

No. 08-304

**In the
*Supreme Court of the United States***

GRAHAM COUNTY SOIL & WATER CONSERVATION
DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,
Respondent.

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

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

I. THE LANGUAGE AND STRUCTURE OF THE FALSE CLAIMS ACT ESTABLISH THAT THE PUBLIC DISCLOSURE BAR COVERS STATE SOURCES.

Respondent and her amici repeatedly assert that the False Claims Act is “exclusively federal” in nature. *See, e.g.*, Resp. Br. 18; U.S. Br. 9, 13, 15, 18. From this assertion, they conclude that Congress must have intended that the public disclosure bar should apply only to federal (but not state) hearings, reports, audits or investigations.

Unquestionably, the focus of the False Claims Act is the recovery of funds fraudulently obtained from the United States. The fact that the statute focuses on the recovery of federal funds, however, does not speak to what Congress intended when it drafted a public disclosure bar so as to preclude *qui tam* actions based on public information.

Respondent brushes aside the many provisions of the False Claims Act that are not “exclusively” federal in nature. First, the public disclosure bar expressly includes non-federal materials. 31 U.S.C. § 3730(e)(4)(A) (2006) (“news media”). Second, Congress used the word “administrative” elsewhere in the Act to reference both state and federal administrative proceedings. 31 U.S.C. § 3733(l)(7)(A) (2006). Third, Congress recognized the unique role played by States (and their political subdivisions) and, therefore, treated them differently from private parties. 31 U.S.C. § 3732(b) (2006). Fourth, Congress expressly amended 31 U.S.C. § 3729 in 1986 to clarify that “claims submitted to State agencies” in connection with a cooperative federal and state program fall within the scope of the

Act. S. Rep. No. 99-345, at 22 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5287; *see Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003). The repeated statements by Respondent and her amici that the False Claims Act is “uniquely federal” do not shed light on the specific meaning of 31 U.S.C. § 3730(e)(4)(A).¹

In drafting the public disclosure bar, Congress used the word “administrative” without the qualifier “federal” – a qualifier that Congress uses in other statutes to limit the word “administrative” to federal proceedings. *See, e.g.*, 15 U.S.C. § 717n(d) (2006); 16 U.S.C. § 1466 (2006). Neither the language, context

¹ In arguing that the focus of the False Claims Act is exclusively federal, Respondent quotes language from the Act that was amended earlier this year, 31 U.S.C. § 3729(a)(2)(C) (2006) (authorizing district court to reduce amount of award, if defendant fully cooperated with the Government before a “criminal prosecution, civil action, or administrative action had commenced under this title”). Respondent and her amici point out that the reference to an “administrative action” in Section 3729 must mean a federal administrative proceeding because only the United States can bring an administrative action “under this title.” *See* U.S. Br. 14. (The American Center for Law and Justice goes so far as to quote the recently amended Section 3729(a)(2)(C) and then incorrectly states that the 2009 Amendments “did not change the language of § 3729 quoted herein.” ACLJ Br. 9 n.3, 10; *but see* Act of May 20, 2009, § 4, Pub. L. No. 111-21, 123 Stat. 1621 (adding quoted language to Section 3729)). Respondent’s argument, however, ignores the fact that “administrative,” as used in 31 U.S.C. § 3730(e)(4)(A), does not include the qualifier “under this title.” Given the vastly different language that Congress used in Section 3729(a)(2)(C) versus Section 3730(e)(4)(A), one does not clarify the meaning of the other.

nor the structure of the statute indicates that Congress intended to limit the word “administrative” to “federal administrative” proceedings. Rather, by including non-federal sources (criminal, civil and administrative hearings and news media) within the scope of the public disclosure bar, Congress signaled that the word “administrative” should not be limited to federal sources.

A. THE PHRASE “CRIMINAL, CIVIL, OR ADMINISTRATIVE HEARING” INCLUDES STATE PROCEEDINGS.

The public disclosure bar lists seven specified sources of information. The first and second clauses each contain three sources. The third clause contains a single source (news media). The circuit courts have properly read the first clause as including *state* criminal, civil and administrative hearings. Thus, the vast majority of the items in the public disclosure bar are not federal sources.

Faced with this unanimous construction of the first clause, Respondent and her amici argue that this unbroken line of authority is in error. Additionally, they assert that each clause of the public disclosure bar should be read separately. Both of these arguments should be rejected.

Respondent argues that the phrase “criminal, civil or administrative hearing” in the first clause of the public disclosure bar is limited to *federal* hearings. Resp. Br. 23; *see* U.S. Br. 25-26. As the circuit courts have repeatedly held, however, there is “little doubt” that a state court hearing “qualifies as a public disclosure.” *United States ex rel. Bledsoe v. Cmty. Health Sys.*, 342 F.3d 634, 645 (6th Cir. 2003); *see* Pet.

