

---

---

# Supreme Court of New Jersey

---

---

Docket No. 090285

STATE OF NEW JERSEY, ex rel.,	:	CIVIL ACTION
EDELWEISS FUND, LLC,	:	ON PETITION FOR
<i>Plaintiff-Petitioner,</i>	:	CERTIFICATION FROM
vs.	:	AN ORDER OF THE
JPMORGAN CHASE & CO.,	:	SUPERIOR COURT,
JPMORGAN CHASE BANK, NA,	:	APPELLATE DIVISION,
AND J.P. MORGAN SECURITIES	:	DISPOSITIVE OF THE
LLC (F/K/A JPMORGAN	:	ACTION PURSUANT
SECURITIES, INC.), CITIGROUP,	:	TO R. 2:2-5(a)
INC., CITIGROUP GLOBAL	:	DOCKET NO. A-1340-23
MARKETS INC., CITIBANK NA,	:	Sat Below:
CITIGROUP FINANCIAL	:	HON. GRETA GOODEN BROWN,
PRODUCTS INC.,	:	P.J., PART D
<i>(For Continuation of Caption,</i>	:	HON. MORRIS G. SMITH
<i>See Inside Cover)</i>	:	

---

---

## JOINT BRIEF IN OPPOSITION TO PETITION FOR CERTIFICATION

---

---

*On the Brief:*

ANNA AGUILAR (ID# 018122000)  
LISA D. BENTLEY (ID# 004272012)  
LAWRENCE S. LUSTBERG (ID# 023131983)  
JENNIFER L. DEL MEDICO (ID# 021182005)  
BRENDAN M. WALSH (ID# 019312006)  
ERIC D. WONG (ID# 018972007)  
MICHAEL P. CONWAY (*Pro Hac Vice*)  
SUSANNA M. BUERGEL (*Pro Hac Vice*)  
DANIEL A. NEGLESS (*Pro Hac Vice*)  
LINA DAGNEW (*Pro Hac Vice*)  
KATHLEEN L. CARLSON (*Pro Hac Vice*)  
DAVID H. HOFFMAN (*Pro Hac Vice*)  
ROBERT N. HOCHMAN (*Pro Hac Vice*)  
THOMAS H. COLLIER (*Pro Hac Vice*)  
JOAN M. LOUGHNANE (*Pro Hac Vice*)  
MATTHEW D. BENEDETTO (*Pro Hac Vice*)

AGUILAR BENTLEY LLC  
171 East Ridgewood Avenue,  
Suite 201  
Ridgewood, New Jersey 07450  
(212) 835-1521  
aaguilar@aguilarbentley.com  
lbentley@aguilarbentley.com

*Attorneys for Defendants-Respondents*  
*Morgan Stanley, Morgan Stanley*  
*Smith Barney LLC, Morgan*  
*Stanley & Co., LLC, and Morgan*  
*Stanley Capital Group, Inc.*

*(For Continuation of Appearances See Inside Cover)*

Date Submitted: February 26, 2025



CITIGROUP GLOBAL MARKETS :  
HOLDINGS INC., AND CITIGROUP :  
GLOBAL MARKETS LIMITED, :  
WELLS FARGO & COMPANY, :  
WELLS FARGO BANK, N.A., :  
WELLS FARGO SECURITIES LLC, :  
AND WACHOVIA BANK, N.A., its :  
predecessor by merger, BANK OF :  
AMERICA CORPORATION, BANK :  
OF AMERICA NA, BANK OF :  
AMERICA SECURITIES LLC, :  
MERRILL LYNCH, PIERCE, :  
FENNER & SMITH :  
INCORPORATED, BANK OF :  
AMERICA CAPITAL :  
CORPORATION, BOFA MERRILL :  
LYNCH ASSET HOLDINGS, INC., :  
AND BANK OF AMERICA :  
MERRILL LYNCH, and MORGAN :  
STANLEY, MORGAN STANLEY :  
SMITH BARNEY LLC, MORGAN :  
STANLEY & CO., LLC, AND :  
MORGAN STANLEY CAPITAL :  
GROUP, INC., :  
*Defendants-Respondents.* :

---

JONES DAY  
250 Vesey Street  
New York, New York 10281  
(212) 326-3939  
jdelmedico@jonesday.com

– and –

JONES DAY  
110 North Wacker Drive,  
Suite 4800  
Chicago, Illinois 60606  
(312) 782-3939  
mconway@jonesday.com

*Attorneys for Defendants-Respondents  
Wells Fargo & Company, Wells Fargo  
Bank, N.A., Wells Fargo Securities  
LLC, and Wachovia Bank, N.A., its  
predecessor by merger*

SIDLEY AUSTIN LLP  
One South Dearborn  
Chicago, Illinois 60603  
(312) 853-7000  
kathleen.carlson@sidley.com  
david.hoffman@sidley.com  
rhochman@sidley.com  
tcollier@sidley.com

– and –

SIDLEY AUSTIN LLP  
787 Seventh Avenue  
New York, New York 10019  
(212) 839-5300  
jloughnane@sidley.com

*Attorneys for Defendants-Respondents  
Morgan Stanley, Morgan Stanley  
Smith Barney LLC, Morgan Stanley  
& Co., LLC, and Morgan Stanley  
Capital Group, Inc.*

GREENBERG RAURIG, LLP  
500 Campus Drive, Suite 400  
Florham Park, New Jersey 07932  
(973) 360-7900  
wonge@gtlaw.com

