No. 18-911

IN THE

Supreme Court of the United States

INTERMOUNTAIN HEALTH CARE, INC., ET AL.,

Petitioners,

v.

UNITED STATES EX REL. GERALD POLUKOFF, ET AL.

Respondents.

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

BRIEF IN OPPOSITION

Rand P. Nolen
George M. Fleming
Sylvia Davidow
Gregory D. Brown
David Hobbs
Jessica A. Kasischke
FLEMING NOLEN & JEZ, LLP
2800 Post Oak Blvd.
Suite 4000
Houston, TX 77056

Tejinder Singh
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
202.362.0636
tsingh@goldsteinrussell.com

Counsel for Respondent Gerald Polukoff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

BRIEF IN OPPOSITION

Respondent Gerald Polukoff respectfully submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

1. This is a case under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, at the pleading stage. The operative Amended Complaint (Complaint)[1] alleges that a cardiologist named Sherman Sorensen performed thousands of medically unnecessary heart surgeries. Specifically, Sorensen routinely surgically closed the "patent foramen ovale" (PFO), a small hole in the heart that 25% of healthy adults have—even though the prevailing medical consensus states that a PFO normally does not require treatment at all, and that surgical closures should be considered only if a patient has multiple unexplained strokes and is not a good candidate for less invasive therapies (like blood thinners). Complaint ¶¶ 3, 80-85, 92-93. Defying that consensus, Sorensen performed PFO closure surgeries on patients who had not suffered multiple unexplained strokes, and as a treatment for migraines—which is not indicated. *Id*. ¶¶ 86, 94, 137, 145. Government health care programs do not pay for medically unnecessary surgeries—and so by knowingly seeking payment from programs like Medicare for unnecessary PFO closures, Sorensen submitted false claims to the government. To get away with billing for the surgeries, Sorensen sometimes

[1] The Complaint is available in the joint appendix filed in the court of appeals, spanning pages 506-617 of that document. We reference paragraph numbers for specific allegations.

created false medical charts diagnosing patients with recurrent strokes and other disorders. *Id*. ¶¶ 137-38.

Sorensen did not act alone. Indeed, surgeons almost never act alone: they need somebody to provide them with a suitable venue, supplies, and support staff to make the surgeries happen. Sorensen worked principally at two hospitals, Intermountain Medical Center, operated by petitioners (collectively "Intermountain"), and St. Mark's Hospital (a defendant-respondent in this case). The Complaint alleges that the hospitals (1) violated the FCA by submitting their own claims for reimbursement for services related to Sorensen's surgeries; (2) used false records that were material to false claims in violation of the FCA; (3) conspired with Sorensen and each other to violate the FCA by agreeing to go along with his surgeries; and (4) fraudulently kept funds that should have been repaid to the government, also in violation of the FCA. Complaint ¶¶ 158-73.

Only Intermountain has sought certiorari. St. Mark's tellingly has not joined Intermountain's petition, filed its own petition, or filed an amicus brief supporting Intermountain. Neither has Sorensen. Thus, we focus on the allegations against Intermountain.

The Complaint alleges that Sorensen practiced at Intermountain for almost a decade (from 2002 until 2011) and performed thousands of surgical closures, the vast majority of which were medically unnecessary. Complaint ¶¶ 22, 114, 136. To put it in perspective, while other hospitals performed a few dozen closures per year, Sorensen personally performed hundreds per year. *Id*. ¶ 93. The Complaint lists hundreds of representative examples from Sorensen's billing records—including patient initials, dates, and the procedure code used—all of which took place during the relevant time period, and

most of which are believed to have been performed at Intermountain. *Id*. ¶ 143 (this paragraph spans over 60 pages). It also includes more detailed illustrative descriptions of some surgeries, done on Medicare or Federal Employees Health Benefit Plan patients, which were medically unnecessary. *Id*. ¶ 144. Many of these examples are from before 2008, a period when Sorensen was believed to be practicing principally (if not exclusively) at Intermountain. *Id*. ¶ 22 (explaining that Sorensen was "closely affiliated with St. Mark's" from 2008 until 2011, but closely affiliated with Intermountain from 2002 until 2011).

The Complaint alleges that Intermountain's hospital administration knowingly participated in this scheme. At a minimum, Intermountain was reckless because since at least 2006, published industry guidelines established that Sorensen's surgeries were not medically necessary, and even a "cursory review of the patients' files" would have shown "that they did not meet the closure indications in the standard of care." Complaint ¶¶ 83, 86, 137.

The Complaint also alleges actual knowledge. "The administration at Intermountain was on notice because of the sheer volume of the procedures performed by Dr. Sorensen and because of complaints from other practitioners and employees that Dr. Sorensen was engaged in a practice of regularly performing unnecessary, invasive cardiac procedures on his patients." Complaint ¶ 114. Indeed, "[f]or years Intermountain ignored the loud objections from its . . . Director of the Catheterization Laboratory, Dr. Revenaugh, and the Medical Director for Cardiovascular Services at Intermountain Healthcare, Dr. Lappe, as well as written

warnings and complaints from Professor Andrew Michaels of the University of Utah." *Id*. ¶ 122.

Intermountain ignored these warnings for the money. "For years, Sorensen leveraged Intermountain with the threat of moving elective patients to St. Mark's whenever Intermountain personnel expressed concern with his practice." Complaint ¶ 150. To keep Sorensen's lucrative practice at Intermountain, "Sorensen was given his own catheterization lab room at Intermountain and provided with a handpicked staff of Intermountain employees. No other cardiologist received this type of special treatment from Intermountain." *Id*. ¶ 153. "Typically, a[registered nurse], an equipment circulator, scrub technician, and a monitor technician participated in each case." *Id*. ¶ 155. Intermountain could bill for all of those employees' services for each surgery—which meant that the hospital costs billed were approximately 10 times the amount that Sorensen billed. *Id*. ¶ 142. The Complaint describes in detail how hospital billing practices work for Medicare, Medicaid, and the military's TRICARE program. *See id.* ¶¶ 26-78.

