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 UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

ELENA KAGAN
Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General
DOUGLAS N. LETTER
STEPHANIE R. MARCUS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The False Claims Act (FCA) provides that no court has jurisdiction over a *qui tam* action "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media," unless the relator "is an original source of the information." 31 U.S.C. 3730(e)(4)(A). The question presented is as follows:

Whether a state or local government report or audit qualifies as a "congressional, administrative, or Government Accounting Office report * * * [or] audit" within the meaning of the FCA.

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INTEREST OF THE UNITED STATES

This case involves the "public disclosure" bar of the False Claims Act (FCA), 31 U.S.C. 3730(e)(4). An overly broad construction of the bar will preclude *qui tam* actions in circumstances in which relators serve the valuable function of bringing to light fraud against the federal fisc; an unduly narrow construction risks requiring the government to share its recovery with a relator when the government was already on the trail of fraud and the relator added nothing of value to the government's suit. The United States therefore has a substantial interest in the Court's construction of the "public disclosure" provision. At the Court's invitation, the

United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. The FCA, 31 U.S.C. 3729 *et seq.*, provides for the imposition of civil penalties and treble damages against any person who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The Attorney General may bring a civil action if he finds that a person has committed a violation. 31 U.S.C. 3730(a). Alternatively, a private person (known as a relator) may bring a "*qui tam*" civil action "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). The government may intervene and take over the relator's action. 31 U.S.C. 3730(b)(2)-(4). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

The FCA's "public disclosure" provision states:

> (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 [(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 inde-

> pendent 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) (footnote omitted).[1]

2. In February 1995, after a storm caused extensive flooding and erosion in western North Carolina, petitioners Graham County and Cherokee County applied for aid under the Emergency Watershed Protection Program (EWP Program), a federal disaster relief program. The Natural Resources Conservation Service (NRCS), an agency of the United States Department of Agriculture (USDA), administers the EWP Program. The counties and the NRCS entered into contracts under which the counties would perform, or hire a contractor to perform, necessary clean-up and repairs, with USDA bearing 75% of the costs. The Graham and Cherokee County soil and water conservation districts administered the contracts. Pet. App. 7a.

Respondent Karen Wilson was a secretary at petitioner Graham County Soil and Water Conservation District (Graham Conservation District). In the summer of 1995, respondent raised concerns with county and conservation district officials about alleged fraud by petitioners in connection with the EWP program. In December 1995, respondent sent a letter reporting her alle-

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[1] Section 3730(e)(4)(A) as enacted refers to the "Government Accounting Office." Both the compilers of the United States Code and the courts have construed that term to refer to the *General* Accounting Office (now renamed the Government Accountability Office). See 31 U.S.C. 3730 n.2; *United States ex rel. Mistick PBT* v. *Housing Auth.*, 186 F.3d 376, 387 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000); Pet. App. 19a n.4.

gations to the NRCS, and in November 1996 she met with agents from the USDA Inspector General's office. Pet. App. 9a-10a.

In April 1996, an outside auditing firm, Crisp, Hughes & Co., prepared an audit (the Crisp Hughes Report) at the request of Graham County regarding the administration by County and Graham Conservation District of the EWP contracts. Pet. App. 11a; J.A. 119-126. The Crisp Hughes Report identified numerous issues of concern, including the decision to hire a Graham Conservation District employee to perform EWP Program contract work and the failure to seek bids for that work. Pet. App. 9a, 11a; J.A. 126. In May 1996, the North Carolina Department of Environment, Health and Natural Resources issued a report (the DEHNR Report) that discussed the Graham Conservation District's non-compliance with various requirements of the North Carolina Agricultural Cost Sharing Program. Pet. App. 97a.

3. In 2001, respondent filed a *qui tam* suit in federal district court, alleging that petitioners had violated the FCA by making numerous false claims for payment under the EWP Program. Pet. App. 11a; 48a-52a. Respondent asserted, *inter alia*, that petitioners had failed to seek bids for EWP Program contract work and had awarded such work to a Graham Conservation District employee who had a conflict of interest. *Id.* at 12a. The United States declined to intervene, and respondent proceeded with the litigation. *Id.* at 48a n.1.[2]

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[2] Respondent also asserted a retaliation claim. Pet. App. 5a n.1. 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), the court of appeals dismissed the retaliation claim as time-barred.

The district court held that it lacked jurisdiction over respondent's FCA claims. Pet. App. 95a-105a. The court ruled that the Crisp Hughes Report constituted a public disclosure of respondent's allegations that the Graham Conservation District had failed to solicit bids for EWP Program contract work and had improperly hired an employee to perform this work. *Id.* at 95a-96a. The court found that respondent "ha[d] not refuted" petitioners' contentions that the Crisp Hughes Report had been publicly disclosed, that she had relied on the report, and that she was not an original source of the allegations. *Id.* at 96a. The court also determined that the DEHNR Report had publicly disclosed allegations of Graham County's improprieties in connection with the North Carolina Agricultural Cost Sharing Program, and that respondent was not an "original source" of those allegations. *Id.* at 97a-98a. In the alternative, the district court granted summary judgment to petitioners on the merits of respondent's FCA claims. *Id.* at 106a-152a.

