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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 *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF 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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BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting a limited and accountable Government, supporting the free

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[1] In accordance with this Court's Rule 37, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief, as reflected in letters lodged with the Clerk of the Court.

enterprise system, and opposing abusive enforcement actions and civil litigation by the Government and private litigants. WLF regularly participates in important constitutional and statutory litigation raising these issues.

WLF has appeared before this Court and other federal courts in several cases raising significant issues regarding the civil False Claims Act ("FCA" or "the Act"), 31 U.S.C. § 3729 *et seq*. *See, e.g.*, *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008); *R & F Props. of Lake County, Inc. v. United States ex rel. Walker*, *cert. denied*, 549 U.S. 1027 (2006); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Boeing Co. v. United States ex rel. Kelly*, *cert. denied*, 510 U.S. 1140 (1994); *Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514 (5th Cir. 1999).

In addition, WLF's Legal Studies Division produces and distributes legal public policy publications on numerous topics, including the FCA. *See, e.g.*, J. Andrew Jackson & Edward W. Kirsch, *The* Qui Tam *Quagmire: Understanding the Law in an Era of Aggressive Expansion* (WLF Monograph) (1998); J. Andrew Jackson, *A Law Gone Rogue: Time to Return Fairness to the False Claims Act* (WLF Legal Backgrounder) (Dec. 16, 2005).

The Allied Educational Foundation ("AEF") is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in legal reform and public policy. AEF has appeared as co-*amicus* with WLF in numerous cases before the Supreme Court on a broad array of public interest and legal policy issues.

Amici curiae submit that, over the last two decades, excessive FCA activity has spawned abusive punitive litigation against businesses, both large and small, to the detriment of those businesses, their employees, and their shareholders as well as to the public at large.

The FCA's *qui tam* provisions encourage private individuals with knowledge of fraud perpetrated against the United States Treasury to come forward and sue on behalf of the United States. To encourage whistleblowers (known as *qui tam* relators) to come forward and expose such fraud, the Government pays a bounty of up to 30% of all recoveries. In other words, the FCA's *qui tam* provisions essentially allow the Government to "purchase" from private individuals the information they may have about fraud on the United States Treasury. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999).

The potential bounties available under the FCA's *qui tam* provisions make this mechanism susceptible to abuse by opportunistic bounty hunters masquerading as true whistleblowers. One of the most effective bars to such parasitic lawsuits has been the jurisdictional public disclosure bar that Congress crafted in the 1986 amendments to the FCA. This public disclosure bar is a core feature of *qui tam* enforcement of the FCA, and it requires dismissal of *qui tam* suits where the *qui tam* relator's case is based on publicly disclosed information and the relator is not an original source to the Government.

In holding that state reports, hearings, audits, or investigations can *never* qualify as "public disclosures" for purposes of the FCA's public disclosure bar, the court of appeals below adopted a *per se* rule that is contrary to the text of the statute, the purpose of the public disclosure bar, and the position of a majority of the circuit courts that have considered this question. Because "public disclosure" is the trigger for determining jurisdiction, this misguided "rule" adopted by the court of appeals will allow cases based on publicly known information to proceed even though the relator does not qualify as an "original source." *Amici* believe that this brief will bring an additional perspective to the issue presented in this case and will assist the Court in determining whether state reports, hearings, audits, or

investigations may qualify as "public disclosures" to bar parasitic *qui tam* lawsuits.

SUMMARY OF ARGUMENT

The history of the FCA evidences Congress's attempt to balance the encouragement of true whistleblowing activity and the discouragement of opportunistic behavior. Indeed, Congress established the public disclosure bar in 1986 for the purpose of preventing parasitic lawsuits by *qui tam* relators bringing suits based on information readily available to the Government or the public. Since 1986, there have been numerous divergent interpretations of various aspects of this jurisdictional bar, a bar that goes to the very heart of a federal court's competence to hear a *qui tam* suit. *See Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1405-06 (2007); *see also Hughes Aircraft Co.*, 520 U.S. at 951.

