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.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## QUESTION PRESENTED

This case involves a *qui tam* suit filed by a private relator under the False Claims Act (FCA). The question presented is as follows:

Whether the court of appeals correctly held that the relator's claims were subject to dismissal under the FCA's public disclosure bar, 31 U.S.C. 3730(e)(4)(A), because "substantially the same allegations" had previously been disclosed in two publicly released documents.

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This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

**STATEMENT**

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, imposes liability on a person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1)(A). The Attorney General may bring a civil action for any such violation. 31 U.S.C. 3730(a). The FCA also permits private persons, commonly known as relators, to file *qui tam* actions on behalf of the United States. 31 U.S.C. 3730(b)(1). In a *qui tam* action, the government may intervene and take over the litigation, 31 U.S.C. 3730(b)(2) and (c)(1), or it

may allow the relator to conduct the suit alone, 31 U.S.C. 3730(c)(3). In either case, if the suit ultimately is successful, the defendant is liable for statutory penalties and treble damages, 31 U.S.C. 3729(a)(1), and the relator receives a portion of the recovery, 31 U.S.C. 3730(d).

Earlier versions of the FCA's *qui tam* provisions created a potential for abuse by allowing relators who had "discovered the fraud by reading a federal criminal indictment" to file suit and share in the government's recovery. *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 294 (2010). Congress sought to prevent such parasitic lawsuits by prohibiting *qui tam* actions that were based on "evidence or information in the possession of the United States," its agencies, officers, or employees. Act of Dec. 23, 1943, ch. 377, 57 Stat. 609.

In 1986, "in an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits," *Graham Cnty.*, 559 U.S. at 295, Congress repealed the ban on *qui tam* suits based on information in the government's possession, replacing it with jurisdictional restrictions that turned on the existence of specified "public disclosure[s]." See False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3157. That provision stated:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the At-

> torney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4) (1986-2010).

In 2010, Congress amended the public disclosure bar. See Pub. L. No. 111-148, Tit. X, Subtit. D, § 10104(j)(2), 124 Stat. 901-902. Among other changes, instead of divesting district courts of jurisdiction, the bar now directs a court to dismiss the action unless the United States opposes dismissal:

> (4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> > (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
> >
> > (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
> >
> > (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

> (B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

31 U.S.C. 3730(e)(4).

2. Pursuant to the National Housing Act, 12 U.S.C. 1701 *et seq.*, the Federal Housing Administration (FHA), a component of the Department of Housing and Urban Development (HUD), offers mortgage insurance programs to encourage private mortgage lenders to provide loans to borrowers who might not otherwise qualify. A mortgagee (*i.e.*, lender) that participates in the program must comply with applicable statutes and regulations, including a requirement that "mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure (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); see 24 C.F.R. 203.501, 203.605(a) (directing the lender to evaluate the need for and to "take the appropriate loss mitigation action"). If a mortgagor (*i.e.*, borrower) fails to make two full monthly payments on the mortgage, the lender generally must "have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting," before the third monthly payment.

24 C.F.R. 203.604(b). If a foreclosure nevertheless occurs, the lender may apply to FHA for an insurance benefit payment.

3. In 1998, respondent, through its predecessor entity (referred to here, collectively, as respondent), applied to HUD for approval as an FHA lender. In its application, respondent agreed to comply with applicable HUD regulations, including loss-mitigation requirements. Pet. App. 14a. Respondent also annually certified to HUD its continued eligibility to participate in the FHA insurance program, again promising compliance with applicable HUD regulations. *Id.* at 14a-15a. In addition, each time respondent requested FHA insurance benefits after a foreclosure, it certified that it had complied with HUD regulations. *Id.* at 15a-16a.

In April 2013, petitioner filed a *qui tam* complaint against respondent. Petitioner alleged that, between 2001 and 2011, respondent had foreclosed on FHA-insured mortgages without satisfying HUD's loss-mitigation requirements, had nevertheless falsely certified compliance, and had received FHA insurance payments. Pet. App. 16a; Compl. ¶¶ 3, 68-70. After investigating petitioner's allegations, the United States declined to intervene. Pet. App. 17a.

