No. 24-542

IN THE

Supreme Court of the United States

UNITED STATES EX REL. JAMES HERON,

Petitioner,

v.

NATIONSTAR MORTGAGE, LLC,

Respondent.

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

BRIEF IN OPPOSITION

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March 10, 2025

QUESTIONS PRESENTED

1. Whether the allegations in petitioner's *qui tam* complaint are "substantially the same" as allegations that had already been publicly disclosed, which bars this action under 31 U.S.C. § 3730(e)(4)(A).

2. Whether petitioner does not qualify for the "original source" exception to the public-disclosure bar, 31 U.S.C. § 3730(e)(4)(B)(2), because he did not "materially add[]" to the information already in the public domain.

CORPORATE DISCLOSURE STATEMENT

Respondent Nationstar Mortgage LLC has two direct parent companies, Nationstar Sub1 LLC and Nationstar Sub2 LLC. Respondent is an indirect, wholly owned subsidiary of Mr. Cooper Group Inc. (formerly known as WMIH Corp.), a publicly traded company.

More than 10% of the stock of Mr. Cooper Group Inc. is owned by (a) Blackrock, Inc., and certain of its affiliates and (b) The Vanguard Group, Inc., and certain of its affiliates.

RELATED PROCEEDINGS

U.S. District Court for the District of Colorado:

United States of America, ex rel. James Heron v. *Nationstar Mortgage LLC*, No. 17-CV-03084 (Sept. 15, 2021)

U.S. Court of Appeals for the Tenth Circuit:

United States of America, ex rel. James Heron v. *Nationstar Mortgage, LLC*, No. 21-1362 (Aug. 13, 2024)

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INTRODUCTION

Petitioner James Heron argues that the courts of appeals have adopted "divergent standards" regarding the public-disclosure bar for *qui tam* actions brought under the False Claims Act. Pet. 16. But there is no divergence on either question presented, and that alone is a sufficient reason to deny the petition. And *even if* Heron's interpretations of the other circuits' decisions were correct and the Tenth Circuit had applied those standards in his case, his claims would have been dismissed anyway. This Court's review is not warranted.

A relator cannot sue on behalf of the United States if his allegations are "substantially the same" as what has already been publicly disclosed. 31 U.S.C. § 3730(e)(4)(A). Both the Tenth Circuit and the D.C. Circuit frame the relevant inquiry exactly the same way, asking whether the public disclosures were sufficient to set the government "on the trail" of the alleged fraud. The Tenth Circuit never "rejected" the D.C. Circuit's inquiry, as Heron mistakenly asserts. The inquiry is the same in both circuits, right down to the identical tracking metaphor.

Nor is there any conflict with the Eleventh Circuit. Heron cites that court's decades-old decision in *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994) (per curiam). But the Tenth Circuit has repeatedly "distinguished *Cooper*"—*not* disagreed with it. As both the Tenth and Eleventh Circuits have explained, *Cooper* is a fact-bound decision. There is no split for this Court to resolve. Moreover, even under Heron's understanding of Eleventh Circuit precedent, his complaint would have been dismissed in that circuit as well.

The petition's second question presented—regarding when a relator can qualify for an exception to the public-disclosure bar because he is an "original source" of information who "materially adds" to what the government already knew, 31 U.S.C. § 3730(e)(4)(B)—does not warrant this Court's review either. Heron first points to a purported split with the Seventh Circuit, but the view he ascribes to the Seventh Circuit is even *less* friendly to relators—so he certainly would have lost in that circuit, too. This case, therefore, provides no occasion for this Court to review that supposed conflict. In any event, the relevant analysis in that Seventh Circuit decision was only a sentence long. In context, that decision could be read as applying the same standard as the Tenth Circuit. And the Seventh Circuit has not yet had the opportunity to address the Tenth Circuit's critique. When that opportunity arises, the Seventh Circuit may well clarify that it never adopted the view ascribed to it by the Tenth Circuit, or it may reevaluate that precedent en banc. Either way, this Court's review is unnecessary.

Finally, there is no conflict with the Third Circuit. At most, the Third Circuit's precedent is unclear—indeed, the Tenth Circuit discussed two possible readings of the Third Circuit's decision, only one of which it found objectionable. Heron acknowledges that the Third Circuit has never clarified which reading of its precedent is correct. And the D.C. Circuit has stated that the Third and Tenth Circuits agree on this point. Even if there were some conflict with the Third Circuit, moreover, Heron abandoned any argument in the court below that his allegations would satisfy some more lenient standard. In fact, he affirmatively embraced the Tenth Circuit's "materially adds" standard.

The petition should be denied.