In this case, the Court is called upon to address the first prong of the FCA's public disclosure bar by clarifying what types of disclosures qualify as "public disclosures" and to resolve a clear conflict among the courts of appeals.[2] In

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[2] Two courts of appeals, the Third Circuit and the Fourth Circuit (in the case below), have held that state reports, audits, or investigations never can serve as "public disclosures" for purposes of the FCA's public disclosure bar. *See United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745-46 (3d Cir. 1997); *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 306-07 (4th Cir. 2008). The Eighth, Ninth, and Eleventh Circuits have reached the opposite conclusion and have held that state reports, audits, or investigations can qualify as "public disclosures." *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003); *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006).

holding that state reports, hearings, audits, or investigations can *never* qualify as FCA "public disclosures," the court of appeals below adopted a rule contrary to the text of the statute, the purpose of the jurisdictional bar, the position of a majority of the circuit courts that have considered this issue, and common sense.

The Fourth Circuit's holding is contrary to the text of the public disclosure bar. The Fourth Circuit misapplies the doctrine of *noscitur a sociis* by dividing the provision into three categories and then applying the doctrine, in isolation, to only one of the categories. However, by examining the public disclosure provision in its entirety, it is clear that Congress did not intend to — and did not in fact — limit the types of "public disclosures" to federal sources. The Fourth Circuit's *per se* rule fails to take into consideration any other key factors, including the nature, scope, subject, and circulation of the state or local information.

Moreover, by limiting the second category to federal sources, the Fourth Circuit frustrates one of the key purposes of the public disclosure bar, which is to prevent parasitic lawsuits by *qui tam* relators who learn of fraud through public channels. Whether a parasitic *qui tam* relator learns of fraud from a state source or a federal source, the result should be the same in that the relator is not entitled to obtain a share of the Government's damages where the relator simply echoes information already in the public domain.

Finally, holding that state sources qualify as "public disclosures" would have no effect on the Government's ability to pursue FCA cases because the public disclosure bar is intended to encourage, not bar, FCA suits by the Government. Moreover, such a holding would not discourage true whistleblowers from filing FCA suits because such whistleblowers could show themselves to be "original sources" under the second prong of the public disclosure bar.

The decision below is demonstrably wrong. It improperly exempts from the jurisdictional bar an entire category of "public disclosures" even though the information was undoubtedly "public" and indisputably "disclosed." It allows certain *qui tam* cases to go forward even where Congress intended to strip federal courts of jurisdiction to hear those cases unless the case is brought by the Attorney General or an "original source." Respectfully, the Fourth Circuit's statutory analysis is flawed and its understanding of the purpose of the public disclosure bar incomplete. This Court should reverse the judgment below.

ARGUMENT

I. CONGRESS INTENDED THE PUBLIC DISCLOSURE BAR TO PREVENT PARASITIC LAWSUITS BY *QUI TAM* RELATORS WHO LEARNED OF FRAUD THROUGH PUBLIC SOURCES

"The history of the FCA qui tam provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). In 1986, after over 100 years of living with two very different extremes — one (before 1943) that allowed parasitic *qui tam* relators to cut and paste (literally) allegations from the Government's own pleadings and another (after 1943) that disallowed *qui tam* suits where the Government had knowledge of the information even if the relator was the Government's source — Congress forged a more balanced approach to screening for proper *qui tam* relators when it enacted the "public disclosure" bar codified in 31 U.S.C. § 3730(e)(4).

This provision states in full:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).[3]

To understand fully what this provision was designed to do, it is important to understand the history of the FCA's *qui tam* provisions and what led Congress to include the public disclosure bar in the 1986 amendments.[4]

As originally drafted, the FCA's *qui tam* provisions were very permissive, as well illustrated by *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which an enterprising *qui tam* relator made a direct copy of a criminal indictment, incorporated those allegations in a civil action under the FCA, and requested his statutory share (then half) of any subsequent civil judgment. *Id.* at 545. The relator ultimately prevailed in this Court based on the text of the

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[3] An "original source" for purposes of Section 3730(e)(4) is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). *See Rockwell*, 127 S. Ct. at 1403. The "original source" analysis is wholly separate from the public disclosure analysis and only comes into play if there indeed is a "public disclosure" within the meaning of Section 3730(e)(4)(A)..

