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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where public sources have disclosed and thus placed the government on notice of a particular alleged fraud by a particular company, can a qui tam relator evade the False Claims Act's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A), by limiting its complaint to a subset of that fraud?

CORPORATE DISCLOSURE STATEMENT

U.S. Bank N.A. is a wholly owned subsidiary of U.S. Bancorp. U.S. Bancorp has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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BRIEF IN OPPOSITION

Respondent U.S. Bank N.A. (U.S. Bank) respectfully submits that the petition for a writ of certiorari should be denied.

INTRODUCTION

The public disclosure bar of the False Claims Act (FCA) prevents qui tam relators from obtaining a bounty at public expense unless they have earned that reward, by bringing to the government's attention a fraud that the government could not have discerned from public sources. The bar thus reserves bounties "for whistle-blowing insiders," while "discourag[ing] …

opportunistic plaintiffs who have no significant information to contribute of their own." *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) (internal quotation marks omitted).

Petitioner Advocates for Basic Legal Equality, Inc. (ABLE) is an advocacy organization that possesses no inside knowledge about U.S. Bank's mortgage lending or foreclosure practices. ABLE instead alleges that by speaking with people whose loans had been foreclosed, it learned that in three instances U.S. Bank supposedly did not adhere to "loss mitigation" practices required by federal regulation. From those three anecdotes, ABLE alleges on information and belief a sweeping fraud across more than 22,000 foreclosures. It seeks treble damages and a civil penalty for each claim.

The problem, as the courts below recognized, is that public sources—indeed, the government's own investigation and enforcement actions—had already publicly disclosed and thus placed the government on notice of ABLE's allegations. Several federal agencies had published a report "not[ing] that various banks, including U.S. Bank, had failed to take a variety of loss mitigation measures." Pet. App. 5a-6a. And U.S. Bank had entered into a Consent Order with the Office of the Comptroller of the Currency (OCC), which required the Bank to comply with loss-mitigation requirements (*id.* 5a) and specifically addressed requirements imposed by the Federal Housing Administration, which are the subject of ABLE's complaint (*see id.* 76a). The district court relied on those disclosures to dismiss ABLE's action under the public disclosure bar, and the Sixth Circuit unanimously affirmed. Both courts correctly applied widely agreed-upon standards in reaching that result.

ABLE now claims that the Sixth Circuit's decision conflicts with decisions by the Seventh and Ninth Circuits. But no such conflict exists. The decisions on which ABLE relies concern a situation not present here, in which a relator alleges a different *type* of fraud from the one revealed by public disclosures. The Sixth Circuit, by contrast, held that ABLE's pleadings assert the same type of alleged fraud that was publicly disclosed, and that ABLE's efforts to frame its claims more narrowly or specifically do not enable it to evade the statutory bar. Not only does that holding implicate no circuit conflict, but the Seventh and Ninth Circuits have made clear (in decisions not addressed by ABLE) that they agree with the Sixth Circuit that a relator cannot evade the public disclosure bar by pleading a more specific or detailed version of an alleged fraud that has been publicly disclosed. Other courts of appeals embrace that principle as well.

Notwithstanding ABLE's efforts to frame this case as implicating a legal conflict, ABLE's argument boils down to its disagreement with the lower courts' determination that the particular public disclosures in this case sufficed to put the government on notice of the narrower fraud alleged in ABLE's complaint. Such factbound arguments do not warrant review, particularly in a case where the court of appeals applied the correct rule and reached the correct result. The petition should be denied.

STATEMENT

1. The Federal Housing Administration (FHA) administers mortgage insurance programs designed to offer banks an incentive to lend to borrowers who might not otherwise qualify. Pet. App. 13a. Those programs allow lenders to claim reimbursement from the

government when a borrower defaults on an insured loan. *Id.*

Participating lenders must agree to comply with various regulations of the U.S. Department of Housing and Urban Development (HUD), including by taking measures to mitigate the risk of default on insured loans—so-called "loss mitigation measures." Pet. App. 13a; *see* 12 U.S.C. § 1715u(a); 24 C.F.R. §§ 203.500, .501. For example, a lender generally "must have a face-to-face interview with the [borrower], or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." 24 C.F.R. § 203.604(b). And "[b]efore four full monthly installments due on the mortgage have become unpaid," the lender must "evaluate" various "loss mitigation techniques"—such as "deeds in lieu of foreclosure," "pre-foreclosure sales," or "partial claims"—"to determine which is appropriate." *Id.* §§ 203.501, 203.605(a). U.S. Bank has annually certified its compliance with FHA requirements. Pet. App. 14a-15a.

2. Following the 2008 financial crisis, the government began to scrutinize the mortgage underwriting, servicing, and foreclosure practices of the nation's largest consumer lenders, including U.S. Bank.

One of the key reviews was performed by three federal agencies—the Federal Reserve System, the OCC, and the Office of Thrift Supervision—which examined foreclosures by U.S. Bank and thirteen other lenders. The product of that review was an April 2011 report (the Interagency Report) that identified "critical weaknesses in servicers' foreclosure governance processes." Pet. App. 42a; *see also id.* 36a-70a (full report). The agencies specifically examined the banks' loss-mitigation practices, including whether they "were in

direct communication with borrowers and whether loss-mitigation actions, including loan modifications, were considered as alternatives to foreclosure." *Id.* 42a. Although they "found evidence that servicers *generally* attempted to contact distressed borrowers prior to initiating the foreclosure process" (*id.* 43a (emphasis added)), the agencies determined that the banks needed to bolster their loss-mitigation processes. The report stated that the agencies would require banks to "[e]stablish a compliance program to ensure mortgage-servicing and foreclosure operations, including loss mitigation and loan modification, comply with all applicable legal requirements and supervisory guidance." *Id.* 66a.