STATEMENT OF THE CASE

I. The Public-Disclosure Bar.

The False Claims Act (FCA) "prohibits submitting false or fraudulent claims for payment to the United States, [31 U.S.C.] § 3729(a), and authorizes *qui tam* suits, in which private parties bring civil actions in the Government's name, § 3730(b)(1)." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 404 (2011). Because the *qui tam* relator stands in the government's shoes and recovers money that would otherwise go to the government, the suit is "subject to special restrictions." *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 425 (2023).

This petition concerns one such special restriction: the public-disclosure bar in § 3730(e)(4). That provision (as worded today) requires dismissing the *qui tam* suit "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" in the news media or in certain types of proceedings, "unless … the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). The statute defines "original source" (as relevant here) as one "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." *Id.* § 3730(e)(4)(B).

This "public disclosure bar" is "an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cnty. Soil & Water Conservation Dist. v. United States*

ex rel. Wilson, 559 U.S. 280, 295 (2010). By requiring that the relator either (1) raise substantially new allegations of fraud or (2) raise allegations for which he or she was an "original source," Congress sought "to minimize 'the potential for parasitic lawsuits by those who learn of the fraud through public channels and seek remuneration although they contributed nothing to the exposure of the fraud.'" *Id.* at 296 n.16 (citation omitted).

II. Heron's Foreclosure.

Heron owned a home in Colorado. His mortgage loan was serviced by Aurora Loan Services, LLC. When Heron defaulted on his mortgage payments, Aurora initiated foreclosure proceedings against him in Colorado state court between 2008 and 2011. Pet. App. 3a-4a. In connection with that proceeding, Aurora submitted various copies of a promissory note Heron executed when he originally purchased his house with handwritten endorsements to "Aurora Loan Services." Pet. App. 4a. According to Heron, that promissory note was inauthentic. *Id.*

In 2012, after purchasing the servicing rights to Heron's loan from Aurora, respondent Nationstar Mortgage LLC replaced Aurora as plaintiff in Heron's foreclosure proceeding. *Id.*

Heron alleged that Nationstar, as "successor" to Aurora, submitted a forged version of the promissory note in those foreclosure proceedings to cover up Aurora's supposed forgeries. *Id.* at 4a, 23a. Heron's home was subsequently foreclosed upon. *Id.* at 4a.

III. Heron's FCA Case.

A. The Second Amended Complaint.

In 2017, Heron filed this *qui tam* suit in the District of Colorado against Nationstar, Aurora, and other defendants, including various individuals and law firms. Pet. App. 2a & n.1. All defendants other than Nationstar were subsequently dismissed. *Id.*

The complaint related to certifications that some mortgage servicers make in connection with receiving federal funds through certain specialized programs. In response to the 2008 financial crisis, Congress authorized the U.S. Department of the Treasury to establish the Troubled Asset Relief Program ("TARP"). *See* 12 U.S.C. § 5211. In turn, Treasury established the Home Affordable Modification Program ("HAMP"), which "provided mortgage servicers with incentive payments—known as TARP funds—to encourage servicers to permit delinquent borrowers to modify loan terms." Pet. App. 3a.

In his Second Amended Complaint (the operative pleading), Heron asserted two claims against Nationstar: (1) failure to return government property, in violation of 31 U.S.C. § 3729(a)(1)(D); and (2) conspiracy to violate the FCA, in violation of 31 U.S.C. § 3729(a)(1)(C). Pet. App. 6a. He alleged that Nationstar wrongfully obtained incentive payments from the federal government and that it certified to the federal government its compliance with state and federal laws despite allegedly submitting forged promissory notes in foreclosure actions. Pet. App. 4a-5a. Heron's voluminous Second Amended Complaint "referenced public information and documents purporting to show

the pervasiveness and illegality of Nationstar's scheme." Pet. App. 6a.

The Second Amended Complaint also contained eight allegations of non-public information regarding Nationstar and Aurora, which the district court listed as follows:

> (1) a private call with an Aurora "Executive Communications" employee where the employee disclosed that Aurora did not own relator's loan …; (2) that Aurora and [Nationstar] produced three contradictory versions of plaintiff's promissory note in foreclosure proceedings …; (3) the existence of a third version of relator's promissory note that had never been filed in public records or filed with the court; (4) the exposure of [Nationstar's] argument that it had no records or knowledge of any forgeries or how the endorsements came into existence; (5) an affidavit obtained by relator from … the endorser on relator's original loan documents, stating that she did not endorse the note to "Aurora Loan Services" …; (6) relator's experience in the mortgage industry; (7) an internal nonpublic record obtained by relator that showed that Aurora paid to endorse a note several days before filing a forged handwritten endorsed note on Aurora's behalf; and (8) an internal Nationstar agreement used to hold outside counsel accountable for taking and receiving original notes and allonges that [Nationstar] sent to counsel.