Respondent moved to dismiss the complaint for failure to state a claim. As relevant here, the district court agreed with respondent that the complaint should be dismissed under the FCA's public disclosure bar. Pet. App. 26a-33a. The court identified two documents that, in its view, had put the federal government "on notice of allegations that [respondent] did not comply with HUD's loss mitigation requirements." *Id.* at 29a.

The first of those documents was a March 2011 consent order between respondent and the federal Office of the Comptroller of the Currency (OCC). Pet. App. 29a. The OCC consent order contained findings, including that respondent 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." *Id.* at 73a. The order also directed respondent to take various remedial measures designed to "achieve[ ] and maintain[ ] effective mortgage servicing, foreclosure, and loss mitigation activities." *Id.* at 75a.

The second document identified by the district court was a federal interagency report issued in April 2011 by the Federal Reserve. Pet. App. 29a. The interagency report was based on "on-site reviews of foreclosure processing at 14 federally regulated mortgage servicers," including respondent. *Id.* at 38a. The report evaluated whether the lenders had been "in direct communication with borrowers and whether loss-mitigation actions, including loan modifications, were considered as alternatives to foreclosure." *Id.* at 42a. While the report concluded that lenders had "generally attempted to contact distressed borrowers * * * to pursue loss-mitigation alternatives" before foreclosing, *id.* at 43a, it also found that the overall foreclosure process suffered from inadequate policies, procedures, monitoring, auditing, and quality-control measures, *id.* at 44a.

The district court concluded that the two documents had provided the government with sufficient information about respondent's loss-mitigation fail-

ures, such that the government "could infer the alleged fraudulent transactions referenced in the Complaint." Pet. App. 31a.[1] The court also determined that petitioner's complaint was "based upon" the previously disclosed fraud and that petitioner did not qualify as an "original source" of the information. *Id.* at 30a-32a. The court therefore held that petitioner's "FCA claims against [respondent] are barred by the public disclosure doctrine," and it dismissed the complaint. *Id.* at 33a.

4. The court of appeals affirmed. Pet. App. 1a-11a. The court observed at the outset that, because the complaint's allegations of fraud spanned a period from 2001 to 2011, it was not clear whether the 2010 amendment to the public disclosure bar should apply. *Id.* at 4a. The court applied the post-amendment version of the bar, however, because petitioner had urged it to do so and because the court concluded that petitioner's "claims fail even under the new requirements." *Ibid.*

The court of appeals held that "[a]t least two sources publicly disclosed" the complaint's allegations of fraud prior to petitioner's suit. Pet. App. 5a. In the court's view, the OCC consent order and the interagency report, by detailing respondent's inadequate practices in dealing with delinquent loans, had "amply disclose[d] the allegation that [respondent] failed to

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[1] The district court also noted that HUD had reached a public settlement with respondent concerning allegations that respondent had failed to comply with FHA underwriting standards by, *inter alia*, refinancing mortgages that included overdue principal, interest, and late charges. Pet. App. 30a. Respondent no longer argues, however, that petitioner's allegations of fraud relating to loss mitigation had already been disclosed by that settlement.

engage in appropriate loss mitigation measures." *Id.* at 6a. The court stated that those sources, along with a 2011 news article, had also "put the government (and everyone else) on notice that [respondent] allegedly had filed non-compliant documents—documents that could supply the foundation for a fraud claim." *Ibid.*

The court of appeals next held that petitioner did not qualify as an "original source" of the information. Pet. App. 7a. "To be an original source," the court explained, "the claimant must have knowledge that 'materially adds to' the public disclosure." *Ibid.* (quoting 31 U.S.C. 3730(e)(4)(B)). Petitioner had pointed to the complaint's description of three specific "incidents that purportedly show that [respondent] failed to engage in appropriate loss mitigation measures." *Ibid.* In the court's view, however, "the incidents do not materially add to the thousands of prior problematic foreclosures already disclosed" because "[t]here is nothing significant or new about the nature of these foreclosures other than proof that there were others like them." *Ibid.*; see *ibid.* ("That doesn't add anything, materially or otherwise.").

