No. 08-304

In the
Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES *EX REL.* KAREN T. WILSON,

Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

Mark T. Hurt
Counsel of Record
ATTORNEY AT LAW
159 West Main Street
Abingdon, VA 24210
(276) 623-0808

Counsel for Respondent

Brian S. McCoy
ATTORNEY AT LAW
633 East Main Street
Rock Hill, SC 29730
(803) 366-2280

Counsel for Respondent

*Gibson*Moore Appellate Services, LLC
421 East Franklin Street ♦ Suite 230 ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

RESTATED QUESTION PRESENTED

Whether a report, audit, or investigation other than one by the federal government, such as a report by an accounting firm of its audit of a local government, can constitute a "congressional, administrative, or Government Accounting Office report, hearing, 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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STATEMENT OF THE CASE

The False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, prohibits false or fraudulent claims for payment to the United States. 31 U.S.C. § 3729(a). The FCA authorizes the Attorney General to bring a civil action against one who has violated the FCA. 31 U.S.C. § 3730(a). Alternatively, a private person (known as the relator) may bring a *qui tam* civil action "in the name of the Government." 31 U.S.C. § 3730(b)(1).

If a relator brings a *qui tam* action, the Government may intervene in the action and take the lead in prosecuting it. 31 U.S.C. § 3730(b)(2). If the Government intervenes, and the Government and relator are successful in obtaining a recovery for the United States, then the relator is entitled to an award between 15% and 25% of the total recovery. 31 U.S.C. § 3730(d)(1). If the United States declines to intervene, and the relator prosecutes alone and is successful in obtaining a recovery for the United States, then the relator is entitled to an award between 25% and 30% of the total recovery. 31 U.S.C. § 3730(d)(2). The FCA's "public disclosure" bar provides that:

> (4)(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[1] [("GAO")] 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).

Beginning in 1995, Graham and Cherokee counties in North Carolina participated in the federal Emergency Watershed Protection (EWP) Program, which provided funding for the clean-up and repair of damage caused by flooding. Pursuant to the EWP Program, each county entered into an agreement with National Resources Conservation Service (NRCS**),** an agency of the United States Department of Agriculture (USDA). Under their respective agreements, the two counties agreed to perform remediation work for which they would receive federal funds. The counties then delegated that work to their respective soil and water conservation districts — petitioners Graham County

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[1] Both the compilers of the United States Code and the courts have construed this term to refer to the General Accounting Office (now renamed the Government Accountability Office). See 31 U.S.C. § 3730 n.2. Pet. App. 19a n.4; *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 382 (3rd Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

Soil & Water Conservation District ("Graham District") and Cherokee County Soil & Water Conservation District ("Cherokee District"). Pet. App. 7a-8a.

Petitioner Richard Greene, then an NRCS employee, functioned as the federal government representative and an inspector for the counties' EWP programs. Green was assisted by another federal employee, William Timpson. *Id. at* 8a. For several years up through 1993, while Greene served as an NRCS employee, Greene directed his wife's company to sell materials to Graham District and Cherokee District, and to pay annual kickbacks directly to the employees of the two districts. *Id. at* 102a.

At the suggestion of Greene, Cherokee District awarded, without any bidding, EWP Program work to Greene's friend Billy Brown. *Id.* at 9a. Greene then funded Brown's purchases of supplies for the EWP work and subsequently received payments of cash back from Brown. Greene inspected and signed off for payment of the EWP work performed by Brown.[2] *Id.* at 137a-38a.

EWP work was normally accomplished by employees of the EWP Program contract party, who received their normal salary while performing the work. *Id.* at 57a. However, Graham District arranged for one of its employees, petitioner Keith Orr, to do, and be paid for, EWP Program work as an "independent" contractor in addition to being paid a

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[2] Richard Greene was subsequently convicted in federal district court for misappropriating the proceeds of logs and other misconduct. Pet. App. 10a, at n 2.

salary for his full-time work as a District employee. *Id.* at 9a. There was no bidding, nor any written contract, for this arrangement. D.E. 256-10[3]. Graham County subsequently admitted that Orr's performance of the work as an independent contractor violated the conflict of interest rules of the EWP Program. D.E. 256-16. Greene personally funded Orr's purchases of supplies for the EWP work, assisted Orr in its performance, and then certified that all of Orr's EWP work met the requirements of the EWP Program.[4] Pet. App. 137a-38a.

Respondent Karen Wilson was the secretary of Graham District from 1993 to Spring 1997. D.E. 184, 5;16. Wilson became troubled by Orr's work for the EWP Program and the arrangements between Greene, Orr, Brown and Timpson, particularly after Orr told Wilson that Green, Brown, Orr, and Timpson divided the proceeds of the EWP contract. Pet. App. 10a. In the summer of 1995, Wilson raised her concerns with various county and conservation district officials. *Id.* She voiced her concerns to two NRCS employees in November 1995 and again in a December 1995 letter to NRCS officials. *Id.* A federal agent interviewed Wilson in November 1996 about the EWP Program. *Id.*

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[3] D.E. refers to the docket entry number of the document when it was filed in the district court below.

[4] On July 12, 1996, the Graham County Finance Officer issued one of the EWP Program checks to Orr with a notarized statement that she was issuing it "under duress and against [her] will and better judgment." JA 117-18.

According to Wilson, in retaliation for her whistleblowing, her employer, petitioner Graham District, and her co-workers harassed her, over the course of a year until it culminated in her constructive discharge. JA 26-32. The harassment included obscene and hostile gesturing, leaving a gun cylinder on her desk, ostracizing her, and threatening to eliminate her position, attack her violently, and kill her husband. *Id.*

On January 25, 2001, Wilson filed an FCA *qui tam* action alleging, *inter alia*, that the Petitioners submitted or caused to be submitted false claims to the Government for benefits under the EWP Program.[5] Pet. App. 11a-12a. Respondent alleged that a conspiracy existed between Greene, Orr, Timpson, and Brown. *Id.* Greene funneled Graham County and Cherokee County EWP work to Brown and Orr, and then Greene and Timpson inspected the work and approved the bills for payment. *Id.* Then, the money was paid to Orr and Brown under the EWP contracts and shared among the co-conspirators. *Id.*

Wilson also alleged that the claims based on the EWP payments to Brown and Orr were false and fraudulent because the counties failed to seek bids

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[5] Wilson also asserted a retaliation claim under section 3730(h) of the FCA. D.E. 1.

