No. 24-845

IN THE
Supreme Court of the United States

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BRIAN O. MARTY
ANDREW B. HOWIE
SHINDLER, ANDERSON, GOPLERUD & WEESE, P.C.
5015 Grand Ride Drive, Suite 100
West Des Moines, IA 50265

JESSICA L. ELLSWORTH
Counsel of Record
DANIELLE DESAULNIERS STEMPEL
MICHAEL J. WEST
J. ANDREW MACKENZIE
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 637-5600
jessica.ellsworth@hoganlovells.com

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTRODUCTION

The courts of appeals are deeply divided over whether the FCA's public disclosure bar requires an express accusation of fraud. Ten circuits hold that it does not: The First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits forbid parasitic qui tam suits where the disclosure details facts from which fraud can be inferred *or* expressly accuses the defendant of fraud. But in the Seventh and Eighth Circuits, only the latter will suffice.

Unable to reconcile this deep division, Respondent Grant tries to change the subject. He contends that every circuit "agree[s] on the legal analysis," and that these "different outcomes" merely reflect different facts. BIO 2-3. But merely reciting a rule is not enough. The Seventh and Eighth Circuits have made clear that they diverge from the FCA's mandate to apply the bar when "substantially the same allegations *or transactions*" were publicly disclosed. 31 U.S.C. § 3730(e)(4)(A) (emphasis added). Grant's attempts to distinguish other cases on their facts similarly backfire; his citations either confirm the split's existence or are irrelevant.

On the merits, Grant does not and cannot defend writing the words "or transactions" out of the statute. He instead claims the Eighth Circuit was faithful to the text, but that cannot be squared with the court's express focus on "allegations."

Grant does not contest the pressing nature of the question presented, which goes to the heart of a statutory bar intended to limit runaway FCA liability. Grant instead focuses his efforts on litigating issues no court has passed upon—and which thus have no bearing on this Court's consideration of whether to grant certiorari.

Grasping at straws, Grant resorts to mischaracterizing Zorn's petition as a "conditional cross-petition." *E.g.*, BIO 1, 2, 11. Zorn's Petition was clear: The important question presented here independently merits this Court's review. Grant's separate petition does not. But *if* the Court grants review of Grant's petition, *then* "it should grant this Petition as well," because a ruling for Zorn on the public disclosure bar

issue would "obviate any need" to address the issues in Grant's petition. Pet. 4-5.

ARGUMENT

I. THERE IS A TWELVE-CIRCUIT SPLIT.

The courts of appeals are deeply divided over whether the FCA's public disclosure bar requires an express allegation of fraud. Ten circuits hold that it does not; two circuits hold that it does. The Court should grant review to resolve that split. None of Grant's counterarguments show otherwise.

1. Grant notes that every "circuit has cited" the D.C. Circuit's landmark decision in *United States ex rel. Springfield Terminal Railway Co.* v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994). BIO 12-15 (collecting cases). True enough. As the Petition explained, the First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits cite and apply *Springfield* in holding the public disclosure bar applies even absent an express allegation of fraud. Pet. 12-23. And as the Petition acknowledged, the Seventh and Eighth Circuits have also recited that teaching. Pet. 23-24.

But invoking a "standard in name only" is insufficient. *Maryland* v. *Kulbicki*, 577 U.S. 1, 2 (2015) (per curiam) (reversing where court recited proper standard but failed to adhere to it); *see, e.g.*, *eBay* v. *MercExchange, L.L.C.*, 547 U.S. 388, 393-394 (2006) (same, where court "recited the" proper test but did not "correctly appl[y]" it). "[I]ncantations of the correct standard are empty gestures" when they are "contradicted by the [c]ourt's conclusion." *Easley* v. *Cromartie*, 532 U.S. 234, 259 (2001) (Thomas, J., dissenting).