Pet. App. 50a-51a.

B. The District Court's Dismissal.

Nationstar moved to dismiss Heron's complaint on multiple grounds. Relevant here, Nationstar argued that the False Claims Act's public-disclosure bar prohibited this parasitic lawsuit because Heron's claims were "substantially similar" to publicly disclosed allegations or transactions—public disclosures that he relied upon in the Second Amended Complaint. Pet. App. 7a. Nationstar highlighted four such public disclosures, as the decision below summarized:

- a consent order between Nationstar and the Massachusetts Division of Banks, for unsound servicing practices and the improper initiation and handling of foreclosure proceedings (the Massachusetts Consent Decree);

- the federal criminal prosecution of Lee Bentley Farkas for bank and TARP fraud schemes involving the sale of fake mortgages (the *Farkas* prosecution);

- a consent order between Aurora and the Office of Thrift Supervision for filing improperly notarized documents in foreclosure proceedings and initiating foreclosure without ensuring mortgage documents were properly indorsed (the OTS Consent Decree); and

- a mortgage fraud notice issued by the Federal Bureau of Investigation (FBI) and Mortgage Bankers Association (the FBI Notice).

Pet. App. 7a.

In opposition, Heron never disputed that these documents were among the types of sources that could give rise to public disclosure and bar a relator from suing under the FCA. Instead, he argued that the public sources did not disclose substantially the same information as his complaint and, even if they did, that he met the "original source" exception. C.A. Supp. App. 42-49.

The district court agreed with Nationstar, concluding that those "disclosures were sufficient to 'set the government on the trail' of defendant's alleged fraud without relator's assistance." Pet. App. 48a.

The district court further concluded that Heron was not an "original source" of those publicly disclosed allegations and transactions. Pet. App. 53a. Heron's Second Amended Complaint alleged various facts about Nationstar's and Aurora's conduct in numerous foreclosure proceedings, both others' proceedings and his own. *Id.* at 50a-51a. The court explained that Heron was not an "original source" of information he had "amalgamated from other foreclosure proceedings," because that "was public information that [he] simply grouped together." *Id.* at 51a.

The district court also concluded that Heron was not an "original source" of the non-public information alleged in the Second Amended Complaint because that did not satisfy the "materially adds" prong of 31 U.S.C. § 3730(e)(4)(B). Pet. App. 53a & n.6. Some of those non-public allegations concerned his own foreclosure. The court concluded that such allegations were "simply details about his foreclosure within the fraudulent promissory note scheme that had been

publicly disclosed." *Id.* at 52a. The remaining non-public allegations "merely add[ed] background information or details about a known fraudulent scheme," the district court concluded, and therefore did not "materially add[] to the publicly disclosed information." *Id.* at 53a (quoting *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 757 (10th Cir. 2019)).

Accordingly, the district court granted Nationstar's motion to dismiss. Pet. App. 54a. It therefore did not need to address Nationstar's alternative arguments—that Heron had not alleged any facts showing that Nationstar submitted false certifications to obtain government funds, and that Heron had failed to plead fraud with particularity. Pet. App. 39a, 54a n.7; *see* C.A. Supp. App. 26-36.

C. The Tenth Circuit Affirms.

In an unpublished decision, the Tenth Circuit affirmed. On appeal, Heron argued that (1) the district court impermissibly relied on information from sources that did not qualify as public disclosures; (2) his lawsuit did not involve allegations or transactions already in the public domain; and (3) he was an original source of new information. Pet. App. 12a. The Tenth Circuit rejected all three arguments. *Id.*

1. Heron first argued that the four sources identified by the district court as public disclosures are not among the enumerated sources listed in 31 U.S.C. § 3730(e)(4)(A)(i)-(iii). But the Tenth Circuit declined to address this issue, concluding that "Heron waived, rather than forfeited, his argument that the Four Sources are not qualifying public disclosures within the meaning of the [FCA]" in his briefing before the

district court. Pet. App. 14a. Heron's petition in this Court does not revisit this point.

2. Heron's next argument was that the four public disclosures were not substantially the same as his own allegations, because those sources "did not name Nationstar specifically, did not involve the same fraudulent conduct alleged in his complaint, or both." Pet. App. 18a. The Tenth Circuit rejected Heron's effort to impose a "hyper-specific" standard that required "near-complete identity of allegations" between the public disclosures and his claims. *Id.* (*Reed*, 923 F.3d at 748 n.12).

