No. 16-1398

IN THE

Supreme Court of the United States

VICTAULIC CO.,

Petitioner,

v.

UNITED STATES *EX REL.* CUSTOMS FRAUD INVESTIGATIONS, LLC,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Third Circuit properly held that a False Claims Act complaint, which alleges that an importer knowingly concealed an obligation to pay or avoided payment of statutorily mandated "marking duties" in connection with over one thousand import shipments specifically identified by date, country of origin, and port of import, satisfies Federal Rule of Civil Procedure 9(b)'s requirement that a complaint alleging fraud "state with particularity the circumstances constituting fraud."

2. Whether the Third Circuit properly held that an importer's knowing evasion of a 10% "marking duty" that "shall be levied, collected, and paid" under circumstances alleged to have been satisfied here, and that shall not "be avoidable for any cause," 19 U.S.C. § 1304(i), violates the False Claims Act's prohibition on "knowingly conceal[ing] or knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money … to the Government," 31 U.S.C. § 3729(a)(1)(G).

RULE 29.6 STATEMENT

Respondent Customs Fraud Investigations, LLC, does not have a parent corporation, and no publicly held corporation owns 10% or more of Customs Fraud Investigations' stock.

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INTRODUCTION

Under the Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, certain imported pipe fittings must be marked, using specific methods, with the English name of their country of origin. *See* 19 U.S.C. § 1304(c). If an unmarked or improperly marked fitting is imported and sold in the domestic market without having the required markings added under the supervision of U.S. Customs and Border Protection, "there shall be levied, collected, and paid upon such article a duty of 10 per centum ad valorem," *i.e.*, a "marking duty," that may not be avoided "for any cause." *Id.* § 1304(i).

In this case, respondent Customs Fraud Investigations, LLC ("CFI"), a limited liability company that researches customs fraud, filed suit under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, against petitioner Victaulic Co., a manufacturer and importer of pipe fittings. The suit alleges that Victaulic knowingly concealed and avoided its obligation to pay marking duties in connection with over one thousand specifically identified import shipments in violation of § 3729(a)(1)(G) of the FCA. Beyond alleging the specifics of the fraud, CFI also made detailed, particularized allegations that this fraud had occurred. Among other things, the operative complaint explained that an examination of 221 Victaulic fittings for sale in the domestic secondary market turned up only three that had been marked with a foreign country of origin, even though foreign-made fittings make up a majority of Victaulic's annual domestic sales.

The U.S. Court of Appeals for the Third Circuit held that the operative complaint satisfied the fraud-specific pleading standard of Federal Rule of Civil

Procedure 9(b) and stated a cognizable theory of FCA liability. Regarding Rule 9(b), the court recognized that CFI was required to "provide 'particular details of a scheme to submit false claims [or avoid obligations] paired with reliable indicia that lead to a strong inference that claims were actually submitted [or obligations avoided].'" Pet. App. 29a–30a (alterations in original) (quoting *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 157–58 (3d Cir. 2014)). It held that the operative complaint's "voluminous records detailing the shipments at issue," *id.* at 30a, and its allegations that far fewer Victaulic pipe fittings bore foreign origin markings than would have been expected absent fraud, satisfied this standard.

As to the FCA, the court held that the complaint stated a claim against Victaulic under the FCA's "reverse" false claims provision, which prohibits "knowingly conceal[ing] or knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money … to the Government." 31 U.S.C. § 3729(a)(1)(G). The court held that the statutorily mandated marking duties at issue fell within the FCA's post-2009 definition of "obligation" as an "established duty, whether or not fixed, arising … from statute or regulation." *Id.* § 3729(b)(3).

Victaulic seeks review of both points. Neither warrants review.

The lower court's Rule 9(b) ruling reflects a case-specific application of established pleading standards to a unique set of facts. Victaulic argues that review is warranted because this case supposedly implicates a split of authority as to whether Rule 9(b) requires a plaintiff alleging a typical FCA violation—*i.e.*, the submission to the Government of false claims for

payment—to allege examples of the specific false claims that were submitted. That claimed split has no bearing here: A false claim, or any other affirmative misrepresentation, is not an element of the "reverse" FCA violation CFI has alleged, so a requirement that specific false claims be pleaded would be nonsensical if applied to a reverse FCA claim. Not surprisingly, therefore, Victaulic cites no decisions of other circuits that impose such a requirement in a reverse FCA action or that otherwise conflict with the Rule 9(b) standard applied by the Third Circuit here.

Moreover, even in FCA cases that, unlike this one, involve submission of false claims or payment to the government, any conflict over the Rule 9(b) standard is rapidly dissipating, if it exists at all. As the Sixth Circuit has recently recognized, every circuit that once required FCA plaintiffs alleging such false claims to provide examples of specific false claims has since "retreated." *United States ex rel. Prather v. Brookdale Senior Living Cmties., Inc.*, 838 F.3d 750, 772 (6th Cir. 2016). Thus, even outside the reverse FCA context, the courts have coalesced around the Rule 9(b) standard applied below, requiring that the complaint allege details of a fraudulent scheme and facts creating a strong inference that the scheme was carried out. At bottom, Victaulic takes issue with the lower court's ruling that CFI's particular allegations satisfied this accepted standard. This Court should deny review of this correct, case-specific ruling.

