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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HEALTH CARE ASSOCIATION, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND THE AMERICAN HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the United States.[1] A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the Nation's business community, including cases before this Court raising important questions under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733.

Amicus curiae American Health Care Association (AHCA) is the national representative of nearly 11,000 non-profit and proprietary facilities dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities. One way in which AHCA promotes the interests of its members is by participating as an *amicus curiae* in cases with far-ranging consequences for its members, including cases brought under the FCA that raise significant legal questions as to how the statute should be applied.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission. Letters communicating petitioners' and respondent's written consent to the filing of this brief have been filed with the Clerk.

Amicus curiae Pharmaceutical Research and Manufacturers of America (PhRMA) is an association whose membership comprises the Nation's leading research-based pharmaceutical and biotechnology companies. PhRMA members alone invested an estimated $50.3 billion in 2008 in discovering and developing new medicines that help patients live longer, healthier and more productive lives. PhRMA advocates for public policies that encourage discovery of important medicines for patients by pharmaceutical and biotechnology companies.

Amicus curiae American Hospital Association (AHA) is the national advocacy organization for hospitals in the United States. AHA represents approximately 5,000 hospitals, health care systems, and other health care organizations, as well as 37,000 individual members. AHA leads, represents, and serves health care organizations that provide care to their communities 24 hours a day, seven days a week, 365 days a year. One way in which AHA promotes the interests of its members is by participating as an *amicus curiae* in cases with important and far-ranging consequences for its members, including FCA cases.

The Chamber, AHCA, PhRMA, AHA and their respective members have a substantial interest in this case. The current version of the FCA provides a *qui tam* relator or the Federal Government with a cause of action against "[a]ny person" who, among other things, "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." Fraud

Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1621 (to be codified at 31 U.S.C. § 3729(a)(1)(A), (B) (Supp. IV 2010)). No proof of specific intent to defraud is required to create liability under the FCA, as the term "knowingly" includes a person who, with respect to information, "acts in deliberate ignorance" or "in reckless disregard" of the "truth or falsity of the information." FERA § 4(a)(2), 123 Stat. at 1622 (to be codified at 31 U.S.C. § 3729(b)(1) (Supp. IV 2010)). Congress emphasized the FCA's lowered intent threshold earlier this year when it amended the FCA to abrogate this Court's unanimous holding in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008). *See* S. Rep. No. 111-10, at 10 (2009) (explaining that changes were designed to "clarify and correct" supposedly "erroneous interpretations of the [FCA] that were decided in *Allison Engine*). There, the Court held that specific intent was a required element under the former version of the FCA's false-statements and conspiracy provisions, 31 U.S.C. § 3729(a)(2) and (3) (2006). *Allison Engine*, 128 S. Ct. at 2130-31.

Despite the fact that specific intent is not a required element in FCA cases, the statute "imposes damages that are essentially punitive in nature." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000); *see also United States ex rel. Brensilber v. Bausch & Lomb Optical Co.*, 131 F.2d 545, 547 (2d Cir. 1942) (per curiam) (holding that the earlier, more lenient version of the FCA was "not only penal, but drastically penal"), *aff'd without opinion by an equally divided Court*, 320 U.S. 711 (1943). A defendant found liable under the current version of the FCA is subject to mandatory treble damages, civil penalties as great as $11,000 per claim, attorneys' fees and costs. FERA § 4(a)(1), 123 Stat. at 1622 (to be codified at 31 U.S.C. § 3729(a) (Supp. IV 2010)).[2]

A relator who brings an action under the FCA is entitled to share in any recovery with the United States. If the United States does not intervene to take over prosecution of the case, the relator receives a bounty of between 25 and 30 percent of the recovery. 31 U.S.C. § 3730(d)(2). If the United States intervenes, the relator's bounty is reduced to between 15 and 25 percent. § 3730(d)(1).

Because of the FCA's punitive nature and relaxed intent standard, *amici*'s interest in the proper application of the FCA is especially heightened in cases brought by *qui tam* relators, who are not subject to meaningful Executive Branch oversight and who may be "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997); *see also Stevens*, 529 U.S. at 778 n.8 (reserving judgment on whether the FCA's *qui tam* provisions "violate Article II [of the United States Constitution], in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3").

[2] On its face, the recently amended FCA provides for a per claim civil penalty of "not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 . . . ." FERA § 4(a)(1), 123 Stat. at 1622 (to be codified at 31 U.S.C. § 3729(a) (Supp. IV 2010)). The $5,000 and $10,000 amounts have been adjusted upward to $5,500 and $11,000, respectively. 28 C.F.R. § 85.3(a)(9) (2009).

In 1986, Congress acted to preclude *qui tam* litigation predicated on publicly disclosed information. The "public disclosure bar," as it is commonly known, provides that

> [n]o 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 [sic] 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.

