No. 18-1044

IN THE

Supreme Court of the United States

PHARMERICA CORPORATION,

Petitioner,

v.

UNITED STATES EX REL. MARC SILVER,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The petition presents three questions about the public disclosure bar of the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*., which precludes FCA lawsuits based on certain publicly disclosed information unless the plaintiff is an original source of the information. 31 U.S.C. § 3730(e)(4). In this case, the Third Circuit held that respondent Marc Silver relied on non-public information to determine and allege that petitioner PharMerica Corporation had defrauded government healthcare programs. The court concluded that PharMerica's fraud "could not have been derived" from public information "absent Silver's addition of the non-public" information he possessed. Pet. App. 15. The court held "that the FCA's public disclosure bar is not implicated in such a circumstance, where a relator's non-public information permits an inference of fraud that could not have been supported by the public disclosures alone." *Ibid*.

The first question presented is whether snippets of Silver's deposition testimony—which PharMerica reads to suggest that Silver based his complaint on public information—doom his claim. That question is not presented here. As Silver explained below, PharMerica's argument takes his testimony out of context—a trick that worked in the district court, but not on appeal. The Third Circuit rejected the premise of this question, determining that "the District Court misapprehended Silver's testimony." Pet. App. 18-19. The court of appeals explained that far from admitting that his claims were based on public information, Silver's "deposition statements . . . make[] clear that his private knowledge . . . was the key to uncovering the fraud." *Id*. at 20. In order to reach the question

PharMerica's petition asks, this Court would have to second-guess that factual determination.

Even if the question were properly presented, it would not warrant certiorari. PharMerica has not cited a single case in which a court of appeals concluded that the record revealed no public disclosure, but held that a relator's admission to the contrary was entitled to conclusive weight. That failure disproves PharMerica's purported circuit split, and establishes that this issue is unimportant because it basically never arises. PharMerica is also wrong on the merits because even if a relator erroneously testifies that he relied upon public disclosures (which did not occur here), there is no reason to give that testimony dispositive weight.

The second question presented relates to the Third Circuit's test for whether allegations or transactions have been publicly disclosed. No circuit would have rejected the Third Circuit's holding that when a fraud can only be inferred from non-public information, the fraud is not publicly disclosed. And no circuit has rejected its rule, which is that the public disclosure bar only applies when either allegations of fraud, or sufficient facts to permit an inference of fraud, are publicly disclosed. Independently, PharMerica itself urged application of the Third Circuit's test without criticism below, limiting its ability to challenge the test now. And contrary to PharMerica's contention, the test the Third Circuit applied—and the result it reached—are fully consistent with the text of the statute and this Court's precedents.

The last question presented is whether the Third Circuit erroneously deviated from its own precedents

holding that the public disclosure bar is triggered when publicly available information supports an "inference of fraud." PharMerica admits (Pet. 5) that the Third Circuit applied the "inference of fraud" standard that PharMerica urges. Thus, at most, PharMerica is arguing that the Third Circuit misapplied the correct rule of law. That has never been enough for certiorari—and it is especially not enough here because the Third Circuit's conclusion is manifestly correct.

Finally, certiorari should be denied for two additional reasons. *First*, the public disclosure bar provision—including the operative language here—was amended effective March 23, 2010. The old version of the statute is on the brink of becoming completely irrelevant because in less than a year, the FCA's statute of repose will bar all new suits governed by it. Nevertheless, if the Court grants certiorari, it would be required to analyze the old text—which is jurisdictional—and apply that language to the (non-operative) original complaint. Then, in order to issue a ruling with continuing relevance, the Court would have to analyze the current version of the statute and apply it to the third amended complaint. The Court can avoid wasting its time on an overruled law by simply awaiting a case arising solely under the operative statute. *Second*, the questions presented are not case-dispositive because Silver could qualify as an "original source" even if the public disclosure bar applies. PharMerica's petition does not address that aspect of the public disclosure bar (which also has been amended).

STATEMENT OF THE CASE

1. The fraud in this case is a kickback scheme involving "swapping." Specifically, PharMerica sold prescription drugs at below-market prices to nursing homes to provide to the homes' Medicare Part A patients in exchange for the opportunity to provide the same drugs—and receive reimbursement from the government at higher prices—to the same nursing homes' Medicaid and Medicare Part D patients. *See* Pet. App. 3-6. Swapping violates the Anti-Kickback Statute (AKS), 42 U.S.C. § 1320a-7b, and AKS violations also violate the FCA. *See id.* § 1320a-7b(g).

To determine that swapping occurred, it is necessary to know what rate the pharmacy charged to nursing homes for Medicare Part A patients. If that rate is below a pharmacy's actual cost per patient, it is likely a kickback. These rates are not public information; they are set forth in private contracts between the pharmacy and nursing homes. *See* Pet. App. 11, 19-20.

Respondent Marc Silver knows firsthand about practices in the nursing home and long-term-care pharmacy industries. From 1986 until 2007, he owned and operated a nursing home. And from 2001 until 2007, he owned and operated a long-term-care pharmacy. C.A. App. 87-88. In 1999, in his role as a nursing home operator, he was offered a per-diem rate of $25 to service his home's Medicare Part A patients. *Id*. at 111. These contracts included a provision allowing the pharmacy periodically to "true up" the reimbursement amount based on changes in market prices and patients' use of drugs—but Silver noted that no true-ups ever occurred, so pharmacy prices remained heavily discounted. *Id*. at 111-12.

In 2001, when Silver started his own pharmacy, he kept records of his costs and determined that in order to break even on drug costs and overhead, he would need to charge a per-diem rate of over $40 per day. C.A. App. 130, 141. Even though drug costs rose during the years that Silver operated his pharmacy, he knew that institutional pharmacies like PharMerica were offering lower and lower per-diem rates in order to induce nursing homes to select PharMerica as their pharmacy provider. *Id*. at 135-41.