In arguing that the public disclosure bar is inapplicable to this suit, petitioner contended that the OCC consent order and the interagency report had addressed only mortgages generally, rather than the FHA-insured mortgages at issue in the complaint. Pet. App. 7a. The court of appeals rejected that argument. While acknowledging that "the consent order and the report do not directly mention federally insured mortgages," the court stated that "the broader, publicly disclosed category * * * encompasses [petitioner's] narrower category." *Id.* at 7a-8a; see *id.* at

8a ("Otherwise, one could always—or at least nearly always—evade the public disclosure requirement by focusing on the allegations in a second action on subclasses of potential claims covered by the initial action."). For similar reasons, the court rejected petitioner's argument that the two public documents "dealt with loss mitigation measures in general, not with specific types of loss mitigation measures, such as face-to-face meetings." *Id.* at 8a-9a. In the court's view, since "[t]he absence of face-to-face meetings is merely one type of failure," the complaint simply "added details" to what the government already knew. *Id.* at 9a (brackets and internal quotation marks omitted).

Finally, the court of appeals rejected petitioner's argument "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. "To qualify as a public disclosure of fraud," the court explained, "the disclosure is not required to use the word 'fraud' or provide a specific allegation of fraud," but simply must "put[] the government on notice of the *possibility* of fraud surrounding the transaction." *Ibid.* (brackets, ellipsis, citations, and internal quotation marks omitted). The court concluded that, although the OCC consent order and interagency report did not contain "an explicit, formal allegation of either fraud or the essential elements of fraud, [they] certainly presented enough facts to create an inference of wrongdoing." *Ibid.* (citation omitted); see *ibid.* ("That's all that's required.").

**DISCUSSION**

The court of appeals held that petitioner's suit was barred by the FCA's public disclosure provision because "substantially the same allegations" had already been disclosed in the OCC consent order and the interagency report. 31 U.S.C. 3730(e)(4). The court's approach is consistent with decisions from other courts of appeals. The different outcomes in those cases do not result from the application of competing legal standards, but simply reflect the fact that many applications of the public disclosure bar will depend upon a close examination of the relevant facts. If the court of appeals committed any error here, its error involved a mischaracterization of the particular public disclosures involved in this case, not a misunderstanding of the governing legal standard.

A further, practical reason exists to decline review. The FCA empowers the United States either to dismiss or to prevent the dismissal of any complaint that is potentially subject to the public disclosure bar. Because the bar is designed to protect the government's interest in preventing parasitic lawsuits, the government's authority to control which cases are dismissed is generally sufficient to vindicate the primary purpose of the public disclosure bar. The petition for a writ of certiorari should be denied.

1. Before it was amended in 2010, the public disclosure bar divested the district courts of jurisdiction over any *qui tam* suit that was "based upon the public disclosure of allegations or transactions" contained in various sources. 31 U.S.C. 3730(e)(4) (1986-2010). Most courts of appeals interpreted that provision to require dismissal if the public disclosures were "substantially similar" to the allegations in the relator's

complaint. *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 518 (6th Cir. 2009); see *Glaser* v. *Wound Care Consultants, Inc.*, 570 F.3d 907, 915, 920 (7th Cir. 2009) (collecting cases). Congress incorporated that standard in the 2010 amendment, and the bar now applies if a public disclosure contains "substantially the same allegations or transactions as alleged in the" complaint. 31 U.S.C. 3730(e)(4)(A).[2]

a. To determine whether public disclosures are substantially the same as the complaint's allegations, the courts of appeals generally have asked whether the disclosures put the federal government "on notice" of a possible false claim. *United States ex rel. Mateski* v. *Raytheon Co.*, 816 F.3d 565, 574 (9th Cir. 2016). That formulation, "which is another way of thinking about substantial similarity," *ibid.*, is connected to the purpose of the public disclosure bar: identifying cases where public disclosures have already "put the Federal Government on notice of a potential fraud," thus obviating the need for a *qui tam* relator to bring the fraud to the government's attention. *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 291 (2010); see *id.* at 312 n.9 (Sotomayor, J., dissenting)