The court of appeals dismissed the retaliation claim as time-barred on remand from this Court's decision in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005)(FCA six-year statute of limitations does not apply to retaliation claims under § 3730(h); court should apply most closely analogous state statute of limitations).

before awarding the EWP work to Orr and Brown; and Graham County's use of Orr as an "independent" contractor violated the EWP Program's conflict of interest rules. *Id.*

On March 13, 2007, the district court granted summary judgment in favor of the defendants based on its conclusion that subject-matter jurisdiction was precluded by the FCA's public disclosure bar. Pet. App. 105a. In support of its ruling, the district court found *sua sponte* that two documents constituted applicable public disclosures: 1) a March 1996 audit report prepared by a private firm of certified public accountants (CPAs), Crisp & Hughes, LLP, of Sylvia, North Carolina (CPA Report); and 2) a May 1996 North Carolina Department of Environment, Health and Natural Resources report (May 1996 DEHNR Report).[6] Pet. App. 96a-98a.

Crisp & Hughes sent the CPA Report, with a cover letter, to Sharon Holloway, the finance officer of petitioner Graham County. JA 119. The cover

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[6] The May 1996 DEHNR Report itself is not in the record. In its decision, the district court noted that the May 1996 DEHNR report concerned "the North Carolina Agricultural Cost Sharing Program [NC Ag Cost Sharing Program] and the involvement of [petitioners] Greene, Timpson [and] Billy Brown ... with improprieties in connection with that program." Pet. App. 97a. While Wilson's original complaint contained allegations regarding the NC Ag Cost Sharing Program, those allegations were dropped from the Third Amended Complaint, JA 9-35, the operative complaint. Thus, as the district court noted in its discussion of the "public disclosure" bar, the NC Ag Cost Sharing Program allegations were "outside the scope of the [third amended] complaint." Pet. App. 87a-88a, 97a-98a. Petitioners' Brief refers to the May 1996 DEHNR Report only briefly and vaguely, and without any citation to the record. Pet. Br. 9 n.4.

letter stated that copies of the CPA Report were sent only to Ms. Holloway, the "Local Government Commission" and to the North Carolina Division of Soil and Water Conservation. *Id.*

Crisp & Hughes addressed the CPA Report itself solely to the Board of Commissioners of Graham County. Pet. App. 95a. The report contains only the results of those procedures performed by Crisp & Hughes that were "agreed to by Graham County." *Id.* Those procedures "were performed solely to assist you [Graham County Board of Commissioners] in determining that the books and records of Graham County have been adequately maintained." *Id.* The CPA Report was "intended solely for your [the Graham County Board of Commissioner's] information." JA 121.

The CPA Report addressed two of Graham County's projects under the EWP Program. The report noted various exceptions: missing documentation, "minor clerical reporting errors," and a total of $192 in calculation errors. JA 124-26. It also noted that

> Certain portions of the project were completed by an individual who was an approved project inspector. This appears to be a violation of the County's code of conduct which was submitted in certifications as prerequisite to establishing project agreements with the USDA.

JA 126. And it also stated that

> G.S. 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.

Id.

The court of appeals vacated and remanded. Pet. App. 1a-46a. The court noted that there was a split in the circuits on the issue of whether the phrase "congressional, administrative, or [GAO] report, hearing, audit or investigation" encompasses an administrative report issued by a State or county. *Id.* at 18a-21a. The court of appeals agreed with the Third Circuit that the phrase encompasses only *federal* audits, reports, hearings and investigations. Pet. App. 22a-37a. It noted that the terms "congressional" and GAO refer to "clearly *federal* sources." *Id.* at 23a-24a. The court concluded, that, for purposes of the public disclosure bar, "[t]he placement of 'administrative' squarely in the middle of a list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to *federal* administrative reports, hearings, audits, or investigations." *Id.* at 23a-24a. The court of appeals further found that the relevant legislative history supported its interpretation. Pet. 34a-35a. Accordingly, the court of appeals held that neither the CPA Report nor the State report fell within the scope of the "public disclosure" bar. Pet. App. 37a.

SUMMARY OF ARGUMENT

The FCA's jurisdictional bar against a *qui tam* action set forth in Section 3730(e)(4) can be triggered by public disclosures "in a criminal, civil or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media." The Fourth Circuit below properly construed the language "administrative . . . report . . . audit or investigation" as referring to reports, audits, or investigations of the federal government, and as not encompassing those of state or local governments (or private entities for that matter).

"Administrative" is susceptible to several different meanings. The most common meaning addresses the management of a government, business or institution. All those organizations generate administrative reports, audits, and investigations that could contain disclosures of fraud against the government.

In construing the language, the Fourth Circuit read it in context and observed that Congress had placed the public disclosure sources into three groups, or categories. The language at issue fell in Category 2 — "a congressional, administrative, or [GAO] report, hearing, audit or investigation." Noting that the modifier "administrative" was sandwiched between the other two modifiers in Category 2 -— "congressional" and GAO that unambiguously refer to the federal government, the Fourth Circuit properly employed the common sense maxim of *noscitur a sociis* to limit the meaning of "administrative" so as to make it consistent with those of the two surrounding terms. Consequently, it properly

construed the language as referring to only *federal* administrative reports, audits and investigations, and as not encompassing those from other sources such as state or local governments. In other words, "administrative" was construed in context.

The Fourth Circuit's construction is supported by the exclusively federal focus of the FCA's overall scheme and structure. The FCA provides tools for the federal government to investigate false claims made against it, and, with the possible assistance of private persons, to obtain a recovery. The FCA has only two categories of persons who may bring FCA actions: the federal government, and "private persons." To the extent that state or local governments may enforce the FCA, they must do so by bringing *qui tam* actions as "private persons" in exactly the same way individuals must.

Construing Category 2 as limited to exclusively federal proceedings conforms to the history and purposes of the FCA. In 1943, Congress amended the FCA to bar *qui tam* actions that were based on evidence or information that the Government had when suit was filed. This so-called "government-knowledge" bar had the broad effect of precluding *qui tam* actions where the federal government merely possessed the evidence or information, even if there was no indication that it had done, or was going to do, anything with it. Congress eventually concluded that the "government knowledge" bar was too restrictive. With the 1986 Amendments to the FCA, Congress replaced the "government knowledge" bar with the more narrow "public disclosure" bar. Under the "public disclosure" bar, a *qui tam* lawsuit is barred only where the alleged

fraud has been publicly disclosed in the course of the federal government taking actions, e.g., auditing, investigating, reporting, that indicate that the Government is actually "on the trail of the fraud," or likely will be as a result of the exposure of the fraud to the general public (and the Government) by the news media.