The lower court also correctly held that the knowing evasion of marking duties is an actionable attempt to avoid an "obligation" under the FCA. Despite claiming that the decision below "conflicts with every other court of appeals that has addressed the issue,"

Pet. 14, Victaulic does not cite a single court of appeals decision (or any decision) applying the FCA's post-2009 definition of "obligation," let alone applying it to marking duties. Moreover, Victaulic's argument that marking duties are not "obligations" rests on unsupported and incorrect assertions about customs law and does not implicate the broader concerns Victaulic invokes about applying the FCA to garden-variety regulatory violations. This Court should deny review of this issue as well.

STATEMENT

1. In May 2013, CFI filed a sealed, *qui tam* complaint against Victaulic. The complaint alleged that Victaulic had engaged in a 10-year fraudulent scheme in which it had: knowingly imported foreign-made pipe fittings that were—in violation of the Tariff Act—not properly marked with the name of their country of origin, *see* 19 U.S.C. § 1304(c); allowed the fittings to enter the domestic stream of commerce without disclosing to U.S. Customs and Border Protection that the fittings were not marked, as required by 19 U.S.C. § 1484(a)(1)(B)(iii); and not paid the 10% marking duty that the Tariff Act provides "shall be levied, collected, and paid" on any unmarked, imported pipe fitting that is not, at the importer's expense, timely destroyed, exported, or marked, 19 U.S.C. § 1304(i).

Attached to the complaint was a spreadsheet with over one thousand entries, specifically identifying by date, country of origin, and port of import "each instance of Victaulic pipe fittings imported by ship into the U.S. [during the relevant period], in connection with which Victaulic evaded the payment of marking duties." Compl., at 7, E.D. Pa. No. 13-2983 (May 30,

2013). Based on this alleged conduct, the complaint asserted a claim against Victaulic under the reverse false claims provision of the FCA, which makes it unlawful to, among other things, "knowingly conceal[] or knowingly and improperly avoid[] or decrease[] an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G).[1]

After the government declined to intervene and the complaint was unsealed, Victaulic moved to dismiss for failure to state a claim. The district court granted Victaulic's motion and dismissed the complaint with prejudice. Pet. App. 150a. Declining to decide whether the complaint satisfied the fraud-specific pleading standards of Rule 9(b), *id.* at 150a n.25, or whether the knowing evasion of marking duties violates the FCA, *id.* at 145a, the district court held that the complaint contained insufficient factual allegations to state a plausible claim to relief under Federal Rule of Civil Procedure 8(a). *Id.* at 150a.[2]

2. CFI moved for relief from judgment and for leave to amend its complaint. With its motion, CFI submitted a proposed amended complaint that provided additional factual allegations to support the existence of the alleged fraud.

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[1] A "reverse" FCA claim is so called because it charges a person with fraudulently avoiding an obligation owed *to* the Government. By contrast, an affirmative FCA claim under § 3729(a)(1)(A) or (B) charges a person with fraudulently seeking payment *from* the Government.

[2] Victaulic also moved to dismiss under the statutory bar on FCA suits based on certain publicly disclosed information. *See* 31 U.S.C. § 3730(e)(4)(A). The district court denied this motion, *see* Pet. App. 125a–139a, and Victaulic did not appeal the denial, Pet. 9 n.1. The issue is therefore not before this Court.

First, the amended complaint described a study that CFI had conducted to corroborate its understanding, based on its "many years of experience in the international trade arena, knowledge of the pipe fitting industry and Victaulic itself, [and] personal observations of Victaulic pipe fittings," that Victaulic was importing unmarked pipe fittings without paying marking duties. First Am. Compl. at 2, E.D. Pa. No. 13-2983 (October 2, 2014). In the first part of the study, CFI compiled and analyzed import data to conclude that imported pipe fittings from China and Poland alone made up between 54% and 91% of Victaulic's annual domestic sales. *Id.* at 15. In the second part, CFI examined 221 examples of Victaulic pipe fittings for sale on eBay, "an active and diverse secondary sales outlet for Victaulic products," *id.* at 16, to see whether a comparable majority were marked as having originated in China or Poland. Only three of these exemplars—fewer than 2%—appeared to bear any foreign country-of-origin marking. *Id.* at 22.

Second, the amended complaint attached a declaration from a statistician, Dr. Abraham J. Wyner, validating the soundness of CFI's eBay study and, based on that study, offering an expert opinion of "99.9% confiden[ce] that Victaulic is improperly marking a significant portion of its imports." *Id.*, exh. 7 at 4.[3]

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[3] To reach this conclusion, Dr. Wyner made two assumptions that he described as "very reasonable and quite conservative." First Am. Compl., exh. 7 at 3. First, he assumed that imported pipe fittings made up a "significant portion" of Victaulic's domestic sales during the relevant period. *Id.* CFI's analysis of ten years' worth of import data verified this assumption. Second, Dr. Wyner assumed that the "internet based secondary market for imported pipe fittings" is not "radically different from the mar-

(*Footnote continued*)

Despite these and other added facts, the district court denied CFI's motion for relief from judgment and for leave to amend. Pet. App. 66a. The district court held that CFI's proposed amendments were untimely and would be futile for two reasons. First, the court held that knowingly avoiding payment of marking duties did not violate the FCA. *Id.* at 99a. Second, the court doubted the reliability of the eBay study and held that, as a result, the amended complaint failed to satisfy Rule 9(b)'s requirement that allegations of fraud be stated with particularity. *Id.* at 100a–110a.

