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 OF *AMICUS CURIAE* BETTER MARKETS, INC., IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Better Markets, Inc. is a nonprofit, nonpartisan organization, founded in the wake of the devastating financial crisis of 2008, that works to ensure the economic security, opportunity, and prosperity of the American public by promoting transparency, accountability, and oversight in the financial markets. Better Markets promotes the public interest and acts as a counterweight to the financial industry's private interest through research, public advocacy, comments on administrative rulemaking, and regular appearances as *amicus curiae* in federal courts. Its overarching goal is a robust system of financial regulation and enforcement that prevents financial crashes, protects consumers from abuses, and eliminates taxpayer bailouts of too-big-to-fail firms.

Better Markets has a material interest in this petition because the False Claims Act is one of the few federal statutes that provides any measure of accountability for organizations, including financial firms, that commit fraud against the government. For example, the Department of Justice has identified the False Claims Act, along with the Financial Institutions Reform, Recovery, and Enforcement Act, as a principal tool for holding accountable those whose financial frauds contributed to the 2008 crisis. *See* Eric Holder, Attorney General, Remarks on Fi-

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[1] This brief was not authored in whole or in part by counsel for any party. No one other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for the parties received 10 days' notice of filing. Representations of consent to filing from counsel for all parties are on file with the Clerk.

nancial Fraud Prosecutions at N.Y.U. School of Law (Sept. 17, 2014), https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law. The rampant fraud that fueled the financial crisis had many victims, and the federal government was often among them. But unlike defrauded consumers, the government has the resources—and a strong cause of action—to hold accountable those whose frauds imperiled the national economy and the public fisc. This prospect of real accountability is secured by the ability of whistleblowers to bring false claims to light through *qui tam* actions. Better Markets seeks to maintain the viability of this important antifraud enforcement mechanism.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision in this case upsets the careful balance struck by Congress in the public-disclosure bar to *qui tam* actions under the False Claims Act. The result is that, in one part of the country, whistleblowers' suits cannot proceed where any previous disclosure can be characterized as generically "encompass[ing]" the specific frauds identified for the first time in a complaint. Pet.'s App. 8a.

When it comes to accountability on Wall Street, this is a dangerous proposition. A sitting United States Senator in his presidential campaign this year has repeatedly declared that widespread financial fraud exists there: " 'The reality is that fraud is the business model of Wall Street.' " John Wagner, *Bernie Sanders vows to fight the 'fraud' of Wall Street, provide relief to bank consumers*, WASH. POST, (Jan. 5, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/01/05/bernie-sanders-vows-to-fight-the-fraud-of-wall-street-provide-relief-to-bank-consumers/. If, instead of in a debate, this generic "allegation . . . were publicly disclosed . . . in a congressional . . . hearing," the Sixth Circuit's reasoning, no less sweeping than the Senator's all-encompassing allegation, would bar all *qui tam* suits against any Wall Street firm for any specific fraud, even those unknown to the Senator. 31 U.S.C. § 3730(e)(4)(A).[2]

The Sixth Circuit's new "encompassing" rule lacks, as this example demonstrates, any limiting principle. But one readily exists, which the Supreme Court should embrace to resolve the recurring confusion and important split among the circuits: Previous public disclosures bar a *qui tam* action only where they contain information that, taken as true, describes fraud with sufficient particularity to state a claim to relief under the False Claims Act. In other words, if the disclosures, standing as the sole allegations in a hypothetical complaint against the same defendant, are insufficiently particularized to survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (and the heightened pleading standard for fraud under Rule 9(b)), then they do not bar a *qui tam* suit that features additional allegations.

Without a limiting principle, the Sixth Circuit will have established a new addition to an unwelcome set of crisis-era neologisms: Not only are financial giants "too big to fail" and their executives "too big to jail," but companies known to have systematic deficiencies are "too bad to sue" even when they de-

[2] The Senator's allegation of fraud was also disclosed *in* the news media, if not "from the news media." 31 U.S.C. § 3730(e)(4)(A)(iii).

fraud the government with previously unidentified false claims. Such an intolerable result cannot stand.

