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

BRIEF FOR THE PETITIONERS

ROY COOPER
Attorney General of North Carolina
CHRISTOPHER G. BROWNING, JR.*
Solicitor General

North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6900

ZEYLAND G. MCKINNEY, JR.
40 Court Street
Robbinsville, NC 28771
(828) 479-2442

SEAN F. PERRIN
Womble Carlyle Sandridge & Rice, PLLC
301 South College Street
Suite 3500
Charlotte, NC 28202
(704) 331-4900

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*Counsel of Record

QUESTION PRESENTED

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

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners are Graham County Soil & Water Conservation District, Gerald Phillips, Allen Dehart, Lloyd Millsaps, Cherokee County Soil & Water Conservation District, Bill Tipton, C.B. Newton, Eddie Wood, Graham County, Raymond Williams, Dale Wiggins, Lynn Cody and Keith Orr.

Richard Greene, Billy Brown and William Timpson were parties to the proceedings below but did not join in the petition.

The respondent is the United States of America ex rel. Karen T. Wilson.

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The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-46a) is reported at *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 528 F.3d 292 (4th Cir. 2008). The opinion of the district court (Pet. App. 47a-152a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 9, 2008. Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the jurisdictional bar of the False Claims Act which provides:

> (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, 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.
>
> (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 provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4) (2006). The False Claims Act is set out in the appendix to the petition for writ of certiorari at 153a-188a.

Subsequent to the filing of the petition for writ of certiorari, Congress amended certain provisions of the False Claims Act. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617. This Act did not amend the language of 31 U.S.C. § 3730(e)(4).

STATEMENT

1. The False Claims Act establishes civil penalties in connection with the presentment of a false or fraudulent claim for payment by the United

States. 31 U.S.C.S. § 3729(a)(1) (LexisNexis 2009). An action to recover statutory damages and civil penalties may be brought by the Attorney General or by a private person ("relator" or "*qui tam* plaintiff") in the name of the United States. 31 U.S.C. § 3730(a), (b) (2006). When a relator brings such an action, the United States may intervene and pursue the prosecution of the claim or decline to participate in the proceeding. 31 U.S.C. § 3730(b)(2) (2006). Regardless of whether the United States chooses to intervene, the relator stands to recover a monetary reward (ranging from 10 to 30% of the recovery, plus attorneys' fees) for filing the action. 31 U.S.C. § 3730(d) (2006).

Congress included a public disclosure bar in the False Claims Act to preclude opportunistic plaintiffs from filing *qui tam* actions based on the work of others. 31 U.S.C. § 3730(e)(4)(A) (2006). Under the public disclosure bar, a private person generally cannot bring a *qui tam* action based on the following public information: "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." *Id.* (Pet. App. 163a). If, however, the plaintiff is the original source of the information, the public disclosure bar does not preclude the action from being brought. *Id.*

2. In February 1995, a storm struck portions of western North Carolina, causing flooding and

erosion. Following that storm, Cherokee County and Graham County separately applied for federal assistance under the Emergency Watershed Protection ("EWP") Program. *See* 16 U.S.C. § 2203 (2006); 7 C.F.R. §§ 624.1 to .11 (2009). Pursuant to the terms of that federal program, each county entered into a project agreement with the United States Department of Agriculture ("USDA"). Under those agreements, the counties agreed to pay 25% of cleanup costs and the USDA agreed to pay the remaining 75%. J.A. 99-108 (Graham County agreement dated June 5, 1995); J.A. 129-38 (Cherokee County agreement dated May 4, 1995). In each county, the work performed under the EWP Program was coordinated by the local soil and water conservation district under the direction of a USDA employee. Pet. App. 8a, 57a-59a, 86a.

Because these two counties receive federal funds, the counties are required, under the Single Audit Act, to file annually a financial audit with the federal government. 31 U.S.C. § 7502(h) (2006).[1]

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[1] The Single Audit Act currently exempts States and local governments that receive less than $500,000 in total federal funds from the Act's audit requirements. 31 U.S.C. § 7502(a)(2)(A) (2006) (setting $300,000 threshold); United States Office of Management & Budget, Audits of State, Local Governments, and Non-Profit Organization, 68 Fed. Reg. 38,401 (June 27, 2003) (revision of OMB Circular No. A-133) (setting $500,000 threshold for fiscal years ending on or after January 1, 2004). At all times relevant to the

The audit must be prepared by an independent auditor. 31 U.S.C. § 7502(c) (2006). Consistent with this federal requirement, Graham County retained the independent accounting firm of Crisp & Hughes to conduct its annual audits. J.A. 109. Under the Single Audit Act, 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). In addition to the audit itself, the Single Audit Act provides that the federal government shall have access to all of the auditor's working papers with respect to the audit. 31 U.S.C. § 7503(f) (2006).[2] The audits that are filed

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complaint, the threshold was $25,000. Single Audit Act of 1984, Pub. L. No. 98-502, 98 Stat. 2327, 2329 (former 31 U.S.C. § 7502(a)(1)(B)).

[2] The Single Audit Act was amended in 1996 to provide that the federal government has a right of access to the auditor's workpapers. Act of July 5, 1996, Pub. L. No. 104-156, 110 Stat. 1401. Prior to 1996, the Act did not expressly refer to auditor's workpapers, but simply stated that the Act does not supercede the provisions of other statutes and regulations relating to maintenance and access to records. The amendment, however, merely codified the numerous agency regulations that required that the workpapers of independent auditors be made available to the United States. For example, at the time of the work at issue in this action, the Department of Agriculture's regulations provided: "Workpapers and reports shall be retained for a

by States and local governments are available to the public through a federal clearinghouse. 31 U.S.C. § 7502(h).

Under North Carolina law, all local government audits required by the federal Single Audit Act must be filed with the North Carolina Local Government Commission. N.C. Gen. Stat. § 159-34 (2007). The Commission requires that the auditor's workpapers be available to both the state and federal government upon request. North Carolina Local Government Commission, Audit Requirements, at 35-E-1.26 (revised June 2005) (available at www.nctreasurer.com; search term "35E12007.doc").

In connection with its audit of Graham County's expenditure of federal funds, Crisp & Hughes prepared an "Agreed Upon Procedures" report in March 1996 (the "Crisp & Hughes Audit Report").[3] J.A. 119-26. This audit report addressed several issues with respect to the County's expenditures under the EWP Program, including whether the work at issue should have been sent out for bids. Among the other items identified in the audit, the report notes that:

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minimum of three years from the date of the audit report . . . . Audit workpapers shall be made available upon request . . . ." 7 C.F.R. § 3015.75(c) (1995).