4. The court of appeals vacated and remanded. Pet. App. 1a-46a. The court observed that a conflict among the circuits existed on the question whether the phrase "congressional, administrative, or [GAO] report[s], hearing[s], audit[s], or investigation[s]" in Section 3730(e)(4)(A) encompasses administrative reports issued by a State or county. *Id.* at 18a-21a. The court agreed with the Third Circuit (see *United States ex rel. Dunleavy* v. *County of Del.*, 123 F.3d 734, 745 (1997)) that this phrase, which comprises the second category of disclosures within the public disclosure provision (Category 2), encompasses only *federal* audits, reports, hearings and investigations. Pet. App. 22a-37a. The court noted that the terms "congressional" and GAO refer to

"clearly *federal* sources." *Id.* at 23a. The court of appeals recognized that "there is nothing inherently federal about the word 'administrative.'" *Ibid.* The court concluded, however, that, for purposes of Section 3730(e)(4)(A), "the 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. App. 34a-35a. The court explained that when Congress amended the FCA in 1986, it enacted the current "public disclosure" bar to "further the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Id.* at 35a (internal quotation marks and citation omitted). The court reasoned that the federal government is unlikely to learn about state or local audits or investigations, and that including such audits and investigations within the scope of the "public disclosure" bar would therefore frustrate Congress's purpose. *Id.* at 35a-36a.

Accordingly, the court of appeals held that neither the Crisp Hughes Report nor the DEHNR Report fell within the scope of the "public disclosure" bar. Pet. App. 37a. The court remanded to the district court to determine whether a USDA report regarding administration of the EWP Program contracts had been publicly disclosed.[3] The court of appeals further held that the

[3] Petitioners concede that the USDA report cannot bar respondent's "principal claim" because that report did not address whether the conservation districts were required to solicit bids for EWP Program contract work. Pet. 6 n.2.

district court had erred by addressing the merits after finding that it lacked jurisdiction. The court of appeals therefore vacated the district court's decision on the merits. *Id.* at 44a-45a.

SUMMARY OF ARGUMENT

1. As the court of appeals correctly held, state and local administrative reports, audits, and investigations are not among the classes of documents that Congress identified as triggering the FCA's public disclosure bar. The context within which the word "administrative" appears, located between two terms—"congressional" and GAO—that are unambiguously federal in nature, clearly conveys Congress's intent that the word be limited to *federal* executive branch entities. That conclusion is confirmed by the exclusively federal nature of the FCA more generally, which provides a cause of action by the federal government for fraud against the United States, and permits *qui tam* actions when federal officials are not in a position to pursue the claim of fraud.

2. Reading the public disclosure bar to encompass state and local administrative reports and investigations would undermine Congress's purposes. Congress sought to balance two sometimes competing objectives, precluding *qui tam* suits when the federal government is already pursuing, or is likely to be in a position to pursue, a fraud claim without the assistance of a relator, while permitting *qui tam* actions when the federal government is unlikely to be in a position to pursue a claim independently. In pursuing these aims, Congress chose not to bar all *qui tam* suits that are based upon publicly-disclosed information. The narrow class of public disclosures that trigger the bar reflects Congress's decision to preclude only lawsuits likely to be duplicative of the fed-

eral government's own enforcement efforts—*i.e.*, those based on information publicly disclosed in a way suggesting that the federal government was already, or was likely to be, on the trail of the fraud. The legislative history of the 1986 FCA amendments, which were intended to expand the range of *qui tam* suits beyond what the prior government-knowledge bar had allowed to go forward, further confirms the court of appeals' reading of Section 3730(e)(4)(A).

3. Petitioners' contrary arguments prove too much, and even petitioners do not embrace the natural consequences of their theories. Petitioners acknowledge that only administrative reports, audits, or investigations of a governmental character should qualify under Category 2. Yet some of petitioners' arguments in favor of including state and local governmental reports within that category would equally imply that reports or investigations by a private non-profit hospital or university administration would trigger the bar.

Petitioners invoke, for example, a dictionary definition of "administration." Unanchored by the adjacent terms in Category 2, however, a literal dictionary definition would also encompasses the "administration" of large private institutions—a position petitioners disavow. Likewise, petitioners highlight that certain, though by no means all, state and local governmental audits are required to be shared with the federal government. That requirement also applies, however, to certain audits by nonprofit organizations, such as hospitals and universities. Congress did not intend that such institutions—frequent participants in federal programs and frequent defendants in litigation under the FCA—could shield themselves from *qui tam* suits by issuing reports that allude to, but then seek to refute, allega-

tions of fraud. Neither did Congress intend that local governmental entities could achieve that result.

Petitioners' attempt to expand Category 2 of the public disclosure bar beyond its self-evident federal scope should be rejected.

ARGUMENT

STATE AND LOCAL GOVERNMENT REPORTS AND AUDITS ARE NOT COVERED BY THE FCA'S "PUBLIC DISCLOSURE" PROVISION

The court of appeals correctly construed the second set of "public disclosure[s]" referenced in 31 U.S.C. 3730(e)(4)(A) as encompassing only *federal* administrative reports, hearings, audits, and investigations. That conclusion is supported by the context in which the word "administrative" appears, sandwiched between the indisputably federal terms "congressional" and "Government Accounting Office." The federal character of Category 2 is further supported by the exclusively federal character of the FCA as a whole, and by other references in the statute to explicitly federal administrative proceedings.

Construing Category 2 in this way furthers Congress's purpose in replacing the prior government-knowledge bar with current Section 3730(e)(4). Congress sought to narrow the prior jurisdictional bar by precluding only those *qui tam* actions based on public disclosures whose nature indicates that the federal government is already pursuing, or will likely be in a position to pursue independently, the allegations of fraud. Petitioners' construction of Section 3730(e)(4)(A) would instead expand the prior bar by preventing as well *qui tam* actions based on state and local government reports, which might never have come to the federal gov-

ernment's attention and might have been written specifically to shield state and local governments from suit. This Court should reject that reading.