Consistent with the Interagency Report, U.S. Bank contemporaneously entered into a Consent Order with the OCC. Pet. App. 71a-104a. The Order stated that the OCC had "identified certain deficiencies ... in the Bank's initiation and handling of foreclosure proceedings." *Id.* 71a. The OCC therefore required the Bank to implement "governance and controls to ensure compliance with all applicable federal and state laws," including requirements imposed by "the Federal Housing Administration." *Id.* 76a; *see also id.* (requiring a "compliance program to ensure that" the Bank's "foreclosure operations, including Loss Mitigation and loan modification, comply with all applicable Legal Requirements"). The OCC also ordered the Bank to develop a plan "for ensuring effective coordination of *communications with borrowers ... related to Loss Mitigation or loan modification and foreclosure activities*," so as "to ensure" that the Bank would make "reasonable and good faith efforts, consistent with applicable Legal Requirements," regarding "Loss Mitigation and foreclosure prevention for delinquent loans." *Id.* 89a-90a (emphasis added).

Thus, contrary to ABLE's characterization of these public documents (Pet. 12-15), the Consent Order and the Interagency Report quite clearly addressed U.S. Bank's compliance with loss-mitigation requirements in particular. ABLE is most notably incorrect in asserting (at 15) that the Consent Order does not "mention the FHA insurance program or its regulatory requirements." In fact, the Consent Order required U.S. Bank to implement "governance and controls to ensure compliance with all applicable federal and state laws," including requirements imposed by "*the Federal Housing Administration*." Pet. App. 76a (emphasis added).

3. ABLE is "a non-profit organization devoted to advocating for the interests of low-income individuals." Pet. 2. In April 2013, ABLE filed this suit under the FCA's qui tam provisions, 31 U.S.C. § 3730. Those provisions allow relators to pursue fraud claims on behalf of the United States in exchange for a share of any recovery.

ABLE's central claim is that U.S. Bank foreclosed on FHA-insured loans without having complied with HUD's loss-mitigation requirements and that it then submitted insurance claims to the government, misrepresenting that it had complied with the requirements. Pet. App. 16a-17a.[1] ABLE makes this claim without possessing any inside information about U.S. Bank or its foreclosure practices. Instead, ABLE alleges that it "consulted with 'many people' whose mortgage loans were foreclosed by U.S. Bank." *Id.* 16a.

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[1] The complaint also includes a claim that U.S. Bank made false records and statements in connection with obligations it owed to the government. Pet. 11 n.3. The district court dismissed this "reverse false claim theory" (Pet. App. 26a), and the petition does not challenge that decision.

The complaint identifies three properties on which U.S. Bank allegedly foreclosed and claimed government insurance without meeting the borrowers face-to-face or evaluating loss mitigation options. Pet. App. 16a. On the basis of those three limited examples, which occurred in Ohio in 2008 and 2009, the complaint alleges on information and belief that U.S. Bank committed fraud with respect to more than 22,000 nationwide foreclosures over a ten-year period—and that U.S. Bank thus claimed from the government more than $2.3 billion in insurance benefits to which it was not entitled. *Id.* 16a-17a; *see* Compl., Dist. Ct. Dkt. 1 (Apr. 1, 2013).

After investigating ABLE's allegations, the government declined to intervene. Pet. App. 17a.

U.S. Bank moved to dismiss the action on several grounds, including that it is precluded by the FCA's public disclosure bar. The bar prevents relators from pursuing qui tam litigation (and thus a share of the government's recovery) unless they have brought to the government's attention a potential fraud that it could not have discerned from public sources. *See infra* pp. 23-24 & n.8. Because ABLE's allegations both pre- and post-date the 2010 amendments to the public disclosure bar, both versions of the statute are potentially relevant here. *See Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010) (amendment is not retroactive).[2]

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[2] The pre-amendment version provides that "[n]o court shall have jurisdiction over [a qui tam action] based upon the public disclosure of allegations or transactions in" certain types of sources, "unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (2009). It defines an "original source" as "an individual who has direct and independent knowledge of the in-

The government filed statements of interest asserting that ABLE's false certification theory was viable. Dist. Ct. Dkt. Nos. 34 (Feb. 12, 2015), 43 (Feb. 27, 2015). The government took no position, however, on whether the public disclosure bar required dismissal.

4. The district court held that this action is barred by several public disclosures.

First, the court observed that "[i]n the wake of the mortgage crisis, the public was inundated with media coverage from nearly every news outlet reporting allegations of mortgagees' servicing failures and improper foreclosures." Pet. App. 28a (citing sources). "[N]ews

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formation on which the allegations are based and has voluntarily provided the information to the Government before filing an action … based on the information." *Id.* § 3730(e)(4)(B).

The post-amendment version provides that "[t]he court shall dismiss [a qui tam action or claim], unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" in specified sources, "unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). It defines an "original source" as "an individual who either ([1]) prior to a public disclosure … , 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 [a qui tam] action." *Id.* § 3730(e)(4)(B).

Before the amendment, most courts of appeals (including the Sixth Circuit) had interpreted "based upon" to mean "substantially similar to," so the amendment in that respect simply codified the majority rule. *See, e.g., United States ex rel. Winkelman* v. *CVS Caremark Corp.*, __ F.3d __, 2016 WL 3568145, at *5 n.4 (1st Cir. June 30, 2016); *United States ex rel. Ondis* v. *City of Woonsocket*, 587 F.3d 49, 57 (1st Cir. 2009); *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 518 (6th Cir. 2009); Pet. 8.

media" qualify as public sources under the pre- and post-amendment versions of the statute. 31 U.S.C. § 3730(e)(4)(A) (2009); (e)(4)(A)(iii) (current version).

