No.

IN THE

Supreme Court of the United States

UNITED STATES EX REL.
ADVOCATES FOR BASIC LEGAL EQUALITY, INC.,
Petitioner,

v.

U.S. BANK, N.A.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The public disclosure bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A), prohibits *qui tam* actions when "substantially the same allegations or transactions" have previously been publicly disclosed, unless the *qui tam* plaintiff is an original source of the information. The circuits are divided over the level of specificity at which a public disclosure must be "substantially the same" as the alleged fraud to trigger the bar.

The question presented is:

Under the public disclosure bar, may a *qui tam* action proceed when it is based on specific allegations of fraud that were not the subject of prior public disclosures and that add substantial material information to the public disclosures, and when the publicly disclosed allegations "encompass" the *qui tam* allegations only if both sets of allegations are characterized at a very high level of generality?

PARTIES TO THE PROCEEDING

The parties to the proceedings below, and in this Court, are:

Advocates for Basic Legal Equality, Inc., suing as relator on behalf of the United States as plaintiff in the district court, appellant in the court of appeals, and petitioner in this Court; and

U.S. Bank, N.A., the defendant in the district court, appellee in the court of appeals, and respondent in this Court.

RULE 29.6 STATEMENT

Advocates for Basic Legal Equality, Inc., is a nonprofit, non-stock corporation. Because it does not issue stock, there is no publicly traded corporation that owns any stock in it, or any other form of ownership interest.

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INTRODUCTION

This case presents an important, recurring, and unsettled issue concerning the "public disclosure bar" of the False Claims Act (FCA). That provision bars an FCA *qui tam* action if official documents or the news media publicly disclosed "substantially the same allegations or transactions" before the case was filed. 31 U.S.C. § 3730(e)(4)(A). Courts of appeals disagree over the level of specificity at which a disclosure must be "substantially the same" as the alleged fraud to trigger the bar.

The United States Court of Appeals for the Sixth Circuit held below that public disclosures that do not reveal the specific fraud alleged in a *qui tam* action are, nonetheless, "substantially the same" and bar the action if the public allegations, as broadly characterized by the court, can be said to "encompass" the *qui tam* action's specific allegations. Pet. App. 8a. In the court's view, public allegations of some sort of misconduct generically comparable to the alleged fraud suffice to "put[] the government on notice 'of the possibility of fraud.'" *Id.* at 9a.

The Seventh and Ninth Circuits have considered and rejected this broad-brush approach. They hold that "a complaint that is similar [to a public disclosure] only at a high level of generality" does not "trigger[] the public disclosure bar." *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 575 (9th Cir. 2016); *accord*, *e.g.*, *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 680 F.3d 933, 936 (7th Cir. 2012). In those circuits, public disclosure of *some* wrongdoing does not bar an FCA action unless it "alerted the government to the specific areas of fraud alleged" in the action. *Mateski*, 816 F.3d at 579. Only disclosures alleging "that a particular [defendant] had committed a particular fraud in a particular way" suffice. *Goldberg*, 680 F.3d at 935.

Here, petitioner Advocates for Basic Legal Equality, Inc. (ABLE), a non-profit organization devoted to advocating for the interests of low-income individuals, brought an FCA *qui tam* action against respondent U.S. Bank. ABLE alleged that the bank made false claims for government payments under the mortgage insurance program administered by the Federal Housing Administration (FHA), an arm of the Department of Housing and Urban Development (HUD). ABLE claimed that, in submitting insurance claims for losses incurred in foreclosing on FHA-insured loans, U.S. Bank falsely certified that it had complied with pre-foreclosure requirements, unique to the FHA program, that are intended to mitigate the government's losses. Specifically, ABLE alleged that U.S. Bank systematically foreclosed on FHA-insured loans without first meeting with borrowers and exploring alternatives to foreclosure, as FHA regulations require before foreclosure on an FHA-insured mortgage.

The Sixth Circuit held that the action was barred by public disclosures in two documents:

> (1) a report by federal banking regulators (not FHA or HUD) finding that many banks, including U.S. Bank, engaged in *different* unsound or illegal practices (such as robo-signing documents) in foreclosures generally—but *not* alleging FHA insurance fraud or violations of loss-mitigation requirements specific to FHA-insured mortgages (such as failure to meet with borrowers before foreclosing); and
>
> (2) a consent order issued by bank regulators alleging that U.S. Bank had engaged in specific foreclosure-related wrongdoing that had nothing to do with fraud on the FHA or violation of any loss-mitigation requirements, let alone those specific to FHA-insured loans.

Neither the report nor the order (Pet. App. 36a & 73a) alleged that U.S. Bank (or any bank) had violated the FHA's special loss-mitigation requirements, much less that U.S. Bank misrepresented compliance with those or any other FHA program requirements.

Even so, the Sixth Circuit found the case barred because the public disclosures, as characterized generally by the court, disclosed that the bank had engaged in "bad foreclosure practices," Pet. App. 7a, a sweeping category that "encompass[ed]" ABLE's particularized allegations of fraud specific to the FHA program. *Id.* at 8a. Similarly, the court found that ABLE could not contribute material new information that would qualify it as an "original source" under the FCA because the government was already aware of "bad foreclosure practices." *Id.* at 7a. In the Seventh and Ninth Circuits, which reject such an over-generalized approach to the public disclosure bar, the disclosures cited by the Sixth Circuit would neither have triggered the bar nor precluded ABLE from qualifying as an original source.

The Sixth Circuit's restrictive approach blocks lawsuits based on allegations that identify specific frauds not previously disclosed to the public, and it disrupts the FCA's "effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 295 (2010). The Court should grant this petition to restore that balance and resolve the conflict among the circuits.

OPINIONS BELOW

The Sixth Circuit's decision is reported at 816 F.3d 428 and reproduced in the appendix at 1a. The court's unreported order denying a petition for rehearing en banc is reproduced in the appendix at 35a. The district court's memorandum opinion and order and its entry of final judgment are unreported and are reproduced in the appendix at 12a and 34a, respectively.