A. Section 3730(e)(4)(A) Does Not Encompass Public Disclosures Made In State Or Local Government Administrative Audits Or Reports

Section 3730(e)(4)(A) identifies three categories of "public disclosure[s]" that can trigger the FCA's jurisdictional bar: (1) disclosures in "a criminal, civil, or administrative hearing"; (2) disclosures in "a congressional, administrative, or [GAO] report, hearing, audit, or investigation"; and (3) disclosures in "the news media." 31 U.S.C. 3730(e)(4)(A). This case presents the question whether Category 2 encompasses disclosures in state and local governmental administrative reports, hearings, audits, and investigations, or instead is limited to disclosures made in federal administrative proceedings. Properly construed within its overall statutory context, Category 2 is limited to disclosures made in a *federal* administrative report, hearing, audit, or investigation.

1. "Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones* v. *United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); see *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("doctrine of *noscitur a sociis*" serves "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"). This Court recently applied the canon of *noscitur a sociis* in *United States* v. *Williams*, 128 S. Ct. 1830 (2008). The Court recognized that the terms "promotes" and "presents" in 18 U.S.C. 2252A(a)(3)(B), concerning the pandering or solicitation of child pornography, were "susceptible of

multiple and wide-ranging meanings" if they were "taken in isolation." *Williams*, 128 S. Ct. at 1839. The Court concluded that this range of meanings was "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" (in that case, "a list that includes 'solicits,' 'distributes,' and 'advertises'"). *Ibid.* Applying that approach, the Court construed the word "promotes" to mean "the act of recommending purported child pornography to another person for his acquisition," and the term "presents" to mean "showing or offering the child pornography to another person with a view to his acquisition." *Ibid.*

Construed in accordance with those principles, Category 2 in Section 3730(e)(4)(A) is limited to the reports, hearings, audits, and investigations of the *federal* government. In its application to legislative bodies or the investigative arms of legislative bodies, Category 2 is unambiguously limited to disclosures made in federal proceedings. As the court of appeals observed, "the exclusively federal nature of the terms 'congressional' and '[General] Accounting Office' is immediately apparent." Pet. App. 25a. The way in which "these clearly federal terms bookend the not-so-clearly federal term," the court concluded, "provid[es] a very strong contextual cue" that the word "administrative" was also intended to have an exclusively federal character. *Ibid.* As the Third Circuit has also explained, it is unlikely "that the drafters of this provision 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). That the term "administrative," read in isolation,

could refer to the administration of a hospital, university, or executive branch of a state or local government as well as a federal executive agency is of no import where, as here, the placement of the term renders apparent its more limited meaning.

Petitioners contend (Br. 23) that the Court should disregard the canon of *noscitur a sociis* in construing Section 3730(e)(4)(A) because that provision reflects such "poor congressional draftsmanship" that Congress cannot be assumed to have given "careful consideration to either its word choice or the order of the listing." That argument, however, would equally impugn petitioners' contention (Br. 17) that the provision should be construed in accordance with its "plain and readily understood meaning." (Petitioners do not say how they derive such meaning if neither word choice nor word order can be trusted.) In any event, at a prior stage of this very case, the Court did precisely what petitioners say is out-of-bounds—construe ambiguous terms in the FCA in light of their surrounding text and the broader statutory structure. See *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 415 (2005) ("[s]tatutory language has meaning only in context"). So too the Court should follow this perfectly ordinary means of statutory construction in giving meaning to Category 2.

2. The federal character of Category 2 is reinforced by that of the FCA more generally, including in its other references to "administrative" proceedings. Most notably, the FCA provides a remedy only for false claims against "the United States Government." 31 U.S.C. 3729(a)(1). Suit may be brought by the United States Attorney General or, in certain circumstances, by *qui tam* relators who sue "for the United States Govern-

ment" and collect a portion of the federal government's recovery, 31 U.S.C. 3730(b)(1) and (d). To the extent that state or local governmental entities may become parties to actions under Section 3730, they do so in the same capacity as private individuals—*i.e.*, as defendants or *qui tam* relators. See, *e.g.*, *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 134 (2003) (holding that local governments are subject to suit as "person[s]" under 31 U.S.C. 3729); cf. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 n.18 (2000) (noting, without resolving, the question whether "States can be 'persons' for purposes of *commencing* an FCA *qui tam* action").

The exclusively federal focus of the FCA's governmental references is also seen in the use throughout Sections 3729 and 3730 of the term "the Government," singular and with a capital "G," to refer exclusively to the *federal* government. See, *e.g.*, 31 U.S.C. 3729(a)(2)-(7); 31 U.S.C. 3730(b)(1)-(3), (e)(2)(A), (3) and (4)(B). Indeed, Paragraph (B) of Section 3730(e)(4), which defines the term "original source" for purposes of the public disclosure bar, limits that term to relators who have voluntarily provided the relevant information to "the Government" before filing a *qui tam* action. The single, capital G, "Government" referenced in Paragraph (B)'s "original source" exception is the *federal* government, as the numerous other references to "the Government" elsewhere in 31 U.S.C. 3730 make clear. The most sensible reading of the jurisdictional bar in Paragraph (A) is that it covers only public disclosures by the same government as "the Government" referenced in the "original source" exception.