That describes the Seventh and Eighth Circuits' approaches. Although those circuits purport to endorse the majority rule, in practice, they narrow the phrase "allegations or transactions" into obscurity by requiring an express allegation of fraud to trigger the public disclosure bar. Pet. 23-25. That is a split in every way that counts.

2. Grant tries to discount this 10-2 split by suggesting that the public disclosure bar erects a higher barrier for false-certification claims under 31 U.S.C. § 3729(a)(1)(B) than for presentment claims under § 3729(a)(1)(A). BIO 16-17 & n.10 (collecting cases). That is meritless. Those cases simply reflect the commonsense conclusion that courts must separately analyze whether the public disclosure bar applies to each claim, while confirming that the Eighth Circuit is on the wrong side of the split in demanding an express allegation of fraud.

For example, in *United States ex rel. Colquitt* v. *Abbott Laboratories*, the Fifth Circuit held the relator's fraudulent-inducement and presentment claims *both* fell under the public disclosure bar, but the presentment claim partially survived under the original-source exception. 858 F.3d 365, 372-377 (5th Cir. 2017). Although public information did not expressly accuse the defendant of fraud, it supplied "all that one would have needed to discover the purported fraud." *Id.* at 373-374; *see id.* at 371-372 (dismissing false-certification claim for failure to satisfy "Rule 9(b)'s heightened pleading standard"); *see also, e.g.*, *United States ex rel. Jones* v. *Collegiate Funding Servs., Inc.*, 469 F. App'x 244, 253-254 (4th Cir. 2012) (certain claims fell under the public disclosure bar, although some were within the original-source exception but

nevertheless failed to state a claim); *United States ex rel. Kirk* v. *Schindler Elevator Corp.*, 437 F. App'x 13, 17-18 (2d Cir. 2011) (summary order) (false-certification claims that "indisputably derive[d] from" public reports were barred, even though the reports do "not definitively state" that fraud occurred, but false-report claims based on relator's "personal knowledge" survived).

3. Grant quibbles with the outcomes of specific cases. But the reality is this: Had Grant filed his suit in virtually any other jurisdiction, the court would have held that the letters and Grant's suit concerned "substantially the same allegations or transactions." 31 U.S.C. § 3730(e)(4)(A).

Grant's contrary argument centers on *United States ex rel. Holloway* v. *Heartland Hospice, Inc.*, 960 F.3d 836 (6th Cir. 2020). BIO 19-20. Even if *Holloway* said what Grant suggests, that would at most make the 10-2 split a 9-3 split. But in fact, the report in *Holloway* simply "call[ed] out what it perceive[d] to be a compliance problem stemming from the technical nature of the claims process" based on "four percent of claims," and recommended "better education, training, and monitoring." *Id.* at 844. Moreover, that report did not provide any defendant-specific information; it reflected "the current state of affairs" "industry-wide." *Id.* at 845 (quotation marks omitted). That is sharply different from the audit letters here, which expressly accused Zorn of "improperly billing" for "high level evaluation and management services." Pet. App. 172a.

Grant contends (at 20) that the Seventh Circuit "reach[ed] the same conclusion" as *Holloway* in *United States ex rel. Baltazar* v. *Warden*, 635 F.3d 866 (7th

Cir. 2011). That proves the point. *Baltazar* also held that reports documenting industry-wide issues, "without attributing fraud to particular firms," do not trigger the public disclosure bar. *Id.* at 868. Because the relator's suit was instead " 'based on' her own knowledge," the court found it "unnecessary to decide whether those reports disclosed the 'allegations or transactions' underlying the suit." *Id.* at 869.