As *amicus* elaborates below, the writ of certiorari should be granted in this case because the false claims identified in the petitioner's complaint are not close to "substantially the same" as the previously disclosed deficiencies in the respondent's foreclosure practices, 31 U.S.C. § 3730(e)(4)(A), and the Sixth Circuit's new "encompass[ing]" rule imperils a critical antifraud enforcement tool without frustrating parasitic lawsuits, Pet.'s App. 8a.

I. The Safety And Soundness Deficiencies Identified By Bank Regulators Are Not "Substantially The Same" As, Or Even Related To, The False Claims Alleged In The Complaint About FHA Insurance.

The Sixth Circuit characterized two documents as having publicly disclosed the false claims alleged in the petitioner's complaint: a consent order between the respondent and the Office of the Comptroller of the Currency ("OCC") and an interagency review of a group of fourteen banks' (including the respondent's) foreclosure policies and practices by the OCC, Office of Thrift Supervision, and Federal Reserve System. Neither document comes close to disclosing fraud against the federal government. A basic understanding of the authoring agencies' purposes confirms the incontrovertible conclusion that these documents do not mention the unique requirements of the insurance program run by the Federal Housing Administration ("FHA") within the Department of Housing and Urban Development ("HUD"), or suggest that any fraud was committed against the program.

A. FHA and OCC Serve Distinct Purposes.

The False Claims Act treats the sprawling federal government as a monolith for purposes of the public-disclosure bar: If, for whatever reason, the National Indian Gaming Commission published a report that disclosed that a particular hospital had defrauded Medicaid, the Department of Health and Human Services would be on constructive notice and no *qui tam* suit based on the same fraud could proceed. Still, if a whistleblowing nurse's *qui tam* suit over Medicaid fraud she witnessed were deemed barred because of a report by the National Indian Gaming Commission, a reviewing court should take a careful, even skeptical, side-by-side look at that report and the complaint to see whether the two sets of allegations or transactions were "substantially the same." 31 U.S.C. § 3730(e)(4)(A). The skepticism is warranted because the agencies serve distinct purposes.

A vast gulf exists between the purposes of, on the one hand, HUD and FHA as insurers of individual mortgages, and, on the other hand, OCC and other bank-supervision agencies as prudential regulators tasked with maintaining the safety and soundness of the whole banking system. This gulf is nearly as vast as, if less obvious than, the one between gambling and Medicaid.

FHA, in insuring mortgages, acts as a market participant, paying money to mortgagees when an insured mortgage takes a loss. *See generally* 12 U.S.C. § 1709. HUD's administration of this longstanding program serves important social goals like promoting affordable homeownership for Americans of modest means. But those broad goals are specifically furthered by prudent management of the

FHA insurance fund, which is why Congress required participants to "engage in loss mitigation actions," 12 U.S.C. § 1715u(a), and required HUD to administer the program "in the best interests of the appropriate insurance fund," *id.* § 1715u(c)(1)(B)(iii). Foreclosure often exacerbates financial loss when compared to alternative actions. Accordingly, HUD requires participating mortgagees to "take those appropriate actions which can reasonably be expected to generate the *smallest financial loss to the Department*." 24 C.F.R. § 203.501 (emphasis added). In sum, Congress provided FHA with a source of funds with which to insure certain mortgages and required HUD to carefully safeguard those funds. Loss mitigation directly serves that purpose. And not just any loss mitigation but the best loss mitigation is required: that which "generate[s] the *smallest* financial loss to the Department." *Id.* (emphasis added).

An important component of the loss-mitigation requirement in FHA-insured loans is the face-to-face meeting. *See* 24 C.F.R. § 203.604(b). Why impose the expense of a face-to-face meeting if mitigating losses is the paramount concern? Loss mitigation takes many forms, "including but not limited to actions such as 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). To determine which action will yield the "smallest financial loss," a lender often needs information beyond the debt-to-income and loan-to-value ratios that might be found in a spreadsheet. The face-to-face meeting ensures that all the relevant information is in one place so that a loss-mitigation decision can be made instead of delayed.