Applying the correct standard, the court below concluded that the four publicly disclosed sources were substantially the same as Heron's claims. Regarding the Massachusetts Consent Order, in which Nationstar *was* specifically named, the Tenth Circuit noted that it overlapped with "the material element of the purported fraud at the heart of Mr. Heron's allegations in this case—that Nationstar's use of promissory notes failed to comply 'with all applicable laws, rules, regulations, requirements and guidelines.'" Pet. App. 19a (citation omitted). And because "Heron raised no substantial-similarity argument about the Massachusetts Consent Order in his opening brief," the Tenth Circuit "conclude[d] Mr. Heron has waived any argument challenging the district court's reliance on the Massachusetts Consent Order in dismissing his complaint." Pet. App. 20a.

The Tenth Circuit could have stopped there. But it further explained that "Heron's allegations about the *Farkas* prosecution demonstrate the government's awareness of fake promissory notes in mortgage fraud schemes perpetuated by recipients of federal TARP

funds." Pet. App. 22a. And the Aurora consent order "reflects the 'essence,' … and 'material elements,' … of the fraudulent conduct allegedly committed by Nationstar," as Aurora's "successor." Pet. App. 23a-24a (citations omitted). Certainly, "[t]he government would not need to look far from Aurora's identified wrongdoing to investigate whether Nationstar also used improperly endorsed promissory notes in foreclosure proceedings—particularly in proceedings involving servicing rights it acquired from Aurora." *Id.* Finally, the Tenth Circuit explained that the FBI notice "shows the government's awareness of fraud in the mortgage industry generally." Pet. App. 26a.

Thus, the Tenth Circuit agreed with the district court that the four publicly disclosed sources, "taken together, met the [FCA's] substantially-the-same standard." Pet. App. 27a.

3. The Tenth Circuit also affirmed the district court's conclusion that Heron was not an original source within the meaning of § 3730(e)(4)(B).[1] On appeal, Heron argued that he "'needs only to *allege* that he has the knowledge required by section 3730(e)(4)(B)(2)' and the 'mere allegation of knowledge is all that is needed to survive a Rule 12(b)(6) motion.'" Pet. App. 30a (quoting Pet'r C.A. Opening Br. 37-38). But the Tenth Circuit explained that the district court was not required "to accept the truth of his conclusory legal assertion." *Id.*

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[1] The statute offers two definitions of "original source," but only the second—subparagraph (2) of § 3730(e)(4)(B)—was at issue on appeal. Pet. App. 27a-28a n.13. The district court had separately concluded that Heron did not satisfy the first definition, either. *See* Pet. App. 53a n.6.

Heron's appellate argument regarding the "original source" exception focused on the information he had "collected from other foreclosure proceedings involving Nationstar." Pet. App. 31a. But the Tenth Circuit reasoned that "[t]his amalgamation of public information is precisely the 'secondhand knowledge' that will not qualify a relator as an original source." *Id.* (quoting *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1547 (10th Cir. 1996)). The only non-public information Heron claimed to possess is the set of eight allegations discussed by the district court. *See* pp. XX, *supra*. The Tenth Circuit noted, however, that "Heron's appellate briefing d[id] not address the district court's thorough analysis of the eight non-public facts alleged in the complaint about which Mr. Heron claims to have independent knowledge." Pet. App. 32.

The Tenth Circuit therefore agreed with the district court that Heron was not an original source and affirmed the dismissal. *Id.*[2]

REASONS FOR DENYING THE PETITION

There is no circuit conflict on either question presented. With respect to the "substantially the same" prong, the Tenth Circuit applies the same test as the D.C. Circuit and it has distinguished—*not* disagreed with—the Eleventh Circuit's thirty-year-old decision

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[2] The Tenth Circuit did not reach Nationstar's alternative arguments for affirmance—that that "to satisfy Rule 9(b) in the *qui tam* context, a plaintiff must allege with particularity the actual false claim for payment submitted to the government" and "the Second Amended Complaint did not 'identify any specific claims or certifications submitted to the government or the specific dates on which those were presented.'" Pet. App. 6a n.5 (quoting C.A. Supp. App. 33).

applying a previous version of the statute. With respect to the "materially adds" prong, the Seventh Circuit decision upon which Heron relies is best read as applying the same standard as the Tenth Circuit. And the Third Circuit decision he cites is at most ambiguous, as the Tenth Circuit noted. There is no conflict among the circuits and the petition should be denied for that reason alone.

To the extent there is any tension among the circuits, moreover, this Court's review is not warranted here. Even under Heron's understanding of Eleventh Circuit precedent, his complaint would have been dismissed. Likewise, the alternative standard that (Heron says) has been adopted by the Seventh Circuit is even worse for relators than the one applied by the court below—so the outcome in his case would have been the same in that circuit, too. And Heron has waived any argument that his complaint could have survived under the supposedly looser standard in the Third Circuit. Accordingly, this case is not a suitable vehicle to decide the questions presented.