3. The Third Circuit reversed on the ground that CFI's proposed amendments were timely and would not be futile.[4]

a. As to futility, the panel first held unanimously, and consistently with the analysis in a brief submitted by the United States as amicus curiae, that marking duties due under the Tariff Act are an "obligation to pay or transmit money or property to the Government," 31 U.S.C. § 3729(a)(1)(G), the knowing evasion of which violates the FCA's reverse false claims provision, Pet. App. 19a–25a; *id.* at 35a n.2. The FCA broadly defines "obligation" as any "established duty, whether or not fixed, arising … from statute or regulation." 31 U.S.C. § 3729(b)(3). Because the marking duties alleged to have accrued here arose "from stat-

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ket for U.S.-made pipe fittings." *Id.*, exh. 7 at 4. The latter assumption, he noted, corresponded with "CFI's actual observations of eBay as a diverse sales outlet with a representative national cross-section of Victaulic pipe fittings, including geographically and by supplier and product variety." *Id.*, exh. 7 at 4–5.

[4] Victaulic does not seek review of the timeliness issue.

ute," the court held that they fell squarely within this definition.

The court noted that this outcome was consistent not only with the statute's plain text, but also with legislative purpose. Congress enacted the statutory definition of "obligation" in 2009 as part of the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617. It did so partially to abrogate a Sixth Circuit decision, *American Textile Manufacturers Institute, Inc. v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999), which had "narrowly defined the term 'obligation' to apply reverse false claims to only fixed obligations and dismiss[ed] a claim for false statements made by importers to avoid paying customs duties." S. Rep. No. 111-10, at 14 n.10 (2009). Indeed, an early version of the new definition expressly identified "customs duties for mismarking country of origin" as an "obligation," but according to FERA's Senate Committee Report this express provision was omitted because "customs duties clearly [fell] within the new definition of the term 'obligation' absent an express reference." *Id.* With the legislative history thus corroborating its reading of the statutory text, the Third Circuit held that the knowing evasion of marking duties violates the FCA.

This holding did not rest on the view that reverse FCA liability attaches to evasion of "contingent duties," as Victaulic's petition asserts. Pet. 31. Nothing in the opinion below suggests that Victaulic's obligation to pay the marking duties allegedly owed was contingent. Rather, the Third Circuit accurately characterized the complaint as alleging that "Victaulic knew *it owed* marking duties *that accrued* on importation but did not pay them." Pet. 22a (emphasis add-

ed). In this respect, the court's position reflected the United States' argument that marking duties, though not "fixed," are "established," not "contingent." U.S. 3d Cir. Br. 14. The court of appeals used the word "contingent" only twice: once in describing the district court's holding, and once as part of a quotation from the legislative history that it cited to explain that the statute's coverage of obligations whose amount is not "fixed" was intended to abrogate the Sixth Circuit's holding in *American Textile*, 190 F.3d at 736, that the statute covered only obligations that could give rise to a common-law action for debt. *See* Pet. App. 20a.

b. A two-judge majority (Senior Judge Roth, joined by Judge Krause) also held that the amended complaint satisfied the pleading standards of Rule 9(b). Rule 9(b), the court explained, required CFI to "provide 'particular details of a scheme to submit false claims [or avoid obligations] paired with reliable indicia that lead to a strong inference that claims were actually submitted [or obligations avoided].'" Pet. App. 29a–30a (alterations in original) (quoting *Foglia v. Renal Ventures*, 754 F.3d at 157–580). The court held that the amended complaint contained both required elements.

The amended complaint contained particular details of a fraudulent scheme, the court held, because of its "voluminous records detailing the shipments at issue, when they entered the country, the alleged problems with those shipments, and, by operation of law, when liability would have attached." *Id.* at 30a. And the amended complaint contained allegations creating a "strong inference" that the alleged fraud had occurred, the court held, because of CFI's eBay

study and Dr. Wyner's declaration that "*the only conclusion* one can possibly reach" from that study "is that Victaulic is not properly marking its imports." *Id.* at 28a (emphasis added by court). While acknowledging the district court's concerns about the study's reliability, the court held that "such skepticism is misplaced" at the motion to dismiss stage, *id.* at 29a, and concluded that at this initial stage, "without the benefit of any discovery, taking all [alleged] facts as true, and making all reasonable inferences in favor of [CFI]," the amended complaint satisfied Rule 9(b), *id.* at 28a.[5]

c. Senior Judge Fuentes concurred in part, dissented in part, and dissented from the judgment. He agreed with the majority that the knowing evasion of marking duties violates the FCA, Pet. App. 35a n.2, but disagreed that the amended complaint was timely or that it satisfied Rules 8(a) and 9(b), *id.* at 59a–62a. Although applying the same legal standard as the majority, *id.* at 59a–60a, he would have held that the specific facts alleged here did not meet that standard, in significant part because of criticisms of the reliability of CFI's study and expert evidence. *Id.* at 42a–58a.

4. Victaulic petitioned for rehearing en banc, challenging the panel majority's application of Rules 8(a) and 9(b), as well as the panel's unanimous holding that the amended complaint's allegations of knowing avoidance of marking duties stated a reverse FCA claim. With respect to the Rule 9(b) issue, the petition did not allege a disagreement among the circuits or

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[5] The majority also held that the amended complaint satisfies the pleading standards of Rule 8(a). Pet. App. at 26a–29a. Victaulic does not seek review of this holding.

urge the Third Circuit to adopt some other circuit's view of how Rule 9(b) applies in FCA cases. Rather, the petition expressly endorsed the Third Circuit's *Foglia* decision, which both the panel majority and dissent had invoked, and argued that the majority had misapplied that "authoritative opinion." Reh'g Pet. 6.