JURISDICTION

The court of appeals issued its decision on March 14, 2016, and denied a timely petition for rehearing en banc on April 27, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4), provides:

> (A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is

> independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

STATEMENT OF THE CASE

1. The False Claims Act—First enacted in 1863, the FCA prohibits knowingly presenting false claims for payment to the federal government and prescribes civil penalties and remedies for violations of its antifraud provisions. *See* 31 U.S.C. § 3729. The FCA was Congress's response to "the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1996 (2016) (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976)). Congress's ongoing concern over the perpetual problem of false claims for government payment has resulted in many amendments to the Act, "but its focus remains on those who present or directly induce the submission of false or fraudulent claims." *Id.*

Among the false claims that violate the FCA are requests for payment that impliedly, and falsely, certify compliance with regulatory requirements that are material to the government's obligation to make payment. As this Court recently held, such implied certification "can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." *Id.* at 2001.

FCA violators are liable to the United States for substantial per-violation civil penalties and "3 times the amount of damages which the Government sustains." 31

U.S.C. § 3729(a). The FCA authorizes civil actions by the government to recover penalties and damages, *see id.* § 3730(a), and also provides that a private person "may bring a civil action for a violation of [the FCA] for the person and for the United States government." *Id.* § 3730(b)(1). Such actions, "brought in the name of the Government" by private plaintiffs, *id.*, are referred to as "*qui tam* actions." *See id.* § 3730(c); *see also Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774–75 (2000). Courts generally refer to the *qui tam* plaintiff as the "relator." *See id.* at 769.

Upon initiating an FCA *qui tam* action, a relator must provide the complaint and the evidence and information on which it is based to the government, which then decides whether to intervene and conduct the action itself. Meanwhile, the complaint remains under seal for at least 60 days. 31 U.S.C. § 3730(b)(2). If the government chooses not to proceed, the relator may conduct the action, *id.* § 3730(b)(4)(B), and receive 25 to 30 percent of any recovery, plus costs and attorneys' fees. *Id.* § 3730(d)(2). If the government conducts the action, the relator generally receives 15 to 25 percent of the proceeds. *Id.* § 3730(d)(1).

The Act's *qui tam* provisions strike a balance. On the one hand, they seek to remedy frauds on the government and deter would-be fraudsters by encouraging meritorious lawsuits that bring to light frauds that might otherwise escape the public eye. On the other hand, they prevent suits that would not further those purposes—actions Congress "deemed unmeritorious or downright harmful." *Graham Cty.*, 559 U.S. at 298. Accordingly, the FCA includes limits on who may bring a *qui tam* action, who may be sued, and the circumstances under which an action may be brought. *See* 31 U.S.C. §§ 3730(b)(5), (e).

At issue here is the Act's "public disclosure bar," which prohibits some *qui tam* actions that mirror allegations already in the public domain. *Id.* § 3730(e)(4). "As originally enacted, the FCA did not limit the sources from which a relator could acquire the information to bring a *qui tam* action." *Graham Cty.*, 559 U.S. at 293–94. A relator could bring an entirely "parasitic" action—even one based on information gleaned from a federal criminal indictment. *Id.* at 294 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)). To preclude such suits, Congress enacted the so-called "government knowledge" provision barring *qui tam* actions "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." *Id.* (quoting Act of Dec. 23, 1943, 57 Stat. 609). That draconian provision substantially curtailed "the volume and efficacy of *qui tam* litigation." *Id.*

In 1986, Congress balanced the two earlier approaches by limiting the bar to actions "based upon public disclosure of allegations or transactions" in specified official hearings and reports or in the news media. Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (1986), *codified at* 31 U.S.C. § 3730(e)(4)(A) (2009). The 1986 legislation sought "to make the FCA a 'more useful tool against fraud in modern times,'" *Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (quoting S. Rep. No. 99-345, at 2 (1986)), by achieving "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who had no significant information to contribute of their own." *Graham Cty.*, 559 U.S. at 294 (quoting *United States ex rel. Springfield Terminal R.R. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)).

In 2010, Congress again amended the public disclosure bar. *See* Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010). That legislation introduced the provision's current language stating that the bar is triggered by prior disclosure of allegations or transactions "substantially the same" as those in the *qui tam* action. The new language codified the construction most circuits had already given the former language, which barred actions "based upon" public disclosures—language most courts construed to bar an action if its allegations were "substantially identical" or "substantially similar" to public disclosures. *See United States ex. rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 514 (6th Cir. 2009); *Leveski v. ITT Educ. Servs. Inc.*, 719 F.3d 818, 828 & n.1 (7th Cir. 2013) (citing *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 920 (7th Cir. 2009)). Thus, both before and after the 2010 amendments, the bar requires courts to compare prior disclosures to the *qui tam* allegations to determine whether they are substantially the same.[1] But as demon-

[1] The 2010 amendments altered the statute in other respects as well. The public disclosure bar does not apply to an action brought by an "original source" of information. 31 U.S.C. § 3730(e)(4)(A). Until 2010, an original source was defined as "an individual who has direct and independent knowledge of the information on which the allegations are based." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467 (2007) (quoting former 31 U.S.C. § 3730(e)(4)(B)). After the 2010 amendments, an original source must either (1) have supplied the information on which the allegations are based to the government before the public disclosure, or (2) have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." 31 U.S.C. § 3730(e)(4)(B).

The 2010 amendments also eliminated language that had made the bar jurisdictional, *see Rockwell*, 549 U.S. at 467, and provided that only *federal* hearings, reports, audits and investigations trigger the bar. *See* 31 U.S.C. § 3730(e)(4)(A)(i)–(iii).

strated below, the courts of appeals have diverged sharply over how to apply the standard.