False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (codified at 31 U.S.C. § 3730(e)(4)(A)). Although Congress enacted substantial amendments to the FCA earlier this year, *see* FERA § 4, 123 Stat. at 1621-25, Congress chose not to amend the public disclosure bar.

The question of how to apply this "murky statute" (Pet. App. 32a) has plagued courts and litigants. *See, e.g.*, *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 470 (2007) (resolving circuit split on meaning of "original source" exception after observing that statutory question was "hardly free from doubt"); *United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 387 (3d Cir. 1999) (Alito, J.) (cataloging public disclosure bar's numerous textual shortcomings and reaching the "inescapable conclusion" that the statute "does not reflect careful drafting" or "precise use of language").

The question presented by this case—whether a report, 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 bar—is of tremendous importance to *amici*'s members, many of whom are subject to regular and numerous inspections and audits by a wide variety of state and local government agencies. These audits and inspections generally assess an entity's compliance with certain complicated (and often confusing) statutory and regulatory requirements that may affect participation in government programs receiving federal funds. The results of these inspections and audits are usually made available to the public.

Relators, in turn, are increasingly using allegations of noncompliance with federal conditions of participation as the basis for FCA liability. *See, e.g.*, *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008) (describing relator's allegations based on hospital's supposed violation of Medicare and Medicaid conditions of participation); *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1169 (9th Cir. 2006) (allowing relator's suit based on university's alleged non-compliance with federal conditions of participation governing student-loan program even though federal agency in question treated noncompliance as an administrative enforcement matter, not fraud), *cert. denied*, 550 U.S. 903 (2007); *United States ex rel. Swan v. Covenant Care, Inc.*, 279 F. Supp. 2d 1212, 1220 (E.D. Cal. 2002) (describing relator's theory of falsity based on nursing facility's alleged noncompliance with Medicare conditions of participation).

In addition, many courts have allowed relators to use the so-called "implied false certification theory"—an expansive approach to FCA liability that is premised on the notion that a claimant impliedly certifies its compliance with laws and regulations whenever it submits a claim for payment. *Compare United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001) (describing genesis of theory and seeking to limit its use in the health care context by recognizing the dichotomy between statutes and regulations creating express conditions of payment, on the one hand, and those creating conditions of participation), *with Hendow*, 461 F.3d at 1177 (suggesting that *Mikes*'s limitation on use of the implied false certification theory should be applied in Medicare cases only).

In this case, the United States Court of Appeals for the Fourth Circuit held that, as a matter of law, reports and audits created by States or their political subdivisions cannot trigger the public disclosure bar. Protesting that it did not have a "secret decoder ring" by which to "gain insight into the meaning of this murky statute" (Pet. App. 32a), the court below conceded that the public disclosure bar does not expressly limit its reach to *federal* administrative reports, *federal* audits or *federal* investigations. The Fourth Circuit then proceeded to misapply the interpretive maxim *noscitur a sociis*—that a word is known by the company it keeps—by disregarding the fact that the "company" the relevant statutory language "keeps" is not singularly federal in character. Rather, the statutory language at issue includes public disclosures made in state and federal fora, as well as in the news media.

SUMMARY OF ARGUMENT

The Fourth Circuit incorrectly held that the public disclosure bar applies only to federal administrative reports, audits or investigations. The plain language of the FCA and a correct application of the doctrine *noscitur a sociis* demonstrate that non-federal reports, audits and investigations also trigger the public disclosure bar. In addition, a survey of this Court's FCA jurisprudence demonstrates that the lower court erred by inserting a "federal" limitation into the public disclosure bar. This Court has consistently refused to infer limitations not found in the plain language of the FCA, and the Court should do so again in this case. This Court has also consistently refused to allow policy-based arguments such as those adopted by the court below to sway its judgment in determining the scope of the FCA, reminding litigants that such arguments are better directed to Congress, not this Court.

If left undisturbed, the lower court's ruling will encourage opportunistic relators to use publicly available information found in the reports of state and local governments as the basis for *qui tam* litigation despite the fact that the FCA would deny subject-matter jurisdiction over *qui tam* actions based on the exact same information if it had been published in a small-town newspaper or in an obscure federal agency report. Liability for hundreds of millions of dollars in mandatory treble damages and civil penalties will turn, not on whether *qui tam* suits are based on publicly disclosed information, but on whether the information was publicly disclosed by a federal, as opposed to a state or local, agency. Such an illogical result is inconsistent with the plain language of the FCA and should be rejected. In addition, the Fourth Circuit's decision will not only force government contractors and grant recipients to incur substantial litigation costs, it will encourage *qui tam* relators to pursue litigation based on information they had no role in uncovering and, if successful, will reward them handsomely for doing so by paying them a statutory share of hundreds of millions of dollars in mandatory treble damages and civil penalties.