As to the FCA issue, the petition acknowledged that "[n]o court has directly addressed" the theory of CFI's complaint, but argued, contrary to the position the United States had expressed as amicus curiae, that marking duties are contingent because they "are only owed if Customs acts to impose" them. *Id*. at 11.

The Third Circuit denied rehearing.

REASONS FOR DENYING THE WRIT

Victaulic seeks review of the lower court's Rule 9(b) ruling, as well as its determination that the knowing evasion of marking duties violates the FCA's reverse false claims provision. Neither issue merits review. On the first issue, Victaulic invokes an inapposite and outdated circuit split to suggest that this Court should review the lower court's case-specific application of an accepted legal standard to an idiosyncratic set of factual allegations. On the second issue, Victaulic asks this Court to resolve a question of statutory interpretation that has generated no split of authority, on the basis of assumptions about customs law that have no support in statute, regulation, or case law and that contradict the views of the United States. This Court should deny review.

I. The Rule 9(b) ruling below is a case-specific application of accepted pleading standards to an idiosyncratic set of factual allegations and does not merit review.

Both the majority and dissent below agreed that Rule 9(b) requires a complaint asserting a reverse FCA violation to plead particular details of a fraudulent scheme, coupled with factual allegations raising a strong inference that the scheme was carried out. Pet. App. 29a–30a; *id.* at 59a–60a. Victaulic itself advocated application of that standard both in its appellate brief and its petition for rehearing en banc. App'ee Br. 31, 41–42; Reh'g Pet. 6–10. Although the judges below disagreed over whether the specific allegations in the complaint at issue here satisfied this standard, the proper application of an accepted legal standard to case-specific circumstances is, as a general rule, not a question of sufficient importance to merit review. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Victaulic has not suggested that this case merits an exception to the general rule. It does not argue that the fact-intensive argument between the majority and dissent about the sufficiency of CFI's study and expert analysis by itself merits review here. Nor does Victaulic argue that cases factually similar to this one are being resolved inconsistently across jurisdictions. Victaulic offers no suggestion that the factual circumstances of this case are frequently recurring, such

that this Court's illustration of the proper application of settled law would provide crucial guidance.[6]

Instead, Victaulic's sole argument as to why the Rule 9(b) issue requires review is that the legal standard employed by all three judges below is inconsistent with the standard employed in other circuits. That argument is incorrect: The claimed circuit split that Victaulic invokes has no bearing on the reverse FCA claim alleged here and is in any event illusory.

A. There is no split of authority as to the proper Rule 9(b) standard in a reverse FCA suit.

The FCA provides for seven distinct avenues of liability. *See* 31 U.S.C. § 3729(a)(1)(A)–(G). The great majority of FCA claims arise under the FCA provisions that make it unlawful to "knowingly present[], or cause[] to be presented, a false or fraudulent claim for payment or approval," *id.* § 3729(a)(1)(A), or to "knowingly make[], use[], or cause[] to be made or used, a false record or statement material to a false or fraudulent claim," *id.* § 3729(a)(1)(B). A false claim is an element of liability under both of these provisions.

Victualic claims that there is a split of authority as to how Rule 9(b) applies to this element of liability. According to the petition, some circuits "have adopted a strict standard requiring allegations of actual false claims, i.e., 'representative samples,'" Pet. 2, whereas other circuits have, like the Third Circuit, *see* Pet.

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[6] Victaulic points generally to the frequency of FCA litigation. Pet. 23–26. That point does nothing, however, to suggest why *this* FCA case, among the hundreds that are filed each year, warrants review.

App. 29a–30a, applied a "more relaxed standard requiring allegations of 'particular details' of a scheme to submit false claims paired with 'reliable indicia' that false claims were actually submitted," Pet. 2.

This asserted disagreement has no bearing here. CFI's sole claim against Victaulic rested on the FCA's reverse false claims provision, which makes it unlawful, in relevant part, to "knowingly conceal[] or knowingly and improperly avoid[] or decrease[] an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G). A false claim, or indeed any affirmative misrepresentation, is not a required element of liability under this provision. Victaulic identifies no cases in which a court of appeals has required the pleading of "representative samples" of false claims submitted to the Government in a *reverse* FCA case—nor does Victaulic even try to explain how any court could sensibly do so.

Indeed, not a single case cited by Victaulic to exemplify the "representative sample" standard is a reverse FCA case. Small wonder. After all, the rationale of the cases that have required representative samples of false claims is that "[t]he submission of a claim is … the *sine qua non*" of a typical FCA claim brought under 31 U.S.C. § 3729(a)(1)(A) or (B), and so Rule 9(b) requires the complaint to provide "some indicia of reliability … to support the allegation of *an actual false claim* for payment being made." *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002). In a reverse FCA case, a false claim is not the *sine qua non*; it is not even a component.

Victaulic's claim that this case presents a circuit split thus rests entirely on an invalid apples-to-oranges comparison. No court has attempted to adapt

the "representative sample" approach to a reverse FCA claim, nor has any court applied a Rule 9(b) standard that is materially different from the one applied below in a reverse FCA case. Thus, this Court should give no credence to Victaulic's claim that this case presents an opportunity to resolve a disagreement among the circuits: There is no disagreement over the application of Rule 9(b) to reverse FCA claims.