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[2] The court of appeals did not resolve which version of the public disclosure bar applies to petitioner's complaint, instead assuming for the purposes of its opinion that the post-amendment version applies. Pet. App. 4a. Because the decision below rests on that assumption, and because at least some of petitioner's allegations indisputably relate to conduct subsequent to the amendment, see Compl. ¶¶ 3, 59, 63, if this Court were to grant plenary review, it would have an opportunity to pass on the post-amendment version, which has greater prospective significance. Cf. Br. in Opp. 25 n.9 (arguing that "the Court would need to apply two distinct versions of the public disclosure bar").

(observing that "'public' disclosure countenances notice").

The court below applied that standard, holding that the public disclosure bar encompassed petitioner's allegations because the OCC consent order and the interagency report had already "put[] the government on notice of the possibility of fraud surrounding the transaction[s]." Pet. App. 6a (ellipsis, citation, and internal quotation marks omitted). That articulation of the governing standard is consistent with the approaches taken by other courts of appeals, which have applied some version of the "on notice" inquiry both before and since the 2010 FCA amendments. See, *e.g.*, *United States ex rel. Winkelman* v. *CVS Caremark Corp.*, 827 F.3d 201, 209 (1st Cir. 2016) (disclosures "put the government on notice of the potential fraud without the aid of these relators"); *Poteet*, 552 F.3d at 512 (similar); *United States ex rel. Bogina* v. *Medline Indus., Inc.*, 809 F.3d 365, 370 (7th Cir. 2016) (similar); *United States* v. *Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999) (similar); *United States ex rel. Fine* v. *Sandia Corp.*, 70 F.3d 568, 572 (10th Cir. 1995) (similar).

b. Petitioner contends (Pet. 19-22) that the court below adopted a legal standard that conflicts with decisions of two other courts of appeals, and that the disagreement is "outcome-determinative" (Pet. 22). Petitioner is incorrect. Although the courts of appeals have adopted various verbal formulations to describe the applicable standard, the legal analyses they perform are not materially different. The different outcomes in the cases cited by petitioner stem not from a disagreement about the proper legal standard, but

rather from differences in the particular facts of each case.

In asserting that a circuit conflict exists, petitioner relies in part (Pet. 19-20) on the Seventh Circuit's statement that, when applying the public disclosure bar, "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* v. *ITT Educ. Servs., Inc.*, 719 F.3d 818, 831 (2013) (ellipsis, citation, and internal quotation marks omitted). The Seventh Circuit has accordingly declined to apply the bar to "a *qui tam* plaintiff who supplies 'vital details' of an FCA claim by alleging that 'a particular defendant had committed a particular fraud in a particular way.'" Pet. 20 (brackets omitted) (quoting *United States ex rel. Goldberg* v. *Rush Univ. Med. Ctr.*, 680 F.3d 933, 935 (7th Cir. 2012)).

Those statements do not conflict with the ruling below, which does not indicate that a plaintiff's FCA allegations should be viewed at a high level of generality (let alone at the "highest level of generality," *Leveski*, 719 F.3d at 831). Instead, the court of appeals, in finding the complaint's allegations to be substantially similar to information contained in the OCC consent order and interagency report, emphasized that those documents had "amply disclose[d]" the relevant information, Pet. App. 6a, and that petitioner's complaint "did not provide information that materially adds to the prior publicly disclosed information," *id.* at 7a. Those conclusions are fully consistent with the Seventh Circuit's statement that the public disclosure bar does not apply if the complaint contains allegations that are "genuinely new and material." *Goldberg*, 680 F.3d at 936. In other cases,

where relators have "merely 'add[ed] details' to what [wa]s already known," the Seventh Circuit has applied the bar. *Bogina*, 809 F.3d at 370 (quoting *Goldberg*, 680 F.3d at 934).

