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 REPLY

JOHN P. RELMAN
SASHA SAMBERG-CHAMPION
STEPHEN M. DANE
MICHAEL G. ALLEN
RELMAN, DANE & COLFAX PLLC
1225 19th Street NW, Suite 600
Washington, DC 20036
(202) 728-1888

ANEEL L. CHABLANI
GEORGE A. THOMAS
ADVOCATES FOR BASIC
LEGAL EQUALITY, INC.
525 Jefferson Avenue, Suite 300
Toledo, OH 43604
(419) 255-0814

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

PAMELA S. KARLAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

Attorneys for Petitioner

September 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

U.S. Bank's attempt to reconcile the Sixth Circuit's decision with Seventh and Ninth Circuit precedents by rewriting it only emphasizes the need for this Court's intervention. Although U.S. Bank tries to portray the circuit conflict as a fact-bound disagreement among courts applying the same standard, its response confirms that the relevant facts are undisputed; that the Sixth Circuit applies a very different standard, as articulated and in practice; and that the conflict is outcome-determinative.

U.S. Bank concedes that the Sixth Circuit's holding that petitioner ABLE's False Claims Act (FCA) case is barred by prior public disclosures rests entirely on two documents: (1) the consent order between U.S. Bank and the Office of the Comptroller of the Currency (OCC) and (2) the Interagency Review addressing unsound practices by mortgage lenders more broadly. Opp. 11–12. U.S. Bank points to nothing in either document alleging that it violated Federal Housing Administration (FHA) loss-mitigation requirements or any comparable requirements, or committed any fraud on any federal agency, let alone the "same type of fraud." In short, U.S. Bank offers no reason to think that it could have prevailed under the standard applied by the Seventh and Ninth Circuits.

Instead, U.S. Bank generically characterizes public allegations of very different forms of mortgage-related misconduct as involving "loss mitigation," and then asserts that those allegations encompass and bar any claim of fraud involving loss-mitigation requirements. That exact approach was rejected by the Seventh Circuit in *United States ex rel. Baltazar v. Warden*, 635 F.3d 866 (7th Cir. 2011), and the many cases following it, and by the Ninth Circuit in *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565 (9th Cir. 2016).

ARGUMENT

1. U.S. Bank wrongly asserts that all the courts of appeals apply the same standard: "[W]here 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." Opp. 14. That description may fairly characterize the Seventh and Ninth Circuit's rule, but the decision below does not apply anything resembling it. Rather, the Sixth Circuit explicitly held that it "doesn't matter" that "no public disclosures of *this type of fraud*—lying to a government agency about failing to follow loss mitigation requirements—were ever made." Pet. App. 9a (emphasis added). Far from requiring prior public disclosure of the same type of fraud, the Sixth Circuit held that allegations of a *different* type of fraud (filing deficient affidavits in state-court foreclosures) involving no false claims against the Treasury sufficed to put the government on notice of the "possibility" of the type of federal insurance fraud alleged by ABLE. *Id.* 6a.

Even if the Sixth Circuit's opinion could be read as ruling that ABLE alleged the "same type" of fraud as the public disclosures, such a ruling on these facts reflects a standard fundamentally different from the one prevailing in the Seventh and Ninth Circuits.

U.S. Bank's explication of the Sixth Circuit's rule reveals how different it is from that of the Seventh and Ninth Circuits: "[I]f 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 disclosure concern motorized means of transport." Opp. 15. U.S. Bank's suggestion that the bar would kick in if both frauds involved cars echoes the Sixth Circuit's conclusion that it was sufficient that the consent order, the Interagency Review, and ABLE's complaint all involved mortgages. Under U.S. Bank's theory, allegations that a car dealer defrauded consumers by selling them worthless extended warranties would somehow put the federal government on notice that the dealer had tampered with odometers on cars it sold the government. That view of the public disclosure bar is consistent with the rule applied by the Sixth Circuit but directly opposed to the rule in the Seventh and Ninth Circuits.