2. The FHA Mortgage Insurance Program—This case involves false claims under the FHA mortgage insurance program established by section 203 of the National Housing Act, 12 U.S.C. § 1709. Through that program, private lenders issue mortgage loans for modestly priced homes, with borrowers making very low down payments. The FHA insures these loans to protect lenders against losses when a homeowner defaults and the lender forecloses. When a foreclosure or other event causes a participating lender to suffer a loss, it submits a claim to the FHA and recoups the lost money from the government. By assuming the risk involved in making these low-down-payment loans, the FHA gives lenders incentives to lend to homebuyers who might not qualify for a conventional loan. It thus aims to expand home ownership by making home loans more available and affordable to first-time homebuyers and other higher-risk and lower-income borrowers.

The FHA mortgage program, over its 82-year history, has insured over 34 million home mortgages. It helped foster a significant expansion of home ownership in the United States between the Depression era, when the rate of home ownership bottomed out at less than 44%, and the early years of this century, when it peaked at over 68%.[2] Lenders participating in the FHA program have gained access to an enormous market that other-

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[2] *See* U.S. Dep't of Hous. & Urban Dev., *The Federal Housing Administration (FHA)*, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/fhahistory; U.S. Census Bureau, *Historical Census of Housing Tables*, https://www.census.gov/hhes/www/housing/census/historic/owner.html.

wise might not exist, and on remarkably favorable terms: Lenders keep the profits from FHA-insured loans, while the government shoulders the risk. When foreclosures multiply, as they did during the recent housing crash, the federal government's exposure is substantial.

In exchange for the benefits it offers lenders, the FHA program imposes unique regulatory requirements that are critical to limiting potentially huge federal liabilities. At issue in this case is the requirement that lenders take steps mandated by federal law to mitigate losses before declaring an FHA-insured mortgage in default, foreclosing, and making a claim for reimbursement from the FHA. Federal statutes and regulations explicitly prohibit mortgagees from initiating foreclosure on an FHA-insured loan unless they first have complied with specific loss-mitigation procedures, including face-to-face meetings with the homeowners and evaluation of alternatives to foreclosure that would minimize losses to the insurance program. *See* 12 U.S.C. § 1715u(a); 24 C.F.R. §§ 203.500, 203.501, 203.604, 203.605. The alternatives lenders must evaluate include "special forbearance, loan modification, preforeclosure sale, support for borrower housing counseling, subordinate lien resolution, borrower incentives, and deeds in lieu of foreclosure." 12 U.S.C. § 1715u(a). Because these loss-mitigation requirements are mandatory with respect to every foreclosure on an FHA-insured loan, submission of an FHA insurance claim following foreclosure impliedly warrants that the mortgagee complied with them. Participating mortgagees must also certify their compliance with these and other regulatory requirements upon applying to participate in the program and annually thereafter.

3. The *Qui Tam* Action—U.S. Bank is a significant participant in the FHA mortgage insurance program. In the decade before this case was filed, U.S. Bank made more than 22,000 insurance claims for losses on foreclosures of FHA loans and received more than $2.3 billion in FHA payments on those claims. Petitioner ABLE received information from multiple homeowners with FHA-insured mortgage loans that U.S. Bank had foreclosed on their homes without holding the required face-to-face meeting or otherwise evaluating loss-mitigation options. It is undisputed that these homeowners' specific claims had never been publicly disclosed in the media or in any federal hearing, audit, report, or investigation.

On April 1, 2013, ABLE filed its complaint under seal in the District Court for the Northern District of Ohio. The complaint alleges that U.S. Bank routinely foreclosed on FHA-insured mortgages without complying with the requirements that it hold face-to-face meetings with homeowners and otherwise consider loss-mitigation options. It further alleges that U.S. Bank knowingly made false claims when requesting insurance benefits for losses resulting from those foreclosures—claims that falsely represented the bank's compliance with loss-mitigation requirements. The complaint alleges that those false representations were material to payment of the claims.[3] It identifies three specific instances when U.S. Bank foreclosed in violation of face-to-face meeting and loss-mitigation requirements, and details the resulting false claims and insurance payments. It alleges that these examples are representative of thousands of fore-

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[3] The complaint also alleged the making of false records and statements in connection with claims, in violation of 31 U.S.C. § 3729(a)(1)(B), in the form of the bank's multiple certifications of compliance with applicable regulations.

closures that violated loss-mitigation requirements and led to false insurance claims.

The United States declined to conduct the lawsuit, and the complaint was unsealed. U.S. Bank moved to dismiss for failure to state a claim under the FCA. As to that issue, the United States filed two "statements of interest" supporting ABLE's argument that it had stated claims actionable under the FCA. The government explained that compliance with loss-mitigation requirements was material to payment decisions under the mortgage insurance program and that mortgagees claiming insurance benefits impliedly certified compliance.

Correctly anticipating this Court's decision in *Universal Health Services* that a false certification theory can be a basis for FCA liability, the district court held that ABLE had stated an FCA claim by alleging implied misrepresentations of compliance with the loss-mitigation regulations. Compliance with those regulations, it found, "goes to the heart of the government's bargain with the mortgagee to pay claims" and is material to the government's payment decision. Pet. App. 22a; *cf. Universal Health Servs.*, 136 S. Ct. at 1995–96.

4. The Claimed Public Disclosures—U.S. Bank also moved for dismissal under the public disclosure bar. Its motion attached three claimed sets of disclosures: (1) an April 2011 report entitled "Interagency Review of Foreclosure Policies and Practices," issued by the Federal Reserve System, the Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (Pet. App. 36a); (2) a consent order issued by the OCC in April 2011 based on the findings of the Interagency Review (*id.* at 73a); and (3) newspaper reports describing the Interagency Review, related settlement agreements with U.S. Bank and other banks, and litigation concerning foreclosure violations by other banks.

None of these sources disclosed that U.S. Bank had violated requirements that it meet with mortgagees and consider loss-mitigation requirements before foreclosing on FHA-insured mortgages or, indeed, on any mortgages. Nor did any of them allege or suggest that U.S. Bank knowingly filed false claims for FHA insurance coverage based on misrepresentations of regulatory compliance.