*Attorneys for Defendants-Respondents  
JPMorgan Chase & Co., JPMorgan  
Chase Bank, N.A., and J.P. Morgan  
Securities LLC (f/k/a J.P. Morgan  
Securities Inc.)*

GIBBONS P.C.  
One Gateway Center  
Newark, New Jersey 07102  
(973) 596-4500  
llustberg@gibbonslaw.com

– and –

WILMER CUTLER PICKERING HALE  
& DORR LLP  
350 South Grand Avenue, Suite 2400  
Los Angeles, California 90071  
(213) 443-5300  
matthew.benedetto@wilmerhale.com

*Attorneys for Defendants-Respondents  
Bank of America, N.A., Merrill Lynch,  
Pierce, Fenner & Smith, Inc., Bank of  
America Corporation, BofA Merrill  
Lynch Asset Holdings, Inc., and Bank  
of America Capital Corporation*

PASHMAN STEIN WALDER  
HAYDEN, P.C.  
Court Plaza South  
21 Main Street, Suite 200  
Hackensack, New Jersey 07601  
(201) 488-8200  
bwalsh@pashmanstein.com

– and –

PAUL, WEISS, RIFKIND, WHARTON  
& GARRISON, LLP  
1285 Avenue of the Americas  
New York, New York 10019  
(212) 373-3000  
sbuergel@paulweiss.com  
dnegless@paulweiss.com

– and –

PAUL, WEISS, RIFKIND, WHARTON  
& GARRISON, LLP  
2001 K Street, NW  
Washington, DC 20006  
(202) 223-7300  
ldagnew@paulweiss.com

*Attorneys for Defendants-Respondents  
Citigroup Inc., Citigroup Global  
Markets Inc., Citibank N.A.,  
Citigroup Financial Products Inc.,  
Citigroup Global Markets  
Holdings Inc., and Citigroup  
Global Markets Limited*

---

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	2
ARGUMENT.....	5
I.    STANDARD OF REVIEW .....	5
II.   THE FRAMEWORK FOR DECIDING STATUTORY RETROACTIVITY IS SETTLED AND WELL-ESTABLISHED .....	6
III.  THE APPELLATE DIVISION CORRECTLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS ON THE PUBLIC DISCLOSURE BAR.....	12
A.   The Appellate Division Correctly Held that the Rate Data Was Publicly Disclosed .....	13
B.   The Appellate Division Properly Analyzed Whether Relator’s Action Is “Based Upon” the Publicly Available Rate Data .....	16
C.   The Appellate Division Correctly Held that the Rate Data Was Publicly Disclosed by the News Media .....	17
CONCLUSION.....	20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases:</b>	
<u>Ardan v. Bd. of Rev.</u> , 231 N.J. 589 (2018) .....	6, 10
<u>Bellevue v. Universal Health Servs. of Hartgrove, Inc.</u> , 867 F.3d 712 (7th Cir. 2017).....	12
<u>D.N. v. K.M.</u> , 216 N.J. 587 (2014) .....	11
<u>Hughes Aircraft Co. v. U.S. ex rel. Schumer</u> , 520 U.S. 939 (1997).....	6, 10
<u>In re Cont. for Route 280, Section 7U Exit Project</u> , 89 N.J. 1 (1982) .....	5–6, 8
<u>In re Est. of Byung-Tae Oh</u> , 445 N.J. Super. 402 (App. Div. 2016).....	11
<u>In re Nat. Gas Royalties</u> , 562 F.3d 1032 (10th Cir. 2009).....	16
<u>James v. N.J. Mfrs. Ins. Co.</u> , 216 N.J. 552 (2014) .....	7
<u>Johnson v. Roselle EZ Quick LLC</u> , 226 N.J. 370 (2016) .....	7
<u>Maia v. IEW Constr. Grp.</u> , 257 N.J. 330 (2024) .....	6, 7, 11
<u>Pisack v. B&amp;C Towing, Inc.</u> , 240 N.J. 360 (2020) .....	7
<u>Rosenberg v. JPMorgan Chase &amp; Co.</u> , 169 N.E.3d 445 (Mass. 2021).....	14, 18, 20
<u>State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase &amp; Co.</u> , 307 Cal. Rptr. 3d 750 (Ct. App. 2023) .....	20
<u>State ex rel. Health Choice Grp., LLC v. Bayer Corp.</u> , 478 N.J. Super. 184 (App. Div. 2024).....	<i>passim</i>