To confirm this, Silver obtained multiple non-public contracts between PharMerica and various long-term-care facilities showing per-diem reimbursement rates between $8.95 and $12. C.A. App. 126, 129. He also interviewed other nursing home operators who negotiated those and similar contracts. *See id.* at 114-17, 126-30.

Silver relied upon that private information to determine and allege that PharMerica was swapping. Specifically, Silver determined that PharMerica was taking a loss on its reimbursements for Medicare Part A patients—and the only plausible reason PharMerica would do that was to get the more lucrative Medicaid and Medicare Part D business.

2. In 2011, Silver sued PharMerica and its competitor, Omnicare, for violations of the Anti-Kickback Statute and FCA. After the defendants' motions to dismiss were denied, Omnicare settled for $124 million and was dropped from the case. *See* Press Release, U.S. Dep't of Justice, *Nation's Largest Nursing Home Pharmacy Company to Pay $124 Million to Settle Allegations Involving False Billings to Federal Health Care Programs* (June 25, 2014), https://www.justice.gov/opa/pr/nation-s-largest-nursing-

home-pharmacy-company-pay-124-million-settle-allegations-involving. PharMerica continued to litigate.

After some discovery, PharMerica filed dispositive motions arguing that the public disclosure bar precludes Silver's claims against it. The district court granted PharMerica's motions. It placed heavy weight on government guidance, *i.e.*, publications to the health care industry explaining how swapping works generally and *could have* been occurring in the nursing home industry (though not with respect to prescription drugs), as well as documents indicating that long-term-care pharmacies were providing services to nursing homes at low prices, and that PharMerica was a large player in the industry. Pet. App. 41-43. The court also noted that Silver had examined PharMerica's Form 10-K financial statements, and used those to determine that the per-diem reimbursements were below cost. *Id*. at 43. The court believed that Silver had admitted, in a deposition, "that he did not need to know" details about PharMerica's per-diem prices and per-patient costs "to conclude that PharMerica had engaged in illegal swapping." *Id*. at 49. Based on this information, the court "conclude[d] that the information cumulatively disclosed in the publicly available documents was sufficient to support an inference that PharMerica allegedly engaged in swapping transactions with nursing homes." *Id*. at 51. The court further held that Silver was not an "original source" of the information. *Id*. at 58, 61.

3. A panel of the Third Circuit unanimously reversed. The court of appeals agreed with Silver on two grounds. First, it held that the district court erred by "treating public disclosures concerning the general

risk of swapping in the nursing home industry as a bar to his specific allegations, supported by non-public information, that PharMerica was actually engaging in swapping." Pet. App. 4. Second, the court held that the district court erred by "concluding that the fraud was publicly disclosed based upon Silver's deposition testimony that he depended upon publicly available documents, without undertaking an independent review to determine whether those documents sufficiently disclosed the fraud." *Ibid*.

The court of appeals explained that "[w]hereas an 'allegation' of fraud is a specific allegation of wrongdoing, a 'transaction' that raises an inference of fraud consists of both the allegedly misrepresented facts and the allegedly true state of affairs." Pet. App. 8. PharMerica had not contended that allegations of fraud had been publicly disclosed, and so the court's task was "to ascertain whether the transactions raising an inference of that allegation of fraud were already publicly disclosed." *Ibid*. The Court explained that in order to make this determination, it "employs a formula of sorts"—to wit:

> If X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed.

Id. at 8-9 (quotation marks omitted). "In this case, the parties agree that the allegedly 'misrepresented' set of facts [X] is that PharMerica was complying with the Anti-Kickback statute, and that the allegedly 'true' state of facts [Y] is that PharMerica was in fact

engaging in the fraudulent practice of swapping, which violates the statute." *Id*. at 10 (footnote omitted). The bar would apply if both of those elements had been publicly disclosed.

In analyzing whether a public disclosure had occurred, the Third Circuit held "that the FCA's public disclosure bar is not implicated . . . where a relator's non-public information permits an inference of fraud that could not have been supported by the public disclosures alone." Pet. App. 15.

Applying that rule, the court of appeals concluded that none of the publicly disclosed documents, alone or considered together, "disclose the fraudulent transactions that Silver alleges, not least of which because the documents do not point to any specific fraudulent transactions directly attributable to PharMerica." Pet. App. 14. "Rather, the documents merely indicate the possibility that such a fraud could be perpetrated in the nursing home industry." *Id*. at 15. The court explained that Silver's claim against PharMerica "could not have been derived" from these general disclosures "absent Silver's addition of the non-public per-diem information." *Ibid*.

The Third Circuit explained why the documents the district court cited did not disclose PharMerica's fraud. For example, the Third Circuit concluded that one of the reports the district court emphasized "does not appear at all to discuss discount pricing or swapping regarding prescription drugs," and "therefore does not support or even hint at the inference that any institutional pharmacy—let alone PharMerica in particular—was swapping or would in the future be likely to swap." Pet. App. 17.

The Third Circuit also found that PharMerica's 10-K financial statement, which merely supplied aggregated financial information, did not disclose the fraud. In this regard, the Third Circuit observed that "[a]t no point did the District Court elucidate what information in the 10-k forms disclosed or suggested that PharMerica was engaged in swapping or how anyone could use the 10-k data in conjunction with information from other public sources to reach such a conclusion." Pet. App. 18. Instead, the district court "merely cited Silver's deposition testimony, in which he purportedly admitted that he relied on PharMerica's financial statements." *Ibid*.