That the decisions on which Victaulic now seeks to rely for its claim of conflict are inapplicable is strikingly demonstrated by its own failure to invoke them below, even when it petitioned for rehearing en banc and had the opportunity, if it chose, to request that the Third Circuit overrule its precedents. Victaulic never asserted that the Third Circuit should use this case to adopt a "representative sample" approach to Rule 9(b), and it repeatedly insisted that the correct Rule 9(b) approach to this case is the one embodied in the Third Circuit's *Foglia* decision.

Indeed, having argued for the *Foglia* standard below, Victaulic has waived any argument that some different standard should be adopted, even if there were a conflict among the circuits over the appropriate Rule 9(b) standard in a reverse FCA case. *See*, *e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."). Victaulic never gave the Third Circuit the chance to consider the novel argument that a requirement of pleading specific false claims should be adapted and applied to a reverse FCA action. This Court should not now address it in the first instance.

B. Even as to FCA cases involving affirmative false claims, there is no conflict meriting review.

Even in FCA cases involving affirmative false claims, courts apply the same Rule 9(b) standard the Third Circuit applied here, requiring that an FCA complaint allege "particular details" of a fraudulent scheme, coupled with "reliable indicia" that the scheme was carried out. Pet. App. 29a–30a. This standard satisfies Rule 9(b)'s goal of "ensur[ing] that there is sufficient substance to the allegations to both afford the defendant the opportunity to prepare a response and to warrant further judicial process." *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 125 (D.C. Cir. 2015). Victaulic concedes that, along with the Third Circuit, the First, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits all employ this standard. Pet. 19–20.

Victaulic contends, though, that some circuits have employed a stricter standard, adopting a requirement that an FCA plaintiff allege specific examples of false claims submitted to the government. *Id.* at 16–18. To support its argument that the split between the two standards is stark enough to merit review, Victaulic asserts that in a 2014 certiorari-stage amicus curiae brief, the Solicitor General "advised this Court that" the supposed split "is an important issue warranting review in an appropriate case." Pet. 14. Leaving aside that this reverse FCA action is not an "appropriate case" for considering which Rule 9(b) standard to apply in a traditional FCA action, Victaulic mischaracterizes its own source.

While stating that if a minority of circuits in fact adhered to the incorrect, "rigid view" that specific

false claims must be alleged, the issue might at some point merit review, the Solicitor General explained that no circuit has "consistently adhered to this rigid understanding of Rule 9(b)." Br. for the United States as Amicus Curiae at 16, 12, *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, No. 12-1349 (U.S. 2014). The Solicitor General further observed that the "extent of the disagreement among the lower courts is … uncertain, and the courts of appeals that have previously articulated a per se rule requiring relators to plead the details of specific false claims may have retreated from a rigid application of that rule." *Id*. at 14.

The retreat that had begun in 2014 has since become a stampede. Despite suggesting a "worsening conflict," Pet. 16, Victaulic does not point to a single decision since 2014 that has adopted a per se "representative samples" requirement. To the contrary, since the government submitted the brief Victaulic cites, at least two circuits have expressly declined to impose such a requirement, *see Heath*, 791 F.3d at 126; *Foglia*, 754 F.3d at 155–57, and three circuits that previously appeared to impose such a requirement have disclaimed or substantially limited it, *Prather*, 838 F.3d at 772; *United States ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 591 F. App'x 693, 704 (11th Cir. 2014); *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 917 (8th Cir. 2014).

Today, no circuit imposes a per se "representative sample" pleading requirement in all FCA cases. Victaulic's argument that the Fourth, Sixth, Eighth, and Eleventh Circuits do so, Pet. 16, is incorrect. Recent decisions of the Fourth, Sixth and Eighth Cir-

cuits hold that specific examples of false claims are not required if the complaint's specific allegations otherwise provide sufficient support for an inference that false claims were submitted. *See United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013); *Prather*, 838 F.3d at 773; *Thayer*, 765 F.3d at 918 (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)). And a panel of the Eleventh Circuit has observed straightforwardly that "there is no per se rule that an FCA complaint must … attach a representative sample claim." *Mastej*, 591 F. App'x at 704.

Ultimately, then, even in FCA cases involving affirmative false claims for payments, the circuits require only that an FCA complaint put the defendant on notice of the specifics of the fraudulent scheme alleged and give the court a reliable basis for an inference of fraud. This flexible standard avoids shutting the courthouse door to FCA plaintiffs with credible claims, while imposing a sufficient obstacle to deter frivolous filings. Moreover, it can be applied to both traditional and reverse FCA claims. The obvious merits of this consensus standard explain why the federal courts of appeals have been able to harmonize themselves without this Court's intervention.

In the end, however, the issue is academic in this case. The supposed conflict, even assuming it exists, concerns a different kind of case, and its resolution would not affect the outcome here. If the Court believes it may eventually merit consideration, the Court should await a case alleging affirmative false claims under § 3729(a)(1)(A) or (B), in which the supposedly competing standards could be sensibly applied. Given that Victaulic contends that the Rule 9(b)

issue "recurs with considerable frequency" in such cases, Pet. 23, an opportunity to address it would be likely to present itself if one or more circuits were to adhere to or adopt the rigid "specific examples" approach that Victaulic now champions. [7]

C. The Third Circuit did not adopt a "mere opportunity for fraud" standard.

Victaulic also argues that review is warranted because the decision below supposedly inaugurated a Rule 9(b) standard never before used in any circuit, including the Third Circuit: namely, that an FCA plaintiff can satisfy Rule 9(b) merely by making "vague and conclusory allegations describing [an] 'opportunity for fraud.'" Pet. 21.