Second, the court noted that "[t]he specific issue of whether mortgagees complied with HUD's loss mitigation requirement of meeting face-to-face with borrowers has been litigated nationwide, including in Ohio state courts against U.S. Bank." Pet. App. 28a. The court specifically relied (*id.*) on *U.S. Bank, N.A.* v. *Detweiler*, 946 N.E.2d 777 (Ohio Ct. App. 2010), in which the Ohio Court of Appeals ruled on summary judgment that U.S. Bank had "made no attempt to establish that it complied with the regulation that it have a face-to-face interview with the mortgagor, or made a reasonable effort to arrange the interview, before bringing [a] foreclosure action." *Id.* at 784. "[C]ivil … hearing[s]" in state court qualify as public disclosures under the pre-amendment version of the statute. 31 U.S.C. § 3730(e)(4)(A) (2009).[3]

Third, the district court explained that "the government was on notice of allegations that U.S. Bank did not comply with HUD's loss mitigation requirements," because of the Consent Order "concluding that U.S. Bank [had] 'engaged in unsafe or unsound banking practices' by 'fail[ing] to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training.'" Pet. App. 29a; *see supra* p. 5. The court observed that the Consent Order required U.S. Bank to "'achieve[] and maintain[] effective mortgage servicing, foreclosure,

[3] Some of ABLE's allegations—like the conduct at issue in *Detweiler*—precede the 2010 amendments to the public disclosure bar. *See* 946 N.E.2d at 778; *supra* p. 7 & n.2.

and loss mitigation activities,'" including by adopting "'controls to ensure compliance with … servicing guides of … the Federal Housing Administration.'" Pet. App. 29a. Federal administrative proceedings qualify as public disclosures under both the pre- and post-amendment versions of the statute. 31 U.S.C. § 3730(e)(4)(A) (2009); (e)(4)(A)(i) (current version).

Fourth, the court explained that "notice of U.S. Bank's loss mitigation violations was published in" the April 2011 Interagency Report, which found that "the servicers' foreclosure processes were under-developed, insufficient, and inadequate." Pet. App. 29a; *see supra* pp. 4-5. Federal reports qualify as public disclosures under both versions of the statute. 31 U.S.C. § 3730(e)(4)(A) (2009); (e)(4)(A)(ii) (current version).

The court held that those disclosures together provided "sufficient information … regarding U.S. Bank's loss mitigation failures from which the Government could infer the alleged fraudulent transactions referenced in the Complaint." Pet. App. 31a.

The court further held that ABLE cannot benefit from the original-source exception to the public disclosure bar. Observing that "ABLE is not the model whistleblowing insider contemplated by the FCA," the court held that "ABLE's knowledge of U.S. Bank's alleged false claims is neither direct nor independent, and adds nothing to the public disclosures that have already been made." Pet. App. 32a.

5. The Sixth Circuit affirmed. Contrary to ABLE's repeated suggestion (at 3, 18, 25, 27), the Sixth Circuit did not rely on the sweeping premise that the public disclosures revealed U.S. Bank had engaged in "'bad foreclosure practices.'" Rather, the Sixth Circuit carefully parsed the public disclosures and determined

that they revealed each material element of ABLE's allegations.[4]

First, the Sixth Circuit held that both the Consent Order and the Interagency Report "amply disclose[d] the allegation that U.S. Bank failed to engage in appropriate loss mitigation measures—the first premise of ABLE's claim." Pet. App. 6a. The court reasoned that the Consent Order "required U.S. Bank to implement … measures 'to ensure [that] reasonable and good faith efforts, consistent with applicable Legal Requirements, *are engaged in Loss Mitigation* and foreclosure prevention for delinquent loans.'" *Id.* 5a (emphasis added by the Sixth Circuit). And the Interagency Report "noted that various banks, including U.S. Bank, had failed to take a variety of loss mitigation measures." *Id.* 6a.

Second, the court held that the Consent Order and the Interagency Report similarly disclosed "[t]he second premise" of ABLE's claim, namely "that U.S. Bank committed fraud when it made false certifications about whether it had engaged in loss mitigation." Pet. App. 6a. The Consent Order "put[] the government on notice of the possibility of fraud," the court explained, because "[i]t required U.S. Bank to implement a … program … 'to ensure compliance with applicable laws, rules and court procedures.'" *Id.* (some internal quotation marks omitted). "This language," the court held, "put the government (and everyone else) on notice that

[4] The Sixth Circuit used the phrase "bad foreclosure practices" only in explaining why ABLE's allegations of three specific instances of non-compliance did not materially add to what the government could have inferred from the public disclosures. Pet. App. 7a ("How … could we say that these *three* incidents affected the government's decision-making? It *already* tried to remedy U.S. Bank's bad foreclosure practices in its 2011 consent decree.").