[3] An "agreed upon procedures report" is an informal audit that addresses specific questions concerning financial records and issues. Pet. App. 92a.

> [North Carolina General Statutes Section] 143-131 requires contracts for construction or repairs costing from $5,000 to $50,000 be awarded in accordance with an informal bidding process. The statute requires that a record of all such bids be kept. No documentation was available to indicate that informal bid requirements had been complied with.

J.A. 126. In the cover letter to the report, Crisp & Hughes stated that copies of the report had been transmitted to the North Carolina Local Government Commission and the Division of Soil and Water Conservation of the North Carolina Department of Environment, Health and Natural Resources. J.A. 119. The letter noted that multiple copies were enclosed for transmittal to the United States Department of Agriculture. *Id.*

The Crisp & Hughes Audit Report was readily available to both the federal government and the public. First, the document constitutes a public record under North Carolina law and was available to the public from both Graham County and the North Carolina Local Government Commission. N.C. Gen. Stat. § 132-1 to -10 (2007). Second, the document was prepared by Crisp & Hughes as part of its review of Graham County's expenditures of

federal funds. Accordingly, the document was available to the federal government in connection with the annual audit required by federal law. *See* 7 C.F.R. § 3015.75(c) (1995). Third, the work of the Graham County Soil & Water Conservation District was under the direct supervision of a federal employee. Richard Greene, a District Conservationist for the United States Department of Agriculture, worked out of the offices of the Graham County Soil & Water Conservation District and directed all of the work performed by it. Pet. App. 8a, 86a. This federal employee selected the contractor to do the work at issue, prepared the forms for the County to request reimbursement for the work, and advised the local district that the work at issue need not be sent out for bids. Pet. App. 9a, 57a-59a, 62a-63a, 72a-73a, 86a. In fact, respondent concedes that Greene ran the district and was "in charge of the entire operation." Pet. App. 128a-29a; *accord* Pet. App. 136a. Thus, the on-site federal employee responsible for this program was aware of every aspect of the operation of the district.

Respondent Karen Wilson, a part-time secretary employed by the Graham County Soil & Water Conservation District, began voicing various concerns about the operation of the district in December 1995. Wilson, however, did not voice any concern about the need to bid the work performed under the EWP Program until after the Crisp &

Hughes Audit Report was available to her. *See* Pet. App. 96a. In her deposition, Wilson readily admitted that she obtained documents from various local, state and federal entities in her attempt to prepare her claims against petitioners.[4] J.A. 112-15.

3. On January 25, 2001, Wilson filed a *qui tam* action and retaliatory discharge claim against Graham County Soil & Water Conservation District, Graham County, Cherokee County Soil & Water Conservation District and various individuals.[5] *See* 31 U.S.C. § 3730(b) (2006) (*qui tam* provisions); 31 U.S.C.S. § 3730(h) (LexisNexis 2009) (retaliatory discharge provisions). The United States declined to intervene in the action. *See* 31 U.S.C. § 3730(b)(2).

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[4] In addition to the March 1996 audit, a May 1996 report prepared by the North Carolina Department of Environment and Natural Resources ("May 1996 DEHNR Report") also addresses various items that were later made the subject of plaintiff's complaint. Like the county audit, this document constitutes a public record under state law. N.C. Gen. Stat. § 132-1 to -10 (2007).

[5] This Court addressed the statute of limitations applicable to Wilson's retaliatory discharge action in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson,* 545 U.S. 409 (2005). Following remand from this Court, the Fourth Circuit dismissed Wilson's retaliatory discharge action as time barred. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.,* 424 F.3d 437 (4th Cir. 2005).

Plaintiff asserted various claims of mismanagement by the Graham County and Cherokee County conservation districts, including an allegation that the work under this federal program was required to be sent out for bids, which was not done. Specifically, the complaint alleges that various payments made by the counties were "improper . . . because there had been no bidding on the contract as required by the EWP-216 program." J.A. 16, 21 (Third Amended Complaint, ¶ 31(a), (n)).

On March 13, 2007, the district court held that plaintiff's claims are jurisdictionally barred pursuant to 31 U.S.C. § 3730(e)(4)(A). The district court held, in the alternative, that defendants are entitled to summary judgment on the merits of plaintiff's claims.

In its decision, the district court concluded that a state audit or investigation is sufficient to constitute a public disclosure under 31 U.S.C. § 3730(e)(4)(A). Pet. App. 95a-97a. The district court further found that Wilson had based her complaint on the March 1996 Crisp & Hughes Audit Report and the May 1996 DEHNR report and that she was not an original source of the information. Pet. App. 95a-98a.

On June 9, 2008, the Fourth Circuit reversed the district court's entry of judgment in favor of defendants. The Fourth Circuit concluded that a state or local government audit, investigation or report does not constitute a public disclosure under

31 U.S.C. § 3730(e)(4)(A). The Fourth Circuit remanded the action to the district court for a determination as to whether any portion of plaintiff's complaint had been based on a federal administrative report prepared by USDA and, if necessary, further consideration of whether defendants were entitled to summary judgment on the merits.[6]

Whether 31 U.S.C. § 3730(e)(4)(A) is limited to federal administrative audits and reports or also includes state administrative reports has divided the circuits. 528 F.3d at 296 (Pet. App. 5a-6a). The Eighth, Ninth and Eleventh Circuits have concluded that state administrative audits and reports fall within the scope of section 3730(e)(4)(A). *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006); *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003). The Third and Fourth Circuits have held to the contrary. *United States ex rel. Dunleavy*

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[6] Wilson denies having had access to this USDA report. *See United States ex rel. Siller v. Becton Dickinson & Co.,* 21 F.3d 1339, 1349 (4th Cir. 1994) (unless plaintiff actually derived the allegations of her complaint from a public disclosure, plaintiff's complaint is not barred by 31 U.S.C. § 3730(e)(4)(A)). Moreover, the USDA report does not address whether the work done under this federal program was required to be sent out for bids.

v. County of Del., 123 F.3d 734, 745 (3d Cir. 1997); *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292 (4th Cir. 2008).