The face-to-face requirement bypasses the carousel of personnel and interminable time on hold that borrowers often experience when attempting to communicate with their lender by phone. It also empowers the lender to make the best decision about how to mitigate losses with a complete set of relevant information. Moreover, the face-to-face visit may achieve similar success as "borrower housing counseling," *id.*—an in-person conversation that focuses a busy borrower's mind on her budget may, like other loss mitigation, prevent a costly foreclosure. FHA's unique face-to-face requirement thus serves not only to provide a fair and efficient process for delinquent borrowers but also to safeguard the insurance fund from the larger losses that result from wanton foreclosures or inadequate loss mitigation.

OCC, by contrast, regulates prudentially for the purpose of "assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the" national banking system. 12 U.S.C. § 1(a). OCC may collect funds from banks subject to its jurisdiction to carry out its supervision, but "[s]uch funds shall not be construed to be Government funds or appropriated monies," and OCC does not manage any funds, insurance or otherwise, from which banks or others receive money directly. *Id.* § 16.

In short, OCC broadly regulates while FHA narrowly transacts; in constitutional parlance, OCC derives its regulatory power from the Interstate Commerce Clause while FHA's regulations rely on the Spending Clause. OCC cannot be the victim of a false claim because it disburses no funds; FHA may be the victim of a false claim when it disburses funds and the recipient falsely certifies compliance with the funds' requirements. The agencies' distinct purposes are reflected in their differing remedial powers: OCC's enforcement actions may require prospective changes in policy, personnel, and programs through cease-and-desist notices, *see* 12 U.S.C. § 1818(b), while FHA may only impose a civil penalty or disqualify a mortgagee from participation for past violations, *see* 24 C.F.R. § 203.605. FHA may induce but cannot compel; OCC may compel but cannot induce.

B. Neither the Interagency Review nor the OCC's Consent Order Disclosed Fraud against the FHA Insurance Program.

Despite their divergent focuses, purposes, and powers, it is of course *possible* that the OCC's consent order or the interagency review disclosed that the respondent had filed false claims with the FHA, just as it is theoretically possible for the National Indian Gaming Commission to uncover Medicaid fraud. But neither document did so. Neither came close.

The interagency review makes no specific finding about the respondent, one of fourteen mortgage-servicing companies whose foreclosure policies and practices were subject to prudential examination. *See* Pet.'s App. 38a n.1. Instead, the review summarizes industry-wide weaknesses in foreclosure-process governance, organizational structure and staffing, affidavit and notarization practices, documentation practices, management of third-party vendors and law firms, and quality control and audit systems. Because the bank-supervision agencies that conducted the report focus on the safety and soundness of the entire banking system, it is unsurprising that they did not investigate or comment on a specific company's compliance with FHA's unique requirements.

They focused instead on "widespread risks . . . to consumers, communities, various market participants, and the overall mortgage market"—not to the FHA insurance fund. *Id.* at 43a. The only federal obligations mentioned are those provided by the Servicemembers Civil Relief Act and the bankruptcy code. *See id.* at 44a, 54a, 65a. The review also mentions "violations of state foreclosure laws designed to protect consumers." *Id.* at 50a.

Although it does not focus on the subject, the interagency report might be fairly characterized as critical of the fourteen servicers' failure to mitigate the foreclosure-related losses incurred by the mortgages' owners. But general failure to mitigate losses is just that—bad business. Losing money does not a fraud make. It implicates the systemic-soundness concerns of prudential regulators, but it does not even suggest, let alone disclose, any fraud against the federal government. Such a fraud occurs when federal money is taken despite violations of the regulations that govern receipt of the money. But the review does not so much as hint at any federal money that may be implicated by the identified unsafe and unsound banking practices, let alone any requirements that may attach to such funds.

The agencies' "reviews did not focus on loan-modification processes," *id.* at 41a, but in their only finding that tangentially touches on the FHA's unique borrower-contact and loss-mitigation requirements, the agencies found that the "servicers *were in contact* with delinquent borrowers and *had considered loss-mitigation* alternatives, including loan modifications," *id.* at 54a (emphases added). The petitioner alleged the exact opposite in its complaint.