I. The circuits agree on the test governing the "substantially the same" prong.

Heron argues that "[t]he courts of appeals have adopted divergent standards for determining whether the publicly disclosed allegations and trans[a]ctions are 'substantially the same' as those alleged in the qui tam relator's action or claim." Pet. 16. He claims that the Tenth Circuit's test differs from that of the D.C. Circuit and Eleventh Circuit. Pet. 16-17.

There is no divergence. The Tenth Circuit applies the same test as that of the D.C. Circuit and Eleventh

Circuit. So there are no "disparate approaches" for this Court to "resolve." Pet. 17.

A. The Tenth Circuit applies the same test as the D.C. Circuit.

In the Tenth Circuit, as Heron acknowledges (Pet. 17), "the operative question is whether the public disclosures were sufficient to set the government 'on the trail of the alleged fraud without the relator's assistance.'" *Reed*, 923 F.3d at 745 (brackets omitted) (quoting *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995)); *see also* Pet. App. 18a (decision below).

The D.C. Circuit applies precisely the same test. Invoking the same "on-the-trail" tracking metaphor, the D.C. Circuit has held that the "inquiry focuses … on whether 'the quantum of information already in the public sphere' was sufficient to 'set government investigators on the trail of fraud.'" *United States ex rel. Doe v. Staples, Inc.*, 773 F.3d 83, 87 (D.C. Cir. 2014) (quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654-655 (D.C. Cir. 1994)). There is no daylight between the tests adopted by the Tenth and D.C. Circuits.[3]

Heron claims that the Tenth Circuit "explicitly rejected" the D.C. Circuit's test, Pet. 16, but that is a

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[3] Other circuits that have expressly adopted the D.C. Circuit's *Springfield Terminal* test also interpret it as focusing on whether the public disclosures were sufficient to "set the government on the trail of fraud." *See, e.g.*, *United States ex rel. Solomon v. Lockheed Martin Corp.*, 878 F.3d 139, 144 (5th Cir. 2017) (citation omitted) (adopting the *Springfield Terminal* test and equating it with the Tenth Circuit's standard); *United States v. CSL Behring, L.L.C.*, 855 F.3d 935, 944, 946 (8th Cir. 2017) (same).

mischaracterization. The D.C. Circuit's opinion in *Springfield Terminal* had expressed the test in mathematical terms, albeit recognizing that doing so ran "the risk of belabored illustration." 14 F.3d at 654. The D.C. Circuit thus explained:

> [I]f 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. The Tenth Circuit never rejected this test. Rather, it simply "decline[d]" to "adopt[] the mathematical formula espoused by the D.C. Circuit." *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1050 (10th Cir. 2004). Declining to adopt a test is a far cry from "explicitly reject[ing]" it. Pet. 16. The Tenth Circuit saw no need to adopt or reject the D.C. Circuit's formula in *Grynberg* because the relator's claim failed "even under *Springfield*'s analysis." *Grynberg*, 389 F.3d at 1050. At bottom, whether or not the Tenth Circuit opts to illustrate this test with a mathematical formula, both the Tenth and D.C. Circuits apply precisely the same "on the trail" inquiry. *See Reed*, 923 F.3d at 745; *Staples*, 773 F.3d at 87. There is no circuit conflict.

Indeed, Heron does not even try to explain how the two circuits' standards differ—much less how any purported difference would have affected the outcome in his case. This Court's intervention is unnecessary.

B. The Tenth Circuit agrees with the Eleventh Circuit, and Heron's claims would have been dismissed regardless.

Heron next suggests that the Tenth Circuit's public-disclosure inquiry differs from the supposedly "stricter test" adopted by the Eleventh Circuit. Pet. 17. According to Heron, the Eleventh Circuit's decision in *Cooper v. Blue Cross & Blue Shield of Florida, Inc.* holds that the public-disclosure bar applies only if the defendant in the *qui tam* action has "been 'specifically identified in public disclosures.'" *Id.* (quoting 19 F.3d 562, 566 (11th Cir. 1994) (per curiam)). Heron apparently reads *Cooper* to establish a per se rule that the public-disclosure bar *always* requires that the defendant was specifically identified in the prior disclosures. But that is not what *Cooper* held.