This argument baldly misstates the holding below. The lower court clearly stated that a complaint must "provide 'particular details of a scheme to submit false claims [or avoid obligations] paired with reliable indicia that lead to a strong inference that claims were actually submitted [or obligations avoided].'" Pet. App. 29a–30a (alterations in original) (quoting *Foglia*, 754 F.3d at 157–58). The dissent agreed with the majority's articulation of the proper standard, *see*

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[7] Indeed, Victaulic's petition suggests that the Second Circuit is "likely" to impose a representative sample requirement in a pending case fitting the affirmative false claims model, *Fabula ex rel. United States v. American Medical Response, Inc.*, No. 15-3930 (2d Cir.) (argued Feb. 27, 2017). Pet. 18. Given the weight and trajectory of the case law, Victaulic's forecast is dubious: Should the Second Circuit do so, it will be an outlier. In any event, speculation that the Second Circuit might, in the future, create a circuit split applicable to a different type of FCA claim is no reason to grant review here.

id. at 59a–60a, although disagreeing with the majority's application of the standard.

Nowhere does the panel's opinion suggest that the allegation of a mere opportunity for fraud, without more, states an FCA claim. The law in the Third Circuit is unambiguously to the contrary: *Foglia*, the decision expressly relied upon by both the panel and the dissent (and Victaulic) below, states explicitly that "[d]escribing a mere opportunity for fraud will not suffice" under Rule 9(b). 754 F.3d at 158. Nowhere does the panel's opinion *relying* on *Foglia* suggest that the panel was *overruling* that precedent on this point. And even if the panel had wanted to overrule *Foglia*, it could not do so: In the Third Circuit, as in other circuits, a panel "lack[s] the power or authority to overrule a decision of a previous panel." *In re Continental Airlines, Inc.*, 279 F.3d 226, 233 (3d Cir. 2002); *see also* 3d Cir. I.O.P. 9.1 ("It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court en banc consideration is required to do so."). Contrary to Victaulic's repeated assertions, the Third Circuit's law remains that allegations demonstrating a mere opportunity for fraud do not satisfy Rule 9(b).

To be sure, the panel majority observed at one point that "the way marking duties are assessed provides an opportunity for fraud." Pet. 30a. But an opportunity for fraud may be relevant to whether Rule 9(b) is satisfied, or even necessary to its satisfaction, without being sufficient. Thus, in *Foglia* itself, the court pointed to the "opportunity for the sort of fraud alleged" as a factor supporting a finding that a com-

plaint satisfied Rule 9(b), *see* 754 F.3d at 158, even while holding that a mere opportunity for fraud is not sufficient. *See id*. Here, too, the opportunity for fraud was one factor among many that led the court to conclude that the amended complaint satisfied the accepted Rule 9(b) standard. Victaulic's disagreement with the court's application of the standard means neither that the court employed a novel standard, nor that review is warranted.

D. The lower court correctly applied the accepted Rule 9(b) standard to the specific facts of this case.

The lower court's Rule 9(b) ruling is unworthy of review not only because it is a case-specific application of uncontroversial legal principles, but also because it *correctly* applies those principles.

Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). As the lower court recognized, the amended complaint painstakingly identified "the shipments at issue, when they entered the country, the alleged problems with those shipments, and, by operation of law, when liability would have attached." Pet. App. 30a; *see also id.* at 33a ("CFI has identified millions of pounds of imported pipe fittings that it alleges were mismarked."). No greater particularity could be needed: The amended complaint put Victaulic on notice as to which import shipments were at issue, and why. That the amended complaint identified many shipments does not mean that it did not identify them with particularity.

To the extent that Rule 9(b) imposes a plausibility requirement independent of Rule 8(a)'s, the lower

court's analysis demonstrates that any such requirement was satisfied.[8] The court recognized that the near-total absence of pipes marked with a foreign country of origin in a sizeable sample drawn from a pool plausibly alleged to be representative of the domestic market for Victaulic pipe fittings created a strong inference that Victaulic was leaving its foreign imports unmarked, in light of the fact that a significant majority of Victaulic's pipe fittings came from abroad. That conclusion was also supported by the opinion of a qualified expert, and the lower court correctly declined to substitute its own understanding of statistical sampling for that of an expert when assessing the inferences that may plausibly be drawn from a statistical study at the pleading stage. And as the panel noted, CFI's amended complaint also alleged that a witness recalled receiving improperly marked Victaulic products on a specific occasion, and that a photograph supplied to the district court by Victaulic itself showed an improperly marked fitting. Pet. App. 8a–9a. Indeed, even if the "specific examples" approach Victaulic now advocates were somehow to be adapted to a reverse false claims case, it would appear that these allegations would satisfy it.

Because the Third Circuit correctly applied uncontroversial legal principles to the particular facts of this case, this Court should deny review.

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[8] Rule 9(b)'s text does not suggest that it imposes an independent plausibility requirement, and Victaulic does not seek review of the lower court's ruling that the amended complaint satisfied Rule 8(a)'s plausibility standard.

II. The lower court's correct ruling that the knowing evasion of marking duties constitutes a reverse FCA violation does not warrant review.