Therefore, as set forth more fully below to supplement the legal argument contained in petitioners' merits brief and to explain the significant negative effects that would flow from a decision affirming the lower court, the judgment of the court of appeals should be reversed.

ARGUMENT

THE PUBLIC DISCLOSURE BAR INCLUDES AUDITS OR INVESTIGATIONS PERFORMED BY STATES OR THEIR POLITICAL SUBDIVISIONS

A. Basic Principles Of Statutory Construction Demonstrate That The Public Disclosure Bar Includes Non-Federal Sources

In a case of statutory construction, a court must always begin with the language of the statute. *Allison Engine*, 128 S. Ct. at 2128. An Act of Congress "should not be read as a series of unrelated and isolated provisions," however. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Federal courts have a "duty to construe statutes, not isolated provisions." *Id.* at 568.

The court below lost sight of these fundamental principles in holding that the FCA's public disclosure bar does not encompass public disclosures resulting from state or local government reports, audits or investigations. Conceding that the statute did not expressly limit its reach to *federal* administrative reports, *federal* audits or *federal* investigations, the Fourth Circuit concluded that the word "administrative" was ambiguous. The court of appeals then looked to the doctrine *noscitur a sociis* as a substitute for the "secret decoder ring" the court said Congress failed to provide in order to "gain insight into the meaning of this murky statute." Pet. App. 32a. The Fourth Circuit then misapplied the doctrine by focusing on only one part of the statutory section in question.

This Court has long held that "[s]ound rules of statutory interpretation exist to discover, and not to direct, the Congressional will." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943). Of particular relevance to this case, the "maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). The maxim can be a "useful rule of construction where words are of obscure or doubtful meaning; and then, *but only then*, its aid may be sought to remove the obscurity or doubt by reference to the associated words." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923) (emphasis added); *see also Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 840 (2008) (rejecting reliance on *noscitur a sociis* because, "although customs and excise are mentioned twice in [28 U.S.C.] § 2680(c), nothing in the overall statutory context suggests that customs and excise officers were the exclusive focus of the provision" such that the statutory phrase "any other law enforcement officer" must be similarly limited).

This Court's unanimous decision in *Russell Motor Car* is instructive for how the Court should decide the question presented by this case. There, the Court was asked to decide whether a statute authorizing the President to "modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or materials" for a limited time following the end of World War I applied only to contracts between private parties, as the petitioners argued, or whether government contracts could also be modified by the President. *See id.* at 519. It was "apparent," the Court found, that the words of the statute, "read with literal exactness, include[d] all contracts, whether private or governmental." *Id.* In response, the petitioners argued that since the Federal Government could not "requisition" its own contracts—an assertion accepted by the Court—the doctrine *noscitur a sociis* counseled that the general words "modify, suspend, [or] cancel" should be similarly limited so that only private contracts could be modified, suspended or canceled by the President. *See id.*

In rejecting the petitioners' argument, the Court observed that *noscitur a sociis* is "not an invariable rule, for the word may have a character of its own not to be submerged by its association." *Id.* at 519. "Rules of statutory construction," the Court explained, "are to be invoked as aids to ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity." *Id.*

The Court in *Russell Motor Car* found that application of the doctrine produced an illogical result in the case before it, noting that "there is nothing in the rule or in the statute which requires us to assimilate the words 'modify' and 'cancel' to the scope of the word 'requisition,' simply because the latter has a necessarily narrower application." *Id.* at 520. The Court further explained:

> The meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, *diverso intuitu* [with a different view, purpose or design], giving each its natural value and appropriate scope when read in connection with the object (any contract) which they are severally meant to control. Thus, the predicate 'requisition' will be limited to private contracts, while the other words may be appropriately extended to include governmental contracts as well.

Id. at 519-20.

As in *Russell Motor Car*, it cannot be seriously disputed that, "read with literal exactness," 261 U.S. at 519, a report, hearing, audit or investigation performed by a State or its political subdivision falls within the plain language of the FCA's public disclosure bar. Again, the public disclosure bar provides that

> [n]o 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 . . . .

31 U.S.C. § 3730(e)(4)(A) (emphasis added). Simply because the words "congressional" and "Government Accounting Office" connote federal activity does not mean that the word "administrative" must be so limited or that the word "administrative" is ambiguous. Instead, the "meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, . . . giving each its natural value and appropriate scope when read in connection with the object . . . which they are severally meant to control." *Russell Motor Car*, 261 U.S. at 520.

