

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

---

---

**AMICUS BRIEF OF THE  
AMERICAN CENTER FOR LAW AND JUSTICE  
IN SUPPORT OF RESPONDENT**

---

---

JAY ALAN SEKULOW

*Counsel of Record*

WALTER M. WEBER

AMERICAN CENTER FOR LAW &  
JUSTICE

201 Maryland Avenue, N.E.

Washington, DC 20002

(202) 546-8890

*Counsel for Amicus Curiae*

---

---

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICUS .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	4
History and Operation of FCA <i>Qui Tam</i> Suits .....	5
Public Disclosure Provision .....	7
Original Source Provision .....	7
I. THE SOURCES OF PUBLIC DISCLOSURE ENUMERATED IN THE FALSE CLAIMS ACT ARE ALL (ASIDE FROM “NEWS MEDIA”) FEDERAL IN NATURE. ....	8
A. Statutory structure and context .....	8
B. Legislative history .....	12
C. Statutory purpose .....	15
II. THE CONTRARY ARGUMENTS OF PETITIONERS AND THEIR AMICI ARE UNPERSUASIVE .....	18
A. Federal “possession” of information about the fraud is no longer the standard after the 1986 amendments to the FCA. ....	19
B. Reading the term “administrative” out of context is improper. ....	19

C. There is no inconsistency in the use of “administrative” in § 3730(e)(4)(A). . . . .	22
D. No supposed “anomaly” supports expanding the FCA’s jurisdictional bar to include state and local government disclosures. . . . .	23
1. “Parasitic” actions . . . . .	23
2. First-to-file rule . . . . .	26
3. Discouraging municipal self-audits . . .	27
4. News media . . . . .	28
CONCLUSION . . . . .	29

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>CASES</b>	
<i>A-1 Ambulance Serv., Inc. v. California</i> , 202 F.3d 1238 (9 <sup>th</sup> Cir. 2000) . . . . .	22, 23
<i>Ali v. Federal Bureau of Prisons</i> , 128 S. Ct. 831 (2008) . . . . .	28
<i>Cook County v. U.S. ex rel. Chandler</i> , 538 U.S. 119 (2003) . . . . .	16
<i>Gonzalez v. Planned Parenthood of Los Angeles</i> , <i>et al.</i> , No. 09-55010 (9 <sup>th</sup> Cir.) . . . . .	1
<i>Gustafson v. Alloyed Co.</i> , 513 U.S. 561 (1995) . . . .	8
<i>Hughes Aircraft Co. v. U.S. ex rel. Schumer</i> , 520 U.S. 939 (1997) . . . . .	5, 6, 26
<i>Jones v. United States</i> , 527 U.S. 373 (1999) . . . . .	8
<i>Pleasant Grove City v. Summum</i> , 129 S. Ct. . . . . 1125 (2009)	1
<i>United States v. Bornstein</i> , 423 U.S. 303 (1976). . .	15
<i>U.S. ex rel. Eisenstein v. City of New York</i> , 129 S. Ct. 2230 (2009) . . . . .	5
<i>U.S. ex rel. Marcus v. Hess</i> , 317 U.S. 537 (1943). . . . .	5, 24

*U.S. ex rel. Wisconsin v. Dean*, 729 F.2d 1100  
 (7<sup>th</sup> Cir. 1984) . . . . . 6

*Vermont Agency of Natural Resources  
 v. U.S. ex rel. Stevens*, 529 U.S.  
 765 (2000) . . . . . 5, 27

**STATUTES**

7 U.S.C. § 6614(b), (c) . . . . . 21

15 U.S.C. §§ 77s(b)(1)(A)(i), (ii), 1692p(a)(2)(B) . . . 21

20 U.S.C. §§ 1011a(c), 1062(7), 1092(6)(B) . . . . . 21

31 U.S.C. § 232(C) (1946) . . . . . 5

31 U.S.C. § 3729 . . . . . 3, 9, 10, 11, 21

31 U.S.C. § 3730 . . . . . 2, *passim*

31 U.S.C. § 3733 . . . . . 21

Fraud Enforcement and Recovery Act of 2009,  
 Pub. L. 111-21, 123 Stat. 1617 . . . . . 9

**OTHER AUTHORITIES**

Beverly Cohen, *Trouble at the Source: The Debates  
 Over the Public Disclosure Provisions  
 of the False Claims Act’s Original Source  
 Rule*, 60 Mercer L. Rev. 701 (2009) . . . . . 17

Joel D. Hesch, *Understanding the “Original Source  
 Exception” to the False Claims Act’s “Public  
 Disclosure Bar” in Light of the Supreme  
 Court’s Ruling in Rockwell v. United States*,  
 7 DePaul Bus. & Com. L.J. 1 (2008) . . . . . 25