The FCA prohibits "knowingly conceal[ing] or knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money … to the Government." 31 U.S.C. § 3729(a)(1)(G). An "obligation," in turn, is "an established duty, whether or not fixed, arising from," among other things, "statute or regulation." *Id.* §3729(b)(3). The lower court agreed with the United States that marking duties, which by statute "shall be levied, collected, and paid" if unmarked foreign goods are imported and not timely marked, destroyed, or exported, and which shall not "be avoidable for any cause," 19 U.S.C. § 1304(i), constitute an "obligation." Thus, the lower court unanimously held, knowing concealment or avoidance of accrued marking duties is a violation of the FCA. Pet. App. 25a.[9]

A. There is no conflict among the circuits.

Victaulic contends that this cogent ruling, which flows straightforwardly from the statutory text, "conflicts with every other court of appeals that has addressed the issue." Pet. 14. But the petition cites no opinion—whether from a court of appeals or from any other court—that has addressed the question whether

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[9] Contrary to Victaulic's characterization, the Tariff Act does not "*allow*[] U.S. Customs and Border Protection … to assess marking duties against importers if unmarked goods enter into commerce, are later detected, and are not subsequently marked, exported, or destroyed." Pet. 7 (emphasis supplied). The Tariff Act *requires* the assessment of marking duties under those circumstances.

marking duties constitute an "obligation" under the current version of the FCA. Indeed, in its petition for rehearing en banc, Victaulic more candidly acknowledged that no court had addressed the application of the FCA's reverse false claims provision as it currently stands to marking duties. Reh'g Pet. 11.

Absent such a direct conflict, Victaulic tries to assert that the Third Circuit's interpretation "creates a circuit split" at a more general level, Pet. 4, by supposedly holding that FCA liability can attach "based on an alleged failure to pay *contingent* duties that would arise—if at all—only after the exercise of discretion by Government actors." *Id.* at 3–4.

This argument fails for two reasons. First, the cases Victaulic cites as holding that various requirements are insufficiently definite to qualify as "obligations" under the FCA all arose before the 2009 amendment that for the first time introduced a statutory definition of "obligation." Victaulic places particular emphasis on the Sixth Circuit's 1999 decision in *American Textile*, *see* Pet. 30—a decision the 2009 amendments were partially intended to abrogate, *see* S. Rep. No. 111-10, at 14 n.10. In the absence of any cited authority applying the post-2009 definition—which specifically provides that an obligation need not be "fixed," 31 U.S.C. § 3729(b)(3)—Victaulic can point to no circuit conflict over the application of the new language to anything, let alone to marking duties. The argument that there is a conflict in principle over the application of the new statutory definition of "obligation" is, to say the least, premature in the absence of citations of any other case law interpreting it.

Second, as the United States explained below, marking duties are not "contingent." Rather, by oper-

ation of statute, they "shall be levied, collected, and paid" when unmarked foreign goods are imported and are not timely marked, destroyed, or exported. 19 U.S.C. § 1304(i). Victaulic responds that the duties are nevertheless contingent because they are owed only "*if* the unmarked goods enter into commerce; … [and] *if* the unmarked goods are not subsequently marked, exported, or destroyed under Customs' supervision." Pet. 32. Certainly, marking duties are "contingent" during the period "prior to the liquidation of the entry covering the" unmarked goods, when marking, destroying, or exporting the goods under Customs supervision remains possible. *Id.*; *see also* 19 C.F.R. § 159.1. But after liquidation occurs through the domestic sale of the unmarked goods and the marking duties have accrued, as they are alleged to have done here, any such contingency evaporates: an importer must at that point pay marking duties. As the United States put it below, the statute "establishes, without the need for further enforcement action by the government, an obligation to pay marking duties if a company (1) imports unmarked goods, and (2) does not export, destroy, or properly mark the goods under CBP supervision." U.S. 3d Cir. Br. 15.

Maybe so, Victaulic responds, but even then marking duties are owed only "*if* the unmarked goods are later detected; … and *if* Customs 'levies' such duties." Pet. 32. This argument is remarkable. Nothing in the Tariff Act suggests that government officials have discretion not to assess marking duties once they have accrued. To the contrary, the Act provides that payment of marking duties shall not "be avoidable for any cause." 19 U.S.C. § 1304(i). Once marking duties have accrued, the only "contingency" that affects whether they are levied is whether the importer suc-

cessfully evades detection. One's obligation to pay one's taxes is not "contingent" merely because one could decline to file a tax return and then evade a subsequent audit. Of course, an obligation can only be *enforced* if the person who tries to evade it is caught, but that does not mean that the obligation does not exist.[10]

In any event, as this discussion makes clear, Victaulic's argument rests more on its disagreement with the Third Circuit, and the United States, about the construction of the laws governing marking duties than on any broader issue concerning the application of the FCA to "contingent" obligations. Victaulic asks this Court to parse the marking duty statute and its implementing regulations to determine whether the obligation they impose is contingent or (in the FCA's terms) "established." 31 U.S.C. § 3729(b)(3). But Victaulic makes no effort to show that there is any disagreement among the lower courts over the meaning of the customs statutes and regulations that would justify expending this Court's time and resources in the examination of such technical questions of customs law. Indeed, Victaulic invites this Court to second-guess the correctness of the Third Circuit's

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[10] Victaulic's related argument that marking duties are contingent because "if Customs has not affirmatively imposed marking duties within one year of importation, the imports are liquidated, and no marking duties can ever be owed" is incorrect. Pet. 33. None of the statutory or regulatory provisions Victaulic cites suggests a one-year time limit for recovering marking duties under the FCA, and its assertion directly contradicts the United States' interpretation of the statute. Victaulic's reading would, in effect, mean that marking duties would almost never be owed or collectable. That result was clearly not Congress's intent.

reading of the customs laws without citing even a single judicial decision supporting its interpretation of the relevant statute and regulations. *See* Pet. 32–35. Victaulic's arguments do not come close to demonstrating that the customs law issues raised in its petition are sufficiently important to merit review.