U.S. Bank allegedly had filed non-compliant documents." *Id.*

The court further held that ABLE cannot qualify as an "original source," because ABLE's allegations regarding three particular foreclosures "do not materially add to the thousands of prior problematic foreclosures already disclosed." Pet. App. 7a.[5]

ABLE argued before the Sixth Circuit that the Consent Order and Interagency Report should not preclude this action because they supposedly do not address *federally insured* mortgages, as distinct from other mortgages. The Sixth Circuit correctly rejected that theory. Even if "the consent order and the report do not directly mention federally insured mortgages," the court explained, that is simply "because they do not single out *any* type of mortgage." Pet. App. 7a-8a. Instead, both documents allege "that U.S. Bank failed to carry out" a broad "swath of 'loss mitigation and foreclosure prevention' procedures … in a manner 'consistent with applicable law and contracts.'" *Id.* 8a. And those "broader, publicly disclosed" allegations with respect to "a variety of mortgages[] encompass[] ABLE's narrower" allegations of fraud with respect to "federally insured mortgages." *Id.*

The court likewise explained that it does not matter whether the Consent Order and Interagency Report "dealt with loss mitigation measures in general," rather than "with specific types of loss mitigation

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[5] At ABLE's request, the court of appeals applied the post-amendment version of the public disclosure bar, including the supposedly "more lenient" version of the original-source exception, to all of ABLE's allegations. Pet. App. 4a. The court did so on the theory that if the complaint failed under the post-amendment version, it would also fail under the pre-amendment version. *Id.*

measures, such as face-to-face meetings," because "[t]he absence of face-to-face meetings is merely" one symptom of a broader form of non-compliance. Pet. App. 8a-9a.

The court of appeals observed that if ABLE were correct, the public disclosure bar would be a dead letter: "[O]ne could always—or at least nearly always—evade the public disclosure requirement by focusing the allegations in a second action on sub-classes of potential claims covered by the initial action. That's not how it works." Pet. App. 8a.

The Sixth Circuit denied ABLE's petition for rehearing en banc, without any judge requesting a vote. Pet. App. 35a.

REASONS FOR DENYING THE PETITION

ABLE has identified no legal question warranting review. There is no conflict between the opinion below and decisions of the Seventh and Ninth Circuits. Indeed, the Seventh and Ninth Circuits have made clear—in decisions largely ignored by ABLE—that they agree with the rule the Sixth Circuit applied. And even if ABLE were correct in asserting a division of authority, any such division would be too recent and shallow to warrant review at this time.

This Court's intervention is also unwarranted because the rule applied by the Sixth Circuit is correct. ABLE's proposed rule would undermine the public disclosure bar, which is an essential safeguard against parasitic efforts to claim a bounty from the public fisc without bringing to the government's attention any genuinely new information about a potential fraud.

I. ABLE HAS IDENTIFIED NO DIVISION OF AUTHORITY WARRANTING REVIEW

ABLE claims (at 19-22) that the Sixth Circuit's opinion conflicts with several decisions of the Seventh and Ninth Circuits. That is incorrect. The Seventh and Ninth Circuits have held that where a relator alleges a different *type* of fraud from what has been publicly disclosed, courts should not construe the disclosures and the relator's allegations in terms so general as to obviate the distinction. But those courts (and others) agree with the Sixth Circuit's holding that a relator may not evade the public disclosure bar by pleading a sub-class of the same type of alleged fraud that has been publicly disclosed.

Despite ABLE's efforts to shoehorn this case into an alleged division of authority, ABLE's petition at bottom challenges the lower courts' determination that the Consent Order and Interagency Report put the government on notice of the same type of fraud alleged in the Complaint. *Compare* Pet. 26 ("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."), *with* Pet. App. 9a (Sixth Circuit's holding that the Consent Order and Interagency Report did "put the government on notice of the possibility of fraud" (emphasis and internal quotation marks omitted)), *and id.* 31a (district court's holding that public disclosures enabled the government to "infer the alleged fraudulent transactions referenced in the Complaint"). Such factbound disputes do not warrant review.

A. The Seventh And Ninth Circuits Agree With The Sixth Circuit's Approach

ABLE's core contention (Pet. 19-21) is that the Sixth Circuit defied the Seventh and Ninth Circuits' admonition that courts should not construe allegations at too high a "level of generality" in applying the public disclosure bar. But the Seventh and Ninth Circuits have never used that amorphous phrase to mean what ABLE would like it to mean.

What those courts have held is that where a relator alleges a different *type* of fraud from what has been publicly disclosed, courts should not construe the disclosures and allegations so broadly as to obviate the distinction between the kind of fraud alleged and the kind of fraud disclosed. *See, e.g.*, *United States ex rel. Goldberg* v. *Rush Univ. Med. Ctr.*, 680 F.3d 933, 935 (7th Cir. 2012) ("[A] very high level of generality is inappropriate, because then disclosure of some frauds could end up blocking private challenges to many *different kinds* of fraud." (emphasis added)). For example, if a relator alleges a fraud having to do with airplanes, and public disclosures have revealed a fraud having to do with cars, the court should not bar the relator's suit on the theory that both the allegations and the disclosures concern motorized means of transport. After all, the government presumably would not think to investigate a potential fraud involving airplanes simply because it had learned of a potential fraud involving cars.

Nothing in the opinion below conflicts with that rule. Rather, the Sixth Circuit held that this action is barred because ABLE's allegations concern the *same* type of fraud revealed by public disclosures. As the Sixth Circuit explained, the public disclosures in this case addressed "a swath of 'loss mitigation and foreclo-

sure prevention' procedures that U.S. Bank" supposedly "failed to carry out in a manner 'consistent with applicable law and contracts,'" and that is precisely "what ABLE alleges"—*i.e.*, that "U.S. Bank did not engage in loss mitigation as required by law." Pet. App. 8a. ABLE's allegations simply address a sub-class of the universe of mortgages and loss-mitigation requirements addressed in the public disclosures, and thus are "encompasse[d]" by those disclosures. *Id.*

This case therefore does not implicate the Seventh and Ninth Circuits' concern. To continue the analogy above, this is not a case in which the disclosures concern cars and the relator's allegations concern airplanes; it is much more like a case in which the disclosures concern a particular make and model of car and the allegations single out the engine of that car. *Cf. Dingle* v. *BioPort Corp.*, 388 F.3d 209, 215 (6th Cir. 2004) (posing this hypothetical, and explaining that allowing a relator to pursue a suit about the engine "would not advance Congress' purpose" of "prosecut[ing] fraud of which the government is unaware"). The Sixth Circuit's holding—that a relator may not evade the public disclosure bar by pleading a subcategory of the same type of alleged fraud that has been publicly disclosed—is entirely consistent with the decisions of the Seventh and Ninth Circuits.