The Third Circuit held that this was error because "the District Court misapprehended Silver's testimony and the central importance of his non-public per-diem information to the plausibility of his allegation of fraud." Pet. App. 18-19. "The crux of Silver's allegation is that the $8-10 per-diem rates that he discovered must have been below-cost (and so violate the Anti-Kickback Act)." *Id*. at 19. The analysis that Silver did to reach this conclusion "would be impossible without first knowing what per-diem rate [PharMerica] was offering to Part A patients (which is not public information)." *Ibid*. The Third Circuit then addressed Silver's deposition testimony directly, and found that the testimony actually disproved the district court's conclusion:

> In his deposition statements concerning his reliance on the financial statements, upon which the District Court based its conclusion that the fraud could be deduced by reliance on the information contained in those documents alone, Silver makes clear that his private

> knowledge of PharMerica's per-diem rates was the key to uncovering the fraud. Without this information, the public information that he consulted, which reported that swapping was a potential problem in the nursing home industry, would have been insufficient to disclose the actual fraud that Silver alleges.

Id. at 20.

In the alternative, the Third Circuit held that the district court "erred procedurally by failing independently to determine whether the public documents at issue in fact contained sufficient information to disclose the fraudulent transactions." Pet. App. 28. Had the district court performed the correct analysis, it would have recognized "the central flaw in PharMerica's argument," which is that "PharMerica's public financial disclosures could not, alone or in concert with the other disclosures, have uncovered PharMerica's alleged swapping. Such a conclusion instead depends necessarily upon Silver's non-public per-diem information." *Id*. at 32. Indeed, "the District Court did not explain how the information in the 10-k, even when combined with the other publicly available information, could lead to an inference of fraud." *Ibid*. The district court's failure to perform an independent assessment of the public documents was therefore "a separate basis for [the Third Circuit's] decision to reverse and remand." *Ibid*.

The Third Circuit stressed that its decision was consistent with "precedents applying the public disclosure bar to parasitic suits in which a relator discovers a fraud based only on the application of background knowledge or experience to the publicly available facts, or to cases in which the relator relies

'even partly' on publicly disclosed allegations of fraud." Pet. App. 22 (citations omitted). That is because "[w]hen a free-standing allegation of fraud already exists in the public realm, the mere application of experience or deductive skills to such information or the addition of another allegation to the already articulated accusation of fraud does not create a new, non-barred, claim of fraud." *Ibid*. "On the other hand, when, as here, the publicly disclosed information lacks relevant significance to the claim of fraud absent the addition of relator's non-public information, there are simply no publicly disclosed allegations of fraud upon which the relators claim could be based." *Ibid*.

The Third Circuit also distinguished "cases in which a fraudulent transaction was deemed disclosed even though the defendant itself was never mentioned in the public documents." Pet. App. 23. The court explained that in this case, "the public disclosures lack any concrete indication that pharmacies were actually swapping, and the most on-point document seems to indicate that they were not doing so." *Id*. at 24. Here, Silver's reliance on the non-public per-diem contracts, and his knowledge the true-up clauses were not being used, "implicate[d] participants in an industry that had, as yet, never been specifically accused of engaging in the fraud." *Ibid*.

4. PharMerica petitioned for rehearing. Its petition argued that the decision below was inconsistent with Third Circuit precedent, focusing principally on its argument that Silver had admitted that he relied on public disclosures. C.A. Reh'g Pet. 7-12. It also argued that "the X + Y = Z formula can serve as a useful interpretive tool, but it . . . should not be used to allow an obviously and admittedly derivative

complaint to avoid the Public Disclosure Bar." *Id*. at 12. The petition was denied without a response. Pet. App. 65.

5. PharMerica seeks certiorari.

REASONS TO DENY THE WRIT

I. The First Question Presented Does Not Warrant Review.

A. The Question Is Not Actually Presented.

The first question presented is "[w]hether a relator's admission that he, in fact, derived his complaint from public disclosures triggers the Bar." Pet. i. As explained in the introduction, this question is not presented here, as the Third Circuit concluded that Silver made no such admission. Instead, the court explained that Silver's deposition statements "make[] clear that his private knowledge of PharMerica's per-diem rates was the key to uncovering the fraud. Without this information, the public information that he consulted . . . would have been insufficient to disclose the actual fraud that Silver alleges." Pet. App. 20. The Third Circuit therefore found that the district court "misapprehended Silver's testimony and the central importance of his non-public per-diem information to the plausibility of his allegation of fraud." *Id*. at 18-19. Instead, the district court should have accepted "Silver's argument that this testimony was taken out of context." *Id*. at 18.

That holding ought to be the end of this question presented because in order to decide the legal significance of Silver's purported admission, this Court would first have to reject the Third Circuit's fact-bound determination that Silver made no such

admission. The Court ordinarily avoids such factual disputes. And here, if the Court agrees (as it should) with the Third Circuit's resolution of the factual premise, then it will never reach the question presented.

Of course, the Third Circuit also held that it was "a separate basis for our decision to reverse and remand" that the district court did not "independently assess[]" whether the fraud was publicly disclosed. Pet. App. 32. But the Third Circuit's primary holding makes its secondary ruling redundant.

* * *

Put that to the side and pretend that the question actually was properly presented, *i.e.*, that the Third Circuit found that Silver admitted that he relied on public documents, but nevertheless held that a court should undertake an independent analysis to decide whether those documents publicly disclose a fraud. The question presented still would not warrant this Court's review because there is no circuit split, the question is fact-bound and unimportant, and the decision below is correct.

B. There Is No Circuit Split.

PharMerica argues that other courts would treat a relator's admission that he relied on public materials as conclusive, even if the record shows that no triggering public disclosure occurred. None of the cases PharMerica cites (Pet. 17-18) say that.

The first case, *Leveski v. ITT Educational Services, Inc.*, 719 F.3d 818 (7th Cir. 2013), could not be more different from this one. There, the Seventh Circuit found that the public disclosure bar was *not* triggered. That the court relied in part on the relator's

deposition testimony to reach that conclusion does not show that the Seventh Circuit would ignore all other evidence in a public disclosure bar inquiry. *Id.* at 831-34.