The Interagency Review contained no allegations specific to U.S. Bank, let alone allegations relating to the bank's compliance with loss-mitigation requirements or its handling of FHA-insured loans and claims for insurance benefits. The report neither addressed compliance with FHA requirements nor mentioned the FHA mortgage insurance program. Rather, it contained an "industrywide" analysis of "foreclosure processing weaknesses" based on reviews of "a relatively small number of files from among the volumes of foreclosures processed" by 14 major mortgage servicers (including U.S. Bank). *Id.* at 38a–39a & n.1.

The principal "weaknesses" identified in the report related to inadequate "governance processes" to "manage and control operational, compliance, legal, and reputational risk associated with an increasing volume of foreclosures"; "inadequate organization and staffing of foreclosure units"; improper practices with respect to the affidavits and notarizations required in the foreclosure process; documentation errors involving fees charged to borrowers; inadequate management of third-party vendors, including some problems with respect to physical control over original notes and mortgages; and weaknesses in quality control and internal auditing. *Id.* at 44a–46a. Although the report concluded that all of the 14 servicers had enough "weaknesses" to support a conclusion that they had engaged in "unsafe and unsound practices" and violations of some applicable federal and state laws, it did not specify violations committed by any particular bank, and it emphasized that "findings varied across institutions." *Id.* at 42a.

Far from disclosing violations of the loss-mitigation requirements at issue in the complaint, the Interagency Review stated that "review of the foreclosure files showed that servicers were in contact with the delinquent borrowers and had considered loss-mitigation alternatives, including loan modifications." *Id.* at 54a. In other words, the banking regulators' limited file reviews had *not* disclosed the allegations or transactions at issue here. To the contrary, the reviews had *failed* to uncover the evidence on which this action is based.

Similarly, the OCC consent order alleged no violations of FHA loss-mitigation requirements, and it described no transactions involving those requirements. Not surprisingly, given that the consent order arose from the Interagency Review, it found that U.S. Bank had "engaged in unsafe or unsound banking practices" of the type the Review identified. It alleged four specific forms of misconduct: (1) filing affidavits in judicial foreclosure proceedings that were not based on the affiant's personal knowledge or review of relevant books and records; (2) filing affidavits in courts and land records offices that were not properly notarized or signed in a notary's presence; (3) failing to "devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training"; and (4) failing to oversee outside counsel and third-party providers of foreclosure-related services. *Id.* at 72a–73a.

The consent order nowhere alleges that U.S. Bank failed to meet with borrowers and consider loss mitigation before foreclosing on *any* mortgages, much less that it violated specific regulatory preconditions for foreclosing on *FHA-insured* mortgages. Nor does the consent order allege that U.S. Bank made any false certifications in its FHA insurance claims, or even mention the FHA insurance program or its regulatory requirements—which is not surprising, given that the OCC does not administer the FHA program. Although the consent order contains provisions imposing additional loss-mitigation requirements on U.S. Bank with respect to its entire mortgage portfolio, *id.* at 75a, those new requirements are not linked to any violation alleged in the order, which neither states nor implies that the bank had violated the specific loss-mitigation regulations already applicable to the FHA-insured subset of its mortgage portfolio.

Finally, the news articles on which U.S. Bank relied for the most part described the Interagency Review, the investigation leading up to it, and the consent orders that resulted. The articles added nothing relevant here to the official disclosures about U.S. Bank. They did not suggest that U.S. Bank had violated FHA loss-mitigation requirements or made false claims for FHA insurance benefits. The only mention of the face-to-face meeting requirement of the FHA regulations came in two articles describing a Virginia Supreme Court decision holding that a violation of the regulations—by a *different* lender—could constitute a defense to a foreclosure action.

5. The District Court's Public Disclosure Decision—The district court dismissed ABLE's claims under the public disclosure bar, concluding that they involved "substantially the same" allegations as the media reports, consent order, and Interagency Review relied upon by U.S. Bank. The court's decision effectively equated the media reports of "allegations of mortgagees' servicing failures and improper foreclosures," the consent order's finding of "unsound banking practices," and the Interagency Report's generic conclusion that mortgage servicers' "foreclosure processes were under-developed, insufficient, and inadequate" with "allegations that U.S. Bank did not comply with HUD's loss mitigation requirements." Pet. App. 28a–29a.[4] The court also held that ABLE was not an "original source" entitled to bring a claim notwithstanding the supposed public disclosures, because it lacked "inside information" about the violations and its allegations added "nothing" to the public disclosures the court had described. *Id.* at 32a.

6. The Court of Appeals' Decision—ABLE appealed, and the Sixth Circuit affirmed, holding that the public disclosure bar applied because, in the court's view, "the 'allegations or transactions' on which [ABLE] premised its claim were publicly disclosed before it filed this lawsuit." Pet. App. 5a. The court applied the current ver-

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[4] The district court also mentioned an Ohio state court's 2010 holding that an issue of fact existed as to whether U.S. Bank had wrongly foreclosed on one specific mortgage in violation of FHA loan servicing requirements. As ABLE had pointed out, however, a state-court case does not qualify as a public disclosure under the current version of the statute, and, in any event, the case involved only a single alleged violation and did not indicate that the bank had knowingly made any false claim for insurance coverage arising out of this or any other violation. Because the Sixth Circuit did not rely on this claimed disclosure, we do not discuss it further.

In addition, the district court mentioned a May 2011 settlement between U.S. Bank and HUD involving violations of FHA loan *underwriting* requirements. Even U.S. Bank had not argued that this wholly unrelated disclosure triggered the bar, and, again, it played no role in the decision on appeal.

sion of the public disclosure bar because "some of the allegedly fraudulent acts occurred before the 2010 amendments, some happened after, and ABLE did not file this lawsuit until 2013," *id.* at 4a, and because the differences between the pre- and post-2010 versions were not material to the outcome. *Id.*

In determining whether ABLE's allegations had been publicly disclosed, the court gave a "broad meaning" to the disclosure bar's same-allegations-or-disclosures trigger. *Id.* at 5a. Based on that reading of the statute, the court focused on whether the public disclosures relied upon by U.S. Bank, characterized broadly, could be said to "encompass[]" ABLE's specific claims. *Id.* at 8a.