132 Cong. Rec. 20530-36 (daily ed. Aug. 11, 1986) . . . . .	12, 13
132 Cong. Rec. 29315-22 (daily ed. Oct. 7, 1986) . . . . .	14
145 Cong. Rec. E1546-48 (daily ed. July 14, 1999) . . . . .	15, 17
S. Rep. No. 99-345 (1986), <i>reprinted in</i> 1986 U.S.C.C.A.N. 5266 . . . . .	6, 25
S. Rep. No. 110-507 (2008) . . . . .	6, 26
<i>Webster's Third Int'l Dictionary</i> (1993) . . . . .	20



**INTEREST OF AMICUS<sup>1</sup>**

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties under law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici. In particular, Counsel of Record for amicus has argued twelve times before this Court, most recently in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

ACLJ attorneys currently represent a *qui tam* relator in a False Claims Act (FCA) suit in California. The case is pending in the Ninth Circuit. *See Gonzalez v. Planned Parenthood of Los Angeles, et al.*, No. 09-55010 (9<sup>th</sup> Cir.). The whistleblower relator in that case is a former employee of a Planned Parenthood (PP) affiliate in Los Angeles who alleges that PP affiliates in California illegally overbilled the state (and through the state, the federal government) to the tune of over \$100 million dollars. (Official investigations, in California and elsewhere, have reached similar conclusions regarding PP affiliates. A 2004 California Department of Health Services audit report, issued months after PPLA fired the relator, found over \$5.2 million dollars in overbilling, over roughly a one-year period, at a single PP affiliate alone. More recently, the Washington State Department of Social and

---

<sup>1</sup> The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

Health Services, on July 20, 2009, found in excess of \$600,000 in improper billing by Planned Parenthood of the Inland Northwest in Spokane.)

The district court in the *Gonzalez* case dismissed the suit under the jurisdictional bar of the FCA. Several of the issues on appeal in *Gonzalez* coincide with the issues before this Court in the present case.

Accordingly, the ACLJ files this amicus brief to urge this Court to embrace the correct interpretation of the FCA's jurisdictional bar.

### SUMMARY OF ARGUMENT

The federal False Claims Act (FCA) authorizes private parties to sue to recover (and to receive a portion of) funds obtained in violation of the FCA. 31 U.S.C. § 3730(b). However, the FCA denies subject matter jurisdiction -- and thus bars private civil actions -- in certain cases of "public disclosure" of the alleged fraud, unless the person bringing the suit is an "original source" of the information. § 3730(e)(4). Not all "public disclosures" count, however. The FCA specifically enumerates which particular types of disclosures can trigger the "public disclosure" bar. § 3730(e)(4)(A). The precise question here is whether a disclosure in an "administrative . . . audit, or investigation," *id.*, refers exclusively to disclosure by *federal* administrative bodies. The answer is "yes."

The text, legislative history, and statutory purposes of the FCA all decisively show that, aside from the news media, only *federal* sources of disclosures can qualify under the FCA's "public disclosure" bar.

The disclosure sources enumerated in § 3730(e)(4)(A) have their antecedents in parallel, sometimes even

identical, language in §§ 3729 and 3730(d) of the FCA. These antecedents are exclusively federal references; hence, the references in § 3730(e)(4)(A) are sensibly read to be likewise federal in nature.

The lead sponsors of the 1986 FCA amendments -- which created the public disclosure provisions -- expressly embraced this same understanding. Moreover, this understanding squares with the purpose of the 1986 FCA amendments. Those amendments sought to expand the availability of *qui tam* suits by abolishing the previous “*federal government knowledge*” bar and replacing it with a more limited bar. To read those same amendments as having imposed expansive new obstacles to *qui tam* suits based upon *state and local* government actions would be nonsensical.

Petitioners and their amici offer no persuasive arguments to the contrary.

That the pertinent information may be available to the federal government is irrelevant, since Congress abolished the “government knowledge” standard with the 1986 FCA amendments.

That the term “administrative,” read literally, could include state and local administrative bodies proves too much, as a literal reading would also include *private* administrative bodies. Rather, the pertinent language must be read in context, not in isolation.

That the term “administrative” is used twice in § 3730(e)(4)(A) creates no inconsistency because both uses are exclusively federal.

Finally, the supposed “anomalies” that petitioners point to do not exist. *Qui tam* actions play a valuable role in augmenting federal enforcement of the FCA, including when such actions are based upon state and

local audits or reports *not* disclosed by the news media. Indeed, ferreting out under-the-radar frauds is one of the main goals of *qui tam* suits. Petitioners and their amici raise other complaints addressed, not to the scope of the FCA jurisdictional bar, but rather to other features of the FCA or of state FOIA laws. Those complaints provide no warrant for distorting the text of the FCA jurisdictional bar.

### ARGUMENT

This case poses the question whether certain state and local government disclosures (in particular, audits) qualify as enumerated sources of “public disclosures” under the FCA. More precisely, since public disclosures in the “news media” *do* trigger the FCA jurisdictional bar, the question here is whether *low-profile, under-the-radar* state or local government disclosures bar private enforcement actions (absent “original source” status) under the FCA.