Grant's remaining Sixth and Seventh Circuit cases are similarly inapposite. *United States ex rel. Whipple* v. *Chattanooga-Hamilton County Hospital Authority*, explained that, although the disclosures identified "facts from which fraud could be inferred," they were not "public." 782 F.3d 260, 266-270 (6th Cir. 2015). In *United States ex rel. Poteet* v. *Medtronic, Inc.*, the Sixth Circuit held the complaint was "based upon" a public disclosure that "presented enough facts to create an inference of wrongdoing." 552 F.3d 503, 513-515 (6th Cir. 2009) (quotation marks omitted), *abrogated on other grounds by United States ex rel. Rahimi* v. *Rite Aid Corp.*, 3 F.4th 813 (6th Cir. 2021).[1] Grant also quotes *United States ex rel. Bellevue* v. *Universal Health Services of Hartgrove Inc.*, No. 11 C 5314, 2015 WL 1915493, at *6 (N.D. Ill. Apr. 24, 2015), but the language in question merely summarized the Seventh

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[1] In 2010, Congress replaced "based upon" with "substantially the same." *See Rahimi*, 3 F.4th at 826. Although the Sixth Circuit holds that the amended language "requires more similarity between the public disclosures and" the complaint, *id.*, other circuits rely on pre-amendment case law, *see United States ex rel. O'Connor* v. *USCC Wireless Inv., Inc.*, 128 F.4th 276, 285 n.5 (D.C. Cir. 2025) (noting split). The Court need not resolve that issue here as the Petition concerns the meaning of "allegations or transactions." *See* Pet. i.

Circuit's decision in *United States ex rel. Absher* v. *Momence Meadows Nursing Center, Inc.*, 764 F.3d 699 (7th Cir. 2014), which diverged from the majority approach in requiring an express allegation about the defendant's mental state. Pet. 23-24.

Neither of Grant's Eighth Circuit cases move the needle. *See* BIO 21. Although *United States ex rel. Rabushka* v. *Crane Co.* purported to adopt *Springfield*, it held the public disclosure bar inapplicable absent allegations of "intentional wrongdoing"—reinforcing the Eighth Circuit's minority position on this issue. 40 F.3d 1509, 1512-14 (8th Cir. 1994); *see* Pet. 24-25. And *Minnesota Association of Nurse Anesthetists* v. *Allina Health System Corp.* held the relator's suit was "based upon" a previously filed lawsuit that expressly alleged fraud. 276 F.3d 1032, 1040, 1043-51 (8th Cir. 2002). The court also concluded that an administrative audit did not trigger the public disclosure bar where some of the allegedly fraudulent practices "arose as a response" to the audit, while others rested on factual assertions directly contrary to the audit's findings. *Id.* at 1043-44. Nothing about that suggests the Eighth Circuit actually follows *Springfield*.

None of Grant's slew of other cases (at 18-22) undermine the split. In fact, several confirm it. *See* Pet. 22-24 (discussing *United States ex rel. Davis* v. *D.C.*, 679 F.3d 832 (D.C. Cir. 2012), and *Cause of Action* v. *Chicago Transit Auth.*, 815 F.3d 267 (7th Cir. 2016)). His remaining circuit decisions concern aspects of the

public disclosure bar not at issue here[2] or did not involve the public disclosure bar at all.[3]

II. THE DECISION BELOW IS WRONG.

The FCA's public disclosure bar sets forth two distinct situations in which it is triggered: when "substantially the same [1] allegations or [2] transactions as alleged in the action or claim were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A). That disjunctive framing makes clear that express allegations of fraud are sufficient, but not necessary, if the public disclosure instead identifies the material elements of the fraudulent transaction. Pet. 26-29.

The Eighth Circuit legally erred in writing "or transactions" out of the statute. The court was clear on that score: It declined to apply the public disclosure bar solely because the audit letters and "Grant's complaint did not *allege* 'substantially the same *allegations*.' " Pet. App. 12a (emphases added).

