No. 24-845

IN THE

Supreme Court of the United States

STEVEN ZORN; IOWA SLEEP DISORDERS CENTER, P.C.; IOWA CPAP, LLC,

Petitioners,

v.

STEPHEN B. GRANT on behalf of The United States of America and on behalf of the State of Iowa,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

Adam D. Zenor
Counsel of Record
Derek R. LaBrie
Zenor Law Firm, P.L.C.
111 East Grand Ave.
Suite 400
Des Moines, Iowa 50309
Phone: (515) 650-9005
Fax: (515) 206-2654
adam@zenorlaw.com
derek@zenorlaw.com

Counsel for Respondent

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTION PRESENTED

Whether the Eighth Circuit panel clearly erred by unanimously finding the False Claims Act's public disclosure defense inapplicable where private education letters sent to a sleep physician contained no inference of fraud.

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INTRODUCTION

The conditional cross-petition raises only a disagreement in the application of facts to a uniform legal test employed by every circuit in assessing the applicability of the public disclosure defense of the False Claims Act ("FCA"). Simply, the cross-petition's underlying premise (that the Eighth Circuit purportedly limits application of 31 U.S.C. § 3730(e)(4)(A) to *express* allegations of fraud) is simply wrong. To that end, this Court need look no further than the Eighth Circuit's own words: "We do not require the public disclosure of a patently fraudulent transaction to bar a suit under the Act. Rather, the bar is given effect when the essential elements comprising that fraudulent transaction have been publicly disclosed so as to raise a reasonable inference of fraud." *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1514 (8th Cir. 1994).

Indeed, this cross-petition, as many of cross-petitioner's own authorities suggest, presents a "fact-dependent" question, *United States ex rel. Rahimi v. Rite Aid Corp.*, 3 F.4th 813, 830 (6th Cir. 2021), which "is intertwined with the merits." *United States ex rel. Colquitt v. Abbott Labs.*, 858 F.3d 365, 373 (5th Cir. 2017). On these facts, then, there is good reason the appellate panel unanimously affirmed the district court's rejection of the public disclosure defense.[1]

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[1] Of course, the panel was *not* unanimous in supplementing Excessive Fines Clause jurisprudence with that of substantive due process. *See* Petition, No. 24-549 (pending related case). On the actual cert-worthy constitutional question presented in No. 24-549, the two-judge majority differed from the

In fact, all of the circuits agree on the legal analysis to be employed. Each circuit applies the same algebraic X + Y = Z formula first introduced by the D.C. Circuit, and re-proposed by the cross-petition as if profound.[2] The circuits agree that, at least with respect to the "allegations or transactions" element, the "essential" or "critical elements of the fraudulent transaction themselves [need to be] in the public domain." *Springfield Terminal*, 14 F.3d at 654. It is no surprise cross-petitioners have cited to no authority

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concurrence, which both differed from the district court's application of the Constitution to the FCA statutory penalties. On that issue, two courts reached three different conclusions. On the singular question presented in this conditional cross-petition, however, all four judges from both courts were aligned and unanimous.

[2] *Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 209 (1st Cir. 2016); *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 103 (2d Cir. 2010), *remanded on other grounds* 563 U.S. 401 (2011); *United States ex rel. Zizic v. Q2Administrators, LLC*, 728 F.3d 228, 236 (3d Cir. 2013); *United States ex rel. Jones v. Collegiate Funding Servs., Inc.*, 469 Fed. App'x 244, 258 (4th Cir. 2012) (relying on inference of fraud); *United States ex rel. Solomon v. Lockheed Martin Corp.*, 878 F.3d 139, 144 (5th Cir. 2017); *United States ex rel. Holloway v. Heartland Hospice, Inc.*, 960 F.3d 836, 844 (6th Cir. 2020); *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 708 (7th Cir. 2014) ("[E]ven if no allegation of fraud has been made, the bar[]…may still apply so long as facts disclosing the fraud itself are in the…public domain."); *Rabushka*, 40 F.3d at 1514 (8th Cir.); *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 571 (9th Cir. 2016); *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 745 n.8 (10th Cir. 2019); *United States ex rel. Bibby v. Mortg. Investors Corp.*, 987 F.3d 1340, 1353–54 (11th Cir. 2021); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) (introducing the concept). Cross-petitioners cite to each of these in their cross-petition.

which recognizes a circuit split here—there is none. Rather, cross-petitioners simply disagree with how that uniform test was applied in this case. That is not something for which this Court grants cert. Supr. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Further, in focusing on different outcomes arising out of distinct underlying frauds, the cross-petition ignores the various means of establishing an FCA violation. *E.g.*, *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010) (recognizing "'[f]alse claims under the FCA take a variety of forms" including (1) presentment theory; (2) false certifications; (3) fraudulent inducement; and (4) conspiracy). While cross-petitioners' authorities nearly exclusively confront *false certification* allegations, Relator Dr. Grant brought a *presentment* case. *E.g.*, *United States ex rel. Taylor v. Boyko*, 39 F.4th 177, 195 n.12 (4th Cir. 2022) (recognizing a relator must demonstrate "presentment" for an "upcoding challenge"); *Mateski*, 816 F.3d at 567, 573 (finding allegations "different in kind and degree from previously disclosed information" where disclosures "may come closer to suggesting breach of contract than fraud"); *United States ex rel. Advocates for Basic Legal Equality, Inc. v. U.S. Bank, N.A.*, 816 F.3d 428, 432 (6th Cir. 2016) (looking for "public disclosures *of this type of fraud*" (emphasis supplied)); *Dingle v. Bioport Corp.*, 388 F.3d 209, 215 (6th Cir. 2004) (restricting public disclosure analysis to where "the respective frauds (*and only those frauds*)" were disclosed with particularity (emphasis supplied));

United States ex rel. Atkinson v. Pa. Shipbuilding Co., 255 F. Supp. 2d 351, 371 (E.D. Pa. 2002) ("[T]hese activities are essentially different in character.").