Basic arithmetic reveals that it is rather unlikely that the agencies' examiners even saw an FHA-insured loan serviced by the respondent. The examiners "reviewed, collectively for all servicers, approximately 2,800 borrower foreclosure files." *Id.* at 39a. Even assuming that the examiners looked at the same number of loans at each of the fourteen servicers (about 200 each) instead of proportionally by market share (in which case they would have looked at about 30 of the respondent's loans[3]), FHA-insured loans represent a small portion of total mortgages, and a particularly small portion of the pre-crisis mortgages that were most likely to become delinquent. *See* U.S. DEP'T OF HOUS. & URBAN DEV., FHA-INSURED SINGLE-FAMILY MORTGAGE ORIGINATIONS AND MARKET SHARE 2 (2009) (share of mortgages insured by FHA was 4% in 2003, 3% in 2004, 1.9% in 2005, 2% in 2006, and 3.4% in 2007), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_16683.pdf.

If the interagency report's data set did not include many (or any) FHA-insured loans serviced by the respondent, how could it disclose the same fraud discovered by the petitioner and alleged in its complaint? Even if the examiners looked at one or two FHA-insured loans serviced by the petitioner, and even if they were engaged in a supererogatory hunt for FHA violations, they plainly uncovered no violations of FHA regulations in light of their general

[3] *See* Pet.'s App. 48a & n.7. If the top five servicers, all examined, represent 60% of the market and the fourteen total servicers examined represent 68%, the nine outside the top five each have on average roughly a 1% market share.)

finding that "servicers were in contact with delinquent borrowers and had considered loss-mitigation alternatives, including loan modifications." Pet.'s App. 54a. The petitioner's complaint, by contrast, unearthed and alleged three specific instances of the respondent's clear-cut violations of the FHA-insurance regulations.

The consent order between OCC and the respondent likewise discloses no violations of the FHA insurance requirements. This failure to disclose FHA violations is unsurprising in light of the OCC's focus as a prudential regulator concerned with safety and soundness issues across the banking system. The consent order sprang directly and contemporaneously from the findings of the interagency report, *see id.* at 46a–47a, which, as demonstrated, (1) did not mention the FHA, (2) utilized a data set that contained few if any FHA-insured loans serviced by the respondent, and (3) in any event found that servicers were in touch with borrowers and doing appropriate loss-mitigation.

The consent order made exactly four findings of unsafe and unsound banking practices committed by the respondent, none remotely concerning the FHA, or any federal funds whatsoever: (1) affiants claimed but lacked personal knowledge of the details of the foreclosed mortgage; (2) the affidavits were improperly notarized; (3) inadequate "oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training"; and (4) inadequate oversight of third-party vendors like law firms. *Id.* at 72a–73a. If there were foreclosure-related fraud disclosed by these findings, it was against state courts or homeowners, not the federal government.

Unlike the interagency review, the OCC's consent order does briefly mention the FHA—once. *See id.* at 75a–76a (requiring an "Action Plan [to] address, at a minimum . . . governance and controls to ensure compliance with all applicable federal and state laws (including the U.S. Bankruptcy Code and the Servicemembers Civil Relief Act), rules, regulations, and court orders and requirements, as well as the Membership Rules of MERSCORP, servicing guides of the Government Sponsored Enterprises or investors, including those with the Federal Housing Administration and those required by the Home Affordable Modification Program, and loss share agreements with the Federal Deposit Insurance Corporation . . . ." (acronyms omitted)). This cursory reference was not in the order's "Comptroller's Findings" section, denominated Article I, but instead in its "Comprehensive Action Plan" section, Article III.

Requiring a plan to ensure general compliance with "all applicable federal and state laws," *id.* at 76a, is a far cry from a finding that the respondent violated every applicable federal and state law. Nor can the requirement of a plan to comply with FHA regulations in particular be construed as disclosing any previous violations of FHA regulations. The consent order discloses only that FHA regulations exist, not that the respondent violated them.

Later, in Article IX, "Mortgage Servicing," which like all the consent order's provisions other than the findings of Article I is forward-looking, the respondent is required to "engage[] in Loss Mitigation and foreclosure prevention for delinquent loans." *Id.* at 90a. Again, this does not disclose that U.S. Bank had previously failed to engage in loss mitigation, a disclosure that would contradict the finding of the interagency report from which the consent order sprang that servicers had generally done so. *See id.* at 54a. Likewise, Article IX's requirement that "staff [be] trained specifically in handling mortgage delinquencies, Loss Mitigation, and loan modifications" does not disclose that all staff were previously untrained. *Id.* at 91a. A remedy discloses only a going-forward obligation, not a previous violation. [4]

In sum, these two documents did not come close to disclosing any fraud against the federal government. Instead, in keeping with the OCC's purpose of assuring the safety and soundness of the banking system, they disclosed unsafe and unsound practices—practices that had nothing to do with the respondent's allegedly false claims for payment from FHA's insurance fund.