<u>U.S. ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.,</u> 186 F. Supp. 2d 458 (S.D.N.Y. 2002) .....	19
<u>U.S. ex rel. Atkinson v. Penn. Shipbuilding Co.,</u> 255 F. Supp. 2d 351 (E.D. Pa. 2002).....	14
<u>U.S. ex rel. Berkley v. Ocean State, LLC,</u> 2023 WL 3203641 (D.R.I. May 2, 2023) .....	19
<u>U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.,</u> 2014 WL 4375638 (E.D. Pa. Sept. 4, 2014) .....	15
<u>U.S. ex rel. Doe v. Staples, Inc.,</u> 932 F. Supp. 2d 34 (D.D.C. 2013).....	14, 15, 17, 19
<u>U.S. ex rel. Green v. Serv. Cont. Educ. &amp; Training Tr. Fund,</u> 843 F. Supp. 2d 20 (D.D.C. 2012).....	18, 19
<u>U.S. ex rel. Integra Med Analytics LLC v. Providence Health &amp; Servs.,</u> 2019 WL 3282619 (C.D. Cal. July 16, 2019) .....	19
<u>U.S. ex rel. Judd v. Quest Diagnostics Inc.,</u> 638 F. App'x 162 (3d Cir. 2015).....	9
<u>U.S. ex rel. Kester v. Novartis Pharms. Corp.,</u> 43 F. Supp. 3d 332 (S.D.N.Y. 2014) .....	19
<u>U.S. ex rel. Kraxberger v. Kan. City Power &amp; Light Co.,</u> 756 F.3d 1075 (8th Cir. 2014).....	17
<u>U.S. ex rel. Oliver v. Philip Morris USA Inc.,</u> 826 F.3d 466 (D.C. Cir. 2016) .....	17
<u>U.S. ex rel. Oliver v. Philip Morris USA, Inc.,</u> 101 F. Supp. 3d 111 (D.D.C. 2015).....	18
<u>U.S. ex rel. Osheroff v. Humana Inc.,</u> 776 F.3d 805 (11th Cir. 2015).....	18
<u>U.S. ex rel. Patriarca v. Siemens Healthcare Diagnostics, Inc.,</u> 295 F. Supp. 3d 186 (E.D.N.Y. 2018) .....	15, 19
<u>U.S. ex rel. Repko v. Guthrie Clinic, P.C.,</u> 2011 WL 3875987 (M.D. Pa. Sept. 1, 2011) .....	14, 15, 17, 18

U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn,  
14 F.3d 645 (D.C. Cir. 1994) ..... 13–14

U.S. ex rel. Winkelman v. CVS Caremark Corp.,  
827 F.3d 201 (1st Cir. 2016) ..... 17

U.S. ex rel. Zizic v. Q2Administrators, LLC,  
728 F.3d 228 (3d Cir. 2013)..... 9, 12

**Statutes & Other Authorities:**

N.J.S.A. § 2A:32C-6(f) ..... 10

N.J.S.A. § 2A:32C-9(c)..... 4, 14

N.J. Ct. R. 2:12-4..... 1

## PRELIMINARY STATEMENT

The Appellate Division resolved this case by applying long-settled legal standards, both as to the law of retroactivity and the public disclosure bar of the False Claims Act. Relator Edelweiss Fund, LLC (“Relator”) seeks review despite those standards, ignoring long-established law in favor of a laundry list of proposed novel rules that, if adopted, would confuse and distort rather than clarify the law. No valid purpose can be served by this Court’s review. See N.J. Ct. R. 2:12-4.

With respect to retroactivity, this Court has consistently applied a presumption against retroactivity and advised the Legislature how to signal its intent to depart from that presumption. Relator offers no meaningful discussion of those cases or how the Appellate Division applied those settled rules here.

As for the public disclosure bar of the New Jersey False Claims Act (“NJFCA”), on every purported error Relator asserts, the law has been thoroughly fleshed out by a body of decisions Relator cannot dispute. Relator offers only unsupported views of federal appellate decisions that ultimately do not call into question the settled nature of controlling legal standards.

Relator asks for new rules because settled law blocks outsiders that lack nonpublic information from bringing dubious claims based on nothing more than an analysis of public facts. Relator is not a conventional false claims act

whistleblower. Relator is an LLC created for the sole purpose of litigation by Johan Rosenberg, a municipal financial advisor who has never worked at any of the Defendant banks. Rosenberg has no inside information that he revealed to the public. Instead, his case arises entirely from his own personal assessment of information available to everyone: the contractual obligations of the Defendants and the publicly disclosed rate changes of the bonds at issue.

The public disclosure bar blocks relator-led claims like this, plucked from widely available information and re-packaged for litigation, because they raise the cost to the public of obtaining critical services. The Attorney General (“AG”) years ago chose not to intervene and expend its resources prosecuting this case. That decision rightly put this case on track for dismissal after the Appellate Division applied settled principles to the undisputed, material facts. This Court should therefore deny the petition.

### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Relator alleges that Defendants violated the NJFCA based on the way they reset interest rates for municipal bonds known as Variable Rate Demand Obligations (“VRDOs”). VRDO rates are reset either daily or weekly and have an option that allows investors to sell back the bonds on the same short time frame. Issuers use VRDOs to secure long-term financing at short-term rates; investors use VRDOs as a highly liquid investment. Defendants acted as

“remarketing agents” that were contractually obligated to use their “judgment” to set the appropriate interest rates. Ja2095–96 (¶¶ 1–2); Ja1989 (Compl. ¶ 26).

There is no dispute that VRDO rate changes are publicly available, posted as a matter of course by a free public database called EMMA as well as by private media companies like Bloomberg, and also by the Municipal Securities Rulemaking Board (“MSRB”) through a service called MSRB SHORT.<sup>1</sup> Relator analyzed the publicly available data it received from the MSRB SHORT service, Ja2173 (¶¶ 194–97), and concluded that Defendants failed to meet Relator’s view of Defendants’ contractual obligations to municipal issuers, speculating that Defendants “mechanically set [VRDO] rates en masse,” Ja1984 (Compl. ¶ 2); see also Ja9 (Fourth Am. Compl. ¶ 2).

There is no dispute that Relator lacks any inside information. Relator’s claim is based entirely on its own analysis of MSRB SHORT data. There is no dispute regarding how much it cost anyone, including Relator’s principal, to obtain this data (\$10,000 per year for MSRB SHORT, Ja3896 (¶ 131)). There is no dispute that anyone monitoring the VRDO market could and often did pay for both the MSRB SHORT and Bloomberg services, and that the data was separately available for free through EMMA.