The Tenth Circuit has twice addressed the Eleventh Circuit's *Cooper* decision, and each time it has "distinguished *Cooper*"—not disagreed with it. *In re Nat. Gas Royalties*, 562 F.3d 1032, 1040-1041 (10th Cir. 2009); *see Fine*, 70 F.3d at 571-572. As the Eleventh Circuit and several other circuits have recognized, *Cooper*'s holding is fact-bound—turning on the difficulty of identifying particular fraudsters in certain factual scenarios.

"In *Cooper*, the question was whether public disclosure of industry-wide insurance fraud, as well as allegations against Blue Cross Blue Shield of Georgia (BCBSG) amounted to public disclosure of fraud by BCBSG's sister corporation—Blue Cross Blue Shield of Florida." *Cho v. Surgery Partners, Inc.*, 30 F.4th 1035, 1044 (11th Cir. 2022). The Eleventh Circuit held that such disclosures did not preclude a *qui tam* suit against Blue Cross Blue Shield of Florida. While

"[t]he government often knows on a general level that fraud is taking place," *Cooper* reasoned, it may have "difficulty identifying all of the individual actors engaged in the fraudulent activity." 19 F.3d at 566. In those circumstances, the public-disclosure bar would be triggered only if Blue Cross Blue Shield of Florida "was mentioned by name or otherwise specifically identified in public disclosures." *Id.*

Importantly, the Eleventh Circuit itself has found "*Cooper* … distinguishable" when the "facts are different." *Cho*, 30 F.4th at 1044. In *Cooper*, the Eleventh Circuit explained, the two Blue Cross Blue Shield entities were engaged in "distinct" schemes, so "a public disclosure that one of a company's subsidiaries engaged in fraud may not alert the government to a parallel, *distinct* scheme by another subsidiary." *Id.* (emphasis added). But where the *qui tam* relator alleges that "an additional player … had its hands in the *same fraudulent scheme*" that was previously disclosed, the *qui tam* action is barred even if that additional player had not been specifically named. *Id.* (emphasis added). Thus, contrary to Heron's suggestion (Pet. 17), the Eleventh Circuit does not read its own decision *Cooper* to establish a per se rule requiring future panels to hold that a defendant must have been specifically named in the public disclosures for the bar to apply. Rather, *Cooper*'s holding turned on the particular facts of that case.

Several other circuits have likewise clarified *Cooper*'s limited holding. The Tenth Circuit has "held that *Cooper* [is] distinguishable" because the disclosures of industry-wide fraud in that case did not meaningfully help the government "identify individual actors"—the government was still left "combing

through the private insurance industry in search of fraud." *Natural Gas Royalties*, 562 F.3d at 1041 (quoting *Fine*, 70 F.3d at 572). But specific identification is unnecessary "where the public disclosures at issue are sufficient to set the government squarely upon the trail of the alleged fraud." *Id.*

The Eighth Circuit distinguished *Cooper* in the same way. "In *Cooper*, the disclosures in question were directed at an entire industry in which the government may very well have 'difficulty identifying all of the individual actors engaged in the fraudulent activity,' 19 F.3d at 566, and a specific reference would thus be necessary for the government to identify and prosecute the fraud." *United States v. CSL Behring, L.L.C.*, 855 F.3d 935, 943-944 (8th Cir. 2017) (citation omitted). Other circuits have similarly characterized *Cooper*'s holding as limited to factual scenarios where the broad disclosures did not meaningfully narrow down the universe of potential wrongdoers. *See United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 329-330 (5th Cir. 2011) (*Cooper*'s reasoning was that "the industry was too large, and the industry-wide allegations were not specific enough"); *United States ex rel. Findley v. FPC-Boron Emps.' Club*, 105 F.3d 675, 687 (D.C. Cir. 1997) (same), *overruled on other grounds as stated in United States ex rel. Davis v. Dist. of Columbia*, 679 F.3d 832 (D.C. Cir. 2012).

In short, the Tenth Circuit does not disagree with the Eleventh Circuit's decision in *Cooper*. Instead, it has repeatedly distinguished that decision, and the Eleventh Circuit itself has noted that *Cooper*'s holding is fact-bound. So there is no circuit conflict to resolve.

Even assuming that Eleventh Circuit precedent differed from the Tenth Circuit's, that difference would be irrelevant here because the public disclosures pleaded by Heron *specifically named* Nationstar. Pet. App. 19a-20a. Nationstar was named in the Massachusetts Consent Order, which the district court determined was "substantially the same as the allegations relator makes in the complaint." Pet. App. 49a. The court of appeals concluded that "Heron has waived any argument challenging the district court's reliance on the Massachusetts Consent Order in dismissing his complaint" because he "raised no substantial-similarity argument about the Massachusetts Consent Order in his opening brief." Pet. App. 20a. Thus, Heron's *qui tam* would be barred in the Eleventh Circuit even under his (mistakenly) expansive reading of *Cooper*. And Heron never made any argument based on *Cooper* in the courts below—he did not even cite that decision.

