No. 17-842

IN THE

Supreme Court of the United States

GEORGE BELLEVUE,

Petitioner,

v.

UHS OF HARTGROVE, INC. DOING BUSINESS AS HARTGROVE HOSPITAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit erred in concluding that petitioner does not fall within the original-source exception to the False Claims Act's public-disclosure bar because his allegations do not "supply any genuinely new and material information" and therefore do not "materially add[ ] to the publicly disclosed allegations" under 31 U.S.C. § 3730(e)(4)(B).

RULE 29.6 STATEMENT

Respondent UHS of Hartgrove, Inc., doing business as Hartgrove Hospital, is a wholly-owned subsidiary of UHS of Delaware, Inc., which is a wholly-owned subsidiary of Universal Health Services, Inc. No publicly-held company owns 10% or more of respondent's stock.

Respondent was incorrectly identified as Universal Health Services of Hartgrove, Inc. in the caption of the court of appeals' opinion and the caption of the petition.

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BRIEF IN OPPOSITION

Respondent UHS of Hartgrove, Inc. ("Hartgrove") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by George Bellevue.

OPINIONS BELOW

The court of appeals' opinion is reported at 867 F.3d 712. Pet. App. 1a. The court of appeals' order denying the petition for rehearing and rehearing en banc is unreported. Pet. App. 65a. The district court's opinions are unreported but are available electronically at 2015 WL 5873292 and 2015 WL 1915493. Pet. App. 21a, 32a.

JURISDICTION

The court of appeals filed its opinion on August 8, 2017, and denied the petition for rehearing and rehearing en banc on September 8, 2017. Pet. App. 65a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provision of the False Claims Act, 31 U.S.C. § 3730(e)(4), is reproduced in the petition. Pet. 2–3.

STATEMENT

Since its enactment, "the False Claims Act has authorized both the Attorney General and private *qui tam* relators to recover from persons who make false or fraudulent claims for payment to the United States." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 (2010) (citation omitted). As originally written, the Act "placed no restriction on the sources from which a *qui tam* relator could acquire information on which to

base a lawsuit." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 412 (2011). This omission fostered suits in which the relator was able to recover without having contributed anything to what the government already knew about the underlying fraud. *Id.*

Congress responded by enacting the False Claims Act's public-disclosure provision, which "strike[s] a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits" based on information already available to the government. *Graham*, 559 U.S. at 294–95. That provision directs courts to "dismiss an action" if "substantially the same allegations or transactions as alleged in the [*qui tam*] action or claim were publicly disclosed" before suit was filed. 31 U.S.C. § 3730(e)(4)(A) (2012). The Act's public-disclosure bar includes an exception, however, where "the person bringing the action is an original source of the information." *Id*. § 3730(e)(4)(A)(iii). A person is an "original source" if he "has knowledge that is independent of and materially adds to the publicly disclosed allegations." *Id*. § 3730(e)(4)(B).

In this case, the Seventh Circuit held that petitioner's allegations that Hartgrove admitted patients in excess of its licensed capacity fell within the public-disclosure bar because he did not "supply any genuinely new and material information" about Hartgrove's admissions practices, and that he did not qualify as an original source because he failed to "'materially add' to the public disclosure." Pet. App. 13a, 16a.

That straightforward application of the False Claims Act to the particular facts of this case does not warrant this Court's review. While petitioner contends that the Seventh Circuit's decision "reads out of the statute the original source exception" and conflicts

with the decisions of other circuits, Pet. 12, the Seventh Circuit's decision—like those of other circuits—gives independent effect to both the public-disclosure bar and the original-source exception. Indeed, petitioner does not make any effort to demonstrate that the outcome of this case would have been different under the supposedly distinct standards applied by other circuits. And even if petitioner could survive the public-disclosure bar, his claims would still fail on alternative grounds, as the district court concluded when twice dismissing those claims.

For each of these reasons, the Court should deny the petition.

1. Hartgrove is a psychiatric hospital that provides inpatient care primarily to children with mental illnesses. Pet. App. 2a. It is enrolled with the Illinois Department of Healthcare and Family Services to receive reimbursements from Medicaid. *Id.* Hartgrove's license initially authorized it to maintain 136 patient beds in its facility; in September 2009, its capacity was increased to 150 beds. *Id.* at 35a–36a.