---

<sup>1</sup> See Ja2098–100 (¶¶ 9, 11), Ja2103–05 (¶¶ 18–19); Ja4272–73 (Eiholzer Cert. ¶¶ 17, 19–20); Ja1548–49 (MSRB R. G-34(c)(ii)(A)(1)–(2)); Ja3896 (¶¶ 131–32); Ja2108–10 (¶¶ 25, 27); Ja1559–62 (Olander Cert. ¶¶ 3–4, 10, 12).

The NJFCA, like other false claims acts, precludes a relator from bringing a suit based on such publicly disclosed information in a provision referred to as the “public disclosure bar.” N.J.S.A. § 2A:32C-9(c). That defense applies only when a relator prosecutes an NJFCA claim; if the State intervenes and assumes full control over the litigation, the defense does not apply. After Relator amended its complaint twice, the AG declined to intervene. Ja2085–87 (7/17/19 Notice of Election to Decline Intervention).

After dismissing Relator’s Third Amended Complaint based on the public disclosure bar, with leave to amend, see 1T at 4:6–8, 13:23–14:3, 14:10–25, 17:3–5, the trial court denied Defendants’ motion to dismiss the Fourth Amended Complaint. The ruling failed to identify what “issues” raised in the new complaint caused the trial court to alter its prior ruling dismissing the case. The case proceeded to discovery and summary judgment on the public disclosure bar. See 2T at 11:17–12:5.

While the parties’ cross-motions for summary judgment were pending, the Legislature amended the NJFCA on June 30, 2023. The amendment—which mirrored an identical federal amendment in 2010—empowered the AG to block dismissal of a relator-initiated NJFCA action without having to intervene (the “2023 Amendment”). See Ja4019 (amendment to N.J.S.A. § 2A:32C-9(c)). On August 16, 2023—more than eight years after Relator’s original complaint was

filed and more than four years after the AG had declined to take over the action—the AG filed a Notice Opposing Dismissal of Relator’s Action based on the 2023 Amendment. See Ja3995–98 (8/16/23 Notice Opposing Dismissal).

The trial court ruled that the 2023 Amendment should be given retroactive effect and therefore granted summary judgment for Relator and denied it for Defendants. 4T at 6:10–13, 35:14–17. The trial court also indicated that if the 2023 Amendment does not apply retroactively, it would have denied both motions based on disputes of material fact, but it did not identify any specific material facts that warranted trial. See 4T at 34:16–21, 35:2–13.

The Appellate Division granted Defendants’ motion for leave to appeal and reversed in a per curiam opinion, applying this Court’s settled retroactivity framework to conclude that the 2023 Amendment is not retroactive. The Appellate Division then applied uniform federal FCA appellate precedent in holding that Relator’s analysis was based on publicly disclosed transactions in the news media, and therefore the public disclosure bar applies. Annex 4–36.

## **ARGUMENT**

### **I. STANDARD OF REVIEW.**

This Court’s review is unwarranted when “the final judgment of the Appellate Division is essentially an application of the principles enunciated” in one of this Court’s prior decisions. In re Cont. for Route 280, Section 7U Exit

Project, 89 N.J. 1, 1 (1982). Relator seeks this Court’s review by ignoring settled principles of law and thus invites this Court to introduce confusion rather than clarity to the law. Certification is not warranted on those grounds.

## II. THE FRAMEWORK FOR DECIDING STATUTORY RETROACTIVITY IS SETTLED AND WELL-ESTABLISHED.

Relator’s petition fails to reconcile its arguments with this Court’s well-settled framework for statutory retroactivity. As this Court recently reaffirmed, it applies “a general rule of statutory construction that favors prospective application of statutes.” Maia v. IEW Constr. Grp., 257 N.J. 330, 349 (2024) (quoting Gibbons v. Gibbons, 86 N.J. 515, 521 (1981)); see also Ardan v. Bd. of Rev., 231 N.J. 589, 610 (2018) (presumption based on “long-held notions of fairness and due process” (quoting James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 563 (2014))).<sup>2</sup> This framework first considers “whether the Legislature intended to give the statute retroactive application.” Maia, 257 N.J. at 349 (quoting James, 216 N.J. at 563). When the Legislature’s intent is clear from the statute’s language, the analysis ends. Retroactive intent may be found when (1) “the Legislature explicitly or implicitly expresses an intent that a law be retroactive”; (2) “an amendment is ameliorative or curative”; or (3) “the parties’ expectations

---

<sup>2</sup> Federal FCA precedent is the same. Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939, 946 (1997).

warrant retroactive application.” Id. at 350; see also Pisack v. B&C Towing, Inc., 240 N.J. 360, 370 (2020) (test for retroactive intent is “[s]ettled”).

The unanimous Appellate Division panel applied this settled framework to correctly hold that the 2023 Amendment is not retroactive. Annex 23–29. As to the first factor, the Legislature expressed its intent to apply the Amendment prospectively by writing that it “shall take effect immediately.” Annex 25 (quoting State ex rel. Health Choice Grp., LLC v. Bayer Corp., 478 N.J. Super. 184, 198 (App. Div. 2024)). “New Jersey courts have repeatedly construed language stating that a provision is to be ‘effective immediately,’ or ‘effective immediately on a given date,’ to signal prospective application.” Maia, 257 N.J. at 352 (collecting cases). This Court has held that “[s]uch language ‘bespeak[s] an intent contrary to, and not supportive of, retroactive application.’” Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 389 (2016) (second alteration in original) (quoting Cruz v. Cent. N.J. Landscaping, Inc., 195 N.J. 33, 48 (2008)). The Legislature’s intent “should be given effect absent a compelling reason not to do so.” James, 216 N.J. at 564. As this Court has “stated on numerous occasions . . . when the legislative intent does not explicitly or implicitly indicate retroactive application of statutes” this Court is “hesitant to do so.” Maia, 257 N.J. at 351–52 (collecting cases). Here, the “express language of the Legislature” requires prospective application. Annex 28. That alone suffices.