App. at 26a (“This court and others have understood clause one to encompass state as well as federal hearings.”); *Federal Recovery Servs. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995) (state court actions constitute “‘public disclosures’ within the meaning of the statute”); *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 918 (9th Cir. 2006) (“state and local administrative hearings are sources of public disclosure”); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1161 n.6 (10th Cir. 1999) (“Our reading of § 3730(e)(4)(A), together with other provisions of the False Claims Act, does not convince us this statute’s reference to ‘civil, criminal and administrative hearings’ applies only to federal proceedings, and not state proceedings.”).

The Ninth Circuit’s decision in *A-1 Ambulance Serv. v. California*, 202 F.3d 1238 (9th Cir. 2000), captures why the circuit courts have been unanimous on this point:

The unambiguous text of the first category of public fora described in § 3730(e)(4)(A) does not contain any federal limitation. Congress could have easily limited the public disclosure bar to “*federal* criminal, civil, or administrative hearings,” but chose not to do so. If the statutory language is clear, that is the end of our inquiry. We will not add a term to the statute that Congress elected not to include.

Id. at 1244 (citation omitted).

Respondent discounts these cases, asserting that several have only a limited discussion of this issue. Federal judge after federal judge, however, has read

this language and concluded that the phrase “criminal, civil or administrative hearing” must be read as including state proceedings. Because the issue is so clear, it has not merited lengthy discussion among the lower courts. The reasoning of these courts is sound. Congress did nothing to indicate that the first clause of Section 3730(e)(4)(A) should be limited to federal sources. Congress should not be presumed to have drafted legislation by stealth.

Noting that the public disclosure bar contains three clauses (the first two beginning with the preposition “in” and the last with the preposition “from”), the United States further argues that these three clauses should be read entirely separately. U.S. Br. 24-25. The United States, however, ignores the fact that when Senate Bill 1562 was introduced, it contained only two clauses – not three. S. 1562, 99th Cong., 1st Sess. (Aug. 1, 1985). The likely explanation as to why Congress later added an additional preposition was simply to improve the readability and flow of the sentence. More importantly, each of the seven items in 31 U.S.C. § 3730(e)(4)(A) set forth the *qui tam* claims that Congress intended to bar. Accordingly, it makes little sense for the second clause to be read differently from the list as a whole. In determining whether it is logical to use *noscitur a sociis*, the grouping as a whole should be considered, rather than focusing on one individual clause, particularly when that clause is not logically distinct from the remainder of the list. *See Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889) (in applying *noscitur a sociis*, a clause must be read “in connection with the other clauses and parts of the act”); *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991) (noting “cardinal rule that a statute is to be read as a whole”).

This is particularly true given the Senate and House Reports do not speak of the public disclosure bar in terms of separate and distinct categories, but rather simply refer to the bar as being applicable to “public information.” S. Rep. No. 99-345, at 28, 1986 U.S.C.C.A.N. at 5293; H. Rep. No. 99-660, at 23 (1986).

The public disclosure bar includes state criminal hearings, state civil hearings, state administrative hearings and reports by the news media. Because five of the seven items in the statutory list include non-federal sources, it would be inappropriate to apply *noscitur a sociis* – thereby ignoring Congress’ overall intent. See *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 379-80 (2006) (“[N]oscitur a sociis is no help absent some sort of gathering with a common feature to extrapolate.”); *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923) (noting that a “word may have a character of its own not to be submerged by its association”).

**B. THE WORD “ADMINISTRATIVE” AS
USED IN THE PUBLIC DISCLOSURE BAR
DOES NOT INCLUDE PRIVATE
HOSPITALS AND UNIVERSITIES.**

Only the government conducts administrative hearings. See Black’s Law Dictionary 51 (9th ed. 2009) (definition of “administrative hearing”: “An administrative-agency proceeding in which evidence is offered for argument or trial.”); *id.* at 71 (definition of “administrative agency”: “A governmental body with the authority to implement and administer particular legislation.”). Both the first and second clause of 31 U.S.C. § 3730(e)(4)(A) include the phrase “administrative . . . hearing.” Accordingly, Congress

has made clear that “administrative” as used throughout the public disclosure bar describes governmental agencies.² The question before this Court is whether those governmental agencies include state and local government or only the federal government.

Faced with a dictionary definition of “administrative” that expressly includes state government, *see* American Heritage Dictionary of the English Language 22 (4th ed. 2000), Respondent and her amici attempt to cast doubt on the plain meaning of this word. Respondent, for example, asserts that the definition of “administration” includes the management of a business. Resp. Br. 14. She therefore asserts that applying this definition would result in the public disclosure bar including hearings and investigations conducted by sports leagues and charitable organizations. *Id.* Similarly, the United States notes that the definition of “administration” includes persons who manage a school or college. U.S. Br. 23. The United States proceeds to argue that “once petitioners effectively concede” that 31 U.S.C. § 3730(e)(4)(A) does not include a report by a private college, “the game is up, because the contextual factors . . . show that [the public disclosure bar] is limited to *federal* reports and audits.” U.S. Br. 24.