Petitioner was employed as a nursing counselor at Hartgrove from 2009 until 2014. Pet. App. 3a. In 2011, petitioner sued Hartgrove under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729. Pet. App. 2a, 4a. In the complaint, petitioner alleged that Hartgrove was admitting patients in excess of its licensed capacity and temporarily housing those patients in dayrooms until private rooms became available. *Id.* at 3a. Petitioner asserted that Hartgrove's submission of Medicaid claims seeking reimbursement for the cost of treating these patients violated the False Claims Act because, among other reasons, admitting excess patients purportedly violated an Illinois administrative regulation requiring hospitals to

ensure that their "occupancy does not at any time exceed capacity, except in the event of unusual emergency." C.A. SA17–19 (¶¶ 46–55) (citing Ill. Admin. Code tit. 77, § 250.230(b)). Petitioner did not allege, however, that Hartgrove failed to provide these patients with medication, therapy, or food, that their psychiatric treatment was in any way compromised, or "that any of the patients placed in the dayroom was left there for an extended period of time." Pet. App. 59a.

The United States declined to intervene in petitioner's suit. Pet. App. 4a.

2. Hartgrove moved to dismiss the complaint on multiple grounds. Pet. App. 4a. As a threshold matter, Hartgrove contended that the complaint was barred by the False Claims Act's public-disclosure provision because two audit reports released prior to petitioner's suit disclosed that Hartgrove had admitted patients in excess of its licensed capacity. A March 2009 audit report by the Illinois Department of Public Health found that Hartgrove's patient count "exceeded the number it was permitted under its license . . . and therefore was 'over census.'" Pet. App. 4a n.1. Similarly, a May 2009 audit report by the Centers for Medicare and Medicaid Services ("CMS") "noted that Hartgrove was over census on at least 52 separate occasions between December 3, 2008, and February 28, 2009." *Id*. The audit reports did not state, however, that the government would seek to recoup payments based on the violations, or that it would prohibit Hartgrove from submitting future Medicaid claims.

The district court initially dismissed the complaint without prejudice. Pet. App. 64a. While concluding that petitioner's complaint was not barred by

the public-disclosure provision, the court held that the complaint failed to state a claim. *Id.* at 56a, 64a.

Petitioner filed an amended complaint, and Hartgrove again moved to dismiss on multiple grounds, including the False Claims Act's public-disclosure bar. Pet. App. 22a. The district court declined to revisit its analysis of the public-disclosure bar, but again dismissed the complaint for failure to state a claim, rejecting the new theory of False Claims Act liability that petitioner added to his amended complaint as "border[ing] on frivolous." *Id.* at 29a. The district court dismissed the amended complaint with prejudice. *Id.* at 31a.[1]

3. The Seventh Circuit affirmed on the ground that petitioner's amended complaint is barred by the False Claims Act's public-disclosure provision, which the Seventh Circuit concluded was a threshold jurisdictional question that it needed to address before reaching other potential grounds for dismissal. Pet. App. 10a–16a.

The court of appeals held that petitioner's allegations regarding Hartgrove's over-capacity admissions fell within the Act's public-disclosure bar because they were "substantially similar to the publicly disclosed allegations" in the 2009 audit reports and "did not supply any genuinely new and material information" to what had already been disclosed in those reports. Pet. App. 13a, 15a. This conclusion, the Seventh Circuit explained, applied with equal force to petitioner's

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[1] Petitioner filed a motion for reconsideration after this Court issued its decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), addressing the implied-certification theory of False Claims Act liability. Pet. App. 17a. The district court denied that motion. *Id.* at 17a–20a.

allegations of over-capacity admissions after the second audit report was issued in May 2009 because those allegations "pertain[ed] to the same entity and describe[d] the same contested conduct as the publicly disclosed information." *Id.* at 14a–15a. The Seventh Circuit further concluded that petitioner did not qualify for the original-source exception to the public-disclosure bar because he "ha[d] not 'materially add[ed]' to the publicly disclosed allegations." *Id.* at 16a (second alteration in original).

REASONS FOR DENYING THE PETITION

The Seventh Circuit's decision that petitioner's complaint is barred by the False Claims Act's public-disclosure provision rests on its application of the Act's unambiguous language to the specific facts of this case. Far from "nullif[ying]" the original-source exception, Pet. 3, the Seventh Circuit simply held that a *qui tam* relator who does not supply anything "genuinely new and material" to the information already in the public domain does not possess "'knowledge that is independent of and materially adds to the publicly disclosed allegations.'" Pet. App. 13a, 15a (quoting 31 U.S.C. § 3730(e)(4)(B)). That common-sense conclusion leaves ample room for courts to conclude—on facts different from those in this case—that a relator is an original source of allegations already in the public domain.

