No. 16-130

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

PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

The brief of the United States all but concedes that the decision below is indefensible on the merits. And it does not dispute that this case provides the Court a clean opportunity to address a legal question concerning the proper application of the public disclosure bar of the False Claims Act (FCA) to undisputed facts. It nonetheless argues that this Court should deny certiorari because the Sixth Circuit did not acknowledge the conflict between the legal standard it applied and the one applied by the Seventh and Ninth Circuits. The government's own analysis of the decision below and the disclosures on which it was based, however, casts the reality of the conflict into sharp relief.

As the government's brief explains, the public disclosures in this case did not reveal any violations of FHA loss-mitigation requirements or fraudulent claims for FHA insurance, let alone any of the particulars of the specific fraudulent scheme alleged here. The Sixth Circuit's decision rested on the view that the public disclosure of generalized allegations of unsound banking practices broadly related to mortgages "encompasses" any specific allegations of fraud relating to that vast subject-matter. U.S. Br. 8 (quoting Pet. App. 7a–8a).

The Seventh Circuit has repeatedly rejected this capacious view of the public disclosure bar. Indeed, in *United States ex rel. Goldberg v. Rush University Medical Center*, 680 F.3d 933 (7th Cir. 2012), it reversed a district court decision premised on exactly the same "encompasses" standard Sixth Circuit applied here. The Seventh Circuit held instead that the public disclosure bar is triggered only by disclosures "that a particular [defendant] had committed a particular fraud in a particular way." *Id.* at 935. Likewise, in *United States ex rel.*

Mateski v. Raytheon Co., 816 F.3d 565 (9th Cir. 2016), the Ninth Circuit held that the bar is *not* triggered by generalized public allegations of wrongdoing that cover particular fraud claims, but comes into play only when a disclosure puts the government on notice of "specific areas of fraud alleged" in a *qui tam* action. *Id.* at 579.

The government does not contend that the public disclosures here indicated that U.S. Bank committed any particular fraud in a particular way, nor does it otherwise seriously suggest that the outcome below could be sustained under the rule applied by the Seventh and Ninth Circuits. Instead, it attempts to paper over the conflict. The government notes that the Sixth Circuit did not, in so many words, disagree with the other circuits' admonitions against applying the public disclosure bar at the "highest level of generality." And the government observes that the circuits agree on some general principles about application of the bar. But the government does not account for the statements in the lower court's opinion that show that it was applying a different rule of law, not simply reaching an inexplicably wrong decision under a common standard. This Court should grant certiorari to resolve this important conflict.

ARGUMENT

1. The government's brief confirms that the Sixth Circuit's invocation of the public disclosure bar rested exclusively on the Interagency Review and the consent decree between U.S. Bank and the Office of the Comptroller of the Currency. And the government's brief explains in considerable detail that neither source said anything about whether U.S. Bank had violated FHA loss-mitigation requirements, including the requirement of face-to-face meetings with borrowers before foreclosure, let alone about whether U.S. Bank made claims for FHA

insurance payments that falsely represented compliance with those requirements. U.S. Br. 6, 16–18. Indeed, the government goes further, acknowledging that neither the Review nor the consent order "specifically discloses loss-mitigation failures by respondent"—inside or outside of the FHA program. U.S. Br. 18.

The government thus concedes that "petitioner may be correct … that 'neither [document] identified the practices that form the basis of [petitioner's] *qui tam* action.'" U.S. Br. 18. (quoting Pet. 18). The government half-heartedly suggests that "reading the two documents together may convey a different impression," and that "the court of appeals could legitimately have interpreted the documents as collectively overlapping with the complaint's allegations to a greater degree than either would have separately." U.S. Br. 18–19. But the government neither points to any features of the disclosures supporting the "legitimacy" of such an "interpretation," nor offers any logical explanation for how such a "reading" could possibly be correct. A report about industry-wide practices that does not allege that *any* industry member violated FHA loss-mitigation requirements or otherwise defrauded the FHA adds nothing conveying even an "impression" of fraud to a consent decree that likewise alleges no violation of FHA loss-mitigation requirements or fraud on the FHA by U.S. Bank. Zero plus zero is still zero, no matter how impressionistically one tries to sum them up.

2. Despite conceding that the public disclosures did not say *anything* about the specific fraud alleged in the complaint, the government contends that the Sixth Circuit's application of the public disclosure bar to dismiss the complaint is consistent with the line of Seventh and Ninth Circuit decisions limiting the bar to cases where

the "particular" or "specific" fraud alleged has been disclosed. *Goldberg*, 680 F.3d at 935; *Mateski*, 816 F.3d at 577; *see also* Pet. 26–29. The government's denial of the conflict rests in large part on its observation that the Seventh and Ninth Circuit cases say that courts applying the bar should not view allegations "at the highest level of generality," and the Sixth Circuit here did not explicitly say that courts should apply the bar "at a high level of generality (let alone at the 'highest level of generality')." U.S. Br. 13.

