

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 OF THE STATES OF PENNSYLVANIA,
ALABAMA, ALASKA, ARKANSAS, COLORADO,
DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO,
INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND,
MASSACHUSETTS, MICHIGAN, NEBRASKA, NEW
HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH
DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA,
UTAH, VERMONT, VIRGINIA, WASHINGTON, AND
WYOMING AS AMICI CURIAE IN SUPPORT OF
PETITIONERS

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INTEREST OF THE AMICI

The amici are States which both receive federal grants and administer programs involving hundreds of billions of dollars of federal funds. Federal law requires them to submit audits and reports of the programs they administer to the federal government, and these audits and reports are also available to the public, in many cases at a clearinghouse maintained by the federal government. The amici have an interest in having these materials declared “public disclosures” under the False Claims Act, and thereby avoiding parasitical claims based upon them, because they may themselves be qui tam relators if they uncover improper or fraudulent claims. The Court of Appeals’ decision places that status in jeopardy, because persons who do no more than gain access to the States’ work will be able on that basis to file qui tam actions themselves, and if they are first to file, pre-empt a state claim. The decision also denigrates the role of state and local governments in administering federal programs by denying public source status to their reports and audits while according it to a newspaper article, a result Congress surely never intended.

SUMMARY OF ARGUMENT

The Court of Appeals held that the language of the False Claims Act bars qui tam actions that are based on public sources like newspapers and federal audits and reports but not on state and local audits and reports that are available to the public. The Court of Appeals rewrote the plain language of the statute and produced a nonsensical result that Congress cannot have intended – especially with respect to the Single

Audit Act, a federal law that requires state and local governments which administer federal programs to submit audits and reports on those programs to the federal government. One of the purposes of the False Claims Act is to encourage qui tam actions by true whistleblowers who have access to information that the federal government does not. It makes no sense, however, to allow qui tam actions by qui tam relators who have done no more than to read state or local audits and reports which, pursuant to the Single Audit Act, are made for the benefit of the federal government, and which are maintained for it and for public view at an online clearinghouse maintained by the United States Census Bureau.

ARGUMENT

State and Local Audits and Reports That Are Available to the Public Are “Public Sources” Under the False Claims Act.

The question in this case is whether audits and reports generated by States and local governments, as opposed to the federal government, are “public sources” of information under the False Claims Act such that private “qui tam” actions based on them are barred. See 31 U.S.C. § 3730(e)(4)(A). The Court of Appeals held that the Act’s reference to public disclosure of information applied only to audits conducted by federal agencies. We agree with the petitioner that this is simply incorrect as a matter of statutory construction, as the language of the statute is broad and clear. Beyond this, however, from the perspective of the States this construction makes no

sense at all, because in many cases state audits of federal programs they administer are required by the federal Single Audit Act, 31 U.S.C. §§ 7501-7507, are done for the benefit of federal authorities, and are available to the public, among other places, at a clearinghouse maintained by the federal government.

1. The False Claims Act, 31 U.S.C. §§ 3729-3733, which provides for treble damages, civil penalties and attorneys fees against those who submit false claims to obtain federal money, has been termed “the federal government’s primary anti-fraud tool for recovering ill-gotten gains from companies submitting false claims for payments to more than twenty government agencies or programs, such as Medicare and the military.” “Understanding the ‘Original Source Exception to the False Claim Act’s Public Disclosure Bar’ in light of the Supreme Court’s Ruling in *Rockwell v. United States*,” 7 DePaul Bus. and Com. L.J. 1 (2008). The Act achieves its purpose partly by encouraging the aid of “whistleblowers” – private parties who may bring qui tam actions on behalf of the government and share in any recovery. 31 U.S.C. §§ 3730, 3730(d). Since the 1986 amendments to the False Claims Act, qui tam relators have received over \$2 billion in total awards – almost \$198 million in 2008 alone. See Fraud Statistics Overview, Civil Division, U.S. Department of Justice, <http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm>. The idea behind this kind of claim is that the government can effectively “purchase” nonpublic information from relators in exchange for a share in the government’s potential recovery. “The False Claims Act Clarification Act: An End to the FCA’s Bar on Parasite Qui Tam Actions,” Vol. 44, *Procurement Lawyer*, 7 (Spring 2009), citing

United States ex rel. Russell v. Epic Healthcare Mgmt. Group, 193 F.3d 304, 309 (5th Cir. 1999). On the other hand, parties who themselves bring no new information to light should not be able to make the government “purchase” information which it already has, or can get for free. Thus, the same language of the False Claims Act precludes parasitic qui tam claims predicated on public information to which the government already has access:

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 person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The Department of Justice has gone on record that, in its view, “a relator who has no first-hand information about fraud and brings nothing new to the suit should not be entitled to reap the rewards of a False Claims Act suit.” The False Claims Corrections Act (2041): Strengthening Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2008) (statement of Michael Hertz, Deputy Assistant Atty. Gen. of the United States), quoted in “The False Claims Clarification Act,” at 3, *supra*.