In *Mateski*, for example, the Ninth Circuit held that the public allegations failed to disclose the fraud alleged by the relator, although both related to cost overruns, mismanagement, and noncompliance with contract specifications in the design of a specific satellite component. 816 F.3d at 579. Similarly, the Seventh Circuit has found that public allegations do not bar False Claims Act claims even where both involve supervision of hospital residents, *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 680 F.3d 933 (7th Cir. 2012), compensation of proprietary school recruiters, *Leveski v. ITT Educ. Servs. Inc.*, 719 F.3d 818 (7th Cir. 2013), non-compliant care at a specific nursing home, *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699 (7th Cir. 2014), and "upcoding" of procedures performed by chiropractors, *Baltazar*, 635 F.3d 866. Under U.S. Bank's view that all claims of fraud involving cars are of the same type—or the Sixth Circuit's view that claims of misfeasance relating to mortgages disclose any type of fraud relating to mortgages—the Seventh and Ninth Circuit cases would have come out differently.

2. Contrary to U.S. Bank's assertions, the Seventh and Ninth Circuits have not retreated from their rejection of the approach used by the Sixth Circuit and advocated by U.S. Bank.

U.S. Bank relies principally on *United States ex rel. Bogina v. Medline Industries, Inc.*, 809 F.3d 365 (7th Cir. 2016). *Bogina* demonstrates only that the Seventh Circuit properly bars FCA actions that, viewed at the appropriate level of specificity, allege fraud substantially similar to publicly disclosed allegations.

The claim in *Bogina* was that the defendant paid nursing homes bribes and kickbacks for buying its products, resulting in false claims for reimbursement under Medicare Parts A and B, Medicaid and a military healthcare program. The previous public disclosures involved the same fraudulent scheme: They alleged that the same defendant had given other hospitals and nursing homes the same kinds of bribes and kickbacks for the same products, resulting in the same kinds of false Medicare and Medicaid claims. *See* 809 F.3d at 369–70. *Bogina*'s holding that those nearly identical claims were barred is fully consistent with *Baltazar*, *Goldberg*, and *Leveski*, which *Bogina* repeatedly cites. *Id.* at 368, 370.

The only differences between the public allegations and FCA claims in *Bogina* were (1) the particular recipients of bribes and kickbacks, and (2) allegations that false claims had been made to a couple of additional medical programs. The court found these minor differences "unimpressive" because "[i]t was common knowledge that Medline 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 programs?" 809 F.3d at 370.

U.S. Bank's effort to adapt these rhetorical questions to this case reveals how different the cases are. To fit this case, the question would have to be: "If U.S. Bank used improperly notarized affidavits in state-court foreclosure proceedings, why wouldn't it also refuse to meet with borrowers before foreclosing on FHA-insured mortgages and then submit false claims to the FHA?" The leap required to apply *Bogina*'s reasoning here shows that it offers no support for the Sixth Circuit's holding and does not undercut other Seventh Circuit decisions that would foreclose application of the bar to this case.

U.S. Bank's invocation of *Cause of Action v. Chicago Transit Authority*, 815 F.3d 267 (7th Cir. 2016), *pet. for cert. pending*, No. 16-131, is equally unavailing. *Cause of Action* reiterated that the Seventh Circuit does not tolerate "viewing FCA claims at the highest level of generality … to wipe out *qui tam* suits." *Id.* at 281 (quoting *Leveski*, 719 F.3d at 831). It held an FCA claim barred by disclosures that alleged the *same* wrongdoing: falsifying "vehicle revenue mile" data used to claim federal transit funding. *Id.* at 278–82. That holding does not suggest that the Seventh Circuit would apply the bar here.

As for the Ninth Circuit, U.S. Bank's reliance on dicta in two earlier decisions casts no doubt on *Mateski*. Opp. 23 (citing *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009), *overruled by United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015) (en banc), and *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996)). *Mateski*'s insistence that a disclosure must have "alerted the Government to the specific areas of fraud alleged" in an FCA case, 816 F.3d at 579, is fully consistent with both *Meyer*'s statement that allegations need not be "identical" (but only "substantially similar") to bar an FCA case and *Hagood*'s statement that it does not suffice to add a "few factual assertions" to what a public disclosure already reveals.