As discussed herein, aside from the “news media,” *all* of the disclosure sources listed in the FCA are *federal* in nature. Thus, absent public disclosure of the pertinent state and local materials in the news media, *state and local* government disclosures do not -- standing alone -- trigger the FCA jurisdictional bar any more than would a *private* corporation’s self-generated audit or report.

To understand this issue, it is helpful first briefly to consider the history and operation of private civil actions under the FCA.

## History and Operation of FCA *Qui Tam* Suits

“The FCA establishes a scheme that permits either the Attorney General, [31 U.S.C.] § 3730(a), or a private party, § 3730(b), to initiate a civil action alleging fraud on the Government. A private enforcement action under the FCA is called a *qui tam* action, with the private party referred to as the ‘relator.’” *U.S. ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2233 (2009) (citation omitted).

The FCA was “enacted in 1863 with the principal goal of stopping the massive frauds perpetrated by large private contractors during the Civil War.” *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000) (internal quotation marks, editing marks, and citation omitted). This original version of the FCA contained a *qui tam* provision allowing *any* person to sue as a relator. *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 540 (1943). The *Marcus* case provided an extreme example: even individuals who allegedly had “contributed nothing to the discovery of [the fraud]” but had merely lifted information from a “previous indictment,” nevertheless could be *qui tam* relators. *Id.* at 545.

In response to *Hess*, Congress amended the FCA in 1943, removing jurisdiction over *qui tam* actions “whenever . . . such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.” 31 U.S.C. § 232(C) (1946). See *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 945 (1997) (“At that time, the FCA required a district court to dismiss a *qui tam* action based on evidence or information the Government had when the

action was brought”) (editing marks and citation omitted).

The 1943 FCA amendment, however, went too far in the opposite direction, depriving courts of jurisdiction over *qui tam* suits in which the would-be relators had provided their information to the government before filing their claims. Most notoriously, in *U.S. ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7<sup>th</sup> Cir. 1984), 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 the State,” merely because the state had disclosed the frauds -- as required by federal law -- to the federal government. S. Rep. No. 99-345, at 12-13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277-78. *See also* S. Rep. No. 110-507, at 3 (2008) (discussing the False Claims Act Correction Act of 2008, one of the predecessor bills to the recently enacted FCA amendments, *see infra* note 3) (“the ‘government knowledge bar’ . . . significantly limited the number of FCA cases that were filed,” rendering the FCA “no longer a viable tool for combating fraud against the Government”).

Congress responded by abolishing the federal “government knowledge” bar, replacing it with a more limited, tailored, “public disclosure” bar. “Congress amended the FCA in 1986 . . . to permit *qui tam* suits based on information in the Government’s possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information.” *Hughes Aircraft*, 520 U.S. at 946 (citation omitted). *See* S. Rep. No. 99-345, at 23-24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89 (“The Committee’s overall intent in amending

the *qui tam* section of the False Claims Act is to encourage more private enforcement suits”).

These 1986 amendments added the “public disclosure” and “original source” provisions to the FCA. The current jurisdictional provisions relevant to this case provide as follows:

### **Public Disclosure Provision**

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 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.

§ 3730(e)(4)(A).

### **Original Source Provision**

For purposes of this paragraph, “original source” means 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.

§ 3730(e)(4)(B).

Under these provisions, the question is no longer what information the federal government possesses,

much less has access to. Rather, there is a two-step inquiry that, as explained below, gauges the relator's *contribution to enforcement* of the FCA. The first question is whether a "public disclosure" bar applies to relator's suit. If so, then the second question is whether the relator meets the "original source" exception to that bar. This second step -- original source analysis -- is only necessary if there has been a public disclosure. If there has been no "public disclosure," then the relator need not be an "original source."

**I. THE SOURCES OF PUBLIC DISCLOSURE ENUMERATED IN THE FALSE CLAIMS ACT ARE ALL (ASIDE FROM "NEWS MEDIA") FEDERAL IN NATURE.**

The text, history, and purpose of the FCA all demonstrate that the sources enumerated under the public disclosure bar of the FCA, with the sole exception of the "news media," must all be *federal sources*.

**A. Statutory structure and context**

"Statutory language must be read in context and a phrase gathers meaning from the words around it." *Jones v. United States*, 527 U.S. 373, 389 (1999) (internal quotation marks and citation omitted). As petitioners concede, "federal courts have a 'duty to construe statutes, not isolated provisions.'" Pet'r Br. at 27 (quoting *Gustafson v. Alloyed Co.*, 513 U.S. 561, 568 (1995)). The FCA is a statutory whole, and viewed in

its entirety, the logic for an exclusively federal meaning to the term “administrative”<sup>2</sup> -- indeed, to all of the non-media disclosure sources listed in the FCA’s jurisdictional provision -- is compelling.