The drafting history of the 1986 Amendments demonstrates that Congress, during the entire process, understood the bars to *qui tam* actions as being potentially triggered only by disclosures from federal governmental sources or the news media. After the Senate bill had been amended so that the first paragraph of the "public disclosure" bar contained language identical to 31 U.S.C. § 3730(e)(4)(A), the interplay between that paragraph and the bill's "original source" provision, which contained the phrase "Government or the news media," made clear Congress' understanding that the sources set forth in the paragraph consisted of components of the Government, i.e., federal government, and the news media. The bill's primary sponsor, Senator Grassley, confirmed that understanding at the time the bill was passed.

The exclusively federal meaning of "administrative" in Category 2 of the "public disclosure" bar is further supported by the Senate's addition of the terms "administrative" and " audit or investigation" to Category 2 as part of a package of comprehensive antifraud legislation. That legislation included both the 1986 FCA Amendments, and Senate bill S. 1334, the Program Fraud Civil Penalties Act, which dramatically expanded the scope of federal administrative investigations and

proceedings to fight false and fraudulent claims against the Government.

Congress' clear purpose for the 1986 Amendments was to encourage the filing of more *qui tam* suits, including suits based on information already in the federal government's possession. This was accomplished by replacing the government knowledge bar, which was triggered by mere federal *possession* of fraud information, with one triggered by the federal *pursuit* of the fraud.

State and local government reports are by definition not the result of activities of the federal government. Thus, the mere possession of them by the federal government gives no indication that the government is pursuing the fraud. Under Petitioners' construction, state and local government reports would constitute potential bar-triggering sources of disclosures simply because the federal government had potential access to them. The effect of the Petitioners' construction would be a return to, and even an expansion of, the discarded "government knowledge" standard. In addition, the Petitioners' construction would have the troubling consequence of permitting a local government, when it is both the source of the purported disclosure and a potential defendant in a *qui tam* action, to create practical immunity under the FCA. Petitioners' construction would frustrate the purposes of the 1986 FCA Amendments by expanding, rather than reducing, the jurisdictional bar, and thereby reduce, rather than increase the number of *qui tam* suits. This obviously was not intended by Congress. Conversely, the Fourth Circuit's construction furthers the purposes of the 1986 Amendments.

ARGUMENT

The court of appeals correctly construed the FCA's "public disclosure" bar as not encompassing disclosures from state and local government administrative reports.

I. The Fourth Circuit Properly Construed "Congressional, Administrative, Or [GAO] Report, Hearing Audit, Or Investigation" In Section 3730(e)(4)(A) Of The FCA As Not Encompassing State And Local Proceedings.

A. When Read In Context, "Administrative . . . Report [Or] Audit" Refers To Only A *Federal* Administrative Report And Audit.

The FCA places the sources of public disclosures that can trigger the jurisdictional bar into three groups, or categories:

1) "a criminal, civil or administrative hearing;"

2) "a congressional, administrative, or [GAO] report, hearing, audit, or investigation;" and

3) "the news media."

§ 3730(e)(4)(A). As demonstrated herein, the court of appeals properly construed category 2 as limited to disclosures made in a *federal* report, hearing, audit or investigation.

"Statutory language has meaning only in context." *Graham County Soil & Water Cons. Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415

(2005); *see also Jones v. United States*, 527 U.S. 373, 389 (1999)("Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'"). "The word 'administrative' is capable of many meanings." *United States ex rel. Dunleavy v. County of Del.*, 123 F.3d. 734, 745 (3d Cir. 1997); *see also Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 103 n.8 (1970) (Harlan, concurring)("'administrative' . . . may in various contexts, bear a range of related meanings.") In fact, perhaps the most common usage of "administrative" is one not limited to government. Administrative is the adjective form of "administration," which is defined as "[t]he management or performance of the executive duties of a government, institution, or business." Black's Law Dictionary (8th ed. 2004)(first definition). Institutions of every stripe are "administered" by their "administrations" and take "administrative" action, e.g., schools, businesses, charitable organizations, sports leagues, political parties, and religious organizations. One may study business administration, work as an administrative assistant, or follow administrative policy at work or school.

"In context, however, those meanings are narrowed by the commonsense canon of *noscitur a sociis* — which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008). When one reads "administrative" in context, "the exclusively federal nature of the terms 'congressional' and '[General] Accounting Office' is immediately apparent, and these clearly federal terms bookend the not-so-clearly federal term." Pet. App. 24a. It is unlikely

that Congress "intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character." *United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997); *see also Third Nat'l Bank v. Impac, Ltd.*, 432 U.S. 312, 322 (1977)(term in statutory provision that was "sandwiched" between two other terms should be given a meaning consistent with those other two terms).

The use by paragraph § 3730(e)(4)(A) of the term "congressional," rather than the broader term "legislative," clearly indicates Congress' intent that the only legislative reports or investigations potentially triggering the public disclosure bar be those of the federal legislature — Congress. Consequently, reports and investigations of a state or county legislature are excluded from the bar's scope. It is therefore unlikely that Congress intended to treat other state or county "administrative" reports or investigations any differently, particularly in the case of counties, which are typically governed by an elected body that exercises both the legislative and administrative powers of county government.[7]

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[7] For example, in North Carolina, all the powers, both legislative and administrative, of county government are invested in the board of commissioners. See N.C. Gen. Stat.153A-12. When the Board passes an ordinance, it is acting in its capacity as the county's legislative body. .*See Jackson v. Guilford County Bd. Of Adjustment*, 166 S.E.2d 78, 83 (N.C. 1969).

Thus, construing "administrative" in Category 2 so that it includes state and local government reports, audits and investigations would improperly broaden its meaning, rendering it inconsistent with the other two clearly federal modifiers. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (applying the maxim of *noscitur a sociis,* the Court should "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"). Restricting the meaning of "administrative" to *federal* administrative so that it is consistent with the two other federal modifiers in Category 2 properly avoids giving unintended breadth to the "public disclosure" bar. *See Jarecki v. G.D. Searle*, 367 U.S. 303, 307 (1961)("maxim *noscitur a sociis* . . . 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"). Accordingly, as the court of appeals correctly held, Category 2 is properly construed as limited to disclosures in a *federal* report, hearing, audit or investigation. *See* Pet. App. 37a; *Dunleavy,* 123 F.3d at 745.

The court of appeals' construction is reinforced by the appearance that Congress' placement of the disclosure sources into the three groups or categories was neither random nor haphazard. Instead, Congress categorized the sources by type of activity. Essentially, Category 1 consists of adjudicative proceedings, while Category 2 consists of legislative or oversight activities. Category 3, containing only "news media," is distinct from the other two categories as non-governmental.

The term "administrative hearing," although it appears in both Category 1 and 2, nonetheless fits into this scheme. "It is unlikely that Congress would have referenced administrative hearings twice in the same sentence, unless it intended to allude to different contexts." *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1245 (9th Cir. 2000). It would be redundant. Thus, the Court should construe the two terms differently, if there is a reasonable construction that does so. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). And there is.