Meyer did not even have to address whether the public disclosure, which concededly involved exactly the same fraud alleged in the FCA case, was substantially similar; the only issue was whether the relators had disclosed it first or were original sources. *See* 565 F.3d at 1199. In *Hagood*, the substantial similarity of some of the allegations was an easy question because both the public disclosure and the FCA action alleged the same unlawful payments to the same entity; as to other claims, the court devoted little attention to the similarity of the allegations because the relator was an original source. *See* 81 F.3d at 1473–76. *Mateski* specifically rejected the suggestion that *Hagood* "requires viewing complaints at only a high level of generality." 816 F.3d at 577. Indeed, *Mateski* found *support* for its approach in *Hagood*'s focus on whether an FCA claim, "fairly characterized," repeats a public disclosure. *Id.* at 578.[1]

Thus, the Seventh and Ninth Circuit decisions U.S. Bank cites neither align those courts with the Sixth Circuit's overly general approach nor suggest intra-circuit conflicts. Instead, they illustrate how much more similarity is required to invoke the public disclosure bar in those circuits than in the Sixth Circuit. In each of those cases, the courts found a claim barred only by prior disclosures that the federal government had been fraudulently induced to make payments because of specific misconduct

[1] Similarly, *Mateski* approvingly cited *United States v. Alcan Electrical & Engineering, Inc.*, 197 F.3d 1014 (9th Cir. 1999), which barred an FCA claim based on "virtually-identical" public allegations. *Mateski*, 816 F.3d at 574.

by the defendant that was the same as, or very similar to, the misconduct alleged in the FCA complaint. By contrast, the Sixth Circuit found that allegations that involved no fraud on the Treasury, and no violations of the types of loss-mitigation requirements at issue here, barred claims just because they involved other unsound practices with respect to mortgages generally.

3. U.S. Bank contends that the circuit-split is too recent and shallow to merit review. Opp. 23–24. It concedes, however, that the Seventh Circuit's line of authority goes back five years and has been reiterated in a string of cases. *See id.* at 26. The Ninth Circuit's adoption of the Seventh Circuit's standard, though recent, is express and firm. And as U.S. Bank itself points out, the Sixth Circuit's opposing position is reflected in its own prior decisions, including *Dingle v. Bioport Corp.*, 388 F.3d 209 (6th Cir. 2004), and *United States ex rel. Gilligan v. Medtronic, Inc.*, 403 F.3d 386, 391 (6th Cir. 2005) (finding disclosure where prior allegations were "general" enough that they "could have encompassed" the fraud now being alleged). If, as U.S. Bank asserts, other circuits also apply the Sixth Circuit's overbroad rule (Opp. 24, n.8), the assertion that the disagreement is recent and shallow is even less persuasive.

U.S. Bank's denial of the need for this Court's guidance on this concededly important issue therefore fails. Indeed, if U.S. Bank were correct that the Seventh and Ninth Circuit's opinions themselves show a lack of consistency, such inconsistency would only underscore the need for this Court's intervention. The Sixth Circuit's application of the bar in this case, where the public disclosures so plainly failed to disclose the allegations at issue, provides a perfect opportunity for such guidance.

4. U.S. Bank predictably characterizes the case as fact-bound and asserts that ABLE's petition rests on mischaracterizations of the facts. But U.S. Bank does not contest the key facts that demonstrate that this case is the ideal vehicle for considering the legal bounds of the public disclosure bar:

- U.S. Bank concedes that the Sixth Circuit's decision rested exclusively on the disclosures in the consent order and Interagency Review. Opp. 11–12.
- U.S. Bank does not argue that the consent order or the Interagency Review alleged false claims for any federal payments (let alone false claims for FHA insurance benefits) or any violations of the FHA's specific loss-mitigation requirements.[2]
- U.S. Bank does not dispute that, in the only instance where the Interagency Review mentioned the kinds of activities at issue here, the Review stated that regulators had *not* found that banks failed to contact delinquent borrowers or consider loss-mitigation measures. Pet. App. 54a.
- U.S. Bank does not contest that the only allegations of wrongdoing in the consent order were its specific

[2] U.S. Bank points out that the consent order contains a single mention of the FHA (but not FHA insurance or regulatory violations) where, in a provision requiring U.S. Bank to comply with all applicable laws and regulations, the order includes FHA "servicing guides." Pet. App. 76a; Opp. 5, 10. U.S. Bank argues that the order thus "addressed compliance" with FHA loss-mitigation requirements. Opp. 6. But U.S. Bank cannot claim that the order *alleged violations* of those requirements (and resulting fraud), which is the relevant point. As amicus curiae Better Markets observes, an order that a bank comply with all applicable laws and regulations is not an allegation that the bank has violated all applicable laws and regulations. Better Markets Br. 12.