The court relied exclusively on the consent order and the Interagency Review even though neither document discusses compliance with FHA regulations or specifically describes any conduct with respect to FHA-insured loans. It found that the consent order disclosed violations of FHA's face-to-face meeting and other loss-mitigation rules because it "required U.S. Bank to implement a wide variety of reforms," including "'*Loss Mitigation* and foreclosure prevention for delinquent loans.'" *Id.* at 5a (quoting consent order, *id.* at 90a, emphasis added by court). And it held that the Interagency Review likewise disclosed such violations because (according to the court) the report "noted that various banks, including U.S. Bank, had failed to take a variety of loss mitigation measures," and it emphasized the "need" for "appropriate" loss-mitigation efforts. *Id.* at 6a.

The two official documents, the court found, disclosed failings that could be characterized as relating to "loss mitigation measures." *Id.* at 6a. That they do not mention FHA loss-mitigation requirements was irrelevant, the court held, because "the broader, publicly disclosed category (a variety of mortgages) encompasses ABLE's narrower category (federally insured mortgages)." *Id.* at 8a.

The court painted with a similarly broad brush in holding that ABLE's allegation "that U.S. Bank committed fraud when it made false certifications about whether it had engaged in loss mitigation … also was publicly disclosed." *Id.* at 6a. Stating that a disclosure that put the government on notice of the "possibility" of fraud sufficed, the court held that the consent order provided such notice because it required U.S. Bank to implement a "compliance program" to ensure that it did not submit improper affidavits and declarations in connection with foreclosures. *Id.* According to the court, this requirement "put the government (and everyone else) on notice that U.S. Bank allegedly had filed non-compliant documents," *id.*, which in turn "put the government on notice of the possibility of fraud," *id.* at 7a.

In other words, the court held that one form of improper activity (filing false affidavits in foreclosure proceedings, which is a fraud on a state court but not on the federal government) put the federal government on notice that U.S. Bank might have engaged in a wholly different form of fraudulent activity (submitting federal insurance claims resting on false certification of compliance with FHA loss-mitigation requirements).

Finally, the court of appeals used similar reasoning to hold that ABLE was not an "original source" of its allegations. The court viewed the prior public disclosures of generic "bad foreclosure practices" as full disclosures of ABLE's fraud allegations. *Id.* at 7a. It followed that ABLE's particular allegations of fraud—including allegations of specific regulatory violations and the knowingly false claims for federal insurance benefits that ensued, as well as concrete examples of that misconduct—"did not provide information that materially adds to the prior publicly disclosed information." *Id.* Thus, for purposes of the original source exception as well as the basic public disclosure bar, the court effectively held that the claims could not proceed because the public disclosures, broadly viewed, "encompasse[d]" the claims. *Id.* at 8a.

ABLE petitioned for rehearing en banc. ABLE argued that the court had applied the bar too rigidly, treating specific fraud claims as being substantially the same as earlier allegations of very different misconduct by characterizing both at the highest level of generality. ABLE pointed out that this approach conflicted with holdings of other circuits, particularly the Seventh and Ninth. *See*, *e.g.*, *Leveski*, 719 F.3d at 831; *Mateski*, 816 F.3d at 578. The Sixth Circuit denied rehearing.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's reading of the public disclosure bar conflicts with decisions of the Seventh and Ninth Circuits.

A. In barring ABLE's *qui tam* suit based on prior public disclosures of wrongdoing entirely distinct from the fraudulent conduct alleged in the action, the Sixth Circuit adopted a sweeping view of the public disclosure bar. Under the Sixth Circuit's reading, if a prior disclosure, characterized at a high level of generality, "encompasses" a *qui tam* plaintiff's allegations, it places the government on notice of the "possibility" of fraud and bars a *qui tam* action. Pet. App. 8a, 9a.

In sharp contrast, the Seventh and Ninth Circuits have repudiated the approach applied here by the Sixth Circuit. In a string of recent cases, the Seventh Circuit has repeatedly held that "viewing FCA claims 'at the highest level of generality … in order to wipe out *qui tam* suits that rest on genuinely new and material information is not sound." *Leveski*, 719 F.3d at 831 (quoting *Goldberg*, 680 F.3d at 936); *see, e.g.*, *Cause of Action v. Chi. Transit Auth.*, 815 F.3d 267, 281 (7th Cir. 2016); *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 707–09 (7th Cir. 2014); *United States ex rel. Heath v. Wis. Bell, Inc.*, 760 F.3d 688, 691 (7th Cir. 2014); *Goldberg*, 680 F.3d at 935–36; *United States ex rel. Baltazar v. Warden*, 635 F.3d 866, 869–70 (7th Cir. 2011). Under the Seventh Circuit's approach, a *qui tam* plaintiff who supplies "vital details" of an FCA claim by alleging that "a particular [defendant] had committed a particular fraud in a particular way" cannot be "thrown out of court under § 3730(e)(4)(A)" based on public disclosures that fail to provide that specific information. *Goldberg*, 680 F.3d at 935.