Petitioner is also wrong in asserting (Pet. 20) that the Ninth Circuit has "explicitly *rejected* an approach" that asks whether the government is on notice of the possibility of fraud. Petitioner relies (Pet. 20-21) on *Mateski*, *supra*, in which the Ninth Circuit agreed with the Seventh Circuit's statement that FCA allegations should not be viewed "at the highest level of generality." *Mateski*, 816 F.3d at 577 (quoting *Leveski*, 719 F.3d at 831). Like the Seventh Circuit in *Leveski*, Ninth Circuit explained that the public disclosure bar, properly understood, "allow[s] relators who provide the Government with genuinely new and material information of fraud to move forward with their *qui tam* suits." *Id.* at 579. As just noted, those formulations of the substantial-similarity test are consistent with the decision below. The Ninth Circuit in *Mateski* made clear, moreover, that it was not abandoning the approach taken in prior cases, in which the court had "asked whether the Government was on notice to investigate the fraud before the relator filed his complaint." *Id.* at 574. Instead, the court explained that it regards the "on notice" inquiry as simply "another way of thinking about substantial similarity." *Ibid.*; see *ibid.* (describing the "on notice" approach as an "alternative articulation of the 'substantially similar' inquiry").

In arguing that the decision below conflicts with *Mateski*, petitioner relies (Pet. 20) on the Ninth Circuit's statement that the public disclosure bar did not apply in that case because "the prior public reports

provided" only "enough information to pursue an investigation into *some* fraud." *Mateski*, 816 F.3d at 579 (ellipsis and internal quotation marks omitted). Petitioner contrasts (Pet. 20) that statement with the statement made by the court below that "[a] prior disclosure is sufficient if it puts the government on notice of the *possibility* of fraud surrounding the transaction." Pet. App. 9a (ellipsis, citation, and internal quotation marks omitted). When those two statements are viewed in context, however, it is clear that the Ninth and Sixth Circuit decisions do not conflict.

Immediately following the statement in *Mateski* quoted above, the Ninth Circuit emphasized that, because the "the prior reports could not have alerted the Government to the specific areas of fraud alleged by [the relator]," the relator's additional disclosures had provided the government with substantially new, material information. 816 F.3d at 579. The court thus emphasized that the "practical consequence" of its approach would be "to allow relators who provide the Government with genuinely new and material information of fraud to move forward with their *qui tam* suits." *Ibid.* Although the Sixth Circuit in this case reached the opposite outcome, it did so based on its conclusion that the public disclosures in the OCC consent order and the interagency report had already "put the government (and everyone else) on notice" of the specific type of fraud at issue in the complaint—namely, respondent's "false certifications about whether it had engaged in loss mitigation." Pet. App. 6a. The court therefore viewed petitioner's complaint as providing no new, material information. *Id.* at 6a-7a. Because the court in *Mateski* adopted a notice-focused approach similar to the one followed below,

and the divergent outcomes of the two cases simply reflect the two circuits' differing assessments of the relevant facts, petitioner's claim of a circuit conflict is incorrect.

2. Petitioner further contends (Pet. 13-15, 22-23, 31-32) that the decision below was erroneous because the OCC consent order and the interagency report did not, as the court of appeals held (Pet. App. 5a-6a), disclose that respondent had failed to engage in appropriate loss-mitigation measures. That argument, however, concerns the court's reading of the record, not its articulation of the governing legal standard.

The OCC consent order contained a list of enumerated findings. Pet. App. 72a-73a. *Inter alia*, the order found that respondent had filed or caused to be filed in state and federal courts mortgage-related affidavits in which the affiants' statements "were not based on * * * personal knowledge or review of the relevant books and records," contrary to the affiants' assertions. *Ibid.* The consent order also stated that respondent had filed or caused to be filed with federal, state, and local authorities "numerous affidavits that were not properly notarized." *Id.* at 73a. In addition, the OCC consent order determined that respondent had "failed to devote to its foreclosure processes adequate oversight, internal controls," and other, appropriate policies. *Ibid.* The consent order did not specifically find, however, that respondent had failed to engage in appropriate loss mitigation.