As further indication that Intermountain acted knowingly, "Sorensen was permitted to violate IHC/Intermountain policy and have the [medical device] manufacturers representatives in the operating room and occasionally actually participating in cases." Complaint ¶ 154. These manufacturers "profited immensely from the outrageous over-utilization of their product" by Sorensen, and in turn "provided extravagant meals to the Intermountain employees nearly every day Sorensen operated at Intermountain." *Ibid*.

In 2011, Intermountain finally adopted internal guidelines restricting these surgeries (consistent with the prevailing medical consensus). Complaint ¶¶ 87-90.

Immediately thereafter, Intermountain audited Sorensen's practice, found that Sorensen's medically unnecessary surgeries threatened the patients' health and safety, suspended Sorensen, and ultimately caused him to surrender his privileges at the hospital. *Id*. ¶¶ 115, 119-22. Thus, even Intermountain has acknowledged, by its belated conduct, that Sorensen performed medically unnecessary surgeries at Intermountain.

2. The original complaint was filed in 2012 by respondent Dr. Gerald Polukoff, a cardiologist who practiced at Intermountain and St. Mark's, and briefly as Sorensen's employee. Complaint ¶ 11; Pet. App. 15a. Polukoff had inside knowledge of the fraud. He observed Sorensen's surgeries firsthand in 2011, and then reviewed Sorensen's billing records. Complaint ¶¶ 116, 123-24, 140-43. Polukoff recognized that Sorensen was performing medically unnecessary closure surgeries, and that the defendant hospitals were complicit. He brought this lawsuit under the FCA.

3. The district court dismissed the Complaint on two grounds as to Intermountain. First, the court held that Sorensen's decisions to perform closure surgeries could not be "false" within the meaning of the FCA because they depended on his subjective medical judgment. Pet. App. 54a.

Second, the court held that the claims against Intermountain did not satisfy Federal Rule of Civil Procedure 9(b). The court held that because Intermountain is a corporation, its knowledge of the fraud "must be held by a managing agent" to create corporate liability. Pet. App. 47a. Because the Complaint did not identify such a managing agent, the district court held that "vital information regarding who knew what

and when they knew it is missing," and therefore concluded that "Rule 9(b) has not been met." *Id*. at 48a.

The district court also concluded, however, that the allegations against Sorensen and St. Mark's satisfied Rule 9(b). With respect to Sorensen, the court held that the Complaint specified all the relevant details "of a purportedly fraudulent scheme to defraud the government in violation of the FCA" including by providing "specific dates for hundreds of unnecessary PFO closures and related examinations performed between 2007 and 2011." Pet. App. 46a. With respect to St. Mark's the court held that the Complaint identified "which agents of St. Mark's knew about Dr. Sorensen's practice of performing PFO closures on pre-stroke patients and when they knew it." *Id*. at 49a.

Polukoff appealed. On appeal, Intermountain raised for the first time the argument that the *qui tam* provisions of the FCA are unconstitutional under the Appointments, Take Care, and Vesting Clauses of Article II of the Constitution. U.S. Const. art. II, § 2, cl. 2; *id.* § 3; *id.* § 1, cl. 1. The United States, which had filed an amicus brief supporting Polukoff on the merits, then intervened to defend the constitutionality of the statute.

4. The Tenth Circuit reversed. The court of appeals held first that a physician's determination that a particular service is medically necessary can be false. The court cited the government's well-established criteria for determining whether services are "reasonable and necessary," and determined that claims for reimbursement for services that do not meet these criteria can be false. Pet. App. 24a-25a. Applying this standard, the court held that the Complaint adequately pleads that Sorensen's surgeries were not necessary, and that the hospital services incident to Sorensen's

surgeries were likewise unnecessary, and therefore ineligible for reimbursement. *Id*. at 25a-27a. On that basis, the Tenth Circuit revived all of the claims against the defendants.

The court addressed Rule 9(b) briefly. *See* Pet. App. 29a-31a. It explained that the purpose of the rule "is to afford defendants fair notice of plaintiff's claims and the factual ground upon which they are based." *Id*. at 29a (quotation marks and alterations omitted). This rule is satisfied in FCA cases, the court held, if the complaint "show[s] the specifics of a fraudulent scheme and provide[s] an adequate basis for a reasonable inference that false claims were submitted as part of that scheme." *Ibid*. (quotation marks omitted). The court also noted that the text of Rule 9(b) expressly states that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Ibid*. Because the rule only "requires that the circumstances of the fraud be pled with enough specificity to put defendants on notice as to the nature of the claim," courts "may consider whether any pleading deficiencies resulted from the plaintiff's inability to obtain information in the defendant's exclusive control." *Id*. at 30a (quotation marks omitted).

Applying these principles, the Tenth Circuit agreed with Polukoff that the Complaint "pleaded allegations against Intermountain with sufficient particularity to survive a motion to dismiss under Rule 9(b)." Pet. App. 29a. It rejected the district court's holding that the Complaint lacks "vital information regarding who knew what and when they knew it" because knowledge can be pleaded generally, and so the particulars the district court deemed dispositive were in fact not required at all. *Id*. at 30a. The court also rejected the district court's erroneous premise (which Intermountain does not now

defend) that the Complaint failed because it did not identify a "managing agent." *Id*. at 31a n.9. Instead, the court held, "it suffices that *any* employee, acting within the scope of his or her employment, had knowledge." *Ibid*. To show that the Complaint adequately pleaded knowledge (the only element the district court and the Tenth Circuit considered), the Tenth Circuit referenced its discussion under Federal Rule of Civil Procedure 12(b)(6), which cited multiple passages from the Complaint alleging that Intermountain knowingly submitted false claims. *See* Pet. App. 28a (citing the same evidence as we cite *supra* pp.3-4).