The "object" that the public disclosure bar is "meant to control" is litigation brought by opportunistic relators who have no personal knowledge on which to base lawsuits seeking to enforce legal claims belonging to the United States. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992) ("The 1986 amendments [to the FCA] attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud."). Excluding public disclosures simply because they emanate from non-federal sources conflicts with the core purpose of the statute by encouraging *qui tam* suits based on public information.

To a large extent, the answer to the question presented is dictated by how wide of a lens one uses when applying the doctrine *noscitur a sociis*. The court below focused its attention on the words immediately before and after the word "administrative"—"congressional" and "Government Accounting Office," respectively—in order to extract a common characteristic of the company kept by the word "administrative." The Fourth Circuit erred in doing so, however. As one federal court aptly observed:

> [L]imiting the word "administrative" to only federal administrative reports, audits and investigations is inconsistent with the plain language of the phrase at issue as well as the language and interpretation of the remaining portions of § 3730(e)(4)(A). The immediately preceding phrase in that statutory section provides that public disclosures include any "criminal, civil, or administrative hearing," and courts have consistently interpreted that phrase to include both *state* and *federal* litigation and administrative hearings. . . . Likewise, this section of the FCA also gives public disclosure status to "the news media" regardless of whether that media is national, state, or local. There is no reason to conclude that Congress intended to limit administrative reports, audits, and investigations to *federal* actions, while simultaneously allowing all *state* and *local* civil litigation, *state* and *local* administrative hearings, and *state* and *local* news media to be treated as public disclosures. To interpret the statute so narrowly would have the anomalous result of allowing public disclosure status to the most obscure local news report and the most obscure state and local civil lawsuit or administrative hearing, but denying 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, 1143-44 (D. Wyo. 2006) (citations and footnote omitted), *aff'd on other grounds*, 562 F.3d 1032 (10th Cir. 2009).

In this case, the "company" the relevant statutory language "keeps" is not singularly federal in character. Rather, the statutory language at issue includes public disclosures made in state and federal fora, as well as in the news media. By interpreting the statute narrowly such that only those disclosures made in federal administrative reports, federal audits or federal investigations trigger the public disclosure bar, the court below gave an impermissibly narrow construction to the statute.

Nor was it necessary to do so in order to "avoid the giving of unintended breadth to [an Act] of Congress." *G. D. Searle*, 367 U.S. at 307. As the court below acknowledged, the words that precede "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation" have been uniformly held to include disclosures made in non-federal settings. *See* Pet. App. 26a ("This court and others have understood [the words 'criminal, civil, or administrative hearing'] to encompass state as well as federal hearings."). The same thing is true of the words that immediately follow "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation." *See* Pet. App. 31a ("[W]e note that in this country there is no 'federal' news media, nor for that matter is there any 'state' news media from which 'federal' news media could be distinguished.").

Therefore, interpreting the words "administrative . . . report, hearing, audit, or investigation" in a non-federal fashion does not expand the statute's meaning past the non-federal boundaries already established by Congress in other portions of the public disclosure bar. *Cf.* 132 Cong. Rec. S11,238-04 (daily ed. Aug. 11, 1986) (remarks of Sen. Grassley) ("The use of the term 'Government' in the definition of original source is meant to include any Government source of disclosures cited in subsection [(4)(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*.") (emphasis added).

B. This Court's False Claims Act Jurisprudence Supports The Conclusion That The Word "Federal" Should Not Be Read Into The Public Disclosure Bar

During the FCA's 146-year history, this Court has issued multiple decisions addressing interpretative problems raised by the statute's language. The logic used in several of those decisions counsels that the lower court's decision in this case is incorrect.

1. *United States ex rel. Marcus v. Hess*

In *Marcus*, a relator copied portions of a federal indictment filed against certain electrical contractors and used the indictment as the basis for an FCA complaint filed a few weeks later. *See* 317 U.S. at 545. The United States, acting as an *amicus curiae*, argued that the Court should reject the relator's suit because he had contributed nothing to the fraud's discovery. *See id.* However, the Court declined the Federal Government's invitation because no language in the FCA at that time precluded the relator's conduct. The Federal Government's policy-based arguments, the Court explained, were "addressed to the wrong forum." *Id.* at 547. Although Congress could have adopted language specifying the amount of new information a relator must possess in order to file suit, Congress had not done so. Therefore, the Court declined to infer such a limitation. *See id.* at 546 & n.9.[3]

The Court in *Marcus* also looked to various clauses within one statutory provision in order to decide whether the conduct in question violated the FCA. The electrical contractors were accused of collusive bid-rigging related to certain contracts entered into with local governments, which contracts were partially funded by the Federal Government. *See* 537 U.S. at 539. In rejecting the electrical contractors' argument that the FCA created liability only if there was a direct contractual relationship with the Federal Government, the Court looked to the various clauses within the FCA's liability provision, which at that time consisted of one long sentence. The Court explained:

> The conclusion that the first clause of [the statute] includes this form of "causing to be presented" a "claim upon or against the Government" is strengthened by consideration of the other clauses of the statute. Clause 2 includes those who do the forbidden acts for the purpose of "aid-

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[3] Congress enacted such a limitation less than one year later. *See* Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609 (prohibiting *qui tam* suits "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") (codified at 31 U.S.C. § 232(C) (Supp. IV 1945)). The "government knowledge" limitation lasted in amended form until 1986, when Congress adopted the current language of the public disclosure bar.