Finally, *Cooper* was decided under a previous version of the public-disclosure bar, which prevented a relator from filing a *qui tam* action that is "*based upon* the public disclosure of allegations or transaction." 31 U.S.C. § 3730(e)(4)(A) (1994) (emphasis added). But that provision was amended in 2010 to delete the "based upon" phrase. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010). It now provides that a *qui tam* action must be dismissed "if *substantially the same* allegations or transactions as alleged in the action or claim were publicly disclosed." 31 U.S.C. § 3730(e)(4) (emphasis added). Since that amendment, the Eleventh Circuit has never applied *Cooper*'s holding regarding a *qui tam* defendant who was not specifically named in the prior disclosures. Even if Heron

were correct that *Cooper* imposed such a per se rule, it is unclear whether that rule survived the 2010 amendment. That is another reason why this Court's review is unwarranted.

II. There is no circuit conflict as to the "original source" provision.

To qualify as an "original source" under the FCA, a relator must have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." 31 U.S.C. § 3730(e)(4)(B). Heron contends that "the courts of appeals are … divided on the test to apply when a qui tam relator claims to meet the definition of 'original source,'" suggesting that the Tenth Circuit's inquiry differs from that of the Seventh and Third Circuits. Pet. 17-19.

Neither of those circuits has staked out definitive positions, however, and this Court's review is not warranted.

A. There is no conflict with the Seventh Circuit and, if anything, that circuit's precedent is less friendly to relators.

Heron first posits that the Tenth Circuit's "materially adds" test differs from that of the Seventh Circuit. Pet. 18. He fails to identify any circuit conflict—or any circuit that would treat him as an original source.

In the Tenth Circuit, a relator "ordinarily will satisfy the materially-adds standard" when he discloses information that "would be capable of influencing the behavior of … the government," but not when he "merely adds background information or details about a known fraudulent scheme." *Reed*, 923 F.3d at 757 (brackets and quotation marks omitted). The Tenth Circuit stated that "the Seventh Circuit has taken a

different path," which the Tenth Circuit characterized as holding that "if a relator's allegations are substantially similar to those contained in the public disclosures, her allegations cannot 'materially add' to the public disclosures.'" *Id.* (quoting *Cause of Action v. Chi. Transit Auth.*, 815 F.3d 267, 283 (7th Cir. 2016) (brackets, quotation marks, and emphasis omitted)).

Given its reading of *Cause of Action*, the Tenth Circuit faulted the Seventh Circuit for "collapsing the materially-adds inquiry into the substantially-the-same inquiry." *Id.* Such a standard leaves no room for the "original source" exception to apply, because the exception operates only when qualifying public disclosures have already been made. *See* 31 U.S.C. § 3730(e)(4)(B). As the Tenth Circuit asked, "what good is an exception (i.e., the original-source exception) that does not actually except anything?" *Reed*, 923 F.3d at 757.

Even assuming that the Tenth Circuit accurately characterized the *Cause of Action* decision, this case does not present that issue because Heron lost in the Tenth Circuit—which is even *friendlier* to relators than the Seventh Circuit. Indeed, on that reading of *Cause of Action*, it is impossible for a relator ever to satisfy the "original source" exception in the Seventh Circuit. So Heron necessarily would have lost there, too, and any disagreement between those circuits could not have made a difference in Heron's case.

Regardless, the Seventh Circuit may not have taken the extreme position that the Tenth Circuit ascribed to it. The *Cause of Action* decision's full analysis of this point consists of a single sentence: "because [the relator's] allegations are substantially similar to those contained in the Audit Report, its information

has not 'materially add[ed]' to the public disclosure." 815 F.3d at 283 (second brackets in original). The Tenth Circuit likely read too much into that single sentence, and the Seventh Circuit has never had occasion to consider the Tenth Circuit's critique.

Indeed, the First Circuit has cited *Cause of Action* as standing for the far more modest proposition that "[t]he question of whether a relator's information 'materially adds' to public disclosures often overlaps with … whether the relator's allegations are substantially the same as those prior revelations." *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211 (1st Cir. 2016) (citing *Cause of Action*, 815 F.3d at 283). That proposition is accepted by the Tenth Circuit, which noted "the potential overlap between the materially-adds inquiry and the inquiry into 'whether the relator's allegations are substantially the same as the prior revelations.'" *Reed*, 923 F.3d at 757 (quoting *Winkelman*, 827 F.3d at 211 (brackets omitted)).