The other cases PharMerica cites are no better. The next case, *United States ex rel. Black v. Health & Hospital Corp. of Marion County*, 494 F. App'x 285 (4th Cir. 2012) (per curiam), is an unpublished decision in which the court undertook an independent analysis of whether the fraud was publicly disclosed—and then, after determining that the public documents disclosed the fraud, stated: "Moreover, Black's own sworn declaration undercuts his argument. He admits that before he filed his initial complaint in this court, he" reviewed public disclosures. *Id*. at 295. That case also does not stand for the proposition that a relator's admission renders all the other evidence irrelevant.

The same is true of *United States ex rel. Boothe v. Sun Healthcare Group, Inc.*, 496 F.3d 1169, 1173 (10th Cir. 2007), in which the relator conceded on appeal that her complaint alleged the same fraud as prior *qui tam* actions. The court still undertook a "side-by-side comparison of the first three allegations of Ms. Boothe's complaint with those contained in prior *qui tam* actions." *Id*. at 1174. It is also true of *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996), in which the court found that a publicly disclosed "memorandum and the Complaint on their face" made the same allegations. The relator's "own admissions" merely "confirm[ed]" the result of the independent assessment of the evidence. *Ibid*.

The final circuit case PharMerica cites, *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337 (4th

Cir. 2009), is even further afield. The only relator testimony the court considered was the relator's statement that he had not been a source for newspaper articles that disclosed the fraud. *Id*. at 351. That testimony related to whether the relator was an original source—not to whether the complaint was based on the articles. Moreover, the court expressly rejected PharMerica's rule, finding that the "deposition testimony is not alone conclusive evidence." *Ibid*.

In sum, PharMerica has not cited a single case embracing the proposition of law about which it asserts a circuit split, *i.e.*, that a district court *must* accept a relator's admission that he relied on public sources—*even if* an independent examination of those public sources would reveal that they do not disclose fraud.

C. This Question Is Fact-bound and Unimportant.

The dearth of circuit cases presenting this legal question highlights that it basically never arises. And why would it? If public documents do not disclose a fraud, a counseled relator is not ordinarily going to damage his claim by saying otherwise. Accepting the (false) premise that in this case, Silver irrationally or erroneously did just that, that fact pattern is *sui generis*—or at least very unlikely to ever recur. The question presented is therefore fact-bound and unimportant, and certiorari should be denied.

D. The Decision Below Is Correct.

The Third Circuit's decision is also clearly correct. PharMerica does not meaningfully dispute a key point: "PharMerica's public financial disclosures could not,

alone or in concert with the other disclosures, have uncovered PharMerica's alleged swapping. Such a conclusion instead depends necessarily upon Silver's non-public per-diem information." Pet. App. 32. Thus, the *truth* is that no public disclosure occurred. PharMerica asks this Court to act otherwise, but a rule that requires courts to deliberately ignore the truth makes no sense.

In addition to blinking reality, PharMerica's rule does violence to the statutory text. The pre-amendment public disclosure bar applies when the action is "based upon" public disclosures. The current text applies when "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." That language calls for an independent, objective inquiry. PharMerica would have the courts perform such an inquiry when the relator testifies that he did not rely on public information. *See* Pet. 19 (explaining that "a relator who truly did not know about the public disclosures still could be barred"). But if the relator admits that he subjectively relied on public information, PharMerica would prohibit any further objective inquiry. That asymmetry has no basis in the text. Indeed, this Court just confirmed that "a single use of a statutory phrase must have a fixed meaning." *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019). But PharMerica's interpretation would give the same statutory language ("based upon" or "substantially the same") two conflicting meanings depending on the facts, solely to advantage defendants.

The only merits argument PharMerica makes in support of its rule is a vague contention about

congressional purpose, *i.e.*, that its stilted reading would further Congress's intent, but a symmetrical reading would "narrow[] the Bar and defeat[] Congressional intent to preclude parasitic relators from collecting a bounty that is reserved for insiders with genuinely new information." Pet. 19. That is wrong for at least three reasons. First, as *Cochise* and innumerable decisions before it made clear, purpose-based arguments cannot overcome clear text—and nothing in the statutory text allows a court to ignore the truth, but only when it serves defendants. Second, the argument fails on its own terms because if an independent assessment shows that the public documents do not disclose the fraud, then the relator is not "parasitic" at all, and it does not serve the statutory purpose to bar his claim. Third, *nothing* about the FCA reserves recoveries for "insiders." Any "person" can act as a relator, 31 U.S.C. § 3730(b)(1), and outsider relators are just as capable of recovering money for the government as insiders. Indeed, outsiders are often better situated to advance FCA claims because they do not depend on the defendant for their livelihood, and so they are not as vulnerable to retaliation.

PharMerica also suggests that a relator's admission should be conclusive because the relator is in a better position than a court to know whether his claims are based on public disclosures. But relators typically are not attorneys well-versed in the nuances of the public disclosure bar, and so they may not understand deposition questions about it. PharMerica also ignores the risk that its "ignore-the-truth" rule would create, *i.e.*, that defense counsel will find a way to trip a relator in a deposition, induce him to say

something that is easily taken out of context, and then rely on that answer to doom a meritorious claim. Indeed, that is exactly what PharMerica tried to do here. There is no good reason for this Court to adopt a rule of law that encourages such litigation tactics.

II. The Second Question Presented Does Not Warrant Certiorari.

The second question presented is whether the Third Circuit applied the wrong standard to determine whether the allegations or transactions in this case had been publicly disclosed. PharMerica argues that three circuits "ask[] only whether the disclosed allegations or transactions form the basis of, or are substantially similar to, a relator's complaint," while the majority of circuits apply an "extra-statutory X+Y=Z test first articulated" by the D.C. Circuit in 1994. Pet. ii. Put slightly differently, PharMerica argues that three circuits will find the public disclosure bar triggered when the relator's allegations resemble the public disclosures, even if the public disclosures do not themselves reveal fraud—while the rest of the circuits require the public disclosures to contain either allegations of fraud, or sufficient information from which those allegations could be inferred. This question is not cert-worthy either.