> ing to obtain" payment of fraudulent claims; Clause 3 covers "any agreement, combination, or conspiracy" to defraud the government by "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.

Id. at 544-45.

As in *Marcus*, the three separate clauses of § 3730(e)(4)(A), considered together, indicate a clear purpose to preclude *qui tam* suits based on public disclosures, without regard to whether the disclosure in question emanated from the Federal Government. Although the second clause of § 3730(e)(4)(A) does not specify whether the word "administrative" should be interpreted to include non-federal sources, the first and third clauses of § 3730(e)(4)(A)—which prohibit *qui tam* suits based on allegations disclosed in a "criminal, civil, or administrative hearing" or from the "news media," respectively—demonstrate that it would be inappropriate to graft a "federal" limitation onto the public disclosure bar as the lower court did in this case.

Furthermore, similar to the situation presented by *Marcus*, the drastic policy choices presented by imposing a federal-only limitation on the public disclosure bar are better left to Congress, not this Court. Section 3730(e)(4)(A) should be applied according to its plain meaning, which imposes no federal limitation on the types of administrative reports, audits or investigations that trigger the public disclosure bar.

2. *Rockwell International Corp. v. United States*

At least two aspects of this Court's recent decision in *Rockwell* also counsel that the lower court's decision is incorrect. There, the Court was asked to interpret the "original source" exception to the public disclosure bar. The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

Among other things, the Court had to decide what "information" and "allegations" were targeted by § 3730(e)(4)(B). With respect to the word "information," the Court found that when § 3730(e)(4) uses the same word multiple times, that word should be interpreted to have the same meaning. *See* 549 U.S. at 472. The relevant "information" for § 3730(e)(4)(B) purposes, the Court held, was that underlying the relator's allegations, and not that of the public disclosure. *Id.* at 470-71. Importantly, in reaching this conclusion, the Court found that the word "information" in § 3730(e)(4)(B) should be interpreted to have the same meaning as the word "information" in § 3730(e)(4)(A). "'[I]nformation' in (A) and (B)," the Court explained, "means the same thing." *Id.* at 472.

The same logic applied here further demonstrates that the judgment of the lower court should be reversed. As the Fourth Circuit acknowledged, the word "administrative" in the first clause of § 3729(e)(4)(A) has universally been held to include *non*-federal sources. *See* Pet. App. 26a (collecting cases, including a previous decision of the Fourth Circuit). Therefore, the word "administrative" in the second clause of § 3729(e)(4)(A) should be given the same meaning, such that non-federal administrative reports, audits or investigations trigger the public disclosure bar. *See also* 31 U.S.C. § 3733(*l*)(7)(A) (providing authority for civil investigative demands under the FCA seeking certain types of discovery material from any "administrative proceeding of an adversarial nature," and not limiting the word "administrative" to federal agencies).[4]

The Court in *Rockwell* also refused to infer a limitation on the "original source" exception's plain language. *See* 549 U.S. at 473. After finding that the relevant "information" for § 3730(e)(4)(B) purposes was that underlying the relator's allegations,

[4] To support its narrow reading of § 3730(e)(4)(A)'s second clause, the United States argues that the statute's first clause should be interpreted narrowly to include only *federal* criminal, *federal* civil, or *federal* administrative hearings. *See* Brief for the United States as *Amicus Curiae* 17-18 (filed May 20, 2009). Essentially, the United States argues that the words "congressional" and "Government Accounting Office" in the second clause of § 3730(e)(4)(A) impose a "federal" limitation on the first clause. *See id.* at 17. However, the plain language of the public disclosure bar supplies no basis on which to infer a "federal" limitation on the first clause's use of the words "criminal, civil, or administrative hearing," a conclusion confirmed by the fact that the first and third clauses of § 3730(e)(4)(A) have been uniformly held to include public disclosures made in non-federal settings. *See* Pet. App. 26a, 31a.

the Court rejected the relator's contention that a court should only examine the relator's original complaint, explaining: "The statute speaks not of the allegations in the 'original complaint' (or even the allegations in the 'complaint'), but of the relator's 'allegations' *simpliciter*. Absent some limitation of § 3730(e)(4)'s requirement to the relator's initial complaint, we will not infer one." 549 U.S. at 473; *see also United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2236 (2009) ("[R]egardless of the purpose of Rule 4(a)(1)(B) [of the Federal Rules of Appellate Procedure] and the convenience that additional time may provide to the Government, this Court cannot ignore the Rule's text . . . .").