Nor does the Seventh Circuit's decision conflict with the decision of any other circuit. No court of appeals has disagreed with the Seventh Circuit's standards for applying the False Claims Act's public-disclosure bar and original-source exception, and petitioner does not attempt to demonstrate that this case would have come out differently in another circuit. And even if petitioner would somehow qualify for the original-

source exception under another circuit's supposedly distinct standard, his complaint would still require dismissal on several other grounds, including his failure to plead with plausibility and particularity that Hartgrove's allegedly false claims were material to the government's payment decisions.

Because the Seventh Circuit's decision is correct and consistent with the decisions of other courts—and because petitioner's complaint is destined for dismissal even if he surmounts the public-disclosure bar—the Court should deny the petition for a writ of certiorari.

THIS COURT'S REVIEW IS NOT WARRANTED.

The petition contends that the Seventh Circuit erroneously construed the False Claims Act's original-source exception and, in so doing, created a conflict with decisions of the First and Third Circuits. Neither assertion is accurate.

A. The Seventh Circuit Did Not Nullify The Original-Source Exception.

According to the petition, the Seventh Circuit's decision "nullifies" the original-source exception because "the only way a person could be an original source would be to add information which would no longer make the claims or allegations substantially similar" for purposes of the public-disclosure bar. Pet. 14. Petitioner's argument fundamentally misconstrues the Seventh Circuit's analysis of the public-disclosure bar and the original-source exception.

The False Claims Act's public-disclosure bar applies where "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed," 31 U.S.C. § 3730(e)(4)(A), and its original-source exception permits the suit to proceed

where the relator nevertheless "has knowledge that is independent of and materially adds to the publicly disclosed allegations." *Id.* § 3730(e)(4)(B). The Seventh Circuit held that petitioner's allegations of overcapacity admissions were "substantially similar to the publicly disclosed allegations"—and therefore fell within the Act's public-disclosure bar—because they "did not supply any genuinely new and material information" about Hartgrove's admissions practices. Pet. App. 13a, 15a. The court further held that petitioner did not qualify for the original-source exception because he did not "'materially add[ ]' to the publicly disclosed allegations." *Id.* at 16a.[2]

That analysis closely tracks the unambiguous language of the False Claims Act. *Compare* Pet. App. 15a (looking to whether petitioner's allegations were "substantially similar" to publicly available information), *and id.* at 16a (looking to whether allegations "'materially add[ ]'" to that information), *with* 31 U.S.C. § 3730(e)(4)(A) (public disclosure if "substantially the same allegations" are in the public domain), *and id.* § 3730(e)(4)(B) (original source if knowledge "is independent of and materially adds" to public information).

Despite the Seventh Circuit's adherence to the plain language of the False Claims Act, petitioner argues that the Seventh Circuit's reasoning "makes the original source provision meaningless" because mate-

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[2] The allegations in this case span the 2010 amendments to the False Claims Act, which modified the language of the public-disclosure bar and original-source exception. *See* Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119 (2010). The Seventh Circuit applied the same analysis to the pre- and post-amendment allegations.

riality is a component of both the court's public-disclosure analysis and its original-source inquiry. Pet. 8. But the fact that petitioner's copy-cat allegations in this case did not qualify for the original-source exception does not mean that the Seventh Circuit has somehow read that provision out of the False Claims Act.

There are ample situations in which the Seventh Circuit's framework would allow a relator who pled publicly disclosed allegations nevertheless to proceed with his suit because he qualified for the original-source exception. In particular, the Seventh Circuit could conclude that the relator's allegations are "substantially similar" to information in the public domain—and are therefore within the public-disclosure bar—because they are not "genuinely new," even though they are "material." Pet. App. 13a. Those publicly disclosed, "material" allegations would fall within the original-source exception if they were also "'independent of'" the publicly disclosed information. *Id.* at 15a (citing 31 U.S.C. § 3730(e)(4)(B)). On the other hand, if the allegations were neither "genuinely new" *nor* "material" (like petitioner's allegations), then they would fail to qualify for the original-source exception because they would not "'materially add[ ]'" to the information in the public domain. Pet. App. 13a, 15a (quoting 31 U.S.C. § 3730(e)(4)(B)).[3]

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[3] For example, if petitioner had provided additional, essential details about Hartgrove's over-capacity admissions—such as allegations that the alleged fraudulent scheme was embodied in written corporate policies that directed employees to admit as many patients as possible and to withhold care and treatment from over-capacity patients—then those allegations would not have been "genuinely new" because they pertained to "the same contested conduct" as was already in the public domain, Pet. App. 15a, but could potentially have been "material" because

Accordingly, while petitioner's publicly disclosed allegations do not fall within the original-source exception, that does not mean that other relators who plead publicly disclosed allegations will be unable to qualify for that exception under the Seventh Circuit's analysis.