Contrary to Intermountain's description (Pet. 11, 19), the Tenth Circuit never concluded that the Complaint failed to satisfy Rule 9(b). It cited a single detail that was missing from the Complaint, explaining that "Intermountain, no doubt, knows which employees handle federal billing for procedures reimbursable under Medicare, and in particular, who reviewed reimbursement claims for Dr. Sorensen during his decade there." Pet. App. 30a-31a (footnote omitted). But the court of appeals never held that Rule 9(b) required Polukoff to allege that detail in the first instance. Instead, that sentence appeared at the tail end of a paragraph in which the court stated that the Complaint "survives Rule 9(b)," and explained that under the rule, knowledge may be alleged generally. *Id*. at 30a. And it appeared right before the Court's concluding sentence, which reiterated that "Dr. Polukoff's amended complaint satisfies the pleading requirements of Rules 12(b)(6) and 9(b)." *Id*. at 31a.

The Tenth Circuit deemed Intermountain's new constitutional arguments forfeited, and did not reach their merits. Pet. App. 18a n.7.

5. Intermountain sought rehearing on the medical necessity question and the Rule 9(b) question—but not the constitutionality question. The rehearing petition was denied after no judge requested a poll. Pet. App. 63a.

6. Intermountain then sought certiorari. It now abandons its medical necessity argument and seeks review on two questions. First, whether a court may create an exception to Rule 9(b)'s particularity requirement when certain information is in the defendant's possession. Pet. i. Second, Intermountain seeks review on its forfeited argument regarding the constitutionality of the FCA under the Appointments Clause; it abandons other constitutional challenges. *Ibid*; *id.* at 23 n.5.

7. Meanwhile, Intermountain's motions to stay this case have been denied by the Tenth Circuit and the district court. The case is now in discovery.

REASONS TO DENY THE WRIT

I. The Rule 9(b) Question Does Not Warrant This Court's Review.

Intermountain asserts that the Tenth Circuit found that the Complaint did not identify the "who and when" of Intermountain's fraud, and that the court of appeals erroneously excused compliance with Federal Rule of Civil Procedure 9(b) because the missing information is within Intermountain's exclusive possession. Pet. 6, 10-11. Intermountain contends that this implicates a circuit split, that the issue is important, and that the decision below is wrong. For several reasons, Intermountain's arguments are unpersuasive.

A. The Question Is Not Squarely Presented.

Certiorari should be denied first because the question presented is not squarely presented in this case.

Intermountain has mischaracterized the Tenth Circuit's holding. The petition asserts that the Tenth Circuit found that the Complaint failed to satisfy Rule 9(b) because it did not identify the "who" and "when" of the fraud, but then excused this noncompliance with the rule by creating an exception when information is solely within the defendant's possession. *See* Pet. 11 (stating that the Tenth Circuit "acknowledged" deficiencies in the Complaint); *id*. at 19 ("As the Tenth Circuit acknowledged, the Relator did not allege the circumstances of the fraud with particularity.").

The Tenth Circuit said no such thing. The court of appeals' brief discussion of Rule 9(b) *never* states that the Complaint fails to satisfy the rule. Pet. App. 29a-31a. On the contrary, the court found on every relevant page that the Complaint "pleaded allegations against Intermountain with sufficient particularity to survive a motion to dismiss under Rule 9(b)," *id*. at 29a, "survives Rule 9(b)," *id*. at 30a, and "satisfies the pleading requirements of Rules 12(b)(6) and 9(b)," *id*. at 31a.

The context around the holding makes its plain language even clearer. The district court held that the Complaint failed to satisfy Rule 9(b) for a single reason: the Complaint did not identify a "managing agent" who knew of the fraud, and so "vital information regarding who knew what and when they knew it is missing." Pet. App. 47a-48a. The Tenth Circuit addressed only this holding (*id*. at 30a (quoting this language)), and it reversed on multiple grounds—none of which involved creating an exception to Rule 9(b).

First, the Tenth Circuit recognized that the text of Rule 9(b) permits knowledge—which was the sole element with which the district court found a Rule 9(b) problem, and the sole element the Tenth Circuit addressed on appeal—to be pleaded generally. Pet. App. 30a. Because Rule 9(b)'s particularity requirement does not apply to the only element the Tenth Circuit addressed, this case does not require the Court to determine "[w]hether a court may create an exception to" that requirement. Pet. i.

Second, the Tenth Circuit recognized that the district court's statement was rooted in a legal error that has nothing to do with Rule 9(b): the district court believed that claims against Intermountain could survive only if its "managing agents" knew of the fraud. Pet. App. 47a. But the Tenth Circuit concluded—and Intermountain does not dispute—that the law does not require a "managing agent" to have knowledge. *See id*. at 31a n.9. This is an independent reason the question is not presented: because the particulars that were missing from the Complaint were not required at all—for reasons that have nothing to do with Rule 9(b)—there is no need to create an exception from Rule 9(b) to account for their omission.

Third, the Tenth Circuit found that the Complaint satisfies the requirement of Rule 9(b) in an FCA case, which is to "'show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme.'" Pet. App. 29a (quoting *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010)). Intermountain ignores the Tenth Circuit's articulation of the rule, and focuses instead on the language in the opinion stating that "[p]ractically

speaking, FCA claims comply with Rule 9(b) when they 'provide factual allegations regarding the who, what, when, where and how of the alleged claims.'" *Id*. at 29a-30a (quoting *Lemmon*, 614 F.3d at 1172) (alteration omitted); *see also* Pet. 6, 9 (quoting this). But that statement is merely illustrative; it is not an inflexible requirement that applies to every allegation in every case (it is not, for example, in the text of the rule). Thus, the Tenth Circuit recognized that details about specific false claims are sufficient, but not necessary if the Complaint otherwise sets forth enough details about the scheme. *See* Pet. App. 29a; *see also Lemmon*, 614 F.3d at 1173 ("The federal rules do not require a plaintiff to provide a factual basis for every allegation. Nor must every allegation, taken in isolation, contain all the necessary information. Rather, to avoid dismissal . . . [t]he complaint must provide enough information to describe a fraudulent scheme to support a plausible inference that false claims were submitted.").