² Neither Respondent nor her amici assert that the adjective “administrative” has different meanings within the same clause. Because the phrase “administrative . . . hearing” is limited to hearings conducted by a governmental body, the phrases “administrative . . . report[s],” “administrative . . . audit[s],” and “administrative . . . investigation[s]” are similarly limited.

Although the United States accurately quotes the dictionary definition of “administration,” it ignores the fact that the phrases “administrative hearing” and “administrative . . . report[s], hearing[s], audit[s] or investigation[s]” are limited to administrative agencies. Simply because a word has multiple definitions does not render that word ambiguous for – as is the case here – “all but one of the meanings is ordinarily eliminated by context.” *Deal v. United States*, 508 U.S. 129, 131-32 (1993). Congress did not intend to include audits and reports of *private* hospitals and *private* universities within the *public* disclosure bar. In contrast, the language, purpose and structure of the Act establish that Congress intended to include State and local government sources within the scope of the public disclosure bar.

The phrase “administrative” as used in the public disclosure bar is linked to administrative agencies – governmental sources. The word “administrative” includes both state and federal administrative agencies as demonstrated by the dictionary definition of the word and the myriad of statutes in which Congress uses the phrase “administrative proceedings” to mean both state and federal administrative agencies. See Pet. App. 23a (“there is nothing inherently federal about the word ‘administrative’”).

Reading the Act as including state sources is consistent with Congress’ expressed intent to preclude *qui tam* actions that are based on public information. S. Rep. No. 99-345, at 28, 1986 U.S.C.C.A.N. at 5293; H. Rep. No. 99-660, at 23; see *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1162 (3d Cir. 1991) (Scirica, J., dissenting) (“Congress strengthened the *qui tam* provisions of the False Claims Act to encourage more people to bring to light

non-public information regarding fraud.”). The text chosen by Congress reflects a public policy choice – to place the work product of state government (consistent with principles of federalism) on the same par as a federal investigation. It also reflects a policy choice not to treat state audits and investigations as inferior to local news reports. *Noscitur a sociis* should not be used to distort that congressional intent. The word “administrative” includes state sources unless the context shows a contrary intent. Nothing in the language of the statute expresses such a contrary intent.

II. PETITIONERS’ CONSTRUCTION OF THE PUBLIC DISCLOSURE BAR ADVANCES THE PURPOSES OF THE 1986 AMENDMENTS.

Construing the public disclosure bar as including state sources is consistent with the purpose of the 1986 Amendments. Congress recognized that *qui tam* actions are necessary to encourage insiders to disclose fraud against the United States. Congress, however, chose to preclude *qui tam* actions by strangers to the fraud who rely on public information.

Given the prevalence of joint federal and state programs, as well as the extensive reporting that is required when States and local governments receive federal funds, Congress appropriately concluded that parasitic relators should not be permitted to base a *qui tam* action on state sources of public information. Moreover, Respondent’s assertion that Petitioners’ reading of the public disclosure bar produces an anomalous result is not persuasive.

A. THE PURPOSE OF THE 1986 AMENDMENTS IS TO ENCOURAGE THE FILING OF *QUI TAM* ACTIONS BY INFORMERS – NOT STRANGERS TO THE FRAUD WHO MERELY RELY ON PUBLIC INFORMATION.

The purpose of the *qui tam* provisions is to encourage insiders – true informants – to come forward with evidence of false claims against the Government. *See, e.g.*, S. Rep. No. 99-345, at 4, 1986 U.S.C.C.A.N. at 5269. Respondent’s argument that the Act should be construed to allow strangers to the fraud to bring a *qui tam* action based on public information cannot be squared with congressional intent.

For well over 700 years, *qui tam* actions have been used in England (and later the American Colonies) to encourage “informers” to come forward with wrongs against the Crown. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775 (2000). Such statutes allow the informers “to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves.” *Id.*

Consistent with this history, Congress made clear that the 1986 Amendments to the *qui tam* provisions were intended to motivate insiders to disclose fraud against the United States. The Senate Report, for example, repeatedly emphasizes that fraud against the Government has flourished as a result of a “conspiracy of silence.” S. Rep. No. 99-345, at 6, 14, 1986 U.S.C.C.A.N. at 5271, 5279. The Senate Report recognizes that there are “serious roadblocks to obtaining information” as a result of the covert nature of fraud. *Id.* at 4, 1986 U.S.C.C.A.N. at 5269. The

Report concludes that paying a bounty for information that would otherwise be hidden from the Government is necessary to break the conspiracy of silence: “Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.” *Id.* at 4, 1986 U.S.C.C.A.N. at 5269. As one witness explained, “without cooperating employees,” the Government “would rarely detect abuses” by its contractors. *Id.* at 5-6, 1986 U.S.C.C.A.N. at 5270-71.

The House Report concludes that it is appropriate to offer incentives to *qui tam* plaintiffs when the Government “may not know of [the] fraud” so that “private individuals who are aware of fraud being perpetrated against the Government” disclose that information. H. Rep. No. 99-660, at 23. The Report recognizes that often a false claim action may not be effectively prosecuted in the absence of an insider who “may be the only person who can bring the information forward.” *Id.* Thus, the Act should be read with an eye toward encouraging employees and other insiders to break the conspiracy of silence – not to reward plaintiffs who base their claim on public documents.