[4] The recent amendments to the FCA did not change the language in the public disclosure provision. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617.

statute at the time. In response, Congress quickly amended the FCA to bar *qui tam* actions "based on evidence or information the Government had when the action was brought." Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 377, 57 Stat. 608.

Nearly 40 years later, the pendulum had swung the other way, as illustrated in *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). In that case, the court of appeals refused to allow the State of Wisconsin to act as a *qui tam* relator in a Medicaid fraud action (even though the investigation had been conducted solely by Wisconsin and the Federal Government learned of the fraud only because Wisconsin had reported it) because, the court held, the FCA barred *qui tam* actions "whenever the government has knowledge of the 'essential information upon which the suit is predicated' before the suit is filed, even when the plaintiff is the source of that knowledge." *Id.* at 1103.

Whereas the *Marcus* case was responsible for the 1943 amendments to the FCA, the *Dean* case was a key motivator for the 1986 amendments. There should be no doubt that Congress was keenly aware of both extremes — as illustrated by the *Marcus* and *Dean* cases — and used this history to shape what would become the public disclosure bar in the 1986 amendments to the FCA. As the Third Circuit has observed, with the 1986 amendments, Congress's "principal intent . . . was to have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision . . . and the restrictiveness of the post-1943 cases, which precluded suit even by original sources." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (internal citations omitted).

Thus, while the immediate impetus for Congress to add the public disclosure bar to the FCA in 1986 was the *Dean* decision, it must be recognized that, in stepping back from

that extreme, Congress endeavored to avoid a return to the other equally undesirable extreme — allowing parasitic *qui tam* relators to bring suits based on information readily available to the Government or the public. The new public disclosure bar was designed, as one court has explained, to obtain "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995) (internal quotation marks and citation omitted); *see also United States ex rel. Devlin v. State of Cal.*, 84 F.3d 358, 362 (9th Cir. 1996) (public disclosure bar intended "to bar parasitic suits through which a plaintiff seeks a reward even though he has contributed nothing significant to the exposure of fraud").

Under Section 3730(e)(4)(A), the first step in the public disclosure inquiry is for a court to determine whether the *qui tam* relator's complaint is based on allegations or transactions that have been publicly disclosed. Several circuit courts have noted that this initial analysis is meant to be a "quick trigger" test that, if necessary, will lead to the more nuanced "original source" analysis required under Section 3730(e)(4)(B). *See Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1476 n.18 (9th Cir. 1996); *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 n.10 (11th Cir. 1994) (per curiam); *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552-53 (10th Cir. 1992). For this reason, courts have held that a "public disclosure" need only be sufficient to have "set the government squarely on the trail of the alleged fraud," *Fine*, 70 F.3d at 571, or to have raised the "specter of 'foul play,'" *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 687 (D.C. Cir. 1997), in order to trigger the jurisdictional bar. But a proper interpretation of "public disclosure" is also important because, if information is not found to be "publicly disclosed," then a relator who is not a

true whistleblower — not an "original source" — is allowed to bring the case. Furthermore, because of the FCA's "first to file" provision, 31 U.S.C. § 3730(b)(5) , a parasitic relator who wins the race to the courthouse bars a *qui tam* suit by a true whistleblower.

II. THE FOURTH CIRCUIT'S *PER SE* RULE IS CONTRARY TO THE TEXT AND PURPOSE OF THE PUBLIC DISCLOSURE BAR AND MUST BE REJECTED

The FCA's public disclosure bar only comes into play if the purported disclosure qualifies as a "public disclosure." Section 3730(e)(4)(A) can be roughly divided into three categories of "public disclosures":

Category 1: "a criminal, civil, or administrative hearing";

Category 2: "a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation"; and

Category 3: "the news media."

31 U.S.C. § 3730(e)(4)(A). The interpretation adopted by the court of appeals below imposes an extra-textual, bright line rule for Category 2: The court's rule prohibits a *state* audit report or investigation from qualifying as a "public disclosure" regardless of any other factors, including the scope, nature, subject, or circulation of the state report.