To show why the Complaint in this case satisfies Rule 9(b), the Tenth Circuit referenced its prior discussion of the allegations under Rule 12(b)(6). *See* Pet. App. 30a ("[F]or many of the same reasons the amended complaint survived Rule 12(b)(6) against all Defendants, it survives Rule 9(b) as well"). In that referenced discussion, the Tenth Circuit described the allegations against Sorensen in detail (*id.* at 25a-26a), and then went on to explain, again in detail, with reference to the allegations quoted in the Statement of the Case, *supra* pp.3-4, how Intermountain defrauded the government by knowingly submitting false requests for reimbursement and hospital cost reports (Pet. App. 26a-29a). On this basis, the Tenth Circuit concluded that the Complaint "pleaded allegations against Intermountain with

sufficient particularity to survive a motion to dismiss under Rule 9(b)." *Id*. at 29a. This is a third reason the question is not presented: because the Tenth Circuit held that the allegations against Intermountain comply with Rule 9(b)'s particularity requirement (to the extent it applies), there is no need to consider whether a court may create an exception from that requirement.

Intermountain ignores all of this, focusing exclusively on the Tenth Circuit's statement that "we excuse deficiencies that result from the plaintiff's inability to obtain information within the defendant's exclusive control." Pet. App. 30a. But that statement was not a holding that the Complaint actually has any material "deficiency." And it certainly did not create a freestanding exception to Rule 9(b). Instead, it was simply another, independent reason for the court's holding that the Complaint satisfies the rule: the court of appeals was saying that *even if* the Complaint had omitted a detail that was known only to the defendants, Rule 9(b) would not require dismissal. The Tenth Circuit's holding, however, was that the Complaint includes enough detail to "satisf[y] the pleading requirements of" Rule 9(b). *Id*. at 31a. Because the question presented does not encompass that holding—which is independently dispositive of this appeal—certiorari should be denied.

B. The Court Has Repeatedly Denied Review of Indistinguishable Questions.

This Court has repeatedly denied petitions seeking review on questions regarding the level of detail required by Rule 9(b) in FCA cases. We count at least 18 examples. *See, e.g.*, *United States ex rel. Chase v. Chapters Health Sys., Inc.*, 139 S. Ct. 69 (2018); *United States ex rel.*

Ibanez v. Bristol-Myers Squibb Co., 138 S. Ct. 2582 (2018); *Med. Device Bus. Servs., Inc. v. United States ex rel. Nargol*, 138 S. Ct. 1551 (2018); *Victaulic Co. v. United States ex rel. Customs Fraud Investigations, LLC*, 138 S. Ct. 107 (2017); *United States ex rel. Jallali v. Sun Healthcare Grp.*, 137 S. Ct. 834 (2017); *United States ex rel. Walterspiel v. Bayer AG*, 137 S. Ct. 162 (2016); *AT&T, Inc. v. United States ex rel. Heath*, 136 S. Ct. 2505 (2016); *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 136 S. Ct. 49 (2015); *United States ex rel. Mastej v. Health Mgmt. Assocs.*, 135 S. Ct. 2379 (2015); *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 572 U.S. 1033 (2014); *United States ex rel. Ebeid v. Lungwitz*, 562 U.S. 1102 (2010); *United States ex rel. Hopper v. Solvay Pharm., Inc.*, 561 U.S. 1006 (2010); *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury*, 561 U.S. 1005 (2010); *United States ex rel. Fowler v. Caremark RX, L.L.C.*, 552 U.S. 1183 (2008); *Sanderson v. HCA-The Health Care Co.*, 549 U.S. 889 (2006); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 549 U.S. 881 (2006); *United States ex rel. Corsello v. Lincare, Inc.*, 549 U.S. 810 (2006); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 537 U.S. 1105 (2003).

The questions presented in these cases vary slightly, but are essentially indistinguishable from Intermountain's question presented. For example, in *United States ex rel. Walterspiel v. Bayer AG*, *supra*, the question presented was whether the court of appeals "erred by refusing to apply a 'relaxed' standard for pleading fraud with particularity, in a False Claims Act case where the records evidencing the additional particulars of the fraud or false claims alleged remain under the control of the Defendants." Pet. i (2016 WL 3549197). Most other cases use slightly different

phrasing to ask an indistinguishable question: whether Rule 9(b) requires relators to plead the details of specific false claims. Although the questions in those cases ask whether the plaintiff complied with Rule 9(b) (as opposed to asking whether noncompliance can be excused), that difference is purely semantic. In almost all of these cases, the core of the question is whether a relator must plead details that are known only to the defendant, *e.g.*, specifics about claims submitted to the government.[2]

Respondents in these cases have noted that there is no clear circuit split, have identified vehicle issues, and have argued that the inquiry is inherently factbound. Those arguments have carried the day. For its part, Intermountain has not offered any reason to think that the issue has suddenly become more certworthy, or that this case presents a uniquely good vehicle to address it.

---

[2] In the Tenth Circuit, Intermountain attempted to distinguish other denials by arguing that whether a relator must plead specific false claims is a different question from whether a court can excuse noncompliance with Rule 9(b) when information is solely in a defendant's possession. *See* Intermountain's Reply in Support of Motion to Stay Mandate 3 n.1 (filed Nov. 4, 2018). For the reasons given above, Intermountain is wrong.

But even if Intermountain is correct that the question presented here is different from the questions presented in these other cases, that would not help Intermountain. Instead, it would show only that Intermountain's petition asks a narrow question that almost never arises: whether violations of Rule 9(b) can be excused. That almost never arises because most of the time (including in this case), courts ask whether a complaint satisfies Rule 9(b)—not whether noncompliance can be excused. By leaving the antecedent question of whether Rule 9(b) has been satisfied off the table in an effort to distinguish this case from others in which certiorari has been denied, Intermountain has narrowed the question in a way that makes this case even less certworthy.

Thus, the Court should continue its long tradition of denying review in these cases.

C. The Asserted Circuit Split Does Not Warrant Certiorari.

Certiorari should be denied because there is no clear circuit split about the question presented. Relying principally on cases from the early 2000s, the petition asserts that the Eighth and Eleventh Circuits adopt a strict interpretation of Rule 9(b) that always requires relators to plead all the details of a fraud, without exception. Pet. 10-11 (citing *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 559 (8th Cir. 2006), and *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1314 n.25 (11th Cir. 2002)). On the other hand, according to Intermountain, eight other circuits are willing to relax Rule 9(b) when relevant information is within a defendant's exclusive possession. *Id.* at 11-15.