In addition, several other references to "administrative" proceedings in Sections 3729 and 3730 are limited

to federal proceedings. For example, Section 3729(a) permits reduction of an FCA damages award if the defendant, *inter alia*, "furnished the United States with the information about the violation" at a time when "no criminal prosecution, civil action, or administrative action had commenced under [Title 31] with respect to such violation." 31 U.S.C. 3729(a)(C). The FCA also precludes *qui tam* actions based on allegations that "are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." 31 U.S.C. 3730(e)(3). These other references to "administrative" proceedings are clearly federal in nature.

The historical context in which the public disclosure bar was enacted further suggests that Congress had federal administrative proceedings in mind when it added the word "administrative" to Category 2. One week before enacting the False Claims Amendments Act of 1986 (1986 FCA amendments), Pub. L. No. 99-562, 100 Stat. 3153, Congress enacted the Program Fraud Civil Remedies Act of 1986 (PFCRA), Pub. L. No. 99-509, Title VI, § 6103(a), 100 Stat. 1937 (31 U.S.C. 3801 *et seq.)*. The PFCRA established federal administrative remedies for fraud, and designated the various federal executive agencies' offices of inspector general as the investigating officials. See 31 U.S.C. 3801(a)(4). Congress considered the PFCRA jointly with the 1986 FCA amendments. See 100 Stat. 3153; *Overview of False Claims and Fraud Legislation: Hearing Before the S. Comm. on the Judiciary*, 99th Cong., 2d Sess. 5 (1986) (discussing FCA amendments and the PFCRA). Thus, Congress likely added "administrative" audits or investigations to Category 2 to cover disclosures made within

the context of federal administrative proceedings like those contemplated in the PFCRA.

Given the exclusively federal character of the FCA's other governmental references, including references to federal administrative proceedings, all on top of the references to Congress and the GAO within Category 2 itself, the "administrative * * * report[s] [and] audit[s]" covered by Section 3730(e)(4)(A) do not include reports or audits by state or local governmental entities. See, *e.g.*, *Gutierrez* v. *Ada*, 528 U.S. 250, 254-255 (2000) (Court applied *noscitur a sociis* to hold that the term "any election" in the Organic Act of Guam is limited to elections for Governor and Lieutenant Governor, since the term "is preceded by two references to gubernatorial election and followed by four," and the relevant section of the Organic Act "contains six express references to an election for Governor and Lieutenant Governor.").

3. To read the term "administrative" in the FCA "public disclosure" provision more broadly than the words surrounding it would also place a State's legislature on a lesser footing than a local county administrator. With respect to legislative bodies, Section 3730(e)(4)(A) is unambiguously limited to reports and investigations of Congress and its investigative arm, the GAO. Section 3730(e)(4)(A)'s clear exclusion of state legislative reports suggests that reports by state and local "administrative" bodies likewise are not covered.

Petitioners argue (Br. 39) that Section 3730(e)(4)(A)'s exclusion of state legislative reports is unsurprising because of "the limited oversight role that state legislatures play with respect to federally funded programs." The premise of that argument is questionable: petitioners primarily cite as support a 30-year-old GAO report aimed at fostering (as its title indicates)

"*Greater Involvement by State Legislatures*." Pet. Br. 37 (citing GAO, *Federal Assistance System Should Be Changed to Permit Greater Involvement by State Legislatures* (1980)). And even if state legislatures do not *frequently* prepare reports regarding states' use of federal funds, Congress would have had no evident reason to distinguish any such documents from the state and local administrative reports that petitioners contend trigger the public disclosure bar.

B. Congress's Purposes In Enacting Section 3730(e)(4)(A), And The Legislative History Of That Provision, Further Support The Court Of Appeals' Decision

The purposes and history of the "public disclosure" bar also support construing Category 2 (and Category 1, for that matter, see pp. 25-26, *infra*) as limited to federal proceedings. The "public disclosure" bar is intended to "further the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." Pet. App. 35a (internal quotation marks and citation omitted). In determining which public disclosures would bar a *qui tam* suit, Congress sought to identify categories of disclosures whose nature indicates that the federal government is already on the trail of the alleged fraud. Documents prepared by state and local governments do not give rise to any such inference.

1. Since its original enactment during the Civil War, the FCA has authorized *qui tam* relators to sue for both the United States and themselves, and to obtain a share of the government's recovery if the suit is successful. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-552 (1943). Such private actions supplement gov-

ernment enforcement efforts, and thereby deter fraud, by harnessing "the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (quoting *United States* v. *Griswold*, 24 F. 361, 366 (D. Or. 1885)).

Congress twice has amended the FCA's *qui tam* provisions in an effort to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield Terminal Ry.*, 14 F.3d at 649. Early in the FCA's history, "the statute was abused by qui tam suits brought by private plaintiffs who had no independent knowledge of fraud," *Seal 1* v. *Seal A*, 255 F.3d 1154, 1158 (9th Cir. 2001), cert. denied, 535 U.S. 1017 (2002), yet could receive one-half of the proceeds. In *Marcus*, for example, this Court held that the FCA in its then-current form authorized a *qui tam* suit brought by a relator who had derived his allegations of fraud from a prior federal indictment. See 317 U.S. at 545-548.