Even authority on which cross-petitioners rely find this distinction meaningful, holding the public disclosure defense *not* applicable to presentment claims, *even if* it applied to contemporaneous false certification claims. *E.g.*, *Colquitt*, 858 F.3d at 371 ("Colquitt's third theory—false presentment through encouraging doctors to present fraudulent claims to Medicare—survived [the public disclosure] motion."); *Jones*, 469 Fed. App'x at 248, 253 (rejecting public disclosure challenge to counts 16–19, which were alleged to be "directly presented false claims," while applying the defense to other false certification claims); *United States ex rel. Kirk v. Schindler Elevator Corp.*, 437 Fed. App'x 13, 18 (2d Cir. 2011) (finding the defense applied to failure-to-file certification claims, but *not* applicable to "the false reports [presentment] claims"). This is not to say presentment claims can *never* be publicly disclosed. It just goes to show that (1) satisfying the rigorous defense burden is more difficult with a presentment claim; and (2) the *facts* matter, making it particularly unripe for cert.

Finally, cross-petitioner's *pis aller* public disclosure argument is hardly dispositive. Oddly enough, it appears the one phrase onto which cross-petitioners latch ("allegations or transactions") is the one part of the FCA on which the circuits *do* agree. That not only renders cert unnecessary, but also futile. The lower courts here found it unnecessary to wade into the other arguably more complicated

interpretative portions of the public disclosure defense. That means that even if there was a circuit split (none exists), which warranted cert (it does not), *and* cross-petitioner was successful in remanding the case (such a drastic rewrite should not be indulged), the public disclosure analysis would not be complete and the lower courts would still have to decide (1) whether the Education Letters sent privately to the offending provider are "in the public domain"; (2) whether the Education Letters are a competent channel of disclosures; (3) whether Dr. Grant is an "original source"; and (4) whether the Government has opposed dismissal. That hardly obviates the constitutional question before this Court in Relator's petition. *See* No. 24-549.

In short, this Court should decline to participate in the solitary, fact-bound question presented in this cross-petition. Instead, it should grant cert for the constitutional question presented in No. 24-549 on which the circuits' *analyses* are otherwise irreparably divided.

STATEMENT OF THE CASE

A. Legal Background

Passed in 1863, the FCA imposes liability for, *inter alia*, knowingly "present[ing]…a false or fraudulent claim for payment or approval" to the Government. 31 U.S.C. § 3729(a); *see also Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000).

The statute invokes the assistance of the general public in identifying and raising the alarm for fraud through a *qui tam* action brought in the name of the Government. 31 U.S.C. § 3730(b)(1). At its inception, the FCA imposed no limitations on the source of a putative relator's information. In 1943, Congress modified that unlimited *qui tam* right after a relator brought a "parasitic" suit copied over from a federal indictment. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 412 (2011). Congress preserved relators' right to bring *qui tam* FCA actions generally, merely imposing a jurisdictional bar against allegations of fraud for which the Government was already aware. *Id.* In 1986, the statute was amended once more to replace the 'Government knowledge bar' with a jurisdictional 'public disclosure bar.' *Id.* Nearly all of cross-petitioners' assertions and authorities can be traced back to this 1986 language (the "public disclosure bar").

In 2010, however, the FCA was amended once more, converting the jurisdictional bar to an affirmative defense which must be proved at trial. Pub. L. 111-148, 124 Stat. 119 § 10104(j)(2); *see also United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 300 (3d Cir. 2016) ("We…join the other circuits that have ruled that the amended version does not set forth a jurisdictional bar."); *see also Reed*, 923 F.3d at 737 n.1 (recognizing this interpretation is "unanimous[]" among the circuits). The post-2010 provision instead reads: "The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as

alleged in the action or claim were publicly disclosed [in specified channels]." 31 U.S.C. § 3730(e)(4)(A).

The 2010 amendment has created "more lenient requirements for" surviving public disclosure dismissal. *Advocates for Basic Legal Equality, Inc.*, 816 F.3d at 430. Stated differently, the public disclosure bar now applies in "narrowe[r]" circumstances, *Silbersher v. Valeant Pharms. Int'l, Inc.*, 89 F.4th 1154, 1160 (9th Cir. 2024), *cert. denied* 145 S. Ct. 140 (mem.), which "mak[es] it easier for relators to clear the public disclosure hurdle." *Bibby*, 987 F.3d at 1353 n.9.

To dismiss an FCA *qui tam* under the public disclosure defense, the Court must be satisfied that the movant has demonstrated (1) there was a public disclosure; (2) through a qualifying channel; (3) which revealed the allegations or transactions subject to the suit. 31 U.S.C. § 3730(e)(4)(A). If the three elements of the first analytical tier are established, the relator may still prosecute the action if either (4) the relator constitutes an "original source" of the allegations;[3] *and/or* (5) the Government opposes dismissal. *Id.*

[3] "Original source" is defined, in relevant part here, as "an individual…who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transaction, and who has voluntarily provided the information to the Government before filing an action under this section." 31 U.S.C. § 3730(e)(4)(B).

This 2010 language applies to this case.[4] Petitioner only asks for cert on the third element.

B. Procedural History

1. Relator Dr. Grant brought this *qui tam* action alleging violations of the FCA and the Iowa False Claims Act ("Iowa FCA"). 31 U.S.C. § 3729(a)(1); Iowa Code § 685.2(1). The Complaint was later amended to allege wrongful retaliation against Relator. 31 U.S.C. § 3730(h); Iowa Code § 685.3(6).[5] At no point did cross-petitioner seek 12(b)(6) dismissal or 12(c) judgment on the pleadings of the operative FCA or Iowa FCA claims.