II. The Sixth Circuit's Mode Of Analysis Abandons Careful Factual Comparisons For Comparisons At The Highest Level Of Generality.

So how does the Sixth Circuit come to conclude that the complaint's allegations of FHA violations were disclosed by these two documents, which plainly do not disclose any FHA violations? It zooms out all the way—and squints.

The decision improperly substituted a mode of analysis at the highest level of generality—whether a public disclosure could be said to "encompass" the

[4] As further confirmation that forward-looking remedies are not findings of past misconduct, the consent order at times requires the respondent to "continue to" engage in certain activities, *e.g.*, "ensure that decisions concerning Loss Mitigation *continue to* be made and communicated in a timely fashion." Pet.'s App. 90a (emphasis added).

specific fraud alleged, *id.* at 9a—for the False Claims Act's text, which bars only those *qui tam* suits whose allegations are "substantially the same" as public disclosures. 31 U.S.C. § 3730(e)(4)(A). If a reader holds the "disclosure" documents and the complaint at arms' length and squints hard enough, they do all use the words "foreclosure" and "loss mitigation." But on any close inspection, the documents' disclosures and the complaint's allegations are not remotely, let alone substantially, the same. The widespread deficiencies like those identified by the OCC are systemically dangerous, harmful to homeowners and their communities, even financially foolish—but they have nothing to do with safeguarding the public fisc against fraud, the animating concern of the False Claims Act. Only the petitioner's complaint discloses any allegations of fraud in connection with federal funds.

The most telling example of the decision's blurry vision is its confusing forward-looking remedies for backward-looking findings. In essence, the decision held that any remedy imposed constructively discloses previous violations of the same sort. But just as the remedial plan to ensure compliance with "all applicable federal and state laws" was not a finding that the respondent violated every applicable federal and state law, the consent order's requirement that the respondent thereafter "*engage*[] *in Loss Mitigation*" did not disclose that it previously failed to do so. Pet.'s App. 5a (emphasis added by Sixth Circuit). Regulators may properly—and routinely do—require remedial measures that do not perfectly correspond to the violations that prompted an enforcement action. A requirement that a company take a particular action is not a disclosure that the company previously failed to do so, let alone that any previous failure to do so constituted fraud. In a criminal context, one cannot infer from a sentence of 100 hours of community service in the form of picking up roadside refuse that the offender was a litterbug rather than a vandal or a drunk driver. No precept of law or logic converts a remedy into a constructive disclosure of an equal and opposite offense.

If remedial actions that bind future behavior are held to constructively disclose previous violations of the same type, the public-disclosure bar will be dramatically expanded beyond its plain statutory meaning. Most, if not all, consent orders and similar agency settlements contain language that bars the defendant or respondent from violating any federal law for a period. This common boilerplate language provides a means for the agency to reinstitute proceedings against the respondent for violations other than the source violation of the enforcement action.

In the end, the Sixth Circuit's "encompass" rule lacks a limiting principle. Any all-encompassing allegation of fraud ("fraud is the business of Wall Street") necessarily "encompasses" specific frauds that the government does not know about. Thankfully, a familiar limiting principle is ready at hand, which this Court would do well to adopt: Previous public disclosures bar a *qui tam* action only where they contain information that, taken as true, suffices to state a claim to relief under the False Claims Act. In other words, if a hypothetical complaint against the same defendant, drawing only on the public disclosures and no independent factfinding, contains information insufficient to survive a motion to dismiss, those disclosures do not bar a real complaint in which the plaintiff adds material information that does state a claim.[5]

Such a standard finds much support in the case law. The Eighth Circuit has held that, for the public-disclosure bar to apply, "the essential elements exposing the transaction as fraudulent must be publicly disclosed as well." *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1512 (8th Cir. 1994). The Eighth Circuit found persuasive a similar articulation by the D.C. Circuit. *See United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) ("The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions only when . . . the *critical elements of the fraudulent transaction* themselves were in the public domain." (emphasis added)).