A. There Is No Circuit Split.

1. First, there is no circuit split because no circuit would have decided this case differently. The Third Circuit's core holding is that the public disclosure bar does not apply when "a relator's non-public information permits an inference of fraud that could not have been supported by the public disclosures alone." Pet. App. 15. No circuit disagrees with that

rule. No circuit holds, for example, that even if the public disclosures do not support an inference of fraud, a valid claim of fraud may nevertheless be barred by those disclosures. Taking as a given the Third Circuit's resolution of the factual predicate (that the public documents in this case did not themselves disclose PharMerica's swapping), every court of appeals would have held that no public disclosure occurred.

PharMerica does not seriously argue otherwise. The only case it expounds upon in any detail, *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322 (5th Cir. 2011), is readily distinguishable. In *McKesson*, "the relator's action included no allegations specific to the defendants, but merely repeated a general description of fraud easily available in several government documents." *Id*. at 324. The complaint, which named more than 450 different defendants, "described several possible schemes, but without alleging which defendants engaged in which schemes or what particular actions were fraudulent." *Id*. at 328. Indeed, the *only* non-public fact the relator's complaint included was the identity of the defendants. But "even that identification may have failed to provide any new information" because the complaint "arbitrarily" chose 450 potential defendants without supplying *any* specific allegations about *any* of them. *Id*. at 330-31. On these unusual facts, the court determined that even though the public disclosures themselves did not specifically disclose that the defendants had committed fraud, the complaint failed because it did nothing more than parrot those disclosures and append an arbitrary list of defendants.

PharMerica argues that *McKesson* stands for the proposition that even when public documents do not

themselves disclose fraud, they bar a claim "based upon" whatever they did disclose. But as the Fifth Circuit's precedents make clear, that is only true when the complaint adds no new information whatsoever. A year after *McKesson* was decided, the Fifth Circuit cabined it to those facts in *Little v. Shell Exploration & Production Co.*, 690 F.3d 282 (5th Cir. 2012). *Little* explained that the bar in *McKesson* "applied only because the complaint at issue 'described various fraudulent schemes only generally' and was devoid of 'particular allegations against any defendant.'" *Id*. at 293 (quoting *McKesson*, 649 F.3d at 328, 330-31). When, on the other hand, "specifics are alleged," then the inquiry is different; it is "whether 'one could have produced the substance of the complaint merely by synthesizing the public disclosures' description' of a scheme." *Ibid*. (quoting *McKesson*, 649 F.3d at 331). "An irreducible minimum is that the disclosures [must] furnish evidence of the fraudulent scheme alleged." *Ibid*. Innocuous disclosures do not trigger the bar.

This case is nothing like *McKesson*. First, the fraud was not described in public documents. Indeed, none of the public documents disclosed, even generally, that pharmacies were swapping Medicare Part A discounts for Medicaid and Medicare Part D prescription drug business from nursing homes. *See* Pet. App. 12-14 & n.8. Second, Silver's operative third amended complaint does not merely parrot public documents and append an arbitrary list of defendants. Instead, it includes extensive non-public details about PharMerica's kickback scheme. C.A. App. 126-30. It also describes Silver's firsthand knowledge gleaned from his role as a nursing home operator and

pharmacy owner, as well as additional investigation he personally conducted. *Id*. at 106-14. His original complaint alleged similar non-public information, Pet. App. 105-114, including allegations specific to PharMerica and its subsidiary, Chem Rx, which was offering nursing homes discounted per-diem rates, *id*. at 114 (¶87).

Because Silver's complaint is specific, *McKesson* is inapposite, and the Fifth Circuit would not apply the public disclosure bar unless Silver "could have produced the substance of the complaint merely by synthesizing the public disclosures' description." *Little*, 690 F.3d at 293 (quotation marks omitted). As the Third Circuit correctly concluded (and PharMerica does not now dispute), the public documents did not enable such a synthesis. Pet. App. 32. Moreover, as PharMerica concedes, as of 2017 the Fifth Circuit has expressly been applying the same rule as the Third Circuit, requiring that the public disclosures must give rise to an inference of fraud to count. *See* Pet. 21 n.21.

2. There also is no circuit conflict about the propriety of the so-called "XYZ" test, first adopted in *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). There, the D.C. Circuit parsed the statute to give meaning to the words "allegations" and "transactions." *Id.* at 647. Considering the "plain meaning," the court noted that "the term 'allegation' connotes a conclusory statement implying the existence of provable supporting facts," while the "term 'transaction' suggests an exchange between two parties or things that reciprocally affect or influence one another." *Id*. at 653-54. The court then explained:

> On the basis of plain meaning, and at the risk of belabored illustration, if X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements. In order to disclose the fraudulent *transaction* publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed. The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.

Id. at 654. The court elaborated that "[f]raud requires recognition of two elements: a misrepresented state of facts *and* a true state of facts. The presence of one or the other in the public domain, but not both, cannot be expected to set government investigators on the trail of fraud." *Id*. at 655. Indeed, "[k]nowledge of the allegedly misrepresented state of affairs—which does not necessarily entail knowledge of the fact of misrepresentation—is *always* in the possession of the government," and "the entire *qui tam* regime is premised on the idea that the government's knowledge of misrepresented claims against the federal fisc (without knowledge that they are misrepresented) does not in itself translate into effective enforcement of the laws against fraud." *Id*. at 656.