Seventh Circuit. ABLE never mentions the Seventh Circuit's decision in *United States ex rel. Bogina* v. *Medline Industries, Inc.*, 809 F.3d 365 (7th Cir. 2016), even though the opinion below relied on it (Pet. App. 9a) and even though it post-dates all but one of the Seventh Circuit authorities on which ABLE relies. That omission is conspicuous because *Bogina* in fact establishes that the Seventh Circuit would reach the same result in this case as the Sixth Circuit did.

The relator in *Bogina* alleged that a supplier of medical equipment and a chain of nursing homes committed fraud when the supplier paid bribes and kickbacks to induce the nursing homes to buy its products. A prior, publicly disclosed qui tam action had alleged that the supplier paid bribes and kickbacks, but the allegations in *Bogina* went beyond the public disclosures in several respects. The prior action focused on bribes and kickbacks to hospitals, not nursing homes, and the settlement of the prior action related only to the Medicare Part A and Medicaid insurance programs, whereas the *Bogina* relator also alleged fraud as to several other insurance programs.

The Seventh Circuit held that those differences were insufficient for the relator's claims to proceed. A relator cannot avoid the public disclosure bar, the court explained, "if he merely 'adds details' to what is already known in outline." *Bogina*, 809 F.3d at 370 (quoting *Goldberg*, 680 F.3d at 934). The court reasoned that the prior action placed the government "on notice of" the relator's allegations because the relator told the government nothing it could not have inferred from the allegations disclosed in the prior action: "It was common knowledge that [the supplier] sold to nursing homes as well as to hospitals, so if it provided kickbacks to the latter, why not to the former as well? … And why offer bribes and kickbacks for products whose buyers would be reimbursed … by Medicare Part A, but not for products covered by other federal programs?" *Id.*

ABLE's complaint fails under *Bogina*, as the Sixth Circuit recognized. *See* Pet. App. 9a (relying on *Bogina*). The public disclosures in this case placed the government on notice of ABLE's allegations in precisely the same manner as in *Bogina*, even if the disclosures here did "not directly mention federally insured mort-

gages" (*id.* 7a) and even if they "dealt with loss mitigation measures in general" rather than "with specific types of loss mitigation measures" (*id.* 8a-9a). To paraphrase the Seventh Circuit, the government could readily have inferred ABLE's allegations from the public disclosures: If U.S. Bank did not fulfill loss-mitigation requirements for mortgages in general, why would it have fulfilled those requirements as to federally insured mortgages in particular? And if it did not fulfill loss-mitigation requirements in general, why would it have fulfilled the specific requirement of face-to-face meetings?

ABLE not only fails to address *Bogina*; it cites no Seventh Circuit authority that is actually inconsistent with the Sixth Circuit's decision in this case.

ABLE relies on *Goldberg*, 680 F.3d 933, and *Leveski* v. *ITT Educational Services, Inc.*, 719 F.3d 818 (7th Cir. 2013). But the relators in both cases alleged different *types* of fraud from what had been publicly disclosed. In *Goldberg*, where public disclosures revealed that hospitals were billing the government for unsupervised work by medical residents, the court held that those disclosures did not bar the relators' allegations that residents had been inadequately supervised. 680 F.3d at 935-936; *see* Pet. 26 ("The Seventh Circuit reversed because billing for *improperly supervised* services was a different fraud from billing for *unsupervised* services."). Likewise, *Leveski* held that a relator could pursue allegations that a for-profit educational institution had unlawfully incentivized employees to recruit students, because the relator alleged "a much more sophisticated" type of fraud than the one that been publicly disclosed. 719 F.3d at 830; *see id.* at 831 ("[T]he sham compensation scheme and the financial aid

violations alleged by Leveski are different than the outright quota system alleged by [prior] relators.").

In this context, *Goldberg* and *Leveski* stated "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). But as the facts of those cases make clear, the Seventh Circuit's concern was about construing allegations and disclosures so generally as to preclude relators from pursuing allegations of one type of fraud where public disclosures reveal a different type. Neither *Goldberg* nor *Leveski* nor any other Seventh Circuit decision holds that a relator may proceed where—as the Sixth Circuit held in this case—the relator alleges a sub-class of the *same* type of fraud as has been publicly disclosed.[6]

ABLE's other Seventh Circuit authorities are also inapposite. In *United States ex rel. Absher* v. *Momence Meadows Nursing Center, Inc.*, 764 F.3d 699 (7th Cir. 2014), the court held that the public disclosure bar did not prevent a relator from pursuing allegations that a nursing home had defrauded the government by submitting claims for inadequate care. The court explained that even though public disclosures revealed the inadequate care, they did not reveal an "essential element of a fraud claim," namely that the nursing home had acted

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[6] ABLE repeatedly cites *Goldberg* (at 1, 20, 23) for the proposition that public disclosures do not preclude subsequent qui tam litigation unless they reveal that a "particular [defendant] … committed a particular fraud in a particular way." *Goldberg*, 680 F.3d at 935. But *Goldberg* uses that language only in describing a prior case, *United States ex rel. Baltazar* v. *Warden*, 635 F.3d 866 (7th Cir. 2011), which is inapposite for the reasons discussed below.

with the requisite scienter by "misrepresent[ing] the standard of care in submitting claims for payment." *Id.* at 708-709; *see also id.* at 709 n.10. That issue is completely distinct from the one presented here, and the opinion below certainly does not conflict with *Absher*'s holding that public disclosures must reveal *all* the material elements of a fraud claim, not just some, in order to preclude the claim. Rather, the Sixth Circuit ruled that the material elements of ABLE's fraud claim *were* publicly disclosed. *See* Pet. App. 5a-6a (separately addressing ABLE's allegation that U.S. Bank "failed to take required loss mitigation measures" and its allegation that U.S. Bank "committed fraud by falsely certifying … that it would and did engage in those loss mitigation measures").