Relator all but ignores this overwhelming caselaw and fails even to acknowledge this Court’s settled retroactivity framework. Instead, Relator asks for a new rule that specifically contradicts this Court’s law: it urges this Court to construe the language “shall take effect immediately” to mean that the Legislature intended for retroactive application. Pet. 9, 13–14. That is no basis for this Court’s review. Cont. for Route 280, 89 N.J. at 1.

The Appellate Division’s decision was consistent with its decision in Bayer, which specifically held that the 2023 Amendment to the NJFCA applies prospectively only. 478 N.J. Super. at 197–99. Relator argues in passing that Bayer’s holding is limited to amendment of the NJFCA’s original source definition. Pet. 12 n.2. But Bayer said no such thing. It held that the Legislature’s intent applied broadly to all “2023 amendments to the [NJFCA]” and that the Legislature “used language clearly indicating that [it] intended the amendments to apply prospectively.” Bayer, 478 N.J. Super. at 198. That interpretation is consistent with the language the Legislature chose, which stated “[t]his act,” not mere provisions of it, “shall take effect immediately.”<sup>3</sup>

Bayer, in turn, relied on the consistent view of the federal courts—including those in the Third Circuit—which uniformly have construed the

---

<sup>3</sup> Ja4021 (2023 NJ Sess. Law Serv. Ch. 73 (ASSEMBLY 5584) (WEST)) (emphasis added).

equivalent “2010 amendment to the [federal] FCA to apply prospectively.” 478 N.J. Super. at 198 (collecting cases); see also Defs.’ App. Div. Opening Br. 14 nn.6–7; U.S. ex rel. Zizic v. Q2Administrators, LLC, 728 F.3d 228, 232 n.3 (3d Cir. 2013); U.S. ex rel. Judd v. Quest Diagnostics Inc., 638 F. App’x 162, 165 (3d Cir. 2015) (“There is no indication . . . that Congress intended to make the amendments to the public disclosure bar retroactive.”). As the Third Circuit has noted, and Relator has entirely ignored, the “presumption against retroactivity is even stronger where,” as here, “an amendment eliminates a defense to a qui tam suit.” Judd, 638 F. App’x at 165.

Indeed, in enacting the 2023 Amendment, the Legislature expressly stated its intent to align the NJFCA with the federal FCA. See Ja4021–22 (Amendment intended to make NJFCA “at least as effective as the” federal FCA “in facilitating these whistleblower actions” (Assembly Budget Committee Report) (quotation marks omitted)). And New Jersey courts, like courts in most states, consider federal FCA cases authoritative guidance on the meaning of its own statute, which is modeled on the federal version. See Bayer, 478 N.J. Super. at 198–99. Therefore, there is no reason to doubt that the Legislature “meant to likewise apply the [NJFCA] amendments prospectively.” Id. at 199. The ruling below was no aberration, as Relator suggests. See Pet. 13. Rather, Relator’s view proposes an aberration.

As concerns the second prong of the test for legislative intent, the Appellate Division correctly observed that the 2023 Amendment was “not curative in nature.” Annex 28. A curative amendment remedies “a perceived imperfection in or misapplication of a statute.” Ardan, 231 N.J. at 611–12 (quoting James, 216 N.J. at 564). Here, the Amendment empowers the AG to permit private relators, who are “motivated primarily by prospects of monetary reward rather than the public good,” Hughes, 520 U.S. at 949, to litigate actions that would otherwise be dismissed without government intervention (which the State has declined in this case). This “altered [the] statute so that it better serves public policy objectives,” Ardan, 231 N.J. at 612, and expanded the NJFCA “to enable the State to obtain enhanced recoveries in Medicaid fraud cases,” Annex 28; Bayer, 478 N.J. Super. at 198–99. This was no mere correction.

Moreover, the 2023 Amendment is not merely procedural, as Relator suggests. Pet. 6, 11. Before the Amendment, to eliminate the public disclosure defense the AG, who initially declined to intervene, would have had to show “good cause” to intervene. N.J.S.A. § 2A:32C-6(f). The 2023 Amendment thus relieves the AG of the substantive burden of demonstrating good cause to deprive the Defendants of their public disclosure affirmative defense.

This Court’s recent decision in Maia does not aid Relator. Maia held that amendments to the State’s Wage Payment Law did not apply retroactively,

applying the same settled framework for discerning legislative intent. 257 N.J. at 349–53. Relator suggests Maia should mean that “retroactivity is a specific series of concerns that bear on a party’s vested rights and whether application of a statute will result in manifest injustice.” Pet. 10 (citing Maia, 257 N.J. at 349–50). But these concerns are implicated only if the Legislature intends to apply a statute retroactively. In the same section of Maia Relator cites, this Court declined to address whether retroactive application affected “vested rights” or created “manifest injustice” because the Legislature made clear its intent to apply the statute prospectively. Maia, 257 N.J. at 349 n.4. Here, as in Maia, this Court need not consider “vested rights” and “manifest injustice” because the Legislature intended to apply the 2023 Amendment prospectively.<sup>4</sup>

Finally, Relator seeks to maintain an insignificant portion of its case by suggesting the 2023 Amendment applies to its claims based on rate changes that occurred after the 2023 Amendment. This afterthought—by Relator’s own admission, relating to only 18 VRDOs out of hundreds of bonds and concerning