Under this rule, "a *qui tam* action cannot be sustained where all of the material elements of the fraudulent transaction are already in the public domain and the *qui tam* relator comes forward with additional evidence incriminating the defendant." 14

F.3d at 655. Similarly, mere "[e]xpertise . . . would not in itself give a *qui tam* plaintiff the basis for suit when all the material elements of fraud are publicly available, though not readily comprehensible to nonexperts." *Ibid*. "However, where only one element of the fraudulent transaction is in the public domain (*e.g.,* X), the *qui tam* plaintiff may mount a case by coming forward with either the additional elements necessary to state a case of fraud (*e.g.,* Y) *or* allegations of fraud itself (*e.g.,* Z)." *Ibid*.

The Third Circuit used this illustration to analyze the public disclosures in this case. Pet. App. 9.

* * *

No circuit disagrees with the D.C. Circuit's analysis. PharMerica argues that three circuits—the Fourth, Tenth, and Eleventh—have disagreed in favor of a textualist rule that asks only whether a relator's complaint is based on allegations or transactions disclosed in public materials, without asking whether those allegations or transactions involve fraud. A detailed examination of these circuits' precedents reveals no conflict. Indeed, each and every circuit PharMerica identified has cited favorably to *Springfield* and its progeny.

3. The Eleventh Circuit has not rejected the D.C. Circuit's analysis. In fact, it did the opposite. In *United States ex rel. Saldivar v. Fresenius Medical Care Holdings, Inc.*, 841 F.3d 927, 935 (11th Cir. 2016), the court held, in the course of a public disclosure bar analysis, that "[i]n order to show that a fraud has occurred, one generally must present a submitted statement or claim (X) and the true set of facts (Y), which shows that X is untrue. These two things

together allow the conclusion (Z) that fraud has occurred." It cited *Springfield* as support.

To argue otherwise, PharMerica cites *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805 (11th Cir. 2015), and *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994) (per curiam). But these cases: (1) pre-date *Saldivar*, (2) do not disavow the XYZ illustration (they never discuss it at all), and (3) are distinguishable.

In *Osheroff*, the relator alleged that specific health clinics were offering kickbacks to patients in the form of free services, including transportation, meals, spa and salon services, and entertainment. 776 F.3d at 808. But these same services were disclosed in prior litigation against one of the defendants, in which a special master had "concluded that [the defendant's] practices could violate the AKS." *Id*. at 812. Moreover, the *Miami Herald* had run a series of five articles identifying the defendants, describing the services provided, and noting that "everything is paid for by taxpayer dollars." *Id*. at 813. Thus, the public sources disclosed, with specificity, the "transactions" at issue—including that they could be fraudulent.

The Eleventh Circuit rejected the relator's argument in *Osheroff* that "the disclosures do not contain any allegations of wrongdoing." 776 F.3d at 814. The court concluded that it was not necessary for "each [public] source to contain an allegation of wrongdoing." *Ibid*. But the court did not hold, as PharMerica suggests, that the public disclosures did not collectively have to enable an inference of fraud. On the contrary, the court recognized that "the disclosures here, particularly that the clinics' free services were all 'paid for by taxpayer dollars,' are

sufficient to raise an inference of fraud under the AKS or [Civil Monetary Penalties Law]." *Ibid*. (citation omitted).

That reasoning and result are entirely consistent with the decision below, and with the D.C. Circuit's XYZ illustration. Here, the Third Circuit never held that *each public source* must contain an allegation of wrongdoing. It merely held that the public documents, taken together, did not support an inference of fraud. On the facts of this case, the Eleventh Circuit would have reached the same result.

The other Eleventh Circuit case PharMerica cites, *Cooper*, is even easier to distinguish. In *Cooper*, the court held that "allegations of widespread [Medicare secondary payer] fraud made in sources in which [the defendant] was not specifically named or otherwise directly identified are insufficient to trigger the jurisdictional bar." 19 F.3d at 566. The court held that only "allegations specific to a particular defendant" could trigger the bar. *Ibid*. The court went on to hold that there was one source that publicly disclosed allegations of fraud, a U.S. House subcommittee hearing about this fraud. It then held that the suit could nevertheless go forward because the relator was an original source of the information. *See id.* at 568.

Nothing in *Cooper* casts any doubt on the XYZ formula. Again, the court never discussed it. And in *Cooper*, the fraud itself ("Z," in the XYZ formulation) was disclosed in the hearing, and so the public disclosure bar applied (as it would in every other circuit). Here, by contrast, the allegation of fraud concededly was not disclosed.

4. No case in the Fourth Circuit has rejected or criticized the D.C. Circuit's analysis, either. PharMerica cites *United States ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 919 (4th Cir. 2013), but that case was not about whether allegations or transactions were publicly disclosed; it was about whether the relator had subjectively relied on those allegations (as required in the Fourth Circuit at the time). In a later appeal in the same case, the Fourth Circuit cited *Springfield* approvingly. *See United States ex rel. May v. Purdue Pharma L.P.*, 811 F.3d 636, 639 (4th Cir. 2016) (citing *Springfield* for general statutory background); *id*. at 642 (citing statements from *Springfield* that had been quoted by this Court about the purpose of the public disclosure bar). PharMerica also cites *Vuyyuru*, but that case is inapposite: it is about whether the relator actually relied on publicly disclosed information, and whether the relator was an original source of materials that appeared in a newspaper article. 555 F.3d at 351. Neither of these cases has anything negative to say about *Springfield*.

Other cases in the Fourth Circuit have cited approvingly to *Springfield*—albeit not for this proposition. *See United States ex rel. Beauchamp v. Academi Training Ctr., LLC.*, 816 F.3d 37, 39 (4th Cir. 2016) (citing case for general statutory history); *United States ex rel. Wilson v. Graham Cty. Soil & Water Conservation Dist.*, 528 F.3d 292, 306 (4th Cir. 2008) (quoting at length from *Springfield* regarding the purposes of the public disclosure bar), *rev'd on other grounds*, 559 U.S. 280 (2010); *Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th

Cir. 2000) (citing *Springfield*'s original source analysis).