The government's implicit suggestion that decisions do not conflict unless they expressly acknowledge disagreement or frame their opposing rules in terms that mirror one another is unexplained and unpersuasive. Accepting the view that a court could split from the Seventh and Ninth Circuit standard only by explicitly embracing the absurd proposition that the public disclosure bar must be applied "at the highest level of generality" would allow lower courts (like the Sixth Circuit here) to apply rules that are different in substance and yield opposite outcomes, as long as they avoid the most direct semantic opposition.

Here, not only the result reached, but also the language the Sixth Circuit used to express its rule, makes abundantly clear that the court applied the bar at a level of generality much higher than permitted by the Seventh and Ninth Circuit precedents. The Sixth Circuit explicitly stated that the bar applies when a "broader, publicly disclosed category" of wrongdoing "encompasses" a *qui tam* relator's "narrower category." Pet. App. 8a. The court therefore found that it "doesn't matter" that "no public disclosures of this type of fraud … were ever made." Pet. App. 9a.

Those statements—which the government acknowledges in its statement of the case and cannot explain away in its argument—express a standard directly opposite to the Seventh and Ninth Circuit rule that a public disclosure must provide notice of the *particular* fraud committed by *particular* defendants. In adopting that rule, both the Seventh and Ninth Circuits reversed district court decisions that used language just like that of the Sixth Circuit here. In *Goldberg*, the Seventh Circuit reversed a district court that had held (like the Sixth Circuit here) that the bar applied because general public disclosures "encompassed" the *qui tam* complaint's allegations. 748 F. Supp. 2d 917, 927 (N.D. Ill. 2010). Likewise, the Ninth Circuit in *Mateski* reversed a decision that had dismissed a *qui tam* action because the district court found that general public allegations of misconduct "cover[ed]" the *qui tam* action's specific allegations of fraud. 2013 WL 692798, at *3 (C.D. Cal. Feb. 26, 2013). In both cases, the courts of appeals adopted their standard of specificity to explain their rejection of rulings premised on a standard identical to the Sixth Circuit's.

3. The government also asserts that there is no conflict because the Sixth, Seventh, and Ninth Circuits all apply the rule that a public disclosure must put the government on notice of the "possibility" of fraud. The government ignores, however, that the circuits employ conflicting "possibility" standards.

Under the Sixth Circuit's version of the standard, it "doesn't matter" that there were "no public disclosures of [the] type of fraud" at issue, as long as public disclosures suggest a vague possibility of some kind of fraud "surrounding the transaction." Pet. App. 9a. In sharp contrast, under the Ninth Circuit's standard, "prior public reports [that] provided enough information to pursue

an investigation into *some* fraud" are not enough to trigger the bar, if they did not "alert the Government to the specific areas of fraud" that form the basis of a *qui tam* action. *Mateski*, 861 F.3d at 579 (internal quotation marks and ellipsis omitted). Similarly, in the Seventh Circuit, even disclosures that the defendant was engaged in one form of outright fraud do not suffice to put the government on notice of the possibility that the defendant was engaged in a variant of that fraud. *See*, *e.g.*, *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818 (7th Cir. 2013).

The government offers no argument that the disclosures here, even if charitably read to reveal the possibility of *some* fraud, put it on notice of the possibility of the specific scheme alleged in the *qui tam* complaint. The disclosures revealed a "possibility" of fraud only in the sense that any disclosure that industry participants may have done something wrong leaves open the possibility that one of them may have done *other* things wrong, too. Under the Seventh and Ninth Circuit's standard, such a speculative, generic "possibility" does not suffice.

4. The government's assertion that "[t]he different outcomes in the cases cited by petitioner stem not from a disagreement about the proper legal standard, but rather from differences in the particular facts of each case," U.S. Br. 12–13, flies in the face of its own description of the cases and its analysis of the disclosures at issue here. The government recognizes that in the Seventh and Ninth Circuit cases, the *qui tam* relators supplied "vital details" by making allegations, absent in the prior disclosures, that "a particular defendant had committed a particular fraud in a particular way." U.S. Br. 13 (citation omitted). The government's account of the facts shows that the same is true here. Indeed, the *qui tam*

relator here supplied even more "vital details" concerning particulars of the fraud that were not in the public disclosures than did the relators in the Seventh and Ninth Circuit cases—because there *were no* particulars in the public disclosures on which the Sixth Circuit relied. *See* U.S. Br. 16–18.

Tellingly, the government's attempt to reconcile the decisions requires it not only to ignore its own account of the facts, but also to put words into the Sixth Circuit's mouth. The government says that the Sixth Circuit held (even if erroneously) that the disclosures in this case "'put the government (and everyone else) on notice' of the specific type of fraud at issue in the complaint." U.S. Br. 15 (quoting Pet. App. 6a). But the key words in that passage—"specific type of fraud"—are the government's, not the Sixth Circuit's. What the Sixth Circuit really held was that *it made no difference* whether the public disclosures disclosed even the "*type* of fraud" alleged by the relator, Pet. App. 9a (emphasis added), let alone the *specific* type of fraud. That is, the Sixth Circuit explicitly rejected the rule that the government now claims it applied (and that the government rightly recognizes that other circuits apply).