---

<sup>4</sup> To the extent Relator is arguing that applying the 2023 Amendment would not be retroactive at all, Pet. 10, Relator waived that argument by admitting at the trial court that it needed retroactive application of the new rule in this case. See Jra1–17. Appellate courts need not consider a “belated argument” that was “not raised in the trial court.” In re Est. of Byung-Tae Oh, 445 N.J. Super. 402, 408 (App. Div. 2016); see also D.N. v. K.M., 216 N.J. 587, 589 (2014) (case not a “good vehicle” for certification where “petitioner did not assert” argument before trial court).

less than two years of rate resets in a case going back to 2009, Jra18—provides no basis for this Court’s review. The law is, yet again, squarely against Relator. Relator’s claims are based on a pattern of conduct allegedly begun over a decade ago and carried forward since. Federal courts, including in the Third Circuit, uniformly apply the pre-amendment version of a law when a single continuous course of conduct is at issue. See Zizic, 728 F.3d at 232 nn.3–4 (applying only the pre-amendment public disclosure bar to an action alleging conduct both pre- and post-dating the 2010 federal amendment); Bellevue v. Universal Health Servs. of Hartgrove, Inc., 867 F.3d 712, 717–18 (7th Cir. 2017) (pre-amendment public disclosure bar applies “where the contested conduct spanned both pre- and post-amendment time periods”). This narrow, settled issue likewise does not merit review.

### **III. THE APPELLATE DIVISION CORRECTLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS ON THE PUBLIC DISCLOSURE BAR.**

The Appellate Division also correctly held that Defendants were entitled to summary judgment on the merits of the public disclosure bar defense. There are no disputed issues of fact and Relator’s petition identifies no questions of law that would merit this Court’s review. Relator admitted that it analyzed publicly available information from MSRB SHORT to allege fraud. Annex 36; Ja2173 (¶¶ 194–97). This admission alone is dispositive of Relator’s claim,

under overwhelming federal FCA precedent. See Bayer, 478 N.J. Super. at 198–99 (construing NJFCA in light of federal FCA precedent). At every turn, Relator downplays or offers a strained, unsustainable reading of the caselaw lined up squarely against it. Relator seeks review not to clarify but to cast doubt on the uniform interpretation of federal and state false claims acts.

**A. The Appellate Division Correctly Held that the Rate Data Was Publicly Disclosed.**

The Appellate Division’s analysis is straightforward: the “data” Relator relied on to allege fraud were “publicly available.” Annex 36. Relator admitted that it used raw data from MSRB SHORT to conduct its analysis. See Ja2173 (¶¶ 194–97). It is undisputed that this information was also posted for free on EMMA and available to Bloomberg subscribers.<sup>5</sup> These sources were available to any member of the public—just like Relator, who was not a whistleblower or insider—and Relator has not asserted that any cost or legal restriction prevented it from accessing and analyzing the data for use in its complaint. Ja2122 (¶ 44).

As for the analysis of that data, bedrock FCA law holds that “[e]xpert analysis” of publicly available data does not support a qui tam suit when “all the material elements of fraud are publicly available, though not readily comprehensible to nonexperts.” Annex 36 (quoting U.S. ex rel. Springfield

---

<sup>5</sup> See supra n.1.

Terminal Ry. Co. v. Quinn, 14 F.3d 645, 655 (D.C. Cir. 1994)); see also N.J.S.A. § 2A:32C-9(c) (2023) (action subject to public disclosure bar when it is “based upon the public disclosure of . . . transactions”). Countless cases reach this same conclusion, including where the inference of fraud requires reviewing publicly available “raw” data.<sup>6</sup> The Massachusetts Supreme Judicial Court reached the same conclusion when addressing Relator’s argument in parallel litigation. Rosenberg v. JPMorgan Chase & Co., 169 N.E.3d 445, 457–58 (Mass. 2021) (“neither the need to perform analysis on the publicly available information nor the benefit of his expertise renders the true state of affairs hidden”).

Relator does not meaningfully contest the Appellate Division’s decision that “technical difficulties” and “costs . . . incurred” did not alter the fact that “the data was publicly available.” Annex 36. What it cost Relator was never in dispute. Nor was it disputed that Relator spent no more than what any member of the public who regularly monitors the municipal bond market actually pays to follow the market. So there are no material facts at issue. Relator’s vague

---

<sup>6</sup> See, e.g., U.S. ex rel. Doe v. Staples, Inc., 932 F. Supp. 2d 34, 40 (D.D.C. 2013) (shipping-manifest database), aff’d, 773 F.3d 83 (D.C. Cir. 2014); U.S. ex rel. Repko v. Guthrie Clinic, P.C., 2011 WL 3875987, at \*8 (M.D. Pa. Sept. 1, 2011) (databases of non-profits, financial data and analysis websites, including Bloomberg Professional), aff’d, 490 F. App’x 502 (3d Cir. 2012); U.S. ex rel. Atkinson v. Penn. Shipbuilding Co., 255 F. Supp. 2d 351, 388–89 (E.D. Pa. 2002) (“[R]elator’s argument that his knowledge was not generally attainable, as is that of an engineer or a cryptographer, is irrelevant.” (citation omitted)), aff’d in relevant part, 473 F.3d 506 (3d Cir. 2007).

references to “new allegations,” a “voluminous summary judgment record,” and a “better understanding of [the] allegations” are of no moment. Pet. 16 (alteration in original) (quotation marks omitted).