The principal basis for the Fourth Circuit's *per se* rule was the court's mistaken belief that the doctrine of *noscitur a sociis* required the adjective "administrative" in Category 2 to mean "federal administrative," thus restricting Category 2 only to federal "administrative . . . reports, hearings, audits, or investigations." *Wilson*, 528 F.3d at 302. The court also reasoned that the public disclosures identified in Category 2 should be limited to "federal" sources because of the purpose

behind the public disclosure bar. *Id.* at 302-07. Respectfully, the Fourth Circuit's statutory analysis is flawed and its understanding of the purpose of the public disclosure bar incomplete.

A. THE RULES OF STATUTORY CONSTRUCTION SHOULD NOT BE USED TO DIVORCE THE PUBLIC DISCLOSURE BAR FROM ITS PURPOSE AND COMMON SENSE READING

In concluding that the term "administrative" in Category 2 must mean "federal administrative," the Fourth Circuit (as did the Third Circuit before it) erroneously applied the doctrine of *noscitur a sociis* — that a statutory "phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Looking at the three examples in Category 2, the Fourth Circuit reasoned that "administrative" must mean "federal administrative" because the other two examples, "congressional" and "Government Accounting Office," clearly were federal sources. *Wilson*, 528 F.3d at 302-03.

Respectfully, this approach misses the forest for the trees. Although it is true that a "word may be known by the company it keeps," this Court has also admonished that the doctrine of *noscitur a sociis* is "not an invariable rule, for the word may have a character of its own not to be submerged by its association." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). Moreover, in applying this rule to Category 2, the court of appeals also should have taken into account what Congress was trying to accomplish with *the entirety* of the types of "public disclosures" set forth in Section 3730(e)(4). *See Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990) ("Thus, the phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts.").

It is, in fact, the broader understanding of Category 2 adopted by the Eighth, Ninth, and Eleventh Circuits that "accords with the broad purposes of the legislation." *Russell Motor Car Co.*, 261 U.S. at 521.

In this case, the Fourth Circuit's narrow focus on the purported "federal" nature of the three examples in Category 2 completely ignores the thrust of all of the categories of "public disclosures" in Section 3730(e)(4)(A). Although the Fourth Circuit acknowledged that neither Category 1 nor Category 3 was limited to "federal" sources, the court's analysis gave short shrift to the expansiveness of those two categories.

Lower courts have almost universally interpreted Category 1 and Category 3 to be quite broad in their application. The circuit courts are in agreement that Category 1 includes both state and federal sources. *See, e.g.*, *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 330, 333 (3d Cir. 2005); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1341, 1350 (4th Cir. 1994); *United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004); *United States ex rel. Gilligan v. Medtronic, Inc.*, 403 F.3d 386, 390 (6th Cir. 2005); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1161 n.6 (10th Cir. 1999). Indeed, even though the text of Category 1 states that it applies only to "criminal, civil or administrative *hearings*," the lower courts have properly and necessarily interpreted this to cover not only actual *hearings* but all proceedings or other aspects of a court case, whether state or federal. *See, e.g.*, *A-1 Ambulance Serv., Inc. v. State of Cal.*, 202 F.3d 1238, 1243-44 (9th Cir. 2000); *Springfield Terminal*, 14 F.3d at 652. The Third Circuit, which along with the Fourth Circuit has read Category 2 to be limited to federal sources, has gone so far as to interpret the term "hearing" in Category 1 to encompass discovery materials exchanged by private parties to a litigation in state or federal court, even

when those materials are not filed with the court and are, thus, not part of the public court record. *See Stinson*, 944 F.2d at 1158-60.

Similarly, the term "news media" in Category 3 has been applied broadly. The lower courts have defined "news media" to mean any published information disseminated to the public in a "periodic manner." *E.g.*, *United States ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 463 (S.D.N.Y.), *aff'd*, 53 F. Appx. 153 (2d Cir. 2002). In applying this definition, courts have had little trouble concluding that "news media" encompasses not only major national daily newspapers, such as the *New York Times* and the *Wall Street Journal*, but also regional newspapers, including the *Lansing State Journal*, the *Syracuse Herald*, and even unspecified "news media" in Nassau and Suffolk Counties (New York). *See, e.g.*, *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476 (2d Cir. 1995); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 14 (2d Cir. 1990); *United States ex rel. Dingle v. Bioport Corp.*, 270 F. Supp. 2d 968, 977 (W.D. Mich. 2003). Courts also have interpreted this category to include a broad array of news outlets besides traditional newspapers. *See, e.g., United States ex rel. Radcliffe v. Purdue Pharma LP*, 582 F. Supp. 2d 766 (W.D. Va. 2008) (holding that a pharmaceutical product's package insert qualified as a news media "public disclosure").