The Seventh Circuit, in a more recent decision, has come closest to explicitly tying the public-disclosure bar to whether the disclosures' contents state a claim, as *amicus* proposes. *See United States ex rel. Baltazar v. Warden*, 635 F.3d 866, 867–68 (7th Cir. 2011) (Easterbook, *C.J.*). In *Baltazar*, the com-

[5] A concern may arise that public disclosures that come very close to stating a claim but do not because of a pleading deficiency should nevertheless bar *qui tam* suits where the relator adds nothing other than a pleading technicality. One possible solution to this concern is to apply the bar to such suits where it would be an abuse of discretion to deny leave to amend the hypothetical complaint because, despite the deficiency, it contains all the essential factual elements of a claim. Another is to require the relator's additional facts to be material. This brief does not aspire to comprehensively resolve the question. But, as these proposals show, the split among the circuits is susceptible to resolution by this Court with a clear and administrable standard.

plaint, which alleged fraudulent "upcoding" in Medicare and Medicaid claims by a chiropractor, had been dismissed under the public-disclosure bar because of reports that documented widespread fraud in the industry. The Seventh Circuit reversed because those reports' contents were insufficient to state a claim:

> The United States could not file suit against a chiropractor, tender copies of the . . . Reports, and rest its case. The chiropractor would prevail summarily, because these reports do not so much as hint that any particular provider has submitted fraudulent bills. It follows that these reports do not disclose the allegations or transactions on which a suit such at Baltazar's is based.

Id. at 868. This conclusion is intuitive, but lower courts have struggled with clearly articulating the intuition.

The purpose of the public-disclosure bar confirms the wisdom of adopting a limiting principle like that proposed by *amicus*: It aims to thwart "parasitic lawsuits," where an attorney rushes from the newsstand to the courthouse at every whiff of scandal. *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Filson*, 559 U.S. 280, 295 (2010). Imagine the nation's most parasitic lawyer at his most creative when reading the interagency review or consent order: They do not hint at, let alone disclose, any federal funds that have been misappropriated. The parasitic lawyer might look to the laws explicitly referenced in the documents—the Servicemembers Civil Relief Act, the bankruptcy code, state foreclosure law—and try to figure out a cause of action. A share-holder action for losses caused by inadequate loss mitigation springs to mind. But if all he did was copy and paste the agencies' findings of poor servicing into a complaint and file it, the suit would be quickly dismissed for failure to even remotely state a claim upon which relief may be granted (and he might be sanctioned under Rule 11 of the Federal Rules of Civil Procedure). The same would result from a complaint that contains only the contents of a news article that quotes a Senator's all-encompassing allegation of pervasive fraud on Wall Street.

Where, by contrast, public disclosures comprise the elements of a claim for relief, an attorney who copies and pastes those disclosures into a complaint would prevail against a motion to dismiss—if there were no public-disclosure bar. These are the parasitic suits that Congress intended to thwart. The attorney or his clients did no work, uncovered no independent and material information, and contributed nothing to the goal of careful stewardship of federal funds.

This Court should grant the writ to clarify the scope of the public-disclosure bar, which remains a source of confusion in lower courts. It can do so by deploying the familiar standard for motions to dismiss under the Federal Rules of Civil Procedure, which is faithful to the False Claims Act's text that bars only *qui tam* actions that are "substantially the same" as publicly disclosed allegations. 31 U.S.C. § 3730(e)(4)(A). If previous allegations are insufficient to survive a motion to dismiss, but the allegations in a complaint do suffice, it follows that they are not "substantially the same." The Court would also do well to clarify that substantial sameness cannot be found through a legal fiction like that used by the Sixth Circuit, where a forward-looking remedy is held to constructively disclose previous violations.

These clarifications will restore the careful balance Congress sought in the False Claims Act, stifling not only genuinely parasitic suits but also those who would defraud the federal government—and who may get away with it unless whistleblowers and other original sources retain the ability and the incentive to bring such frauds to light.

CONCLUSION

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

Respectfully submitted,

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