Respondent and the United States incorrectly assert that Petitioners’ construction of the False Claims Act undermines the purpose of the 1986 Amendments. Resp. Br. 34-39. Specifically, the United States argues that Congress intended to limit the scope of the bar as it existed prior to 1986 and that Petitioners’ construction of the bar would expand the prior bar. U.S. Br. 9, 21, 31. Respondent and the United States misinterpret the purpose of *qui tam* actions and the public disclosure bar.

Prior to 1943, there was no public disclosure bar. A plaintiff could literally copy a criminal indictment

and file a *qui tam* action based on that indictment. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). Congress, however, recognized that the interests of the United States were not served by allowing a *qui tam* action by a plaintiff who “br[ings] no information of his own to the suit.” See S. Rep. No. 99-345, at 10, 1986 U.S.C.C.A.N. at 5275. Accordingly, Congress amended the Act in 1943 to place restrictions on *qui tam* actions. At that time, the statute was amended to bar *qui tam* actions if the United States had knowledge of the fraud prior to the filing of the action. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608, 609.

Congress ultimately recognized that the bar, as adopted in 1943, cut off many valid *qui tam* actions. In 1986, Congress abandoned the government knowledge bar and instead replaced it with a list of specific disclosures that would bar *qui tam* actions, regardless of whether the United States had knowledge of the specific disclosure. Thus, the focus of the bar shifted from information known to the United States to information that had been placed in the public domain. Congress’ intent, both pre-1986 and post-1986, remained to prevent a *qui tam* action by a plaintiff who “br[ings] no information of his own to the suit.” See S. Rep. No. 99-345, at 10, 1986 U.S.C.C.A.N. at 5275. The only question before Congress was the most effective means to achieve this result.

Reading the public disclosure bar as including state sources does not expand the public disclosure bar beyond what Congress intended. Rather, Petitioners’ reading of the bar is consistent with Congress’ stated view that relators who bring no information of their own to the suit and simply rely on information in the public domain should not be permitted to siphon off a portion of the Government’s recovery. Congress

replaced the government knowledge bar with a list of specified public disclosures – a list that is not limited to federal sources. Recognizing that this list is not limited to federal sources (as all must concede given the list’s inclusion of “news media”) is not an “expansion” of the bar.

Similarly, recognizing that the bar includes non-federal sources does not constitute a return “to the unduly restrictive ‘government knowledge’ standard that Congress rejected in the 1986 FCA amendments.” U.S. Br. 31 (quotations omitted). Petitioners’ construction does not bring the bar anywhere close to what it looked like from 1943 to 1986. Prior to 1986, the public disclosure bar cut off all *qui tam* actions if the United States had knowledge of the fraud, even if the relator was an original source. After 1986, the test is: 1) whether the disclosure falls within certain enumerated categories of information that are available to the public and 2) if so, whether the plaintiff is an original source of that information. Simply because Congress recognized that the pre-1986 test unduly barred *qui tam* claims does not mean that Congress wanted to allow *qui tam* actions by persons who base their claims on information already in the public domain.

Petitioners’ construction of the public disclosure bar recognizes that Congress adopted reasonable limits on *qui tam* actions and chose to cut off opportunistic suits in which the plaintiff adds no value. In drawing that line, Congress concluded that state administrative reports should be included in the bar just as are state administrative hearings and reports by the news media.

B. THE SINGLE AUDIT ACT AND THE PREVALENCE OF JOINT STATE AND FEDERAL PROGRAMS DEMONSTRATES THAT THE FEDERAL GOVERNMENT HAS OPEN ACCESS TO STATE REPORTS THAT SHOW IMPROPER USAGE OF FEDERAL FUNDS.

The United States argues, without citation to authority, that the public disclosure bar should be read as limited to “information publicly disclosed in a way suggesting that the federal government was already, or was likely to be, on the trail of fraud.” U.S. Br. 8; *see id.* at 1, 16, 27-28. Even if this standard were applied (which is not based on the statutory text or the legislative history), the United States’ assertion that it is unlikely to learn about state and local government investigations is not well founded. *See* U.S. Br. 6, 21.

First, as this case illustrates, when States and local governments are involved in the expenditure of federal funds, the federal government is generally involved in the administration of that program. Like many other federal programs, the Emergency Watershed Protection Program is a joint federal and state program in which the costs of the program are paid by both federal and local government. Here, the day-to-day operations of the local soil and water conservation district were run by a federal employee. This federal employee was well-aware of every aspect of the operation of the local district, including the fact that the work at issue (as detailed in the audit report) was not sent out for bids. To say that such reporting is not a source of disclosure that will logically place the United States “on the trail of fraud” ignores reality.