5. PharMerica has not cited a Tenth Circuit case holding that even if public documents do not disclose fraud, the public disclosure bar nevertheless applies if the relator referenced those documents. Absent such a holding, there is no conflict.

With respect to the XYZ formula, the Tenth Circuit has not adopted that specific illustration—but it applies the same basic rule as the other circuits. In *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1050 (10th Cir. 2004), the court of appeals quoted at length from *Springfield*. It then said:

> We have not adopted the mathematical formula espoused by the D.C. Circuit in *Springfield* and we decline to do so here. But even under *Springfield's* analysis, [relator] fails to establish jurisdiction. Here, the uncontested evidence, including averments found in [relator's] several affidavits, conclusively confirms the public domain contained *all* the elemental aspects of the allegedly fraudulent transaction.

Ibid. The court went on to carry out the analysis and held that both "X" and "Y" "were within the public domain." *See id.* at 1051.

This does not suggest a circuit split, either. Instead, it shows that the Tenth Circuit, in dictum, declined to adopt the D.C. Circuit's precise formulation, but otherwise applied the D.C. Circuit's reasoning. *Grynberg* did not criticize any aspect of *Springfield*. And in *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995), the Tenth

Circuit cited *Springfield* approvingly to explain the purpose of the public disclosure bar.

6. The Fifth Circuit's precedents further confirm that there is no circuit conflict. As PharMerica concedes, the Fifth Circuit adopted the XYZ test in 2017, without acknowledging any change in its rule. *See United States ex rel. Colquitt v. Abbott Labs.*, 858 F.3d 365, 373-74 (5th Cir. 2017). "District Courts in the Fifth Circuit" were also "utiliz[ing] the influential *Springfield* opinion" well before 2017. *United States ex rel. Lockey v. City of Dallas*, 2013 WL 268371, at *7 (N.D. Tex. Jan. 23, 2013), *aff'd*, 576 F. App'x 431 (5th Cir. 2014) (per curiam). This shows that the circuits are all applying the same rule—and merely sometimes using different illustrations to explain it—further undermining any asserted conflict.

B. This Case Is a Poor Vehicle.

This case is a poor vehicle to adjudicate this question because PharMerica itself accepted the use of the Third Circuit's test below. *See* Pet. C.A. Br. 22 (advancing the XYZ illustration as the relevant test). Moreover, as the Third Circuit explained, "the parties agree[d] that the allegedly 'misrepresented' set of facts [X] is that PharMerica was complying with the Anti-Kickback statute, and that the allegedly 'true' state of facts [Y] is that PharMerica was in fact engaging in the fraudulent practice of swapping, which violates the statute." Pet. App. 10 (footnote omitted). In its petition for rehearing, PharMerica again conceded that the XYZ formula "can serve as a useful interpretive tool." C.A. Reh'g Pet. 12. The only problem PharMerica identified is that, in its view, Silver's admission that he relied on publicly available documents proved that Silver's complaint was "based

upon" the public disclosures. But as explained above, Silver made no such admission—and so PharMerica did not advance any real objection to the test the Third Circuit used.

This presents two problems for PharMerica. First, it is not clear that its challenge to the XYZ formula has been effectively preserved in light of its endorsements of the formula as a test and interpretive tool.

Second, PharMerica's concessions undermine its critique of the decision below. PharMerica now complains (for the first time) that the XYZ formula "treats transactions and allegations as the same thing." Pet. 24. PharMerica argues that the XYZ formula required the court to search for "Y," *i.e.*, "that PharMerica was violating the AKS by swapping" which is the same as "Z" (the allegation of fraud), and so the formula reads "transactions" out of the statute. *Ibid*.

To the extent PharMerica is right about the identity of Y and Z, that is only because it agreed that the lower courts should apply the test this way. It is not inherent to the XYZ formula that Y must equal Z; the rule could have been applied differently. For example, "X" could have been that PharMerica was charging per-diem rates at or above its cost, with true-up clauses designed to ensure profitability; "Y" could have been that PharMerica's per-diem rates were below cost, and PharMerica was not utilizing its true-up clauses; and "Z" could have been the inference that PharMerica's per-diem discounts were illegal kickbacks. In that scenario, Y and Z would be different. The only reason they aren't is because PharMerica itself "agree[d]" that Y referred to unlawful swapping. Pet. App. 10. Having elected that

application, PharMerica cannot now complain about it.

Even putting PharMerica's concessions aside, the fact that the XYZ formula could be applied differently proves that PharMerica's objection is not to the XYZ test itself, but instead to its application here. The misapplication of a properly stated rule of law, however, is typically not a reason to grant certiorari.

C. The Decision Below Is Correct.

Finally, the decision below is correct. In order for public disclosures to bar a fraud claim, the disclosures must at least support an inference of fraud. To hold that the public disclosure bar is triggered by the disclosure of innocuous transactions would be contrary to the plain meaning of the statutory text, and to the purpose of the FCA. *See Springfield*, 14 F.3d at 653-56.

To be clear, if a complaint merely parrots public information, then under any rule, the complaint is doomed to fail unless the relator is an original source. If the public information does not permit an inference of fraud, then the complaint will not state a viable claim for fraud and will be dismissed under Federal Rule of Civil Procedure 12(b)(6) or Federal Rule of Civil Procedure 9(b). On the other hand, if the public information does permit an inference of fraud, and the complaint merely parrots it, then the public disclosure bar will apply.

To avoid these consequences (dismissal for failure to state a claim or a public disclosure bar violation), the relator must bring something beyond the public information that enables the fraud claim to move forward. But of course, that is what the Third Circuit holds, and it held that Silver's complaint meets that

standard because he supplied critical non-public information.