1. At the outset, the cases Intermountain cites on the other side of the split are about whether the complaints adequately pleaded that false claims were submitted. *See Joshi*, 441 F.3d at 556; *Clausen*, 290 F.3d at 1311. They are not about the element of knowledge—which Rule 9(b) provides may be pleaded "generally," and which was the only element the lower courts addressed in this case. Certainly, none of the cases Intermountain cites are about whether a "managing agent" knew of the fraud. Consequently, it is not clear that *any* court of appeals would have resolved this case differently, and that alone would be reason to deny certiorari.

But even ignoring that, and even assuming *arguendo* that the circuits once adopted inconsistent positions about the question presented, certiorari should be denied

because the split has already resolved itself without this Court's intervention. Today, every court of appeals applies a consistent understanding of Rule 9(b). Any remaining differences between the courts of appeals are semantic, not substantive—and even those are likely to disappear over time.

2. The two circuits that Intermountain describes as "strict" have changed their tune. In the Eighth Circuit, Intermountain relies on a case from 2006 applying a strict understanding of Rule 9(b). But the Eighth Circuit's more recent precedents have recognized that "Rule 9(b) 'is context specific and flexible and must remain so to achieve the remedial purpose of the [FCA].'" *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 918 (8th Cir. 2014) (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)). Thus, the court found "persuasive the approach of those circuits that have concluded that a relator can satisfy Rule 9(b) by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id.* at 917-18 (citing precedent from the First, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh circuits; quotation marks omitted). That standard is indistinguishable from the standard the Tenth Circuit applied in this case. *See* Pet. App. 29a (holding that "claims under the FCA need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme") (quotation marks omitted).

The Eighth Circuit recently reaffirmed *Thayer*, and further reaffirmed that "[w]here 'the facts constituting the fraud are peculiarly within the opposing party's

knowledge,' the 'allegations may be pleaded on information and belief.'" *United States ex rel. Strubbe v. Crawford Cty. Mem'l Hosp.*, 915 F.3d 1158, 1163 (8th Cir. 2019) (quoting *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783-84 (8th Cir. 2009)). Thus, the Eighth Circuit's precedents indicate the same sort of flexibility that led the Tenth Circuit to uphold the Complaint in this case.

The Eleventh Circuit's precedents are similarly evolving. Even early on, the Eleventh Circuit recognized that "Rule 9(b)'s heightened pleading standard may be applied less stringently . . . when specific factual information about the fraud is peculiarly within the defendant's knowledge or control." *United States ex rel. Hill v. Morehouse Med. Assocs.*, 2003 WL 22019936, at *3 (11th Cir. Aug. 15, 2003) (quotation marks and brackets omitted). The court cited precedents from other circuits holding that "'when the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge, the Rule 9(b) standard is relaxed.'" *Ibid*. (quoting *United States ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 308 (5th Cir. 1999)). And it held that a complaint survived even when it did not provide details about specific false claims (patient names and exact dates) that had been submitted, because that information was within the defendant's possession.

More recently, in *United States ex rel. Mastej v. Health Management Associates*, 591 F. App'x 693, 704 (11th Cir. 2014), the court explained that it applies a "nuanced, case-by-case approach" to Rule 9(b) in FCA cases that eschews "bright-line rules." Consistent with that standard, the Eleventh Circuit found Rule 9(b) satisfied in a case in which "[t]he Complaint [did] not . . . specify by name or title the person who actually pushed the send button and transmitted the [fraudulent

statement] to the [government]." *United States ex rel. Matheny v. Medco Health Sols., Inc.*, 671 F.3d 1217, 1230 (11th Cir. 2012). The court reasoned that the other allegations in the complaint provided sufficient particularity to survive Rule 9(b), and "the exclusion of this detail" was therefore not fatal. *Ibid*.

In another case, the Eleventh Circuit allowed a claim to proceed even though the complaint never pleaded when false claims were submitted, because the other allegations in the complaint provided sufficient indicia of reliability for the court to infer that false claims had been submitted. *See United States ex rel. Walker v. R&F Props. of Lake Cty., Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005). Thus, the Eleventh Circuit has permitted complaints that do not precisely identify the "who" and "when" of false claims when the complaints otherwise plead enough detail to provide the defendants with notice of the allegations against them.

3. A survey of cases from what Intermountain describes as the more lenient jurisdictions confirms that the circuits are not sharply divided over the meaning of Rule 9(b). The cases Intermountain cites from the D.C. Circuit (Pet. 12) and Fifth Circuit (*id.* at 13) found the complaints in question failed to comply with Rule 9(b), and affirmed their dismissal. As Intermountain acknowledges, the Ninth Circuit dismisses complaints for failure to comply with Rule 9(b) as well. *Id.* at 14. And the Second, Third, Sixth, Seventh, and Tenth Circuits have also not hesitated to affirm Rule 9(b) dismissals. *See, e.g.*, *United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 28 (2d Cir. 2016); *United States ex rel. Tessler v. City of New York*, 712 F. App'x 27, 30 (2d Cir. 2017); *Wood ex rel. United States v. Applied Research Assocs.*, 328 F. App'x 744, 748 (2d Cir. 2009); *United States v.*

Eastwick Coll., 657 F. App'x 89, 95 (3d Cir. 2016); *United States ex rel. Judd v. Quest Diagnostics Inc.*, 638 F. App'x 162, 169 (3d Cir. 2015); *United States ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 874 F.3d 905, 920-22 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2582 (2018); *United States v. Walgreen Co.*, 846 F.3d 879, 882 (6th Cir. 2017); *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1106 (7th Cir. 2014); *United States ex rel. Gross v. AIDS Research All.-Chi.*, 415 F.3d 601, 603 (7th Cir. 2005); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 727 (10th Cir. 2006); *United States ex rel. Lacy v. New Horizons, Inc.*, 348 F. App'x 421, 426 (10th Cir. 2009); *United States ex rel. Schwartz v. Coastal Healthcare Grp., Inc.*, 2000 WL 1595976, at *5 (10th Cir. Oct. 26, 2000). These decisions belie Intermountain's claim that the world is divided between circuits that faithfully apply Rule 9(b) and circuits that refuse to do so. Instead, it is clear that all courts of appeals are applying a case-by-case approach to the complaints before them.