B. There Is No Disagreement Among The Circuits Regarding The Interplay Between The Public-Disclosure Bar And Original-Source Exception.

Petitioner's attempt to manufacture a circuit split regarding the interaction between the public-disclosure bar and original-source exception is equally unavailing. No circuit has rejected the Seventh Circuit's standard either explicitly or implicitly.

Petitioner first points to *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201 (1st Cir. 2016), where the First Circuit held that publicly disclosed allegations qualify for the False Claims Act's original-source exception if they are "sufficiently significant or essential so as to fall into the narrow category of information that materially adds to what has already been revealed through public disclosures." *Id.* at 211. In articulating that standard, the First Circuit acknowledged that "[t]he question of whether a rela-

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they provided significant additional information about the way in which the alleged fraudulent scheme was operated. Petitioner therefore might have been an original source of those hypothetical allegations if he could have demonstrated "independent" knowledge of the allegations, even though they were publicly disclosed. But petitioner asserted no such allegations in his complaint. *See id.* at 59a (petitioner "makes no . . . allegations" that "Hartgrove's failure to provide rooms to certain patients has affected their treatment or prognosis").

tor's information 'materially adds' to public disclosures often overlaps with the questions of whether public disclosure has occurred and, if so, whether the relator's allegations are substantially the same as those prior revelations," and it favorably cited the Seventh Circuit's decision in *Cause of Action v. Chicago Transit Authority*, 815 F.3d 267 (7th Cir. 2016)—the very decision that the Seventh Circuit cited in this case to support its original-source analysis. *See Winkelman*, 827 F.3d at 211; *see also* Pet. App. 16a (petitioner's "line of reasoning was foreclosed by *Cause of Action*").

The First Circuit's description of the "narrow" original-source exception and its invocation of *Cause of Action* make clear that its original-source standard is fully compatible with that of the Seventh Circuit. Indeed, petitioner does not contend that this case would have come out differently in the First Circuit.

Nor could he plausibly have done so. In *Winkelman*, the First Circuit held that the relator's allegations of Medicaid and Medicare fraud did not fall within the original-source exception because they merely repeated what was already publicly known or "[o]ffer[ed] specific examples" of conduct already disclosed. 827 F.3d at 212–13. In so holding, the court rejected the relator's argument that his complaint "materially added" to the publicly disclosed information because it alleged that "[the] fraud continued after" the public disclosure. *Id*. at 212. "[S]imply asserting a longer duration for the same allegedly fraudulent practice," the First Circuit reasoned, "does not materially add to the information already publicly disclosed," *id.*—a conclusion that the court substantiated

by again favorably citing the Seventh Circuit's decision in *Cause of Action*. *See id.* (citing *Cause of Action*, 815 F.3d at 281–82).

That is precisely the conclusion that the Seventh Circuit reached here, where it held that petitioner's allegations of Medicaid fraud "did not supply any genuinely new and material information" to what was already known as a result of the 2009 government audits—and therefore did not "'materially add'" to the public disclosure for purposes of the original-source exception—because his allegations of post-2009 violations "pertain[ed] to the same entity and describe[d] the same contested conduct as the publicly disclosed information." Pet. App. 13a, 15a, 16a.

Petitioner's reliance on the Third Circuit's decision in *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294 (3d Cir. 2016), is equally unavailing. The Third Circuit concluded that allegations "materially add" to publicly disclosed information for purposes of the original-source exception if they "contribute significant additional information to that which has been publicly disclosed so as to improve its quality." *Id.* at 306. The court explained that, to satisfy this standard, the relator's allegations must "add[ ] in a significant way to the essential factual background: 'the who, what, when, where and how of the events at issue.'" *Id*. at 307. In articulating that approach, the Third Circuit did not take issue with—or even mention—the Seventh Circuit's original-source analysis.