Rather, Relator takes the view that payment of market costs for widely used products renders that information nonpublic. Relator cited no case for that view. Pet. 18. There is none for the obvious reason that information commonly becomes publicly available because the public is willing to pay for it. Trade publications and other common sources of news media require market-determined payments. See, e.g., U.S. ex rel. Patriarca v. Siemens Healthcare Diagnostics, Inc., 295 F. Supp. 3d 186, 200 (E.D.N.Y. 2018) (subscription-cost “argument has no traction”); U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co., 2014 WL 4375638, at \*8, \*10 (E.D. Pa. Sept. 4, 2014) (rejecting argument that “the Zepol database is not ‘news media,’ and is not generally available to the public because subscribers pay a substantial fee to access its information”); Staples, 932 F. Supp. 2d at 40 (subscription to access shipping-manifest data is “news media”). Courts in the Third Circuit have specifically held that, despite its subscription costs, Bloomberg Professional is news media subject to public disclosure. See Repko, 2011 WL 3875987, at \*7–8. And as Relator acknowledges, Pet. 17, EMMA provides this information for free.<sup>7</sup>

---

<sup>7</sup> See supra n.1.

**B. The Appellate Division Properly Analyzed Whether Relator’s Action Is “Based Upon” the Publicly Available Rate Data.**

The Appellate Division applied well-established precedent in determining that Relator’s action is “based upon” publicly available rate data. Relator nevertheless asks this Court to jettison that precedent and muddy false claims act law by ruling that a claim is not “based upon” publicly disclosed data if the “government would need to comb through myriad transactions’ to find the fraud.” Pet. 20 (quoting In re Nat. Gas Royalties, 562 F.3d 1032, 1042 (10th Cir. 2009)). On its face, Relator’s argument is absurd—of course its allegations are “based upon” the publicly disclosed data; it admitted as much and its analysis could not have happened without the MSRB SHORT data.<sup>8</sup> More importantly here, Natural Gas Royalties—which affirmed dismissal on public disclosure bar grounds, 562 F.3d at 1037—announced no such rule. Natural Gas Royalties discussed a different question: whether prior public allegations of fraud within an industry suffice to publicly disclose the fraud as to particular industry participants who were never named in the prior public disclosure. Id. at 1042. That is irrelevant here because Relator alleges that the VRDO data identifies each Defendant. The rule in Natural Gas Royalties simply does not apply.

---

<sup>8</sup> Contrary to Relator’s assertion, Pet. 20, the Appellate Division expressly stated that “Rosenberg relied on that publicly available data in drawing his conclusions.” Annex 36.

Relator is ultimately asking for a new, expansive rule that analyzing a “massive amount of VRDO rate data” defeats the public disclosure bar. Pet. 17. But that, too, runs contrary to settled law. Publicly available sources need not declare that fraud has occurred for the public disclosure bar to apply. See, e.g., U.S. ex rel. Winkelman v. CVS Caremark Corp., 827 F.3d 201, 209 (1st Cir. 2016). Nor is it relevant whether fraudulent transactions could be found only with great difficulty after an investigation or through data analysis. See U.S. ex rel. Oliver v. Philip Morris USA Inc., 826 F.3d 466, 475 (D.C. Cir. 2016) (memorandum publicly disclosed by being posted in database of nearly 4.5 million documents); Staples, 932 F. Supp. 2d at 40 (shipping-manifest database); Repko, 2011 WL 3875987, at \*8 (databases including Bloomberg).

**C. The Appellate Division Correctly Held that the Rate Data Was Publicly Disclosed by the News Media.**

Finally, Relator asks this Court to draw arbitrary and confusing distinctions regarding what counts as “news media” within the public disclosure bar. Pet. 18. Relator’s proposed rule—which would define news media to exclude Bloomberg, MSRB SHORT, and EMMA—contradicts the U.S. Supreme Court’s directive that the term “news media” “has a ‘broad sweep.’” U.S. ex rel. Kraxberger v. Kan. City Power & Light Co., 756 F.3d 1075, 1079 (8th Cir. 2014) (quoting Schindler Elevator Corp. v. U.S. ex rel. Kirk, 563 U.S. 401, 408 (2011)). Under the federal FCA, “news media” includes any source

whose aim is to distribute information to the public, no matter how small the audience and whether or not it resembles a traditional news organization.<sup>9</sup>

The trial court previously held that EMMA and Bloomberg are news media, citing “the overwhelming majority of cases” as well as the Massachusetts Supreme Judicial Court’s ruling on Relator’s parallel case. 1T 14:14–25; Rosenberg, 169 N.E.3d at 459 (“[T]he ordinary meaning of the words ‘news media’ is quite broad and includes information shared through means of communication that reach or influence people widely.”). EMMA is “publicly available and widely disseminated” and its express purpose is “to increase the transparency of the municipal securities market by providing free public access to municipal securities disclosures and data.” Rosenberg, 169 N.E.3d at 461 (quoting overview of EMMA). Federal precedent likewise holds that Bloomberg is news media. Repko, 2011 WL 3875987, at \*7–8.