While "[t]he term 'hearing' in its legal context undoubtedly has a host of meanings," *United States v. Fla. E. Coast Railway Co.*, 410 U.S. 224, 239 (1973), the federal Administrative Procedures Act (APA), 5 U.S.C. § 551 *et seq.*, requires that an administrative hearing be either adjudicative or rule-making, never both. *Association of Nat'l Advertisers, Inc., v. FTC*, 627 F.2d 1151, 1160 (D.C. Cir. 1979)("Administrative action pursuant to the APA is either adjudication or rule-making.") Thus, using the APA's dichotomy, and applying the construction canon of *noscitur a sociis*, "administrative hearing" in Category 1 must refer to an adjudicative hearing, while in Category 2 it must refer to a rule-making hearing, which is "quasi-legislative" in nature. This construction avoids rendering one of the "administrative hearing" references redundant or vague by giving distinct, yet complementary meanings to both. Together, they exhaust the range of possibilities under the APA.

This coherent categorization of the public disclosure sources by Congress further supports the weight given by the Fourth Circuit to the grouping of those sources in its construction of the "administrative" sources in Category 2. Furthermore, the fact that the public disclosure sources can be construed coherently and without redundancy only by applying the federal APA's scheme for administrative action also supports the construction itself – that the sources in Category 2, including the "administrative" ones, are exclusively federal.

B. The Fourth Circuit's Construction Is Consistent With, And Supported By The Exclusively Federal Orientation Of The FCA's Overall Scheme And Structure.

The Fourth Circuit construction of the sources in Category 2 as exclusively federal is consistent with, and supported by the federal orientation of the FCA's overall structure and scheme. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."(citation and internal quotation omitted)). The FCA gives tools to the federal government to investigate fraud against it, and, with the help of private persons, to recover the funds of which it was defrauded.

The exclusively federal focus of the FCA's governmental references is demonstrated by the FCA's repeated use of the term "Government." *E.g.*, 31 U.S.C. § 3729(a)(1); *id.* at § 3730(b)(1). Although "Government is undefined, the FCA uses it

interchangeably with "United States Government" throughout sections 3729 and 3731 of the FCA to refer to only the federal government. *See, e.g.,* 31 U.S.C. §§ 3729(a)(1)&(3).

The FCA references to *governmental* actions are likewise exclusively to those of the federal government. The FCA refers repeatedly to the *federal* government investigating and prosecuting fraud against the United States both pursuant to, and in parallel to, the FCA, e.g., "[t]he Attorney General diligently shall investigate a violation under section 3729," 31 U.S.C. § 3730(a); "the Government's investigation or prosecution of a criminal or civil matter arising out of the same fact," *id.* at § 3730(c)(4); "the Government may elect to pursue its claim through any alternate remedy available to the Government," *id.* at § 3730(c)(5); **"**a civil suit or an administrative civil money penalty proceeding in which the Government is already a party," *id.* at § 3730(e)(3); "a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements," *id.* at § 3731(d).

To the extent that state and local governments may bring an FCA action, they must do so as "private person[s]." *See* 31 U.S.C. § 3730(b)(1). This is in juxtaposition to the federal government, which is uniquely authorized to bring a governmental FCA action through the Attorney General, *id.* at § 3730(a), and to intervene and take over any *qui tam* action, including any that might be brought by a state or local government, *id.* at § 3730(B)(4)(A). If a state or local government were to bring an FCA action, like any other "private person[]," it is

required to bring it "in the name of the [federal] Government." *Id.* at § 3730(b)(1). Thus, in the detection and prosecution of fraud, the FCA puts state and local governments on par with private individuals, and accords them, unlike the federal government, no special status.

Therefore, the Act's exclusive focus on *federal* governmental actions reinforces the conclusion that FCA references to governmental instrumentalities of fraud investigation and prosecution, like those in the "public disclosure" bar, are references to those of *federal* government.

C. Petitioners' Construction Is Improperly Based On The Meaning Of Words Divorced From Their Context.

The Petitioners' primary argument against the court of appeals' construction is that the word "administrative," considered in isolation, is unambiguous and has only one meaning: "[t]he activity of a government or state in the exercise of its powers and duties." Pet. Br. 17-18. As an initial point, the argument fails because it violates the "fundamental principal of statutory construction (and of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see also King v. St. Vincent's Hosp*, 502 U.S. 215, 221 (1991)("the meaning of statutory language, plain or not, depends on context").

Moreover, as shown supra, 14, it also fails because "administrative" has at least one additional meaning in common usage at odds with their

suggested construction. While Petitioners hedge their position by also asserting that the phrase "administrative . . . report . . . audit, or investigation" has a plain and readily understood meaning, Pet. Br. 17-18, this fails to improve their position because private entities do all of these things, including holding "hearings[s]," the activity that Petitioners left out of their phrase. And, of course, the ellipses in their phrase show that it is not the actual statutory language but an edited version of it.

Contrary to Petitioners' argument, one must look at "administrative" in context even to restrict its meaning so as to exclude private activities. [8] Likewise, the same contextual analysis necessary to restrict its application to governmental activities – its syntactic relationship to congressional and GAO, also supports restricting its meaning to that of the *federal* government.

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[8] Petitioners' citations to other sections of the Code to establish that "administrative" has one fixed meaning regardless of the context is unavailing. The Code uses "administrative" also to refer to explicitly private entities. *E.g.*, 7 U.S.C. § 6614(b)&(c). Further, almost all of Petitioners' cites are to the phrase "administrative proceeding," which does not occur in 31 U.S.C. § 3730(e)(4). They can only point to a single instance of "administrative" elsewhere in the FCA that they claim supports their position. Pet. Br. 20-21 (citing 31 U.S.C. § 3733(l)(7)). However, like almost all of their other citations, "administrative" in that section is part of the phrase "administrative proceeding." *See* 31 U.S.C. § 3733(l)(7). More importantly, it is located in a context that is significantly different from that of "administrative" in 31 U.S.C. § 3730(e)(4)(A). It is in the section dealing with the powers of the Attorney General to issue a civil investigative demand, and not in the sections governing *qui tam* actions.

Petitioners also suggest that Congress was so sloppy in drafting the "public disclosure" bar that any attempt to ascertain its meaning through a fine parsing of its language is futile, and that well-established tools of statutory construction, like *noscitur a sociis,* are thereby rendered useless. Pet. Br. 14. The Court has elsewhere rejected Petitioners' defeatist approach to construing the "public disclosure" bar; and instead has reached conclusions about the meaning of the provision based on the nuances and interplay of various phrases in the text. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 471 (2007) (construing paragraph (B) of the FCA's "public disclosure" bar in light of the precise interplay of terms in that paragraph with those in paragraph (A)). In any case, Petitioners' contention that Congress' draftsmanship was so poor that the context of the words in the statute offer no clues to their meaning cannot be reconciled with their contention that the provisions of the statute are so plain and clear that their meaning can be derived by merely consulting the dictionary for the definitions of the individual words.