In its recent decision in *Mateski*, the Ninth Circuit endorsed the Seventh Circuit's approach. 816 F.3d at 577. Citing *Baltazar*, *Goldberg*, and *Leveski*, the court stated that "[w]e find the reasoning of these cases persuasive, and we believe that the Seventh Circuit's approach effectuates the purpose of the public disclosure bar by 'strik[ing] a *balance* between encouraging private persons to root out fraud and stifling parasitic lawsuits.'" 816 F.3d at 577 (quoting *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011)). The court therefore expressly "adopt[ed] the Seventh Circuit's approach." *Id.* The court explicitly *rejected* an approach, like the Sixth Circuit's, that focuses solely on whether the government is "on notice" of the generic *possibility* of fraud. *See id.* at 574. To bar a *qui tam* action, the court held, a public disclosure must do more than "provide[] enough information to pursue an investigation into *some* fraud." *Id.* at 579 (internal quotation marks and ellipsis omitted). Rather, the public disclosure must "have alerted the Government to the specific areas of fraud alleged by [the relator]." *Id.*[5]

B. Compounding the conflict among the circuits over the breadth of the public disclosure bar is the Sixth Circuit's extraordinarily narrow reading of the "original source" exception. Having concluded that the public disclosures here made the same allegations as the *qui tam* action because, read generally, they encompassed any sort of "problematic foreclosures," Pet. App. 7a, the court reasoned that ABLE could not be an original source because its specific allegations did not "add anything" to those disclosures—even though ABLE supplied key details (violations of FHA loss-mitigation rules and the knowingly false insurance claims that followed) critical to a claim of fraud on the FHA and wholly absent from the public disclosures. Pet. App. 7a. Despite the statute's express language stating that a plaintiff who "materially adds to the publicly disclosed allegations" may proceed, 31 U.S.C. § 3730(e)(4)(B), the Sixth Circuit effectively held that a relator's allegations cannot "materially add" to publicly disclosed allegations that suffice to trigger the public disclosure bar—thus reading one part of the original source exception out of the statute.

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[5] The defendant in *Mateski* recently received an extension of time to petition for certiorari. *Raytheon Co. v. United States ex rel. Mateski*, No. 15A1237 (June 13, 2016). The extension application argues that there is a "split among the circuit courts of appeals on the level of generality at which to assess public disclosure of alleged fraud for purposes of the public disclosure bar," and that the Sixth Circuit's decision in this case, "in direct conflict with [*Mateski*]," holds "that a 'broader, publicly disclosed category [of misconduct] … encompasses [any] narrower category." Application for Extension of Time, at 2, *Mateski*, No. 15A1237 (filed June 3, 2016).

This holding, too, runs counter to the Seventh Circuit's reading of the original source provision. That court has held that the dispositive question is whether the relator is the "original source of the specific allegations in her complaint." *Leveski*, 719 F.3d at 836. Thus, even if a prior publication has disclosed the allegations in a complaint on a very general level, if the *qui tam* relator adds specific details that are material to the claim of fraud, the action may proceed. Together with its broad reading of the public disclosure bar, the Sixth Circuit's cramped reading of the original source exception departs dramatically from the Seventh Circuit's recognition that the public disclosure bar must be read consistently with the statutory goal of allowing relators with "genuinely new and material information" to proceed. *Id.* at 831.

II. The disagreement among the circuits is outcome-determinative.

The circuits' disagreement is not semantic. The Seventh and Ninth Circuits' rule results in outcomes irreconcilable with the Sixth Circuit's rule. This case exemplifies the difference: This action would not have been barred in the Seventh or Ninth Circuit because the public disclosures did not reveal the specific fraud alleged in the *qui tam* action.

The two disclosures relied upon by the Sixth Circuit—the Interagency Review and the consent order—alleged, respectively, a variety of unsound banking practices by a large number of industry participants and a smaller number of unsound banking practices by U.S. Bank. But neither identified the practices that form the basis of ABLE's *qui tam* action: U.S. Bank's false claims for insurance coverage. On the contrary, in the one passage that comes closest to touching on the practices at issue here, the Interagency Review specifically found that, in the files it reviewed, banks had *not* failed to meet with distressed homeowners and consider mitigation. And neither document said a word about whether any bank had violated *any* FHA requirements or misrepresented that it had complied. The consent order, while imposing its own new loss-mitigation requirements on U.S. Bank, did not allege past violations of any legally required loss-mitigation measures—let alone the specific measures required by the FHA. Even assuming, generously, that imposing these new requirements prospectively might imply that U.S. Bank did not always fully consider loss mitigation for all loans, it did not imply that the bank had failed to meet existing requirements under the special FHA regulations to take loss-mitigation steps (including required face-to-face meetings) with respect to FHA loans, nor that it knowingly misrepresented compliance while seeking government payments.

The two documents thus did not satisfy the Seventh and Ninth Circuits' requirement that a disclosure reveal that this "particular [defendant] had committed a particular fraud in a particular way." *Goldberg*, 680 F.3d at 935. And even if, as the Sixth Circuit held, allegations that U.S. Bank had filed improper affidavits in foreclosure proceedings might have put the government on notice of *some* fraud, Pet. App. 6a, it could not "have alerted the Government to the specific areas of fraud alleged by [ABLE]." *Mateski*, 816 F.3d at 579.

Analysis of the Seventh and Ninth Circuit precedents underscores the concreteness of the conflict among the circuits and confirms that the outcome here would have been different in the Seventh or Ninth Circuit. The key precedents from those circuits involved strikingly similar issues about how broadly to construe prior disclosures, yet they reached opposite results from the Sixth Circuit and reversed district courts that adopted the same reasoning used by the Sixth Circuit here.

Ninth Circuit—In *Mateski*, the *qui tam* relator alleged that Raytheon, a federal contractor tasked with designing and building a key imaging sensor for a satellite system, submitted false claims for payment under its contract. The relator specifically alleged that Raytheon falsified waivers of specifications, forged signoffs certifying work performed, failed to address electrostatic discharge issues, and used cross-contaminated and prohibited materials. 816 F.3d at 568.

Just as U.S. Bank did here, Raytheon invoked the public disclosure bar based on reports that did not make those specific fraud allegations. Instead, the reports included broad allegations of mismanagement, breach of contract, and costly delays in Raytheon's work. The district court in *Mateski* followed exactly the approach taken by the Sixth Circuit in this case, reasoning that "public disclosures that broadly discuss design noncompliance and manufacturing defects cover this claim and others like it." 2013 WL 692798, at *3 (C.D. Cal. Feb. 26, 2013).