Second, the Single Audit Act requires state and local governments to have audits performed of their operations when the entity's expenditure of federal funds exceeds a specified threshold. 31 U.S.C. § 7502(a)(2)(A) (2006). The audit at issue in this case was performed by an independent auditor who was retained to ensure that Graham County complied with the Single Audit Act.³ This audit was available to the United States. 7 C.F.R. § 3015.75(c) (1995) (requiring that workpapers to be available to the United States).

The Single Audit Act provides the United States with an easy method to monitor misappropriation of federal funds. Under the Single Audit Act, local governments must file annually a financial audit with the federal government. 31 U.S.C. § 7502(h) (2006). The auditor must report to the federal government any non-compliance with laws and regulations discovered as a result of the audit. 31 U.S.C. § 7502(c), (g)(2) (2006). Such an audit is a quintessential example of a disclosure that logically should put the United States on "the trail of fraud." The only purpose for these

³ Respondent argues that the audit at issue was a local government audit "only in a narrow, technical sense," because Crisp & Hughes was an independent accounting firm retained by Graham County. Resp. Br. 37. The fact that this audit was conducted by an independent auditor retained by the County versus a county employee is immaterial. *See, e.g., United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174-75 (5th Cir. 2004); *Hays v. Hoffman*, 325 F.3d 982, 988-89 (8th Cir. 2003). Under Respondent's theory, whenever the federal government commissions an independent contractor to conduct a study, that federal report would fall outside of the scope of the public disclosure bar.

audits is to warn the United States when federal money is being misspent.

Remarkably, the United States argues that a state administrative report required by the Single Audit Act “may be provided to a federal government agency and placed on an internet clearinghouse without triggering any alarm bells within the federal government.” U.S. Br. 30. Unlike the United States Department of Justice, Petitioners are unwilling to assume that the federal government is not competent to take action when it receives a local government audit that identifies misappropriation of federal funds, particularly when that audit is filed with the United States pursuant to a statute designed to root out inappropriate expenditures.

The assertion by Respondent and her amici that state and local government audits are insufficient to put the federal government on notice of fraud is not well taken. Reports by state and local governments are much more likely to put the federal government on the trail of fraud than will an obscure report by a weekly newspaper of limited circulation.⁴

⁴ The United States asserts that if the filing of a local government administrative audit under the Single Audit Act constitutes a public disclosure under 31 U.S.C. § 3730(e)(4)(A), then the filing of an audit by a private hospital would also constitute a public disclosure. U.S. Br. 29-30. The United States’ brief, however, distorts Petitioners’ argument. Non-governmental audits do not fall within the scope of the public disclosure bar, and the Single Audit Act does not change that result. The Single Audit Act, however, demonstrates that local government audits are readily available to the federal government and are not “stashed away with millions of other documents in dusty

**C. CONGRESS' FAILURE TO INCLUDE
STATE LEGISLATIVE REPORTS IN THE
PUBLIC DISCLOSURE BAR DOES NOT
PRODUCE AN ANOMALOUS RESULT.**

Respondent observes that the public disclosure bar includes “congressional” reports and therefore appears to exclude state legislative reports. In her view, this supports her constricted reading of “administrative . . . report, hearing, audit, or investigation” because it would be anomalous for Congress to include state administrative reports within the scope of the public disclosure bar but exclude state legislative reports. Resp. Br. 15.

Respondent, however, ignores the fact that a completely logical reason exists why Congress did not include state legislative reports in the public disclosure bar. At the time of the 1986 Amendments, many members of Congress viewed state legislatures as having little to no role in the oversight of federal programs. That role was filled by state administrative agencies. The limited role played by state legislatures is detailed at length in reports by the General Accounting Office and others prior to the enactment of the 1986 Amendments. U.S. Gen. Accounting Office, *Federal Assistance System Should be Changed to Permit Greater Involvement by State Legislatures* (Dec. 15, 1980) (GGD-81-3); Carol S. Weissert, *State Legislatures and Federal Funds: An Issue of the 1980s*, 11 *Publius: Journal of Federalism* 67, 67 (Summer 1981). The fact that the National Conference of State Legislatures would warn its members that they “must

file cabinets.” Resp. Br. 35 n.12.

be aware of traditional Congressional anxiety” with respect to state legislative oversight of federal assistance programs is particularly telling. National Conference of State Legislatures, *A Legislator’s Guide to Oversight of Federal Funds* 27 (1980).

Rather than ignoring these reports, the United States responds that these reports are nearly 30 years old. That, of course, is Petitioners’ point. The focus in determining congressional intent with respect to the 1986 Amendments should be the circumstances faced by the 99th Congress – not events nearly three decades later. At the time of the 99th Congress, one could readily conclude that Congress (rightly or wrongly) was utterly unconcerned about state legislative oversight of federal programs and had no desire to encourage such oversight. In the absence of a definitive legislative history on this point, we will never know with any degree of precision why the 99th Congress chose to use the phrase “congressional reports” rather than “legislative reports” in the public disclosure bar. It may have been a congressional bias against state legislative involvement with respect to joint federal/state programs. It may have been poor word choice. Or, it may have been any number of other reasons. Given these potential explanations, it is simply incorrect to conclude that the absence of state legislative reports from the public disclosure bar gives rise to an anomalous result.