The Fourth Circuit expressly recognized that the literal language of the statute, 31 U.S.C. § 3730(e)(4)(A), includes state administrative audits and reports. 528 F.3d at 301 (Pet. App. 22a). Nevertheless, the Fourth Circuit concluded that congressional intent justified overriding the literal language of the False Claims Act. *Id.* (concluding that "examination of the relevant language in context" overrides Congress' literal language). Yet, in doing so, the Fourth Circuit itself concluded that the meaning of the statute is "murky" and whether Congress intended to limit the public disclosure bar to federal reports, audits and investigations is not clear. *Id.* at 305 (Pet. App. 32a). The court noted, "[a]lthough we ultimately disagree with [petitioners,] we must admit that there is some force to [their] argument." *Id.* at 303 (Pet. App. 28a).

SUMMARY OF ARGUMENT

The False Claims Act bars a *qui tam* action that is based on certain publicly disclosed information unless the *qui tam* plaintiff is an original source of that information. 31 U.S.C. § 3730(e)(4). The list of publicly disclosed information includes an "administrative . . . report, . . . audit, or

investigation." Relying on the doctrine of *noscitur a sociis* (a word is known by the company it keeps), the Fourth Circuit concluded that state and local government administrative reports, audits and investigations do not constitute an "administrative . . . report, . . . audit, or investigation." Specifically, the Fourth Circuit concluded that because the statutory list contains two uniquely federal terms ("congressional" and "Government Accounting Office"), the word "administrative" should be limited to federal administrative materials. The Fourth Circuit reached this conclusion even though the vast majority of the items in the statutory list are not uniquely federal (e.g., news media).

The word "administrative" is neither vague nor ambiguous. The term is commonly understood to refer to both state and federal administrative proceedings. Throughout the United States Code, Congress uses the word "administrative" to refer to both federal and state proceedings. Moreover, Congress has demonstrated that when it wants to distinguish between state and federal administrative proceedings, it knows how to draft language to do so. Because the meaning of the word "administrative" is clear, the Fourth Circuit erred in turning to the doctrine of *noscitur a sociis* to rewrite the meaning of this statute. *Noscitur a sociis* may only be used when a particular word or phrase is obscure or of doubtful meaning. The doctrine may not be used to create ambiguity. In drafting this statute, Congress

chose the word "administrative" rather than "federal administrative," thereby indicating its intent that both state and federal audits, investigations and reports would give rise to a public disclosure under the statute.

The doctrine of *noscitur a sociis* is premised on the assumption that Congress acts deliberately in selecting and ordering the words of the statutory list. The False Claims Act, and particularly section 3730(e)(4), stands as a particularly poor example of congressional draftsmanship. The 67 words that make up the public disclosure bar are rife with inconsistencies. Accordingly, it is inappropriate to assume that the statutory list at issue should be rewritten to create a uniform list of closely related items. In fact, it is impossible to read the list as limited to federal materials given the inclusion of "news media" among the list. *Noscitur a sociis* may only be used if there is a common feature that may be extrapolated from the statutory list. Of the seven items set out in this list, only two are uniquely federal. Because the statutory list is clearly not limited to federal materials, the court below erred in using *noscitur a sociis* to limit the plain language of a single term of this list (administrative reports, audits or investigations).

The Fourth Circuit's decision creates numerous anomalies that clearly were not intended by Congress. For example, the statute uses the phrase "administrative hearings" in two separate clauses.

The first clause of the public disclosure bar provides that a *qui tam* action may not be based on a "criminal, civil or administrative hearing." 31 U.S.C. § 3730(e)(4)(A). This clause, which contains no uniquely federal terms, has universally been construed by circuit courts, including the Fourth Circuit, to include state administrative hearings. The second clause of the statute reads as follows: "congressional, *administrative*, or Government Accounting Office report, *hearing*, audit, or investigation." *Id.* (emphasis added). Under the Fourth Circuit's decision, the phrase "administrative hearing" in the first clause has a completely different meaning than "administrative . . . hearing" in the second clause, even though the phrases are in the same sentence. Such an anomalous result flies in the face of basic principles of statutory construction.

Additionally, the Fourth Circuit's reading of the statute encourages the filing of parasitic *qui tam* actions – the very conduct that Congress sought to discourage when it enacted the public disclosure bar. Under the Fourth Circuit's decision, a plaintiff may simply copy a state administrative report verbatim into a complaint, file a *qui tam* action and then demand a bounty even though the plaintiff added nothing to an ongoing investigation. Such a result siphons off the recovery that the United States would otherwise be entitled to receive. The numerous anomalies that flow from the Fourth

Circuit's decision demonstrate that its reading of the statute is in error.

ARGUMENT

By its express terms, the False Claims Act provides that federal courts shall not have jurisdiction to hear a *qui tam* action that is based on an "administrative . . . report . . . audit, or investigation." 31 U.S.C. § 3730(e)(4)(A). The Fourth Circuit erred in using the doctrine of *noscitur a sociis* (i.e., a word is known by the company it keeps) to rewrite the language of this statute so as to limit its scope to *federal* administrative reports, audits and investigations. Congress could easily have inserted the word "federal" before "administrative," as it has done in other statutes. Congress, however, chose language with no such limitation.

The doctrine of *noscitur a sociis* is intended to prevent "ascribing to one word a meaning so broad that it is inconsistent *with its accompanying words*, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (emphasis added; internal citations omitted). The words that accompany "administrative" do not establish that the public disclosure bar, contrary to the plain text of the statute, should be read to exclude state administrative reports, audits and investigations.

Moreover, the Fourth Circuit's rewriting of the statute produces numerous anomalies that are inconsistent with congressional intent.

I. THE WORD "ADMINISTRATIVE" IS NOT AMBIGUOUS AND SHOULD NOT HAVE BEEN REWRITTEN BY THE FOURTH CIRCUIT TO MEAN "FEDERAL ADMINISTRATIVE."