Against these points, Intermountain may be able to identify minor variations in how the circuits phrase their tests, or perceived inconsistencies in results. But that would only highlight that there is no clear circuit conflict, and that the question presented is inherently factbound. Today, in every circuit, whether a complaint survives Rule 9(b) turns on whether it describes a fraudulent scheme with sufficient particularity to infer that false claims were submitted. Every complaint is different, and every appellate brief is, too—so naturally results will vary from case to case. But there is no deep disagreement among the circuits about how the rule itself works. And any previously-existing differences have been vanishing over time.

Recognizing this fact, two circuit courts have recently confirmed that any split has resolved itself. The Sixth Circuit observed that every circuit that has purported to apply "a heightened standard"—including the Eighth and Eleventh Circuits—"has retreated from such a requirement in cases in which other detailed factual allegations support a strong inference that claims were submitted." *United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 838 F.3d 750, 772-73 (6th Cir. 2016). The Second Circuit similarly determined that "reports of a circuit split are . . . greatly exaggerated" because "[a]s the various Circuits have confronted different factual variations," they have adopted a "consistent" case-by-case approach. *United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 89 (2d Cir. 2017).

Given the ongoing convergence in the circuits, and the fact that the Tenth Circuit's decision embodies the consensus view, there is no reason for this Court to review this issue now. That is especially true because no circuit would have decided this case differently.

D. The Question Presented Is Not Especially Important.

Certiorari should be denied because Intermountain has failed to establish the importance of the question presented. Intermountain argues that the question is important because Rule 9(b) serves as a gatekeeper against meritless suits, and discovery and settlement costs in *qui tam* cases are high. Pet. 16-18. If that were enough, then any FCA case involving Rule 9(b) would be certworthy. We know that is wrong, and we have at least 18 denials to prove it. The mere fact that defendants

sometimes have to proceed to discovery is not an issue of national importance.

Intermountain also does no work to tie the question presented to unwarranted defense costs. To make this argument persuasive, Intermountain would have to identify a large number of meritless lawsuits that should have been rejected at the pleading stage, survived solely because the court determined that relevant information was within the defendant's possession, and then resulted in significant costs for an innocent defendant. It has not identified a single case fitting that mold. Instead, it relies on aggregate numbers of FCA actions, and notes that many do not result in recovery. Without identifying how many of those lawsuits go past the pleading stage because of a relaxed reading of Rule 9(b), however, Intermountain cannot argue anything about the importance of the question presented—and it cannot show that adopting its rule would help.

Finally, Intermountain attempts to raise the specter of forum shopping, arguing that the FCA's venue provision would allow plaintiffs to file only in circuits with lenient pleading standards. Pet. 17-18. But according to Intermountain, the Eighth and Eleventh Circuits have had strict standards since 2006. FCA litigation in those jurisdictions should have dried up long ago. It hasn't, and so Intermountain's concerns can be dismissed.

E. The Case Is a Poor Vehicle to Decide the Question Presented.

This case presents additional vehicle problems that counsel in favor of denial.

1. The question presented cannot resolve the entire case. Even if Intermountain prevails and shows that the

causes of action based on its own claims are deficient, the Complaint still states a claim that Intermountain conspired with Sorensen. The petition does not dispute that the allegations against Sorensen satisfy Rule 9(b). And it plainly sets forth enough facts to state a claim that Intermountain conspired with Sorensen by allowing him to perform medically unnecessary surgeries at Intermountain's hospital. Thus, no matter how the Court addresses this question, Intermountain will still have to go through discovery (which would inevitably reveal the claims it submitted to the government, too), and it will still have to litigate this case to settlement or judgment.

2. The question presented cannot resolve the case with prejudice. Even if Intermountain wins, dismissals under Rule 9(b) are essentially always granted with leave to amend. Intermountain's petition does not identify any specific deficiency with the Complaint, but anything it finds could be cured, and the case would simply start again.

3. We have strong alternative grounds for affirmance, which are antecedent to the question presented. We will argue first that the Complaint complies with Rule 9(b) even without reference to materials within Intermountain's possession. *See* Part F.2, *infra*. We will also argue that Rule 9(b) permits courts to account for information in the defendant's possession—so that even if the Complaint is missing some details that Intermountain already knows, it still complies with Rule 9(b). *See* Part F.3, *infra*. If the Court resolves either of those questions in our favor, it will have no need to reach the question presented, which presumes that Rule 9(b) has been violated.

F. The Decision Below Is Correct.

Certiorari should be denied because the decision below is correct for two, independent reasons. First, the Complaint complies with Rule 9(b) even without reference to any information in Intermountain's possession. Second, the Tenth Circuit correctly recognized that when missing details are within a defendant's sole possession, a complaint can survive Rule 9(b) without that information if it otherwise alleges enough to enable the defendant to prepare a defense. Intermountain's arguments to the contrary lack merit.

1. Before we discuss details, we pause to ask what ought to be an easy question: Where is the beef? It is clear—and Intermountain does not dispute—that the purpose of Rule 9(b) is to give Intermountain sufficient notice so that it can defend itself, and to protect it from baseless strike suits. Intermountain states that the Complaint is deficient because it does not identify the "who" or "when" of the fraud. But exactly what information is Intermountain talking about, and why does that information matter to Intermountain's ability to defend itself? Intermountain never says.

This silence is conspicuous, to say the least. The truth of the matter is that Intermountain knows exactly what it has been accused of doing, and it is grasping for a technicality to escape liability. But as explained in further detail below, that is not the point of Rule 9(b).