III. CONSTRUING THE PUBLIC DISCLOSURE BAR AS INCLUDING STATE AND LOCAL GOVERNMENT REPORTS WOULD NOT CAUSE LOCAL GOVERNMENTS TO BE IMMUNIZED FROM LIABILITY.

Respondent and the United States argue that reading the public disclosure bar as including state and local administrative reports would allow local governments to effectively immunize themselves from *qui tam* actions. Resp. Br. 37-38; U.S. Br. 22-23. That argument is unpersuasive.

A public disclosure in an administrative report, hearing, audit or investigation would not immunize a defendant from an action by the United States. Nor would it immunize a defendant against a *qui tam* action in which the relator is an original source. Thus, the concern that a potential False Claims Act defendant would voluntarily disclose its own wrongdoing in a public document for the purpose of cutting off potential *qui tam* actions is not realistic. Given the fact that the submission of a false claim to the United States subjects a defendant to criminal liability, fines, debarment, treble damages and attorneys' fees, no rational entity would prepare a report that self-discloses fraud with the sole purpose of cutting off *qui tam* actions. 18 U.S.C. § 287 (2006); 31 U.S.C. § 3729 (2006); 48 C.F.R. § 9.407-2(a)(8)(ii) (2008); see *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 919 (9th Cir. 2006) (“The fear [that state and local governments will self-report fraud to create *qui tam* immunity] is unfounded . . . because it is unlikely that an agency trying to cover up its fraud

would reveal the requisite ‘allegations or transactions’ underlying the fraud in a public document.”).

Moreover, Respondent and the United States ignore the fact that Congress was completely unconcerned about this risk with respect to other types of public disclosures. Under 31 U.S.C. § 3730(e)(4)(A), a newspaper or radio station – non-governmental entities that, in contrast to state and local governments, do not serve the public interest – could run an obscure news report concerning a false claim made by it or its affiliates with the intent of cutting off subsequent *qui tam* actions. At the time of the 1986 Amendments, General Electric stood as one of the largest defense contractors in the country. S. Rep. No. 99-345, at 2-3, 1986 U.S.C.C.A.N. at 5267. As referenced by the Senate Report, General Electric had been criminally convicted of defrauding the United States. *Id.*; *see also id.* at 5-6, 14, 1986 U.S.C.C.A.N. at 5270-71, 5279 (describing testimony of General Electric employee who was discharged for alerting the Government of fraud). Congress was well aware that General Electric, through its ownership of NBC and RCA, owned a substantial portion of the Nation’s media outlets. *See, e.g., General Electric, RCA Merger Complete*, United Press Int’l (June 9, 1986) (describing merger as “the largest non-oil merger in U.S. corporate history”). Nevertheless, Congress apparently saw no risk that General Electric would immunize itself from *qui tam* actions by having its radio affiliate in Bolinas, California (Marine Radio Station KPH which broadcast in Morse code) run a news report about the company’s defense contracts. *See Carl Nolte, Voice to Ships at Sea Stilled by Technology*, San Francisco Chronicle, July 1, 1997 (describing history of radio station). Given that Congress had no such concerns

with respect to General Electric, a for-profit corporation, Respondent's argument with respect to state and local governments rings hollow.

Finally, a *qui tam* action may not be brought against a State. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Respondent therefore cannot argue that a State (as opposed to a local government) would prepare an administrative report in order to immunize itself from a *qui tam* action. Respondent's argument is completely inapplicable with respect to reports prepared by a State rather than local governments.

IV. RESPONDENT'S LEGISLATIVE HISTORY ARGUMENT SHOULD BE REJECTED.

In asserting that Congress intended the word "administrative" to be limited to federal sources, Respondent attempts to build an argument based on the legislative history of the False Claims Act, as well as the Program Fraud Civil Remedies Act ("PFCRA"), 31 U.S.C. § 3801 *et seq.* (2006). Respondent's argument should be rejected for three reasons. First, the statements made by Senator Grassley prior to enactment of the 1986 Amendments do not support Respondent's arguments. Second, the statements of two lone members of Congress (Senator Grassley and Representative Berman) made 13 years after the enactment of the statute at issue should not be used to ascertain legislative intent. Third, the legislative history of the PFCRA does not advance Respondent's arguments with respect to the public disclosure bar of the False Claims Act.

**A. SENATOR GRASSLEY’S ISOLATED
STATEMENTS MADE PRIOR TO THE
1986 AMENDMENTS DO NOT SUPPORT
RESPONDENT’S ARGUMENTS.**

Respondent relies upon an isolated sentence by Senator Grassley with respect to a bill that was later revised. His statement is not controlling with respect to congressional intent. *Consumer Prod. Safety Comm’n v. GTE*, 447 U.S. 102, 118 (1980) (“even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history”). Moreover, when his statements are read in context, the quoted language does not support Respondent’s argument.