The first and overriding principle of statutory construction is that "a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). Thus, when the statutory language is plain, "'the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Arlington Cent. Sch. Dist. v. Murphy,* 548 U.S. 291, 296 (2006) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). A federal court is not at liberty to rewrite a statute to reflect a meaning that it deems more desirable. *Ali v. Fed. Bureau of Prisons,* 128 S. Ct. 831, 841 (2008). Rather, courts must "give effect to the text Congress enacted." *Id.*

The phrase "administrative . . . report . . . audit, or investigation" has a plain and readily understood meaning. *See, e.g.,* American Heritage Dictionary of the English Language 22 (4th ed. 2000) (definition of

noun "administration": "The activity of a government or state in the exercise of its powers and duties."). Throughout the United States Code, Congress has repeatedly used the word "administrative" to refer to both federal and state administrative proceedings.[7]

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[7] *See, e.g.,* 7 U.S.C. § 2276(b)(2)(B) (2006) (specified confidential information shall not be "used for any purpose in any action, suit, or other judicial or administrative proceeding"); 10 U.S.C. § 613a(b)(3) (2006) (deliberations of military selection boards may not be used "in any action, suit, or judicial or administrative proceeding"); 10 U.S.C. § 1102(b)(1) (2006) (restricting use of medical quality assurance reports "in any judicial or administrative proceeding"); 10 U.S.C. § 2304(c)(3) (2006) (competitive procedures need not be used to retain an expert for purposes of "any trial, hearing, or proceeding before any court, administrative tribunal, or agency"); 11 U.S.C. § 362(a)(1) (2006) (filing of bankruptcy petition constitutes an automatic stay of "a judicial, administrative, or other action or proceeding against the debtor"); 11 U.S.C. § 505(a)(2)(A) (2006) (bankruptcy court may not determine amount of debtor's tax liability if such liability has been previously adjudicated by a "judicial or administrative tribunal of competent jurisdiction"); 11 U.S.C. § 922(a)(1) (bankruptcy petition constitutes automatic stay of "a judicial, administrative, or other action or proceeding" to enforce claim against debtor); 12 U.S.C. § 1817(j)(6)(A) (2006) (requiring disclosure of "any material pending legal or administrative proceedings"); 13 U.S.C. § 9(a) (2006) (confidential census reports may not be "used for any purpose in any action, suit, or other judicial or

In fact, the False Claims Act itself (in a provision separate and distinct from the public disclosure bar

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administrative proceeding"); 15 U.S.C. § 37b(c) (2006) (congressional declaration that medical resident matching programs do not violate state and federal antitrust laws "shall apply to all judicial and administrative actions or other proceedings" pending on date of enactment); 15 U.S.C. § 2055(e)(2) (2006) (specified reports shall not be subject to subpoena or discovery "in any civil action in a State or Federal court or in any administrative proceeding"); 49 U.S.C. § 20107(c)(3)(A) (2006) (intercepts of railroad radio communications "shall not be admitted into evidence in any administrative or judicial proceeding," except for impeachment or in state and federal felony prosecutions); 50 U.S.C. app. § 502(2) (2006) (purpose of Service Members Relief Act is to "provide for the temporary suspension of judicial and administrative proceedings").

In these statutes, Congress uses the word "administrative" to include both state and federal administrative proceedings. For example, in the preamble to the Service Members Relief Act, Congress notes that the Act provides for suspension of "administrative proceedings." 50 U.S.C. app. § 502(2). The body of the Act, however, expressly provides for suspension of state and federal administrative proceedings. 50 U.S.C. app. § 512(a), (b) (2006). Similarly, when Congress uses the phrase "administrative . . . proceeding" in the automatic stay provisions of the bankruptcy code, that phrase clearly encompasses state administrative proceedings. *Contractors' License Bd. v. Dunbar (In re Dunbar)*, 245 F.3d 1058, 1063 (9th Cir. 2001).

at issue in this appeal) uses the word "administrative" to refer to both state and federal administrative proceedings. 31 U.S.C. § 3733(*l*)(7) (2006). With the 1986 amendments to the False Claims Act, Congress added a significant tool to the Government's arsenal in fighting fraud – the ability of the Department of Justice ("DOJ") to issue civil investigative demands. 31 U.S.C.S. § 3733 (LexisNexis 2009). This section allows DOJ to obtain discovery materials produced in other actions (referred to as "product of discovery") and sets specific procedures with respect to such an investigative demand. 31 U.S.C.S. § 3733(a) (LexisNexis 2009). The statute defines "product of discovery" as depositions, interrogatories and requests for admissions obtained through discovery "in any judicial or *administrative proceeding* of an adversarial nature." 31 U.S.C. § 3733(*l*)(7) (emphasis added). Given Congress' desire that DOJ have broad access to information through civil investigative demands, Congress clearly intended the word "administrative proceeding" to include both state and federal proceedings. In contrast to the numerous examples of Congress using the word "administrative" to mean state and federal administrative proceedings, when Congress wants to distinguish between a state administrative agency

and a federal administrative agency, it knows how to use language to achieve this result.[8]

Consistent with the numerous statutes in which Congress has used "administrative" to include state administrative proceedings, the Fourth Circuit conceded that "there is nothing inherently federal about the word 'administrative.'" 528 F.3d at 302. As the Fourth Circuit recognized, the public disclosure bar "by its express terms does not limit its reach to federal administrative reports or investigations." 528 F.3d at 301.

Having chosen the word "administrative" rather than the phrase "federal administrative," Congress, through the plain language of the statute, has expressed its intent that both state and federal audits, investigations and reports give rise to a public disclosure under 31 U.S.C. § 3730(e)(4)(A). The Fourth Circuit erred in turning to the obscure doctrine of *noscitur a sociis* to override the plain language of the statute.

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[8] *See, e.g.,* 6 U.S.C. § 575(b)(1)(G) (2006) ("State Administrative Agencies"); 15 U.S.C. § 717n(c)(2) (2006) ("a Federal or State administrative agency"); 15 U.S.C. § 717n(d) (2006) ("a Federal administrative agency"); 16 U.S.C. § 1466 (2006)("any Federal administrative agency"); 16 U.S.C. § 3117(a) ("any State or Federal (as appropriate) administrative remedies"); 20 U.S.C. § 956(f) (2006) ("State administrative agency"); 28 U.S.C. § 1342 (2006) ("a State administrative agency"); 42 U.S.C. § 3789d(c)(2)(A)(i) (2006) ("a Federal or State administrative agency").

II. THE FOURTH CIRCUIT ERRED IN RELYING ON THE DOCTRINE OF *NOSCITUR A SOCIIS* AS A BASIS FOR REWRITING THE STATUTE.

Relying on the doctrine of *noscitur a sociis*, the Fourth Circuit concluded that the public disclosure bar should be read as limited to federal administrative reports, audits and investigations. The Fourth Circuit erred in its application of this doctrine of statutory construction. First, the doctrine may be used only when the language of the statute is ambiguous. Second, the doctrine assumes that Congress acted deliberately and methodically in preparing the statutory list at issue. The doctrine is of limited value when, as here, Congress has not given careful consideration to either its word choice or the order of the listing. Third, the doctrine is only applicable when a common feature may be extrapolated from the statutory list.