Petitioners argue that, to the extent context is relevant, the FCA's grouping of the disclosure sources should be ignored, and the sources analyzed as if they consisted of a laundry list of seven items. They then conclude that "there is no common feature to extrapolate from this list" that might shed light on its meaning. Pet. Br. 25-26. This crude approach falls short because it fails to use ordinary and accepted contextual cues included in the text as it was actually drafted by Congress. As noted, supra 16-18, one can detect an internal logic to Congress'

grouping of the disclosure sources into three different categories.

Even if one were to apply the maxim of *noscitur a scoiis* to the entire list of disclosures, one should reach the same conclusion. Just as the meaning of Category 2's general term "administrative" is properly informed and limited by the other explicitly federal terms located within Category 2, the meaning of the terms in Category 1 should be construed in light of Category 2's federal nature, as well as the federal orientation of the statute overall. As the United States demonstrated in its amicus curiae brief at the petition stage, all of the governmental disclosure sources should be construed as exclusively federal, including those in Category 1. U.S. Amicus Pet. Br. 6. Furthermore, this construction is also supported by the history and purposes of the FCA, see infra 24-33.

Petitioners contend erroneously that the Third, Fourth, Fifth, Ninth and Eleventh Circuits have "soundly rejected" construing Category 1as limited to *federal* criminal, civil and administrative hearings. Pet. Br. 28. To the contrary, as the court of appeals observed, "only one court thus far has explicitly addressed the possibility that [Category 1] should be limited to federal hearings." Pet. App. 28a. (citing *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000)).[9] And that one court

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[9] *See United States ex rel. Paranich v. Sorgnard,* 396 F.3d 326, 332-33 (3rd Cir. 2005)(argument that Category 1 was limited to federal proceedings was neither addressed, nor apparently, even raised); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004)(same); *McElmurray v. Consol. Gov't of Augusta-*

supported its holding that Category 1 is not limited to federal proceedings with its contention that it avoided rendering the reference to "administrative hearings" in Category 2 redundant, under the assumption that "administrative" in Category 2 was properly construed as exclusively federal. *See* 202 F.3d at 1244. That rationale for the holding is undermined by the more satisfying construction providing that the first reference is to adjudicative administrative hearings, while the second reference is to rule-making administrative hearings, see supra, 17. While not necessary to resolve the question presented in this appeal, the better analysis holds that Category 1 is limited to federal proceedings as well.

II. The History And Purposes Of The Act Support The Fourth Circuit's Construction.

The FCA, and its "public disclosure" bar, should be construed "in light of the evident legislative purpose in enacting the law in question." *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Construing "administrative . . . report . . . audit, or investigation," and, indeed, all of the governmental sources of disclosure in the "public disclosure" bar as exclusively federal furthers the purposes of the FCA and the 1986 Amendments to it. Conversely, construing those governmental sources as

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Richmond County, 501 F.3d 1244, 1252-53 (11th Cir. 2007)(same); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994)(court addressed and rejected with little discussion related, yet different, argument that "civil hearing" be read "as only encompassing hearings in civil cases in which the Government is a party").

encompassing state and local governments frustrates those purposes.

A. Construing "Administrative . . . Report [And] Audit" As Limited To Federal Administrative Reports And Audits Is Supported By The History Of The FCA And The 1986 Amendments To It.

The FCA was originally enacted with the goal of combating the massive fraud engaged in by government contractors supplying the Union Army during the Civil War. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000). Since its original enactment, the FCA has authorized private individuals to bring FCA *qui tam* actions on behalf of the United States, and if successful in obtaining a recovery for the United States, to receive a share of it. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 539-40 (1943). In *Hess*, the Court held that the FCA authorized a *qui tam* action by a relator who had derived the allegations in his complaint solely from information in a federal criminal indictment. *Id.* at 545-48.

In reaction to *Hess,* Congress amended the FCA to remove jurisdiction of the federal courts over *qui tam* actions that were "based upon evidence or information in the possession" of the federal government at the time the *qui tam* action was brought. 31 U.S.C. § 3730(b)(4)(1982). As a result, "once the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant." *Hughes Aircraft*

Co. v. United States ex rel. Schumer, 520 U.S. 939, 948 (1991) *Id.* at 948 (citations omitted).

Eventually, Congress concluded that this government-knowledge *qui tam* bar was "too restrictive of *qui tam* actions, resulting in an under-enforcement of the FCA." *United States ex rel Duxbury v. Ortho Biotech Prod.*, 579 F.3d 13, 33 (1st Cir. 2009). In 1986, as part of a major overhaul of the FCA, Congress abolished the "government-knowledge" bar. *Hughes Aircraft*, 520 U.S. at 948 ("the 1986 amendment eliminates a defense to a *qui tam* suit — prior disclosure to the Government"). The 1986 Amendments to the FCA replaced the "government-knowledge" bar with a more narrowly tailored "public disclosure" provision, and thereby "expanded the circumstances under which *qui tam* relators may pursue actions to enforce a false claimant's liability to the Government." *Id.* (citations omitted).

Under that "public disclosure" provision, a potential *qui tam* relator is no longer barred from bringing a *qui tam* suit simply because the federal government is in possession of information relating to the fraud that is the subject of the suit. Instead, he is barred from bringing a *qui tam* lawsuit only where the alleged fraud has been publicly disclosed in the course of the federal government taking actions, e.g., auditing, investigating, reporting, that indicate, in the words of the United States, that "the Government is already on the trail of the fraud," (U.S. Amicus Pet. Br. 10), or will likely be spurred to get on it as a result of the exposure of the fraud to the general public (and the Government) by the news media. And even where the Government is on

the trail of the fraud, the FCA nonetheless allows and encourages the potential relator, under the "original source" exception to file suit if he has first-hand knowledge of the fraud that will contribute to the prosecution of the case.

B. The Drafting History Also Demonstrates Congress' Understanding That The Government Sources Of Public Disclosures In The FCA's Public Disclosure Bar Were Those Of The Federal Government Only.

The drafting history of the 1986 amendments to the FCA demonstrates that Congress, during the entire process, understood the bars to *qui tam* actions as being potentially triggered only by disclosures from federal governmental sources.