Section 3729,<sup>3</sup> which immediately precedes § 3730 (the *qui tam* section), sets forth civil penalty provisions under the FCA. This section spells out the circumstances under which an offender who cooperates with the government faces reduced liability. The offender, for example, must furnish all information about the violation to the government within 30 days

---

<sup>2</sup> As the court below reasoned in interpreting the phrase “administrative . . . audit” in § 3730(e)(4)(A), the federal nature of that particular reference appears from its immediate placement. The term “administrative” is sandwiched between two exclusively federal terms: “in a *congressional*, administrative, or *Government Accounting Office* report, hearing, audit, or investigation,” § 3730(e)(4)(A) (emphasis added). Thus, this placement strongly suggests that the term “administrative” refers to federal administrative agencies.

Petitioners counter that this Court must look not to the particular *phrase* where the term “administrative” appears, but rather to the pertinent *subsection*. Petitioners’ proposal, however, is arbitrarily narrow. To understand the relevant terms of the FCA, this Court should look as well to the *adjacent sections and subsections* of the FCA. As explained in the text, these neighboring provisions are powerful indicators of the meaning of the jurisdictional provisions.

<sup>3</sup> The FCA was amended by a bill signed into law on May 20, 2009. Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, 123 Stat. 1617. The private *qui tam* section of the FCA, 31 U.S.C. § 3730, was not amended, with the exception of § 3730(h), the retaliation provision, which is not at issue here. The 2009 amendments to the FCA did not change the language of § 3729 quoted herein. This brief cites to the amended version.

of obtaining that information. § 3729(a)(2)(A). Hence, such an offender is a species of whistleblower. Importantly, this section adds the following condition:

At the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation . . . .

§ 3729(a)(2)(C).

The phrase “criminal prosecution, civil action, or administrative action . . . commenced under this title with respect to such violation” and the term “investigation” in § 3729(a)(2)(C) parallel the phrase “criminal, civil, or administrative hearing” and the term “investigation” in the jurisdictional section, § 3730(e)(4)(A), and were presumably included for similar reasons, namely, to discount the value of a whistleblower who alerts the federal government about something it is already pursuing.

Notably, the text in § 3729 does not include the modifier “federal” before “criminal prosecution, civil action, or administrative action.” Nevertheless, this phrasing clearly applies only to actions involving the United States, either directly or through a private relator, as only such suits can be commenced “under this title,” *i.e.*, under the FCA. *Supra* p. 5. The term “investigation” likewise has no express “federal” modifier. Nevertheless, its exclusively federal reference follows both from the federal context of the remainder of subsection § 3729(a)(2)(C) and from the

parallel use of “investigation” in § 3730(c) (where the federal context is made explicit), described below.

This language from § 3729 is then carried forward into three separate subsections of § 3730.

First, the FCA in § 3730(c) authorizes a stay of certain discovery in a *qui tam* case where such discovery would interfere with “the Government’s investigation or prosecution of a criminal or civil matter arising out of the same facts,” § 3730(c)(4). This same subsection then employs the phrases “the criminal or civil investigation or proceedings” and “the ongoing criminal or civil investigation or proceedings” as synonyms for the “the Government’s investigation or prosecution of a criminal or civil matter” already referred to in this subsection. *Id.* The references are thus all exclusively federal, though again, the specific modifier “federal” is not used.

Next, the FCA in § 3730(d) sets the parameters of an award to a *qui tam* relator in cases where “the Government” proceeds with the relator’s suit. The statute caps the relator’s share at 10% of the proceeds where the action is “based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media,” § 3730(d)(1). This subsection echoes the similar language in § 3729(a)(2)(C) and § 3730(c). This subsection also closely tracks -- in large part, word-for-word -- the language in the subsequent jurisdictional provisions. As in the jurisdictional provisions, the text in § 3730(d)(1) does not use the

express modifier “federal,” but in context the meaning is clear: where the federal government was already publicly pursuing the matter, and the relator was not an independent source of the information, the reward to the relator should be discounted.

Finally, the FCA includes virtually identical language in its jurisdictional subsection, § 3730(e)(4), set forth *supra* p. 7.

The phrasing in the jurisdictional provisions, then, is not a collection of isolated words bereft of context, but rather a continuation of phraseology employed (with minor wording) over the FCA as a statutory whole. This statutory context points compellingly to an interpretation of the sources enumerated in § 3730(e)(4) as referring to exclusively *federal* sources (with the exception of the “news media”).

## **B. Legislative history**

The legislative history matches this understanding. On Aug. 11, 1996, Senator Grassley, the lead Senate sponsor of the 1986 FCA amendments, offered a substitute amendment to S. 1562 (the bill that would ultimately pass). 132 Cong. Rec. 20530 (daily ed. Aug. 11, 1986). This substitute, while not identical to the version finally adopted, was nearly identical in its jurisdictional subsection. One difference was that the definition of “original source” linked the timing of the public disclosures to the Government filing an FCA action, rather than to the relator filing. Thus, this near-final version provided:

(5)(A) 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, a congressional, administrative, or Government 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.

