

No. 08-304

IN THE
Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER
CONSERVATION DISTRICT, *et al.*,
Petitioners,

v.

UNITED STATES EX REL. KAREN T. WILSON
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

**BRIEF OF THE NATIONAL LEAGUE OF
CITIES, U.S. CONFERENCE OF MAYORS,
GOVERNMENT FINANCE OFFICERS
ASSOCIATION, NATIONAL ASSOCIATION OF
COUNTIES, INTERNATIONAL CITY/COUNTY
MANAGEMENT ASSOCIATION, AND
INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION AS *AMICI CURIAE*
SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether an audit and investigation performed by a State or its political subdivision constitutes an “administrative * * * report, * * * audit, or investigation” within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members are municipal governments and officials throughout the United States.¹ These organizations regularly file *amicus* briefs in cases that, like this one, raise issues of vital concern to the Nation's local governments.

In *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003), this Court held that private plaintiffs may sue local governments under the False Claims Act. This case presents the question whether a private plaintiff's suit under the Act is barred when it consists of allegations based on information that has already been publicly disclosed in an audit report of a state or local government. The resolution of that question will determine the circumstances in which local governments may be liable under the Act. Resolution of the question will also affect the consequences for local governments of conducting certain audits and investigations and, more generally, the conditions under which those governments administer federally funded programs. For these reasons, *amici* have a compelling interest in the question presented and a unique perspective on its proper resolution.

A brief description of each *amicus* organization appears in the appendix to this brief.

¹ *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

SUMMARY OF ARGUMENT

Petitioners' brief demonstrates why the decision below is inconsistent with the text and purpose of the False Claims Act. In this brief, *amici* explain how the court of appeals' interpretation of the jurisdictional bar harms local governments and respond to one of the Solicitor General's arguments in defense of that interpretation.

1. If adopted by this Court, respondent's construction of the jurisdictional bar would harm local governments in two ways. First, by allowing plaintiffs to piggy-back on the investigative efforts of local agencies, it would hinder local governments' ability to investigate wrongdoing in connection with federally funded programs. It would create disincentives for agencies to conduct audits and investigations, and create incentives for plaintiffs' lawyers to interfere with those audits and investigations once begun. Second, local governments would be compelled to divert increasingly scarce resources to pay for *qui tam* litigation initiated by opportunistic plaintiffs.

2. The Solicitor General argues that the term "administrative" must have an exclusively federal meaning because the jurisdictional bar does not cover state *legislative* reports and it would therefore be anomalous for the bar to cover state *administrative* reports. There is no such anomaly. At the time of the jurisdictional bar's enactment, Congress provided state legislatures essentially no role in the administration of federally funded programs and assigned almost all responsibility to governors and state administrative agencies. It is therefore likely that Congress did not envision a role for state legislatures in the investigation or audit of the use of federal funds. For that reason, the omission of state legisla-

tive reports from the statute is consistent with a congressional intent to include state and local administrative reports.

ARGUMENT

I. IF ADOPTED BY THIS COURT, RESPONDENT'S CONSTRUCTION OF THE JURISDICTIONAL BAR WOULD HARM LOCAL GOVERNMENTS.

For most of the long history of the False Claims Act, *qui tam* actions were not brought against local governments. In 2003, however, this Court held that local governments are subject to *qui tam* suits. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003). That decision has exposed more than 87,000 local governments to suits under the Act. See U.S. Census Bureau, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002, at 1, available at http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf. At the same time, there has been a marked increase in the overall number of False Claims Act filings by private plaintiffs. See U.S. Department of Justice, Civil Division, *Fraud Statistics Overview 2*, available at <http://www.taf.org/STATS-FY-2007.pdf>.

Many of the *qui tam* suits since *Cook County* have been filed against local governments, which participate in a variety of federal programs and receive substantial federal funding. See *Cook County*, 538 U.S. at 129. In 2001-2002, the most recent period for which statistics are available, federal transfer payments accounted for \$15.2 billion of municipal governments' revenues. See U.S. Census Bureau, 2002 Census of Governments, *Finances of Municipal and Township Governments: 2002*, Apr. 2005, at 1, available at <http://www.census.gov/prod/2005pubs/>

gc024x4.pdf. Federal payments have increased greatly in the years since, given the dramatic rise in the number of federally funded programs after the terrorist attacks of September 11, 2001 and during the severe recession that began in 2008. See, e.g., Steven Maguire & Shawn Reese, *CRS Report for Congress, Department of Homeland Security Grants to State and Local Governments: FY2003 to FY2006*, at 2-9, Dec. 22, 2006, available at <http://www.fas.org/sgp/crs/homesecc/RL33770.pdf> (discussing grant programs instituted after September 11, 2001, including Law Enforcement Terrorism Prevention Program and Metropolitan Response Program); National Conference of State Legislatures, *Economic Recovery Overview*, last updated Aug. 13, 2009, available at <http://www.ncsl.org/?TabId=16779> (describing distribution of funds under American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, by category, including education and law enforcement). State and local agencies participating in federally funded programs regularly conduct audits or investigations in connection with the programs—as a condition of their participation, see, e.g., 31 U.S.C. § 7502; at the request of the relevant federal agency; or as a matter of good governance.