But courts have gone further. They have also construed "news media" to encompass publications with a limited circulation, such as scientific, scholarly, or technical publications. For example, in *Alcohol Foundation*, the district court *agreed with the Government* that the relator's allegations had been publicly disclosed in scientific publications that the relator claimed were "too technical for the average member of the public to understand" and were distributed to a small, professionally specialized reader base. 186 F. Supp. 2d at 463. In rejecting the relator's narrow

reading of the term "news media," the court noted that a similarly "cramped" interpretation of "hearing" had been rejected based on a plain reading of the public disclosure bar and reasoned that

> [n]o principle of statutory construction or public policy would compel a cramped reading of the term "news media" or the imposition of a judicially created limit on "news media" to encompass only the newspaper context.

Id. (citing *A-1 Ambulance*, 202 F.3d at 1244).

In *Dunleavy*, the Third Circuit (much like the Fourth Circuit in this case) found it "hard to believe that the drafters of [Category 2] intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character." 123 F.3d at 745. But the force to this observation falls away when one considers the placement of Category 2 — sandwiched as *it* is between Category 1 and Category 3, neither of which is limited to "federal" sources. Given the generally broad application of Categories 1 and 3, it simply defies logic and common sense to impose a reading of Category 2 that is so dramatically different from these other two.

B. ELIMINATING STATE SOURCES FRUSTRATES ONE OF THE PURPOSES OF THE PUBLIC DISCLOSURE BAR

Although the Fourth Circuit claimed that limiting Category 2 to federal sources was faithful to the intent of Congress, *Wilson*, 528 F.3d at 302-07, this claim does not withstand scrutiny.

The main thrust of the Fourth Circuit's reasoning for limiting Category 2 to federal sources was that "[i]nformation about federal investigations and audits is easily available to the members of the Department of Justice charged with enforcing the FCA" and because "the federal

government is unlikely to learn about state and local investigations." *Wilson*, 528 F.3d at 306. Thus, the court reasoned, "a large number of fraudulent claims against the government would go unremedied without the financial incentives offered by the *qui tam* provisions of the FCA." *Id*. Even assuming that such concerns are factually grounded, they address, at best, only half of what Congress sought to remedy in 1986 when it forged the public disclosure bar. Indeed, although the Fourth Circuit's analysis focused on avoiding overly strict application of the public disclosure bar whereby even original sources can be barred from bringing suit (in other words, overturning *Dean*), that singular focus fails to account for Congress's other goal — to avoid a return to *Marcus* by also preventing "potential . . . parasitic lawsuits by those who learn of the fraud through public channels." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 319 (2d Cir. 1992). *See also* S. Rep. No. 99-345 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5269 (Congress was seeking "the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.").

Moreover, there is no explicit or implicit requirement in Section 3730(e)(4)(A) that the disclosure actually be known or transmitted — or even readily available — to the Federal Government for it to qualify as a "public disclosure." Certainly, as a practical matter, there is no reason to think that federal officials are conducting routine electronic searches for news media accounts exposing potential fraud on the federal fisc. Nevertheless, for purposes of Category 3, a short article describing a scheme to defraud the Government appearing on page 5 of the "Metro" section of the *Topeka Capital-Journal* is just as much a "public disclosure" as a full-fledged exposé of a scheme to defraud the Government splashed across the front page of the *Washington Post*. Ready access to the "public disclosure" by federal officials in Washington or elsewhere is just not part of the test created by Congress.

