name of the United States, but the United States has not yet decided whether to intervene." *Am. Civ. Liberties Union v. Holder*, 673 F.3d 245, 250 (4th Cir. 2011).

While the complaint is under seal, "[t]he Attorney General diligently shall investigate a violation under section 3729 ["False claims"]." 31 U.S.C. § 3730(a); *see also* DoJ, The False Claims Act: A Primer (Apr. 22, 2011), http://tinyurl.com/pblrjld ("The government is required to investigate the allegations in the complaint."). The False Claims Act facilitates the Justice Department's investigation of a *qui tam* complaint's allegations by authorizing the Attorney General or his designee to issue a "civil investigative demand" ("CID") to "any person [who] may be in possession, custody, or control of any documentary material or information relevant to a false claims law

investigation." 31 U.S.C. § 3733(a)(1); *see* Boese, *supra* § 5.07[A][1] (2011 Supp.) & 5.07[A][2] (2013-2 Supp.). The Department of Justice frequently utilizes this broad investigative tool to require any person with relevant documents or information to produce documentary evidence, answer written interrogatories, and/or give oral testimony. *See* 31 U.S.C. § 3733(a)(1). If it so chooses, the Department can share with a *qui tam* relator any information that it obtains through issuance of CIDs. *Id.*

The Justice Department also can and frequently does obtain relevant information from the department or agency to which false or fraudulent claims allegedly were submitted. For example, as reflected by their semiannual reports to Congress,[2] Inspectors General at the Department of Defense, General Services Administration, Department of Veterans Affairs, and other federal departments and agencies vigorously exercise their broad authority under the Inspector General Act of 1978 to issue administrative subpoenas for investigating procurement-related fraud and other statutory, regulatory, or contractual violations, both at the request of the Justice Department and independently. *See* 5 U.S.C. App. 3, § 6; *see also* Boese, supra § 5.07[B] (2013-2 Supp.).

---

[2] *See, e.g.*, DoD IG Semiannual Report to the Congress (April 1, 2017 - Sept. 31, 2017), at 34, https://goo.gl/3tqXRT; GSA OIG Semiannual Report to the Congress (April 1, 2017 - Sept. 31, 2017), at 25, https://goo.gl/pQhmjC; VA OIG Semiannual Report to Congress (April 1, 2017 - Sept. 31, 2017), at 68-72, https://goo.gl/k5C53f.

Thus, where a district court grants a defendant's motion to dismiss a relator's complaint (or amended complaint) for failure to satisfy Rule 9(b)'s particularity requirement, the public, as well as the court, can have confidence that the Justice Department, often in conjunction with the affected department or agency, has investigated the complaint's allegations before notifying the court that the United States will not be intervening. And even following such a dismissal, the United States, if circumstances warrant, can file its own False Claims Act suit based on its own investigation—subject, of course, to Rule 9(b)'s pleading requirements. *See* 31 U.S.C. §§ 3730(a) & (b)(5).

E. Supreme Court Review is Needed To Achieve Strict, Nationally Uniform Enforcement of Rule 9(b) In *Qui Tam* Litigation

The petition discusses in detail the deep circuit divisions concerning how Rule 9(b) is being applied in *qui tam* suits. *See* Pet. at 14-23. As this *amicus* brief explains, this fundamental issue is exceptionally important to a multitude of federal government contractors, including any *qui tam* contractor defendants targeted with allegations that they induced third-parties (e.g., subcontractors) to submit false or fraudulent claims. Only this Court can establish a nationally uniform rule that will eliminate *qui tam* relator forum-shopping and ensure that Rule 9(b) is applied in a way that achieves its objectives in a just manner.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LAWRENCE S. EBNER
Counsel of Record
CAPITAL APPELLATE
ADVOCACY PLLC
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@capitalappellate.com

Counsel for *Amici Curiae*

March 2018