The matter proceeded to bench trial beginning January 10, 2022. Instead of arguing that cross-petitioner's fraud was publicly known or accessible, cross-petitioner ardently defended the merits, arguing there were no fraud schemes. The district court found cross-petitioners to have engaged in a protracted scheme to bill top-level medical codes to public payors. *E.g.*, Pet. App. 110a. To support cross-petitioner's scheme, he developed a template which incorporated medically unnecessary services and services which *could not be physically performed* in the examination rooms. *Id.* at 68a, 103a. The district court credited

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[4] The district court as factfinder in this bench trial found cross-petitioners submitted 1,050 false claims between 2011–2018. *E.g.*, Pet. App. 131a. The initial *qui tam* Complaint was filed under seal in 2018. *See* D. Ct. Doc. 1.

[5] The Complaint was amended several other times to plead violations of the Stark Law, 42 U.S.C. § 1395nn(a)(1), and to limit the scope of competing state law employment contract claims. These are not at issue here.

testimony from multiple employees that cross-petitioner also frequently ordered the destruction and alteration of medical records to justify intentional obstructive sleep apnea ("OSA") misdiagnoses. *Id.* at 125a. In fact, the contrived OSA diagnoses were intended to permit his self-referring all newly diagnosed patients to his durable medical equipment company next door. *Id.* Cross-petitioner pressured others to bill and accord themselves as he did. *Id.* at 149a.

In the district court's 88-page trial order, and after its ability to carefully consider all of the evidence in the case, the district court rejected cross-petitioners' public disclosure defense. The district court found that the request to apply this "fact-dependent" analysis, *Rahimi*, 3 F.4th at 830, came without factual support, specifically "[w]ithout [cross-petitioners] pointing to any specific testimony." Pet. App. 97a. The district court noted that the Education Letters onto which cross-petitioners latch were "remedial and merely offer[ed] Dr. Zorn and Iowa Sleep staff additional education." *Id.*[6] Finally, and although unnecessary because cross-petitioner failed to satisfy the first analytical tier of the defense, the district court noted that "Plaintiff points out in his resistance, at a minimum, Dr. Grant is an original source." *Id.* at 97a n.22.

2. Cross-petitioners appealed four holdings to the United States Court of Appeals for the Eighth

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[6] The district court previously "[a]ssum[ed] without deciding the Letters qualify as a" specified channel (element 2), "let alone one that is sufficiently 'public.'" (element 1). D. Ct. Doc. 90, at 9.

Circuit. Relator cross-appealed.[7] Relevant to this cross-petition, the panel unanimously affirmed the district court.

The panel found the Education Letters "revealed only the possibility of inaccurate billing." Pet. App. 12a. Using the same two-step analysis urged in the cross-petition, the panel *first* found the "letters failed to accuse expressly the defendants of committing fraud." *Id.* *Second*, and consistent with the analysis employed by every circuit, *see supra* note 2, the panel found "an uninitiated reader would not reasonably infer from the [Education Letters] that the defendants had committed fraud." *Id.* at 13a. Indeed, the letters specifically offered to educate the provider and promote appropriate claim submission procedures. *Id.*

As with the district court, the unanimous panel did not decide the remaining elements of the public disclosure defense. *First*, the panel "d[id] not address whether the AdvanceMed letters constitute a public 'Federal report, hearing, audit, or investigation'" (elements 1 and 2). *Id.* at 12a n.3. The private contractor (AdvanceMed) who authored the Education Letters at issue operated pursuant to CMS's authority to promote "[e]ducation of providers." 42 U.S.C. § 1395ddd(b)(4). Although the same statute affords authority to "[a]udit," *id.* § 1395ddd(b)(2), that did not happen here.

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[7] Both parties appealed the district court's application of the Excessive Fines Clause, the same question in No. 24-549.

Second, the panel held that because the district court properly "rejected the defendants' public disclosure defense, [the panel] need not decide whether [Relator] qualifies as an 'original source.'" Pet. App. 13a.

3. Cross-petitioners never timely sought rehearing. Cross-petitioners never previously argued Eighth Circuit precedent applied the wrong standard or was discordant with a majority of circuits. Simply, cross-petitioners never gave the lower court any opportunity to review the arguments raised here or change its circuit precedent (it need notj).

By contrast, Relator filed a timely petition for rehearing regarding the questions presented in No. 24-549. The Government intervened for the limited purpose of filing its own petition for rehearing on the constitutional question. Pet. App. 156a–157a. On October 9, 2024, rehearing was denied. Three circuit judges would have granted rehearing.

4. On November 13, 2024, Relator filed his cert petition in No. 24-549. This Court requested a response. After extension, on February 5, 2025, cross-petitioner filed the present conditional cross-petition, "[s]hould the Court grant…a petition from the relator." Pet. 4.

REASONS FOR DENYING THE WRIT

This Court has recently denied cert to a similar public disclosure defense question in which the petitioner concocted an unsupported circuit split. *See Valeant Pharms. Int'l, Inc. v. Silbersher*, No. 23-1093,

145 S. Ct. 140 (2024) (mem.). This cross-petition should be no different. There is no circuit split, the Eighth Circuit performed the same two-step inquiry cross-petitioners appear to request, the question presented is inextricably fact-centric, and is far from dispositive here. Because this fact-specific question "does not create a [cognizable] conflict and does not involve a question of national importance, it is inappropriate to grant certiorari." *Accord Idaho Dep't of Emp't v. Smith*, 434 U.S. 100, 104 (1977) (Stevens, J., dissenting in part).

I. Every circuit interprets "allegations or transactions" of fraudulent conduct the same.

There is no circuit split. *See supra* note 2. Every appellate circuit has cited to and adopted the D.C. Circuit's analysis. *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 512 (6th Cir. 2009) (adopting the *Springfield* framework, "[f]ollowing the lead of our sister circuits"). The *Springfield* test has been described as "foundational" to the public disclosure bar. *United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923, 933 (D.C. Cir. 2017).