Grant does not contend that such a reading comports with the FCA's text—nor could he. He instead insists the Eighth Circuit properly considered whether the letters adequately identified fraudulent

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[2] *United States ex rel. Boothe* v. *Sun Healthcare Grp., Inc.*, 496 F.3d 1169, 1174-77 (10th Cir. 2007) (prior *qui tam* complaints alleged "materially identical" schemes); *Fed. Recovery Servs., Inc.* v. *United States*, 72 F.3d 447, 450-452 (5th Cir. 1995) (relator conceded complaint was "based on" prior public disclosures); *Cooper* v. *Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566-568 (11th Cir. 1994) (reports identified industry-wide problems, were non-public, or original-source exception applied).

[3] *Vargas* v. *Lincare, Inc.,* 134 F.4th 1150 (11th Cir. 2025); *United States ex rel. Cafasso.* v. *Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047 (9th Cir. 2011).

"transactions" based on the court's statement that "an uninitiated reader would not reasonably infer from the letters that the defendants had committed fraud." BIO 24-25 (quoting Pet. App. 13a). That misses the point. A 2016 government audit resulted in a letter accusing Zorn of improperly billing Medicare for his services. Pet. App. 159a-160a. Then, two years later, a second audit resulted in another letter, which underscored that Zorn had been warned two years earlier, detailed continued billing problems, and identified "overpayments" made to Zorn. Pet. App. 172a-175a. The *transactions* called out in those letters thus supported an inference of false claims.

The Eighth Circuit held otherwise only by ratcheting up the "transactions" standard so high that it functionally required the letters to allege fraud outright. The court's use of the wrong scienter standard and focus on the "uninitiated reader" crystallize this error. Perhaps an "uninitiated reader" would need an express allegation to conclude that Zorn "intentionally" committed fraud. Pet. App. 12a (citation omitted). But the proper question is whether "the material elements of the fraudulent transaction are already in the public domain," and support an inference that the defendant acted "in reckless disregard" of whether the information they submitted was true or false, even if that conclusion is "not readily comprehensible to non-experts." *Springfield*, 14 F.3d at 655; 31 U.S.C. § 3729(b)(1)(A)(iii).

Grant's last retort (at 25-26)—that Zorn's expert disclaimed any fraud—is a sideshow. "[L]egal conclusions pertaining to the 'allegations or transactions' language" are the purview of "independent [judicial] review." *Springfield*, 14 F.3d at 655. The question is

thus whether the audit letters publicly disclosed the transactions underlying the theory of fraud on which Grant ultimately prevailed. For the reasons explained, the answer is yes.

III. THIS IS AN EXCELLENT VEHICLE TO RESOLVE THE IMPORTANT QUESTION PRESENTED.

1. Grant does not contest the vital role the public disclosure bar plays in checking the ever-increasing number of FCA lawsuits filed against large companies, small-town doctors, and everyone in between. Pet. 29-32.

Grant instead downplays this case as "fact-heavy" and "fact-bound." BIO 26-27. But the question presented is not whether the Eighth Circuit properly applied the facts to the law. It is what the law requires. After this Court resolves that question—a holding that will apply to every FCA case involving the public disclosure bar—this Court can remand to the Eighth Circuit to apply the correct legal standard.

More generally, FCA cases are by their nature rooted in specific facts. But that has not stopped this Court from regularly granting review to resolve threshold legal questions arising under that statute. *See, e.g.*, *Wisconsin Bell, Inc.* v. *United States ex rel. Heath*, 145 S. Ct. 498 (2025); *United States ex rel. Polansky* v. *Executive Health Res., Inc.*, 599 U.S. 419 (2023); *United States ex rel. Schutte* v. *SuperValu Inc.*, 598 U.S. 739 (2023); *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176 (2016).

2. This is an ideal vehicle to address this important issue. Pet. 32. Grant's arguments to the contrary are unpersuasive.