1. The doctrine of *noscitur a sociis* may not be used to create ambiguity. It may only be used to remove doubt. *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). The doctrine should be employed only when a "particular word is obscure or of doubtful meaning." *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893); *see also* Norman J. Singer, *Statutes and Statutory Construction* § 47:16, at 347 (7th ed. 2007) (doctrine is "a mere guide to legislative intent" and "will not be applied

where there is no ambiguity"); *see also* Francis J. McCaffrey, *Statutory Construction* 41 (1953) ("If the intent of the legislature is plain, the maxim *noscitur a sociis* must give way."); Earl T. Crawford, *The Construction of Statutes* § 190, at 326 (1940) (doctrine is to be used "only as an instrumentality for determining the intent of the legislature where it is in doubt").

The word "administrative" is neither obscure nor of doubtful meaning. As set forth above, the dictionary definition of this word includes both state and federal government. Congress has repeatedly used the word "administrative" to include both state and federal government. The Fourth Circuit therefore wrongly used the doctrine of *noscitur a sociis* not to remove doubt but to create it.

2. The doctrine of *noscitur a sociis* is based on the assumption that Congress acts deliberately in selecting and ordering the words of the statutory list at issue. Accordingly, the doctrine is of limited use when Congress has not given careful consideration to either its word choice or the order of the listing. As the circuit courts have repeatedly noted, the public disclosure bar, 31 U.S.C. § 3730(e)(4), is the poster child of poor congressional draftsmanship. *See Graham County,* 528 F.3d at 305; *United States ex rel. Findley v. FPC-Boron Employees' Club,* 105 F.3d 675, 681 (D.C. Cir. 1997).

As Justice (then Judge) Alito noted in *United States ex rel. Mistick v. Housing Authority,* 186 F.3d

376, 387 (3d Cir. 1999), section 3730(e)(4)(A) refers to the General Accounting Office[9] as the "*Government* Accounting Office" and "thus misnames an instrumentality that Congress has consistently viewed as its own." The section makes awkward use of prepositions in its reference to "the public disclosure . . . *from* the news media." *Id.* The section refers to criminal and civil "hearings," even though Congress unquestionably intended to capture trials, not just hearings. *Id.* The section states that no court shall have jurisdiction "over an action . . . based on a public disclosure," thus ignoring the fact that false claim actions frequently have multiple claims, only some of which are based on a public disclosure. *Id.* The statute fails to explain what Congress intended by the term "based on" or the degree to which an action must be "based on" the public disclosure. *Id.* While section 3730(e)(4)(A) speaks in terms of "allegations or transactions," the word "transactions" is mysteriously dropped from section 3730(e)(4)(B). 186 F.3d at 388. "The inescapable conclusion is that the *qui tam* provision does not reflect careful drafting." *Id.*

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[9] In 2004 (18 years after the 1986 amendments to the False Claims Act), Congress renamed the General Accounting Office the Government Accountability Office ("GAO"). Act of July 7, 2004, Pub. L. No. 108-271, § 8, 118 Stat. 811, 814.

In *Mistick*, the Third Circuit noted, that "[i]n light of this apparent lack of precision, we are hesitant to attach too much significance to a fine parsing of the syntax of § 3730(e)(4)(A)." *Id.* Accordingly, the doctrine of *noscitur a sociis* is a poor lens for viewing the False Claims Act. The doctrine is premised on the assumption that Congress gave careful consideration to the order of the statutory list and the relationship of the various terms. That assumption, however, does not hold true with respect to the False Claims Act.

3. The doctrine of *noscitur a sociis* applies only when a statutory listing raises an implication that the items in the list have a related meaning. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.,* 547 U.S. 370, 378 (2006). "[*N*]*oscitur a sociis* is no help absent some sort of gathering with a common feature to extrapolate." *Id.* at 379-80. Here, there is no common feature that can be extrapolated from the disconnected items that Congress has placed in the statutory list. This list includes criminal and civil hearings, congressional reports and reports of the news media. Such a wide-ranging and varied list simply does not support an assertion that Congress intended (but failed to express) that the terms of this list (such as administrative reports, audits or investigations) would be limited to federal documents.

Section 3730(e)(4)(A) contains a list of seven items: 1) criminal hearings, 2) civil hearings,

3) administrative hearings, 4) congressional reports, hearings, audits and investigations, 5) administrative reports, hearings, audits and investigations, 6) "Government [sic] Accounting Office" reports, hearings, audits and investigations, and 7) news media. Of these seven items, only two are uniquely federal – congressional materials and GAO materials. None of the other five items contains language that would limit the public disclosure bar to federal materials, and one of the items (news media) could not logically be limited to federal materials. Thus, there is no common feature to extrapolate from this list.

Rather than looking at the list as a whole, the Fourth Circuit chose to focus on a subset of this list – the phrase "congressional, administrative, or Government Accounting Office report, hearing, audit or investigation." By narrowly focusing on a single clause of the statute, the Fourth Circuit reduced the number of non-federal items to one (administrative, reports, hearings, audits or investigations) as compared to two uniquely federal items. As a result, the Fourth Circuit concluded that the word "administrative" lies "'sandwiched between modifiers which are unquestionably federal in character.'" 528 F.3d at 302 (quoting *Dunleavy*, 123 F.3d at 745). The Fourth Circuit's approach, however, is the judicial equivalent of placing blinders on a horse. The Fourth Circuit ignores the fact that this clause is sandwiched between non-federal terms ("news

media" and "criminal, civil and administrative hearings").

As this Court recognized in *Gustafson*, federal courts have a "duty to construe statutes, not isolated provisions." 513 U.S. at 568. Accordingly, federal statutes "should not be read as a series of unrelated and isolated provisions." *Id.* at 570. A statutory clause should not be "viewed alone," but must be considered in light of the provisions and arrangement of the statute as a whole. *Gonzales v. Oregon*, 546 U.S. 243, 273 (2006). When the statute is read as a whole, there are simply no "clearly federal terms [that] bookend" the word "administrative." 528 F.3d at 302. Rather, the word "administrative" is simply part of a larger list that includes both federal and non-federal terms.