In this case, § 3729(e)(4)(A) does not speak of "federal" administrative reports, "federal" hearings, "federal" audits or "federal" investigations. Therefore, like it did in *Rockwell*, the Court should reject the Fourth Circuit's inference of a "federal" limitation on § 3729(e)(4)(A)'s meaning.

3. *Allison Engine Co. v. United States ex rel. Sanders*

Lastly, the Court in *Allison Engine* was asked to interpret the FCA's false-statements and conspiracy provisions. *See* 128 S. Ct. at 2131-32. At the time, the FCA created liability for any person who "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," 31 U.S.C. § 3729(a)(2) (2006), or who "conspire[d] to defraud the Government by getting a false or fraudulent claim allowed or paid," § 3729(a)(3).

With respect to their conspiracy count, the relators in *Allison Engine* argued they should not have to prove that the alleged conspirators had the specific purpose of getting a false claim approved by the Federal Government due to the FCA's broad definition of the word "claim." At the time, the FCA defined the word "claim" to include "any request or demand . . . for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c) (2006). Based on that broad statutory definition, the relators argued it was sufficient for them to prove the alleged conspirators agreed upon a fraudulent scheme that had the effect of causing a private entity to make payments using money obtained from the Federal Government. *See Allison Engine*, 128 S. Ct. at 2130.

The Court eventually rejected the relators' argument, concluding that the interpretation urged by the relators would have required the Court to add language not appearing in the statute. *Id.* at 2131. "Had Congress intended subsection (a)(3) to apply to anyone who conspired to defraud a recipient of Government funds," the Court explained, "it would have so provided." *Id.*[5]

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[5] Congress later removed the words "defraud the Government by getting a false or fraudulent claim allowed or paid" from the FCA's conspiracy provision in order to "specifically address the intent requirement read into the section by the Court in *Allison Engine*." S. Rep. No. 111-10, at 12. In its current form, the FCA creates liability for any person who

The Court in *Allison Engine* also rejected the interpretation of the FCA's false-statements provision forwarded by the relators and supported by the United States acting as an *amicus curiae*. *See* 128 S. Ct. at 2128. Again, the FCA at that time created liability for any person who "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2) (2006). The relators and the United States argued it was sufficient to demonstrate that a false statement resulted in the use of federal funds to pay a false or fraudulent claim. *See Allison Engine*, 128 S. Ct. at 2128.

That interpretation, the Court found, "impermissibly deviate[d] from the statute's language." *Id.* In particular, § 3729(a)(2)'s use of the words "to get" denoted "purpose, and thus a person must have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be liable under § 3729(a)(2)." *Id.*[6]

"conspires to commit a violation" of the various new subparagraphs found in the FCA's amended liability provision. FERA § 4(a)(1), 123 Stat. at 1621 (to be codified at 31 U.S.C. § 3729(a)(1)(C) (Supp. IV 2010)).

[6] Congress has since removed the words "to get" from the FCA's false-statements provision in order to "strik[e] the language the Supreme Court found created an intent requirement for false claims liability under that section." S. Rep. No. 111-10, at 12. The FCA now creates liability for any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." FERA § 4(a)(1), 123 Stat. at 1621 (to be codified at 31 U.S.C. § 3729(a)(1)(B) (Supp. IV 2010)).

Likewise, in this case, had Congress intended § 3730(a)(4)(A) to apply only to federal disclosures, it would have so provided. Moreover, Congress's use of the word "administrative" throughout the FCA does not denote the restrictive, federal-only interpretation given to it by the lower court.

C. Allowing Opportunistic Relators To Extract Millions Of Dollars Based On Publicly Available Audits Or Investigations Will Undermine The Purpose Of The Public Disclosure Bar And Have Significant Adverse Effects For Countless Law-Abiding Citizens And Businesses

Even if the Court were to focus on the statutory purpose animating the public disclosure bar, that purpose reinforces the plain statutory meaning set forth above. Compliance with statutes and regulations is critically important and fraud against the Federal Government is unacceptable; however, the proliferation of vexatious or otherwise unmeritorious *qui tam* suits threatens the legitimate business activities of every federal contractor and federal grant recipient in the United States.