C. IT IS ENTIRELY APPROPRIATE FOR STATE SOURCES TO QUALIFY AS "PUBLIC DISCLOSURES"

There is no injustice or unfairness in allowing state-originated materials to qualify as "public disclosures." State-originated materials are just as "public" and just as "disclosed" as federal reports, hearings, audits, or investigations. Regardless of the fact that the allegations in a state report have become "public," the Fourth Circuit's *per se* ban against state-generated "public disclosures" would allow wholly parasitic *qui tam* suits to go forward.

In contrast, the Eleventh Circuit in *Battle* invoked the public disclosure bar under similar facts, thereby preventing parasitic claims from going forward. The Eleventh Circuit confronted a case in which the *qui tam* relator, a former university employee, filed an FCA suit against individual university administrators for alleged fraudulent activities in connection with the Federal Work Study Program. 468 F.3d at 758. According to the Eleventh Circuit, the relator's FCA allegations relied "chiefly on information that was publicly disclosed" in audit reports issued by the Georgia Department of Audits. *Id*. at 762. These state audits "revealed serious noncompliance with federal regulations and risk factors for fraud." *Id*. at 759. In 2002, the university reached a $2.17 million settlement with the U.S. Department of Education "to settle questioned costs identified by the state auditors in audits from 1997-2000 and in lieu of further file review." *Id*.

In the district court, the relator "referred Defendants to the audits performed by the State of Georgia Department of Audits and Accounts" and sought "all damages allowed under the False Claims Act for these violations." *Id* at 762. This blatant attempt by the relator to obtain a share of the Government's damages by simply regurgitating the findings of an official investigation sounds eerily familiar to the scenario in *Marcus*, where the *qui tam* relator simply cut and pasted the allegations from a criminal indictment into his

FCA complaint and demanded half of any subsequent civil judgment. *See Marcus*, 317 U.S. at 545. Yet, under the Fourth Circuit's *per se* rule, a relator not an original source could use these state audit reports to bring a *qui tam* case because the public disclosure bar would not be triggered. The Eleventh Circuit, on the other hand, had no difficulty concluding in *Battle* that the state report satisfied the public disclosure bar in Section 3730(e)(4)(A) and, thus, affirmed the dismissal of the relator's FCA claims. 468 F.3d at 763.

D. INTERPRETING THE PUBLIC DISCLOSURE BAR TO INCLUDE STATE SOURCES HAS NO EFFECT ON ENFORCEMENT OF THE FCA, NOR DOES IT DISCOURAGE TRUE WHISTLEBLOWERS FROM FILING FCA SUITS

Allowing state reports, hearings, audits, and investigations to qualify as "public disclosures" has no effect whatsoever on the *Government*'s ability to pursue FCA cases. Actions under the FCA may be initiated by the Attorney General or by a *qui tam* relator. *See* 31 U.S.C. §§ 3730(a) & (b). In addition, the Government may intervene in an action initially brought by a relator, thereby taking over the suit. *Id.* § 3730(b)(4)(A). As this Court has noted, the jurisdictional nature of the public disclosure bar has no impact on the ability of the United States to pursue an FCA action, whether the Attorney General initially brought the case or whether the Government chooses to intervene in a case filed by a *qui tam* relator. *See Rockwell*, 127 S. Ct. at 1411.[5]

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[5] It also should be noted that more than 95% of the recoveries in FCA cases arise in cases in which the Department of Justice either intervenes in a *qui tam* case or initiates a case on its own. *See, e.g.*, U.S. Gov't Accountability Office, GAO-06-320R, *Information on False Claims Act Litigation*, at 35 (2006), *available at*

Likewise, allowing state reports, hearings, audits, and investigations to qualify as "public disclosures" should have no effect on true whistleblowers. Indeed, the determination that a *qui tam* relator's claims are based on a "public disclosure" is only the first part of the public disclosure analysis. Under the "original source" exception, even a *qui tam* suit based on a "public disclosure" can go forward if the *qui tam* relator is a true whistleblower and "has direct and independent knowledge" of the alleged fraud. 31 U.S.C. § 3730(e)(4).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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[Footnote continued from previous page]

http://www.gao.gov/new.items/d06320r.pdf (analyzing FCA case data from the Department of Justice for Fiscal Years 1987-2005).