B. The Third Circuit did not hold that all regulatory violations give rise to reverse FCA liability.

Unable to show that the lower court's reasoned statutory interpretation conflicts with either the narrow or the broader holdings of any other court, Victaulic makes a final argument that the opinion below creates "liability for reverse false claims [that] is so broad that it encompasses any potential regulatory violation." Pet. 29. According to Victaulic, this view conflicts with the holdings of a number of circuits—including the Third Circuit itself—that "imposing FCA liability for an alleged failure to comply with regulations would 'short-circuit the very remedial process the Government has established to address non-compliance with those regulations.'" Pet. 31 (quoting *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 310 (3d Cir. 2011)).

Once again, Victaulic's claim of conflict is misdirected: Three of the opinions it cites have nothing to do with what types of obligations can support *reverse* FCA claims, but involve the very different issue of whether an affirmative FCA claim can be based on a defendant's implied certification of compliance with regulatory conditions on government payments—an issue this Court already resolved in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). In the fourth, *Hoyte v. American Na-*

tional Red Cross, 518 F.3d 61, 68 (D.C. Cir. 2008), the discussion Victaulic cites involved the court's disposition of yet another distinct type of claim: a claim of retaliation against a whistleblower. None of these decisions could remotely be said to conflict with the Third Circuit's decision.

Even more devastating to Victaulic's argument, nothing in the Third Circuit's opinion says or even suggests that every regulatory violation gives rise to reverse FCA liability. This case concerns the unusual circumstance in which the conduct concealed by the defendant gives rise to an "established duty" by operation of a "statute or regulation." 31 U.S.C. § 3729(b)(3). It does not involve contingent liabilities for fines or penalties for a garden-variety regulatory violation. As the United States explained below, the statute explicitly provides that marking duties are not penalties, nor does their imposition depend on the exercise of discretion in enforcing the statute. U.S. 3d Cir. Br. 14–15. The Third Circuit's holding that such an obligation can serve as the basis of a reverse FCA claim is consistent with statements in pre-amendment judicial decisions that the "mere contingent potential that … fines or penalties might be … sought and imposed" for a regulatory violation does not give rise to a reverse FCA claim. *United States ex rel. Bain v. Ga. Gulf Corp.*, 386 F.3d 648, 653 (5th Cir. 2004).

Thus, as the United States put it below, the imposition of liability here does not threaten to give the FCA the sort of "incredible scope" under which "any 'statutory or regulatory violation that *might have* led to the imposition of a fine' or penalty" will be covered. U.S. 3d Cir. Br. 13 (quoting *American Textile*, 190 F.3d at 739). Rather, under the Third Circuit's read-

ing of the statute, those violations that have as their consequence the necessary and unequivocal obligation to pay a certain sum to the government create the potential for FCA liability. Pet. App. 22a (noting that marking duties are "due and owing, without exception" once the conditions triggering them exist); *accord*, *United States ex rel. Simoneaux v. E.I. duPont de Nemours & Co.*, 843 F.3d 1033, 1040 (5th Cir. 2016) (agreeing with the Third Circuit and distinguishing obligations to pay customs duties from regulatory fines and penalties). Even then, only a knowing avoidance of the obligation to pay what is owed will trigger reverse FCA liability. Victaulic's contrary reading of the opinion is, at best, greatly exaggerated.

Victaulic offers no reason for jumping to the conclusion that the sky is falling on the basis of only one reverse FCA decision under the amended statute, based on the specific features of the customs laws at issue. If later decisions expand the ruling below beyond the statute's proper bounds, or if a conflict develops over the nature of violations that support a reverse FCA claim, an issue appropriate for review by this Court may arise. That time has not yet come.

Review of the bounds of reverse FCA liability—if it ever becomes necessary—would be better informed not only by further development of case law construing the relevant amendments to the FCA, but also by a complete factual record. This case arises from a motion to dismiss and a non-final appellate ruling remanding to allow the filing of the amended complaint, discovery within the limits imposed by the Federal Rules of Civil Procedure, and, ultimately, either summary judgment or trial. This Court's established practice is to reserve interlocutory review for excep-

tional cases. *See*, *e.g.*, *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., opinion respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); Shapiro, Geller, *et al.*, *Supreme Court Practice* § 4.18, at 282 (10th ed. 2013).

This case exemplifies the reasons supporting this Court's practice. Any number of resolutions below could avoid or affect the need to resolve issues concerning the scope of reverse FCA liability. And in any event, whether Victaulic's conduct constituted a reverse FCA violation would be an issue better resolved on a summary judgment or trial record making clear exactly what Victaulic did or did not do to avoid marking duties.

In the meantime, this Court should deny review of the Third Circuit's correct holding, as a matter of first impression, that CFI's allegations of Victaulic's knowing avoidance of marking duties state a claim under the FCA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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