In 1943, shortly after the *Marcus* decision, Congress amended the FCA to divest the courts of jurisdiction over *qui tam* suits that were "based on evidence or information the Government had when the action was brought." 31 U.S.C. 3730(b)(4) (1982).[4] In that context, the reference to "the Government" unambiguously was limited to the federal government, which could choose to

[4] Although the Senate version of the 1943 amendments contained an exception to the jurisdictional bar for suits brought by relators who were the "original source" of the government's information, that provision was dropped from the enacted version without explanation. S. Rep. No. 345, 99th Cong., 2d Sess. 12 (1986).

bring the suit itself based on the information in its possession. In the 1980s, Congress concluded that the absolute bar against *qui tam* suits based on information already in the federal government's possession precluded an unduly broad range of potentially valuable suits. See *Springfield Terminal Ry.*, 14 F.3d at 650-651.

In 1986, as part of a broader reform of the FCA, Congress replaced the government-knowledge bar with the present Section 3730(e). Current Section 3730(e)(4)(A) encompasses *qui tam* suits based on information that the government has publicly disclosed in the course of investigating, exposing, prosecuting, or otherwise pursuing the allegations of fraud. That provision is best understood as Congress's effort to identify the types of disclosures that evidence a likelihood that the federal government is already acting, or likely to act, on the alleged fraud. At the same time, Congress carved out an exception to the bar for situations in which the relator was the "original source" of the information about the fraud.

The legislative history of the 1986 FCA amendments confirms that the governmental proceedings referred to in the "public disclosure" bar are exclusively federal. Although the amendments were directed at narrowing the then-existing bar, which encompassed all suits based on knowledge possessed by the federal government, Congress did not intend to alter the bar's exclusive focus on whether the *federal* government is able to pursue the fraud unaided by a *qui tam* relator.

The uniquely federal focus of the amendment is demonstrated by the text of the original House and Senate bills. The bill reported by the House Judiciary Committee would have barred *qui tam* actions that are (1) "based on specific evidence or specific information which

the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding," (2) "based on specific information disclosed during the course of a congressional investigation," or (3) "based on 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 term "administrative * * * proceedings" in that bill, linked as it was to the provision's reference to "information which the Government disclosed," could have meant only federal administrative proceedings. The bill passed by the House of Representatives contained this provision. See 132 Cong. Rec. 22,330, 22,331, 22,345 (1986).[5]

The bill reported by the Senate Judiciary Committee contained a parallel, though differently worded, provision. It stated that a person could not bring a *qui tam* action "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) (proposed 31 U.S.C. 3730(e)(4)). Although the Senate bill broadened the House bar by making it applicable regardless of who had made the disclosure during the governmental proceeding, the focus on federal proceedings remained, as evidenced by the reference to congressional or GAO reports.

After the Senate bill was reported, the Senate adopted a substitute version of the bill. See 132 Cong. Rec.

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[5] The House bill contained an exception for situations in which "the Government" was aware of the information for at least six months before the relator filed suit but did not initiate a civil action within that period. H.R. Rep. 660 at 42-43 (proposed 31 U.S.C. 3730(b)(5)(B)).

at 20,530. That provision contained a "public disclosure" bar that was identical for present purposes to 31 U.S.C. 3730(e)(4) as finally enacted. See 132 Cong. Rec. at 20,531 (proposed 31 U.S.C. 3730(e)(5)). The legislative history "contains no hint of any intention to sweep local [or state] government sources of information into the jurisdictional bar through the addition of the word 'administrative.'" *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.* v. *Westchester County*, 495 F. Supp. 2d 375, 383 (S.D.N.Y. 2007). To the contrary, in describing the substitute bill's *qui tam* provisions, Senator Grassley, the principal sponsor, explained that "the term 'Government' in the definition of original source"—*i.e.*, in that definition's requirement that the relator must have voluntarily informed "the Government" of the allegations prior to suit—"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." 132 Cong. Rec. at 20,536 (Statement of Sen. Grassley).

Paragraph (B) was later amended again, so that the relator was no longer required to have disclosed to the Government or the media the allegations that were then publicly disclosed. See *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 470-471 (2007); 31 U.S.C. 3730(e)(4)(B). Senator Grassley's explanation makes clear, however, that Paragraphs (A) and (B) in Section 3730(e)(4) are to be read together and that the public disclosure bar in Paragraph (A) is triggered only by a disclosure made by a component of the *federal* "Government" referred to in Paragraph (B). As discussed above, see pp. 18-19, *supra*, that interpretation is also consis-

tent with the focus of the bill passed by the House, which was expressly limited to "information which the Government disclosed" in one of the enumerated governmental fora. H.R. Rep. 660 at 42 (proposed 31 U.S.C. 3730(b)(5)(A)).

2. Construing the "public disclosure" bar as limited to disclosures in federal proceedings furthers Congress's purpose "to encourage more private enforcement suits," S. Rep. 345 at 23; see *Chandler*, 538 U.S. at 133 (explaining that the 1986 FCA amendments "enhanced the incentives for relators to bring suit"), whereas petitioners' interpretation would disserve that purpose. In replacing the prior government-knowledge bar with current Section 3730(e)(4), Congress narrowed the scope of the bar by "allow[ing] private parties to sue even based on information already in the Government's possession." *Ibid.*; see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997) (1986 amendments "permitt[ed] actions by an expanded universe of plaintiffs"). Interpreting Section 3730(e)(4)(A) to encompass state and local reports, however, would significantly *expand* the jurisdictional bar, precluding *qui tam* suits based on information that has never been in the federal government's possession and that is unlikely to come to its attention, even though such suits could have gone forward under the pre-1986 version of the statute. "Because the federal government is unlikely to learn about state and local investigations," construing the public disclosure bar to encompass state and local reports would "discourage private actions that the federal government is *not* capable of pursuing on its own, thus frustrating rather than furthering the goals of the FCA." Pet. App. 36a.