The number of *qui tam* suits under the FCA has grown exponentially over the past two decades. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview* (2008) (charting 1048 percent increase in number of new *qui tam* cases filed in federal fiscal years 1987 and 2007, respectively), *as reprinted in* 2 John T. Boese, *Civil False Claims & Qui Tam Actions* (*Civil False Claims*) app. H-2 (3d ed. 2008). The United States pursues less than a quarter of those lawsuits. *See* U.S. Dep't of Justice, *Fraud Statistics—Qui Tam Intervention Decisions & Case Status* (2008), *as* *reprinted in* 2 *Civil False Claims* app. H-7. The vast majority are prosecuted after the Department of Justice has declined to intervene by relators who are motivated in large part by the statute's contingent bounty provision and who are not constrained by concerns as to what impact their suits will have. *See, e.g.*, *Conner*, 543 F.3d at 1221 (observing that relator's suit, which alleged that a single false certification on an annual cost report rendered legally false all of a hospital's Medicare and Medicaid reimbursement claims, would have "catastrophic" consequences for those that "provide medical services to the financially disadvantaged and the elderly").

As explained by a recent House of Representatives report:

> More than 97% of the amounts received in settlements and judgments in *qui tam* cases have come in the 20% of the matters in which the Government has intervened. In other words, fewer than 3% of recoveries have been derived from the 80% of the total investigative pool that the Justice Department has rejected. Indeed, last year (through September 30, 2008), the Government recovered about $1.043 billion in *qui tam* FCA cases; of that total roughly $1.037 billion came from *qui tam* cases in which the Justice Department intervened and only about $5.9 million came from relators litigating declined cases.

H.R. Rep. No. 111-97, at 30 (2009) (dissenting views of Reps. Smith, Issa and Jordan).

Vexatious or otherwise unmeritorious *qui tam* suits do more than just increase litigation costs, however. The pressure placed on defendants to settle such suits often proves enormous given the drastic consequences of an adverse ruling, including the "death penalty" of exclusion from federal programs, which, in turn, can lead to mandatory exclusion from certain state programs. *See, e.g.*, 42 U.S.C. § 1396a(a)(39) (requiring States to exclude from participation in their respective Medicaid programs any individuals or entities excluded by federal authorities). Understandably, many businesses, when faced with a *qui tam* lawsuit that threatens the business' viability, choose to settle.

If allowed to stand, the interpretation of the public disclosure bar adopted by the court below will only exacerbate this situation, as persons with no personal knowledge to support their allegations will be allowed to file suit based on public disclosures contained in reports, hearings, audits and investigations simply because the public disclosures did not emanate from the Federal Government.

In addition, the interpretation of the public disclosure bar adopted by the court below does not properly acknowledge the system of "cooperative federalism" that pervades numerous federal programs. The cooperative federalism model of legislation is that in which the Federal Government encourages States and local governments to implement federal programs. *See, e.g.*, *Schaffer v. Weast*, 546 U.S. 49, 52 (2005) (observing that the Individuals with Disabilities Education Act "is frequently described as a model of cooperative federalism") (citation and internal quotation marks omitted); *New York v. United States*, 505 U.S. 144, 167-68 (1992) (collecting cases demonstrating that "a program of cooperative federalism is replicated in numerous federal statutory schemes[,]" including the Clean

Water Act, the Occupational Safety and Health Act of 1970, the Resources Conservation and Recovery Act of 1976, and the Alaska National Interest Lands Conservation Act) (internal citations and quotation marks omitted); *Batterton v. Francis*, 432 U.S. 416, 431 (1977) (noting that the Aid to Families with Dependent Children program involved the "concept of cooperative federalism").

Medicaid is perhaps the best-known example of cooperative federalism. The Medicaid Act, 42 U.S.C. §§ 1396-1396v, establishes a scheme of joint federal-state funding of health care for millions of low-income individuals, with the States assuming day-to-day responsibility for running their respective Medicaid programs. The Medicaid Act provides that determinations of compliance with program statutes and regulations must be made in onsite inspections known as "surveys." For the most part, those inspections are conducted by state agencies, not the Federal Government. *See, e.g.*, 42 U.S.C. § 1396r(g)(1)(A) (providing that, in the context of Medicaid-participating nursing facilities, "each State shall be responsible for certifying, in accordance with surveys conducted under paragraph (2), the compliance of skilled nursing facilities").

Furthermore, States that wish to receive federal funds must operate a "fraud and abuse control unit," 42 U.S.C. § 1396a(a)(61), and provide a "mechanism to receive reports from beneficiaries and others and compile data concerning alleged instances of waste, fraud, and abuse," § 1396a(a)(64). A State must conduct a preliminary investigation whenever it "receives a complaint of Medicaid fraud or abuse from any source or identifies any questionable practices." 42 C.F.R. § 455.14 (2008). A State is also required to report to the Federal Government the number of complaints of fraud or abuse that warrant preliminary investigation. § 455.17(a). After conducting a preliminary investigation, if the State has reason to believe that a recipient has abused the Medicaid program, the agency must conduct a full investigation. § 455.15(c). For each case that warrants a full investigation, the agency must report to the Federal Government the provider's name and number; the source of the complaint; the type of provider; the nature of the complaint; the approximate range of monetary losses involved; and the legal and administrative disposition of the case. § 455.17(b).