In *Springfield*, the D.C. Circuit rejected "an unduly broad reading of the [then-]jurisdictional bar." *Springfield Terminal*, 14 F.3d at 647. The Court recognized that "the [FCA] bars suits based on publicly disclosed 'allegations or transactions,' not information." *Id.* at 653. Specifically, the Court held the purported disclosures must be "sufficient to constitute 'allegations or transactions' *of fraudulent conduct*." *Id.* (emphasis supplied). The Court

differentiated allegations and transactions through an algebraic X + Y = Z formula, where "Z represents the *allegation* of fraud and X and Y represent its essential elements." *Id.* at 654 (emphasis in original). The provision applies "*only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain." *Id.* (emphasis in original). *Springfield* found that standard not met even under the pre-2010 language. *Id.* at 657.

Even looking at the authorities cross-petitioner cherry-picks, every circuit has adopted an identical understanding as *Springfield*.

The First Circuit applies *Springfield*'s test. *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 54 (1st Cir. 2009) ("[P]ublic disclosure occurs when the essential elements exposing the particular transaction as fraudulent find their way into the public domain.").

The Second Circuit is in accord. *Kirk*, 601 F.3d at 103 ("[T]he public disclosure…must be of the material elements of the 'allegations or transactions' on which the claim is based.").

The Third Circuit expressly adopted *Springfield*'s algebraic X + Y = Z formula, accepting both that "[a]n allegation of fraud is an explicit accusation of wrongdoing" and "[a] transaction warranting an inference of fraud is one that is composed of a misrepresented state of facts plus the actual state of facts." *Zizic*, 728 F.3d at 235–36.

The Fourth Circuit cases on which cross-petitioner relies applied the same inferential "transaction" analysis. *E.g.*, *Jones*, 469 Fed. App'x at 258 (determining whether the allegations "adequately support the inference that false claims were actually presented to the federal government").

The Fifth Circuit also adopted *Springfield*. *Solomon*, 878 F.3d at 144. In rejecting the applicability of the defense, the Fifth Circuit recognized the question to be "intertwined with the merits." *Colquitt*, 858 F.3d at 373.

The Sixth Circuit had opportunity to apply *Springfield* in nearly identical circumstances as here. The Sixth Circuit held that a report about a medical provider's miscoding patient encounters was *not* a public disclosure: "[a]lthough a report need not use the word 'fraud' to qualify as a disclosure, it still must carry an inference of wrongdoing." *Holloway*, 960 F.3d at 844. The Court applied the same *Springfield* formula. *Id.*

The Seventh Circuit also—contrary to cross-petitioners' suggestion—adopts, relies upon, and applies *Springfield*. *Absher*, 764 F.3d at 708 ("But even if no allegation of fraud has been made, the bar[]…may still apply so long as facts disclosing the fraud itself are in the…public domain.").

The Eighth Circuit adopted *Springfield* almost immediately. *Rabushka*, 40 F.3d at 1512 ("We agree with *Springfield* that the essential elements exposing the transaction as fraudulent must be publicly

disclosed as well.").[8] Cross-petitioner's explicit ask on this petition is already a part of Eighth Circuit jurisprudence. And, the unanimous panel below explicitly cited *Rabushka* and faithfully applied it. *See* Pet. App. 12a.

The Ninth Circuit applies *Springfield*, too, holding that information which "may come closer to suggesting breach of contract than fraud" is not a public disclosure. *Mateski*, 816 F.3d at 573.

The Tenth Circuit adopted *Springfield* the year after it was decided. *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571–72 (10th Cir. 1995).

The Eleventh Circuit independently vacated a dismissal the same year *Springfield* was decided on the grounds that the alleged report "does not allege [the defendant]…actually engaged in wrongdoing." *Cooper v. Blue Cross & Blue Shield of Fla.*, 19 F.3d 562, 567 (11th Cir. 1994). Still, the Eleventh Circuit cites to and applies *Springfield*. *Bibby*, 987 F.3d at 1535–54.

The D.C. Circuit continues to use *Springfield*'s "familiar equation." *United States ex rel. Oliver v. Philip Morris USA Inc.*, 826 F.3d 466, 471 (D.C. Cir. 2016).

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[8] Cross-petitioner contends "the Eighth Circuit added a further requirement: that a disclosure contain an express allegation of fraud." Pet. 24. Contrary to that *uncited* suggestion, the Eighth Circuit relied on the statute's use of "transactions"—it did not write it out.

Simply, a litigant is not entitled to cert just because he is disappointed in the application of a uniform test. Supr. Ct. R. 10; *see also Valeant Pharms. Int'l*, 145 S. Ct. 140 (denying certiorari where a litigant proposed a different—but still unavailing—circuit "split" on the public disclosure bar).[9]

II. The public disclosure defense is fact-centric.

Cross-petitioners attempt to distill distinct frauds from different disciplines to an unworkable, unavailing overgeneralization. The application of the unanimous *Springfield* test to the facts in this record hardly lends itself to this Court's review. Different frauds are different. That is why lower courts are entrusted with, and well-equipped for, this factual question.

A. The specific fraud theory matters.

Courts around the country have recognized that different FCA claims rise and fall on their own merits. *See Kirk*, 601 F.3d at 114 (noting a "contractor bill[ing] for something it did not provide" is a quintessential FCA claim, whereas courts are to be more circumspect when "a contractor falsely represents that it is in compliance with a particular federal statute or regulation or an applicable contractual term"). The former scenario describes a presentment claim (as brought here). The latter scenario describes a false certification theory.

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[9] The appellate court's *Silbersher* decision also found the relator's "*qui tam* allegations provide[d] a critical fact necessary for scienter." *Silbersher*, 89 F.4th at 1168.