In essence, the government's view implausibly suggests that the Sixth Circuit made an inexplicable error in analyzing the public disclosures at issue under a standard that could not possibly support the result the court reached. Even if that were the case, the glaring inconsistency in results, and the evident difficulty the Sixth Circuit had in applying the standard, would reflect a need for this Court's guidance that counsels in favor of plenary review, if not summary reversal.

The premise of our request for review, however, is that the Sixth Circuit meant what it said in holding that

it "doesn't matter" whether the particular fraud alleged by a *qui tam* plaintiff has been subject to public disclosure, as long as that fraudulent conduct is somehow "encompassed" by the subject-matter of highly general assertions of wrongdoing. That the court stuck to its guns on rehearing when ABLE explained that its result could not be squared with the Seventh Circuit's standard tends to confirm that it was deliberately applying a different legal standard. This Court should grant certiorari to resolve the resulting intercircuit conflict.

5. Although the government denies the conflict, its brief confirms that this case presents a suitable vehicle for deciding the scope of the current version of the public disclosure bar. The government agrees that under both the prior version of the statute and the current one, the determinative issue is whether the *qui tam* action's allegations are substantially the same as those in the prior public disclosures. U.S. Br. 10–11. It also acknowledges that even if there were any material difference between the old version and the new, this case would give the Court the "opportunity to pass on the post-amendment version, which has greater prospective significance," because the Sixth Circuit applied that version and "at least some of petitioner's allegations indisputably relate to conduct subsequent to the amendment." U.S. Br. 11 n.2.

The government also does not contest that consideration of the "original source" exception would be appropriate if this Court were to grant review. Indeed, the government's analysis of the public disclosures here makes apparent that, even if the disclosures somehow barely revealed enough about the fraud alleged to trigger the public disclosure bar, ABLE's allegations "materially add[] to the publicly disclosed allegations," 31 U.S.C. § 3730(e)(4)(B), by supplying very specific infor-

mation about the nature of U.S. Bank's violations without which there could be no fraud claim.

6. Finally, the government is wrong to suggest that a proper and consistent interpretation of the public disclosure bar is unimportant because the government can always prevent a dismissal based on the bar by opposing it, *see* 31 U.S.C. § 3730(e)(4)(A), and can also move for dismissal of any *qui tam* action if it so chooses. 31 U.S.C. § 3730(c)(2)(A). These remedies are relatively rarely invoked. In most cases, as in this one, the United States declines to place a decisive thumb on the scales, and neither takes over the suit, moves to dismiss it, nor expresses a position on whether the public disclosure bar applies or on the ultimate merits of the action. Such cases, however, remain of substantial importance, as the government's filing of multiple amicus briefs and statements of interest concerning other issues in this case reflects. Meritorious *qui tam* claims prosecuted without government involvement annually return tens of millions of dollars to the Treasury, including $1.1 billion in 2015 alone.[1]

The interests of the government and the public demand that such cases be decided consistently and in accordance with the congressional policy of "encourag[ing] more private enforcement suits … to strengthen the Government's hand in fighting false claims." *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 440 (2016) (citation omitted). Thus, as the government recognized below, "[t]he United States has a substantial interest in the proper interpretation of the FCA" even where, as here, it has taken no position on the ultimate merits of a claim. Br. for United States as Amicus Curiae 2, *ABLE v. U.S. Bank*, No. 15-3654 (6th Cir.).

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[1] https://www.justice.gov/opa/file/796866/download.

Similarly, in *Rigsby*, the government informed the Court that its ability to prevent dismissals for violation of the Act's sealing requirement by intervening was not sufficient to protect the interests served by the FCA "because the government relies on the relator." Oral Argument Tr. 47, No. 15-513 (Nov. 1, 2016). Indeed, although the government there "just didn't say anything" to the district court about whether it should dismiss, *id.* at 48, the government maintained that it had a "substantial interest" in a proper application of the Act. *See* Br. for U.S. as Amicus Curiae 1, *Rigsby*, No. 15-513 (U.S.).

In this case, as in *Rigsby*, requiring the government to "expend resources" to prevent an improper dismissal may impair the government's interests, including by "potentially handing [the defendant] an unjust windfall." *Id.* at 31. Moreover, allowing the circuits to maintain divergent interpretations of the public disclosure bar will lead to forum-shopping and uncertainty for litigants—relators and defendants alike—about the viability of cases. That the government's ability to prevent a dismissal may "*partially* mitigate[]" the harmful effects of conflicting constructions of the public disclosure bar, U.S. Br. 19 (emphasis added), is therefore not a sufficient reason to deny review here.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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