The Respondent and each of her amici quote a single sentence spoken by Senator Grassley on the Senate Floor concerning an early version of the bill. Resp. Br. 29; U.S. Br. 20; ACLJ Br. 13; TAF Br. 30. Respondent boldly asserts that Senator Grassley “confirmed” her interpretation of the statute “at the time that the bill was passed.” Resp. Br. 11. The August 11, 1986 statement on which she relies, however, was made months prior to the bill’s passage with respect to a subsection that was subsequently revised. The sentence on which Respondent puts such great emphasis is as follows:

The use of the term “Government” in the definition of original source is meant to *include* any Government source of disclosures cited in subsection (5)(A); that is, Government *includes* Congress, the General Accounting Office, any executive or independent agency as well as all

other governmental bodies that may have publicly disclosed the allegations.

132 Cong. Rec. 20530, 20,536 (1986) (emphasis added) (statement of Sen. Grassley).

At the time, the original source provision read: “original source’ means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the Government.” 132 Cong. Rec. 20,531. Between August 11, 1986 and the enactment of the 1986 Amendments on October 27, 1986, the original source provision changed dramatically. First, Congress deleted the reference to “the news media” in this paragraph. Second, and more importantly, Congress deleted the requirement that the information must be disclosed by the plaintiff “prior to an action by the Government.” The requirement that a relator could only qualify as an original source if he or she disclosed the information to the United States “prior to an action by the Government” stood in direct conflict with a separate provision of the bill that provided that the filing of an action by the United States cuts off subsequently filed *qui tam* actions. See 132 Cong. Rec. 20,531 (then 31 U.S.C. § 3730(e)(4)). Given that the draft legislation discussed by Senator Grassley had glaring flaws and was later revised, Senator Grassley’s “clarification” of this early bill does not indicate congressional intent with respect to the enacted legislation.⁵

⁵ The brief of the United States avoids referencing this glaring problem with respect to the draft legislation.

Moreover, it is important to remember that the quoted statement concerns the original source provision, not the public disclosure bar. In the quoted sentence, Senator Grassley simply states that “Government” as used in the original source provision “includes” government bodies that disclose the public information upon which the plaintiff relies.⁶ See *United States v. Gertz*, 249 F.2d 662, 666 (9th Cir. 1957) (“The word ‘includes’ is usually a term of enlargement, and not of limitation.”). Senator Grassley does not state that the public disclosure bar is limited to federal sources. A fleeting sentence as to what the original source provision includes does not answer whether Congress intended to exclude state sources from the public disclosure bar.

Given the substantial changes in the proposed legislation subsequent to August 11, 1986, Respondent errs in asserting that Senator Grassley’s one sentence “explanation makes clear that [both the original source provision and public disclosure bar are limited to] the federal government.” Resp. Br. 29. More importantly, Respondent’s selective quotation of Senator Grassley’s remarks ignores other statements by Senator Grassley that demonstrate that he viewed the public disclosure bar as having a broad reach.

Rather, the United States simply notes that the bill “was later amended” and generically describes those changes. U.S. Br. 20.

⁶ Senator Grassley uses very broad language in describing the original source provision (“all other governmental bodies” – without a capital “G”). 132 Cong. Rec. 20536.

Immediately before the sentence quoted by Respondent, Senator Grassley states that the bill precludes a *qui tam* “suit . . . based solely on *public information*.” 132 Cong. Rec. 20,536 (emphasis added); *see also id.* (using phrase “public source” to include “a criminal, civil, or administrative hearing”). Thus, Senator Grassley described the public disclosure bar in very broad terms, using the phrase “public information” rather than “federal sources and the news media.” The phrase “public information” encompasses testimony given in open court in state trials, state administrative reports that are available to the public under state law, and news reports.⁷ *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (plurality) (Constitution requires state criminal trials be open to the public); Justin D. Franklin & Robert E. Bouchard, *Guidebook to the Freedom of Information and Privacy Acts* (2d ed. 1986) (detailing public access to reports by state and local governments). A report concerning a fraudulent Medicaid claim is no less “public information” because it is contained in an audit performed by the State of North Carolina than by the United States Department of Health and Human Services.

The Senate and House Reports, like Senator Grassley’s comments, demonstrate that the items listed in the public disclosure bar should be broadly, rather than narrowly, construed. The House Report

⁷ The phrase “public information” does not include an audit performed by a private hospital that is not available to the public. *Cf. U.S. Br. 8* (erroneously asserting that petitioners’ construction of public disclosure bar would include audits conducted by a non-profit hospital).

describes the public disclosure bar as applying to “public information.” H. Rep. No. 99-660, at 23. The Senate Report uses this same phrase. S. Rep. No. 99-345, at 28, 1986 U.S.C.C.A.N. at 5293.