Cross-petitioners similarly cite authority suggesting that "'where liability does not depend on anything specific in the defendants' claims themselves as the basis for alleging that they were false…' no specific allegations of a particular claim are required." *See Jones*, 469 Fed. App'x at 253 n.12 (internal quotation omitted); *see also Reed*, 923 F.3d at 748 n.12 (recognizing the public disclosure defense applies when "only the essentials of the relator's allegations [are] identical to or of an identical type as those disclosed publicly"); *Advocates for Basic Legal Equality*, 816 F.3d at 432 (analyzing whether there were "public disclosures *of this type of fraud*" (i.e., false certification) (emphasis supplied)).

It makes sense then, that different FCA fraud theories would impact the findings as to the public disclosure defense. *Colquitt*, 858 F.3d at 373 (recognizing the "public disclosure question is intertwined with the merits"); *Mateski*, 816 F.3d at 567 ("Mateski's Complaint alleges fraud that is different in kind and degree from the previously disclosed information about Raytheon's problems in performing on the contract at issue."). Nearly all of cross-petitioners' cited authorities confront *false certification* claims—not presentment claims. Every circuit agrees, not just in the words they use but in their very holdings, that the distinction between FCA theories matters. That presentment claims often survive while their false certification counterparts are dismissed is no coincidence.[10] Those facts control.

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[10] *Colquitt*, 858 F.3d at 371 (holding public disclosure defense did not apply to the presentment claims but it could warrant dismissal of separate false certification claims); *Jones*,

B. The circuits confronting similar circumstances reject the public disclosure defense.

It is cross-petitioners' coveted *Springfield* test itself which recognizes "the task of determining whether 'allegations or transactions' have been 'public[ly] disclos[ed]' will never be cut-and-dried." *Springfield Terminal*, 14 F.3d at 656. The public disclosure question is inherently "fact dependent." *Rahimi*, 3 F.4th at 830. And, courts are advised to answer this question "on a claim-by-claim basis, asking whether the public disclosure bar applies to each reasonably discrete claim of fraud." *United States ex rel. Boothe v. Sun Healthcare Group, Inc.*, 496 F.3d 1169, 1176 (10th Cir. 2007).

This case involves interrelated fraud schemes perpetrated by a long-time sleep medicine practitioner in and around Des Moines, Iowa, a metropolitan area home to approximately 750,000 people. Specifically, Relator adduced evidence at trial, accepted by the district court as factfinder, that cross-petitioner "would up-code his patient visits…with the goal of increasing his overall financial compensation." Pet. App. 125a. Upcoding is the unlawful practice of a medical provider inflating a claim submission to public payors by misstating or overstating services performed and medical necessity to provoke higher state and federal payments. *See also Vargas v. Lincare, Inc.*, 134 F.4th 1150, 1154 (11th Cir. 2025) (reversing dismissal of upcoding claims).

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469 Fed. App'x at 248, 253 (same); *Kirk*, 437 Fed. App'x at 18 (same).

Though upcoding claims like Relator's here are no stranger to public disclosure challenges, the appellate courts routinely reject them. In this way, even if a circuit split existed as to the "allegations or transactions" portion of the public disclosure defense generally (there is not), there is certainly no split on *these* types of fraud. *Boothe*, 496 F.3d at 1176.

The Sixth Circuit confronted materially similar circumstances. The court held the public disclosure defense *inapplicable* to a report from the Health and Human Services Office of Inspector General ("OIG") in an upcoding case. *Holloway*, 960 F.3d at 844. Although it was briefed heavily below, cross-petitioner relegates *Holloway* to a footnote, wherein it is acknowledged as contravening cross-petitioners' thesis of a circuit split. Pet. 18 n.5.

Holloway is, of course, instructive here. The provider at issue did not provide "curative treatment" to the patients' presenting problems,[11] prioritized bolstering the practice's documentation and "not on truthful clinical evidence,"[12] which included authoring "distorted" clinical records.[13] *Holloway*, 960

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[11] Cross-petitioner contrived OSA diagnoses and provided no treatment to the patients' presenting condition. Pet. App. 124a.

[12] Cross-petitioner would "fluff[] up the [provider's] note" with unnecessary services and observations. Pet. App. 67a. Cross-petitioner also documented performing items which could not be physically performed in the examination rooms. *Id.* at 68a, 103a.

[13] Cross-petitioner additionally distorted and destroyed medical records to contrive OSA diagnoses. *Id.* at 125a.

F.3d at 840, 842. Similar to here, the defendant pointed to an OIG report as a purported public disclosure, which found a portion of the provider's claims to be inaccurate. *Id.* at 844. The Sixth Circuit found, however, that the OIG report identified only "a compliance problem" and constituted "no insinuation of fraud." *Id.* The OIG report's "recommended action is not an investigation, but instead better education, training, and monitoring." *Id. Holloway* is not alone. *See, e.g.*, *United States ex rel. Whipple v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 782 F.3d 260, 269–70 (6th Cir. 2015) (finding allegations of upcoding not "barred" by the then-jurisdictional public disclosure provision after AdvanceMed review).[14]

The Seventh Circuit confronted a similar case to *Holloway*, reaching the same conclusion. *United States ex rel. Baltazar v. Warden*, 635 F.3d 866, 867 (7th Cir. 2011) ("Yet although bills for services never performed likely reflect fraud, miscoded bills need not; the errors may have been caused by negligence rather than fraud…."); *United States ex rel. Bellevue v. Universal Health Servs. of Hartgrove Inc.*, No. 11 C 5314, 2015 WL 1915493, at *6 (N.D. Ill. Apr. 24, 2015) ("[Public disclosure of a regulatory violation, by itself, does not necessarily bar a claim under the FCA based on that violation.").[15]

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[14] Of course, cross-petitioner also relies on AdvanceMed Education Letters here.