The original House bill reported by the House Judiciary Committee barred *qui tam* actions based on disclosures by the federal government or from federal governmental proceedings, and from the news media. Those disclosures were specified as: 1) "specific evidence or specific information which the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding" 2) "specific information disclosed during the course of a congressional investigation," or 3) "specific public information disseminated by any news media." H.R. Rep. No. 660, 99th Cong., 2d Sess. 42 (1986)(proposed 31 U.S.C. §3730 (b)(5)(A)). The bill passed by the House of Representatives contained this provision. *See* 132 Cong. Rec. 22,330, 22,331 and 22,345 (1986).

The Senate bill reported by the Senate Judiciary Committee also contained a *qui tam* bar that was similar in many respects to that of the House bill. It barred *qui tam* actions

> based upon allegations or transactions which are the subject of a civil suit in which the Government is already a party, or [brought] within six months of the disclosure of specific information relating to such allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media.

S. Rep. No. 345, 99th Cong., 2d Sess. 43 (1986)(Senate Report) (proposed 31 U.S.C. § 3730(e)(4)). After the Senate bill was reported, the Senate adopted a substitute version of the bill (Senate substitute bill), *see* 132 Cong. Rec. at 20,530, which clarified that the governmental sources of disclosures in its *qui tam* bar, like the ones in the House bill, were exclusively federal. The Senate substitute bill contained a "public disclosure" bar with language identical to 31 U.S.C. § 3730(e)(4)(A) as finally enacted. *See* 132 Cong. Rec. 20,531(proposed 31 U.S.C. § 3730(e)(5)). However, the bill's proposed "original source" paragraph, paragraph (B), provided, in pertinent part, that to qualify as an original source, *inter alia*, one had to have timely "voluntarily informed the Government or the news media" of the alleged fraud. *Id.* (proposed 31 U.S.C. § 3730(e)(5)(B)). The phrase "Government or the news media" in the paragraph (B) corresponds to the sources of disclosures listed in (A) and puts them into two categories ---- 1)

governmental and 2) "the news media." This interplay between paragraphs (A) and (B) unmistakably indicates Congress' understanding that the governmental sources set forth in (A) were components of the Government, i.e., the federal government.

In describing the substitute bill's *qui tam* provisions, Iowa Senator Charles Grassley, the principal sponsor, voiced this Congressional understanding by pointing out that

> the term 'Government' in the definition of original source is meant to include any Government source of disclosures cited in subsection (5)(A)[subsection (4)(A) as enacted]; that is Government includes Congress, the General Accounting Office, any executive or independent agency as well as other governmental bodies that may have publicly disclosed the allegations.

See 132 Cong. Rec. 20,536.[10] His explanation makes clear that all governmental sources of disclosures listed in paragraph (A) are those of the same Government that is referred to in paragraph (B), that is, the federal government.

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[10] "We did intend, and any fair reading of the statute will confirm, that the disclosure [triggering the public disclosure bar of the FCA] must be in a federal criminal, civil or administrative hearing. Disclosure in a state proceeding of any kind should not be a bar to a subsequent *qui tam* suit." 132 Cong. Rec. 16031-33 (1999)(letter addressed to U.S. Attorney General Janet Reno from Rep. Howard Berman and Senator Charles Grassley (primary sponsors of the 1986 Amendments to the FCA)).

The reference to "the news media" was subsequently dropped from paragraph (B) in the version of the Senate bill that was enacted into law. However paragraph (B)'s reference to the Government remained in the final version, and paragraph (A) was enacted into law unchanged. It is inconceivable that the subsequent change to paragraph (B) somehow altered Congress' understanding of that the federal governmental sources of disclosure listed in paragraph (A) were exclusively federal.

C. Congress Added The "Administrative . . . Audit Or Investigation" Language To The Public Disclosure Bar In Conjunction With Its Expansion Of Federal Administrative Tools And Proceedings To Fight Fraud In FCA's Companion Statute, PFCRA.

The events surrounding the Senate's passage of its FCA substitute bill on August 11, 1986, show that Congress added the "administrative . . . audit or investigation" language to Category 2 of the "public disclosure" bar as part of a package of comprehensive antifraud legislation that included both the 1986 Amendments to the FCA, and Senate bill S. 1134, Program Fraud Civil Penalties Act (PFCPA), which dramatically expanded the scope of federal administrative investigations and proceedings to fight false and fraudulent claims against the Government.

The original Senate bill for the 1986 Amendments to the FCA provided that the Government could elect to pursue a recovery for the

false claims "through any alternate remedy available to it, including, but not limited to any administrative civil money penalty proceeding." S. Rep. 345, at 42 (proposed 31 U.S.C. § 3730 (c)(3)). The Senate Report noted that while the Department of Health and Human Services was currently authorized to use administrative proceedings for the recovery of false claims, the Senate Governmental Affairs Committee had favorably reported S. 1134 [PFCPA], "which would extend this type of administrative mechanism for addressing false claims to all Executive agencies." S. Rep. 345, at 27. The Report noted that the Senate Judiciary Committee "intends that if civil money penalty proceedings are available, the Government may elect to pursue the claim either judicially or through an administrative civil penalty proceeding." *Id*.

On July 28, 1986, Senator Grassley reported that, after working "to reach a consensus on comprehensive antifraud legislation," a compromise had been reached that would permit the passage of both the PFCRA bill and the FCA bill. 132 Cong. Rec. 17,936 (July 29, 1986). At Senator Grassley's request, the two bills, which incorporated the compromise amendments, were printed in the Congressional Record. *Id.* at 17,936-46. The PFCRA bill expanded the availability of the civil money penalty proceedings to all federal executive agencies. *Id.* at 17,937-43 (proposing 5 U.S.C. § 801 *et seq.*). It also designated the agencies' inspectors general (IGs) as the primary investigatory officials, making reference to the Inspector General Act of 1978. *Id.* at 17,936 (proposed 5 U.S.C. § 801(a)(5)). That Inspector General Act of 1978 consolidated the responsibility to "conduct . . . audits and

investigations" of an agency under its IG. Pub. L. No. 95-452, § 4(a)(1), 92 Stat. 1101, 1102 (1978)(codified as amended at 5 U.S.C. App. 4(a)(1)).

The FCA substitute bill brought the first paragraph of the public disclosure bar into final form, in part, by adding to Category 2 the terms "administrative" and "audit or investigation:"

> . . . allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, [administrative] or Government Accounting Office report[,] ~~or~~ hearing, [audit, or investigation,] or from the news media.

Compare 132 Cong. Rec. 20,538 (Aug. 11, 1986)(proposed 31 U.S.C. § 3730(e)(5)[enacted as 31 U.S.C. § 3730(e)(4)(A)]) *with* S. Rep. No 345 at 43 (changes indicated). The substitute bill also added "or an administrative civil money penalty proceeding" to the provision immediately preceding the bill's "public disclosure" bar, making it identical to 31 U.S.C. § 3730(e)(3) as finally enacted:

> In no event may a person bring an action . . . based upon allegations or transactions which are the subject of a civil suit [or an administrative civil money penalty proceeding] in which the Government is already a party.