As *amici* explain below, respondent's construction of the False Claims Act, if adopted by this Court, would harm local governments in two ways. First, it would enable relators to sue local governments based on information obtained during state and local audits and investigations, thereby hindering their ability to monitor the use of federal funds. Second, it would require local governments to divert scarce resources to defend, settle, and pay judgments in *qui tam* suits filed by opportunistic plaintiffs.

A. Respondent's Construction of the Jurisdictional Bar Would Hinder the Ability of Local Governments to Investigate the Misuse of Federal Funds.

The court of appeals construed the False Claims Act to permit relators to use state and local audits offensively against municipalities. Local governments may understandably seek to avoid such litigation by deciding not to conduct an audit or investigation that is not required by law or, if they do conduct one, by deciding not to make the results public. In either event, their taxpayers will suffer.

The type of publicly disclosed self-policing at stake serves a number of purposes. It monitors the use of federal funds; it informs local taxpayers how elected officials are performing their duties; and it deters misuse of the funds. If such publicly disclosed self-policing can expose local governments to *qui tam* actions by opportunistic relators, there will very likely be a reduction in either self-policing or public disclosure. The court of appeals and respondent have in effect endorsed the principle that no good deed should go unpunished; under their interpretation of the jurisdictional bar the “reward” for publicly disclosed self-policing is a lawsuit.

Because a foreseeable consequence of the court of appeals' decision is that local governments will, when possible, either decline to investigate themselves or decline to disclose their findings, the judgment below is both unfair and unwise. Local governments should not be put to the Hobson's choice of subjecting themselves to litigation or avoiding self-investigation. And Congress could not have intended that they would be.

Affirmance of the court of appeals' decision would hinder government investigations in another way. As petitioners explain (Pet. Br. 29-31), plaintiffs without any independent knowledge of the possible misuse of federal funds would scour state and local government reports, audits, and investigations that are already available, or obtain those that are not readily available through freedom-of-information requests,² and then file *qui tam* suits based on information copied from the state or local source.

Moreover, given the False Claims Act's first-to-file provision, under which the filing of a *qui tam* action by one plaintiff cuts off later-filed actions by other plaintiffs, 31 U.S.C. § 3730(b)(5), plaintiffs' lawyers would have an incentive to request information and file suit before investigations have been completed. Such frequent and often premature demands for public records, whether in the form of informational requests or as part of the civil discovery process, would inhibit state and local agencies' ability to conduct thorough and accurate investigations.

To uncover misconduct, state and local agencies typically pursue multiple leads, interview numerous witnesses, and explore many potential dead ends. Repeated requests for records before investigations are complete are therefore not likely to uncover wrongdoing, but they are highly likely to interfere with investigations. State and local agencies should

² All 50 States have a FOIA statute or its equivalent. See Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 543 (1993). Many state statutes permit broad access to these types of records. See, e.g., Cal. Gov't Code § 6250 et seq.; N.C. Gen. Stat. § 132-1; Ohio Rev. Code § 149.43; Tex. Gov't Code Ann. § 552.001 et seq.; Va. Code Ann. § 2.2-3704 et seq.

not be hindered in their efforts to conduct audits and investigations, and Congress could not have intended that they would be.

B. Respondent's Construction of the Jurisdictional Bar Would Require Local Governments to Divert Scarce Resources to Litigate Opportunistic *Qui Tam* Suits.

The court of appeals' decision substantially expands the universe of potential *qui tam* suits against local governments. The costs of defending these suits, and of paying settlements and judgments, including treble damages and attorneys' fees, see 31 U.S.C. §§ 3729(a)(1), 3730(g), will distort the budgets of those municipalities, many of which are already experiencing severe fiscal difficulties.

Most local governments' budgets contain very high fixed costs for law enforcement, emergency services, and other first responders. See U.S. Department of Labor, Bureau of Labor Statistics, *Career Guide to Industries, 2008-09 Edition, State and Local Government Except Education and Hospitals*, Mar. 12, 2008, available at <http://www.bls.gov/oco/cg/cgs042.htm>. In 2001-2002, for example, public safety accounted for over 15 percent of municipal expenditures. See 2002 Census of Governments, *supra*, at 1.