Despite the clarity and breadth of this language, the Fourth Circuit has said that it applies only to federal audits and hearings. The Court of Appeals

conceded that “the statute by its express terms does not limit its reach to federal administrative reports or investigations,” Pet. App. at 22a, but concluded that, because the law includes some specific references to congressional and GAO reports, the entire listing should be taken to include “only those reports that originate with the federal government.” Id. at 23a. In drawing this conclusion – that Congress intended to limit public sources to federally originated report and audits – the court used the interpretive maxim “noscitur a sociis” – “a word is known by the company it keeps,” id. at 23a, and also the principle that, “where possible, courts should give effect to every word in a statute.” Id. at 31a. The court observed that “[i]f Congress had intended clause two to encompass state audits, reports, or investigations, it could have saved a few words by referring to disclosures in governmental audits, reports, or investigations, a phrasing that avoids the use of words that are inherently and exclusively federal in nature.” Id.

2. We agree with petitioner that the Court of Appeals has essentially rewritten the plain and clear language of a statute in a way that will in many cases lead to nonsensical results, and cannot be what Congress intended.

The general rule is that if statutory text is plain and unambiguous, the Court “must apply the statute according to its terms.” *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058, 1063-64 (2009), citing *United States v. Gonzales*, 520 U.S. 1, 4 (1997); *Dodd v. United States*, 545 U.S. 353 (2005); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530

U.S. 1, 6 (2000); *Caminetti v. United States*, 242 U.S. 470 (1917). Here the statute is indeed plain and unambiguous.

By its terms, the False Claims Act bars qui tam actions that are based on an “administrative . . . report . . ., audit or investigation.” 31 U.S.C. § 3730(e)(4). In the elided text, Congress did include the terms “congressional” and “Government Accounting Office,” presumably to illustrate the type of report, hearing, audit or investigation classified as a public source, but the Court of Appeals was wrong to seize on this and the doctrine of *noscitur a sociis* to limit the broad language of the False Claims Act. The Court has said that pairing a broad statutory term with a narrow one does not shrink the broad one, *S.D. Warren, Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), yet that is what the Court of Appeals has done here. Neither was the Court of Appeals justified in adding words to the statute, effectively rewriting it to refer to federal reports, federal audits, and federal investigations.

Rewriting a statute like this by a court is never appropriate. The Court has said that it is “not free to rewrite [a] statute that Congress has enacted. When the statute’s language is plain, the sole function of the courts – at least when the disposition required by the text is not absurd – is to enforce it according to its terms,” *Dodd v. U.S.*, 545 U.S. 353, 358 (2005) (internal quotations marks and citations omitted). In this case it is the text as rewritten by the Court of Appeals that makes no sense, leading to irrational distinctions and anomalous results.

In this regard, the Court has said with respect to statutory construction that, its “role [is] to make sense rather than nonsense out of the corpus juris.” *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 101 (1991). But in at least one important respect, the Court of Appeals’ reading of the statute does just the opposite. The Single Audit Act, 31 U.S.C. § 7501, et seq., imposes broad and comprehensive auditing and reporting requirement on all State, local government or non-profit organizations, 31 U.S.C. § 7501(a)(13), which expend, either directly or through subrecipients, more than \$500,000 in federal funds a year.¹ 31 U.S.C. § 7501(a)(4); 31 U.S.C. § 7501(a)(14). Thus, the Single Audit Act applies to all significant federal programs administered by state and local governments.² See generally, United States Office of Management and Budget, http://www.whitehouse.gov/omb/financial_fin_single_audit/.

The audits prescribed by the Act are “in lieu of any financial audit of Federal Awards which a non-Federal entity is required to undergo under any other Federal law or regulation,” 31 U.S.C. § 7503(a), and, depending on the circumstances, may be state-wide, agency specific, or program specific. 31 U.S.C. §§ 7502(a)(1)(B) and (c); 7502(d). The audit is to be

¹ The Single Audit Act was first enacted in 1984, two years before the amendment to the False Claims Act here in issue, and its monetary threshold has increased over time, from its original threshold of \$25,000.

² Although state and local governments which receive less than \$500,000 a year in federal funds are exempt from the Single Audit requirement, they are not exempt from any federal record keeping requirement. 31 U.S.C. § 7502(B).

conducted by an independent auditor “in accordance with generally accepted government auditing standards.” 31 U.S.C. § 7502(c). The auditor is required to report any noncompliance with applicable laws and regulations. 31 U.S.C. § 7502(e)(4), (g)(2). When the audit is completed, the State or local government is to transmit the “reporting package,” which includes “financial statements, schedule of expenditure of Federal awards, corrective action plan . . . and auditor’s reports . . . to a Federal clearinghouse designated by the Director [of the Office of Management and Budget] available for public inspection . . .”. 31 U.S.C. § 7502(h). The federal audit clearinghouse is maintained by the United States Census Bureau. See Federal Audit Clearinghouse, <http://harvester.census.gov/sac/> and the Census Bureau says that “the Federal Audit Clearinghouse (FAC) facilitates Federal oversight of entities expending federal money. The FAC accomplishes this goal by being the sole source of Single Audit information for federal agencies for a majority of auditees. In addition, public scrutiny of Federal grants is increased by making audit information public.” See <http://www.census.gov/econ/overview/go1400.html>.