Reversing, the Ninth Circuit rejected that approach. The court held that such reports of "general problems involving mismanagement, technical difficulties, and noncompliance with contract and policy directives," 816 F.3d at 579, were insufficient to bar the relator's specific allegations of fraud. The general allegations the Ninth Circuit found insufficient in *Mateski* are directly analogous to the "weaknesses" and "unsound banking practices" disclosed in the Interagency Review and consent order here. The Ninth Circuit held such disclosures inadequate because Mateski's claim, like the claim here, "alleges fraud that is different in kind and degree from the previously disclosed information about [the defendant's] problems." *Id.* at 567. Even if those different allegations might have led (indeed, did lead) the government to investigate "*some* fraud," they did not disclose the *fraud alleged by the relator*. *Id*. at 579.

Under the Sixth Circuit's standard, by contrast, the disclosures in *Mateski* would have been characterized generically as revealing "bad contract practices"—just as the Sixth Circuit characterized the prior disclosures here as involving "bad foreclosure practices," Pet. App. 7a—and would have barred the *qui tam* action because they "encompassed" its allegations and put the government "on notice" of a "possibility of fraud." *Cf.* Pet. App. 8a–9a.

Seventh Circuit—Four Seventh Circuit decisions likewise starkly illustrate that the conflict with the Sixth Circuit is outcome-determinative.

In *Goldberg*, the relator alleged that a teaching hospital made false Medicare and Medicaid claims by billing for surgeries performed by residents and falsely certifying that the procedures were supervised by a teaching physician (as required for payment). The certifications were false because the teaching physician was not available throughout the procedure: The hospital assigned physicians to supervise multiple procedures simultaneously. 680 F.3d at 935. The hospital contended that the public disclosure bar applied because both the Department of Health and Human Services (HHS) and a GAO report had previously alleged that fraudulent billing for unsupervised surgical procedures was an "industry-wide practice" engaged in by "*all* (or almost all) teaching hospitals." *Id*. at 934, 936. The district court agreed, reasoning—as the Sixth Circuit did here—that the *qui tam* allegations were "encompassed" by public disclosures that it characterized broadly as describing "fail[ure] to follow Medicare Rules and Regulations regarding attending physician supervision." 748 F. Supp. 2d 917, 927 (N.D. Ill. 2010).

The Seventh Circuit reversed because billing for *improperly supervised* services was a different fraud from billing for *unsupervised* services. "[N]o one who read" the prior disclosures, the court observed "would know or even suspect that [the defendant] was misrepresenting the 'immediate availability' of teaching physicians during concurrently scheduled procedures." *Id.* at 935. Unless the prior disclosures were improperly read "at the highest level of generality—as covering all ways that supervision could be missing or inadequate—the allegations of these relators are not 'substantially similar.'" *Id.* at 936. Such a view of the public disclosure bar, the court held, was "not sound." *Id.*

Goldberg's test, applied here, would foreclose application of the bar. No one reading the Interagency Review or consent order would "know or even suspect" that U.S. Bank misrepresented compliance with the face-to-face meeting and other loss-mitigation requirements specific to FHA loans. Unless those sources are read at the highest level of generality—as covering all ways that foreclosures could be improper—ABLE's allegations are not substantially similar.

Conversely, the Sixth Circuit's approach would require a different outcome in *Goldberg*, as demonstrated by the district court's opinion in that case. Indeed, the public disclosures there described conduct with far greater resemblance to the alleged fraudulent conduct than the disclosures here.

In *Absher*, another Seventh Circuit case, the relators alleged that a nursing home made false Medicare and Medicaid claims by failing to record and disclose noncompliant care that resulted in scabies, pressure ulcers, and rashes. The defendant invoked the public disclosure bar based on government reports documenting inadequate care at the nursing home and revealing "issues" with scabies, pressure sores, and other skin problems. 764 F.3d at 708. Emphasizing that a public disclosure bars a *qui tam* claim only if it alleges fraud or discloses "facts establishing the essential elements of fraud," *id.*, the Seventh Circuit held that the action could proceed. The court found that, even if the reports disclosed that the defendant had "provided non-compliant" care, they did not disclose its *concealment* of and *misrepresentations* concerning the medical problems, and thus did not reveal knowing submission of false claims. *Id.*

Under *Absher*, even if the generalized allegations of bad foreclosure practices in the Interagency Review and consent decree were relevant to U.S. Bank's violation of FHA-specific regulations, they could not disclose U.S. Bank's *fraud*—the subsequent knowing submission of false claims. By the same token, the *Absher* plaintiffs' claims would have been barred under the Sixth Circuit's holding in this case: The court would certainly have found that disclosures of bad patient care—disclosures much more closely related to the alleged fraud than any disclosures of "bad foreclosure practices" in this case—put the government on notice of the "possibility" of fraudulent claims concerning patient care.

In the Seventh Circuit's *Baltazar* decision, the plaintiff claimed that a chiropractor submitted false Medicare and Medicaid claims by "upcoding" them to misrepresent services performed. The defendant argued that the claim was barred by GAO and HHS reports finding similar fraud in 73% of claims by chiropractors. The Seventh Circuit held that reports attributing misconduct to industry members without revealing which ones committed which fraud "do not prevent a *qui tam* suit against any particular member of that industry." 635 F.3d at 868.

Under *Baltazar*, the Interagency Review, which did not attribute specific conduct to any particular industry member, would not disclose *anything* as to U.S. Bank. Even if it could be read to allege that *someone* violated FHA-specific loss-mitigation rules—and under a fair reading, it cannot—the report did not allege that *U.S. Bank* committed any such violations. ABLE, like the *Baltazar* relator, "supplied vital facts that were not in the public domain," 635 F.3d at 869, when it alleged such violations by U.S. Bank.