> findings that U.S. Bank had filed affidavits that were not based on personal knowledge and not properly notarized, and that it had failed to implement proper internal controls and external oversight of foreclosure activities. *Id.* at 72a–73a.

Echoing the Sixth Circuit, U.S. Bank nonetheless characterizes all regulatory requirements involving mortgages as broadly related to "loss mitigation." It therefore concludes that allegations of any such regulatory violations necessarily "encompass" violations of the FHA's specific loss-mitigation rules, and thus put the government on notice of the possibility of false FHA insurance claims. Far from turning on factual disputes, this purely legal argument neatly tees up the disagreement between the Sixth Circuit and the Seventh and Ninth Circuits, both of which have rejected exactly that overbroad reading of the public disclosure bar.

5. U.S. Bank's various assertions that this case is a poor candidate for addressing the conflict are red herrings. U.S. Bank asserts, for example, that ABLE's allegations are not based on "inside" information. Opp. 2, 6. But the statute bars cases only based on specific public disclosures; it does not require "inside" information.

U.S. Bank insinuates that ABLE's claims are unfounded because its suit is based solely on information about three violations. *Id.* at 2, 7. U.S. Bank's comments have nothing to do with the public disclosure bar, but would be relevant only to whether the complaint satisfies Rule 12(b)(6), an issue the district court resolved in ABLE's favor and the Sixth Circuit did not address. U.S. Bank's insinuation is also groundless. ABLE's complaint specifically alleged that it had information about other violations and described the three illustrative examples to comply with Sixth Circuit requirements for pleading large-scale fraud. *See United States ex rel. Bledsoe v. Cmty. Health Sys.*, 501 F.3d 493 (6th Cir. 2007).

U.S. Bank's assertion that this case would require the Court to address two versions of the public disclosure bar, Opp. 25 n.9, is likewise a misdirection. U.S. Bank concedes that the 2010 amendment did not affect the question here: The determinative issue under both versions of the statute is whether an FCA claim is substantially similar to publicly disclosed allegations. *Id.* at 7–8, n.2. As U.S. Bank puts it, "the amendment in that respect simply codified the majority rule." *Id.*

6. U.S. Bank's argument that this Court should not review the Sixth Circuit's application of the original source exception if it considers whether the allegations here triggered the public disclosure bar actually demonstrates the desirability of reviewing the two issues together. Echoing the lower court, U.S. Bank asserts that if a relator's allegations are substantially similar to prior disclosures, details added by the relator cannot "materially add" to the public disclosures. *Id.* at 27. That rule would render the original source exception superfluous. U.S. Bank's reliance on such an obvious misreading of the statute emphasizes the importance of considering the original source issue together with the basic application of the public disclosure bar.

7. Finally, U.S. Bank's assertion that the Seventh and Ninth Circuits' standard "vitiate[s]" the public disclosure bar is false. *Id.* at 29. Nor does that standard conflict with the rule (which U.S. Bank concedes is *accepted* by the Seventh and Ninth Circuits) that a relator cannot avoid the bar merely by making "more specific or detailed allegations of a fraud that has been publicly disclosed." Opp. 28. U.S. Bank's suggestion that the claims are partly "based on" public disclosures just because they may be partly "*related to*" them in some broad sense is likewise meritless. *Id.* (emphasis added).

As U.S. Bank's citation of Seventh Circuit decisions barring truly parasitic claims demonstrates, a proper interpretation of the public disclosure bar serves both of the statute's purposes—rather than treating one of them as more important, as the Sixth Circuit's rule does—by barring copycat suits while encouraging actions based on "genuinely new and material information." *Mateski*, 816 F.3d at 579; *Leveski*, 719 F.3d at 831.

CONCLUSION

The petition should be granted.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

JOHN P. RELMAN
SASHA SAMBERG-CHAMPION
STEPHEN M. DANE
MICHAEL G. ALLEN
RELMAN, DANE & COLFAX
PLLC
1225 19th Street NW
Suite 600
Washington, DC 20036
(202) 728-1888

PAMELA S. KARLAN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

ANEEL L. CHABLANI
GEORGE A. THOMAS
ADVOCATES FOR BASIC
LEGAL EQUALITY, INC.
525 Jefferson Avenue
Suite 300
Toledo, OH 43604
(419) 255-0814

Attorneys for Petitioner

September 2016