[15] This is consistent with courts' skepticism of applying the public disclosure defense in cases involving "qualitative judgments." *Cause of Action v. Chi. Transit Auth.*, 815 F.3d 267, 279 n.16 (7th Cir. 2016); *United States ex rel. Graziosi v. R1*

The Eighth Circuit has also long held that medical reports do not automatically bar an otherwise valid FCA claim, applying the same *Springfield* test adopted in *Rabushka*. *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1044 (8th Cir. 2002) ("The audit did not reveal what the Association now contends was the true state of the facts."). In fact, in *Allina Health*, there was no dispute Medicare conducted a *bona fide* audit, but because the FCA allegations brought were distinct from the audit results, no public disclosure had occurred. *Id.* Such disclosures simply "do not give rise to an inference of fraud." *Rabushka*, 40 F.3d at 1513; *see also Rahimi*, 3 F.4th at 826 (recognizing the post-2010 public disclosure defense's requirement of "more similarity between the public disclosures and the *qui tam* allegations"); *Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 452 (5th Cir. 1995) (suggesting that setting forth "qualitatively different information" would be relevant to disproving public disclosure and proving "original source" status).

Even more broadly, courts around the country routinely reject application of the public disclosure

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RCM, Inc., No. 13-CV-1194, 2019 WL 861368, at *7 (N.D. Ill. Feb. 22, 2019) (holding the analysis to be different in cases involving "qualitative judgments" such as "[t]he assessment of medical necessity"); *see also* Pet. App. 73a n.14 (recognizing the subjectivity inherent in sleep physician coding). In these circumstances, careful attention is due the disclosed information and the FCA fraud theory brought. *E.g.*, *United States ex rel. Branch Consultants, LLC v. Allstate Ins. Co.*, 668 F. Supp. 2d 780, 800 (E.D. La. 2009) ("These facts, because there is no allegation that they were previously known, comprise 'qualitatively different information than what had already been discovered.'" (internal quotation omitted)).

defense when there is no "suggestion of wrongdoing by anyone." *United States ex rel. Ven-A-Care v. Actavis Mid Atl. LLC*, 659 F. Supp. 2d 262, 267 (D. Mass. 2009); *see also United States ex rel. Davis v. Dist. of Columbia*, 679 F.3d 832, 835 (D.C. Cir. 2012) ("Davis does not allege, however, that any claimed services were not provided or that any costs were exaggerated."); *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1057–58 (9th Cir. 2011) ("[U]nsavory conduct is not, without more, actionable under the FCA."); *Poteet*, 552 F.3d at 513 n.6 ("We do not find these sources sufficient to qualify as public disclosures *of fraud*." (emphasis in original)); *Cooper*, 19 F.3d at 567 ("But the report does not allege that BCBSF in its capacity as a primary insurer actually engaged in wrongdoing."); *United States ex rel. Davis v. Prince*, 753 F. Supp. 2d 569, 586 (E.D. Va. 2011) ("[T]he audit report clearly expresses dissatisfaction with the fact that Blackwater does not require its employees to fill out time sheets in which they certify the number of hours worked each day, but there is no allegation of fraud or wrongdoing by anyone."); *United States ex rel. Dekort v. Integrated Coast Guard Sys.*, 705 F. Supp. 2d 519, 556 (N.D. Tex. 2010) (holding that even though public information "discloses in a general sense the subject matter of defective hulls and misaligned shafts, as well as overall design failure, it cannot be said to disclose the 'allegations' and 'transactions' upon which Relator's claims are based"); *United States ex rel. Integra Med Analytics, LLC v. Creative Sols. in Healthcare, Inc.*, No. SA-17-CV-1249-XR, 2019 WL 5970283, at *11 (W.D. Tex. Nov. 13, 2019) (holding "the CMS data itself carries with it no allegation or inference of fraud").

Comparatively, where did AdvanceMed assert or disclose that cross-petitioner here was falsifying medical records? Destroying others? Contriving OSA diagnoses for the purpose of self-referral and inuring follow-up visits back to him? That he consolidated the appointment time slots so patient visits never exceeded the timeframe necessary to bill 4- or 5- level codes? That the items included in his manufactured template were medically unnecessary, incapable of being performed in the exam rooms, and otherwise overstated? AdvanceMed noticed only that cross-petitioner billed a lot of 5s based on shoddy documentation. This FCA case was about much more, including contriving that very documentation.

Consistent with all of the foregoing authorities, the panel below unanimously held the AdvanceMed letters "offer[ed]…remedial education, and an uninitiated reader would not reasonably infer from the letters that the defendants had committed fraud" in this upcoding case. Pet. App. 13a. Cross-petitioner simply disagrees with this factfinding here. In similar presentment FCA cases, the various courts reach similar holdings for good reason. The Education Letters do not publicly disclose the fraudulent conduct—*all* material elements of any fraud are simply not present.

III. The panel did not clearly err in applying the uniform *Springfield* test.

Once again, cross-petitioners ignore the *analysis* employed by the circuits, and instead look to

the *results achieved*.[16] In applying that generally accepted legal framework here, however, the unanimous panel did not clearly err in affirming the district court. *See Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 613 (2021) (applying clear error standard of review to district court's factual findings following a bench trial).

Springfield interpreted the public disclosure defense (then-bar) to apply to "allegations" and "transactions." 31 U.S.C. § 3730(e)(4)(A). *First*, the court determined that "allegation" means "a conclusory statement implying the existence of provable supporting facts." *Springfield Terminal*, 14 F.3d at 653–54. *Second*, the court determined that "transactions" amounts to "the essential elements" of a fraudulent act. *Id.* at 654. "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.*

The panel unanimously and faithfully applied that direction below.[17] The panel *first* confronted

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[16] Just as with cross-petitioners' BIO in No. 24-549, cross-petitioners put too much emphasis on the outcomes. What is relevant to the cert question, however, is the conformity of the legal analysis. Here, that is the uniformly employed *Springfield* test. In No. 24-549, that is the disparate infection of Excessive Fines Clause jurisprudence with substantive due process.