Like the Fourth Circuit, the United States asserts that Congress' use of the words "congressional" and "Government Accounting Office" indicates that Congress intended the clause "administrative . . . report, . . . audit, or investigation" to be limited to documents prepared by the federal government. Br. for U.S. as *Amicus Curiae* at 17 (filed May 20, 2009). The United States, however, argues that the first clause of the statute ("a criminal, civil, or administrative hearing") should also be read as limited to federal hearings. *Id.* at 17-18. Thus, the position of the United States is that even though only two of the seven items set out in section 3730(e)(4)(A) are

uniquely federal, all of the items contained in the list (except for "news media") should be limited to federal materials. The United States' position stretches the doctrine of *noscitur a sociis* beyond its breaking point and is inconsistent with this Court's long-standing principle that Congress is presumed to have meant the words that it used. *See, e.g., Dodd v. United States*, 545 U.S. 353, 357 (2005); *Conn. Nat'l Bank v. Germain,* 503 U.S. at 253-54. As a result, this argument has been soundly rejected by every circuit that has considered it. *McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1252-53 (11th Cir. 2007); *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 332-33 (3d Cir. 2005); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004); *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994).

The Fourth Circuit erred in its application of the doctrine of *noscitur a sociis*. The phrase "administrative . . . report, . . . audit or investigation" is not ambiguous. Moreover, the statutory list is not restricted to federal materials. In fact, the vast majority of the items set out in the list are non-federal sources. Consequently, the doctrine of *noscitur a sociis* may not be used to alter the language that Congress chose in drafting this statute.

III. THE FOURTH CIRCUIT'S CONSTRUCTION OF THE PUBLIC DISCLOSURE BAR CREATES ANOMALOUS RESULTS THAT CONGRESS DID NOT INTEND.

The Fourth Circuit's decision construes the statute in such a way as to undermine the very purpose of the public disclosure bar and creates anomalies that could not have been intended by Congress. These anomalies further demonstrate that the Fourth Circuit erred in relying on *noscitur a sociis* as a basis to rewrite the statute.

A. The Decision Below Undermines The Purpose Of The Public Disclosure Bar.

The Fourth Circuit's decision undercuts the very purposes of the public disclosure bar. First, the Fourth Circuit's reading of the statute encourages the filing of parasitic actions by strangers who have done nothing to facilitate a fraud investigation. Second, the decision makes it less likely that true whistleblowers will be able to pursue a *qui tam* action. Third, the decision makes it less likely that States and local governments will investigate possible mismanagement of federal programs.

1. The public disclosure bar is designed to deter parasitic *qui tam* actions. *Glaser v. Wound Care*

Consultants, Inc., 570 F.3d 907, 913 (7th Cir. 2009); *In re Natural Gas Royalties ex rel. United States v. Exxon Co.*, 566 F.3d 956, 961 (10th Cir. 2009); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009); *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 507 (6th Cir. 2009). Parasitic suits add little in value and siphon off a portion of the government's recovery. *In re Natural Gas Royalties,* 566 F.3d at 960; *see* 31 U.S.C. § 3730(d).

The Fourth Circuit's construction of the public disclosure bar encourages the filing of parasitic *qui tam* actions. Under the Fourth Circuit's holding, a plaintiff may freely base his or her *qui tam* action on a report that is readily available to the public through a state or local government agency. A plaintiff can obtain these reports with virtually no effort by simply searching the Internet or serving a state FOIA request. *See* www.bsa.ca.gov/reports/agency/79 (providing access to reports of California State Auditor, including audit relied on by *qui tam* plaintiff in *Bly-Magee*, 470 F.3d at 917-18).

Under the Fourth Circuit's decision, a plaintiff could copy verbatim a state or local government report into a complaint, file the action and then demand a substantial percentage of any recovery of federal funds. Congress, however, has made clear that plaintiffs who simply rely on information that has been publicly disclosed should not be permitted

to siphon off a portion of the Government's recovery. 31 U.S.C. § 3730(e)(4)(A).

2. The decision below threatens to jeopardize the claims of true whistleblowers who are pursuing false claims investigations based on their own independent knowledge. Under the first-to-file provision of the False Claims Act, the filing of a *qui tam* action by one plaintiff cuts off all subsequently filed *qui tam* actions brought by other plaintiffs. 31 U.S.C. § 3730(b)(5) (2006). Thus, under the Fourth Circuit's opinion, an insider who has worked for years in gathering information in order to expose corruption could find his or her *qui tam* action gutted when a complete stranger to the fraud wins the race to the courthouse and files a parasitic lawsuit that is based solely on information available to the public in a state audit.

3. The practical effect of the Fourth Circuit's decision is to discourage investigations by local governments. Under the Fourth Circuit's decision, an audit or investigation by a local government may be obtained by a complete stranger to the transaction and then made the basis of a *qui tam* action against that local government. If the Fourth Circuit's decision is upheld, a substantial risk exists that a cottage industry will develop in which plaintiffs' attorneys will scour local government reports in hopes of finding self-reporting by counties and cities of errors relating to the expenditure of federal funds. Many local governments will

undoubtedly respond to this risk by choosing not to engage in such investigations. Such a result is not in the public interest. The False Claims Act should not be construed in such a way as to result in a chilling effect on such investigations.

B. THE DECISION BELOW CREATES ANOMALOUS RESULTS THAT WERE NOT INTENDED BY CONGRESS.

The Fourth Circuit's construction of the statute produces several bizarre results. These anomalies demonstrate that the Fourth Circuit's reading of the statute is wrong.

1. The Fourth Circuit gave two different meanings to the word "administrative" in the same sentence. The statute expressly states that information available through "a criminal, civil, or administrative hearing" shall constitute a public disclosure. 31 U.S.C. § 3730(e)(4)(A). As set out above, every circuit that has considered whether a state "administrative hearing" can give rise to a public disclosure has concluded that such proceedings fall within the scope of 31 U.S.C. § 3730(e)(4). Under the Fourth Circuit's reading of the public disclosure bar, the phrase "administrative hearing" as it is used in the first clause of this section includes state administrative hearings. The Fourth Circuit, however, concluded that the phrase "administrative . . . hearing" as it is used in the

second clause of this section does not include state administrative hearings. Thus, the Fourth Circuit's decision ascribes completely different meanings to the same phrase even though the two phrases appear within four words of each other.[10] Not only does the Fourth Circuit's construction run afoul of the canon of statutory construction that similar or identical clauses in the same statute must be read *in pari materia*, the conclusion that the two phrases, in such close proximity, mean different things defies all logic. *See Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (under the rule of *in pari materia*, "a legislative body generally uses a particular word with a consistent meaning in a given context").