Yet, the Fourth Circuit's construction of the public disclosure bar would lead to the anomalous result that a formal report prepared by a state Medicaid official and then widely disseminated would not trigger the public disclosure bar, while a one-paragraph article in a little-read weekly newspaper of limited circulation would. Given the close state-federal cooperation manifested by Medicaid and similar programs, non-federal reports, audits and investigations addressing allegations of fraudulent conduct in federal or cooperative programs should trigger the FCA's public disclosure bar.

By strictly limiting the public disclosure bar to information contained in federal reports, federal audits and federal investigations, the Fourth Circuit has opened the courthouse door to *qui tam* actions based on information purloined from audits and reports prepared by non-federal actors. As a result, *qui tam* actions may be initiated in cases where the relator has no direct or personal knowledge of the information on which the suit's allegations are based. Ironically, while the Fourth Circuit's decision is based on a doctrine (*noscitur a sociis*) designed to divine congressional intent, its interpretation will encourage the very type of opportunistic *qui tam* litigation the public disclosure bar was designed to prevent.

By reading the word "federal" into the public disclosure bar, the Fourth Circuit's decision has also made it more difficult for individuals who actually possess personal knowledge of fraudulent activity to bring *qui tam* suits. Under the FCA's first-to-file bar, the filing of a *qui tam* suit by one relator prevents the filing of a subsequent *qui tam* suit by another relator. 31 U.S.C. § 3730(b)(5). Under the lower court's construction of the public disclosure bar, therefore, an individual who closely observed fraudulent conduct could have their *qui tam* action blocked by an individual whose earlier-filed *qui tam* action was based on publicly disclosed information found in a non-federal report, audit or investigation.

D. The Public Disclosure Bar Should Be Construed In Favor Of Restricting Subject-Matter Jurisdiction Since The Bar Acts As A Limitation On The Extraordinary Assignment Of Legal Claims Belonging To The Federal Government

The FCA's *qui tam* provisions provide a limited exception to the common-law rule that private citizens have no standing to prosecute legal claims belonging to the United States. *See Stevens*, 529 U.S. at 776 (explaining in detail the history of *qui tam* actions in England and concluding that no common-law right to pursue such actions existed in the American Colonies); *see also Woods v. Empire Health Choice, Inc.*, 574 F.3d 92, 98 (2d Cir. 2009) ("There is . . . no common law right to bring a *qui tam* action; rather, a particular statute must authorize a private party to do so."); *Stalley v. Methodist Healthcare, Inc.*, 517 F.3d 911, 917 (6th Cir. 2008) ("There presently is no common-law right to bring a *qui tam* action, which is strictly a creature of statute."), *cert. denied*, 129 S. Ct. 1004 (2009); *Stalley v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1233 (11th Cir. 2008) (same); *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007) (same); *United Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19, 23-24 (1st Cir. 2007) (same), *cert. denied*, 128 S. Ct. 1125 (2008).

As this Court held in *Stevens*, 529 U.S. at 773, the FCA's *qui tam* provisions provide an extraordinary exception to the common-law rule by partially assigning legal claims belonging to the Federal Government, which, in turn, gives the relator Article III standing. The FCA is one of the very few federal statutes providing such an assignment. *See Stevens*, 529 U.S. at 768 n.1. The FCA's public disclosure bar, in turn, functions as a congressionally imposed limitation on the assignment of the Federal Government's legal claims. In light of the foregoing, the public disclosure bar should be applied according to its plain meaning and not according to the "secret decoder ring" provided by *noscitur a sociis*.

The court below recognized the "logic and symmetry" of contrary decisions, observing: "Although we ultimately disagree with this approach to the statute, we must admit that there is some force to the argument." Pet. App. 28a. The tenor of the lower court's decision suggests that the court struggled to discern what Congress intended through the cautionary tale in legislative draftsmanship that is the public disclosure bar.

Should this Court find itself in a similar situation after examining the arguments for and against the lower court's judgment, the default presumption that private persons have no standing to prosecute legal claims belonging to the United States counsels that the public disclosure bar should be construed in favor of limiting the ability of private persons to exploit the partial assignment provided by the FCA's *qui tam* provisions. *Cf. United States v. Bornstein*, 423 U.S. 303, 313 n.8 (1976) (noting that ambiguities in the FCA should be interpreted in favor of the defendant given the statute's penal nature).

CONCLUSION

For the foregoing reasons and those stated in the brief of petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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