(B) For purposes of this paragraph, “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. 20531 (proposed § 3730(e)(5)). Addressing this provision, Sen. Grassley explained:

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. 20536. The Senate sponsor’s comments plainly identify the term “administrative,” in the phrase “congressional, administrative, or Government Accounting Office,” as meaning “any executive or independent agency” of the capital “G,” i.e., federal, “Government.” In addition, these comments identify

“all other governmental bodies” involved in any hearing that produces a public disclosure as a “Government” -- i.e., federal -- “source of disclosure.”

When the bill (S. 1562), now in its final form, came to the House floor, 132 Cong. Rec. 29315-20 (daily ed. Oct. 7, 1986), Rep. Berman of California, the principal House sponsor for the bill, included “legislative history for the Record,” *id.* at 29321. That “legislative history” contained the following explanation of the jurisdictional provisions:

The final bill has adopted the Senate version of who may file an action under the False Claims Act. Before the relevant information regarding fraud is publicly disclosed through various *government* hearings, reports and investigations which are specifically identified in the legislation or through the news media, any person may file such an action as long as it is filed before the *government* filed an action based upon the same information. Once the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an “original source” may bring the action. A person is an original source if he had some of the information related to the claim which he made available to the *government* or the news media in advance of the false claims being publicly disclosed. This person has the right to bring an action after these disclosures are made public as long as it is filed before an action is commenced by the *Government*.

*Id.* at 29322 (emphases added). While the capitalization is inconsistent, it is clear that all

references to the government are to the federal, capital “G” government, and that the “various government hearings, reports and investigations which are specifically identified in the legislation” are exclusively federal in nature.

Both Sen. Grassley and Rep. Berman subsequently reaffirmed this understanding of the 1986 FCA amendment in a letter to Attorney General Janet Reno. In that letter, entered in the Congressional Record, the legislative sponsors stated unequivocally: “We did intend, and any fair reading of the statute will confirm, that the disclosure must be in a *federal* criminal, civil or administrative hearing. Disclosure in a *state* proceeding of any kind should *not* be a bar to a subsequent *qui tam* suit.” 145 Cong. Rec. E1546 (daily ed. July 14, 1999) (emphasis added).

### C. Statutory purpose

This Court has acknowledged in a prior FCA case “the conventional judicial duty to give faithful meaning to the language Congress adopted in light of the evident legislative purpose in enacting the law in question.” *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Reading the enumerated sources in § 3730(e)(4)(A) as exclusively federal furthers the purposes of the 1986 FCA amendments; by contrast, construing the sources to include state and local bodies would undermine those purposes.

The basic purpose of the 1986 amendments was to make the FCA a more useful tool against fraud in modern times. Because Congress was concerned about pervasive fraud in all Government programs,

it allowed private parties to sue even based on information already in the Government's possession, . . . and enhanced incentives for relators to bring suit.

*Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 133 (2003) (internal quotation marks and citations omitted).

As noted earlier, the 1943 amendments to the FCA barred actions where the federal government was already in possession of the pertinent information. *See supra* pp. 5-6. Congress determined that this restriction posed too great of an obstacle to *qui tam* suits, and so Congress amended the FCA in 1986 to encourage more private actions. *Cook County*, 538 U.S. at 133. It therefore makes perfect sense that the 1986 amendments would *limit* the jurisdictional bar by replacing mere federal possession of the pertinent information with federal pursuit of the pertinent matter as the relevant trigger. To read the 1986 amendments as having *expanded* the jurisdictional bar, by adding a whole host of obstacles resting on *state and local* government activities, would be nonsensical. This would replace actual federal possession of information -- the 1943 version of the jurisdictional bar -- with merely deemed federal possession of information, an even more expansive bar to *qui tam* suits. To borrow from the *Cook County* case, "Congress could have done that, of course, but it makes no sense to suggest Congress did it under its breath." 538 U.S. at 133 (footnote omitted).

Even if Congress had perversely sought to smuggle a "knowledge" standard back into the FCA -- which it clearly did not -- charging the federal government with

implicit knowledge of state and local government acts is unrealistic.

[A]s a practical matter, it is probably unrealistic to expect the federal government to be on notice of all information disclosed by the myriad of state and local administrative agencies, unless they are reported in the news media, in which case [the disclosures] would qualify as public disclosures under the Act. Therefore, allowing relators to base their *qui tam* actions upon state and local administrative materials may well be necessary to alert the federal government to frauds disclosed in state and local administrative forums.

Beverly Cohen, *Trouble at the Source: The Debates Over the Public Disclosure Provisions of the False Claims Act's Original Source Rule*, 60 Mercer L. Rev. 701, 740 (2009) (footnotes omitted). *Accord* 145 Cong. Rec. E1548 n.1 (daily ed. July 14, 1999) (letter of Sen. Grassley and Rep. Berman) (“Disclosure of fraud in a state court proceeding, even a state criminal proceeding, is unlikely to get the attention of the federal government, unless it is publicized in the news media, a contingency the public disclosure bar addresses”). The federal government simply cannot be presumed to be aware of every state or local audit, hearing, or investigation.