2.a. The Tenth Circuit's decision is correct first because the Complaint satisfies Rule 9(b). The rule provides that "a party must state with particularity the circumstances constituting fraud," and that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). In

this case, the Tenth Circuit held that "claims under the FCA need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme." Pet. App. 29a (quotation marks omitted).

As described *supra* p.13, Intermountain ignores that holding and focuses on the illustrative language stating that Rule 9(b) requires a plaintiff to identify the "who, what, when, where and how" of the claims. But that language does not appear anywhere in Rule 9(b), or in this Court's cases interpreting the rule. And as explained above, it is merely an illustration of a practical way to comply with the rule; it is not an inflexible requirement that applies to all allegations in all cases. The core question is whether the complaint has described the scheme in *sufficient* detail, even if it does not set forth *every* detail.

As explained in the split discussion, Part C, *supra*, this interpretation of Rule 9(b) has been embraced by the courts of appeals. The United States has agreed in invitation briefs discussing whether complaints must allege specific false claims. In *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, *supra*, the government argued that "a *qui tam* complaint satisfies Rule 9(b) if it contains detailed allegations supporting a plausible inference that false claims were submitted to the government, even if the complaint does not identify specific requests for payment." U.S. Br. 10 (2014 WL 709660). On the other hand, a "rule that a relator must plead the details of particular false claims" would "undermine[] the FCA's effectiveness as a tool to combat fraud against the United States." *Ibid*. That is because "relators may be privy to detailed information indicating that their employers are engaged in fraud

against the United States, and may be well-positioned to provide valuable assistance to the government's anti-fraud efforts, even if they are not privy to the details of the defendants' billing activities." *Id*. at 15. Moreover, there is no good reason for relators to provide details about specific claims, because "[t]he government rarely if ever needs a relator's assistance to identify claims for payment that have been submitted to the United States. Rather, relators typically contribute to the government's enforcement efforts by bringing to light other information that shows those claims to be false." *Id*. at 16.

b. The Complaint satisfies the correct Rule 9(b) standard. First, to reiterate, the only element that the district court and the Tenth Circuit addressed was knowledge, which may be alleged generally, and which was alleged in this case. *See supra* pp.3-4 (citing and quoting relevant allegations); *see also* Pet. App. 28a (same). For example, Intermountain's administration knew of Sorensen's preposterous volume of surgeries, heard warnings from its own employees (including Dr. Revenaugh, the head of the catheterization lab, and Dr. Lappe, the medical director for cardiovascular services) that Sorensen was performing medically unnecessary surgeries, ignored published guidance establishing that the surgeries were unnecessary, and would have known from even a cursory review that the surgeries did not conform to accepted standards of medical practice. But rather than shut Sorensen's practice down, Intermountain gave him special treatment, including a full-time catheterization lab with hand-picked staff, and exceptions from rules prohibiting medical device manufacturers from participating in surgeries. It did this to prevent Sorensen from moving his lucrative practice to St. Mark's. That is more than enough to "generally"

allege knowledge. Indeed, Intermountain does not even argue that the Complaint fails Rule 9(b) with respect to knowledge. That should be the end of the matter because there is no sound reason for this Court to consider any other element in this case.

Even if the Court considers elements other than knowledge (for example, whether claims were submitted), and therefore applies Rule 9(b)'s particularity requirement, the Complaint would survive because it pleads details about the fraudulent scheme and provides ample basis to conclude that Intermountain submitted false claims. The Complaint alleges that three groups of defendants (Sorensen, Intermountain, and St. Mark's) perpetrated the same scheme to perform and bill for medically unnecessary heart surgeries. Intermountain does not dispute that the allegations against the other defendants satisfy Rule 9(b). The allegations against Sorensen are particularly detailed, including hundreds of specific surgeries, and bills submitted to the government for them. The Complaint includes more than 60 pages of representative examples, including patient initials and dates, drawn directly from Sorensen's billing records. It also explains why the surgeries are medically unnecessary.

The allegations against the hospital defendants are closely correlated with the allegations against Sorensen because Sorensen performed his unnecessary surgeries at these two hospitals, and their role in the fraudulent scheme was to provide and bill for services related to Sorensen's surgeries. As the Tenth Circuit held in its Rule 12(b)(6) analysis, which Intermountain does not dispute, "the complaint adequately alleges that Dr. Sorensen's surgeries and any procedure associated therewith was not, in fact, 'reasonable and necessary.'"

Pet. App. 27a. The detailed allegations against Sorensen thus bolster the allegations against the hospitals. Specifically, the Complaint puts Intermountain on notice of the false claims it submitted: all claims related to the identified surgeries that occurred at Intermountain, and similar surgeries in the relevant time period. It also explains how those claims were submitted, *e.g.*, through reimbursement requests and hospital cost reports.

c. To be clear, Intermountain does not even appear to dispute this understanding of Rule 9(b) in its petition. As explained in Part A, *supra*, the entire petition is premised on the notion that the Tenth Circuit itself found the Complaint deficient under Rule 9(b): it assumes this antecedent question was resolved in Intermountain's favor. For the reasons in Part A, that's wrong; the Tenth Circuit found the Complaint adequate. But even if Intermountain's description of the Tenth Circuit's opinion were correct, the Court should nevertheless deny certiorari because the Complaint complies with Rule 9(b) even without reference to information in Intermountain's possession, and so the Court would affirm before it even reaches the question presented.