Compare 132 Cong. Rec. 20538 *with* S. Rep. No 345 at 43 (changes indicated).

Thus, these changes, including the addition of Category 2 language "administrative" and "audit or investigation," were made in the context of a

Congressional effort to establish a comprehensive anti-fraud program that would include administrative investigations and proceedings authorized under PFCRA, which "was designed to operate in tandem with the FCA."[11] *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 n. 17 (2000). This further evidences the federal focus of the FCA in general, and of the administrative sources in Category 2 of the "public disclosure" bar in particular.

Congress' exclusive focus on enforcement by federal administrative agencies when it crafted an administrative remedy for false claims against the government comports with its view that the law enforcement response to fraud against the federal government was the exclusive responsibility of federal agencies. This is because "[u]nlike most other types of crimes or abuses, fraud against the Federal Government can be policed by only one body — the Federal Government." S. Rep. No. 345 at 7.

Accordingly, the history of the FCA, and its 1986 Amendments, demonstrate that Congress intended and understood that "administrative . . . reports, audits, and investigations" in Section 3730(e)(4)(A) referred solely to those of federal administrative agencies, and that the rest of the governmental sources of disclosures therein were exclusively federal.

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[11] The Program Fraud Civil Remedies Act, 31 U.S.C. § 3801 *et seq.*, was enacted at virtually the same time as the 1986 Amendments to the FCA. *See Stevens*, 529 U.S. at 765.

III. The Purposes Of The FCA Are Furthered By The Fourth Circuit's Construction.

A. Petitioners' Construction Would Reimpose A Form Of The "Government Knowledge" Bar, Frustrating The Purposes Of The 1986 FCA Amendments.

The Fourth Circuit's construction of sources in Category 2 of the "public disclosure" bar as limited to federal proceedings furthers Congress' purposes for the 1986 FCA Amendments. Conversely, Petitioners' construction undermines them.

This Court has recognized that a key purpose of the 1986 Amendments to the FCA was to encourage more *qui tam* suits by narrowing the scope of the jurisdictional bar "to allow private parties to sue even based on information already in the Government's possession." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003). This was accomplished by replacing the *qui tam* bar triggered by mere federal *possession* of fraud information (the "government knowledge" bar), with one triggered by the federal *pursui*t of the fraud. Specifically with respect to provisions in Category 2 of the "public disclosure" bar at issue here, the bar is triggered only where a public disclosure indicates that the federal government is auditing, reporting, or investigating the fraud.

On the other hand, State and local audits, reports and investigations are by definition not activities of the federal government and, like the mere possession of fraud information by the federal government, give no indication that the federal government is pursuing the fraud. Thus, reading

the Category 2 language "administrative . . . audit, report, or investigation" as encompassing state and local government reports "would, in effect, return us to the unduly restrictive 'government knowledge' standard" *Dunleavy*, 123 F.3d at 746. But it would be a version far more restrictive than even the original one because it would replace the "government knowledge" bar's *actual* possession of information standard with a standard of *deemed* federal possession of the fraud information in the state and local reports, whether or not the federal government actually possessed the reports.

Accordingly, Petitioners' construction would frustrate the purposes of the 1986 Amendments by expanding, rather than reducing, the jurisdictional bar, and thereby reduce, rather than increase, the number of *qui tam* suits.[12] Conversely, the Fourth Circuit's construction, by allowing *qui tam* actions based on information that the federal government merely possesses, even if it is in the form of a state or local government report, the Fourth Circuit's construction furthers Congress' purpose for the 1986 FCA Amendments "to encourage more private enforcement suits." S. Rep. 345, at 23.

Whether the Government has access to the reports because it possesses them in its own file cabinets, or because they are available in electronic file cabinets like the Federal Clearinghouse, to bar

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[12] Petitioners' construction would encompass numerous state and local government reports and audits that are stashed away with millions of other documents in dusty file cabinets in thousands of municipal, county and state government office buildings around the country, which will never come to the attention of the federal government.

qui tam suits based merely on that theoretical access still frustrates Congress' purpose of narrowing the scope of the bar to "allow private parties to sue even based on information already in the Government's possession." *Chandler*, 538 U.S. 119, 133 (2003).

Construing Section 3730(e)(4)(A) as encompassing audit reports that were obtained by grantees of federal funds to comply with the Single Audit Act, 31 U.S.C. § 7501-7507, like the CPA Report, illustrates some of the troubling questions raised by the attempt to characterize reports and audits by nonfederal entities as Category 2 administrative audits and reports. The Single Audit Act requires each "non-federal entity" receiving federal funds in excess of a threshold amount to obtain an audit. 31 U.S.C. § 7502(a). This audit requirement is imposed on governmental and private recipients alike. *Id.* at § 7501(a)(13)("'non-federal entity' means a State, local government, or nonprofit organization"). The resulting audit reports, like the CPA Report, can be prepared and issued by a public accountant, e.g., a CPA in private practice. *Id.* at § 7501(a)(8)(B). Thus, unlike federal agency audit reports, there is nothing even particularly "governmental" about the resulting Single Audit Act audit report. Rather, it is the result of a private person or entity (CPA or CPA firm) auditing a grantee of federal money, which, in the case of the CPA Report, just happens to be a local governmental entity.

There is no question that Crisp & Hughes, the entity that performed the audit and issued the CPA Report, was a nongovernmental private entity.

Accordingly, the CPA Report is a report *by* Graham County, as opposed to a report *about* Graham County, only in the sense that Graham County hired the CPA firm to do the audit. The characterization of the CPA Report as a report by Graham County on the basis that it is its agent's report is undercut by the Single Audit Act's requirement that the audit be performed by a CPA who is "independent." 31 U.S.C. § 7502(c). That is, of course, "independent" of the grantee he is auditing. Thus, the assertion that Crisp & Hughes acted as an "agent" of Graham County in performing the audit and issuing the CPA would be true, at most, only in a narrow, technical sense.

Construing the FCA's public disclosure bar as encompassing local government reports is particularly troublesome where the local government is properly considered both the source of the purported disclosure (as the Petitioners assert with respect to the CPA Report) and a potential defendant in a *qui tam* action. As the Third Circuit noted, "[i]f state and local government reports were treated as administrative reports under the Act, the jurisdictional bar might be invoked through information submitted by those bent on convincing a federal agency that no fraud, in fact, was occurring." *Dunleavy*, 123 F.3d at 734, 745.