Moreover, treating state and local government disclosures as jurisdictional bars to private FCA suits would enable collusive state and local governments to defeat *qui tam* suits through careful, low key “disclosures.” In a *qui tam* case in California, for example, certain state officials willingly catered to the

defendants by (1) halting further planned audits of the remaining defendant California affiliates, audits that presumably would have revealed additional tens of millions of dollars of unlawful overbilling; (2) excusing the \$5 million dollars in overbilling that one limited audit of one particular defendant affiliate found; (3) declining to recoup the massive illegal transfer of taxpayer money to the defendants that was found; and, (4) changing the law to allow the affiliates to continue their hefty mark-ups at taxpayer expense. (All of this was accomplished apparently without any relevant public disclosure in the news media.) Government officials who are so willing to accommodate and shield the perpetrators of a massive taxpayer fraud are hardly likely to call the matter to the attention of the federal government.

The FCA should not be read to be self-defeating. The enumerated sources (aside from the news media) are exclusively federal, and hence state or local audits (and, for that matter, other state or local sources) do not qualify as an enumerated sources of public disclosures.

## **II. THE CONTRARY ARGUMENTS OF PETITIONERS AND THEIR AMICI ARE UNPERSUASIVE.**

Petitioners and their amici press a number of arguments for reading the phrase “administrative audits” in the FCA’s jurisdictional bar to include state and local government administrative audits. None of these arguments is persuasive.

**A. Federal “possession” of information about the fraud is no longer the standard after the 1986 amendments to the FCA.**

Petitioners emphasize that, on the facts of this case, federal officials already had knowledge of, or at least access to, information regarding the alleged fraud. Pet’r Br. at 4-5, 7-8, 43-44. *See also* States Br. at 9-10. It is true that, prior to the 1986 amendments to the FCA, federal “possession” of the relevant information barred private *qui tam* suits. *Supra* pp. 5-6. However, Congress abolished this standard with its 1986 amendments. *Supra* p. 6. It is therefore manifestly incorrect to assert, as do amici, that “[t]he idea behind” FCA *qui tam* claims “is that the government can effectively ‘purchase’ nonpublic information from relators in exchange for a share in the . . . recovery,” States Br. at 3. Incentives for *qui tam* suits under the current version of the FCA purchase, not *information*, but *enforcement*.

Petitioners’ argument is essentially an attempt to inject the federal government knowledge standard back into the FCA’s jurisdictional bar; this attempt to resurrect the prior version of the FCA must therefore be rejected.

**B. Reading the term “administrative” out of context is improper.**

Petitioners insist that the modifier “administrative” must be read literally to include *all* administrative bodies, whether federal, state, or local.

This argument proves too much. Reading the term

“administrative” in strictly literal fashion would also sweep any *private* administrative “report, hearing, audit, or investigation” into the FCA’s jurisdictional bar. Private universities have administrations, for example, and those administrations conduct investigations, hold hearings, and issue reports.<sup>4</sup> Private insurance companies, private accounting firms -- indeed, all manner of private businesses -- have administrations which conduct internal and external investigations, hold hearings, and issue reports and audits of varying kinds. Yet, not even petitioners, despite their insistence upon the “plain and readily understood meaning” of the text, take the position that *private* administrative reports, hearings, audits, or investigations qualify as potential sources of disclosure under the FCA’s jurisdictional bar. Instead, petitioners read their own implicit modifier, “government,” into the statutory language. Presumably petitioners would defend their insertion of an unexpressed modifier by arguing that the statutory terms must be read in the context of the statute as a whole. This is true -- but this same statutory context is precisely the reason why the enumerated sources (aside from the “news media”) must be understood, not just as *governmental*, but as exclusively *federal governmental*. *Supra* § I(A).

Petitioners cite to a dictionary definition of “administrative” that includes the adjective “government.” But one can as easily point to other dictionary definitions not so limited. *E.g.*, *Webster’s Third Int’l Dictionary* 28 (1993) (defining

---

<sup>4</sup> *E.g.*, [www.princeton.edu/pr/pub/integrity/08/discipline/](http://www.princeton.edu/pr/pub/integrity/08/discipline/) (describing disciplinary process at Princeton University).

“administration” both as “the total activity of a state” *and* as “a body of persons who are responsible for managing a business or institution”; defining “administrative” as the adjectival form of “administration”).

Petitioners cite to particular uses of the term “administrative” in the U.S. Code to refer to both federal and state bodies. Pet’r Br. at 18 & n.7. But the Code also uses the term “administrative” to refer to private entities. *E.g.*, 7 U.S.C. § 6614(b), (c); 15 U.S.C. §§ 77s(b)(1)(A)(i), (ii), 1692p(a)(2)(B); 20 U.S.C. §§ 1011a(c), 1062(7), 1092(6)(B).<sup>5</sup>

Petitioners argue that Congress could have put the word “federal” in front of “administrative” in the text of the FCA. Pet’r Br. at 21. Again, this proves too much. Congress also could have put the word “government” in front of “administrative.” It did not, and for the same reason: such language would be redundant, as the context already clearly indicates that the term must be understood as an exclusively federal governmental reference.