Nor did the Third Circuit apply its original-source standard in a manner that would have led to a different outcome in this case. The Third Circuit held that, "[w]hile the information set forth in" news articles and

other documents "publicly disclosed the basic elements of the fraud's transaction . . . , the information that" the relator thereafter "acquired from discovery in [a] wrongful death action added significant details to the essential factual background of the fraud—the who, what, when, where, and how of the alleged fraud—that were not publicly disclosed." *Moore*, 812 F.3d at 308.

Petitioner does not come close to meeting that standard because the two audit reports disclosed all of the significant details about Hartgrove's over-capacity admissions, Pet. App. 4a n.1, 12a–16a, including that "Hartgrove was over census on at least 52 separate occasions between December 3, 2008, and February 28, 2009." *Id.* at 4a n.1. Petitioner's complaint merely rehashes those same allegations and contends that Hartgrove continued to admit patients in excess of its capacity after the date of the public disclosures. *See*, *e.g.*, *id.* at 39a. Those allegations of continuing over-capacity admissions do not "add[ ] in a significant way to the essential factual background" and thus do not "materially add" to the publicly disclosed information under the Third Circuit's articulation of the original-source exception. *Moore*, 812 F.3d at 307.

Accordingly, there is no disagreement among the circuits regarding the interplay between the public-disclosure bar and the original-source exception and no prospect that this case would have been decided differently in another circuit.

C. This Case Is A Poor Vehicle For Addressing The Question Presented.

Finally, even if this case did meet the other criteria for this Court's review—which it manifestly does not—it would still be a poor vehicle for addressing the

question presented because, as the district court concluded on two occasions, petitioner has failed to plead an actionable False Claims Act violation with plausibility and particularity. There is no reason for this Court to expend its limited resources on a case that would be destined for dismissal on remand.

There are fatal legal deficiencies in each of petitioner's three theories of False Claims Act liability. For example, as the district court concluded, petitioner's allegation that Hartgrove presented false claims for "inpatient" services for patients housed in dayrooms, rather than private rooms, "borders on frivolous" because the Illinois regulations petitioner invoked to define "inpatient" care pertain to hospital construction and reporting obligations, not Medicaid reimbursement. Pet. App. 28a–29a. Similarly, petitioner's allegation that Hartgrove presented impliedly false claims by violating an Illinois regulation prohibiting hospitals from exceeding their licensed capacity "except in the event of unusual emergency," *id.* at 59a–62a (citing Ill. Admin. Code tit. 77, § 250.230(b)), fails under this Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), because, among other reasons, petitioner did not allege that Hartgrove's claims for payment made any "specific representations about the . . . services provided." *Id.* at 2001; *see also* Pet. App. 17a–20a. And petitioner's theory that Hartgrove never intended to comply with applicable statutes and regulations and thus fraudulently induced the government to accept its participation in the Medicaid program is legally deficient because petitioner failed to plead anything beyond bare, conclusory allegations regarding Hartgrove's intent. Pet. App. 31a, 61a–62a.

There is also a cross-cutting flaw in all of petitioner's theories of liability: he failed to plausibly plead that any alleged misrepresentations were "material" to the government's decision to pay Hartgrove's claims. *See* 31 U.S.C. § 3729(a)(1)(B); *Escobar*, 136 S. Ct. at 2002. As this Court explained in *Escobar*, "if the Government pays a particular claim in full despite its actual knowledge that certain [regulatory] requirements were violated," that "is very strong evidence that those requirements are not material." 136 S. Ct. at 2003. Here, petitioner did not allege that the government stopped paying Hartgrove's reimbursement claims after learning of its over-capacity admissions. In fact, the Centers for Medicare & Medicaid Services found that Hartgrove was "in compliance with the Medicare Conditions of Participation," C.A. SA3, and made no effort to recoup payments from Hartgrove, which was permitted to continue submitting claims for reimbursement.

Thus, even if petitioner is able to overcome the public-disclosure bar, this Court's resolution of the question presented would have no impact on the ultimate resolution of this case because petitioner's complaint would inevitably be dismissed on other grounds—as it has been twice before.

* * *

As the Seventh Circuit recognized, this is precisely the type of "parasitic" lawsuit that Congress sought to foreclose when it enacted the False Claims Act's public-disclosure bar. *Graham*, 559 U.S. at 295. The Seventh Circuit faithfully applied the plain language of that provision and the original-source exception when it held that petitioner's allegations do not "supply any genuinely new and material information" to the allegations already in the public domain and

therefore do not "'materially add'" to the publicly available information for purposes of the original-source exception. Pet. App. 13a, 16a. No circuit would have reached a different outcome when confronted with petitioner's wholly derivative allegations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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