Against this background, Category 2 in Section 3730(e)(4)(A) is properly construed, consistent with the most natural reading of its text, as limited to federal reports, hearings, audits, and investigations. That interpretation better serves the "twin goals" (*Springfield Terminal Ry.*, 14 F.3d at 651) of Section 3730(e)(4)—*i.e.*, promoting *qui tam* actions alleging possible fraud that the federal government is not publicly pursuing and may be unaware of, while precluding relator actions when the government is already on the way toward prosecuting its own suit. While federal inquiries and their outcomes are readily available to Department of Justice attorneys, many state and local reports and investigations never come to the attention of federal authorities. See Pet. App. 35a-36a. And even when such materials *are* provided to the federal government, their mere presence in federal files does not suggest that federal officials are actively investigating or likely to investigate the matters they cover. Barring suits by relators based on disclosures from state and local sources would therefore frustrate Congress's effort to strike an appropriate balance between encouraging private citizens to expose fraud unknown to or unaddressed by the federal government and preventing suits by would-be relators who add nothing to the government's own enforcement efforts.

Construing Section 3730(e)(4)(A) as encompassing state and local government reports is particularly problematic where, as here, the county is both the source of the purported disclosure and a defendant in the *qui tam* suit. If the Crisp Hughes Report were to qualify as a public disclosure, Graham County would effectively have shielded itself from a *qui tam* action. As the Third Circuit has 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 745. That result would frustrate the FCA's core purpose.

C. Petitioners' Contrary Arguments Are Unpersuasive

1. Petitioners contend (Br. 13) that "[t]he word 'administrative' is neither vague nor ambiguous," but rather "is commonly understood to refer to both state and federal administrative proceedings." But this argument, as noted earlier, ignores the context in which this word appears. The canon that individual terms should be construed in light of their larger statutory context exists precisely to exclude interpretations that, while literally sound, make no sense in light of a statute's other terms and purposes. In *Gutierrez*, for example, the Court held that the term "any election" did not encompass the "general election" of which the relevant gubernatorial election was a part, see 528 U.S. at 254-255; yet the general election obviously was an "election" within any literal understanding of that word.

Indeed, petitioners themselves do not embrace the broadest meaning of the word "administrative" that the word will literally bear. The first definition of the term "administration" in the dictionary on which petitioners rely (Br. 17-18) is "[t]he act or process of administering, especially the management of a government *or large institution*." *American Heritage Dictionary of the English Language* 22 (4th ed. 2006) (emphasis added); see *ibid.* (giving as definition 3.b, "The group of people who manage or direct an institution, especially a school or college."). Petitioners do not contend, however, that the "administrative" reports and audits referenced in

Section 3730(e)(4)(A) include reports and audits prepared in connection with the management of large private institutions. Presumably petitioners recognize that Congress did not intend to allow the administrators of private hospitals and universities, frequent participants in federal programs and frequent defendants under the FCA, to shield themselves from *qui tam* liability by conducting audits or issuing reports that describe and then attempt to refute allegations of fraud. Petitioners may also recognize that their preferred definition of "administration" ("The activity of a government or state," Pet. Br. 18) better accords with Section 3730(e)(4)(A)'s overall focus on *governmental* proceedings than does a definition that would sweep in private entities. But once petitioners effectively concede that the word "administrative" cannot be construed in isolation, the game is up, because the contextual factors that give meaning to Category 2 show that it is limited to *federal* reports and audits.

2. Petitioners argue (Br. 25-26) that, rather than treating Category 2 as a distinct statutory unit, in which the word "administrative" is sandwiched between two distinctly federal terms, the Court should regard Section 3730(e)(4)(A) as identifying seven separate sources of public disclosure, five of which are not "uniquely federal." That contention disregards the statutory structure, which separates the sources of public disclosure into three distinct categories.

Under Section 3730(e)(4)(A), public disclosures will bar a *qui tam* action, except by an original source, if the disclosures are made "*in* a criminal, civil, or administrative hearing, *in* a congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation, or *from* the news media." 31 U.S.C.

3730(e)(4)(A) (emphases added). Each of the italicized prepositions introduces a distinct category of disclosures (the first two governmental and the third non-governmental), and each adjective in Section 3730(e)(4)(A) modifies the noun or nouns within its own category. Category 2, which is set off in the statutory text as an independent group, has an undisputed federal character, regardless of what meaning might be attributed to the other categories.

a. Petitioners argue (Br. 32-33) that Category 1 in Section 3730(e)(4)(A) includes disclosures in state as well as federal "criminal, civil, or administrative hearing[s]," and they further contend that the "administrative * * * report[s], hearing[s], audit[s], [and] investigation[s]" referenced in Category 2 must likewise include state administrative proceedings. But, as noted, the three categories are separated both by grammar and subject matter. There is consequently no need for the first category (which refers to adjudicative proceedings) and the second category (which refers to legislative and executive investigations) to have a similar scope.