Besides requiring that the audit reporting packages be maintained in a clearinghouse easily accessible to the public, the Single Audit Act gives federal agencies other responsibilities with respect to the audits generated pursuant to it. The Act contemplates, for example, that the appropriate federal agencies will review the audit materials: “To the extent that such audit provides a Federal agency with the information it requires to carry out its responsibilities . . . a Federal agency shall rely upon

and use that information.” 31 U.S.C. § 7503(b). Federal agencies that disburse federal funds are not only to monitor the use of those funds, 31 U.S.C. § 7504(a)(1), but also to “assess the quality” of audits conducted under the Single Audit Act, 31 U.S.C. § 7504(a)(2), and provide “technical assistance” with respect to them when necessary. 31 U.S.C. § 7504(b).

As applied to the reporting packages generated by state and local governments pursuant to the Single Audit Act, the ruling of the Court of Appeals makes no sense at all, because, pursuant to the ruling they do not qualify as public sources of information under the False Claims Act since they were not generated by a federal agency. As we have said before, the statutory language of the False Claims Act certainly by its plain terms seems broad enough to encompass Single Audit reporting packages, and considering these materials “private” information cannot be a result Congress intended. These reports and audits are required by federal law, are prepared for the benefit of federal agencies which have a statutory duty to review them, and are maintained for public view in a clearinghouse maintained by the United States Census Bureau. If the purpose of the “public source” provisions is “to encourage legitimate private suits by legitimate whistleblowers, while barring suits by opportunistic qui tam plaintiffs who base their claims on matters that have been publicly disclosed by others,” *Hays v. Hoffman*, 325 F.3d 982, 987 (8th Cir.), cert. denied, 540 U.S. 877 (2003); S.Rep. No. 99-346, 99th Cong. 2nd Sess., reprinted in 1986 U.S.C.C.A.N. 5266, then this interpretation of the statutory language is nothing short of nonsensical as it applies

to the reports and audits covered by the Single Audit Act.

3. The Court of Appeals' holding, applied to the Single Audit Act, is not without cost to the federal government and to the States as well. In the first place, the federal government may wind up paying a qui tam share for information it already has, which was developed for it, and which its agencies are statutorily required to monitor. If single audit reports are not public sources, then a relator can file a claim under the False Claims Act based solely on information contained in them, and share in any recovery even if the government chooses to intervene. 31 U.S.C. § 3730(d).⁴

This result hurts the States too, which are themselves potential qui tam relators. 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.01(B)(5), at 4-19 (3d ed. 2005) ("A number of qui tam cases have been brought by state and local governments."); see, e.g., *United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F.Supp. 624 (N.D. Ill. 1992) (qui tam action brought by Illinois Attorney General); *United States ex rel. Magnolia City Hospital v. Medical Business Assocs.*, 2006 U.S. Dist.

⁴ The same is true with respect to the many other reports that states and local governments must file with the United States. See, e.g., 42 U.S.C. § 300g-9(b)(2), (c)(3); 42 U.S.C. § 1396b(d)(1), (6); 42 U.S.C. § 1758(h)(3); 42 U.S.C. § 3796dd-6; 42 U.S.C. § 3796kk-6; 49 U.S.C. § 47141(d).

LEXIS 46713 (W.D. Ark. 2006) (qui tam action brought by municipal hospital). States may well uncover instances of fraud and abuse in the course of preparing federally required audits and which are reflected in these audits. Under the False Claims Act, the first filer of a qui tam action forecloses all subsequent claims. 31 U.S.C. § 3730(b)(5). Taken together with the Court of Appeals' decision, what this means for the States is that an individual who does no more than read their publicly available work and file suit based on it may foreclose them from the benefit of their own efforts.

There is also the danger that ongoing investigations may be impeded by opportunistic potential relators trolling state records and reports, available to the public, which might form the basis for a qui tam claim. Although many of these materials, as we have said, are available online, other more intrusive avenues are available to obtain public documents, for example, the States' version of the Freedom of Information Act. In Pennsylvania, that is the "Right to Know" law, Pa. Stat. Ann. tit. 65 § 67.101, et seq. Other States have similar laws, and the efforts of potential qui tam relators through their use has the potential to be harmful and disruptive to ongoing investigations. States are required to create Medicaid Fraud Control Units for example, to which they are required to report incidents of probable fraud. See 42 U.S.C. § 1396b(r)(2)(B). Depending on the scope of a State's version of the Freedom of Information Act law, these reports may be available while an investigation is pending. At the least, States will incur a substantial cost in having to respond to requests for information if state reports can be the basis for a qui tam action.

The Court can and should avoid these anomalous results by giving the False Claims Act its plain meaning. Reports and audits available to the public are “public disclosure.”

CONCLUSION

The Court should reverse the judgments of the Court of Appeals.

Respectfully submitted,

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