In short, petitioners’ (selective) resort to hyper-literalism does not provide a satisfactory interpretive device for understanding the jurisdictional bar of the FCA. Rather, the relevant provisions must read *in context*. As demonstrated *supra* § I(A), that context

---

<sup>5</sup> Petitioners also cite to the use of the term “administrative” in 31 U.S.C. § 3733(l)(7) of the FCA. But § 3733 deals with “civil investigative demands” by the Attorney General (or his designee), not *qui tam* suits. The phrase in question, “any judicial or administrative proceeding of an adversarial nature,” is not part of that chain of parallel phrases in §§ 3729-30 which give context to the FCA’s jurisdictional bar. It is thus of little, if any, interpretive relevance to the question presented.

points to a reading of the sources enumerated in 31 U.S.C. § 3730(e)(4)(A), aside from the “news media,” as being exclusively *federal* in nature.

**C. There is no inconsistency in the use of “administrative” in § 3730(e)(4)(A).**

Petitioners contend that the reference to an administrative “report, hearing, audit, or investigation” cannot be exclusively federal because the immediately preceding reference to an “administrative hearing” includes state and local administrative hearings. Pet’r Br. at 25-27, 32. But petitioners’ premise is mistaken. The preceding reference to a “criminal, civil, or administrative hearing” is *also* exclusively federal, as explained *supra* § I. It is simply not true that “the vast majority of the items set out in the list are non-federal sources.” Pet’r Br. at 28. To the contrary, *all* of the listed sources are federal, with the sole exception of the “news media.” There is no inconsistency.

The United States argued as much in its brief in support of certiorari, as petitioners acknowledge. Pet’r Br. at 27. Petitioners offer no substantive response to the argument in support of this position. Indeed, petitioners’ only response is to cite five lower court cases. *Id.* at 28. According to petitioners, each of these courts “considered” and “soundly rejected” “this argument” that the FCA reference to a “criminal, civil, or administrative hearing” is a reference to exclusively *federal* proceedings. *Id.* Closer inspection reveals, however, that four of the five cases petitioners cite did not even mention “this argument.” The only case that did so, *A-1 Ambulance Serv., Inc. v. California*, 202

F.3d 1238 (9<sup>th</sup> Cir. 2000), rejected the argument on the basis that Congress “could have easily” inserted the modifier “federal” but “chose not to do so,” *id.* at 1244. This argument fails for the reasons set forth *supra* §§ I, II(B). Indeed, the logical conclusion of the *A-1* court’s faulty rationale would be to sweep *private* hearings into the FCA’s jurisdictional bar as well, since Congress “could have easily” inserted the word “governmental” before administrative but “chose not to do so.”

**D. No supposed “anomaly” supports expanding the FCA’s jurisdictional bar to include state and local government disclosures.**

Petitioners contend that reading the FCA jurisdictional bar in accordance with the statutory text, structure, history, and purposes outlined above, *supra* § I, would “create anomalies” that require a different interpretation. This is not so.

**1. “Parasitic” actions**

Petitioners argue that if the jurisdictional bar is not read to apply to state and local government disclosures, this would permit “parasitic actions by strangers who have done nothing to facilitate a fraud investigation,” which petitioners claim “undercuts the very purposes of the public disclosure bar.” Pet’r Br. at 29.

There are multiple flaws in this contention.

First, as noted above, the overall intent of Congress in the 1986 FCA amendments was to *encourage more*

*qui tam* suits. *Supra* pp. 6, 7, 15.

Second, Congress deliberately chose not to bar FCA suits based upon any and all public disclosures; rather, only disclosures from certain enumerated sources count. Private relators can sue based upon any matter that has only been publicly disclosed by unenumerated sources. This is a description of the statute, not an argument for its reinterpretation. For example, even under petitioners' expansive view of the jurisdictional bar, relators can bring a *qui tam* action based upon the "public disclosures" of a private business or university. According to petitioner's logic, this creates an "anomaly." Not so. The statutory significance of various sources of public disclosures varies; this is simply the natural consequence of the choice, by Congress, to limit the universe of sources that can trigger the jurisdictional bar.

Third, the FCA jurisdictional bar will apply to all matters that the "news media" has publicly disclosed. Thus, *qui tam* relators who are not original sources will only be able to sue over matters that have *not* already been publicized in the press. Ferreting out such under-the-radar frauds is a major purpose of a *qui tam* suit.

Fourth, *pace* petitioners, there is considerable value to private attorney general actions, even where the matter is already "publicly disclosed." This Court recognized as much in *Hess*. *See* 317 U.S. at 545 (noting that relator brought an additional "net recovery to the government"). Common sense confirms that a federal government limited in money, manpower, and time cannot possibly pursue all frauds, even those it knows about. Indeed, even when a *qui tam* suit has been filed and the federal government has

been notified, the federal government frequently declines to take up the action. As one former Department of Justice attorney explained, “[t]here are many reasons why the government may not wish to intervene . . . . For instance, the government has previously declined out of a desire to preserve resources by allowing the relator to bear the brunt of litigation costs.” Joel D. Hesch, *Understanding the “Original Source Exception” to the False Claims Act’s “Public Disclosure Bar” in Light of the Supreme Court’s Ruling in Rockwell v. United States*, 7 DePaul Bus. & Com. L.J. 1, 16 (2008).