In any event, if petitioners are correct to argue that treating one category as encompassing non-federal sources and the other category as excluding them would be anomalous, the solution would lie not in expanding the coverage of Category 2, but in limiting the coverage of Category 1. Category 2, after all, contains the more explicit textual evidence of Congress's intent: as explained above, see pp. 11-12, *supra*, the adjectives "congressional" and "[General] Accounting Office" in that phrase strongly suggest that the sandwiched adjective "administrative" refers only to federal administrative reports. Understanding Category 2 as conferring meaning on Category 1, rather than the reverse, would be

consistent with the text, history, and purposes of Section 3730(e)(4) and the FCA as a whole. The scope of Category 1 would then be consistent not only with Category 2's federal focus but with the federal focus of Section 3730 and the FCA as a whole. In particular, Category 1 then would comport with the reference in Section 3729(a) to a "criminal prosecution, civil action, or administrative action * * * *under this title*," 31 U.S.C. 3729(a)(C) (emphasis added), which refers to administrative hearings involving the federal government.[6]

b. Petitioners argue (Br. 33-34, 42-43) that it would be anomalous to bar *qui tam* suits based on public disclosures by the "news media"—Category 3 within Section 3730(e)(4)(A)—while allowing suits based on public disclosures in state administrative reports to go forward. In making this argument, petitioners appear to take the view that one public disclosure is much like any other. But Congress adopted a different approach. If Congress had wished to bar all *qui tam* suits that are based on publicly-disclosed information, it could easily have done so. But Congress chose instead to limit Section 3730(e)(4)(A) to specified categories of public disclosure, and the disclosures from non-governmental entities included in Category 3 are different in kind from the

[6] The court of appeals stated that its divergent interpretations of Categories 1 and 2 (treating only the second as exclusively federal) avoided what would otherwise be a redundancy in the statute's reference in both phrases to administrative hearings. There is, however, no redundancy. Category 1—"criminal, civil, or administrative hearing[s]," 31 U.S.C. 3730(e)(4)(A)—refers to adjudicative proceedings, whereas Category 2—"congressional, administrative, or [GAO] report[s], hearing[s], audit[s], or investigation[s]," *ibid.*—refers to legislative or oversight proceedings, such as an administrative rulemaking proceeding or an investigation carried out by an agency's inspector general.

governmental disclosures covered by Categories 1 and 2.

As explained above, the 1986 FCA amendments were intended to expand the class of *qui tam* suits that could go forward, while continuing to preclude suits (except those brought by an "original source") when the federal government already was, or was likely to be, on the trail of the fraud. In drafting Section 3730(e)(4)(A), Congress sought to identify the specific categories of public disclosures that provide the greatest assurance that federal officials are pursuing, or are likely to pursue, the fraud and that the assistance of *qui tam* relators is therefore unnecessary. A media disclosure—because of its widely dispersed nature—can generally be expected to come to the federal government's attention when it concerns fraud on the federal fisc. Indeed, media exposés are often part of an effort to urge the government into action.[7]

By contrast, publicly-disclosed allegations of fraud in state and local administrative reports neither suggest that a federal inquiry is already ongoing nor are likely to serve as a spur to federal action. A "public disclosure" of a governmental fraud investigation occurs whenever that investigation is disclosed to even a single "stranger to the fraud" outside the government, at least so long as the outsider is not precluded from further disseminating the information. See, *e.g.*, *United States ex rel. Fine* v. *MK-Ferguson Co.*, 99 F.3d 1538, 1545

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[7] Petitioners hypothesize (Br. 33) disclosures of fraud in local media of limited circulation. The Court need not decide in this case on the outer limits of the phrase "news media." Petitioners underestimate the degree to which local stories, if in fact newsworthy, may gain wider circulation, as they are picked up by larger media entities or spread through the internet.

(10th Cir. 1996); *United States ex rel. Fine* v. *Advanced Sciences, Inc.*, 99 F.3d 1000, 1005-1006 (10th Cir. 1996); *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 322-323 (2d Cir. 1992); see also *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980) ("as a matter of common usage," the term "public disclosure" under the Consumer Product Safety Act, 15 U.S.C. 2051 *et seq.*, includes disclosure to FOIA requester).[8] If the investigation so disclosed is being conducted by the federal government, then application of the "public disclosure" bar serves Congress's purposes: such a disclosure indicates that the federal government is already on the trail of the alleged fraud. But if the investigation is conducted by a local or state governmental entity, its disclosure to a single member of the public neither signals that federal anti-fraud efforts are already ongoing nor provides assurance that the federal government is likely to become aware of the fraud. Under these circumstances, application of the public disclosure bar would frustrate, rather than further, Congress's purpose.[9]

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[8] But cf. *United States* v. *Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), overruled on other grounds by *Glaser* v. *Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009). In *Bank of Farmington*, the Seventh Circuit disagreed with the Tenth Circuit's statement that a disclosure of fraud allegations "to any member of the public not previously informed thereof" constitutes a "public disclosure," and adopted instead as its test whether the disclosure was "likely to alert the authorities about the alleged fraud." 166 F.3d at 861-862 (citing *Advanced Sciences*, 99 F.3d at 1006).

[9] The anomalous result that local governments would be able to shield themselves from *qui tam* suit by disclosure to a narrow audience is exacerbated in light of the majority rule in the courts of appeals (with which the United States agrees) that a *qui tam* action is "based upon" the allegations in the public disclosure whenever "the relator's complaint describes allegations or transactions that are substantially

3. Petitioners contend (Br. 4-5, 35) that, because the Single Audit Act of 1984 (SAA), 31 U.S.C. 7501, *et seq.*, requires covered recipients of federal awards to submit audits to the federal government, state and local administrative reports and audits like those at issue here are likely to come to the federal government's attention. Petitioners' reliance on the SAA is misplaced.