Over the past two years, municipalities' budgets have become increasingly stretched as revenues have steadily decreased but fixed costs have not. As a result of deteriorating economic conditions, two-thirds of city financial officers reported that their cities were less able to meet fiscal needs in 2008 than in the previous year. See National League of Cities,

City Fiscal Conditions in 2008, Sept. 2008, at 5, available at http://66.218.181.91/ASSETS/A49C86122F0D4DBD812B91DD5777F04D/CityFiscal_Brief_08-FINAL.pdf. And “all indications point to worsening city fiscal conditions in 2009 and 2010.” *Ibid.*

It is thus singularly inequitable to require local governments to divert scarce resources to litigate *qui tam* actions like this case. As noted above, one such glaring injustice is that plaintiffs’ lawyers without independent knowledge of a false claim can simply monitor state or local government reports, audits, and investigations or obtain them through freedom-of-information requests. Consequently, under respondent’s theory local governments not only would be required to spend taxpayer dollars on *qui tam* litigation, they would face the prospect of paying windfalls to “opportunistic plaintiffs who have no significant information to contribute of their own.” *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

II. THE OMISSION OF STATE LEGISLATIVE REPORTS FROM THE JURISDICTIONAL BAR DOES NOT SUPPORT RESPONDENT’S CONSTRUCTION.

In defending the decision below, the Solicitor General has advanced a theory on which the court of appeals itself did not rely: that reading the term “administrative” to include state and local administrative agencies “would create an unwarranted anomaly,” by “put[ting] a State’s legislature on a lesser footing than a local county administrator.” U.S. Br. *Am. Cur.* 8-9. Because “state legislative reports are excluded from the scope of [the jurisdictional bar],” the Solicitor General argues, “Congress did not likely

intend to mandate different treatment for reports by a state or local ‘administrative’ body.” *Id.* at 9.

This contention is mistaken. As we explain below, the omission of state *legislative* reports from the False Claims Act’s jurisdictional bar is consistent with a congressional intent to include state and local *administrative* reports.

As of 1986, when the current version of the jurisdictional bar was enacted, Congress had provided essentially no role for state legislatures in the administration or oversight of federally funded programs. As one authority has put it, in the years leading up to the 1986 amendments, “most grant-in-aid statutes [did] not specify any role for state legislatures.” George D. Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 AM. U. L. REV. 279, 282 (1979). Instead, federal grant programs assigned virtually all administrative responsibility to state executive agencies. See, e.g., U.S. General Accounting Office, *Federal Assistance System Should be Changed to Permit Greater Involvement by State Legislatures* 11 (Dec. 15, 1980) (detailing “widespread assignment of legislative functions to Governors or State agencies in federal grant programs”); see also Michael J. Curro, *The Federal Interest in Legislative-Administrative Relations in the States* 3 (report prepared by senior GAO evaluator for Midwest Political Science Association’s 1981 annual meeting); Carol S. Weissert, *State Legislatures and Federal Funds: An Issue of the 1980s*, 11 PUBLIUS: THE JOURNAL OF FEDERALISM 67 (Summer 1981); Brown, *Federal Funds and National Supremacy*, 28 AM. U. L. REV. at 282, 286-287.

In 1980, the GAO reviewed 75 federal grant programs, which represented the largest such programs

available to state governments and accounted for over \$43 billion in FY 1979. Seventy of the programs assigned to the governor or a state administrative agency the function of preparing and submitting applications for federal assistance. *Federal Assistance System Should Be Changed* at 13. Of the 36 federal programs that assigned to the State the tasks of overseeing and evaluating the program, moreover, *every one* assigned those tasks to a state administrative agency. *Id.* at 16. As far as the administration of federal programs was concerned, state legislatures were, as one GAO official put it, the “odd man out.” Curro, *supra*, at 1.

Contemporaneous federal statutes demonstrate that Congress viewed governors and administrative agencies, not legislatures, as the state officials and entities that would disburse federal funds, set the priorities for those funds, administer the federal programs, and evaluate their performance. See *Federal Assistance System Should Be Changed* at 11-14. For example, legislation establishing the Urban Mass Transit program designated the governor as the recipient of the federal funds and the official who “shall determine” the amounts available to each municipality. *Id.* at 13-14. Legislation establishing State Energy Conservation programs authorized “the Governor” to “submit * * * a State energy conservation plan.” Energy Policy and Conservation Act, Pub. L. No. 94-163, § 362(e), 89 Stat. 871 (1975). And the Comprehensive Employment and Training Act of 1973, (CETA), Pub. L. No. 93-203, 87 Stat. 839, specified that the governor would receive and disburse the federal funds. *Federal Assistance System Should Be Changed* at 26. Indeed, the Labor Department’s Solicitor opined that state legislative appropriation of CETA funds would violate grant conditions, be-

cause it would “hinder[] [the governor’s] exercise of the administrative discretion assigned to him by the Federal statute.” *Ibid.*

These are just a few of the statutes that assigned roles to the state executive branch—but not to the state legislative branch—in administering federal programs. There were many others. See, *e.g.*, 16 U.S.C. § 1455(c)(5) (1976) (requiring governors in States with substantial water-quality problems to allocate federal funding to a state agency for administration); 16 U.S.C. § 1455(h) (1976) (specifying that governor has authority to target specific areas for activities such as health planning and water-quality planning); 29 U.S.C. § 721(a)(1)(A) (1976) (providing that funds for vocational rehabilitation are to be administered by state agency).