2. Congress has expressly provided that information "from the news media" will give rise to a public disclosure. 31 U.S.C. § 3730(e)(4)(A). Under the Fourth Circuit's decision, a one paragraph newspaper report in an weekly paper of limited circulation will give rise to a public disclosure while an audit conducted by an elected state official and widely disseminated will not. "To interpret the statute so narrowly would have the anomalous result of allowing public disclosure status to the most obscure local news report . . . but denying

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[10] Additionally, the Fourth Circuit's construction of the word "administrative" is inconsistent with how Congress has used that word elsewhere within the False Claims Act. 31 U.S.C. § 3733(*l*)(7).

public disclosure status to a formal public report of a state government agency." *In re Natural Gas Royalties Qui Tam Litig.,* 467 F. Supp. 2d 1117, 1144 (D. Wyo. 2006), *aff'd*, 562 F.3d 1032 (10th Cir. 2009).

The Fourth Circuit improperly assumed that simply because a report is published by the "news media," that report is much more readily available to the federal government than a state administrative report. This is simply not the case. Tens of thousands of media outlets exist in this country. The vast majority of these consist of small local radio broadcast stations, weekly newspapers and local interest magazines. Consequently, the federal government has little practical ability to retrieve, filter and use most of these news media reports.

In contrast, the States and local governments coordinate very closely with the federal government with respect to federally funded programs. *See, e.g.,* 42 U.S.C. § 1396b(a)(6)(B), (q), (r)(2)(B) (2006) (requiring States to create Medicaid Fraud Control Units which are funded in substantial part by the federal government and operate under the oversight of the Inspector General of the Department of Health and Human Services); 42 C.F.R. § 1007.17 (2008) (mandatory reporting of state Medicaid Fraud Control Units to federal government). The federal government requires detailed reporting with respect to the expenditure of federal funds. *See, e.g.,* 31 U.S.C. § 7502. The very program at issue here demonstrates this close coordination. As the district

court noted, an employee of the United States Department of Agriculture was physically present at the office of the local conservation districts and directed the day-to-day work of the districts. *See* Pet. App. 86a. The project at issue was a joint program that utilized the resources of both the federal and local government and was paid for by both.

The federal government requires States and local governments to prepare audits and reports with respect to the expenditure of federal funds, makes those reports available through a federal clearinghouse, and posts those reports on the Internet. *See* 31 U.S.C. § 7502. The Fourth Circuit's conclusion that Congress did not intend to treat such reports as public sources produces a bizarre result, particularly when the availability of these reports is contrasted with the limited circulation of the thousands of weekly papers that exist in the United States.

IV. THE POLICY ARGUMENTS SUGGESTED BY LOWER COURTS AS TO WHY THE PUBLIC DISCLOSURE BAR SHOULD NOT BE READ AS INCLUDING STATE AND LOCAL GOVERNMENT REPORTS ARE UNPERSUASIVE.

Although the majority of the circuit courts have held that state administrative reports fall within the scope of the public disclosure bar, the Third Circuit, Fourth Circuit and a handful of district courts have opined that the public disclosure bar is limited to federal administrative materials. These lower court decisions have developed three principal public policy arguments as to why the bar should be limited to federal administrative reports, audits and investigations. These public policy arguments, however, lack merit. Moreover, these arguments are insufficient to justify rewriting the words chosen by Congress. *See Ali,* 128 S. Ct. at 841 ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.").

1. One district court has noted that the language of the public disclosure bar does not include state legislative reports – only congressional reports. *United States ex rel. Hansen v. Cargill, Inc.,* 107 F. Supp. 2d 1172, 1180 (N.D. Cal. 2000). The court concluded that it would be anomalous for Congress to bar *qui tam* actions that are based on a

state administrative report but not bar *qui tam* actions that are based on a state legislative report. *Id.*

At the time of the 1986 Amendments to the False Claims Act, a perception existed within many federal agencies that state legislatures play (or should play) virtually no role in the oversight of federally assisted programs. This perception is documented in detail in a 1980 GAO report to Congress. U.S. Gen. Accounting Office, *Federal Assistance System Should be Changed to Permit Greater Involvement by State Legislatures* (Dec. 15, 1980) (GGD-81-3). The report notes that for essentially all federal programs, Congress has assigned responsibility for the State's administration of the program to the Governor and the State executive branch, thereby "rais[ing] questions about the viability of a [state] legislative role" with respect to these programs. *Id.* at 11. The GAO notes that state legislatures have "generally been ignored" by Congress with respect to joint state and federal programs. *Id.* at 13. Although the federal government provides substantial technical and financial assistance to the state executive agencies with respect to federal assistance programs, these resources "are usually not available" to state legislatures. *Id.* at 19. Thus, the report notes, the ability of a state legislature to evaluate federal programs is "weak" compared to that of the Governor. *Id.* at 19.

Based on its interviews of various state legislators, the GAO noted that legislatures "often view involvement in [oversight of] Federal programs as an inefficient use of limited time." *Id.* at 10. According to the report, state legislative oversight of federal grant programs is "low" and "sporadic." *Id.* at 39-40. Although the report notes that several state legislatures conduct audits and program evaluations, the report does not reference a single incident of a state legislative audit revealing fraud. *Id.* at 4, 16. Rather, the focus of state legislative audits of federally funded programs, when they occur, is to "eliminat[e] unneeded or ineffective programs." *Id.* at 44. During this time period, the Advisory Commission on Intergovernmental Relations (an independent agency created by Congress) similarly expressed its concern that "state legislative bodies ha[ve] been specifically and intentionally ignored" with respect to federal programs. Carol S. Weissert, *State Legislatures and Federal Funds: An Issue of the 1980s*, 11 Publius: Journal of Federalism 67, 67 (Summer 1981). In 1980, the National Conference of State Legislatures warned that "state legislatures must be aware of traditional Congressional anxiety" with respect to state legislative oversight of federal assistance programs. National Conference of State Legislatures, *A Legislator's Guide to Oversight of Federal Funds* 27 (1980).

In light of the fact that federal assistance programs establish virtually no role for state legislatures and that Congress has ignored state legislatures with respect to these programs, it is wholly unremarkable that Congress did not include state legislative reports in the public disclosure bar when the Act was amended in 1986. As a result of the virtually non-existent legislative history with respect to this provision, one can only speculate as to the reasons Congress chose not to include state legislative reports among the list. *See* 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.02[A], at 4-47 to -48 (3d ed. 2006) ("Because Section 3730(e)(4) was drafted subsequent to the completion of the House and Senate Committee reports on the proposed False Claims Act Amendments, those reports, which contained discussion of altogether different bars, cannot be used in interpreting it."). Given the limited oversight role that state legislatures play with respect to federally funded programs, however, the plain language of the statute cannot be characterized as odd or producing an absurd result.