Grant invokes this Court's denial of certiorari in *Valeant Pharmaceuticals International, Inc.* v. *Silbersher*, No. 23-1093, 145 S. Ct. 140 (2024) (mem.), as a reason to deny the Petition. BIO 11-12, 16. That is baffling. *Valeant* concerned the "stitching together" of different public disclosures and whether inter partes review "constitutes a channel for public disclosure." Pet. for Writ of Certiorari at i, *Valeant* (Apr. 4, 2024). This Court's decision to pass on those distinct questions is irrelevant here.

Grant suggests that Petitioner did not preserve the question presented because he did not "seek 12(b)(6) dismissal or 12(c) judgment on the pleadings" in the district court or rehearing in the Eighth Circuit. BIO 8, 12. None of that was necessary. The public disclosure bar is not one of Rule 12(b)(6)'s waivable defenses. *See* Fed. R. Civ. P. 12(b)(6)(1)-(7). A Rule 12(c) motion is optional. *See* Fed. R. Civ. P. 12(c). And petitioners need not seek rehearing before seeking cert. *See* S. Ct. Rule 13.3. Zorn preserved the question presented at every point. Pet. App. 7a-8a, 10a (explaining Zorn raised the bar at summary judgment, after trial, and on appeal).

Grant finally stresses (at 27-32) that this case includes several unresolved issues upon which he will prevail on remand, thus rendering this Court's review "futile" and tempering the constitutional-avoidance concern raised in the Petition. All of that is wrong.

The Eighth Circuit refused to apply the public disclosure bar solely because Grant did not "allege 'substantially the same allegations' " as the audit letters. Pet. App. 12a. The court expressly declined to reach the other issues Grant identifies, as even Grant admits. *Id.* at 12a-13a & n.3; *see* BIO 27, 30. This case

thus offers a streamlined vehicle to address the question presented. Moreover, the specter of unresolved issues is no barrier to certiorari. This Court regularly addresses only one aspect of a case before remanding to the lower courts to address any remaining issues. *See, e.g.*, *Waetzig* v. *Halliburton Energy Servs., Inc.*, 145 S. Ct. 690, 695, 700-701 (2025); *National Rifle Ass'n of Am.* v. *Vullo*, 602 U.S. 175, 199 n.7 (2024). The fact that a remand may result in the petitioner not obtaining full relief, *e.g. United States ex rel. Escobar* v. *Universal Health Servs., Inc.*, 842 F.3d 103, 106 (1st Cir. 2016), does not render this Court's review "futile." It is the system at work.

In any event, Zorn will prevail on the remaining § 3730(e)(4) issues on remand:

The allegations or transactions were "publicly disclosed" through an appropriate channel because they are contained in "audits" that at least one person outside the Government—Grant—obtained. *See Hays* v. *Hoffman*, 325 F.3d 982, 987-988 (8th Cir. 2003).

Grant is not an "original source" because he lacks "independent" knowledge that "materially adds" anything not already covered by the letters. 31 U.S.C. § 3730(e)(4)(B). Grant himself alleged that he was "prompted" into action by the letters. Third Am. Compl. ¶ 39, D. Ct. Dkt. No. 59.

And the Government has not "opposed" dismissal under the public disclosure bar, as authorized by the statute. BIO 32; *see* 31 U.S.C. § 3730(e)(4)(A). The document Grant cites, D. Ct. Dkt. No. 15, is a standard notice of non-intervention. At no point in that document, or any other filing, has the Government opposed dismissal under the public disclosure bar.

Bottom line: Grant's speculations about the ultimate result in this case are exactly that. This Court should ignore them and grant the Petition.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

BRIAN O. MARTY
ANDREW B. HOWIE
SHINDLER, ANDERSON, GOPLERUD & WEESE, P.C.
5015 Grand Ridge Drive, Suite 100
West Des Moines, IA 50265

JESSICA L. ELLSWORTH
Counsel of Record
DANIELLE DESAULNIERS STEMPEL
MICHAEL J. WEST
J. ANDREW MACKENZIE
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 637-5600
jessica.ellsworth@hoganlovells.com

Counsel for Petitioners

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