The legislative histories of other statutes confirm that Congress deemed the state executive branch more suitably structured than the legislative branch to administer federal grant programs. For example, the legislative history of the statute that established the Law Enforcement Assistance Administration (LEAA), Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, states that the governor was designated to administer the program because Congress believed that it would be “more convenient and effective” to deal with a single authority representing the State “than [with] a body as diverse and pluralistic as a legislature.” *Federal Assistance System Should be Changed* at 12. As Senator Dirksen put it, “[we need] a captain at the top, in the form of the Governor, and those he appoints, to coordinate the matter for a state.” *Ibid.* Similarly, the Senate Judiciary Committee explained as follows why the planning agency for the LEAA should be administered by the state executive

branch: “It would be inconsistent with the centralized and coordinated statewide planning that is one of the key elements of the LEAA program and render close supervision more difficult. Such a structuring of the program would also create a greater danger of politicization of the LEAA effort.” S. REP. NO. 847, 94TH CONG., 2D SESS. 16 (1976).

When state legislatures *were* given a role in federal programs, it was generally quite restricted. For example, federal grant programs did not “recognize legislative changes to State executive plans unless approved by the Governor or the designated state agency.” *Federal Assistance System Should be Changed* at 23. Moreover, while some federal programs required the State to match a specific percentage of the grant funds, such requirements did not allow state legislatures to substitute alternatives for the executive proposals; the legislatures were thus faced with the choice of accepting proposals they may have found problematic or losing the federal grant money altogether. *Id.* at 23-24. Finally, many federal programs allowed state agencies to use in-kind matching resources to satisfy the match requirement, thereby enabling the state executive to bypass the legislature entirely. *Ibid.*

When, in 1980, the GAO asked Congress to provide a greater role for state legislatures in federally funded programs, Congress declined to do so. The GAO specifically proposed that Congress amend the Intergovernmental Cooperation Act of 1968, Pub. L. No. 90-577, 82 Stat. 1098, to ensure that, “on a cross-cutting basis applicable to all Federal grant programs, grant provisions assigning responsibilities to State executive officials not be construed as limiting or negating the powers of State legislatures under State law to appropriate Federal funds, to designate

State agencies, and to review State plans and grant applications.” *Federal Assistance System Should Be Changed* at iii. Congress made no such amendment. See 42 U.S.C. § 4201 (1968) (making no amendments regarding state legislative involvement in administration or oversight of federal funds between 1980 and 1981), *recodified* at 31 U.S.C. §§ 6501-6508 (making no amendments regarding state legislative involvement in administration or oversight of federal funds between 1981 and False Claims Act’s amendment in 1986).

In short, as of 1986, when it added the jurisdictional bar to the False Claims Act, Congress had provided essentially no function for state legislatures in the implementation, administration, or evaluation of federally funded programs. It is therefore likely that Congress did not envision a role for state legislatures in the investigation or audit of the use of federal funds. Not surprisingly, Congress did not include state legislative reports in the jurisdictional bar, and no “anomaly,” U.S. Br. *Am. Cur.* 8, results from that omission.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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SEPTEMBER 2009

APPENDIX

APPENDIX***AMICUS ORGANIZATIONS***

The Government Finance Officers Association seeks to enhance and promote the professional management of governments for the public benefit by identifying and developing financial policies and practices and promoting them through education, training, and leadership.

The International City/County Management Association is a non-profit professional and educational organization for chief appointed managers, administrators, and assistants in cities, towns, counties, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments worldwide.

The International Municipal Lawyers Association is a non-profit organization that has served as an advocate and resource for local government attorneys since 1935. With more than 2,500 members, IMLA operates as an international clearinghouse for information and cooperation on municipal legal matters.

The National Association of Counties is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's counties. It advances county-related issues with a unified voice before the federal government and assists counties in finding and sharing solutions.

The National League of Cities was established in 1924 by and for reform-minded state municipal leagues. Today it represents more than 19,000 cities, villages, and towns across the country. NLC's mis-

sion is to strengthen and promote cities as centers of opportunity, leadership, and governance; to provide programs and services that enable local leaders to better serve their communities; and to function as a national resource and advocate for the municipal governments it represents.

The U.S. Conference of Mayors is the official non-partisan organization of cities with populations of 30,000 or more. Among UCSM's primary roles are promoting the development of effective national urban/suburban policy, strengthening federal-city relationships, and ensuring that federal policy meets urban needs.