In fact, the local government might need not even do any such convincing to immunize itself from a *qui tam* action. Rather, it would only have to go to the minimal effort of issuing a self-serving investigative report; and making a very limited publication of that report, perhaps as a handout at one of its

public meetings.[13] After its initial distribution of copies to a few members of the public, then it could be filed away. If this were to occur, the federal government might never learn of its existence, yet, the fraudulent local government would then be immune from a *qui tam* suit except by one who qualifies as an original source. This is a true moral hazard of Petitioner's position — it creates the incentive for such white-washing "internal investigations" to become standard operating procedure for local governments under the guise of litigation avoidance.

Petitioners suggest that the Fourth Circuit decision would have a "chilling" effect on local governments investigating and reporting irregularities in their spending of federal funds because potential whistleblowers could scour local government reports for signs of fraud, and then bring *qui tam* actions. Pet. 31-32. This concern is overblown. Other incentives against self-reporting of irregularities and fraud, such as the potential for criminal prosecution, and the loss of federal grant monies, would certainly weigh more heavily on the investigation and reporting decision than would the prospect of a *qui tam* action. Moreover, Congress has already chosen which incentives to provide for the self-reporting of FCA violations. *See* 31 U.S.C. §

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[13] Courts have held that, for purposes of the FCA's public disclosure bar, "publicly disclosed" means a disclosure to even a single person, as long as that person is a "stranger to the fraud" outside of the government who is not precluded from further disseminating the information. *See. e.g., United States ex rel. Fine v. MK-Ferguson Co.* 99 F.3d 1538, 1544-45 (10th Cir. 1996); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2nd Cir. 1992).

3729(a) (court authorized to assess double, rather than triple damages). Immunity from *qui tam* actions is not one of them.

B. Petitioners' "News Media" Anomaly Argument Is Misplaced.

Petitioners suggest that the Fourth Circuit's construction of the "public disclosure" bar is flawed because it could create the anomalous result of the bar being triggered by allegations in a local newspaper of limited circulation, but not triggered by allegations of fraud in a widely disseminated audit by a state government official. Pet. Br. 33-35. However, Congress likely understood and expected that any significant public disclosure of actionable fraud (from other than federal sources) would be discovered and disseminated to the public by the news media. Thus, using Petitioners' example, a state audit report containing allegations of fraud against the federal government that were readily ascertainable from the report, those allegations would likely be reported by the news media.

C. Petitioners' Overly Broad "Parasitic" *Qui Tam* Action Definition Is At Odds With The Text, History, And Purposes Of The FCA.

Petitioners argue that the Fourth Circuit's decision is contrary to the purposes of the FCA because it promotes parasitic *qui tam* actions that the "public disclosure bar" was designed to deter. Pet. Br. 20. This argument fails because their definition of parasitic relators — those "who simply rely on information that has been publicly disclosed," Pet. Br. 30-31, is overly broad and is at odds with the

actual design of "public disclosure" bar, as well as its history and purpose.

The text of the "public disclosure" bar reflects Congress' clear choice not to require that every *qui tam* relator be an original source of his allegations. Instead, Congress limited the scope of the *qui tam* bar to disclosures from only certain specific sources. *See Eberhart v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 870 (4th Cir. 1999); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499-1500 (11th Cir. 1991).

If Congress had wanted to discourage relators from basing its *qui tam* actions on any "information that has been publicly disclosed," no matter what the source of the disclosure, it could have simply prohibited *qui tam* suits based on any public disclosure of the allegations unless the relator was an original source. But it chose not to do so. Thus, the "public disclosure" bar is not designed to deter *qui tam* actions based on disclosures, or even public disclosures, of allegations from a source not listed in section 3730(e)(4)(A).

For example, no one could reasonably argue that the "public disclosure" bar is designed to deter a relator from basing a *qui tam* suit on allegations of fraud publicly disclosed by a corporation or a public interest group, even if the relator was a stranger to the fraud, so long as the allegations had not also been disclosed by the news media or one of the other sources listed in the bar. Instead, the FCA encourages the relator in that circumstance to bring *qui tam* action by incentivizing him with a guaranteed share of any recovery he achieves for the Government.

Petitioners shed crocodile tears for the hypothetical "insider" who has worked for years in gathering information in order to expose corruption only to lose the race to the courthouse to a "stranger to the fraud" who files a *qui tam* action based on the revelation of fraud in a publicly disclosed state audit. Pet. Br. 31. However, the FCA is not designed to sort out and reward who might be the "best" or most "deserving" relator. Rather, FCA's "first to file" rule reflects Congress' choice to put a premium on the prompt exposure of fraud by the filing of *qui tam* actions.

Driving Congress' empowerment and encouragement of *qui tam* relators by the 1986 Amendments was its determination that "[f]raud permeate[d] generally all Government programs," S. Rep. 345, at 2, and that, as a result of the federal government's lack of resources to investigate all of that fraud, it was "forced to make 'screening' decisions" of whether to investigate fraud allegations "based on resource factors." S. Rep. 345, at 7. Consequently, "[a]llegations that perhaps could develop into very significant cases are left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient." *Id.* In other words, there is simply too much fraud for the Government to handle alone and it has its hands full just with the fraud it already knows about.

Accordingly, even those citizens who lack first-hand knowledge of a fraud l play a valuable role in supplementing the government's law enforcement by filing and prosecuting *qui tam* suits and recovering money for the Government. The Fourth

Circuit's construction of the "public disclosure" bar promotes those *qui tam* suits unless there is an indication that the Government is already on the trail of the fraud and is therefore likely to take action itself.

Petitioners' position, if adopted, would result in fewer *qui tam* suits filed and prosecuted to successful completion. For each *qui tam* suit that is barred, where the Government did not then file its own FCA action, either through a lack of knowledge, or a lack of resources, the result would be a lost potential recovery of defrauded taxpayer dollars. On the other hand, even in *qui tam* cases that the Petitioners deride as "parasitic," where the Government intervenes (but would have filed its own FCA action but for the first-filed *qui tam*), the United States nonetheless enjoys 75% to 85% of the recovery.

The Fourth Circuit's construction is the only one which is consistent with the purpose of the FCA to increase the United States' potential recovery as contemplated by the FCA; is faithful to the text; and is consistent with the FCA's legislative history.

CONCLUSION

Based on the foregoing, relator Wilson respectfully requests that the Court affirm the decision of the court of appeals reversing the order of the district court.

Respectfully submitted,
Karen Wilson,
Respondent

Counsel:
MARK T. HURT
Counsel of Record
159 West Main Street
Abingdon, VA 24210
276-623-0808

BRIAN S. MCCOY
633 East Main Street
Rock Hill, SC 29730
803-366-2280