The alleged fraud in *Cause of Action* concerned the Chicago Transit Authority's years-long submission of false vehicular mileage data to the federal government. 815 F.3d at 269-270. The Illinois Auditor General had released an "Audit Report" and "Technical Report" fully detailing the scheme. *Id.* On the heels of those reports, the *qui tam* relator merely lifted their details and "styled them as a complaint with references to the statutes and regulations that support its legal theory of fraud." *Id.* at 282. That restyling was "the extent of [the relator's] contribution." *Id.* Against that backdrop, *Cause of Action* did not require extensive analysis of the "materially adds" element. The relator in that case simply added nothing significant to the facts already in the public domain.

To the extent that *Cause of Action*'s single-sentence analysis of the "materially adds" criterion leaves open questions, the Seventh Circuit can easily clarify at the next opportunity.[4] It may decide that the Tenth Circuit has overread *Cause of Action*, because a relator's knowledge may sometimes materially add to the publicly disclosed information despite being substantially similar. Or, if the Seventh Circuit concludes that *Cause of Action* really does reach further, then the Tenth Circuit's critique may be grounds for considering the issue en banc. Either way, this Court's review is not warranted.

B. The Third Circuit's precedent is unclear, as the Tenth Circuit recognized, and Heron has waived any argument under it.

According to Heron, "[t]he Tenth Circuit claims that its test for 'original source' is narrower than the Third Circuit's standard." Pet. 19. But that is not what the Tenth Circuit said.

Rather, the Tenth Circuit observed that "[t]he path plotted by the Third Circuit in its noteworthy decision, *Moore*, is *less clearly defined*." *Reed*, 923 F.3d at 758 (citing *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 306 (3d Cir.

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[4] The Seventh Circuit has applied *Cause of Action*'s "materially adds" reasoning only once, in *Bellevue v. Universal Health Services of Hartgrove, Inc.*, 867 F.3d 712, 721 (7th Cir. 2017). The analysis there was also perfunctory, and that decision predated the Tenth Circuit's critique in *Reed*. The facts in *Bellevue* recall those in *Cause of Action*: the relator essentially parroted letters and an "audit report" issued by government agencies, and "did not supply any genuinely new and material information." *Id.* at 719-720.

2016) (emphasis added)). Under one "possible" interpretation of *Moore*, the Tenth Circuit noted, "one might read the Third Circuit's approach in that case to permit 'a relator who merely adds detail or color to previously disclosed elements of an alleged scheme' to qualify as an original source." *Id.* (citation omitted). The Tenth Circuit disagreed with that approach. But it recognized that "[p]erhaps *Moore* is amenable to a narrow interpretation," which would find support in *Moore*'s language that the materially-adds standard is not met unless the relator's information "adds *in a significant way* to the essential factual background." *Id.* (quoting *Moore*, 812 F.3d at 307) (emphasis supplied by Tenth Circuit).

Thus, the Tenth Circuit discussed two "possible" readings of the *Moore* decision, each of which finds support in the opinion. Flagging one ambiguous decision from another circuit is hardly an "acknowledged disagreement[]," as Heron claims. Pet. 21. Nor has the Third Circuit ever determined which of the two possible interpretations of *Moore* is correct. As Heron concedes, "[t]he Third Circuit has not subsequently expanded upon its discussion in *Moore*." Pet. 20. The Third Circuit's precedent therefore remains at most unsettled, and this Court's review is premature.

In fact, the D.C. Circuit reads the *Moore* decision's "interpretation of 'materially adds'" as "consistent" with that of the Tenth and First Circuits (as well as several other circuits). *United States ex rel. O'Connor v. USCC Wireless Inv., Inc.*, 128 F.4th 276, 289 & n.8 (D.C. Cir. 2025). That further undermines Heron's suggestion of any circuit conflict.

In any event, Heron has waived any argument that the courts below should have applied some looser "materially adds" standard that he could have satisfied. In the court below, Heron affirmatively acknowledged that "[t]he test for whether a relator's knowledge 'materially adds to' the existing public disclosures is set forth in *Reed*" and that "a relator will *not* satisfy the 'materially adds' prong if he 'merely adds background information or details about a known fraudulent scheme.'" Pet'r C.A. Opening Br. 42 (emphasis in original) (quoting *Reed*, 923 F.3d at 757). Heron has therefore waived any argument that some more favorable test governs.

This is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). "Absent unusual circumstances—none of which is present here—[this Court] will not entertain arguments not made below." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015). Heron could have sought rehearing en banc or otherwise indicated to the court below that he believes its standard is too demanding. He did neither. Since Heron abandoned this issue below, and because the circuits are not in conflict, there is no basis for this Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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March 10, 2025