It is of no moment, nor significant to the Appellate Division’s application of settled law here, that Relator cites an unpublished California federal district court opinion to suggest that niche or non-traditional sources must be excluded

---

<sup>9</sup> See U.S. ex rel. Green v. Serv. Cont. Educ. & Training Tr. Fund, 843 F. Supp. 2d 20, 32 (D.D.C. 2012) (“[C]ourts that have considered the issue have construed the term [news media] to include readily accessible websites.”); see also, e.g., U.S. ex rel. Osheroff v. Humana Inc., 776 F.3d 805, 813 (11th Cir. 2015) (collecting cases holding that information-distributing websites are news media); U.S. ex rel. Oliver v. Philip Morris USA, Inc., 101 F. Supp. 3d 111, 125 (D.D.C. 2015) (publicly available and searchable websites), aff’d, 826 F.3d 466.

from “news media.” Pet. 19 (citing U.S. ex rel. Integra Med Analytics LLC v. Providence Health & Servs., 2019 WL 3282619, at \*11–16 (C.D. Cal. July 16, 2019), rev’d on other grounds, 854 F. App’x 840 (9th Cir. 2021)). Integra Med’s rule has never been reviewed or adopted by any appellate court, let alone a court in New Jersey. Other courts have rejected Integra Med as “unconvincing.” See U.S. ex rel. Berkley v. Ocean State, LLC, 2023 WL 3203641, at \*4 (D.R.I. May 2, 2023). And the overwhelming weight of federal authority recognizes that news media includes sources whose primary purpose is to disseminate information to the public, including technical and niche information sources.<sup>10</sup> Relator acknowledges the “[m]any federal courts” that reject its narrow interpretation of “news media,” Pet. 19, but rather than distinguishing the cases, asks this Court to create a new rule of law that has been rejected because it confuses rather than clarifies.

Relator also mentions that two state court decisions held that MRSB is not news media. Pet. 19. But that is not correct. Relying on state-specific authority,

---

<sup>10</sup> See, e.g., U.S. ex rel. Kester v. Novartis Pharms. Corp., 43 F. Supp. 3d 332, 346 (S.D.N.Y. 2014) (“disclosures directed to ‘smaller’ or ‘professionally specialized’ reader bases”); U.S. ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc., 186 F. Supp. 2d 458, 463 (S.D.N.Y. 2002) (“scientific and scholarly works” that are “too technical” for the average reader), aff’d, 53 F. App’x 153 (2d Cir.); Green, 843 F. Supp. 2d at 33 (webpage “directed to a select audience” (quotation marks omitted)); Staples, 932 F. Supp. 2d at 40 (shipping “manifest information submitted to Customs” (quotation marks omitted)); Patriarca, 295 F. Supp. 3d at 197–202 (scholarly/scientific journals).

these nonbinding decisions (including a trial court ruling that has never been reviewed) held that EMMA—not MSRB SHORT, the data source relied on by Relator—is not news media. See State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., 307 Cal. Rptr. 3d 750, 776–78 (Ct. App. 2023); Ja3877 (State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., No. 2017 L 000289 (Ill. Cir. Ct. June 13, 2023) (citing Illinois authorities concerning “Illinois’s narrow and traditional definition of news media”). No court has ruled that MSRB SHORT or Bloomberg are not news media (either one is sufficient to trigger the bar), and the Massachusetts Supreme Judicial Court concluded that EMMA is news media. Rosenberg, 169 N.E.3d at 461.

The Appellate Division correctly applied overwhelming federal precedent controlling the outcome here. Relator asks this Court to part with and confuse false claims act precedent rather than clarify and make it uniform. That is no basis for review.<sup>11</sup>

### **CONCLUSION**

For these reasons, Relator’s petition for certification should be denied.

---

<sup>11</sup> Relator’s argument that the Appellate Division improperly shifted the burden in this case is a red herring. Pet. 16–17. Because the 2023 Amendment is not retroactive, the Appellate Division correctly relied on decisions interpreting the pre-amendment NJFCA which hold that the public disclosure bar is an issue of standing. See Annex 30 (citing Bayer, 478 N.J. Super. at 194). And nothing in the Appellate Division’s decision turned on who bore the burden of proof.

Dated: February 26, 2025

**AGUILAR BENTLEY LLC**

By: /s/ Anna Aguilar  
ANNA AGUILAR

*Attorney for Defendants-Respondents  
Morgan Stanley, Morgan Stanley  
Smith Barney LLC, Morgan Stanley  
& Co., LLC, and Morgan Stanley  
Capital Group, Inc.*

**GIBBONS P.C.**

By: /s/ Lawrence S. Lustberg  
LAWRENCE S. LUSTBERG

*Attorney for Defendants-Respondents  
Bank of America, N.A., Merrill  
Lynch, Pierce, Fenner & Smith, Inc.,  
Bank of America Corporation, BofA  
Merrill Lynch Asset Holdings, Inc.,  
and Bank of America Capital  
Corporation*

**PASHMAN STEIN WALDER  
HAYDEN, P.C.**

By: /s/ Brendan M. Walsh  
BRENDAN M. WALSH

*Attorney for Defendants-Respondents  
Citigroup Inc., Citigroup Global  
Markets Inc., Citibank N.A.,  
Citigroup Financial Products Inc.,  
Citigroup Global Markets Holdings  
Inc., and Citigroup Global Markets  
Limited.*

**GREENBERG TRAURIG, LLP**

By: /s/ Eric Wong  
ERIC WONG

*Attorney for Defendants-Respondents  
JPMorgan Chase & Co., JPMorgan  
Chase Bank, N.A., and J.P. Morgan  
Securities LLC (f/k/a J.P. Morgan  
Securities Inc.)*

**JONES DAY**

By: /s/ Jennifer L. Del Medico  
JENNIFER L. DEL MEDICO

*Attorney for Defendants-Respondents  
Wells Fargo & Company, Wells  
Fargo Bank, N.A., Wells Fargo  
Securities LLC, and Wachovia Bank,  
N.A., its predecessor by merger*