The whole point of allowing *qui tam* actions is to supplement federal enforcement with an army of private litigants: “only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.” S. Rep. No. 99-345, at 2, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267. Private enforcement does not “siphon off a portion of the government’s recovery,” Pet’r Br. at 30. Rather, private enforcement multiplies the government’s recovery by expanding the breadth of enforcement.

*Qui tam* statutes are passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

*Hughes Aircraft*, 520 U.S. at 949 (internal quotation and editing marks and citations omitted).

Like other offers of private bounties, FCA *qui tam* incentives yield a net gain to the government, as the government reaps large sums from the many recoveries it never could or would have pursued by itself. “All told, the 1986 Amendments have led the Government to recover over \$20 billion since 1986, of which \$12.6 billion has been the result of *qui tam* actions.” S. Rep. No. 110-507, at 6 (2008).<sup>6</sup> Moreover, the government can increase its relative share of the recovery simply by proceeding with the *qui tam* action itself. 31 U.S.C. § 3730(d)(1), (2) (reducing range of awards to *qui tam* plaintiffs where government takes over the suit). And if the government is already suing over the fraud in question, *qui tam* suits -- which in that case really *would* be parasitic -- are totally barred. 31 U.S.C. § 3730(e)(3).

## 2. First-to-file rule

Petitioners lament that under the FCA, the studious “insider who has worked for years in gathering information” cannot sue if a “stranger to the fraud” files first. Pet’r Br. at 31. See 31 U.S.C. § 3730(b)(5). Petitioner’s gripe, however, is not with the scope of the jurisdictional bar, but rather with the first-to-file rule. True, there is no “best plaintiff” rule under the FCA. But this is not irrational. Presumably Congress chose to place the premium on speed -- better to expose the

---

<sup>6</sup> Tellingly, the United States -- the most interested party on this specific question -- did not complain in its amicus brief in support of certiorari that it would somehow be shortchanged by allowing *qui tam* suits in the present context.

fraud now, rather than wait for a plodding insider to conduct “years” of research -- instead of requiring a potentially messy determination of who is the “best plaintiff.”<sup>7</sup>

### 3. Discouraging municipal self-audits

Petitioners argue that, if local governments can be sued on the basis of their own self-investigations, they will hesitate to conduct such investigations. Pet’r Br. at 31. (States and state agencies already cannot be sued in *qui tam* suits under the FCA. *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000).) This is a makeweight. Such self-investigations already generate the far more serious risk of federal civil penalties, and perhaps even criminal enforcement. And the “cottage industry” of “plaintiffs’ attorneys” to which petitioners disparagingly refer is none other than the cadre of private attorneys general who supplement, at private expense (and thus benefit to taxpayers), the policing of federal fraud laws.

---

<sup>7</sup> The arguments of some amici that state FOIA laws may interfere with state fraud investigations, States Br. at 11; Nat’l League of Cities Br. at 6-7, are similarly inapposite. States can remedy any such problems by modifying their FOIA laws to shield ongoing state investigations. There is no need to distort the FCA to save states from their own FOIA statutes.

The concerns of the Chamber of Commerce over the application of the FCA to situations other than overbilling, Chamber of Commerce Br. at 6-7, meanwhile, are more properly directed to the scope of the FCA itself, not to the jurisdictional provisions.

#### 4. News media

Petitioners argue that it is anomalous have public disclosures from the news media trigger the jurisdictional bar but not public disclosures from state and local governments. Pet'r Br. at 33-34. Again, this is not an anomaly, but rather an exercise in legislative line-drawing. Petitioners could as easily find fault with Congress's choice not to list *private* administrative reports or audits that are publicly disclosed. Surely a publicly disclosed self-audit by Chrysler is more likely to gain federal official attention than a report in the Kankakee Daily Journal. Nevertheless, Congress has judged that, by and large, the purpose of exposing and pursuing frauds against the federal fisc is served sufficiently well by disclosures from *federal* and *media* sources to outweigh the need for *qui tam* actions by relators who are not original sources. That Congress reached a different judgment regarding state, local, and non-media private disclosures is not unreasonable. As petitioners concede, "We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable," Pet'r Br. at 36 (quoting *Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831, 841 (2008)).

**CONCLUSION**

This Court should affirm the judgment of the Fourth Circuit.

Respectfully submitted,

Jay Alan Sekulow  
*Counsel of Record*  
Walter M. Weber  
American Center for Law &  
Justice  
201 Maryland Avenue, N.E.  
Washington, DC 20002  
(202) 546-8890

*Counsel for Amicus Curiae*

October 26, 2009