Like their "plain text" argument, petitioners' invocation of the SAA proves too much. The SAA covers not only state and local governmental recipients of federal awards, but also "nonprofit organization[s]," including not-for-profit corporations operated for "scientific, educational, [or] service * * * purposes in the public interest." 31 U.S.C. 7501(a)(13) and (14); 31 U.S.C. 7502(a)(1)(A). If submission of reports to the federal government pursuant to the SAA triggered the application of Section 3730(e)(4)(A), administrative reports by private nonprofit universities and hospitals would qual-

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similar to those already in the public domain," *Glaser* v. *Wound Care Consultants, Inc.*, 570 F.3d 907, 910 (7th Cir. 2009), and there is no requirement that the relator have derived her allegations from the public disclosure. The Fourth Circuit is now the only court of appeals that limits Section 3730(e)(4)(A) to situations in which the relator "*actually derived*" the allegations in her complaint from the publicly disclosed documents. *Ibid.*; see *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1349, cert. denied, 513 U.S. 928 (1994); Pet. App. 40a-41a. This Court need not resolve that circuit conflict in order to decide the question presented in this case. Although the court of appeals did not regard the district court as having made an explicit factual finding that respondent's complaint was "based upon" the Crisp Hughes Report under the Fourth Circuit's more restrictive standard, *id.* at 41a, the district court did note evidence that respondent had access to the report, and it stated that respondent "has relied on this document," *id.* at 96a. Thus, her complaint would appear to be "based upon" the Crisp Hughes Report under either construction of that phrase.

ify, and these entities too could potentially shield themselves from *qui tam* suits.

Moreover, the SAA covers only a small subset of the state and local government reports and audits that would be encompassed by the "public disclosure" bar under petitioners' interpretation. The SAA covers only formal audits "conducted by an independent auditor in accordance with generally accepted government auditing standards," 31 U.S.C. 7502(c), and applies only to grantees that expend $500,000 or more in federal funds in any fiscal year. 31 U.S.C. 7502(a)(1)(A) ($300,000 threshold); 68 Fed. Reg. 38,401 (2003) (threshold increased to $500,000 beginning in 2004). The vast majority of administrative investigations, audits, or reports conducted by state and local governments therefore would not be covered by the SAA.[10]

More fundamentally, petitioners' argument based on the SAA is inconsistent with the purpose of the 1986 FCA amendments. The premise of petitioners' argument is that if documents containing information suggestive of fraud are provided to the federal government, no *qui tam* action should be allowed. In amending the FCA in 1986, however, Congress eliminated the prior government-knowledge bar. A state administrative report covered by the SAA may be provided to a federal government agency and placed on an internet clearinghouse without triggering any alarm bells within the federal government or otherwise spurring a federal investi-

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[10] The Crisp Hughes Report itself may fail to qualify as an audit for purposes of the SAA. Compare, *e.g.*, 31 U.S.C. 7502(c) (requiring that SAA audits conform to "generally accepted government auditing standards") with J.A. 122 (observing that procedures used to prepare the Crisp Hughes Report "do not constitute an audit made in accordance with generally acceptable auditing standards").

gation. See *Dunleavy*, 123 F.3d at 745-746 (refusing to hold that local government's grantee report to the Department of Housing and Urban Development was a public disclosure because "expansion of the FCA's definition of 'administrative report' to state and local government reports would in effect return us to the unduly restrictive 'government knowledge' standard" that Congress rejected in the 1986 FCA amendments). Especially given the vague and summary nature of many of those reports, their filing does not so alert the federal government of fraud as to raise the bar to *qui tam* actions.

4. Petitioners also rely (Br. 20) on 31 U.S.C. 3733(*l*)(7)(A), which contains an isolated reference to "administrative" hearings in a context indicating that state hearings are included. Under 31 U.S.C. 3733(a)(1), the Attorney General may issue civil investigative demands for materials obtained in other proceedings, including, *inter alia*, materials obtained by discovery "in any judicial or administrative proceeding of an adversarial nature," whether state or federal. 31 U.S.C. 3733(*l*)(7)(A). But petitioners offer no reason to extrapolate from Section 3733(*l*)(7)(A)'s coverage to the construction of the public disclosure bar that they propose.[11] Unlike the reference to "administrative * * * report[s] [and] audit[s]" in the public disclosure provision, the reference to "any * * * administrative proceeding" in Section 3733(*l*)(7)(A) is not sandwiched between two

[11] This Court has previously declined to assume that the definition of a term for purposes of the civil investigative demand provision also applies to the other provisions of the FCA. See *Stevens*, 529 U.S. at 783-784 & n.13 (noting that the term "person" is defined to include States for purposes of civil investigative demands but does not include States for purposes of *qui tam* liability).

clearly federal terms. Nor does it serve to identify circumstances in which federal officials are already investigating the fraud or likely to do so. To the contrary, Congress enacted Section 3733 precisely because it recognized that the information to be acquired through civil investigative demands, including information revealing fraud on the federal fisc, might otherwise be *unavailable* to the federal government. *United States* v. *Markwood*, 48 F.3d 969, 983-984 (6th Cir. 1995). If Section 3733 is relevant at all, it is as a reminder that the federal government does not have such easy access to state and local administrative materials as to render unnecessary all *qui tam* actions based upon them. Petitioners' arguments on this score, like its others, mistake the meaning and purpose of the public disclosure bar.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General
DOUGLAS N. LETTER
STEPHANIE R. MARCUS
Attorneys

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