Finally, in *Leveski*, the relator alleged that a for-profit college submitted false financial aid claims to the Department of Education by paying recruiters and financial aid officers commissions for signing up students, in violation of Department regulations, and disguising the commissions as bonuses legitimately based on other criteria. The school argued that the allegation was disclosed by a prior lawsuit alleging that it maintained a pay system including explicit commissions for recruiting students. Although both the public disclosures and the *qui tam* allegations could be characterized generally as involving fraud regarding incentive-based compensation, the Seventh Circuit held that the relator's claims were not barred because "the details" of the violations were "quite different." 719 F.3d at 832. The new claims involved allegations of concealment that were "wholly absent from" the earlier case. *Id.* at 830. Further, the court held that even if the public disclosures could be read to trigger the fraud, the specifics supplied by the relator would render her an "original source." *Id.* at 836.

Under *Leveski*, the allegations of wrongdoing against U.S. Bank in the consent order would not bar the quite different allegations of FHA loss-mitigation rule violations and fraudulent FHA insurance claims, which are "wholly absent" from that order. Conversely, the Sixth Circuit's standard would dictate a different outcome in *Leveski*, as prior claims of fraud regarding "bad employee compensation" would have encompassed *Leveski*'s more specific allegations and meant that her specific details "added nothing."

III. The issue is important and requires resolution by this Court.

In the FCA, "Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Cook Cty.*, 538 U.S. at 129. The FCA is "the primary vehicle" for "recouping losses suffered through fraud" against the government. H.R. Rep. No. 99-660, at 18 (1986). It "has been used more than any other [statute] in defending the Federal treasury against unscrupulous contractors and grantees." S. Rep. No. 99-345, at 4 (1986). In fiscal year 2015 alone, the government recovered $3.5 billion from FCA cases, $2.8 billion of which came in cases filed as *qui tam* actions, as most FCA cases are.[6]

Given the critical importance of the FCA and the centrality of its *qui tam* provisions to its effectiveness, this Court has recognized the need to resolve disagreements over the Act's construction and application, deciding ten significant FCA cases since 2000,[7] and granting review of

[6] Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015.

[7] *See Universal Health*, 136 S. Ct. 1989; *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015);
(*Footnote continued*)

another for this Term.[8] The attention this Court has given the statute reflects both the FCA's importance and the Court's acknowledgment that its "*qui tam* provisions present many interpretive challenges." *Kellogg Brown & Root*, 135 S. Ct. at 1979.

The interpretive challenge at issue here is particularly significant because it involves a gateway issue determining whether any FCA claim—even one that, as the district court found, properly pleads substantial allegations of fraud—may proceed at all. The public disclosure bar is now a much heavier impediment to FCA actions in the states that make up the Sixth Circuit than in the Seventh and Ninth Circuits. Because the Act provides jurisdiction over *qui tam* actions only in districts where a defendant "can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred," 31 U.S.C. § 3732(b), the obstacles to bringing suit—or, viewed from another perspective, the protections for defendants—imposed by the public disclosure bar will depend on where defendants operate or commit fraud.

That lack of uniformity is troubling because it involves a provision critical to effectuating Congress's intended balance between encouraging beneficial efforts to assist in recovering federal monies and discouraging "parasitic" litigation that does not advance the FCA's goals. *See Schindler Elevator*, 563 U.S. at 413; *Graham*

Schindler Elevator, 563 U.S. 401; *Graham Cty.*, 559 U.S. 280; *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009); *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008); *Rockwell*, 549 U.S. 457; *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005); *Cook Cty.*, 538 U.S. 119; *Stevens*, 529 U.S. 765.

[8] *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, No. 15-513 (cert. granted May 31, 2016).

Cty., 559 U.S. at 295. The importance, and difficulty, of achieving that balance is reflected in the many occasions when this Court has been forced to address interpretive issues regarding the public disclosure bar that divided the lower courts.[9] Plaintiffs and defendants alike require guidance and certainty on the critical question presented by this petition.

Reviewing this case to resolve the lower courts' disagreement is especially appropriate because the rule adopted by the Sixth Circuit led it to a grievously erroneous decision here: The court held that ABLE's lawsuit was barred by disclosures that do not even hint at the fraud alleged in the complaint. No one reading the Interagency Review or the OCC consent order would have any reason to suspect that U.S. Bank had committed fraud against the FHA program by falsely certifying compliance with loss-mitigation requirements. The disclosures in those documents never touch on the loss-mitigation rules, describe no conduct that would violate them, and say nothing at all about the FHA program. And the court compounded its error by finding that ABLE's specific allegations—without which a claim of fraud against the FHA would not have been possible—did not even add anything material to the public disclosures. This case is a classic instance of a bad reading of the law leading to an indefensible result.

That result substantially distorts the balance Congress attempted to draw. The "touchstone" of the bar's "generally broad scope" has always been "public disclosure." *Schindler Elevator*, 563 U.S. at 408, 410. The Sixth

[9] *See Schindler Elevator*, 563 U.S. 401; *Graham Cty.*, 559 U.S. 280; *Rockwell*, 549 U.S. 457; *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Marcus*, 317 US. 537.

Circuit's construction of the statute loses sight of that touchstone by allowing generic allegations of wrongdoing to substitute for the specific disclosures required by the statute, and barring actions involving allegations and transactions that have never been publicly disclosed in any meaningful sense. That reading of the statute prevents it from accomplishing, in the end, what it is supposed to do: "allow relators who provide the Government with genuinely new and material information of fraud to move forward with their *qui tam* suits." *Mateski*, 816 F.3d at 579; *accord Leveski*, 719 F.3d at 831.

Restoring the balance is a job for this Court. Congress has spoken clearly by expressly limiting the bar to actions based on allegations "substantially the same" as those already disclosed and providing that an action that "materially adds" to publicly disclosed information may proceed. 31 U.S.C. § 3730(e)(4). Yet the Sixth Circuit read the statute to bar an action based on *substantially different* disclosures, even when the relator's allegations reveal fraud with specificity not remotely found in those disclosures. That misreading of the law—to which the Sixth Circuit adhered even when informed that it has been explicitly rejected by other circuits—demands review by this Court.

CONCLUSION

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

Respectfully submitted,

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