[17] Ironically, the panel below erroneously applied *de novo* review, a vestige from when the provision was jurisdictional. Pet. App. 11a. Even under the less exacting *de novo* standard (as opposed to the proper clear error standard applicable to the affirmative defense), the panel unanimously affirmed.

Springfield's "allegation" inquiry, noting "the AdvanceMed letters failed to accuse expressly the defendants of committing fraud." Pet. App. 12a. Though cross-petitioner unconvincingly suggests otherwise, the panel's analysis did not end there. *Second*, the panel unanimously determined, under the same step two analysis as adopted in *Springfield*, that "an uninitiated reader would not reasonably infer from the letters that the defendants had committed fraud." *Id.* at 13a. In short, the Eighth Circuit conducted precisely the *Springfield* two-step cross-petitioners now advance. *See also Rabushka*, 40 F.3d at 1514 ("We do not require the public disclosure of a patently fraudulent transaction to bar a suit under the Act.").[18]

On these facts which the lower courts were charged with applying to this uniformly interpreted law, cross-petitioner's own retained expert witness testified that "[he] did not see" any typical fraud scheme or insinuation of the same against cross-petitioner. Trial Tr. (Vol. III), at 618:10–25 (recounting fraud schemes including payment for services not rendered, upcoding, falsifying documentation, and fabrication of medical records). Instead, cross-petitioner's retained expert testified that in considering whether factors support the

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[18] Of course, the irony is not lost that cross-petitioners fervently defended their conduct at trial, and now purport to argue that Dr. Zorn's fraud was so plain it was in the public domain. Even if a defendant can straddle the proverbial fence and defend the merits with a position contrary to an affirmative defense (he should not), it certainly produces no cert-worthy question to *this* Court as to whether that affirmative defense has been adequately demonstrated.

insinuation of a fraud scheme, an evaluator would want to consider whether the provider used improper treatment modalities (e.g., CPAP), whether the provider received prior education about coding, whether medical necessity existed for the services and examinations documented, the duration and pattern of the conduct, overuse of other codes, whether the provider destroyed or falsified medical records (including the very documentation on which the evaluator was to rely), among others.[19] *Id.* at 662:21 – 671:5. He also testified that he did not believe fraud existed on this record. *Id.* at 668:20–23.

The district court, as factfinder, disagreed with cross-petitioner's expert on the merits when *all* of the information was presented to it. But as to this public disclosure defense question here, cross-petitioner's position is inconsistent with the law, his defense below, his own retained expert's opinion, and the other evidence in this record. The district court's careful factfinding was properly evaluated alongside *Springfield*. This Court should not entertain such a fact-heavy question for which the panel below unanimously employed the same legal test as every circuit, and, in doing so, reached an outcome consistent with all other courts confronting like cases.

IV. The "allegations or transactions" question is not dispositive of the defense.

Finally, the other undergirding principle advanced by the cross-petition (that the public

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[19] Of course, none of this was "disclosed" in the AdvanceMed letters.

disclosure defense would obviate the constitutional question presented in No. 24-549) is simply wrong, too. Whether the lower courts could have found for cross-petitioner on the "allegations or transactions" element is not dispositive of the defense as a whole. *Accord United States ex rel. Solis v. Millenium Pharms., Inc.*, 885 F.3d 623, 628 (9th Cir. 2018) (remanding for "original source" analysis, recognizing the "allegations or transactions" element not to be dispositive of the case). There are at least four other elements which are undecided in this record, but on which Relator would prevail.[20] In short, the constitutional question is not obviated, the fact-bound inquiry is futile for this Court to undertake, and Relator would still be found to prevail nonetheless.

A. There was no disclosure in the public domain.

The first previously-identified element to the public disclosure defense is that the disclosure needs to have entered the public domain. *See* 31 U.S.C. § 3730(e)(4)(A). Of course, neither the Eighth Circuit panel nor the district court needed to address the issue of the requisite level of publicity. *See* Pet. App. 13a n.3. If this Court were to entertain the cross-petition (it should not), and reverse (the law should not be so contorted), cross-petitioner would still have the obligation to prove the AdvanceMed letters were sufficiently public. He cannot.

"The general rule is that a disclosure is 'public' if it is generally available to the public." *United States*

[20] Even prevailing on one would defeat the defense.

ex rel. Poteet v. Bahler Med., Inc., 619 F.3d 104, 110 (1st Cir. 2010). Indeed, "the critical elements exposing the transaction as fraudulent [must be] placed *in the public domain*." *Kirk*, 601 F.3d at 103 (collecting caselaw, emphasis supplied); *see also United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003) ("Although 'public' has several definitions, the most germane to this topic is 'accessible to or shared by all members of the community."); *Springfield Terminal*, 14 F.3d at 654.[21] This distinction derives from the intent of the law itself—quashing *only* 'parasitic' suits. Some courts have even found the converse, that the defense applies where a disclosure is made *not* merely to "an employee of Defendants nor an employee of the government," but to the public at large. *United States ex rel. Integra Med Analytics LLC v. Providence Health & Servs.*, No. CV 17-1694 PSG (SSX), 2019 WL 3282619, at *8 (C.D. Cal. July 16, 2019).

The AdvanceMed letter—what cross-petitioner's own retained expert called an Education Letter, and *not* an insinuation of wrongdoing—was a private letter sent only to the defendants. It was not accessible to the public at large.

Finally, the "public domain" standard is particularly problematic for cross-petitioner here. The purported disclosures deal exclusively with patients'

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[21] There is modest split among the circuits as to the *separate question* of how "public" is to be interpreted for purposes of the defense. *E.g.*, *Cause of Action*, 815 F.3d at 276 n.11 (surveying split). That this element was not material to the district court's decision should not be perceived as *carte blanche* authority for this Court to pretermit the lower courts' analyses.

medical information, which is statutorily privileged. *E.g.*, *United States ex rel. Fine v. Advanced Sci., Inc.*, 99 F.3d 1000, 1006 n.3 (10th Cir. 1996) ("We need not address public disclosure in a privileged setting….").