It is also not clear whether the court of appeals was correct in concluding (Pet. App. 6a) that the remedial portion of the OCC consent order "put the government (and everyone else) on notice" of respondent's loss-mitigation failures. The order directed respond-

ent to implement an action plan to "achieve[] and maintain[] effective * * * loss mitigation activities." *Id.* at 75a; see *id.* at 74a-76a. The order did not indicate, however, whether the action plan was intended to remedy past misconduct or instead to serve as a purely prophylactic measure guiding future behavior. Thus, while the action plan directed respondent to assure adequate financial support, organizational structure, staffing, and internal controls for its loss-mitigation activities, *id.* at 75a, it did not necessarily disclose that respondent previously had failed to offer borrowers appropriate loss-mitigation alternatives to foreclosure. Indeed, the consent order directed respondent to review its foreclosures to determine "whether" it had offered appropriate loss mitigation on foreclosed loans "consistent with * * * other loss mitigation programs," such as HUD's regulations. *Id.* at 87a.

It is similarly questionable whether the interagency report reveals loss-mitigation failures by respondent. The report stated that reviewers "did not focus on loan-modification processes" but did "check[] for evidence that [lenders] were in contact with borrowers and had considered alternative loss-mitigation efforts." Pet. App. 41a. The report's findings, however, do not directly reflect the complaint's allegations: The report found that lenders had "generally attempted to contact distressed borrowers prior to initiating the foreclosure process to pursue loss-mitigation alternatives, including loan modifications." *Id.* at 43a-44a. The report did not identify or otherwise discuss instances in which respondent (or any other lender) had failed to offer loss mitigation.

Although the interagency report faulted lenders for improper practices, those findings did not relate specifically to loss mitigation. The report noted that lenders had "under-developed and insufficient" governance procedures that had hampered the lenders' ability to oversee the entire foreclosure process. Pet. App. 44a-45a. The report also identified specific weaknesses, such as "inadequate affidavit and notary-signing processes," "inadequate staffing levels and training programs," *id.* at 54a, and poor oversight of third-party vendors and law firms, *id.* at 58a. But the report did not identify a failure to offer loss mitigation to borrowers. The closest thing to such a disclosure was a finding that lenders had exhibited "weaknesses in quality-control procedures" and had failed to perform "at a satisfactory level" when "evaluating and testing compliance with applicable laws and regulations, court orders, pooling and servicing agreements, and similar contractual arrangements." *Id.* at 64a. But that generalized statement about lenders' failure to satisfactorily evaluate compliance with "applicable" laws, orders, agreements, and contracts did not necessarily disclose that the lenders had failed to engage in loss mitigation.

In sum, petitioner may be correct (Pet. 22) that "neither [document] identified the practices that form the basis of [petitioner's] *qui tam* action." However, though neither document, when read in isolation, specifically discloses loss-mitigation failures by respondent, reading the two documents together may convey a different impression. In applying the public disclosure bar here, the court of appeals could legitimately have interpreted the documents as collectively overlapping with the complaint's allegations to a

greater degree than either would have separately. In any event, the court's potential misreading of the record in this case would not reflect a misunderstanding of the applicable legal standard, nor would it otherwise suggest a disagreement among the circuits that would warrant this Court's review.

3. Finally, any need for this Court's review is partially mitigated by the fact that the 2010 amendment authorizes the United States to determine whether an FCA complaint should proceed. Under current 31 U.S.C. 3730(e)(4)(A), a court may not dismiss a complaint under the public disclosure bar if dismissal is "opposed by the Government." Conversely, if the government determines that a relator's action should not go forward—based on the public disclosure bar or for another reason—the government may dismiss the case. See 31 U.S.C. 3730(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action."). In light of those provisions, the United States is well situated to protect its own interests and to assure that the public disclosure bar serves its intended purpose: "strik[ing] a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cnty.*, 559 U.S. at 295; see *id.* at 310 (Sotomayor, J., dissenting) (noting the public disclosure bar's "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own") (citation omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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