Nor does the Sixth Circuit's opinion conflict with *United States ex rel. Baltazar* v. *Warden*, 635 F.3d 866 (7th Cir. 2011). *Baltazar* held that a relator's allegations of billing fraud by a chiropractic office were not barred by public disclosures revealing that many chiropractors had committed such fraud, where "none of" the disclosures "mention[ed]" the individual provider in question. *Id.* at 867. Consistent with *Baltazar*, the opinion below relied on public disclosures that specifically identified U.S. Bank as having allegedly violated loss-mitigation requirements. Pet. App. 5a-7a.

ABLE does not discuss the other two Seventh Circuit decisions that it cites: *Cause of Action* v. *Chicago Transit Authority*, 815 F.3d 267 (7th Cir. 2016), *petition for cert. filed*, No. 16-131 (U.S. July 27, 2016), and *United States ex rel. Heath* v. *Wisconsin Bell, Inc.*, 760 F.3d 688 (7th Cir. 2014). That is for good reason, as those decisions not only comport with the opinion below but affirmatively support it.

In *Cause of Action*, the court explained that a relator must "present 'genuinely new and material information' beyond what has been publicly disclosed" in order to avoid the public disclosure bar, and accordingly held that the complaint was barred even though it included "additional pieces of information" not present in public disclosures. 815 F.3d at 281 (quoting *Goldberg*, 680 F.3d at 935-936). ABLE's complaint is likewise barred under that standard. Even if the complaint adds specifics not addressed in the public disclosures, that information is not "'genuinely new' … beyond what has been publicly disclosed" (*id.*); it is merely a narrower version of what has been publicly disclosed. *Cause of Action* also rejected an argument almost identical to ABLE's theory that the public disclosures in this case must directly address the FHA insurance program to trigger the statutory bar. *See id.* at 280 n.17. The court held that public disclosures need not "specifically reference a particular program in order for the federal government to infer that it is being defrauded." *Id.*[7]

In *Heath*, the Seventh Circuit held that a relator could proceed with his allegations because they "required independent investigation and analysis" beyond what had been publicly disclosed. 760 F.3d at 691. But the court distinguished that situation from the one here, in which a "relator's complaint merely add[s] specificity … to the allegations already detailed in the public investigation." *Id.*

None of ABLE's Seventh Circuit authorities conflicts with the opinion below. Indeed, the Seventh Cir-

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[7] Again, the disclosures in this case *did* mention the FHA's loss-mitigation requirements. Pet. App. 76a; *supra* p. 6.

cuit's opinion in *Bogina* reveals that it agrees with the Sixth Circuit's holding in this case.

Ninth Circuit. ABLE's sole Ninth Circuit authority—*United States ex rel. Mateski* v. *Raytheon Co.*, 816 F.3d 565 (9th Cir. 2016)—also presents no conflict with the Sixth Circuit's holding. In *Mateski*, the court allowed a relator to pursue allegations that a defense contractor had committed fraud by failing to comply with technical requirements for a satellite sensor. Although "prior public reports had described general problems with [the contractor's] work on [the sensor]," the court held that those reports did not preclude the relator's complaint because "none provided specific examples or the level of detail offered by [the relator]." *Id.* at 578.

Critically, the *Mateski* court regarded the gap between the relator's allegations and the public disclosures as so significant as to amount to a difference in *kind*, not just in degree of specificity—a point the Ninth Circuit twice made in explicit terms. 816 F.3d at 567 ("Mateski's Complaint alleges fraud that is different *in kind and degree* from the previously disclosed information about Raytheon's problems in performing on the contract at issue." (emphasis added)); *id.* at 578 ("[W]e now reverse the district court's dismissal of this case because Mateski's Complaint alleges fraud that is different *in kind and in degree* from the previously disclosed information about [the sensor]." (emphasis added)). *Mateski* is thus similar to *Goldberg* and *Leveski* in holding that a relator may not be barred from pursuing allegations of a *different* type of fraud from the one revealed by public disclosures. Nothing in *Mateski* suggests the Ninth Circuit would have reached the same result had it believed the relator's fraud allegations differed from the public disclosures only in degree of spec-

ificity, as the Sixth Circuit ruled in this case (Pet. App. 8a).

Moreover, the Ninth Circuit has elsewhere held that a qui tam suit is barred where "'fairly characterized [it] repeats what the public already knows,'" even if it is "'supported by a few factual assertions never before publicly disclosed.'" *Hagood* v. *Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996) (quoting *Wang* v. *FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992)) (some internal quotation marks omitted); *see also, e.g.*, *United States ex rel. Meyer* v. *Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009) ("For a qui tam suit to be 'based upon' a prior public disclosure, § 3730(e)(4)(A), the publicly disclosed facts need not be identical with, but only substantially similar to, the relator's allegations."), *overruled on other grounds by United States ex rel. Hartpence* v. *Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015) (en banc). That rule is consistent with the Sixth Circuit's holding that "[a] *qui tam* plaintiff 'is not allowed to proceed independently if [it] merely "adds details" to what is already known in outline.'" Pet. App. 9a (quoting *Bogina*, 809 F.3d at 370).