In short, there exists an elementary interpretative challenge that this Court's review is here deprived of, and which is an essential element of the defense. Accordingly, cross-petitioner would not be entitled to the relief he seeks here, and the constitutional question would *not* be obviated by considering the public disclosure defense contemporaneously with (or even before) the constitutional question in No. 24-549. That secondary auspice for the cross-petition (an alleged escape from having to confront the Eighth Circuit's significant constitutional errors) is unavailing.

B. Education Letters are not specified channels for disclosures.

Next, the public disclosure defense applies only to a narrow set of channels. 31 U.S.C. § 3730(e)(4)(A) (applying only to public disclosures contained in "a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party," "a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation," and "the news media"). "By its plain terms, the public disclosure bar applies to some methods of public disclosure and not to others." *Schindler Elevator Corp.*, 563 U.S. at 414; *Reed*, 923 F.3d at 742 n.4 (discussing both "public" and the channels elements).

As above, AdvanceMed operated under CMS's authority to "educate"—*not* "audit." 42 U.S.C. § 1395ddd(b)(4). The panel expressly reserved the unnecessary question of "whether the AdvanceMed letters constitute a public [disclosure through proper channels]." Pet. App. 12a n.3; *accord* Trial Tr. (Vol. III), at 597:23 (cross-petitioner's retained expert witness testifying "This is essentially what's called an education letter.").[22] Cross-petitioner has cited no authority that this essential component of the public disclosure defense has been (or could be) satisfied, particularly on this record. That prevents the cross-petition's sought relief.

C. Relator is an "original source" of the FCA claims.

Even if there was a public disclosure (there was not), the case is not subject to dismissal if the relator is an "original source." 31 U.S.C. § 3730(e)(4)(A). The 2010 amendments expanded the definition of the term, promoting relators coming forward in defense of the public fisc. *Moore & Co.*, 812 F.3d at 297.

Under the "original source" exception to the public disclosure defense, where a relator "supplie[s] the missing link between the public information and the alleged fraud," the case is not subject to dismissal. *Shea*, 863 F.3d at 935; *see also Springfield Terminal*,

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[22] Cross-petitioner Dr. Zorn himself testified at trial that the AdvanceMed letter was not properly issued under the federal regulations. Trial Tr. (Vol. I), at 74:1–14 ("They don't have any authorization for Medicare patients' reviews. They can't issue demand letters on Medicare patients."). He now asks to rely on them.

14 F.3d at 657 (recognizing a relator who "bridge[s] the gap" is permitted to maintain his action).

Here, Relator Dr. Grant is a "paradigmatic whistleblowing insider[]" whose claims cannot be dismissed. *United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 475 (5th Cir. 2015), *aff'd sub nom.*, 580 U.S. 26 (2016) (cleaned up). Relator was an employee of cross-petitioner's business. He saw firsthand the degree to which cross-petitioner upcoded his medical procedures, pressured the other providers to do the same, overstated the duration of the patient encounters, affied to performing services and examinations which could not be physically performed in the examination rooms, employed one treatment modality (cross-petitioner's referral-based sister CPAP company) at the exclusion of all others, upscored polysomnography records to contrive OSA diagnoses, declined to treat the patient's presenting problem, and privately rebuked all education. Relator was essential to demonstrating this was not simply a case of poor documentation or lack of education. This was pervasive fraud.

Cross-petitioner can put forth no evidence or finding to the contrary. *See* Pet. App. 13a ("[W]e need not decide whether Grant qualifies as an 'original source.'"); *id.* at 97a–98a n.22 ("Plaintiff points out in his resistance, at a minimum, Dr. Grant is an original source 'who has knowledge that is independent of and materially adds to the prior public disclosure.'"). Even if there was a *public* disclosure made through qualifying channels of the "allegations or transactions" of fraudulent conduct (there was not), cross-petitioner would still not be entitled to relief.

D. The Government opposed dismissal.

The 2010 amendments imposed another challenge on applying the public disclosure defense—allowing the Government's opposition to dismissal to foreclose the defense. 31 U.S.C. § 3730(e)(4)(A) ("unless opposed by the Government"); Pub. L. 111-148, 124 Stat. 119 § 10104(j)(2); *see also Moore & Co.*, 812 F.3d at 300 ("Finally, if a court holds that a relator's claim is publically disclosed, the amended bar nonetheless permits the government to oppose the court's dismissal of the action."); *United States ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 811 (11th Cir. 2015) ("The amended section also provides that the government can oppose dismissal, allowing the case to proceed even if the public disclosure provision would otherwise apply."); *United States v. Alcan Electrical & Eng'g, Inc.*, 197 F.3d 1014, 1017 n.4 (9th Cir. 1999) (affording the Government a chance to oppose dismissal).

The Government (both federal and Iowa) held a standing objection to the dismissal of this action—whether by Relator *or cross-petitioners*. D. Ct. Doc. 15, at 1 ("Therefore, the United States and Plaintiff State request that, should either the Relator or the Defendant propose that this action be dismissed, settled, or otherwise discontinued, this Court solicit the written consent of the United States and Plaintiff State before ruling or granting its approval."). Nowhere does cross-petitioner suggest that the United States has reversed course and acquiesced in this dismissal. It would have had to.

CONCLUSION

For the foregoing reasons, the conditional cross-petition does not present a cert-worthy question and should be denied. This Court should instead grant the petition in No. 24-549.

Respectfully submitted,

Adam D. Zenor (Bar # 322700)
Counsel of Record
Derek R. LaBrie (Bar # 322662)
Zenor Law Firm, P.L.C.
111 East Grand Ave., Suite 400
Des Moines, Iowa 50309
Phone: (515) 650-9005
Fax: (515) 206-2654
adam@zenorlaw.com
derek@zenorlaw.com

Counsel for Petitioner