Senator Grassley’s isolated sentence of August 11, 1986 does not support Respondent’s arguments. Rather, the legislative history, when read as a whole, indicates that Congress intended to bar *qui tam* actions that are based on public information, regardless of whether the source of that public information is the federal government, a state or local government or the news media.

**B. POST-ENACTMENT STATEMENTS BY
SENATOR GRASSLEY AND
REPRESENTATIVE BERMAN ARE
IRRELEVANT.**

Respondent and her amici assert that a letter written by Senator Grassley and Representative Berman to the Attorney General reflects congressional intent with respect to the public disclosure bar. Resp. Br. 29 n.10; ACLJ Br. 15; *see* 145 Cong. Rec. 16,031 (1999). That letter, however, was authored 13 years after the 1986 Amendments. Accordingly, their fellow senators and representatives did not have the opportunity to vote for or against the bill as modified by this post-hoc interpretation. *See Heintz v. Jenkins*, 514 U.S. 291, 298 (1995).

Post-enactment remarks “cannot serve to change the legislative intent of Congress expressed before the Act’s passage.” *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974). This letter is nothing more than a “strategic manipulation[] of legislative history to secure results [the authors] were unable to achieve

through the statutory text.” *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005). As Justice (then Judge) Scalia has cautioned, “the use by [members of Congress] of self-created legislative history to achieve the result they were unable to obtain through the legislative process is precisely the sort of ‘history’ we should steadfastly reject.” *Gott v. Walters*, 756 F.2d 902, 914, *vacated and reh’g en banc granted*, 791 F.2d 172, *remanded with instructions to dismiss as moot*, 791 F.2d 172 (D.C. Cir. 1985). As a result, the Tenth Circuit has correctly held that this letter should not be entitled to “any weight.” *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1161 n.6 (10th Cir. 1999).

The efforts by Senator Grassley and Representative Berman to rewrite the legislative history of the 1986 Amendments should be rejected by this Court.

**C. THE LEGISLATIVE HISTORY OF THE
PROGRAM FRAUD CIVIL REMEDIES ACT
DOES NOT SUPPORT RESPONDENT’S
ARGUMENT.**

Respondent asserts that the Program Fraud Civil Remedies Act (“PFCRA”), 31 U.S.C. § 3801 *et seq.*, helps to explain the language of the public disclosure bar of the False Claims Act. Resp. Br. 30-33. Respondent, however, is unable to cite to a single statement in a committee report or in the floor debate to establish that the public disclosure bar of the False Claims Act was modified to take into account the PFCRA. Instead, Respondent notes that the words “audits” and “investigations” were added to the Senate’s draft of the public disclosure bar on July 28,

1986 – approximately two months before Congress adopted the PFCRA. Resp. Br. 30-33. Based on this timing, Respondent’s amici speculate that administrative reports, audits and investigations were added to the False Claims Act as a result of the PFCRA. U.S. Br. 14 (Congress “likely added” this language as a result of the PFCRA). The caveats that the United States places upon this hypothesis are well taken given that the PFCRA does not even use the word “audits.”

Even if the PFCRA caused Congress to focus on the significance of administrative investigations, this would not answer whether other types of administrative investigations should trigger the bar. Not even the United States argues that when Congress added administrative investigations, it meant only PFCRA investigations. Administrative proceedings under the PFCRA are but a small subset of proceedings in which evidence of fraud may be placed in the public domain – proceedings that include both federal and state investigations. Thus, whether the PFCRA caused Congress to reconsider the language of the public disclosure bar is irrelevant. It does not resolve whether Congress intended for state audits and investigations to fall within the scope of the bar.

By arguing that Congress added administrative audits and administrative investigations in response to the PFCRA, Respondent and the United States demonstrate the error of one of their earlier arguments. Respondent – without citation of any authority – asserts:

“[A]dministrative hearing” in Category 1
[“criminal, civil, or administrative hearing”]
must refer to an adjudicative hearing, while in

Category 2 [“congressional, administrative, or Government Accounting Office report, hearing, audit or investigation”] it must refer to a rule-making hearing, which is “quasi-legislative” in nature.

Resp. Br. 17; *see* U.S. Br. 26 n.6.

An adversarial hearing under the PFCRA is adjudicative. Such a hearing cannot be characterized as “rule-making” or a “quasi-legislative” function. 31 U.S.C. § 3803. Thus, under Respondent’s construction of the public disclosure bar, a hearing under the PFCRA would fall under the first clause of the public disclosure bar. Yet, Respondent relies on the PFCRA and its adjudicative proceedings as explaining why Congress changed the second clause. Respondent’s argument demonstrates that the three clauses of the public disclosure bar are not distinct “categories” with distinct meanings. If they were, it would make little sense to assert that adjudicatory proceedings under the PFCRA (which Respondent views as falling under the first clause) caused Congress to revise the language of the second clause. Respondent’s argument based on the PFCRA cannot be reconciled with her other arguments.

* * * *

The Fourth Circuit erred in rewriting the statute. Neither the plain language, statutory context nor legislative history justify limiting the scope of the public disclosure bar to federal sources.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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