III. The Third Question Presented Does Not Warrant Certiorari.

Finally, PharMerica argues that the Third Circuit "deviated from its own precedent and rejected the possibility, or 'inference,' of fraud standard," holding instead that the public disclosure bar is only triggered if the public disclosures reveal "concrete" or "actual" fraud. Pet. 27. We will address this question only briefly.

PharMerica concedes that the Third Circuit "referenced the 'inference of fraud' standard." Pet. 27. That understates the matter. The Third Circuit's opinion repeatedly relies on this standard. *See* Pet. App. 8, 9, 10, 15, 17, 21, 25, 27, 31, 32. Indeed, the Third Circuit's *holding* references the standard that PharMerica accuses the court of ignoring. *Id.* at 15 ("[W]e hold that the FCA's public disclosure bar is not implicated . . . where a relator's non-public information permits an *inference of fraud* that could not have been supported by the public disclosures alone.") (emphasis added). Far from "deviating" from its precedents, the Third Circuit applied them here. The Third Circuit, after carefully examining the documents PharMerica identified, concluded that there was no inference of fraud without Silver's non-public information. The court also distinguished cases that had found claims barred—including cases in which public documents disclosed frauds without identifying a defendant, and cases in which a relator merely applied his expertise to information in the public domain. *Id.* at 22-26.

Crediting PharMerica's argument as much as we possibly can, the most one could say is that the Third Circuit misapplied the "inference of fraud" rule to the facts of this case. But even if PharMerica could show that the circuit court misapplied circuit precedent (which it did not), that is not a reason to grant certiorari—especially because PharMerica did not even contest this aspect of the Third Circuit's decision while seeking rehearing.

Finally, to the extent PharMerica seeks a different result, it is wrong on the merits. Fraud against the government is ubiquitous, and so there is always a "possibility" of fraud. Indeed, that is precisely why the FCA was enacted, and why it has been repeatedly strengthened since 1986. Holding that the disclosure of any possibility of fraud triggers the public disclosure bar would preclude myriad meritorious claims, disserving the public and undermining Congress's objective in enacting the FCA. This case illustrates the point: a holding that the public disclosures in this case triggered the bar—when those disclosures did not allege even an industry-wide fraud, let alone a fraud by PharMerica itself—would serve no valuable purpose. It would merely prevent knowledgeable relators from coming forward to recover on the government's behalf.

Courts in the status quo, including the Third Circuit, are applying the public disclosure bar in a way that balances Congress's twin objectives of permitting meritorious claims while barring parasitic ones. PharMerica's hope, of course, is to simply bar every claim. This Court should not countenance that result.

IV. Two Additional Reasons to Deny Certiorari.

A. The Statute Has Been Amended.

Many of PharMerica's arguments relate to a version of the statute that is no longer in effect. Before March 23, 2010, the public disclosure bar was jurisdictional and applied to claims that were "based upon the public disclosure of allegations or transactions" in an enumerated source. 31 U.S.C. § 3730(e)(4) (2006 & Supp. III 2010). As of March 23, 2010, the bar is no longer jurisdictional, and applies "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" in a different list of sources. 31 U.S.C. § 3730(e)(4)(A); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901-02 (2010). There are other important changes, too: the original source exception has been broadened; and the government now has the power to veto dismissals under the bar. Courts must apply the old version of the statute to false claims submitted before March 23, 2010, and the new statute to false claims submitted thereafter. Silver's complaints allege that PharMerica submitted false claims during both time periods. *See* Pet. App. 6-7.

The amendment makes this case an inferior vehicle. There is no good reason for this Court to interpret the old statute, which is on the brink of becoming irrelevant. While a few cases involving claims submitted before March 23, 2010 remain pending, almost no new cases reaching that far back are being filed—and the FCA's 10-year statute of repose will cut them off altogether next March. *See*

31 U.S.C. § 3731(b). The Court should not waste time on dead letters.

Unfortunately, if the Court grants certiorari, it cannot avoid that result. As PharMerica concedes (Pet. 9 n.11), the old statute was jurisdictional and looks to the original complaint—while the operative statute looks to the third amended complaint. Thus, if the Court grants certiorari, it would be *required* to verify its subject-matter jurisdiction by interpreting the old statute and applying it to a now-irrelevant complaint before considering the current statute and applying it to the operative third amended complaint. There is no reason to undertake such a cumbersome and circuitous legal analysis when the Court could instead await a case involving only the operative statutory text.

PharMerica may argue that the relevant statutory language has not changed significantly, and so the analysis of the old statute will still be informative. But "based upon" and "substantially the same" are different phrases. For example, as PharMerica concedes, the current statute does not require a relator to have subjectively relied on public disclosures. Pet. 19 n.19. The amendment thus undermines PharMerica's argument on the first question presented, which asks whether a relator's admission of subjective reliance is dispositive. The amendment also hurts PharMerica on the second question because PharMerica argues that the disclosure of innocuous transactions can trigger the bar—but innocuous transactions and fraudulent ones are not "substantially the same."

Any doubt here should be resolved against certiorari. If PharMerica is correct that the questions

presented are cert-worthy, then another case will surely arise soon under the operative statute. If we are correct that the questions are not cert-worthy, then denial is still the right decision.

B. Silver Is an Original Source.

Even if PharMerica wins that the public disclosure bar applies, Silver can still prevail as an original source who timely provided substantial pertinent information to the government. Indeed, Silver is exactly the sort of relator Congress sought to incentivize with the FCA. This issue was litigated below (Resp. C.A. Br. 43-49), but the Third Circuit ruled for Silver on other grounds. That further diminishes the importance of the questions presented. This argument also re-presents the amendment problem, as the original source provision was significantly amended in 2010.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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