B. Any Perceived Tension Among The Cases Warrants Further Development

To the extent ABLE has identified any tension among the cases, it does not warrant review at this time, for three reasons.

First, any perceived tension among the results of individual cases is factbound and at most reflects the complexity of applying the agreed-upon legal standard to the varying circumstances of each complaint. The Sixth, Seventh, and Ninth Circuits all apply the same

overarching rule: public disclosures bar a given complaint when they reveal allegations or transactions that are substantially the same as those presented in the complaint and so suffice to put the government on notice of its allegations. *See* Pet. App. 6a ("If the disclosure 'puts the government on notice of the "possibility of fraud" surrounding the … transaction, the prior disclosure is sufficient.'"); *Bogina*, 809 F.3d at 370 (relator's suit was barred because "[t]he government was" already "on notice of the possibility of" the alleged fraud); *United States* v. *Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999) (because a public disclosure "put the government on notice of the alleged FCA violation," the relator could not proceed without satisfying the original-source exception).[8]

The determination whether a given set of public disclosures suffices to put the government "on notice" of related fraud allegations is fact-intensive, and reasonable judges may not always agree on the answer. But factbound disagreement among three-judge panels applying the same standard does not warrant review. Nor does ABLE's factbound disagreement with the

[8] Other courts of appeals apply the same rule. *See, e.g.*, *United States ex rel. Winkelman* v. *CVS Caremark Corp.*, __ F.3d __, 2016 WL 3568145, at *6 (1st Cir. June 30, 2016) ("[T]he ultimate inquiry … is whether the government has received fair notice, prior to the suit, about the potential existence of the fraud."); *United States ex rel. Doe* v. *Staples, Inc.*, 773 F.3d 83, 87 (D.C. Cir. 2014) ("[O]ur inquiry focuses … on whether 'the quantum of information already in the public sphere' was sufficient to 'set government investigators on the trail of fraud.'" (quoting *United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 654-655 (D.C. Cir. 1994)); *United States ex rel. Fine* v. *Sandia Corp.*, 70 F.3d 568, 572 (10th Cir. 1995) ("substantial identity exists between" qui tam allegations and public disclosures where "the public disclosures … [are] sufficient to put the government on notice as to" the allegations).

lower courts' application of the standard in this case. *See supra* p. 14.[9]

Second, even if the opinion below were in tension with certain decisions of the Seventh and Ninth Circuits—which it is not—it is consistent with other decisions of those courts. Any conflict, therefore, occurs within the Seventh and Ninth Circuits rather than between those courts and the Sixth Circuit. Such intra-circuit tensions should be resolved by the Seventh and Ninth Circuits without the need for this Court's review. *See, e.g.*, *Joseph* v. *United States*, 135 S. Ct. 705, 707 (2014) (Kagan, J., respecting denial of certiorari) ("[W]e usually allow the courts of appeals to clean up intra-circuit divisions on their own, in part because their doing so may eliminate any conflict with other courts of appeals."); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Third, even if ABLE were correct to identify an unacknowledged division of authority between the Sixth Circuit and the Seventh and Ninth Circuits, this Court should await further development of the issues among the other courts of appeals. That is true not only because any alleged division is shallow but also because the decisions in it are quite recent. *Mateski*, *Bogina*, *Cause of Action*, and this case were all decided in

[9] That is particularly true because the Court would need to apply two distinct versions of the public disclosure bar—the pre-amendment version as to pre-amendment allegations and the post-amendment version as to post-amendment allegations. Different disclosures would be relevant under those two standards. As to pre-amendment allegations, for example, the Court would need to consider the state-court decisions that the district court addressed but the Sixth Circuit did not. *See supra* p. 7 & n.2, p. 9 & n.3.

2016, *Absher* and *Heath* in 2014, *Leveski* in 2013, *Goldberg* in 2012, and *Baltazar* in 2011. The courts of appeals decide public disclosure bar cases on a regular basis. Further development of the law will either recognize the discord alleged by the petition or (more likely) clarify that it is illusory.

C. ABLE Has Identified No Division Of Authority Regarding The Original-Source Exception

ABLE also suggests in passing (at 21-22) that the Sixth Circuit's application of the original-source exception conflicts with the Seventh Circuit's analysis in *Leveski*. That argument fails for several reasons.

First, *Leveski* discusses the original-source exception only in dicta, having ruled that the relator's allegations were not "'based upon'" public disclosures. 719 F.3d at 836 (acknowledging that the public disclosure "inquiry need not go any further" than that).

Second, *Leveski* and the opinion below address different versions of the original-source exception. *See supra* n.2 (comparing versions). The Sixth Circuit applied the post-amendment version of the statute, holding that ABLE's allegations do not "'materially add[]'" to what was publicly disclosed. Pet. App. 4a; *see supra* n.5. By contrast, *Leveski* discusses the pre-amendment version of the statute, commenting that the relator "ha[d] direct and independent knowledge of her allegations." 719 F.3d at 828-829, 836. *Leveski* does not address the circumstances under which a relator's allegations may "materially add" to public disclosures even if they are substantially similar to those disclosures. It therefore cannot conflict with the opinion below.