2. Both the Fourth Circuit and other federal courts have asserted that Petitioners' construction of the Act would encourage local governments to draft obscure reports that disclose wrongdoing, thereby rendering the local government immune from future *qui tam* actions. This argument, however, ignores the fact that although local governments may be

sued under the False Claims Act, States may not be sued by a *qui tam* plaintiff. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). The Fourth Circuit's rationale therefore offers no justification for reading the public disclosure bar as excluding *state* administrative reports. Because States cannot be sued by a *qui tam* plaintiff, they would not draft reports describing their own misconduct for the sole purpose of cutting off *qui tam* actions.

Additionally, the Fourth Circuit's argument overlooks the fact that the effect of section 3730(e)(4)(A) is only to bar truly parasitic lawsuits – opportunistic plaintiffs who add no value to the fraud investigation. Under the False Claims Act, a plaintiff who is an original source of the information at issue (rather than acting as a parasite) is not barred from bringing a *qui tam* action. Additionally, the public disclosure bar does not preclude the United States from pursuing a false claim action even if the information on which that action is based is in the public domain. As a result, local governments have no incentive to create reports or audits for the sole purpose of cutting off *qui tam* actions.

3. In the decision below, the Fourth Circuit emphasized that state and local government reports are not particularly likely to come to the attention of the federal government. 528 F.3d at 306. Thus, the

Fourth Circuit concluded that state and local government reports should be excluded from the public disclosure bar. The Fourth Circuit's conclusion, however, is built upon faulty logic.

As the Fourth Circuit recognized, state administrative hearings fall within the public disclosure bar as a result of the first clause of section 3730(e)(4)(A) ("criminal, civil, or administrative hearing"). "The federal government is no less likely to obtain information from a state administrative audit than it is from a state administrative hearing." *Bly-Magee*, 470 F.3d at 918. In fact, the federal government is less likely to have access to an administrative hearing than to an administrative report. Many state administrative reports are readily available on the Internet. Those which are not available on the Internet can be readily obtained through a FOIA request.[11] In contrast, state administrative hearings frequently are not transcribed. Moreover, searching a state administrative proceeding for specific information tends to be much more difficult than simply

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[11] State FOIA requests exempt certain documents (e.g., attorney-client communications) from public disclosure. A state report that is not subject to public disclosure, of course, would not constitute a bar to a *qui tam* action. *See* 31 U.S.C. § 3730(e)(4)(A) (action must be "based upon" public disclosure).

requesting the state or local government to make available a specific report or category of reports.

Similarly, reports by the news media are not necessarily readily available to the United States Department of Justice. A substantial portion of the media outlets in the United States consists of local radio stations. *See* U.S. Gov't Accountability Office, *Media Ownership* 10 (March 2008) (number of radio stations operating in 2006 totaled 13,793). Information aired by local radio stations is generally non-searchable.[12] Once the broadcast is delivered, it is lost to all but those who heard the original broadcast. Certainly, a formal report prepared by a state auditor that is published on the Internet is much more readily available to the Department of Justice than is a fleeting radio news broadcast from Nisswa, Minnesota (Radio Station KBLB; population of 1,953). The same may be said of newspaper reports. The majority of newspapers throughout the country are not searchable through Lexis, Westlaw or similar databases. Many of these newspapers are weekly papers with circulations in the hundreds (and in some cases fewer). The Fourth Circuit's assumption that material from the news media is

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[12] Although the contents of some radio station broadcasts may be available on the Internet, this is not the industry norm. *See* www.npr.org (example of searchable broadcasts).

more readily accessible to the Department of Justice than state and local government reports is flawed.

In contrast to the difficulty of searching and tracking the millions of articles and broadcasts emanating from the thousands of media outlets throughout the country, the information contained in state and local reports, audits and investigations is, in comparison, readily available to the Department of Justice. A substantial portion of the work of state and local government involves cooperative programs with the federal government. In fact, the program at issue here, the Emergency Watershed Protection Program, is such a program with the costs being shared by the county and federal government. 16 U.S.C. § 2203; 7 C.F.R. §§ 624.1 to .11. A federal employee was physically housed at the local soil and water conservation district and directed the work by the districts. Moreover, the very report at issue was prepared as a result of the federal government's requirement that States and local governments receiving federal funds must be audited annually. 31 U.S.C. § 7502(h). Given that the report at issue was likely in the possession of the federal government, *see* J.A. 119, and was certainly within its constructive possession, an argument that the content of the report is "unlikely to come to [the federal government's] attention" is without merit. Br. for U.S. as *Amicus Curiae* at 15 (filed May 20, 2009).

When, as here, a state or local government report is prepared in connection with the operation of a joint program, the contents of that report are generally accessible to the federal government. Moreover, all fifty States have FOIA statutes. Matthew D. Bunker, *et al.*, *Access to Government-held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 Fla. St. U. L. Rev. 543, 543 (1993). As a result, state and local reports are available to both the federal government and interested citizens.

In its decision, the Fourth Circuit notes that "there is no central location (like a county courthouse with a searchable docket) where information about [administrative reports, audits or investigations] is kept and made available to the public." 528 F.3d at 306. The requirement of a searchable docket cannot be found within the text of the statute. Moreover, the Fourth Circuit ignores the very nature of state FOIA requests. Under state FOIA statutes, there is no need to travel to a county courthouse, search a docket and then retrieve the document of interest. Under state FOIA laws, one must merely request the type of document or report being sought. It is then incumbent on the state or local government to undertake the search and retrieval of that document. The Fourth Circuit's decision is based on a fundamental misunderstanding as to the ease with which state

and local government reports may be obtained through a state FOIA request.

The public policy arguments espoused by the Fourth Circuit do not justify rewriting the statute so as to change the word "administrative" to "federal administrative." The statute, as written, does not produce absurd results. The policy choice as to whether state and local government audits, reports and investigations should fall within the scope of section 3730(e)(4)(A) is best left to Congress. The language chosen by Congress should not be re-written by this Court.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

ROY COOPER
Attorney General of North Carolina
Christopher G. Browning, Jr.*
Solicitor General of North Carolina
Counsel for Petitioners Graham County Soil & Water Conservation District, Gerald Phillips, Allen Dehart, Lloyd Millsaps, Cherokee County Soil & Water Conservation District, Bill Tipton, C.B. Newton and Eddie Wood

Zeyland G. McKinney
Counsel for Petitioner Keith Orr

Sean F. Perrin
Counsel for Petitioners Graham County, Raymond Williams, Dale Wiggins and Lynn Cody

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