3. Independently, the Tenth Circuit correctly recognized that when missing details are within a defendant's sole possession, Rule 9(b) does not require a relator to include them. This understanding of Rule 9(b) is the most consistent with this Court's discussion of the rule in *Rotella v. Wood*, 528 U.S. 549 (2000). There, the Court explained that Rule 9(b) is tempered by "the flexibility provided by [Fed. R. Civ. P.] 11(b)(3), allowing pleadings based on evidence reasonably anticipated after further investigation or discovery." *Id*. at 560. In support, it cited *Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1050-51 (7th Cir. 1998), which the Court

described parenthetically as "relaxing particularity requirements of Rule 9(b) where RICO plaintiff lacks access to all facts necessary to detail claim." *Rotella*, 528 U.S. at 560. In *Corley*, the complaint "generally identifie[d] the content of allegedly fraudulent communications," but was "unable to state the specific time or place that a communication was made, nor . . . identify the particular [individual] to whom the communication was directed." 142 F.3d at 1050-51. The court held that the pleadings were sufficient because that information was in the defendant's possession.[3]

This reasoning is both binding and correct. There is no good reason for Rule 9(b) to require a relator to plead what the defendant already knows. That interpretation of Rule 9(b) would not serve the notice-providing purposes of the rule, and would not protect a defendant from strike suits. Consequently, as long as the Complaint pleads the other relevant details, it has pleaded the "circumstances constituting fraud" with the requisite "particularity." Fed. R. Civ. P. 9(b). As explained above, this case illustrates the point: Intermountain knows everything it needs to know from the Complaint, and additional details would add nothing.

The downsides to Intermountain's interpretation, on the other hand, are well-known and serious. As the United States has explained in its amicus briefs, and many courts have confirmed, Intermountain's rule would insulate complex frauds from enforcement because the people who know *why* claims are false may not have access to the minutiae of the defendant's billing practices. *See Chorches*, 865 F.3d at 86; *Prather*, 838 F.3d at 772;

---

[3] Intermountain cites that same case, *Corley*, as landing on the Tenth Circuit's side of the alleged circuit split. *See* Pet. 14.

Grubbs, 565 F.3d at 190; *United States ex rel. Vatan v. QTC Med. Servs., Inc.*, 721 F. App'x 662, 663-64 (9th Cir. 2018).

4. Against these arguments, Intermountain contends that courts must apply the rule as written. Pet. 19-20. That argument dooms Intermountain with respect to the element of knowledge, as the text of the rule permits general allegations. And with respect to other elements, the rule is not as explicit as Intermountain suggests. Merely stating that the "circumstances constituting fraud" must be stated "with particularity" does not explain which details must be included in any particular case—especially when, as this Court noted in *Rotella*, Rule 11 permits pleadings based on information likely to be discovered later. *See* 528 U.S. at 560. It is entirely reasonable for courts to find that frauds have been pleaded "with particularity" when some aspect of the "who, what, when, where, and how" of the fraud is not accessible to the plaintiff, but is at the defendant's fingertips, and the complaint is otherwise sufficiently detailed.

Intermountain also argues that its reading of Rule 9(b) is most consistent with the purposes of the FCA, because it is most likely to ensure that a *qui tam* relator is an original source of the information in the complaint. That argument is unpersuasive. The first purpose of the FCA is to assist the government in recovering funds lost to fraud. To the extent it requires the dismissal of complaints like Polukoff's, Intermountain's interpretation would undermine that purpose by insulating frauds from enforcement and deterring relators from bringing meritorious claims.

Intermountain's argument about original sources is particularly weak. The FCA does not limit recoveries

only to original sources of information. Instead, the original source rule is an exception to the public disclosure bar, which bars an FCA claim if the same allegations or transactions have been publicly disclosed unless the relator is an original source of the information. *See* 31 U.S.C. § 3730(e)(4)(A). When, as here, no public disclosure has occurred, the original source exception is irrelevant.

In any event, Polukoff is exactly the sort of insider the FCA seeks to encourage: he has substantial non-public knowledge of the fraud—including firsthand observations of Sorensen's unnecessary surgeries, a firsthand review of Sorensen's billing records, and years of work at Intermountain and St. Mark's that provide him with insight about those hospitals' role in the fraud. He is, in many ways, the ideal whistleblower—which again proves that Intermountain's reading of Rule 9(b) is at odds with the FCA's purpose.

Because the decision below was correct in all respects, certiorari should be denied.

II. The Appointments Clause Question Does Not Warrant This Court's Review.

The second question presented is whether the FCA's *qui tam* provisions violate the Appointments Clause of Article II of the Constitution, U.S. Const. art. II, § 2, cl. 2. We understand that the United States intends to focus on this question in its brief in opposition, so we'll be quick about this.

A. There Is Not Even an Arguable Circuit Split, and None Is Asserted.

Intermountain does not assert that this question gives rise to a circuit split. It cannot, because every court

of appeals that has considered Intermountain's argument has rejected it. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 758 (5th Cir. 2001) (en banc); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 760 (9th Cir. 1993). Indeed, there has been no significant litigation about the constitutionality of the FCA since the Tenth Circuit rejected a challenge in 2002. *See United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 815 (10th Cir. 2002).

B. This Case Is an Inferior Vehicle.

This question will arise in literally every FCA case in which the government does not intervene, and so Intermountain should have to present a compelling argument for why this case is a uniquely good vehicle to consider it. The opposite is true. The Tenth Circuit did not even reach the merits because Intermountain's constitutional challenge was forfeited below, Pet. App. 18a n.7, which means that this Court would be the first to adjudicate its merits. That is a disfavored procedural posture. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to consider constitutional arguments not addressed below because this Court is "a court of review, not of first view"); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam).

Indeed, it appears that Intermountain did everything it could to prevent the Tenth Circuit from considering its argument. It forfeited the argument in the district court, but then presented it to the panel (which could not accept it), and then dropped the argument from its petition for rehearing (when the court could have accepted it). That is baffling. To the extent the

Court has any interest in this question, it should await a case in which the merits have been properly pressed and passed upon below.

C. The False Claims Act Does Not Violate the Appointments Clause.

Finally, the FCA's *qui tam* provisions are constitutional. *Qui tam* relators are not officers of the United States; they are private plaintiffs pursuing a cause of action under federal law. They do not act as officers, and they do not need to be treated as officers to comply with Article II.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

Rand P. Nolen
George M. Fleming
Sylvia Davidow
Gregory D. Brown
David Hobbs
Jessica A. Kasischke
FLEMING NOLEN & JEZ, LLP
2800 Post Oak Blvd.
Suite 4000
Houston, TX 77056

Tejinder Singh
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
202.362.0636
tsingh@goldsteinrussell.com

April 24, 2019