Third, when the Seventh Circuit *has* applied the post-amendment version of the original-source excep-

tion, it has reasoned in a manner consistent with the opinion below. In *Cause of Action*, the Seventh Circuit held that the relator's allegations did "not 'materially add[]' to the public disclosure" because the "allegations [were] substantially similar to those contained in the" public disclosure. 815 F.3d at 283. The court reached that conclusion even though the relator pleaded details of the alleged fraud that had not been publicly disclosed, including by specifying the federal program at issue. *See id.* at 280 n.17, 281-282. *Bogina* similarly holds that the additional details pleaded by the relator—including his references to government programs not at issue in the publicly disclosed prior action—did not "'materially add[] to the publicly disclosed allegations' against" the defendant. 809 F.3d at 370. The Seventh Circuit's reasoning in these cases is the same reasoning as the Sixth Circuit's in this case. Pet. App. 7a. Accordingly, ABLE has raised no original-source question that warrants this Court's intervention.

II. THE SIXTH CIRCUIT APPLIED THE CORRECT RULE

It is ABLE's proposed rule, not the Sixth Circuit's, that would conflict with numerous precedents and with the purposes of the public disclosure bar.

A. ABLE's Proposed Rule Would Conflict With Broadly Agreed-Upon Principles Of Law

ABLE contends (at 22-23) that the Consent Order and Interagency Report should not bar this action because they supposedly do not specifically address the particular subcategory of mortgages or the particular types of loss-mitigation requirements at issue in the

complaint.[10] ABLE is in effect seeking a rule that public disclosures of fraud cannot bar subsequent qui tam litigation unless they reveal every detail of the relator's allegations. That argument conflicts with two broadly settled principles of public disclosure law.

First, numerous courts have held that relators may not avoid the public disclosure bar by pleading more specific or detailed allegations of a fraud that has been publicly disclosed. The Sixth, Seventh, and Ninth Circuits all embrace that rule (*see supra* pp. 17, 21, 23), and so do other courts of appeals. For example, the First Circuit held in *United States ex rel. Winkelman* v. *CVS Caremark Corp.*, __ F.3d __, 2016 WL 3568145 (1st Cir. June 30, 2016), that "a complaint that targets a scheme previously revealed through public disclosures is barred even if it offers greater detail about the underlying conduct," such as by identifying particular "government programs" involved in the alleged fraud. *Id.* at *7. The D.C. Circuit held in *United States ex rel. Oliver* v. *Philip Morris USA Inc.*, __ F.3d __, 2016 WL 3408023 (D.C. Cir. June 21, 2016), that a relator cannot avoid the public disclosure bar by pleading "additional details" or "more specific details about [a] general practice" revealed by public disclosures. *Id.* at *4. And the Tenth Circuit held in *United States ex rel. Fine* v. *MK-Ferguson Co.*, 99 F.3d 1538 (10th Cir. 1996), that a relator's allegations were properly dismissed because "they [were] substantially identical to and supported by the publicly disclosed allegations and transactions," even though they were "more narrow and specific in scope." *Id.* at 1547; *see also In re Natural Gas Royalties Qui Tam Litig.*, 562 F.3d 1032, 1039-1040 (10th Cir. 2009)

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[10] Again, ABLE's characterization of the disclosures is incorrect. *See supra* p. 6.

(applying this rule to reject the relator's argument that his action was not barred because public disclosures did not identify certain details in the complaint). ABLE points to no decision of any court that has adopted its highly restrictive vision of the public disclosure bar.

Second, and relatedly, numerous courts have held that a qui tam action is barred even if it is only *partly* based on public disclosures. *See, e.g.*, *United States ex rel. Ahumada* v. *NISH*, 756 F.3d 268, 275 (4th Cir. 2014) ("[T]he public-disclosure bar 'encompasses actions even *partly* based upon' … public disclosures." (quoting *United States ex rel. Vuyyuru* v. *Jadhav*, 555 F.3d 337, 350-351 (4th Cir. 2009)); *United States ex rel. Zizic* v. *Q2Administrators, LLC*, 728 F.3d 228, 238 (3d Cir. 2013); *Glaser* v. *Wound Care Consultants, Inc.*, 570 F.3d 907, 920-921 (7th Cir. 2009); *Walburn* v. *Lockheed Martin Corp.*, 431 F.3d 966, 975 (6th Cir. 2005); *United States ex rel. Reagan* v. *East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 176 (5th Cir. 2004); *United States ex rel. Precision Co.* v. *Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992). ABLE's allegations are at least *partly* related to the conduct disclosed by the Consent Order and Interagency Report, even if they add certain specifics.

ABLE's proposed rule would thus upend years' worth of public disclosure law across the courts of appeals.

B. ABLE's Proposed Rule Would Vitiate The Public Disclosure Bar

ABLE's proposed rule would also sharply curtail the effectiveness of the public disclosure bar, undercutting a critical safeguard against copycat relators who seek to obtain a reward they have not earned.

If ABLE can bring this suit, then the public disclosure bar would not stop other relators (or ABLE itself) from pursuing slightly different or more specific allegations equally encompassed by the public disclosures. For example, the next suit might raise similar claims with respect to a different type of government-insured mortgage (such as mortgages insured by the Department of Veterans Affairs, 38 C.F.R. § 36.4350(g)(iii)), or claims regarding a different loss-mitigation requirement, or claims against one of the other thirteen lenders identified in the Interagency Report.

As the Sixth Circuit correctly held, "That's not how it works." Pet. App. 8a. Congress drafted the public disclosure bar to prevent such abuses of the qui tam provisions, by reserving bounties "for whistle-blowing insiders" rather than "opportunistic plaintiffs who have no significant information to contribute of their own." *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) (internal quotation marks omitted). The lower courts rightly dismissed ABLE's action on that basis, and there is no reason for this Court to resurrect it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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